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NAGPUR.

# NAGPUR HIGH COURT
# 1938

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" " Frederick Louis Grille, Kt., I.C.S., Bar-at-law, *(Offg.)*

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| 289 | ILR | 1938 N | 239 |
| | 176 | I C | 663 |
| 292 | 1938 | N L J | 152 |
| | 177 | I C | 173 |
| 294 | 1938 | N L J | 145 |
| | 177 | I C | 678 |
| 296 | 177 | I C | 516 |
| 297 | 1938 | N L J | 139 |
| | 175 | I C | 234 |
| | 39 | Cr L J | 584 |
| 297 | ILR | 1938 N | 580 |
| 298 | 1938 | N L J | 168 |
| | 177 | I C | 531 |
| 300 | 1938 | N L J | 107 |
| 303 | 176 | I C | 465 |
| | 39 | Cr L J | 747 |
| | ILR | 1938 N | 595 |
| 308 | 1938 | N L J | 166 |
| | 178 | I C | 988 |
| 309 | 177 | I C | 971 |
| | ILR | 1938 N | 573 |
| 312 | 177 | I C | 760 |
| 314 | 177 | I C | 931 |
| 316 | 173 | I C | 620 |
| | 39 | Cr L J | 342 |
| | ILR | 1938 N | 454 |
| 318 | 174 | I C | 386 |
| | 39 | Cr L J | 405 |
| 320 | 178 | I C | 110 |
| 321 | 176 | I C | 79 |
| 322 | 1938 | N L J | 155 |
| | 177 | I C | 505 |
| 324 | 177 | I C | 831 |
| 325 | 174 | I C | 523 |
| | 39 | Cr L J | 427 |
| 326 | | ... | |
| 328 | 1938 | N L J | 185 |
| | 176 | I C | 853 |
| | 39 | Cr L J | 818 |
| | ILR | 1938 N | 516 |
| 334 | 1938 | N L J | 12 |
| | 174 | I C | 510 |
| | 39 | Cr L J | 458 |
| 335FB | 177 | I C | 6 |
| 358 | | ... | |
| 363 | 1938 | N L J | 162 |
| | 178 | I C | 308 |
| 365 | 175 | I C | 795 |
| | 39 | Cr L J | 700 |
| 366 | ILR | 1938 N | 461 |
| 370 | | ... | |
| 373 | 1938 | N L J | 17 |
| 376 | 175 | I C | 753 |
| 377 | | ... | |
| 385 | 178 | I C | 920 |
| 388 | 1938 | N L J | 198 |
| | 176 | I C | 728 |
| 391 | 178 | I C | 825 |
| 394 | 1938 | N L J | 250 |
| | ILR | 1938 N | 442 |
| | 177 | I C | 605 |
| | 39 | Cr L J | 917 |
| 398 | 175 | I C | 691 |
| 399 | 1938 | N L J | 202 |
| | 176 | I C | 693 |
| 401 | ILR | 1938 N | 496 |
| 406 | 1938 | N L J | 217 |
| | 176 | I C | 866 |
| | 39 | Cr L J | 829 |
| 408 | 178 | I C | 271 |
| 409 | 1938 | N L J | 269 |
| FB | ILR | 1938 N | 423 |
| | 177 | I C | 274 |
| 411 | 175 | I C | 761 |
| 413 | 176 | I C | 686 |
| 415 | | ... | |

## A. I. R. 1938 Nagpur = Other Journals *(concld.)*

| AIR | Other Journals | | | AIR | Other Journals | | | AIR | Other Journals | | | A I R | Other Journals | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 420 | ... | | | 449 | 1938 | N L J | 264 | 485 | 1938 | I T R | 255 | 513FB | 1938 | N L J | 423 |
| 422 | 1938 | N L J | 220 | | 178 | I C | 602 | | 1938 | N L J | 172 | 522 | ... | | |
| | 177 | I C | 902 | 451 | 178 | I C | 656 | | 178 | I C | 711 | 525 | 1938 | N L J | 303 |
| 423 | 1938 | N L J | 237 | 454 | 178 | I C | 479 | 487 | 1938 | N L J | 285 | | 179 | I C | 256 |
| | 179 | I C | 82 | 455 | ... | | | 490 | 1938 | N L J | 292 | 527 | 1938 | N L J | 341 |
| 431 | 178 | I C | 865 | 458 | 175 | I C | 911 | | 179 | I C | 12 | | 179 | I C | 224 |
| 433 | 178 | I C | 54 | 459 | 178 | I C | 485 | 492 | 178 | I C | 29 | 528 | 1938 | N L J | 99 |
| | 39 | Cr L J | 981 | 461 | 1938 | N L J | 210 | 493 | 178 | I C | 465 | | 178 | I C | 581 |
| 434 | ILR | 1938 N | 604 | | 178 | I C | 215 | | 40 | Cr L J | 73 | 529 | 1938 | N L J | 299 |
| | 1938 | N L J | 82 | 464 | 177 | I C | 889 | | 1938 | N L J | 309 | | 177 | I C | 819 |
| | 178 | I C | 293 | 465 | 176 | I C | 820 | 495 | 1938 | N L J | 195 | | 39 | Cr L J | 954 |
| 439 | ... | | | | 39 | Cr L J | 807 | | 178 | I C | 461 | 530 | 1938 | N L J | 392 |
| 441 | 177 | I C | 945 | 466 | 178 | I C | 755 | 497 | 1938 | N L J | 306 | 534 | 1938 | N L J | 336 |
| 442 | 1938 | N L J | 223 | 470 | ILR | 1938 N | 535 | 499 | ... | | | 537 | 1938 | N L J | 357 |
| | 176 | I C | 623 | | 179 | I C | 285 | 502 | 1938 | N L J | 312 | 540 | ILR | 1938Nag | 174 |
| 444 | 176 | I C | 985 | 475 | 178 | I C | 410 | | 178 | I C | 568 | | 174 | I C | 148 |
| | 39 | Cr L J | 838 | 476 | ... | | | 504 | 176 | I C | 163 | 544 | 1938 | N L J | 445 |
| 445 | 1938 | N L J | 259 | 480 | 1938 | N L J | 144 | 506 | 1938 | N L J | 317 | 546 | 1938 | N L J | 279 |
| | 177 | I C | 396 | | 178 | I C | 535 | 512 | 176 | I C | 755 | 550 | 1938 | N L J | 403 |
| | 39 | Cr L J | 895 | 481 | 1938 | N L J | 214 | | 1938 | N L J | 295 | 554 | 1938 | N L J | 342 |
| 448 | 176 | I C | 784 | | 178 | I C | 97 | | 39 | Cr L J | 791 | | ILR | 1938 N | 550 |
| | 39 | Cr L J | 810 | 482 | ... | | | | | | | 558 | 1938 | N L J | 389 |

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| ILR | A I R | | | ILR | A I R | | | ILR | A I R | | | ILR | A I R | | | ILR | A I R | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1936 | N | 203 | 165 | 1937 | N | 288 | 276 | 1937 | N | 170 | 361 | 1937 | N | 126 | 456 | 1938 | N | 54 |
| 10 | 1937 | ,, | 45 | 167 | ,, | ,, | 184 | 280 | ,, | ,, | 216 | 364 | ,, | ,, | 227 | 461 | ,, | ,, | 366 |
| 21 | 1939 | ,, | 69 | 171 | 1938 | ,, | 176 | 283 | ,, | ,, | 243 | 370 | 1938 | ,, | 42 | 469 | ,, | ,, | 163 |
| 27 | 1937 | ,, | 248 | 174 | ,, | ,, | 540 | 289 | 1938 | ,, | 198 | 377 | 1937 | ,, | 407 | 482 | ,, | ,, | 119 |
| 31 | ,, | ,, | 289 | 183 | 1937 | ,, | 36 | 298 | 1937 | ,, | 91 | 382 | 1938 | ,, | 225 | 489 | 1937 | ,, | 259 |
| 41 | ,, | ,, | 186 | 186 | ,, | ,, | 318 | 301 | ,, | ,, | 241 | 395 | 1937 | ,, | 385 | 496 | 1938 | ,, | 401 |
| 45 | ,, | ,, | 246 | 192 | ,, | ,, | 341 | 302 | ,, | ,, | 316 | 399 | 1938 | ,, | 13 | 509 | 1939 | ,, | 75 |
| 50 | 1938 | ,, | 93 | 200 | ,, | ,, | 397 | 305 | ,, | ,, | 386 | 402 | 1937 | ,, | 391 | 516 | 1938 | ,, | 228 |
| 54 | 1937 | ,, | 354 | 206 | ,, | ,, | 372 | 308 | ,, | ,, | 345 | 407 | ,, | ,, | 409 | 535 | ,, | ,, | 470 |
| 91 | 1938 | ,, | 112 | 221 | ,, | ,, | 237 | 326 | ,, | ,, | 338 | 409 | 1938 | ,, | 156 | 550 | ,, | ,, | 554 |
| 106 | ,, | ,, | 122 | 229 | 1938 | ,, | 95 | 333 | 1938 | ,, | 152 | 420 | 1937 | ,, | 387 | 558 | 1939 | ,, | 50 |
| 115 | ,, | ,, | 134 | 233 | ,, | ,, | 87 | 342 | 1936 | ,, | 289 | 423 | 1938 | ,, | 409 | 573 | 1938 | ,, | 309 |
| 133 | 1937 | ,, | 154 | 239 | ,, | ,, | 289 | 344 | 1937 | ,, | 94 | 431 | ,, | ,, | 129 | 580 | ,, | ,, | 297 |
| 136 | 1938 | ,, | 24 | 245 | 1937 | ,, | 108 | 346 | 1936 | ,, | 277 | 436 | ,, | ,, | 107 | 583 | ,, | ,, | 212 |
| 149 | 1937 | ,, | 12 | 248 | 1938 | ,, | 56 | 348 | 1938 | ,, | 84 | 442 | ,, | ,, | 394 | 592 | ,, | ,, | 286 |
| 151 | 1938 | ,, | 145 | 255 | ,, | ,, | 1 | 354 | ,, | ,, | 101 | 451 | ,, | ,, | 46 | 595 | ,, | ,, | 303 |
| 157 | 1937 | ,, | 394 | 268 | ,, | ,, | 80 | 359 | 1937 | ,, | 87 | 454 | ,, | ,, | 316 | 604 | ,, | ,, | 434 |
| 160 | ,, | ,, | 54 | | | | | | | | | | | | | | | | |

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| NLJ | A I R | | | NLJ | A I R | | | NLJ | A I R | | | NLJ | A I R | | | NLJ | A I R | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1938 | N | 122 | 107 | 1938 | N | 300 | 198 | 1938 | N | 388 | 299 | 1938 | N | 529 | 389 | 1938 | N | 558 |
| 8 | ,, | ,, | 131 | 112 | ,, | ,, | 269 | 202 | ,, | ,, | 399 | 303 | ,, | ,, | 525 | 392 | ,, | ,, | 530 |
| 12 | ,, | ,, | 334 | 117 | ,, | ,, | 267 | 210 | ,, | ,, | 461 | 306 | ,, | ,, | 497 | 399 | 1939 | ,, | 39 |
| 17 | ,, | ,, | 373 | 139 | ,, | ,, | 297 | 214 | ,, | ,, | 481 | 309 | ,, | ,, | 493 | 403 | 1938 | ,, | 550 |
| 24 | ,, | ,, | 163 | 144 | ,, | ,, | 480 | 217 | ,, | ,, | 406 | 312 | ,, | ,, | 502 | 409 | 1939 | ,, | 27 |
| 37 | ,, | ,, | 176 | 145 | ,, | ,, | 294 | 220 | ,, | ,, | 422 | 317 | ,, | ,, | 506 | 416 | ,, | ,, | 3 |
| 40 | ,, | ,, | 230 | 148 | ,, | ,, | 265 | 223 | ,, | ,, | 442 | 327 | 1939 | ,, | 50 | 418 | ,, | ,, | 7 |
| 48 | ,, | ,, | 145 | 152 | ,, | ,, | 292 | 237 | ,, | ,, | 423 | 336 | 1938 | ,, | 534 | 423 | 1938 | ,, | 513 |
| 54 | ,, | ,, | 169 | 155 | ,, | ,, | 322 | 250 | ,, | ,, | 394 | 341 | ,, | ,, | 527 | 434 | 1939 | ,, | 13 |
| 60 | ,, | ,, | 273 | 157 | ,, | ,, | 266 | 259 | ,, | ,, | 445 | 342 | ,, | ,, | 554 | 439 | ,, | ,, | 44 |
| 66 | ,, | ,, | 134 | 159 | ,, | ,, | 287 | 264 | ,, | ,, | 449 | 348 | 1939 | ,, | 85 | 445 | 1938 | ,, | 544 |
| 79 | ,, | ,, | 275 | 162 | ,, | ,, | 363 | 269 | ,, | ,, | 409 | 353 | ,, | ,, | 1 | 448 | 1939 | ,, | 75 |
| 82 | ,, | ,, | 434 | 166 | ,, | ,, | 308 | 276 | ,, | ,, | 251 | 357 | 1938 | ,, | 537 | 454 | ,, | ,, | 42 |
| 90 | ,, | ,, | 283 | 168 | ,, | ,, | 298 | 279 | ,, | ,, | 546 | 366 | 1939 | ,, | 91 | 457 | ,, | ,, | 64 |
| 96 | ,, | ,, | 288 | 172 | ,, | ,, | 485 | 285 | ,, | ,, | 487 | 375 | ,, | ,, | 33 | 459 | ,, | ,, | 78 |
| 98 | ,, | ,, | 272 | 185 | ,, | ,, | 328 | 292 | ,, | ,, | 490 | 379 | ,, | ,, | 35 | 463 | ,, | ,, | 5 |
| 99 | ,, | ,, | 528 | 195 | ,, | ,, | 495 | 295 | ,, | ,, | 512 | 384 | ,, | ,, | 10 | 466 | ,, | ,, | 72 |
| | | | | | | | | | | | | | | | | 476 | ,, | ,, | 47 |

# THE
# ALL INDIA REPORTER
# 1938
## Nagpur High Court

### * A. I. R. 1938 Nagpur 1

STONE C.J. AND VIVIAN BOSE J.

*Bhagwantrao Jairam and another — Defendants 9 and 10* — Appellants.

v.

*Punjaram Sadashiv and others Plaintiffs, and others Defendants 1 to 3* — Respondents.

Second Appeal No. 132 of 1934, Decided on 5th February 1937, from appellate decree of 2nd Addl. Dist. Judge, Wardha, D/- 22nd December 1933.

*** (a) Hindu Law — Partition — Property acquired by widow on partition among sons is in same category as property inherited from husband.**

The property which a widow acquires under Mitakshara law on a partition among sons cannot be treated as property given to her in lieu of her maintenance but should be treated as property in the same category as one inherited from the husband : *34 All 234* (*P C*), *Rel. on.* [P 3 C 1]

*** (b) Hindu Law — Succession — Among Sudras illegitimate son is his father's heir — Widow allotted property on partition between legitimate and illegitimate sons — On her death, illegitimate sons can claim share in property allotted to her.**

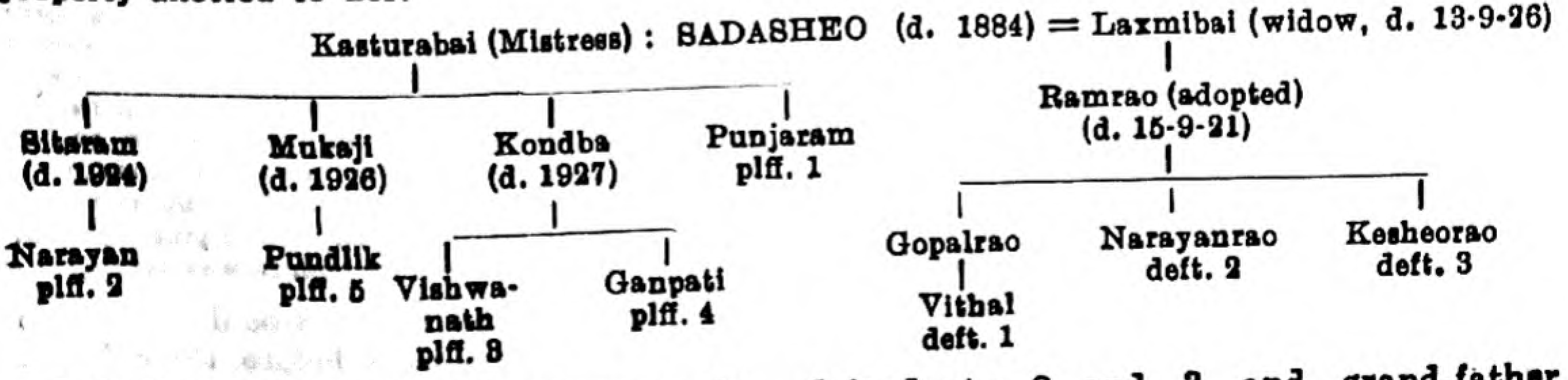
Among Sudras the illegitimate son is the father's heir and except in so far as his rights have been curtailed by express texts, he must be treated as such. After his father's death he becomes a member of the coparcenary—a member with curtailed rights but nevertheless a member. [P 3 C 2; P 6 C 2]

Where therefore a widow acquires property on a partition between legitimate and illegitimate sons and subsequently dies, the illegitimate sons can claim a share in the property allotted to her : *Case law discussed.* [P 2 C 2 ; P 3 C 1 ; P 5 C 1]

R. G. Rao and G. N. Kawley — *for Appellants.*

K. P. Vaidya — *for Respondents 1 to 5.*

**Judgment.**—The suit out of which this appeal arises is for partition and separate possession of the plaint property to the extent of the plaintiffs' share, which they originally claimed was two-third but which they now admit is only two-fifth. They claim as reversioners to Sadasheo, the common ancestor of the plaintiffs and the first three defendants. The following genealogical tree will explain the relationship between them.



Sadasheo had four illegitimate sons who represent the plaintiffs' branch of the family. Plaintiff 1 Punjaram was one of them, and the other plaintiffs are the sons of the other three. Sadasheo also adopted a son Ramrao who represents the defendants' branch. He was the father of defendants 2 and 3 and grand-father (father's father) of the third. The illegitimate sons are the issue of a mistress and as the parties are Sudras they were admittedly entitled to a share on the death of the father, and their rights to this were upheld in a previous litigation. In the year

1902 the illegitimate sons sued Ramrao and Sadasheo's widow Laxmibai, Sadasheo being then dead, for partition. Their right to partition was disputed, but the parties agreed among themselves that if their right was upheld then the shares should be as follows : the four illegitimate sons should be given 8-annas, the adopted son Ramrao 4-annas and the widow Laxmibai 4-annas. Of course, this distribution was not in accordance with the rule laid down by their Lordships of the Privy Council in 46 Mad 167[1]; the illegitimate sons obtained much more than they were legally entitled to. The division was evidently made in accordance with the law as it was then understood, but that does not matter any longer. The parties agreed to it and their agreement reached finality in the shape of a decree long ago.

In 1908 Laxmibai sued her adopted son Ramrao and his illegitimate brothers for demarcation and separate possession of the share given her under the above decree. As a result, she was given a 4-annas malguzari share in mauza Pipalgaon and a 1-anna malguzari share in mauza Sirpur with some home farm land. She was still dissatisfied and on 8th September 1909 she exchanged the 4-annas of mauza Pipalgaon and her home farm lands appertaining to it for another 1-anna share in mauza Sirpur and some more home farm lands in that village. This was under a private arrangement between Ramrao and herself. Some years later on 19th March 1920 there was a partition between Ramrao and his sons in which Gopalrao the father of defendant 1 obtained a 2-annas share in Pipalgaon. This is admittedly part of the 4-annas which had originally been assigned to Laxmibai. After this followed a series of transfers by Gopalrao of portions of this 2-annas share to defendants 9 and 10. They have been given in detail in the lower Court and need not be repeated here. Laxmibai died on 13th September 1926 and the plaintiffs claim a two-fifth share in the property which was assigned to her at the partition. As regards the exchange with Ramrao, they contend that she obtained only a life-interest and so was not entitled to enter into any arrangement with respect to the property assigned to her, which would enure beyond her life. Consequently the assignment to Gopalrao and his alienations to defendants 9 and 10 do not bind them.

It is evident from Ex. P.1 the judgment of the Judicial Commissioner's Court in the previous suit of 1902, that the 4 annas share then assigned to Laxmibai was the usual share to which a mother is entitled under the Mitakshara on a partition between the sons. Of course, the extent of the share she obtained was less than she was legally entitled to but as everybody was then agreed on that point, this cannot be regarded as altering the nature of her interest in it. What is important is that she obtained what she actually got in this capacity The plaintiffs argue that what the mother gets in these circumstances is given in lieu of her right to maintenance and consequently is carved out of an estate which has already vested in the sons : therefore the property must revert to the estate from which it was taken, i. e. the estate of the sons, legitimate and illegitimate. Some support is to be found for this position in Edn. 8 of Mulla's Hindu Law, para 128 (2), page 163 The learned author observes that the estate in such a case passes not to her stridhana heirs but "to the sons or grandsons out of whose portion it was taken out". This was also the view of Kinkhede A J. C. in 23 N L R 184[2] at page 191 and is the view taken in Trevelyan's Hindu Law, Edn. 3, page 365, and apparently also in Gour's Hindu Code, Edn. 3, page 1427. We do not read the Privy Council decision upon which these views are based in that way. In 34 All 234[3] at page 243 their Lordships observe that there are two possible alternatives :

> If the share given to a widow on partition is given to her as substitute for that to which she would be entitled upon inheritance, then, according to the foregoing authorities, it would seem reasonable that it should follow the same rule of descent and revert on her death to her husband's heirs. If, on the other hand, it is given to her by way of provision for her maintenance, it seems equally reasonable that when the necessity for her maintenance has ceased, the property shall revert to the estate from which it was taken.

It is true, the result would have been the same in the case before their Lordships whichever point of view was adopted, but their Lordships had to decide the principle upon which they were to proceed and so continued:

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[1] Kamulammal v. Visvanathaswami Naicker, A I R 1923 P C 8=71 I C 648=46 Mad 167=50 I A 32 (P C).

[2] Bhaurao v. Gangi, A I R 1926 Nag 453 = 95 I C 734=23 N L R 184.

[3] Debi Mangle Prasad v. Mahadeo Prasad Singh, (1912) 34 All 234=14 I C 1000 = 39 I A 121 (P C).

> Their Lordships do not feel justified in putting property acquired by a widow on a partition of the joint estate, upon a footing different from that on which property coming to her by way of inheritance has been placed .... The principle upon which the cases relating to inheritance have been decided appears to be safe guide in dealing also with cases of partition.

In an earlier portion of their judgement, (at page 241) they point out that the property which the widow inherits from her husband passes on her death "to the next heirs of her deceased husband". Golapchandra Sarkar Sastri in the Edn 7 of his learned work on Hindu Law at pages 532 and 739 argues that such a share cannot be in lieu of maintenance, for, when the estate is very large the mother would get property far in excess of what would be necessary for that purpose and when very small far too little. It is true the learned author had originally based his opinion upon the old Allahabad view which was reversed by their Lordships of the Privy Council but it has not been altered in the latest edition of his work and so far as these observations are concerned they seem to be sound. In any case their Lordships relied on the fact that Sir William Macnaghten in his Principles and Precedents of Hindu Law puts partition on the same footing as inheritance, as far as the rights of a widow are concerned. It is immaterial whether this is unsupported by the Mitakshara or not (*see* West and Buhler's Hindu Law, Edn. 3, Vol. 2, page 323). Their Lordships have decided it is the law and in our opinion have placed such property in the same category as property inherited from the husband. It follows descent must be traced from Sadasheo.

The next point is more difficult. The defendants argue that illegitimate sons obtain their rights because of a special text and that but for it they would have no right at all. Consequently, once they have been given a share on partition they have obtained all they are entitled to under the special text and so are not entitled to inherit again under the ordinary Hindu law. This view was applied by the Madras High Court in 55 Mad 856[4] where the learned Judges held the doctrine of reverter did not apply in the case of an illegitimate son. As against this is the view that they are sons and have always been looked upon as sons, and but for the stricter notions of marriage which gradually crept into the Hindu law would have shared in the patrimony like any other son. The text relating to the illegitimate son is therefore a text of curtailment cutting down what was once his undoubted right and consequently must be strictly construed and cannot be applied beyond its own express provisions. Some justification for this view is to be found in 57 All 85.[5]

There can be no doubt that the Hindu law on the point is in a confused state, and that whichever view is taken, anomalies will arise. We therefore deem it advisable to review briefly such portions of the law as are now beyond dispute before examining the merits of these two conflicting positions. Their Lordships have settled at least these two points in 18 Cal 151[6] at page 155. First that the illegitimate son does not acquire by birth a right to share in the estate in the same way as a legitimate son; and second, that after the father's death a coparcenary is created between the legitimate and the illegitimate sons entitling them to retain the whole estate between them if they do not want to partition, and entitling them to succeed to each other by survivorship The illegitimate son thus excludes the widow of the legitimate son and takes the whole estate to himself on the death of the legitimate son when there has been no partition. Their Lordships quoted with approval a sentence from the judgment of Haridas J. in 4 Bom 37[7] at page 47 where he says:

> I would therefore hold that the plaintiff and Mahadu, being male members of an undivided Hindu family governed by the Mitakshara law, etc.

So it is now clear that whatever may be the position of the illegitimate son before the father's death, after it he becomes a member of the coparcenary; a member with curtailed rights, it is true, but nevertheless a member. Haridas J. was even more emphatic in another part of the same judgment and their Lordships while accepting his conclusions and actually quoting some of his words did not disapprove of this passage :

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[4] Karuppai Ammal v. Rama Swami, A I R 1932 Mad 440=137 I C 645 = 55 Mad 856= 62 M L J 698.

[5] Jagarnath Gir v. Sher Bahadur Singh, A I R 1935 All 329=153 I C 1078=57 All 85=1935 A L J 150.

[6] Jogendro Bhupate Hurrochandra Mahapatra v. Nityanand Man Singh, (1891) 18 Cal 151= 17 I A 128=5 Sar 596 (P C).

[7] Sadu v. Baiza, (1879) 4 Bom 37 (F B).

> I am not prepared to allow that the former (i. e. the illegitimate son) is not a coparcener, and not therefore entitled to succeed by right of survivorship. His legal status as a son is unquestionably recognized and accordingly he inherits from his father even before the latter's widow; and if there are auras putras of his father he succeeds to the father's estate jointly with them. He is clearly therefore their coparcener . . . he is their brother, not only in the popular, but also in the legal, acceptation of the term.

The learned Judge meets the argument that the illegitimate son is not included in the enumeration of heirs given in the Mitakshara Chap. 2, S. 2, placitum 2 by pointing out that that placitum only lays down the order of succession on the failure of sons and consequently can have no application where there are sons legitimate and otherwise.

We turn next to more debatable ground. A Full Bench of the Madras High Court has held in 41 Mad 44[8] that the putative father of an illegitimate son succeeds to the illegitimate son. The Judges were unanimous and the ground of their decisions was that the illegitimate son is an undoubted heir to the father and consequently by the rule of mutuality the father must succeed to the son. Wallis C. J. pointed out that the illegitimate son was recognized as one of the father's nearest heirs at the date of Yajnavalkya though his right was only to a half.

> From the time of Yajnavalkya onwards, the illegitimate son has been an heir to his father and an heir of a very high rank excluding all the subsequent classes of sons which at that time included even the dattaka or sons given in adoption.

Oldfield J. considered that the decision of the Judicial Committee in the case quoted above established that :

> A coparcenary exists between the legitimate and illegitimate sons in virtue of a relationship and not as specially created by the recognition of the latter in the texts for special purposes which they specify, and subject to special limitations, which those purposes imply. Such relationship can be traced only through the affiliation of both sons to their common father; and the result, which must be accepted, is the recognition of the illegitimate son as a son in the most comprehensive sense, subject only to certain disabilities.

Kumaraswami Sastriyar J. said :

> The fact that a special text was necessary to give him a favourable position cannot in my opinion be treated as showing an intention to exclude him from the category of sons whom the Smriti writers mention as capable of inheriting to their father.

Another very learned Hindu Judge, Bhashyam Ayyangar J. was of the same opinion in 25 Mad 519[9] at p. 524 :

> The Sudra's illegitimate son is therefore in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction.

These views appear to follow logically from the ground on which the Judicial Committee based their decision and unquestionably from the decision of Haridas J. in the Bombay case. As opposed to this however there is a large body of authority which holds that the illegitimate son does not succeed to collaterals. It is not an undisputed view. Many eminent Hindu law scholars are against it : *See* Sarvadhikari's Principles of Hindu Law, Edn. 2, p. 826 and Kumaraswami Sastri J. in 49 Mad 116[10] at p. 154. But they are all agreed that however much this rule may be opposed to principle, it is perhaps too late to question the long series of decisions on the point. However, it is possible to distinguish them. The rule is based on a text of Manu as interpreted by commentators and is reproduced in Ch. 1, S. 11, placita 30 and 31 of the Mitakshara. But these very placita show clearly that the illegitimate son is a kinsman and a blood relation. What they say is that Manu provided two sets of six sons. The first six he declared to be heirs and kinsmen and the next six, which include "the son of an unmarried woman", as not heirs but kinsmen. Then the commentator proceeds :

> That must be expounded as signifying that the first six may take the heritage of their father's collateral kinsmen (sapindas and samanodakas) if there be no nearer heir ; but not so the last six. However, consanguinity and the performance of the duty of offering libations of water and so forth on account of relationship near or remote belong to both alike.

It is true the learned Judges in 21 All 99[11] at pp. 103 and 104 say that sapinda relationship presupposes a lawful marriage, but we agree with Sadasiva Ayyar J. in 41 Mad 44[8] at p. 56 that there is nothing to support this view and the quotation just cited appears to us to indicate the contrary. Their Lordships of the Privy Council decided in 37 All 604[12] at p. 623 that although under the Mitakshara

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[8] Subramania Ayyar v. Rathnavelu Chetty, A I R 1918 Mad 1346=42 I C 556=41 Mad 44=33 M L J 224 (F B).

[9] Ramalinga Muppan v. Pavadai Goundan, (1902) 25 Mad 519=11 M L J 399.

[10] Ayaswaryanandaji Saheb v. Sivaji Raja Saheb, A I R 1926 Mad 84=92 I C 928=49 Mad 116=49 M L J 568.

[11] Shome Shankar Rajendra Varere v. Rajesar Swami Jangam, (1898) 21 All 99=1898 A W N 170.

> the right of inheritance arises from sapinda relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the gotrajas, the test to be applied to discover the preferential heir is the capacity to offer oblations.

It follows that one must be a blood relation before the oblation can be offered and vice versa. Therefore, since the Mitakshara recognizes the illegitimate son's right to offer libations of water and so forth on the ground of consanguinity and relationship, it is clear his sapinda relationship to his father and brothers is accepted. Of course it is anomalous in such a view to cut him off from succession to collaterals, but as Sadashiva Ayyar J. says in the case just cited: "This is one of the anomalies of the Hindu law which do not rest upon any principle but only upon texts."

It is to be observed that Bipin Krishna Bose A. J. C., in construing a similar text which deals with the sister in the chapter on inheritance, decided that she succeeded as an heir and participated in the inheritance. Ch. 1, S. 7, placitum 6, says, with respect to the sister, that she "participates" in the inheritance. The corresponding section dealing with the illegitimate son is S. 12, placitum 1. It says that "the father being dead, the brothers should make him partaker of the moiety of a share". The language, therefore, is the same and was presumably used in the same sense; at any rate it ought to be construed as such. The Allahabad High Court have extended this principle to the extent of allowing a mother to succeed to her illegitimate son even among the regenerate classes: 57 All 85.[5] Put very briefly their line of reasoning is this: under the old Mitakshara law, the son who is now looked upon as illegitimate would not have been regarded as illegitimate at all and so would undoubtedly have succeeded. His position has been curtailed from time to time by various texts: he is not now entitled to claim a share and the relationship between him and the regenerate father is no longer recognized, but the same cannot be said of the mother. Therefore in the absence of a text taking it away, his right to inherit to her is still intact. Then the learned Judges applied the rule of mutuality and eventually decided that the mother could succeed to her illegitimate son.

This is also the view in these Provinces. In 16 N L R 221[13] Macnair A. J. C. held that an illegitimate daughter not born of an adulterous intercourse inherits the property of her mother if there are no preferential heirs, whether the mother is twice-born or a Sudra. The same view is taken in 21 Mad 40[14] and in 45 Bom 557.[15] But there are two cases which require consideration. They are 34 Bom 553[16] and 38 Mad 1144.[17] They hold that in a competition between a legitimate and an illegitimate child with respect to the mother's stridhana, the former excludes the latter. The reason given for this in the Bombay case is that the law of inheritance presupposes a lawful marriage. We have already pointed out that there is in our view nothing to support this. But apart from that, the opinion recorded there is obiter, for the learned Judges came to the conclusion that in the case before them marriage had to be presumed and rested their decision on that fact. The consequence was that this difficult problem was not carefully considered and disposed of in a short paragraph.

The same cannot be said of the Madras case. But there also, the learned Judges have taken a view which we have already discussed and find ourselves unable to accept. The competition there was between a legitimate son and two illegitimate daughters, and the decision is founded on the assumption that illegitimate children have no status at all and no rights except those conferred by special texts. There is no text dealing with the illegitimate daughter, so they held she is excluded from the inheritance. This is an understandable position, though, as we have said, we prefer another view, but in our opinion the weakness of the decision lies in two points. The learned Judges did not dissent from the cases which decide that the illegitimate child succeeds in the absence of nearer heirs. They merely endeavoured to distinguish them, and the reason they give is that the illegitimate child succeeds in such a case

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[12] Buddha Singh v. Laltu Singh, A I R 1915 P C 70=30 I C 529=42 I A 208=37 All 604 (P C).

[13] Mt. Kasturi v. Lote, A I R 1920 Nag 196=56 I C 952=16 N L R 221.

[14] Arunagiri Mudali v. Ranganayaki Ammal, (1898) 21 Mad 40.

[15] Dundappa v. Bhimawa, A I R 1921 Bom 137 =59 I C 561=45 Bom 557=22 Bom L R 1306.

[16] Jagannath Raghunath v. Narayan, (1910) 34 Bom 553=7 I C 459=12 Bom L R 545.

[17] Meenakshi v. Munlandi Panikhan, A I R 1915 Mad 63=25 I C 957=38 Mad 1144=27 M L J 353.

> on the ground that in the absence of preferential heirs, and if the Crown does not intervene, they succeed as blood relations.

But that is precisely the view which is negatived in the body of the ruling. The illegitimate daughters were excluded because they were not regarded as 'daughters' within the meaning of the texts The other point is this. The learned Judges distinguish the Calcutta rulings which favour the illegitimate child on the ground that Calcutta Judges are influenced by the theory which prevails in Bengal that the offering of oblations has to be taken into account in determining heirship, and that that does not affect the Mitakshara where the rules of inheritance are based on community of blood. But this is exactly what their Lordships of the Privy Council have overruled in 37 All 604[12] at p. 623 to which we have already referred Therefore, though with the utmost respect, we disagree with the ratio decidendi of this decision, especially as Seshagiri Aiyar J., who delivered the main judgment, went to the length of saying that he thought that even the text which allows the illegitimate son of a Sudra half a share should now be regarded as obsolete.

Turning next to the ruling which at first sight appears to be on the other side, 55 Mad 856,[4] it deals with a special situation. The father on his death left a widow and an illegitimate son who of course succeeded to the estate half and half. When the widow died there was a daughter's son and the question was whether he got the entire moiety which had vested in the widow or only half of it. Now the text says:

> However, should there be no sons of a wedded wife the son of the female slave takes the whole estate provided there be no daughters of a wife nor sons of daughters. But if there be such the son of the female slave participates for half a share only.

It is therefore understandable that this text should be construed as meaning that the illegitimate son can only get half so long as there is a daughter or a daughter's son, and that consequently there can be no reverter so long as daughter's sons exist. But this would be because of the text and not because he is not an heir to his putative father or because he is not a member of the family. The learned Judges do not refer at all to the mass of authority which we have just analysed. We are consequently unable to accept the decision as authority for anything but the point it actually decides. The result is that we are left with the position that the illegitimate son is the father's heir and except in so far as his rights have been curtailed by express texts, he must be treated as such. We do not deny that this leads to anomalous results. It is anomalous to find for instance that if Ramrao had been a daughter, his sons would have got more than they do now. But the Hindu law is full of anomalies and any other result would lead to equally anomalous situations. All we can do is to administer the law as we find it and interpret it as logically as we can in the circumstances.

In the beginning, the plaintiffs claimed 2/3rd of the 4 annas which went to Laxmibai at the partition, but the first Court decreed only 2/5th and there was no appeal against that. 2/5th is all that they could have obtained under the law, but the difficulty arises about the extent of the property which comprised Laxmibai's 4 annas share. As we have said the plaint claims a share in all the property which was originally allotted to Laxmibai as a result of her suit in 1908. But, as we have also pointed out, she exchanged some of it for other portions of the family property in Ramrao's possession in 1909. There is no suggestion that the exchange was an unfair one, and it was obviously more convenient for her to manage a compact estate in one village instead of properties scattered over two. This arrangement did not affect the plaintiffs or any property allotted to their share So we are of opinion that her share must be regarded as having consisted of the properties which were in her possession after the exchange in 1909 and not those allotted to her in 1908. Any other conclusion would be unfair to defendants 9 and 10 who are subsequent transferees from Gopalrao. It would also be unfair to defendant 1, for the transferees from his father will naturally claim compensation if their property is taken from them. On the other hand, it would not affect the plaintiffs in any way. The partition must, in our opinion, be looked upon as a whole as if it had extended over the years 1908 and 1909 and the situation regarded as if the subsequent arrangement under which Ramrao and Laxmibai exchanged portions of the properties originally allotted to them was part and parcel of the partition proceedings. Consequently the plaintiffs' suit fails with respect to the properties which were assigned to Ramrao by Laxmibai under the exchange of 1909, and we leave them to such remedies as they may have, if any, with respect to the property which Ramrao handed over to Laxmibai. That property has not been included in this suit and so we are unable to deal with it here. The appeal thus succeeds with respect to the property which Ramrao obtained by exchange from Laxmibai on 8th September 1909 and fails as regards the rest. The decrees of the lower Courts will consequently be modified by excluding this property from the decree and dismissing the plaintiffs' claim with respect to it.

As regards costs, the plaintiffs claimed 2/3rd when they were only entitled to 2/5th, that is, they claimed 4/15th more than they were entitled to. Therefore in the first Court they will be allowed 11/15th of the costs proportional to the property with respect to which they now succeed. The defendants will be allowed 4/15th of the costs on that portion. As regards the rest of the property with respect to which the plaintiffs' case has been dismissed, the plaintiffs will pay the defendants such costs as are apportionable to that part of the claim. With respect to the costs here and in the lower Appellate Court, defendants 9 and 10 appealed as regards the 2/3rd the plaintiffs had originally claimed, although only 2/5th had actually been decreed. Therefore they appealed unnecessarily as regards 4/15th. They will therefore receive 11/15th of the costs apportionable to the property in respect of which the plaintiffs' claim has been dismissed, and pay the plaintiffs 4/15th of that amount. As regards the rest of the property with respect to which the appeal has failed, they will pay the plaintiffs such costs as are apportionable to that part of the claim.

D.S./R.K. *Appeal partly allowed.*

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## * A. I. R. 1938 Nagpur 7

VIVIAN BOSE J.

*Official Receiver, Amraoti (K. B. Abdul Kadar)* — Appellant.

v.

*Shridhar and others* — Respondents.

Second Appeal No 87-B of 1934, Decided on 23rd August 1937, from appellate decree of Addl. District Judge, Amraoti, D/- 12th January 1934.

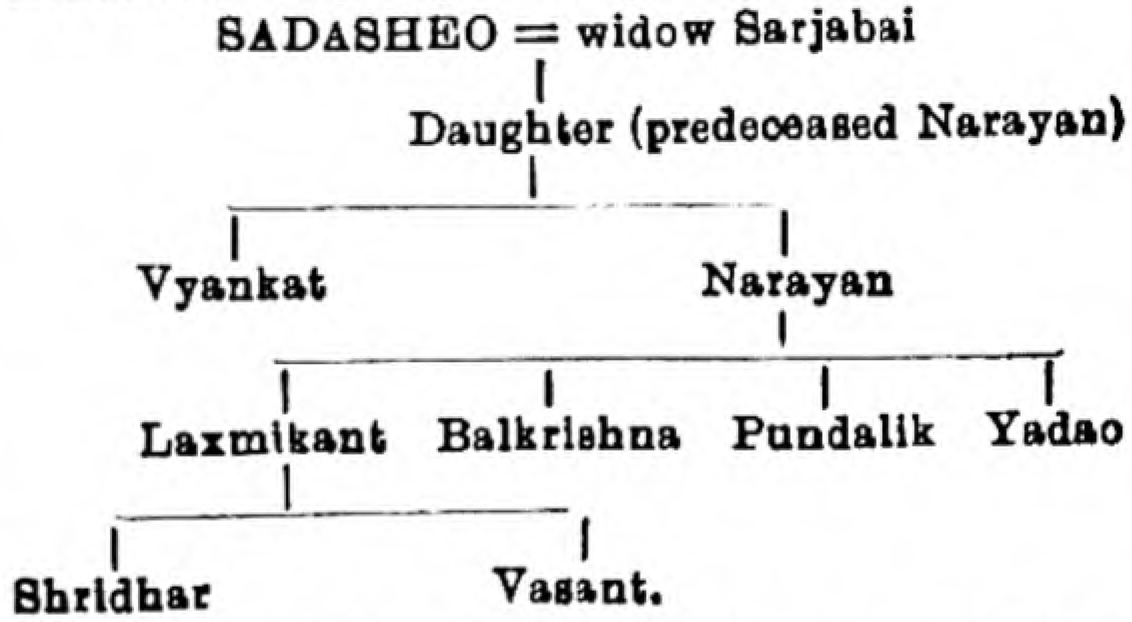
*** Hindu Law — Succession — Obstructed heritage — Male issue of acquirer do not obtain interest by birth.**

The male issue of the acquirer do not obtain an interest by birth in property which has descended as obstructed heritage: *A I R 1915 Mad 998, Dissent.; 27 Mad 300 and 34 Mad 211, Disappr.; 35 Cal 1039 (P C), Expl.; Case law discussed.* [P 12 C 1]

V. K. Rajwade and V. D. Kale — *for Appellant.*

K. V. Brahma — *for Respondents.*

**Judgment.** — One Sadasheo owned S. No. 5 of Mauza Edlabad which forms the subject matter of the present dispute. He died leaving a widow Mt. Sarjabai and two daughters' sons, Vyankat and Narayan, the daughter having predeceased him. Narayan had four sons of which Laxmikant was one. The first two respondents are sons of this Laxmikant. The relationship between these persons will be best illustrated by a genealogical tree:



On 23rd June 1927 Laxmikant applied to be adjudged insolvent and was so declared on 17th February 1928. The Official Receiver, who is the appellant here, claims one-fifth share in the field in dispute on the ground that it is the joint family property of Narayan and his four sons and that Laxmikant has one-fifth share in it. The appeal turns on that point. Property inherited from the maternal grandfather is obtained by obstructed heritage. There is no doubt about that. The two kinds of properties are defined in the Mitakshara, Ch. 1, S. 1, placitum 3 of the book on inheritance. Unobstructed heritage is confined to property coming from the father, the paternal grandfather or paternal great-grandfather; every other kind of inheritance is obstructed. In the former case the son, the sons' son and the son's son's son of the acquirer get a right by birth. The devolution is not on the acquirer alone but on the co-parcenary, on all those who in the eye of the Hindu law form one body with him. The position is explained in Mulla's Hindu Law, 8th Edn., p. 234, and also in 31 C W N 293.[1] There is thus no doubt about this and I need not enlarge upon the matter any further. But trouble arises when the heritage is obstructed as here. Do the sons, grandsons and the great-grandsons in the male line get a right by birth in such a case? As I read the Mitakshara they do not. It is not co-parcenary property in that sense, and that is the view of Trevelyan in his Hindu Law, 2nd Edn. page 235 and of Mayne in his Hindu Law, 9th Edn. page 355. Golapchandra Sastri and J. C. Ghose are also of the same opinion: *see* Sarkar's Hindu Law, 7th Edn., p. 336, and J. C. Ghose's Hindu Law, 3rd Edn. p. 375.

I am aware that the Mitakshara gives the sons a right by birth in the self-acquired property of their father though it gives them no right to challenge his alienations or to demand a partition in respect of it; at any rate, this is the sense in which it is now understood, though the Madras High Court considered this a departure from the strict Mitakshara law in 3 Mad 370,[2] at p. 377: *see* Ch. 1, S. 5, p. 10 and also Ch. 1, S. 1, pp. 3 and 27. Also according to Golapchandra Sastri, on the father's death the sons succeed by survivorship and not by descent: *see* Sarkar's Hindu Law, 7th Edn., p. 184. But the matter is not of much practical importance so far as the present case is concerned: in that sense the wives of coparceners and unmarried sisters and mothers are also members of the co-parcenary and obtain certain rights in the coparcenary property: *see* Sarkar's Hindu Law, p. 362. But it cannot for a moment be contended that these rights would enable them to transfer or alienate their interests in the property or prevent the acquirer from dealing with it as he pleased. Therefore when I use the expression "right by birth" in the course of this judgment, it must be distinctly understood that I am not referring to the limited kind of rights which arise here. The verse in the Mitakshara dealing with the son's rights in the ancestral estate was unfortunately loosely translated by Colebrooke. A more exact translation is given in Ghose's Hindu Law, 3rd Edn. p. 375 and is also referred to in Sarkar's Hindu Law, 7th Edn., p. 343. The Allahabad High Court deals with this in 29 All 667,[3] at p. 669 and the Madras High Court in 27 Mad 300,[4] at pp. 309-310. The verse is to be found in Ch. 1, S. 1, p. 27 of the Mitakshara and according to Ghose runs thus: "Therefore it is a settled point that property in the paternal or grand-paternal estate is by birth". Sastri gives it a slightly wider meaning, for he says that the true meaning of the original Sanskrit term "pitamaha" which Colebrooke translated as "ancestral" is "property inherited from the paternal grand-ancestors in the male line". As it is now settled that the great-grandson in the direct male line is also included in the coparcenary, Sastri is probably right, though Setlur in his Collection of Hindu Law Books on Inheritance translates the word as "grandfather" at p. 7. However, that need not detain us now. What is beyond doubt is that Colebrooke's use of the word "ancestral" in that particular verse is limited to ancestors in the male line and does not include ancestors in the female line. Their Lordships of the Privy Council have accepted this in 35 Cal 1039[5] at p. 1045, where they say:

> Unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, . . . . . they are not deemed ancestral in Hindu law.

That ought to conclude the matter, but another difficulty arises from a decision of the Privy Council in 25 Mad 678.[6] The property in question in that case had devolved upon two brothers who were joint in estate and had come from their maternal grandfather; one of the brothers died before separation and the question arose whether the property should go to his heir or devolve upon the other parcener by survivorship. Their Lordships held that the rule of survivorship applied even though it was a case of obstructed succession. But in the course of their decision, their Lordships made two observations which have since been a source of judicial conflict. They stated :

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[1] Masit-Ullah v. Damodar Prasad, A I R 1926 P C 105=98 I C 1031=53 I A 204=48 All 518=31 C W N 293 (P C).

[2] Muttayan Chetti v. Shivagiri Zemindar, (1881) 3 Mad 370.

[3] Jamna Prasad v. Ram Partap, (1907) 29 All 667=1907 A W N 211=4 A L J 582.

[4] Karuppai Nachiar v. Sankara Narayanan Chetty, (1904) 27 Mad 300 (F B).

[5] Atar Singh v. Thakar Singh, (1908) 35 Cal 1039=42 P R 1910=6 I C 721=35 I A 206=12 C W N 1049=8 C L J 359 (P C).

[6] Venkayyamma Garu v. Venkataramanayyamma Bahadur Garu, (1902) 25 Mad 678=29 I A 156=12 M L J 299=8 Sar 286 (P C).

> In the grandfather's hands it was separately acquired property. In the hands of the sons it was ancestral property which had devolved on them under the ordinary law of inheritance.

The Madras High Court construed this to mean ancestral in the technical sense in which the expression is used in Hindu law in 39 Mad 930[7] at pages 933.934. But an earlier Full Bench of the Madras High Court had already taken a different view in 27 Mad 300[4] at page 309. The Allahabad, Bombay and Patna High Courts also held that it was not so used : 29 All 667,[3] 36 Bom 424[8] at pages 425-431 and 43 I C 370.[9] In view of their Lordships' later pronouncement in 35 Cal 1039[5] which I have quoted above, I respectfully agree with the majority view. It was argued that the later Privy Council decision was based on a Punjab custom and this is also the view in 39 Mad 930[7] at page 934. I have examined the ruling carefully and though their Lordships' case came from the Punjab, I have not been able to find a single syllable either in the decision or in the report to suggest that the decision was based on custom and not on Hindu law; on the contrary the High Court had held that :

> Ancestral property for the purpose of this suit means property which was held by an ancestor who is the common ancestor of the parties. In this case therefore it would mean property held by any direct ancestor of Dyal Singh and of Dhanna Singh.

Their Lordships expressly negatived this finding and stated that :

> Unless the lands come to Dhanna Singh by descent from a lineal male ancestor in the male line through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu law.

With the utmost respect to the learned Madras Judges, I cannot construe this as a decision based on Punjab custom. However, that does not settle the problem, for their Lordships also observed in the Madras case that :

> According to the principles of Hindu law there is a co-parcenaryship between the different members of a united family and survivorship following upon it. There is community of interest and unity of possession,

and it was upon this principle of Hindu law that they decided the case, expressly stating that according to the Mitakshara the doctrine of survivorship is not limited to unobstructed succession and to the succession to the joint property of reunited coparceners, but also applies in cases of obstructed heritage: they definitely decided that the case before them was one of obstructed succession. A difficulty therefore arises at once. Under the Mitakshara obstructed heritage ordinarily descends to the next in the line of inheritance and not to a body of persons comprising several generations within themselves, and yet in a Mitakshara coparcenary the male issue of the acquirer ordinarily obtains a right in the coparcenary property along with the acquirer the moment it descends to him. The Madras High Court therefore pertinently remarked in the Full Bench ruling reported in 27 Mad 300[4] at pages 312.313 that unless the sons of the daughter's sons are given a right by birth in the property thus acquired by their fathers from the maternal grandfather, we will get an anomalous kind of joint family property; it will be subject to the rule of survivorship and yet the male issue of the joint owners will not become joint owners with their fathers in it by birth. This according to the learned Judges will be a species of coparcenary property unknown to the Mitakshara. This objection is repeated in another Full Bench ruling of the same High Court reported in 34 Mad 211[10] at page 218 and is the opinion of Beaman, J. in 32 Bom 479[11] at page 493.

In so far as the objection is founded on anomaly, I do not think it is insuperable. The Hindu law is full of anomalies and there is no reason why this should not be treated as just another. After all, most rules are subject to exceptions and this may well be one of them, and in any case, whichever view is taken anomalies must arise. What can be more anomalous than this? If the two brothers

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7. Ramayya v. Jagannadham, A I R 1915 Mad 998=30 I C 889=39 Mad 930.
8. Bai Parson v. Bai Somali, (1912) 36 Bom 424 =15 I C 774=14 Bom L R 400.
9. Bishwanath Prasad Sahu v. Gajadhar Prasad Sahu, A I R 1917 Pat 146=43 I C 370=3 Pat L J 168.
10. Munisami Chetti v. Maruthammal, (1911) 34 Mad 211=7 I C 176=20 M L J 687 (F B).
11. Karsondas Dharamsey v. Gangabai, (1908) 32 Bom 479=10 Bom L R 184.

had been separate when they inherited their maternal grandfather's property, or if there had been only one of them, then their sons would have had no interest, for the property having descended as obstructed heritage the sons acquire no right in it by birth: but if the two happen to be joint then according to the Madras view the selfsame property by the selfsame devolution assumes a different character and the sons acquire a right in it by birth. The devolution in the one case would be to the next in the line of succession in accordance with the ordinary laws of inheritance, and in the other not to a person but to an entity comprising several generations: not only would the next in the line of succession inherit but also those in more remote degrees. Consider also another case. A man dies leaving a grandson by one daughter and two grandsons who are joint by another. There can be no coparcenary in this sense between the three of them for they belong to different families, and yet the property would devolve on the two grandsons as coparcenary property and on the single grandson as something else. That in itself defeats the usual meaning of co-parcenary property.

I do not think there can be any doubt that in all ordinary cases of obstructed succession, the sons of the acquirer do not obtain a right by birth. It is only in the exceptional cases mentioned in Ch. 1, S. 1, p. 27 of the Mitakshara—an exception peculiar to the Hindu law—that the sons and their male issue acquire such rights, that is to say, in cases of unobstructed succession where 'ancestral' property descends to the lineal male issue. Any other view would cut at the very foundation of the Mitakshara doctrine of inheritance. Their Lordships did not hold otherwise in 25 Mad 678.[6] They were not considering the rights of the sons. It is true they referred to the brothers as coparceners and that they implied that the property on descent became their coparcenary property, but we know from their later decision in 35 Cal 1039[5] that they were not using the term 'ancestral' in its technical Hindu law sense, and I can see no reason to suppose that they were using the term co-parcenary in any more technical way. I can hardly think that their Lordships were abrogating the Mitakshara doctrine of inheritance altogether. The very fact that they emphasized that the inheritance was obstructed in that case shows that they intended to retain some kind of distinction between the two kinds of property.

I think many of the difficulties which arise from their Lordships' decision will disappear if we analyse the different meanings of the terms 'co-parcener' and 'co-parcenary property'. They are not terms which are peculiar to the Hindu law, though they are usually used with a special technical significance in the Mitakshara: though even there they are used in different senses as I shall show presently. In England a coparcenary is said to exist whenever "two or more persons together form an heir": *see* Williams on Real Property, Edn. 21, p. 230, quoting Coke on Littleton and Blackstone. In Halsbury's Laws of England, Vol. 24, p. 210, it is stated that "co-parcenary arises where two or more persons take hereditaments by the same title by descent". But when we come to consider their incidents we find from the same authority that:

> There is *jus accrescendi* and on the death of one coparcener her share devolves upon those who claim under her by devise or by descent and then the coparcenary continues between her successors in title and the other co-parceners.

Golapchandra Sastri also deals with this in his Treatise on Hindu Law, Edn 7, p.339. Therefore it is clear that under the English law descent is one step at a time and that the issue of the coparcenary do not step in until one of the coparceners dies. Dayabhaga coparcenaries follow much the same rules: *see* 6 M I A 526[12] at p. 539.

There can be no doubt that coparcenaries are recognized by the Dayabhaga though their incidents differ from Mitakshara coparcenaries. The manner in which the property descends under that system conforms to the English definition, and Mayne refers to Dayabhaga coparcenaries as also do Mulla and Golapchandra Sastri: *see* Mayne's Hindu Law, Edn. 9, p. 381; Mulla's Hindu Law, Edn. 8, p. 328 and Sastri's Hindu Law, Edn. 7, p. 981. Unfortunately I am not familiar with the Dayabhaga, but I find that the term 'parcener' is used in at least one place: Dayabhaga on Inheritance, Ch. 1, p. 35. Then again when two or more widows succeed as heirs to their husbands, they succeed as coparceners (11 M I A 487[13]), and so also do daughters succeeding to their father, even when they are married: 23 W R 214[14] at p 218. Their Lordships expressly referred to them as coparceners in the first case and in the second it was pointed out that they succeeded as one heir, which of course is the same thing. In both cases the rule of survivorship was applied. Therefore even under the Hindu law co parcenaries which devolve but one step at a time and in which the rule of survivorship applies are not unknown.

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[12] Surjeemoney Dossee v. Denobundoo Mullick, (1854-57) 6 M I A 526=4 W R 114=1 Suther 291=1 Sar 583 (P C).

Another thing to bear in mind is this. Even under the Mitakshara different members of the co-parcenary have different rights in its property. I have already referred to the case of a father's self-acquired property where, although the sons obtain a right in it by birth and succeed by survivorship, they cannot challenge his alienations or demand partition. Then come the mother's rights. She is also a member of the coparcenary, but all she can claim is a right of maintenance and residence unless there is a partition among the sons, in which case she gets a share for the period of her life. An unmarried sister is also a member of the co-parcenary with special rights. She 'participates' in the inheritance: *see* 5 N L R 161.[15] The illegitimate son also has rights and though he obtains no right by birth he steps in as a member of the coparcenary with rights of survivorship as soon as the father dies: *see* 18 Cal 151[16] at p. 155 and Second Appeal No. 132 of 1934.[17]

It is clear then that there are many different kinds of co parcenaries known to law, even to the law of the Mitakshara, and so it is more than possible that their Lordships were not using the term in the limited sense in which it is ordinarily understood in Mitakshara cases any more than they were using ancestral in a restricted way. All that they were dealing with was property which had descended upon two persons in the same degree. As they were joint, their Lordships decided that the descent was upon them as one heir and that the property was coparcenary in that sense. As they were members of a joint family, they decided that the incident of survivorship should apply. As I have said they had already applied this incident to the coparcenary which is formed when two widows inherit and also in the case of daughters. Their Lordships applied the same principle to the case of two joint grandsons. I am fortified in this by the undoubted fact that there can be a coparcenary within a coparcenary. Trevelyan in his Hindu Law adverts to this at page 238 of Edn. 2 of his work:

> Property may be coparcenary as regards some members of a joint family, while other members of the family, although coparceners in the family property, have no share therein.

This occurs when a member of a coparcenary dies leaving separate property. The property then becomes the coparcenary property of his lineal male issue within the requisite degrees but his collateral coparceners have no interest in it. Another instance is this. Consider an undivided family with five successive generations, *A*, *B*, *C*, *D* and *E*, in which *A* and *C* respectively acquire property in their own behalf. During their respective lives, the property will be their respective self-acquisitions. When *C* dies, his son and grandson *D* and *E* will get his property as coparceners and *A* and *B* will have no interest in it. When *A* dies his son *B* and his great-grand son *D* will get his separate estate by survivorship as a coparcenary, but *E* will get no share in it though he is a member of the joint family: *see* Mayne's Hindu Law, Edn. 9, page 347. Therefore we then get two coparcenaries within the same joint family, one group consisting of *B* and *D* and another of *D* and *E*; we also have a position in which *E* gets no interest in the property inherited by his father *D* from *A*.

Some support for an intermediate position is to be found in West and Buhler's Hindu Law, Edn. 3, Vol. 1, page 715. The learned authors are dealing there with the case reported in 3 Mad 370[2] at page 377 which went up to the Privy Council. Their Lordships' decision is to be found in 6 Mad 1.[18] That was also a case of inheritance from the maternal grandfather and the question was whether the property so inherited was liable for the acquirer's debts after it had descended to the son on the father's death. Both the High Court and their Lordships held that it was on the now well-established pious obligation theory. But the High Court also discussed another question and held that the property was not the father's self-acquisition and considered that although it was "ancestral in the sense in which the property inherited by the father from the paternal grandfather is liable to partition under the Mitakshara law at the instance of the son", yet it was "not self-acquired property on that ground for purposes other than those of partition". In other words, they considered that the son acquired right by birth in it, that he could restrain alienation and challenge its liability for the immoral and illegal debts of the father but could not demand partition. Their Lordships of the Privy Council declined to express an opinion on this point except to the extent of agreeing that property of this kind is not the self-acquired property of the father. The learned authors of West and Buhler commenting on the High Court's observations say:

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[13] **Bhugawandeen Doobey v. Myna Baee, (1866-67) 11 M I A 487=9 W R 23=2 Suther 124=2 Sar 327 (P C).**

[14] **Aumirtolall Bose v. Rajoneekant Mitter, (1875) 2 I A 113=23 W R 214=15 Beng L R 10=3 Sar 430 (P C).**

[15] **Mt Lochan v Babai, (1909) 5 N L R 161.**

[16] **Jogendro Bhupati Hurrochandra Mahapatra v. Nityanund Man Singh, (1891) 18 Cal 151=17 I A 128=5 Sar 596 (P C).**

[17] **Bhagwantrao v. Punjaram, *Reported in* A I R 1938 Nag 1.**

[18] **Muttayan v. Zamindar of Sivagiri, (1883) 6 Mad 1=9 I A 128=4 Sar 354 (P C).**

> This notion of property being of one class for one purpose and of another for another is a subtlety which the authorities do not apparently warrant and which would lead to contradictory consequences. The rules for partition of inherited property point to male lineal inheritance, leaving property owned in any other right to be distributed as self-acquired or according to the special rules applicable on account of the character of the property as sacred or secular or as affected or not with the support of public duties.

Therefore, though such property is not self-acquired property, it is distributed according to the same rules. These illustrations go a long way towards meeting the objections raised in 39 Mad 930[7] at page 934 and the two Full Bench cases to which I have already referred, namely 27 Mad 300[4] at page 313 and 34 Mad 211[10] at page 218, to the effect that there can be no joint family property under the Mitakshara in respect of which the male issue of the joint owners will not by birth become joint owners with their father. As I have shown, there are many such instances. I am therefore in respectful agreement with those High Courts which hold that the male issue of the acquirer do not obtain an interest by birth in property which has descended as obstructed heritage, and dissent from the decision in 39 Mad 930.[7] This is especially so as the Madras Full Bench in 27 Mad 300[4] refused to extend the logical consequences of holding the contrary to a case in which the stridhan property of a woman devolved upon her sons who formed an undivided Hindu family, and also because they stated that the principles cannot apply to property which descends collaterally from the maternal uncle.

I want, however, to make it clear again that when I use the expression "right by birth" I am referring to the wider interests which that phrase ordinarily connotes and not any lesser rights such as those of maintenance, residence and survivorship. It may be, though it is not necessary to decide that here, that the sons do acquire the same or similar rights in respect of property thus acquired as they do in the self-acquired property of their father, but that will not entitle them to question the father's alienation or any other dealing with the property either by him or by his creditors against him during his lifetime. I am painfully conscious that my reasoning is strained, but I am unfortunately compelled either to confine the decision of their Lordships to the facts on which it is based and treat the situation dealt with there as one of those anomalous positions which are common in Hindu law, or to overthrow the doctrine of obstructed heritage and thus unsettle a law about which there has not been any doubt hitherto. As I have said, their Lordships cannot now be said to have based their decision on the fact that property of this kind is ancestral, and therefore coparcenary property for that reason. Their later pronouncement settles that point. At the same time their Lordships are definite that the heritage in such a case is obstructed. If the sons of the acquirer are to be given a right by birth in such property, then the rule must be applied to all kinds of obstructed heritage whether the descent is on two persons or one, and if on two whether they are joint or separate. In my opinion the former alternative will not unsettle any law while the latter will. Therefore I prefer the Bombay, Allahabad and Patna view to that of the Madras High Court.

The result is that the Official Receiver has no right to proceed against this property during the lifetime of the father. The decision of the lower Appellate Court is right. I dismiss the appeal with costs. Counsel's fee Rs. 25.

B.D./R.K. *Appeal dismissed.*

## * A. I. R. 1938 Nagpur 13

STONE C. J. AND VIVIAN BOSE J.

*Yeshwant Rao and another* — Appellants.

v.

*Laxman Rao Bajirao Marathe* — Respondent.

First Appeal No. 65 of 1934, Decided on 12th March 1937, from decree of Addl. Dist. Judge, Wardha, D/- 31st January 1934.

*** Limitation Act (1908), Arts. 68 and 80—Debt secured by bond—On payment of certain amount by certain date, bond to be fully satisfied—Bond held was not single bond—Art. 68 or Art. 80 applied and not Art. 67.**

A suit was instituted on a debt secured by a bond. The bond provided : "Accounts have been made and Rs. 9,091-0-3 is due from us to you . . . . . The following agreement has taken place between you and us that if we pay you Rs. 7,000 by 23rd May 1930 and if we pay this amount by the date fixed, you will give up the balance, Rs. 2,901-0-3 and pass a receipt in full satisfaction of the bond, but if we do not pay you Rs. 7,000 by the date fixed, we shall be liable to pay the whole of the amount of Rs. 9,091-0-3, and we shall pay you compound interest at 10 annas per cent. per mensem on this amount from the date of the bond":

*Held* that this was not a single bond and hence not governed by Art. 67 but that either Art. 68 or Art. 80 applied and the date when limitation began was 24th May 1930. [P 13 C 2; P 14 C 1]

M. R. Bobde and J. R. Mudholkar — *for Appellants.*

T. J. Kedar — *for Respondent.*

**Judgment.**—This case raises an interesting point on the law of limitation. The facts that are material are simple : The suit is on a debt secured by a bond. The date of the bond is 22nd January 1930. The date of the suit is 24th April 1933, and the question arises as to whether the suit is in time. In order to resolve that question, it is necessary to consider Arts. 66, 67 and 80 and also to glance at Art. 68. As the question to some extent turns on the wording of the bond, it is desirable to set out the bond in extenso in its translated form :

> Accounts have been made and Rs. 9,091-0-3 is due from us to you . . . . . The following agreement has taken place between you and us that if we pay you Rs. 7,000 by 23rd May 1930, and if we pay this amount by the date fixed, you will give up the balance of Rs. 2,091-0-3 and pass a receipt in full satisfaction of the bond, but if we do not pay you Rs. 7,000 by the date fixed, we shall be liable to pay the whole of the amount of Rs. 9,091-0-3, and we shall pay you compound interest at 10 annas per cent. per mensem on this amount from the date of the bond.

It is urged, on behalf of the appellants, by Mr. Bobde in an ingenious argument that such a bond is a single bond, and being a single bond either Art. 66 or Art. 67 applies, and those Articles being specific and together exhaustive, exclude the application of the general Art. 80. It is said that the Article applicable to this case is Art. 67, for here no date is fixed for payment. If that be so, the starting point for limitation is the date of the execution of the bond, that is to say 22nd January 1930, and therefore the suit is time-barred. In our opinion, that argument fails unless this bond is a single bond. Further we observe that we are not to be taken as deciding that in this bond any date is fixed for payment. That is another point which does not arise in view of the conclusions we have arrived at as to the kind of bond here in question. Bonds can be divided into two classes, single and double, or unconditional and conditional. The learned authors in Halsbury's Laws of England, Vol. 3 (Hailsham edition) at page 92, Art. 163, state the matter as follows :

> The ordinary form of bond now in use is one accompanied by a condition in the nature of a defeasance, the performance of the condition generally being secured by a penalty. This form of bond is called a double or conditional bond, and consists of two parts : first, the obligation, and secondly the condition. The condition which may be contained in the same or another instrument, or may be indorsed on the back, specifies the real agreement between the parties, that is to say, the money to be paid or acts or duties to be performed or observed, the payment, performance, or observance of which is intended to be secured by the bond—and provides that on due performance of the condition the bond shall be void.

In a footnote there is a reference to an old case (1670) 2 Saund 78,[1] decided as long ago as 1670, which laid down that the omission of words providing that the obligation shall be void does not affect the validity of the condition. In our opinion, on a true construction of the bond in this case, it provided that if on or before 23rd May 1930 the person under obligation should pay Rs. 7,000, then the bond would become void, that is to say, no further sum was due to, and no further remedy remained in the creditor. That being so, this is not in our opinion a single bond, and either Art. 68 or Art. 80 applies. Art. 68 provides that on a bond subject to a condition it is three years from the time when the condition is broken, and Art. 80 provides that in the case of a bond not therein expressly provided for, it is three years from the time when the bond becomes payable. In our opinion, before 23rd May 1930 the holder of the bond could not have sued upon it; for, in our view, the true nature of the agreement between the parties was that the debtor was given time until 23rd May 1930 to pay; if he then paid Rs. 7,000, he need pay no more; if he failed to pay Rs. 7,000 by then, he would have to pay the whole, that is to say Rs. 9,091 0.3. On that view we are of the opinion that whether Art 68 or Art 80 applies, the date when limitation begins is 24th May 1930.

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[1] Mauleverer v. Hawxby, (1670) 2 Saund 78= 85 E R 748.

The learned counsel for the appellants raised a further objection on the ground that the learned trial Judge, after having held that the agreement to pay the whole amount of Rs. 9,091.0 3 was penal, has yet refused relief against the penalty and has given a decree for the Rs. 9,091.0 3. In our opinion, however, that point fails because what the learned Judge says is not that the Rs. 9,091.0.3 was penal but that the provision for Rs. 9 091.0 3 with compound interest at 10 annas per cent. per month from the date of the bond on failure to pay Rs. 7,000 by the date fixed was penal. Seeing that the learned Judge only gave a decree for Rs. 9,091.0.3 allowing nothing whatever for interest, compound or otherwise, we certainly cannot see that the defendants have anything to complain about. On this point also the appeal fails. We therefore arrive at the same conclusion as the learned trial Judge though for different reasons, and the result is that the appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Nagpur 14

STONE C. J.

*Jayanarayan Ramkisan Marwadi — Defendant* — Appellant.

v.

*Dhanraj Ganesh Marwadi — Plaintiff* — Respondent.

**Second Appeal No. 206-B of 1934, Decided on 8th April 1937, from appellate decree of Second Addl. Dist. Judge, Akola, D/- 19th July 1934.**

*** Civil P. C. (1908), S. 73 — Assets held by Court — Decree transferred to Collector for further execution by Civil Court — Money received by Collector is money received by him for and on behalf of transferring Court — Such money, while in his hands, is "assets" held by such Court.**

Even though the Collector to whom the decree is transferred for further execution, by a Civil Court, is not a Court, still in view of the duties of the Collector in this matter, though he is not an agent of such Court, the moneys received by him in execution of such decree are moneys received by him for and on behalf of such Court. The moneys so received, while they are in his hands, are "assets" held by such Civil Court: *A I R 1937 Nag 16; A I R 1936 Bom 277 and A I R 1937 Nag 217, Rel. on.* [P 16 C 1]

A. L. Halve and V. K. Rajwade — *for Appellant.*

A. V. Khare and W. B. Pendharkar — *for Respondent.*

**Judgment.**—This is a second appeal in a suit whereby the plaintiff claims from the defendant Rs. 238-5-0 which he says he should have received out of a total sum of Rs. 370-5-0 by way of rateable distribution, that Rs. 370-5-0 being in a Court as assets of a judgment-debtor against whom the plaintiff's father in one suit and the defendant's brother in another suit had obtained decrees. The questions narrow down to two: (1) What is the date on which the sums amounting to Rs 370-5-0 were received in the executing Court, and (2) Is that date before the plaintiff got his decree transferred for execution to that Court? The second question discloses a curious chapter of accidents. The history can be stated shortly as follows: The plaintiff's case was decreed in the Court of the Sub-Judge, Second Class, Murtizapur. An application was made on 1st September 1928 before the District Judge, Akola, asking for the decree to be transferred for execution. The application is to be found at page 37 of the paper-book. It recites that the decree has been obtained, that the judgment-debtor has property, and that that property is being sold by the Collector at the instance of the Sub-Judge, Second Class, No. 3, Akola. It then prays that the decree be transferred from that Sub-Court to the Second Sub-Judge, First Class, Akola. That prayer was granted. On the same day an application was made for rateable distribution.

Now it will be seen that as a result of that unfortunate application, this case was transferred to a First Class Sub-Judge when the other case was being executed by a Second Class Sub-Judge; in other words, two different Courts were functioning. The mistake appears to have struck somebody about 18 months later when the case was transferred from the First Class Sub-Judge to the Second Class Sub Judge, No. 3, Akola, on 20th February 1930. That was the Court which had the assets and before which any application for rateable distribution could have to be made. The First Class Sub-Judge's Court had no assets of course at any time because the assets were being gathered in by the Second Class Sub-Judge's Court, and until 20th February 1930 the Second Class Sub-Judge's Court had no jurisdiction in the case the decree in which has passed to the plaintiff, because the case had not been transferred to it. Thus it was only on 20th February 1930 that so far as the plaintiff's case was concerned—that is to say the case in which the plaintiff's father was the decree-holder and which had passed to the plaintiff on the death of the father—it was transferred for execution to the Court of the Sub-Judge, Second Class, No. 3, Akola. Meanwhile, the defendant's brother's decree, which had passed to the defendant on the death of the brother, was being executed in that Court—that is, the Court of the Sub Judge, Second Class, No. 3, Akola—which had sent to the Collector the C form for realizing by sale certain attached property. That property the Collector had sold. On 5th March 1929 the judgment-debtor produced before the Collector Rs. 92 and on 7th February 1930 the balance, Rs. 278.5 0. Thus by 7th February 1930, the Collector had received the Rs 370-5 0. Subsequently he set aside the sale and long after in July returned the C form with the report that showed that on 7th February the judgment-debtor had deposited the full amount payable to the decree-holder. The records of the Court show that Rs 370 5 0 was actually received by the Nazir on 25th March 1930 as decree money payable to the decree-holder.

The question is: Was that money received by the Court within the meaning of S. 73, Civil P. C., before or after 20th February 1930? If received before, rateable distribution does not arise; if received after, to the extent at any rate that it was received after, it does. Further it is argued, relying on 26 Mad 179[1], that the assets are to be deemed received on the last day they were gathered in, and therefore the whole should be deemed to be received not on 7th February 1930 when partly received by the Collector, but on 20th March 1930 when received by the Court. If that be so, then the money, on 20th February 1930, was available in that Court for rateable distribution. It will be remembered that an application for rateable distribution was made on 1st September 1928. That application was made to the Court of the Second Class Sub-Judge, No. 3, Akola. That application was granted, but as was pointed out by the appellant, that application was before a Court which had no jurisdiction because, although undoubtedly the application for transfer made before the District Judge on the same day was intended to transfer the matter to the Court of the Second Class Sub-Judge No. 3, Akola, the prayer was that it be transferred to the Sub-Judge, First Class, Akola, and that prayer was granted. It subsequently went on for many months before the Court of the First Class Sub Judge, Akola, as appears from his order sheet. Thus, that order made for rateable distribution by the Second Class Sub Judge, No. 3, Akola, was made without jurisdiction and has no effect: A I R 1928 Mad 496.[2] A subsequent application for rateable distribution was made, but that was refused.

Thus the matter narrows down to the question: When was this money received by the Court? A similar point was considered by Pollock J. in A I R 1937 Nag 16[3] where he held, following A I R 1920 Bom 35,[4] that the assets must be deemed to have been received by the Court on the date when they were received by the Collector. Against that, I have cited to me a decision of my own and a decision of a Bench of the Bombay High Court, A I R 1936 Bom 277.[5] My decision is reported in 19 N L J 175.[6] What was under consideration there was whether a Collector was a Court within the meaning of O 21, R 2. The same conclusion was arrived at in both cases, viz. that the Collector is not a Court.

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[1] Ramanathan Chettiar v. Subramania Sastrial, (1903) 26 Mad 179.

[2] Nanjunda Chettiar v. Nallakaruppan Chettiar, A I R 1928 Mad 496=109 I C 404=55 M L J 120.

[3] Narbar v. Lahanu, A I R 1937 Nag 16=168 I C 158.

[4] Dattatraya v. Pundlik, A I R 1920 Bom 35=58 I C 992=22 Bom L R 1001.

[5] Shankar v. Keshav, A I R 1936 Bom 277=164 I C 9=60 Bom 729=38 Bom L R 505.

[6] Ragboji v. Vithoba, A I R 1937 Nag 217=169 I C 110=19 N L J 175.

28 N L R 179[7] was also cited in this connexion, but I fail to see its relevance. If the Collector be not a Court, then it is said that when the Collector receives money, it is not a Court receiving money and consequently assets are not held by a Court within the meaning of S. 73. I see no reason to differ from the conclusion I came to in 19 Nag L J 175[6] being fortified by the view taken in A I R 1936 Bom 277[5], since reported. But it seems to me that it is one thing to hold that the Collector is not a Court and another thing to hold that the Court is not deemed to have received money when the Collector received it, bearing in mind the duties and purpose of a Collector in this matter. I do not say that the Collector is an agent of the Court, but I do think that when the Collector receives into his hands moneys, those moneys are to be received by him for and on behalf of the Court, and while they are in his hands, they are held by the Court just as they would be held by the Court when the Nazir receives them. A great difficulty would arise in practice otherwise. Decree-holders would go away satisfied, attachments might be raised, then long afterwards, as in this case, other decree-holders would be entitled to come along and claim rateable distribution, with the result that the first decree-holder, who had lost his attachment, would be only partly satisfied.

In my opinion therefore, the critical date was 7th February 1930. That being so, it is not necessary to consider what is the date on which instalments are deemed to be received—that is to say, whether they are all referred to the date when the last instalment was received, because in this case even that date is before 20th February 1930. It is an unfortunate case for the plaintiff who finds himself in a difficulty because of a slip made in the application before the District Judge on 1st September 1928. That however is not the defendant's fault. The appeal is allowed with costs.

A.L./R.K. *Appeal allowed.*

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[7] Sadasheoappa v. Punjabrao, A I R 1932 Nag 166=140 I C 293=28 N L R 179.

## A. I. R. 1938 Nagpur 16

PURANIK J.

*Trimbak Totaram Lingayat Wani* — Applicant.

v.

*Commissioner of Income-tax, Central and United Provinces, Lucknow* — Non-applicant.

Misc. Civil Case No. 20-B of 1935, Decided on 16th August 1937.

**(a) Income-tax Act (1922), S. 66 (as amended in 1933) — Order of Commissioner under S. 33 — Reference lies only when order involves enhancement or is prejudicial to assessee — Order maintaining assessment of Assistant Commissioner is not prejudicial.**

Under S. 66 (as amended) no reference lies against an order of the Income-tax Commissioner under S. 33 unless the order is one which involves an enhancement of the assessment or is otherwise such as is prejudicial to the assessee; but if the Income-tax Commissioner simply maintains the decision of the Assistant Commissioner and the assessment made by him, it cannot be said that the order of the Commissioner of Income-tax is such as is prejudicial to the assessee: *A I R 1935 Mad 379 and A I R 1937 Nag 154, Foll.* [P 17 C 1]

**(b) Income-tax Act (1922), S. 66 (as amended in 1933)—Retrospective effect.**

All cases pending at the time the Act was amended in 1933 will be governed by the Act as amended. [P 18 C 1]

M. R. Bobde and V. K. Rajwade — *for Applicant.*

D. N. Chaudhari — *for Non-applicant.*

**Order.**—This is an application for issue of a writ of mandamus against the Commissioner of Income-tax under S. 66 (3), Income-tax Act. The applicant was assessed to income-tax by the Income-tax Officer, Khamgaon, by an order under S. 23 (3), Income-tax Act, dated 19th February 1934 for the assessment year 1933-34. An appeal was then preferred to the Assistant Commissioner, Amraoti, but it was dismissed by order dated 11th October 1934. The Commissioner of Income-tax was requested to revise this order but he declined to revise: vide his order dated 12th December 1934. Thereafter the applicant applied to the Commissioner of Income-tax under S. 66 (2) accompanied by a fee of Rs. 100 requiring him to refer to the High Court the questions of law arising out of the aforesaid order but the Commissioner of Income-tax refused to state the case by order dated 13th February 1935. The applicant feeling himself aggrieved by this decision of the Commissioner of Income-tax has preferred this application for issue of a writ of mandamus against the Commissioner of Income-tax.

A preliminary objection was raised at the hearing that this application is not tenable. It is contended that under the new amendment of S. 66, Income-tax Act, no reference lies against an order of the Income-tax Commissioner under S. 33 unless the order is one which involves an enhancement of the assessment or is otherwise such as is prejudicial to the assessee, but if the Income-tax Commissioner simply maintains the decision of the Assistant Commissioner and the assessment made by him, it cannot be said that the order of the Commissioner of Income-tax is such as is prejudicial to the assessee. This was the view taken in 58 Mad 367[1] at page 369 and has been followed by a Divisional Bench of this High Court in Misc. Judicial case No. 89 of 1935.[2] Counsel for the assessee replying to this objection argued that it was not proper to urge that when he applied to the Commissioner of Income-tax under S. 66 (2) for making a reference, he was applying for an order of reference arising out of the order of the Commissioner of Income-tax. It was argued that it could not be presumed that the applicant was making an untenable application if under the Proviso to S. 66 (2) as amended, no application for reference could be made. If the Income-tax Commissioner has only maintained the order of the Assistant Commissioner of Income-tax, it was not proper to say that the application that was made was against the order of the Commissioner of Income-tax. Counsel for the applicant wants me to hold that the application was one against the order of the Assistant Commissioner of Income-tax and that the same has been refused. He therefore maintains that his application is tenable and that the writ should be issued against the Commissioner of Income-tax.

The argument of the counsel for the applicant, though ingenious, has no substance. In the application to the Income-tax Commissioner he has very clearly stated that he was applying for reference after the decision by the Commissioner of Income-tax on 12th December 1934. He also stated therein that he received the intimation of that order on or about 20th December 1934. This application for reference was filed before the Commissioner of Income-tax on 5th February 1935. It is idle to argue that was an application against the order of the Assistant Commissioner of Income-tax. Under the Income-tax Act an application for reference has to be filed within 60 days of the date on which the assessee is served with a notice of an order under S. 31 or S. 32 or of an order under S. 33 enhancing an assessment or otherwise prejudicial to him. The application before the Commissioner of Income-tax was filed not within 60 days of the service of a notice of order under S. 31 or S. 32 but within 60 days of the service of notice of an order under S. 33. The Commissioner of Income-tax rejected that application pointing out that no reference lay inasmuch as his order did not enhance the assessment and was not such as was otherwise prejudicial to the assessee. In the application for writ of mandamus in this Court, it has been very clearly stated in the application that the Commissioner of Income-tax dismissed the application for review by order dated 12th December 1934 and thereupon the applicant made an application to the Commissioner of Income-tax under S. 66 (2) requiring him to refer to the High Court the questions of law arising out of the aforesaid order and decision. Nothing could be clearer than this statement of the assessee that his application for reference to the Commissioner of Income-tax was one arising out of the order of the Commissioner himself and not from the order of the Assistant Commissioner of Income-tax as is argued before me.

It is not disputed before me that if his application was against the order of the Commissioner of Income-tax, it is not tenable, but it was tried to be argued that as the Income-tax case was pending at the time when the amendment permitting application for reference against the orders of the Income-tax Commissioner in certain cases was introduced, the amendment should not govern the case of the present assessee but his case should be governed by the Act as it was before the amendment was inserted in it. This does not in any way make the position of the assessee better. Under the old Act in no case a reference arose from an order under S. 33

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[1] **Venkatachalam v. Commissioner of Income-tax, Madras, A I R 1935 Mad 379=156 I C 64=58 Mad 367=68 M L J 227 (S B).**

[2] **Central India Spinning, Weaving and Manufacturing Co. Ltd. v. Commissioner of Income-tax,** ***Reported in*** **A I R 1937 Nag 154.**

of the Act. Reference could be made only against the order of the Assistant Comissioner of Income-tax. The assessee's counsel wants me to hold that as the old Act applied, his application must be treated as one from the order of the Assistant Commissioner of Income-tax. I am clearly of opinion that when the application was made, the amendment had already come into force, it being an amendment of the year 1933 and it was only in view of that amendment that the application before the Commissioner of Income-tax for reference was made. All pending cases will be governed by the Act as amended. The assessee had failed to make any application for reference from the order of the Assistant Commissioner of Income-tax within the stipulated period, and I do not find throughout the proceedings any reference whatsoever to the order of the Assistant Commissioner of Income-tax from which a reference was sought. The argument of the respondent therefore regarding the maintainability of the application is not sound and cannot be accepted.

As I have already stated, the assessee's counsel before me did not try to maintain that the view taken in 58 Mad 367[1] at page 369, and followed in Misc. Judicial Case No. 89 of 1935[2] by a Divisional Bench of this Court, was in any way wrong. It was not also argued before me that the order of the Income-tax Commissioner, though one maintaining the order of the Assistant Commissioner of Income-tax, was such as should be treated as otherwise prejudicial to the interests of the assessee. In fact no attempt was made for maintaining the application as one arising out of the order of the Commissioner of Income-tax, though it purports to be one as arising out of that order. The preliminary objection therefore prevails and the application is dismissed. The applicant will pay the non-applicant's costs Rs. 75. In the view I have taken of the case, I do not propose to go into the merits of the application that is before me.

B.D./R.K. *Application dismissed.*

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*** A. I. R. 1938 Nagpur 18**

NIYOGI J.

*Manikchand Pranjiwan Mehta* — *Defendant* — Appellant.

v.

*Berar Motor Supply Co.*— *Plaintiff* — Respondent.

Second Appeals Nos. 223-B and 232-B of 1935, Decided on 7th April 1937, from appellate decree of 3rd Addl. Dist. Judge, Amraoti, D/- 5th July 1935.

*** Contract —Hire purchase agreement is a compound of agreement of hiring and of agreement of sale tinged with agreement of hypothecation — Precise time when property in chattel was to pass to hirer must be ascertained — Language of agreement indicating various stages of development of contract must be considered.**

The hire purchase agreements are, on account of their complexity, not easy to construe. The terms used by the parties are frequently so obscure and equivocal that they are calculated to elude an attempt to gather their intention from them. Hire purchase agreement is ordinarily so complex that it may be described as a compound of agreement of hiring and agreement to sell tinged with an agreement of hypothecation. With all these, it at bottom may well be a contract of sale on credit. The main point in regard to the hire purchase agreement is to ascertain the precise time when property in the subject matter of the agreement passes to the hirer, for, on that point turns the nature of the rights and obligations of the parties which have to be ascertained for the purpose of giving appropriate relief. The question whether or not the agreement which wears the garb of hire purchase agreement transfers by its own force the ownership from one party to the other is one of great moment for the purposes of determining the nature and extent of the remedy that is available to the aggrieved party. If it is found that the agreement is a contract of sale with the condition of retarded payment of the price by instalments, the property in the chattel would pass to the ostensible hirer. If on the other hand the agreement is one of hiring albiet coupled with an option to purchase, the property will not pass to the hirer as he will be treated only as a bailee until he exercises his option after having fulfilled the required conditions. In the former case the owner who has parted with his ownership is entitled to sue the purchaser for the balance of the price as a debt owed to him. In the latter case he may seize the chattel or sue for recovering the arrears of hire money or for damages as a consequence of the breach of the contract. To construe a hire purchase agreement, one must look into the language used by the parties to it for indications of the various stages in the development of the contract in relation to the rights and obligations that the parties contemplated to create, alter or extinguish. Every part of the agreement must therefore be explored to seek out the clue to the real intention of the parties as to the time of the transition of the property in the subject matter of the agreement. If the agreement embodies a stipulation which entitles the hirer to terminate the contract at any

**time he pleases, that stipulation will qualify the contract as a whole and would also serve to shed light on the intention of the parties as to the time of the transfer of ownership from one party to the other : (*1895*) *A C 471, Discussed*; *Case law reviewed*. [P 19 C 2; P 20 C 1, 2; P 21 C 1, 2]**

M. R. Bobde — *for Appellant.*

T. L. Sheode — *for Respondent.*

**Judgment.** — This appeal and Second Appeal No. 232-B of 1935 arise out of a suit filed by the respondent in this appeal to recover Rs. 2,000 on account of a Ford motor truck which the appellant had received under a hire purchase agreement. The trial Court had passed a decree for Rs. 1,094-6-0 which amount was reduced by the lower Appellate Court to Rupees 621-15-0. It is from this decree that both parties have filed two sister appeals. The plaintiff's case was that on 1st January 1930 the defendant took delivery of a Ford motor truck under a hire purchase agreement in terms of which the defendant paid Rs. 500 as an advance and agreed to pay as hire money Rs. 219-11-0 on the first day of every month for 12 months. On the defendant having paid the money for 12 months, he had the option to purchase the truck. He executed the hire purchase agreement on 7th January 1930 and took delivery of the truck. On 22nd March 1930 by which time the defendant had paid Rs. 419-11-0, he returned the truck to the plaintiff in a disordered condition with the result that the plaintiff had to repair it at the cost of Rupees 125-12-0. The plaintiff sold the truck for Rs. 800 on 23rd March 1931 and filed the suit to recover the balance of Rs. 2,000 including interest after having credited to the defendant the payments made by him and the sale proceeds of the truck. The suit was framed as for recovering the overdue instalments of the purchase of the truck with interest after crediting in the defendant's account the amounts received by the plaintiff. The cause of action was stated to arise on the date of default in payment of the hire money, also called instalment, every month. The defendant admitted the hire purchase agreement but pleaded that he had returned the truck in the last week of March 1930 as it was found to be unsound and defective in working with instructions to repair the truck, but that the plaintiff represented that the charges of repairs would amount to Rs. 400 and that he did not care to repair the truck and return it to the defendant in spite of several demands. The defendant claimed to be the owner of the truck and asserted that the sale by the plaintiff of the truck was fraudulent. The plaintiff in his reply traversed the defendant's allegations and particularly denied that the property in the truck had passed to the defendant.

In the Courts below the suit was treated as one to recover the purchase money of the truck or damages for breach of agreement to purchase the truck and both Courts gave credit to the defendant for what they considered as the reasonable amount of sale proceeds. It appears to me that the rights and obligations arising from the hire purchase agreement have not been properly ascertained. The hire purchase agreements are on account of their complexity not easy to construe. The terms used by the parties are frequently so obscure and equivocal that they are calculated to elude an attempt to gather their intention from them. The transactions of this kind at first were regarded in England with suspicion as being designed to disguise what in reality were bills of sale with a view to evade registration on the one hand and to entice on the other hand an unwary hirer into a situation which ultimately compelled him to be a reluctant purchaser. A note of caution was sounded by Lord Macnaghten in delivering the opinion in a case reported in (1895) A C 471[1] at page 482 :

> The learned counsel for the respondents spoke of dealings of this sort with an air of righteous indignation as if they were traps for the extravagant and the impecunious—mere devices to tempt improvident people into buying things which they do not want and for which at the time they cannot pay. I think that is going too far. I do not see why a person fairly solvent and tolerably prudent should not make himself the owner of a piano or a carriage or anything else by means of periodical payments on such terms as those in question in the present case. The advantages are not all on one side. If the object of desire loses its attractions on close acquaintance, if faults are developed or defects discovered, if a coveted treasure is becoming a burthen and an encumbrance, it is something surely to know that the transaction may be closed at once without further liability and without the payment of any forfeit.

Although such agreements cannot be denounced as a snare, the difficulty of extracting the real intention of the parties embodied in them remains and in this particular case the difficulty is enhanced by the conduct of the parties to it. I have therefore in the first instance to analyze the agreement to ascertain what they meant their mutual rights and obligations under it were to be and then see how far their acts or defaults were in conformity with their agreement or how they can be reconciled with it. I have in other words to see in what manner the agreement is enforceable in view of their acts and defaults. Hire purchase agreement is ordinarily so complex that it may be described as a compound of agreement of hiring and agreement to sell tinged with an agreement of hypothecation. With all these, it at bottom may well be a contract of sale on credit. The main point that occurs to me in regard to the hire purchase agreement is to ascertain the precise time when the property in the subject matter of the agreement passes to the hirer, for, on that point turns the nature of the rights and obligations of the parties which have to be ascertained for the purpose of giving appropriate relief. Before I examine the terms of the agreement on which the present suit is founded, I think it may be useful to review some English cases, particularly those in which the agreements were in terms closely resembling those of the agreement with which I shall presently deal.

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[1] **Helby v. Mathews, (1895) A C 471 = 64 L J Q B 465 = 11 R 232 = 72 L T 841 = 43 W R 561 = 60 J P 20.**

In (1878) 9 Ch D 419[2] and (1881) 18 Ch D 30[3] it was, on the true construction of the hire purchase contract, held that the subject matter of the agreement did not pass to the hirer, whereas in (1893) 2 Q B 318[4] it was held that the property in the goods passed to the hirer. In (1895) A C 457[5] and (1895) A C 471,[1] which arose in the House of Lords, it was held that the property in the goods did not pass to the hirer. In (1934) 1 K B 32,[6] wherein the hirer had given for the full price of the motor-car a promissory note which had been discounted by the owner, it was held that the property did not pass to the hirer and that the owner was entitled to adjustment in his action to recover the car and then risk for its detention and conversion. It was pointed out that on the true construction of the agreement it was neither a sale on credit, an agreement to sell nor a bill of sale and that the promissory note was given only as a security for the instalment and not in payment thereof, and further that the so-called purchaser was only a bailee. In (1934) 2 K B 305,[7] in which a financing company had resumed possession of a lorry which had been fraudulently sold to the plaintiffs in that case by a person who had entered into a hire purchase agreement with the company, it was held that the lorry was rightly resumed, and the plaintiffs' claim was thrown out on the ground that the property in it had not passed to him. Turning to Indian decisions, it was held in 49 Bom 172,[8] 54 Bom 381[9] and 54 All 781,[10] that the property in the chattel had passed to the hirer, and in 52 Mad 829[11] the trial Judge's finding that the property did not pass to the hirer was not disputed.

The question, whether or not the agreement which wears the garb of hire purchase agreement transfers by its own force the ownership from one party to the other, is one of great moment for the purpose of determining the nature and extent of the remedy that is available to the aggrieved party. If it is found that the agreement is a contract of sale with the condition of retarded payment of the price by instalments, the property in the chattel would pass to the ostensible hirer. If, on the other hand, the agreement is one of hiring albiet coupled with an option to purchase, the property will not pass to the hirer as he will be treated only as a bailee until he exercises his option after having fulfilled the required conditions. In the former case the owner who has parted with his ownership is entitled to sue the purchaser for the balance of the price as a debt owed to him. In the lattter case he may seize the chattel or sue for recovering the arrears of hire money or for damages as a consequence of the breach of the contract. To ascertain the precise nature and effect of the hire purchase agreement, a rule of construction was enunciated by Lord Herschell in (1895) A C 471[1] at p. 475. The noble Lord, while delivering his opinion in the House of Lords observed :

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[2] Ex parte Crawcour : In re Robertson, (1878) 9 Ch D 419 = 47 L J Bk 94 = 39 L T 2 = 26 W R 733.

[3] Crawcour v. Salter, (1881) 18 Ch D 30 = 51 L J Ch 495=45 L T 62=30 W R 21.

[4] Lee v. Butler, (1893) 2 Q B 318 = 62 L J Q B 591=4 R 563=69 L T 370=42 W R 88.

[5] McEntire v. Crossley Brothers, (1895) A C 457=64 L J P C 129 = 11 R 207 = 72 L T 731=2 Manson 334.

[6] Modern Light Cars Ltd. v. Seals, (1934) 1 K B 32=102 L J K B 680=149 L T 285=77 S J 420=49 T L R 503.

[7] Staffs Motor Guarantee Limited v. British Wagon Co. Ltd., (1934) 2 K B 305 = 103 L J K B 613=151 L T 396.

[8] Cole A. Cecil v. Nanalal Morarji, A I R 1925 Bom 18 = 92 I C 191 = 49 Bom 172 = 26 Bom L R 880.

[9] Bhimji N. Dalal v. Bombay Trust Corporation Ltd., A I R 1930 Bom 306=124 I C 800=54 Bom 381=32 Bom L R 64.

[10] Mahabalee Prasad v. H. N. Palmer, A I R 1932 All 607=141 I C 615=54 All 781=1932 A L J 761.

[11] Auto Supply Co. Ltd. v. Raghunatha Chetty, A I R 1929 Mad 884=121 I C 593 = 52 Mad 829=57 M L J 618.

> My Lords, it is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement. If Brewster agreed to buy the piano, the parties cannot, by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract into which they entered. What then was the real nature of the transaction ? The answer to this question is not, I think, involved in any difficulty. Brewster was to obtain possession of the piano, and to be entitled to its use so long as he paid the plaintiff the stipulated sum of 10s. 6d. a month, and he was bound to make these monthly payments so long as he retained possession of the piano. If he continued to make them at the appointed times for the period of three years, the piano was to become his property, but he might at any time return it, and upon doing so, would no longer be liable to make any further payment beyond the monthly sum then due.

The analysis of the agreement made by Lord Shand in the same case is highly instructive and will repay quotation :

> The decision of this question depends entirely on the true construction of the agreement between the plaintiff and Brewster under which the latter got possession of the instrument. It is true that by that agreement, Brewster undertook to pay to the appellant not only a first instalment of 10s. 6d. described as a "rent or hire instalment," but to pay the same amount on the 23rd of each succeeding month and that it was provided that on the payment of thirty-six monthly instalments the piano should become his property. If these stipulations had been unqualified, there would have been an absolute obligation or agreement by Brewster to acquire the instrument in property, and by purchase, although the instruments were described as for rent or hire, and the case in (1893) 2 Q B 318[4] would have directly applied. But the whole obligations by Brewster were qualified by the stipulation : "that the hirer may terminate the hiring by delivering up to the owner the said instrument." This provision appears to me to make it clear that there was no purchase and no agreement to purchase. The hirer need not continue the hiring a day longer than he desired ; and he need not allow the transaction to become one of purchase unless he desired to do so.

The rule that is deducible from those weighty observations is that to construe a hire purchase agreement, one must look into the language used by the parties to it for indications of the various stages in the development of the contract in relation to the rights and obligations that the parties contemplated to create, alter or extinguish. Every part of the agreement must therefore be explored to seek out the clue to the real intention of the parties as to the time of the transition of the property in the subject matter of the agreement. If the agreement embodies a stipulation which entitles the hirer to terminate the contract at any time he pleases, that stipulation will qualify the contract as a whole and would also serve to shed light on the intention of the parties as to the time of the transfer of ownership from one party to the other. This test which was pointed out by Lord Shand in the above-mentioned case was applied in India in 54 Bom 381[9] and 54 All 781.[10] Now it is time to turn to the hire purchase agreement which forms the foundation of this suit. The main clauses of the agreement are these :

> Clause 1. The owners being the owners of the motor vehicle with fittings, tools, accessories . . . . . . . agree to let and the hirer agrees to take the vehicle upon a hiring or tenancy from the date hereof subject to the terms and conditions herein contained and hereon endorsed.
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> Clause 2. On signing this agreement, the hirer shall pay to the owners in first payment a sum of Rs. 500 in consideration of the option to purchase given to the hirer hereinafter and the said sum shall become the absolute property of the owners.
>
> Clause 3. The hirer shall pay at Amraoti by way of hire without demand the sum of Rupees 219-11-0 and thereafter the sum of Rs. 219-11-0 on the first day of every calendar month beginning with the month next after the date hereof until twelve such monthly instalments have been made unless he shall have terminated this agreement as hereinafter provided.
>
> Clause 4. In the event of all the stipulated monthly hire having been duly and punctually paid, the vehicle shall at the hirer's option become the absolute property on payment of Rs. 5, but the hirer shall have the option of purchasing the vehicle at any time during the currency of this agreement by paying in one lump sum the balance of all the hire hereinbefore mentioned and any other expenses incurred by the owners.

On the reverse of this agreement there are certain additional conditions :

> 1. The hirer shall be at liberty at any time during the continuance of this agreement to terminate the hiring by returning the vehicle to the owners in Amraoti free of all expenses to the owners, but this shall be without prejudice to any claims the owners may have against the hirer in respect of this agreement.

2 (b). To indemnify the owners against loss by reason of damage to the vehicle from any cause whatsoever or by reason of claims by third parties in respect of the same.

2 (e). Not to sell, mortgage, pledge, hypothecate, hire or otherwise deal with the vehicle nor to part with the possession of the vehicle nor to remove it for regular service out of district without the express written permission of the owners previously obtained, nor to use the vehicle for any purpose other than that declared in the original proposal form.

4. Hirer acknowledges that he holds the vehicle as a bailee of the owners and shall not have any property or interest as purchaser therein until he shall have exercised his option of purchase as hereinbefore provided and shall have paid the whole amount due under their agreement or under any term thereof.

5. The owners may terminate the contract of hiring and forthwith recover possession of the vehicle: (a) If any monthly hire is in arrear left and unpaid for seven days after the date fixed for its payment. (b) If the hirer commits or suffers any breach of the conditions and obligations herein stipulated to be observed and performed by him.

8. . . . . They need not give notice of intended sale by auction. They can auction the vehicle at any time after two weeks; provided such action results in the owners realizing more than the amount justly due to them including interest, all cost and damages, such surplus shall be paid by them to the hirer.

Now examining the terms of this agreement, it appears to me clear that the parties contemplated various stages in the development in the completion of the contract; the first stage is from the date of the contract to the date of payment of the whole price of the car by instalments or in one lump sum; the second stage is that the hirer after having paid the stipulated sum was to have the option of purchasing or not purchasing. In case he decided to purchase he was bound to pay Rs. 5 whereon the agreement would be turned into an agreement of sale and the owner would be bound to sell. Now so long as the contract was in its first stage, the property in the truck remained with the owner and the potential purchaser became a bailee—the truck being entrusted to him for use. During this period the hirer could terminate hiring by returning the vehicle to the owner. This, I think, is the most important clause which ought to govern the mutual rights and obligations of the parties to the present case. Now, by virtue of this condition, it was open to the hirer to return the truck to the owner at any time before the time to exercise his option to purchase arrived and thus put an end to the agreement. The rights and obligations of the parties would then have to be determined with reference to the date when the agreement terminated. If it terminated when the hirer returned the truck to the owner and declined to take it back within a reasonable time, then that would be construed as an implied termination of the contract of hiring by the hirer. As the hirer had not acquired property in the truck at that critical date, the owner could not have possibly derived any advantage by selling the truck since the truck was his own. There is no doubt the condition which gave liberty to the owner to sell the truck by auction at any time two weeks after seizure, but that was subject to the proviso that if the sale resulted in realizing sale proceeds exceeding the amount recoverable by them including interest, etc., the surplus was to be paid to the hirer. But this condition cannot be construed as indicating transfer of property to the hirer as soon as it was seized by the owners. A clause of this nature was contained in the agreement which came up for consideration in (1895) A C 457.[5] Lord Herschell, while considering this part of the agreement, observed that the clause was not inconsistent with the ownership remaining with the owners in the absence of a further clause providing that if the owner sells the chattel at a loss and the sale produces less than what would be due by the hirer, the owner could recover the balance. In such a contingency the noble Lord observed:

> His only course, if he contemplated such a result, would be to determine not to sell but to keep possession and to sue for damages for breach of contract or to prove for such damages: *see* (1895) A C 457[5] at page 465.

On a proper construction of the agreement, giving full effect to every material part of it, there appears to be no doubt that the parties did not contemplate transfer of property during the currency of the agreement of hiring and if it is found on consideration of the facts of this case that the agreement terminated during this critical period, then the owner could only have the right to resume possession of the truck and to sue not for the price of the truck but only for recovering the hire money which might have fallen into arrears before the termination of the agreement coupled with a claim for damages as compensation for any loss occasioned to the owner in consequence on account of the hirer having broken his contract.

Now turning to the facts of the case, it would appear that the hirer (defendant) sent the truck to the plaintiff's workshop for repairs on 31st March 1930: *see* Ex. D-1. It had been repaired by 12th April 1930 as is clear from Ex. D-2 dated 12th April 1930, but on account of some misunderstanding as to the charges for repairs, the defendant did not take it away. The plaintiff had therefore to ask the defendant by a notice (D.3) dated 21st April 1930 to settle his account and take away the truck. In that notice, the plaintiff clearly intimated to the defendant that if he failed to take away the truck, he would sell it by auction. The defendant, as has been remarked by the lower Appellate Court, did not remove it in spite of the letter Ex. D.3. The defendant ought to have settled the plaintiff's bill and paid off the arrears of instalments and removed the truck within a reasonable time, i. e. by the end of April 1930. He did not remove and the only inference that is deducible from his conduct is that he was not willing to perform his part of the contract. Consequently the contract must be deemed to have terminated on 1st May 1930.

The next question is what was the plaintiff's remedy? As the property in the truck was not transferred to the defendant, he was not liable to pay the price of it. It must be noticed that condition No. 1 (*see* p. 42 of the paper book), reserved to the defendant full liberty to terminate the contract of hiring by returning the vehicle to the plaintiff. In view of this condition, the defendant must be deemed to have exercised his option to determine the contract on 1st May 1930 by which date he ought to have taken away the truck but failed to do so. It is with reference to this date that the defendant's liability must be determined. Under condition No. 2, the defendant was bound to keep the vehicle in thorough working order and good condition and further to indemnify the plaintiff against loss by reason of damage to the vehicle from any cause whatsoever. If on 1st May 1930 the defendant had clearly told the plaintiff that he terminated the contract of hiring, he would have been liable to pay any charges which would be necessary to repair the vehicle so as to restore it to "working order and good condition" and to compensate the plaintiff for any loss caused by damage to the vehicle and further to pay off the arrears of the hire money. But the defendant would not be liable to pay the future instalments since the contract itself would come to an end on 1st May 1930. The defendant would not be entitled to the return of Rs. 500, the initial payment he had made. It was a payment of the first instalment of rent, not merely an advance of rent: *see* 52 Mad 829.[11] The defendant could not get back whatever amount he had already paid as rent. The plaintiff was therefore entitled to appropriate the amount of Rs. 500.

In view of the aforesaid considerations the defendant's liability has now to be ascertained. The defendant himself sent the vehicle to the plaintiff's workshop and the plaintiff's repair-bill amounted to Rs. 41-2-0 excluding the labour charges (which have been rightly disallowed by the lower Appellate Court). As to the bill for Rs. 125, the defendant cannot be held liable to pay. The plaintiff carried out the repairs in March 1931, that is to say nearly one year after the vehicle had come into his custody. The vehicle was the property of the plaintiff and it was his duty to bring any serious defects in it or any damage caused to it to the defendant's notice within a reasonable time after it came into his possession. The lower Appellate Court was therefore right in disallowing the repairing charges of Rs. 125. The plaintiff was entitled to recover as follows:

| | Rs. | a. | p. |
|---|---|---|---|
| Instalments due in February, March, April and May ... | 878 | 12 | 0 |
| Bill for repairs made in April 1930 | 41 | 2 | 0 |
| | 919 | 14 | 0 |
| Deduct repayment ... | 419 | 11 | 0 |
| Balance due to the plaintiff ... | 500 | 3 | 0 |

The plaintiff's suit must however be dismissed as it is beyond limitation. The suit was substantially one for recovering hire of a vehicle and therefore governed by Art. 50 of Sch. 1, Limitation Act. As I have held the plaintiff was only entitled to recover the hire which had fallen into arrears on and before 1st May 1930, his suit ought to have been filed within three years from the various dates on which the hire became payable He filed his suit on 19th July 1933 and it was consequently barred by time. The defendant's appeal (S. A. No. 223-B of 1935) succeeds and plaintiff's appeal (S. A. No. 232-B of 1935) fails. The result is that the plaintiff's suit stands dismissed with costs in all the Courts. Counsel's fees Rs. 50.

B.D./R.K. *Suit dismissed.*

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## ✻ A I R 1938 Nagpur 24

STONE C. J. AND VIVIAN BOSE J.

*Jainarayan and another* — Appellants.

v.

*Sonaji and others* — Respondents.

First Appeal No. 16-B of 1934, Decided on 9th April 1937, from order of Addl. Dist. Judge, Amraoti, D/. 17th November 1933.

**(a) Hindu Law—Debts—Father—Decree—Secured or unsecured debt by father, if neither illegal nor immoral, imposes pious obligation upon undivided sons — Decree against father alone — Sons' share can be proceeded against in execution.**

A debt, secured or unsecured, contracted by the father, neither for illegal nor for immoral purpose, imposes a pious obligation upon the undivided sons and if a decree is obtained against the father alone, it may be enforced by attachments and sale of entire co-parcenary property. In such a case the decree-holder can proceed in execution against the sons' share and need not proceed by a separate suit : *Case law referred.* [P 27 C 2]

**✲ (b) Hindu Law—Debts—Father—Decree—Mortgage suit against father and sons—Debt neither for illegal nor for immoral purpose—Decree against father alone—Partition before personal decree under O. 34, R. 6, Civil P. C.—Sons' property cannot be taken in execution of personal decree—Procedure to enforce sons' liability is governed by Civil P. C., and not by old Hindu law of procedure.**

In so far as the substantive law is concerned, that dealing with the actual rights and liabilities of the parties, e. g. son's liability for his father's debts, it is of course regulated by the Hindu law, but as regards the procedure to be followed, the old Hindu law of procedure under which these rights could once have been enforced no longer applies, and Courts are governed in these matters by the Code of Civil Procedure. [P 29 C 2]

Where in a mortgage suit against the father and sons, the suit is dismissed against the sons and a decree given against the father alone and before an application for personal decree is made under O. 34, R. 6, Civil P. C., the partition takes place, the property of the sons cannot be taken in execution of the personal decree even if the debt was not incurred for immoral or illegal purpose. To say a son is under a pious obligation to pay certain debts is one thing; to say this property can be taken in execution is another. Property of the sons can only be attached and sold in execution if it falls within the kind of property that can be attached and sold under S. 60, Civil P. C. After partition, the share that goes to the son does not belong to the father and the father has no disposing power over it. Therefore such property does not fall within S. 60. Thus it cannot be attached. But the son can be made liable for his father's debts if he has become a surety; he can be made liable under the pious obligation rule also. In neither of the cases however could his liability take the form of having his property taken in execution and sold without any prior proceedings brought against him leaving him to raise the question whether his liability as surety or under the pious obligation rule precluded him from claiming in execution : *Case law discussed.* [P 29 C 1,2]

M. R. Bobde — *for Appellants.*

M. B. Kinkhede — *for Respondents 4 to 11.*

**Judgment.**—This case raises a question of considerable difficulty and importance. It is concerned with the execution of a personal decree passed in a mortgage suit brought against certain fathers and their sons (forming four joint Hindu families). The mortgage suit was dismissed as against the sons, and decreed against the fathers. The purpose of the mortgage being to purchase land, the land so purchased and the fathers' share in the ancestral lands were made available to satisfy the mortgage debt. The judgment, after directing a decree for sale of those properties (subject to usual time for redemption) proceeded as follows :

> Liberty for applying for 'personal decree' against defendants 1 to 4 only is given for the balance if sale is made and if there is a balance of decretal debt.

Defendants 1 to 4 were the adult executants, as mortgagors, of the mortgage. We are in this appeal concerned with defendants 5 to 9 (the sons of defendant 1) and defendants 10 to 13 (sons of defendant 2). The other defendants have not appealed. In order to make the position that here arises clear, it is necessary to mention a few dates. The judgment in the mortgage suit was pronounced on 29th August 1925. The preliminary decree was issued on the same day. A final decree was passed on 6th August 1926. An application for a personal decree was made on 22nd February 1929 and a personal decree issued on 5th July 1929. Meanwhile on 17th June 1926 a partition had been effected between defendant 1 and his sons, and on 2nd April 1928 between defendant 2 and his sons. Following upon the personal decree, which was directed inter alia against defendant 1 and defendant 2, there were execution proceedings wherein the decree-holders sought to take in execution certain items of property which had formed part of the property of the respective joint families on the ground that a personal decree against a father, where Hindu law applies, can be executed against the property of the sons, even though those sons have become divided, if the decree is a mere working out of a pre-partition judgment.

We proceed on the basis that here the personal decree (which it will be observed was granted after partition on an application made after partition) is a mere working out of the pre-partition judgment and should thus be regarded as though it were a pre-partition event. If regarded otherwise, it makes the position of the decree-holder worse. It is also to be noted that the mortgage was held not to be for any such purpose as would make it binding on the sons. The mortgage contained a personal covenant and the sons' liability is founded on the pious obligation imposed by the texts upon a Hindu son to pay his father's debts. It is regarded as of no moment whether the debt in question here is the original debt, clothed with contractual obligation through the personal covenant to repay, or the debt of record created by the judgment. In either case, it is said, one has a pre-partition debt by which the sons' shares are burdened. It is next to be observed that the sons were made co-defendants with the fathers in the mortgage suit and it was held that :

> Defendants 5 to 17 are not liable for the claim and their shares in the ancestral property are exempted. Defendants 5 to 18, however, shall bear their own costs under the circumstances of the case.

The preliminary decree provided inter alia as follows :

> (4) It is ordered and decreed that the defendants 5 to 17 are not liable for the claim.

It is obvious that such facts introduce us at once to a mass of non-congruous case-law which centres round the opinion of the Board in 46 All 95.[1] Their Lordships there lay down the famous five propositions which summarise the authorities relating to the son's liability for the father's debts under the Mitakshara system of law. Two of those propositions have here been relied upon :

> (2) If he is the father and the reversionaries are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.
>
> (3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

Stress has also been laid on a portion of the judgment at p. 102, viz.:

> . . . . if looked at straight in the face, what position could be more anomalous than this? A father who is manager, borrows a like sum from *A* and *B*. To *A* he gives a mortgage on the family estate containing a personal covenant. To *B* he gives a simple acknowledgment of loan. *B* sues and gets a decree; on this decree, execution can follow and the estate can be taken. *A*, suing upon his mortgage, cannot recover.

It is to be noted in passing that their Lordships felt the difficulty of the position which they were constrained to leave untouched by the principle of *stare decisis*. It is clear that they were purporting to apply the law as established by a long series of cases and did not hesitate to narrow their own observations in 39 All 437[2] which did not agree with the catena of authorities they were concerned with, and which included 43 Mad 421.[3] That case we shall have to advert to later. It was cited before the Board and neither overruled nor criticised. It will be noticed, in the above quotation their Lordships are posing the case of a mortgage with personal covenant. It is naturally argued that their Lordships introduced the personal covenant in order to put a case where there is both conveyance (mortgage) and contract (covenant). It is then said that their Lordships have in effect said that in such a case, i. e., where there is a debt secured (contractually) by a covenant to repay and (really) by a transfer of a piece of property, the lender cannot recover his debt from the sons. If that be so, it follows directly that the "debt" referred to in proposition (2) at p. 104 excludes a debt secured by a mortgage and that therefore in most cases of loans to Hindus with sons a secured is in a worse position than an unsecured creditor unless of course the mortgage is binding on the family. That it is possible to hold two views about the meaning of the above decision is obvious from the history of that authority's treatment by the Allahabad High Court.

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[1] Brij Narain v. Mangal Prasad, A I R 1924 P C 50=77 I C 669=51 I A 129=46 All 95 (P C).

[2] Sahu Ram Chandra v. Bhup Singh, A I R 1917 P C 61=39 I C 280=44 I A 126=39 All 437 (P C).

[3] Kandasami Goundan v. Kuppa Moopan, A I R 1920 Mad 479=55 I C 320=43 Mad 421=38 M L J 203.

In 47 All 122[4] (before Sulaiman J., as he then was, and Mukerji J.) the facts were: *A* (father) mortgaged joint ancestral property. The loan was not to pay off antecedent debt; it was not immoral. The mortgagee sued *A* alone on the mortgage. The subject matter was brought to sale. The sons sued for a declaration that the mortgage and auction sale were not binding on them. The result was, the action was dismissed on the ground that the debt was binding on the sons and that proposition (2) applied, "debt" there including a debt secured by a mortgage. In 51 All 136[5] (Sulaiman C. J., Mukerji and Boys JJ.), Sulaiman C. J. adhered to his view that "debt" in proposition (2) includes mortgage debts, but the other two Judges held that "debt" as used in that proposition did not include a debt secured by a mortgage. In 57 All 357[6] (Sulaiman C. J. and Rachhpal Singh J.), it was held by both Judges that the second proposition includes debt secured by a mortgage as well as other debts. Thus the learned Chief Justice of the Allahabad High Court has throughout taken the view that proposition (2) applies to mortgage debts. Mukerji J. has taken both views, his second opinion being that it does not. Boys J. has also taken the view that it does not. Rachhpal Singh J. takes the view that it does.

In A I R 1936 Nag 93[7], Pollock J. held that a mortgage to secure a debt effected neither for necessity nor to pay an antecedent debt was not binding on the sons and the estate is not bound. It is not bound by the mortgage and it is not bound by the debt. Agreeing with the majority view in 51 All 136[5], he concluded that in proposition (2) "debt" does not include debt secured by mortgage. It will be apparent on a perusal of the Allahabad decisions above cited, that most of the difficulty felt has been due to the contrasted cases put by the Board. Those cases were put to show an absurd distinction, the distinction being between secured and unsecured debts and the result being that in one case the "estate can be taken" and in the other case the mortgagee "cannot recover". Were it not for this, there is no difficulty. Proposition (2) is dealing with debt; proposition (3) is dealing with the burdening of an estate by a mortgage. Proposition (2) is concerned with what may be taken in execution, of a decree given in a suit brought to enforce payment of a debt. Proposition (3) is considering neither suit nor execution but when a mortgage binds the estate. It will be remembered that the Board were proceeding to crystallize an anomalous and unsatisfactory branch of law by declaring *stare decisis*, and that they had cited before them 43 Mad 421,[3] i. e. that was one of the "decisions" they felt constrained by and which they did not criticise.

In 43 Mad 421[3] a father executed alone a mortgage. A mortgage suit was instituted against father and sons. The mortgage was held not to be binding on the sons. It was further held that the mortgagees were entitled to a conditional decree under O. 34, R. 6, against the father personally and against the joint family property of himself and his sons (undivided) for the deficiency if the sale of the father's share disclosed a deficiency. The greatest difficulty felt in that case arose out of the Board's observation in 39 All 437.[2] Against that difficulty was placed the then recent decisions in Madras (one of which was a Full Bench case), viz. 41 Mad 136[8] and 42 Mad 711.[9] There it was held that the pious obligation of the sons did arise during the father's lifetime and that the debt involved in a mortgage was an antecedent debt which attracted the pious obligation of the sons to pay, even though the mortgage as a transfer of an interest in joint ancestral property failed. The Full Bench view is pithily stated by Sadasiva Ayyar J. in 42 Mad 711[9] as follows:

> The uniform course of decisions . . . . . has been to treat a really antecedent mortgage debt on the same level with a really antecedent simple debt for the purpose of supporting a subsequent alienation against the son's share.

As was pointed out by the learned Chief Justice (Sir John Wallis), the more restrictive language used in 39 All 437[2] might have been due to certain vigorous sentences of Sir John Stanley in 31 All 176.[10] Sir John Wallis observes at p. 727 as follows :

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[4] Gajadhar Pande v. Jadubir Pande, A I R 1925 All 180=85 I C 31=47 All 122=22 A L J 980.

[5] Jagdish Prasad v. Hoshyar Singh, A I R 1928 All 596=115 I C 775=51 All 136=26 A L J 1289 (F B).

[6] Jahan Singh v. Hardat Singh, A I R 1935 All 247=152 I C 487=57 All 357=1934 A L J 1018.

[7] Ramkisan Bholaram v. Shioram Kisanrao, A I R 1936 Nag 93=163 I C 99.

[8] Peda Venkanna v. Sreenivasa Deekshatulu, A I R 1919 Mad 1175=43 I C 225=41 Mad 136=33 M L J 519.

[9] Arumugam Chetti v. Muthu Koundan, A I R 1919 Mad 75=52 I C 525=42 Mad 711=37 M L J 166 (F B).

> Their Lordships, I cannot help thinking, were influenced by these forcible observations in laying down the principle in the way they did. It is however clear I think that Sir John Stanley did not intend to lay down that there was any necessity to show that the debt was not only antecedent but also not incurred on the security of the family property, because he does not lay down any such restriction in formulating the rule and because he refers with approval to the decision of the Full Court in 15 All 75.[11] In that case the mortgage in question was executed in satisfaction of a prior mortgage debt incurred by the father to the same mortgagees. It was contended that the alienation was bad because the mortgage was effected in discharge of the mortgagee's own prior debt, and was therefore not an antecedent debt within the meaning of the rule. Sir John Edge C. J. with whom the other Judges concurred rejected this contention and after citing a Calcutta ruling that the purchase money itself which was the consideration for a conveyance could not be said to be an antecedent debt—the point now decided by their Lordships — added : "I know of no other restriction of the term 'antecedent debt' ".

This criticism was approved in 46 All 95[1] at p. 102 (where however there is unfortunately a wrong reference, p. 730 being occupied by part of Sadasiva Ayyar J.'s judgment). It will be apparent from the above why the Board posed the case of a mortgage with personal covenant. They were taking a case where there was no antecedent debt (in the sense to be understood after 39 All 437[2] as restricted by 46 All 95[1] at p. 103. In such a case where contract and conveyance synchronize, the mortgage would not by reason of antecedency alone be binding on the estate. It will be observed that their Lordships follow the illustration at p. 102 with the following observation :

> It seems to have been felt that if the debt for which a mortgage was given was in any proper sense antecedent then, it so to speak escaped the direct infringement of the principle that the father manager could not burden the estate except for necessity.

In other words, their Lordships are contrasting the obligation imposed by a mortgage with the obligation springing from a decree on an ordinary debt. The mortgage is not binding; the decree can be executed against the sons' shares. It does not follow that a personal decree having been given after the father's share has been exhausted against the father thereby creating a debt of record, that debt or the original debt which justifies the passing of a personal decree is excepted from the debts which the sons are under a pious obligation to pay. In our opinion, there is no logical ground for excluding a debt secured by a mortgage from the expression "debt" as used in proposition (2) of 46 All 95.[1] It directly follows that such a debt, being neither illegal nor immoral, imposes a pious obligation upon the undivided sons and a decree having been obtained against the father alone, it may be enforced by attachment and sale of the entire coparcenary property : *see* 12 Lah 495.[12] In such a case it has been held that the decree-holder can proceed in execution against the sons' share and need not proceed by a separate suit : A I R 1936 Lah 193[13] and A I R 1931 Lah 717.[14] Clearly on the view taken above as to the extent of proposition (2) on such a debt, the son's share can be reached in some circumstances in execution and the suit by the son to have his share declared absolved would fail : 47 All 122.[4]

Does it make any difference that here (a) the judgment in the mortgage suit exempts the sons' shares (b) after judgment and before execution there is partition ? As to (a) we feel no difficulty. All that the sons' shares were freed from was the burden created by the mortgage. This property is not now sought in execution because of the mortgage but because of the debt which led to a personal decree which in turn creates a debt of record. The question is : can that be pursued in execution against the sons' shares ? The fact that the sons' shares have been declared not bound by the mortgage is neither here nor there. As to (b) a real difficulty discloses itself. The application for a personal decree was entitled in a manner which restricted the non-applicants to the four judgment-debtors, i. e., defendants 1 to 4. It was against them that a personal decree was sought and against them that it was given. This personal decree was doubtless sought, following upon the liberty to apply, under the provisions of O. 34, R. 6.

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[10] Chandra Deo Singh v. Mata Prasad, (1909) 31 All 176=1 I C 479=6 A L J 263 (F B).

[11] Badri Prasad v. Madan Lal, (1893) 15 All 75 =1893 A W N 52 (F B).

[12] Sardarilal v. Bharat National Bank Ltd., A I R 1931 Lah 716=130 I C 836=12 Lah 495=32 P L R 744.

[13] Pannalal v. Rama Nand, A I R 1936 Lah 193 =163 I C 95=38 P L R 712.

[14] Muni Lal v. Gian Singh, A I R 1931 Lah 717 =134 I C 1120=32 P L R 709.

Thus putting on one side details, this is a case where *A*, father of *B*, etc. is sued inter alia for debt; a personal decree is given against *A*; then *A* and *B*, etc. separate; then execution is sought to be effected. Admittedly the doctrine of lis pendens does not come into play. It is only necessary to refer to S. 52, T. P. Act, to see why. The partition is thus effective to divest *A* of property. Whether the shares which go to the sons can by suitable procedure be made liable or not is not the question now before us. The question we have to resolve is whether it can be taken in execution of the decree obtained against *A*. S. 60, Civil P. C., tells us what property of *A* can be taken. It provides as follows :

> (1) The following property is liable to attachment and sale in execution of a decree, namely lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf.

It was argued before us that the words "belonging to the judgment-debtor, or over which . . . . he has a disposing power . . ." relate to the words "all other saleable property" and not to the words "lands, houses . . . ." We cannot accept this argument. In our opinion the Code is restricting the decree-holder to property which either belongs to the judgment-debtor or over which the judgment-debtor has disposing power. It was urged against the view that if *A* dies, the decree-holder can execute against the ancestral property in the hands of the sons although obviously the property after *A's* death no longer belongs to *A* nor has *A* any longer a disposing power and it is said the same position should arise if *A* goes out of the family not by death but by separation. But the reason why the decree could be executed in the case of death is that the decree-holder could proceed against the sons or one of them as legal representatives under the fiction created by S. 53, Civil P. C. It is clear that it is one thing to say that the son cannot be proceeded against for such a debt and another thing to say that the decree against the father passed in a proceeding (the application for a personal decree) to which the son was not a party, can be enforced by execution against the son's property : *see* 47 Mad 621[15] at pp. 629 and 632.

Before we can get at the son's property (the son being now separate from his father and the son's property being separated by metes and bounds from the father's property), that property must in some way be connected with the judgment-debtor. If at the time of execution the son were not divided, we can immediately see a connexion. The property would be property over which the father has disposing power and would therefore fall within the class of property that can be attached. It would therefore be property against which attachment could issue in execution of a decree obtained against the father. But if the father has no disposing power and the decree is not against the son, it is difficult to see how it can be reached without doing violence to S. 60.

It is said that one must give the proper meaning to "judgment-debtor" in S. 60 and that proper meaning is found by looking at S. 2 (1) : "judgment-debtor means any person against whom a decree has been passed or an order capable of execution has been made". That however carries the matter no further. The personal decree here was passed against the father. It was not even sought against the son. In 19 N L J 143[16] it was held that the holder of a decree, passed in a suit against the father alone, could not execute that decree against the son's share after partition. The facts there were different in this that there the suit was after partition ; here the application for a personal decree was after partition. That makes no difference in principle. 19 N L J 143[16] agreed with the conclusion in 53 All 868.[17] It was observed in 19 N L J 143[16]:

> If the father's power to dispose of his son's share is "property", how can that be attached and sold in execution of a decree obtained against the father alone after partition when he loses his disposing power and therefore his "property."

It is true that the matter was being looked at from the point of view of insolvency law rather than S. 60, Civil P. C., but if the judgment-debtor has lost his disposing power, he has lost the only thing which under the provisions of S. 60 makes property now the property of the judgment-debtor's son open to be taken in execution of the decree. It is said that this is not the reason why the son's property can be taken. The true ground of liability is the son's pious obligation and therefore if the debt is of such a kind as to impose on the son a pious obligation to pay it, the son's property can be taken. It is also urged that the well-known principle established by 19 Cal 683,[18] viz. that litigants should not be driven to suits when their remedy can be obtained in execution, should be applied. As supporting the view that pious obligation founds the right in the decree-holder, 55 All 283[19] and 6 Luck 497[20] are stressed. 55 All 283[19] is of course distinguishable from this present case on facts. In that case father and sons were joint, they were all sued and the question was whether the sons were under a pious obligation to pay the particular debt of the father. That case is no authority for the proposition that a separated son's property can be taken in execution. On the other hand, 6 Luck 497,[20] a Full Bench case, is a direct authority in favour of the view that after partition a son's share can be taken in execution of a decree passed against the father. Unfortunately, neither in the order of reference nor in the judgments is S. 60, Civil P. C. glanced at. It seems to have been assumed that granted a son is liable, it follows that the son's property can be taken in execution. To us however it appears equally plain that to say a son is under a pious obligation to pay certain debts is one thing ; to say his property can be taken in execution is another. In our view, property can only be attached and sold in execution if it falls within the kind of property that can be attached and sold. What that is is found by looking at S. 60. When one looks at S. 60 one finds that the property in question should either belong to the judgment-debtor or he should have a disposing power over it. After partition the share that goes to the son does not belong to the father and the father has no disposing power over it. Therefore such property does not fall within S. 60. Thus it cannot be attached. It by no means follows that the son cannot be made liable. He could be made liable for his father's debts if he had become a surety ; he can be made liable under the pious obligation rule. In neither of the cases put, could his liability take the form of having his property taken in execution and sold without any prior proceedings brought against him, leaving him to raise the question whether his liability as surety or under the pious obligation rule precluded him from claiming in execution.

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[15] Jagannatha Rao v. Viswesam, A I R 1924 Mad 682=80 I C 228=47 Mad 621=46 M L J 590.

[16] Govindram v. Nathulal, A I R 1937 Nag 45 =170 I C 724=19 N L J 143.

[17] Bankey Lal v. Durga Prasad, A I R 1931 All 512=135 I C 139=53 All 868=1931 A L J 917 (F B).

Finally it is said that the son's share can be got at in execution because the partition does not completely divest the father of the property allocated to the sons, but such shares go to the sons burdened with debts to pay which the sons are under a pious obligation. This is the same point in a different guise. It was not said that the sons held the share to the extent of the debt "on his (the father's) behalf" within the meaning of S. 60. It is to be remembered that the law we are interpreting here is not the Hindu law governing a son's liability, but the codified law of procedure under which alone that liability can now be enforced. In so far as the substantive law is concerned that dealing with the actual rights and liabilities of the parties, it is of course regulated by the Hindu law, but as regards the other, the old Hindu law of procedure under which these rights could once have been enforced, no longer applies, and we are now governed in these matters by the Code of Civil Procedure. A point was taken that defendant 1 having died his sons at least were liable. This is a new point taken for the first time in reply. We decline to consider it. The appeal accordingly fails and is dismissed with costs. We are obliged to counsel for very helpful arguments and careful analysis of an intricate legal position.

S.C./R.K. *Appeal dismissed.*

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[18] Prosunno Kumar Sanyal v. Kali Das Sanyal, (1892) 19 Cal 683=19 I A 166=6 Sar 209 (P C).

[19] Lalta Prasad v. Gajadhar Shukul, A I R 1933 All 235=149 I C 181=55 All 283=1933 A L J 550.

[20] Raghunandan Pershad v. Moti Ram, A I R 1929 Oudh 406=119 I C 449=6 Luck 497=6 O W N 689 (F B).

## * A. I. R. 1938 Nagpur 30

VIVIAN BOSE AND PURANIK JJ.

*Mt. Sahaudra Bai w/o Ram Pratap — Defendant 1*—Appellant.

v.

*Shri Deo Radha Ballabhji Mandir, through Balu Dinanath Shrivastava and others — Plaintiffs* — Respondents.

First Appeal No. 1 of 1933, Decided on 15th July 1937, from decree of Second Sub-Judge, First Class, Saugor, D/- 30th September 1932.

* **(a) Trusts Act (1882), S. 15 — Trustee of temple lending its funds to his relative—Such act cannot be protected under S. 15.**

A temple is not a money lending concern, and therefore for a trustee of the temple to divert its funds out of the usual course of business into such channels is not the kind of act which can be protected under S. 15. This is especially so when the money is loaned to the trustee's relative. [P 32 C 2]

**(b) Trusts Act (1882), Ss. 20 and 15—Standard of care necessary to apply to temporary investment of capital is same as is required for current expenditure not immediately wanted.**

The care to be applied to a temporary investment of capital can be no less than that which the Trusts Act requires for an investment of current expenditure not immediately wanted, and so an omission to apply the same standard of care would amount to the kind of neglect contemplated by S. 15. [P 32 C 2]

* **(c) Limitation Act (1908), Art. 98 — Suit against daughter in respect of breach of trust committed by father—No defalcated money in her possession—Art. 98 applies.**

A suit was brought against a daughter in respect of a breach of trust committed by her father. She herself was not a trustee, and she had not committed any wrong act: also the defalcated money was not in her possession; nor was there anything else in her hands which could be said to represent it:

*Held* that the suit against her was clearly one to make good the loss occasioned by her father's breach of trust out of his general estate. To such a suit Art. 98 would apply. [P 33 C 1]

**(d) Limitation Act (1908), S. 10 — Property followed need not be identical property in respect of which breach of trust is committed — But property should be in hands of the person sued.**

It is not necessary that the property followed should be identical property in respect of which a breach of trust has been committed. It can be anything into which the original property has been converted, whatever form the conversion may have taken, provided of course the one can be clearly and definitely connected with the other. But under S. 10, whatever the form the original property may have taken, it is essential that it should be in the hands of the person sued: *9 Bom 373, Ref.* [P 33 C 1]

**(e) Limitation Act (1908), Art. 98 — Cause of action.**

Article 98 does no more than carry deceased trustee's liability for breach on to his estate after his death. It does not contemplate any different cause of action. [P 34 C 1]

* **(f) C. P. Tenancy Act (1 of 1920), S. 12 (4) —S. 12 prohibits certain transfers — Deed of relinquishment by one tenant in favour of other in settlement of dispute regarding right to the holding of deceased tenant is not transfer—Such document can be admitted to registration.**

Section 12 prohibits certain transfers mentioned in the body of the section. A deed of relinquishment by an occupancy tenant for valuable consideration in favour of another claiming a right to the holding of a deceased tenant in settlement of a dispute with him is not a transfer and therefore there is no contravention of S. 12. Hence such document can rightly be admitted to registration. [P 34 C 2]

**(g) Transfer of Property Act (1882), S. 52 —Application for leave to sue in forma pauperis in respect of certain lands dismissed — S. 52 does not apply.**

According to doctrine of lis pendens, any dealings with the property in suit by a party thereto cannot affect the rights of any other party 'under the decree or order which might be made therein'. Where a person makes an application for leave to sue in forma pauperis in respect of certain property and the Court dismisses that application, no rights with respect to the property arise in his favour out of this order and hence S. 52 does not apply. [P 34 C 2; P 35 C 1]

**(h) Deed—Consideration — Parties upholding—Strangers cannot complain.**

Where the parties to the transaction uphold the passing of consideration, no stranger can complain of the want or inadequacy of the consideration: *27 All 271, Ref.* [P 36 C 2]

**(i) C. P. Tenancy Act (1 of 1920), S. 89 — Deed of relinquishment by occupancy tenant in favour of landlord temple — Tenant being panch of temple and holding deed on behalf of trustees of temple—Delivery of deed held sufficient.**

An occupancy tenant executed a deed of relinquishment in favour of the landlord temple. The tenant was one of the panchas of the temple and therefore prima facie had authority to hold the deed on behalf of the trustees of the temple till they were in a position to consider the matter:

*Held* that this amounted to a sufficient delivery of the deed and hence the provisions of S. 89 were satisfied. [P 36 C 2]

**R. N. Padhye and W. B. Pendharkar** — *for Appellant.*

**D. N. Chaudhuri** — *for Respondents.*

**Judgment.**—This appeal arises out of a suit by the trustees of a temple, Shri Deo Radha Ballabhji, on the strength of a bond dated 4th May 1924 and for the recovery of a grain debt. We are not concerned with the latter in this appeal and so need only consider the position with respect to the former. There is also an alternative prayer for possession of the occupancy and absolute occupancy fields mentioned in the plaint. We shall deal with this alternative claim later when we dispose of the cross-objection. One Seth Jagannath Prasad constructed the plaintiff temple and on 20th November 1911 executed a deed of gift (Ex. P-16) in favour of the temple and at the same time constituted a body of trustees he himself being one of them. Among the property gifted was a sum of Rupees 2,000. Soon after the gift, namely on 22nd April 1912, he loaned this money to defendants 3 and 4, defendant 3 being his son-in-law. The plaintiffs' case is that this was done without the sanction of the trustees and on his own responsibility and that it constituted a breach of trust. They state that Jagannath was only the treasurer of the temple funds and had no authority to loan out money in this way without the sanction of the other trustees. He was not the managing trustee. There appear to have been acknowledgments of this loan two of which are on 11th May 1918 and on 8th May 1921, and then finally the bond in suit (Ex. P. 1) was executed as a further renewal on 4th May 1924 for Rs. 3,237. This was in favour of the temple and the decree now under appeal is in respect of this debt. The appellant, who is defendant 1 in the case, is involved in this way: Seth Jagannath died on 15th January 1927 leaving two daughters of whom the appellant is one. The other is now dead and need not detain us any further. On Jagannath's death the whole of his property was taken possession of by defendant 2 who claimed a right to it under a will executed by Jagannath. But this was later declared to be invalid by the Court of the Judicial Commissioner on 14th December 1929 and so eventually defendant 1 obtained possession of the entire estate and still has it.

The plaintiffs say that they will not be able to recover this debt from defendants 3 and 4 and so claim a right to proceed against Jagannath's estate in the hands of his heir, defendant 1, because of this breach of trust. The lower Court accepted this position and included defendant 1 in the decree. It is against this decision that the present appeal has been filed. The appellant's case, as placed before us, consists of three parts: (1) that her father Jagannath never advanced this loan to defendants 3 and 4 and that it was advanced by another person known as Jagannath Kataria, (2) that if he did, it was with the consent and sanction of the panchas, and (3) that in any case his action would not constitute a breach of trust because it was a reasonable and diligent act within the meaning of S. 15, Trusts Act. As regards the third of these positions, it was never pleaded, and the appellant's plea as regards the other two is ambiguous. What she said was this:

> The part of para. 15 of the plaint to the effect that Jagannath Prasad had dealings with defendants 3 and 4 without the consent of the trustees is denied.

This was in reply to the plaintiffs' allegations which were couched in the following terms:

> The plaintiff temple is entitled to recover the amount from the estate of Jagannath Prasad because the deceased Jagannath Prasad had advanced this loan to his real relatives on his own responsibility without consulting and without the consent of the panchas in committee, which (transaction) is not binding on the plaintiff temple.

It is impossible to determine from this pleading of the appellant whether she intended to traverse the averment that Jagannath had advanced the loan, or merely the one that he had done so on his own responsibility without the consent of the trustees. However, we will assume for the purposes of this appeal that she intended to combat both points. The claim against defendant 1 being one in respect of a breach of trust, the burden is undoubtedly on the plaintiffs to establish the breach. They have therefore to prove both that Jagannath actually advanced this money to defendants 3 and 4 out of the trust funds in his possession and also that he did this without authority. That the advance was made to these two defendants out of trust funds is beyond doubt, and it is the case of both sides. Ex. P-15 is a copy of the minutes of the proceedings of the trustees. The third resolution dated 22nd June 1912 runs thus: "Munim Nandkishore and Pan. Jagannathji have advanced Rs. 2,000 on interest on their own responsibility".

Rampratab (D. W. No. 1), who is the husband of defendant 1, says that the money was lent to him by one Jagannath Kataria who was a Brahmin, and not by Jagannath Mahesri, the father of defendant 1 and the father-in-law of the witness. He also admits that the transaction referred to in the resolution was in respect of the Rs. 2000 loaned to him and says that the Jagannath referred to in that resolution is the Brahmin Jagannath Kataria. As against this there is P. W. 6, Ramkrishnarao, who is a member of the trust committee. He says that he knows nothing personally about this loan but that he does know that Jagannath Kataria had nothing to do with the temple finances whereas Jagannath Mahesri had. If he is to be believed, then of course the Jagannath referred to in the resolution of which Ex. P-15 is a copy must have been Jagannath Mahesri and not Jagannath Kataria. P. W. 2 is another trustee and is also the president of the temple committee. He also states that the trust funds used to remain in the hands of Jagannath Mahesri. It is true, he refers in his cross-examination to the Jagannath mentioned in the resolution we have quoted as Pandit Jagannath, but that, we gather from the general tenor of his deposition, was a slip. He was referring to the resolution in question and at a casual glance must have interpreted the letter Pan. (प.) which precedes the word "Jagannath" as Pandit.

The question then resolves itself into this: Which of these two sets of witnesses is to be believed? P. W. 6 is not any too reliable because he states that the trustees did not know of the loan until the year 1928. It is impossible to believe that statement in the face of the resolution Ex. P-15. But this much is clear from the two plaintiffs' witnesses whom we have cited: both are emphatic that Jagannath Mahesri was the one who handled the temple funds and that the other Jagannath had nothing to do with them. It is evident from P. W. 2, Dinanath, and P. W. 4, Fatehchand, that the account books of the temple were all in the possession of Jagannath and used, in his lifetime, to be written and kept in his shop. In fact it is clear from the evidence that no separate set of account books was maintained in respect of the temple funds. Jagannath merely had a khatha in his own books referring to the temple finances. It is clear then that the books are with the defendants and that they have not produced them. All that they have produced are certain books showing that interest was paid in respect of this loan to the temple. The books of the year 1912 when the money was advanced are not here. Defendant 3 (D. W. 1), who is the husband of defendant 1, states that the item with respect to this loan is credited in his account books of grain. He admits that those books are with him and adds that he does not know whose *hasthe* is written in them. We are clear that the matter could easily have been established beyond doubt if these books had been produced. On the whole, in view of the defendants' conduct in not producing these books, we believe the plaintiffs' witnesses and hold that Jagannath Mahesri advanced the loan in question.

The next question is whether his action amounted to a breach of trust. It was argued that it did not because Seth Jagannath acted as carefully as a man of ordinary prudence would have acted in the conduct of his own affairs. Protection was therefore claimed for his action under S. 15, Trusts Act. With respect to that, it is enough to say that the temple is not a moneylending concern, and therefore for a trustee to divert its funds out of the usual course of business into such channels is not the kind of act which can be protected under that section. This is especially so when the money is loaned to the trustee's son-in-law. Apart from that, S. 20 deals with the only way in which trust moneys can be temporarily or permanently invested in the absence of any express direction in the instrument of trust. This is certainly not one of those ways. It was argued that S. 20 applies only to temporary investments of money which are intended for current expenditure and not to moneys donated for capital purposes. If that is correct, then all we need say is that the care to be applied to a temporary investment of capital can be no less than that which the Act requires for an investment of current expenditure not immediately wanted, and so an omission to apply the same standard of care would amount to the kind of neglect contemplated by S. 15. But there is a much greater obstacle than this. S. 54 definitely prohibits the investment of money on the personal security of a co-trustee. Jagannath and defendant 3 were both trustees, and as the loan of money by one trustee to the other on the latter's personal security is definitely prohibited under the Act, it is clear that there was a breach of trust.

The next question we have to determine is whether the suit is within limitation. The cause of action against defendant 1 is, as we have said, in respect of a breach of trust committed by her father. She herself was not a trustee, and she has not committed any wrong act: also the defalcated money is not in her possession; nor is there anything else in her hands which can be said to represent it. Therefore the suit against her is clearly one to make good the loss occasioned by Jagannath's breach of trust out of his general estate. To such a suit Art. 98, Limitation Act, would, in our opinion, apply. The only other possibility is S. 10, and of course we agree that Art. 98 cannot apply if S. 10 does. S. 10 applies to cases for the recovery of defalcated property or its proceeds from the hands of the persons mentioned in that section. This is what their Lordships of the Privy Council decided in 6 All 1[1] at p. 9. It is, in our opinion, essential that the actual property or something into which it has been converted should be in the hands of the person sued. This view is in accordance with the decision in 9 Bom 373[2] at p. 379. The property in question here is not in the hands of the person sued, and as we have said, there is nothing else which can be said to represent it in her hands either. Consequently, in our opinion, S. 10 cannot apply. The expression used in that section "for the purpose of following such property" has been explained in 11 Mad 274[3] at p. 279, and the only persons in whose hands it can be followed are shown there. They are: a person to whom the trustee has parted with the property not for value, or an assignee not for value, or the trustee himself when he has converted the trust property into other property held in his own name. Since the money in question has not been converted into any portion of Jagannath's estate or in any way mixed up with his own money, it cannot be said to have been in his hands during his lifetime or in those of his legal representatives after his death.

Counsel for the plaintiffs-respondents relied on U. N. Mitra's Law of Limitation and Prescription, Vol. 2, p. 821, Edn. 6, on 11 Mad 274[3] at p. 279 which we have just quoted, on 32 Bom 394[4] at p. 400 and on 52 Bom 184[5] at p. 187. He argued that the old view that only property in specie could be followed is no longer law. That of course is indisputable. It is not necessary that the property followed should be the identical property in respect of which a breach of trust has been committed, that is to say, in the present case the identical coins handed over to defendants 3 and 4. It can be anything into which the original property has been converted, whatever form the conversion may have taken, provided of course the one can be clearly and definitely connected with the other. But under S. 10, whatever the form the original property may have taken, it is essential that it should be in the hands of the person sued.

32 Bom loc. cit.[4] and 11 Mad loc. cit.[3] were both cases of misappropriation either by the trustee himself or by one of his legal representatives. In the Bombay case the judgment of Heaton J. at p. 403 makes it quite clear that the property then in suit was trust money which had become merged in the trustee's own property. Consequently of course S. 10 applied; the other Bombay case[2] is not in point. No case has been cited in which a person who had not got the money or its proceeds in his hands has been sued under S. 10. We are clear then that Art. 98 applies. But with respect to this it was then argued that the money now in suit had been put into Jagannath's hands for a specific purpose, namely to invest it on behalf of the temple; that consequently there was no breach of trust in 1912, and that the breach did not commence till 1929 when he wrongly gave a renewal of the bond. This case was not pleaded, and it involves a complete change of front. In our opinion para. 3 of the plaint, to which we were referred, does not cover it. All that the plaintiffs state there is that Jagannath was the treasurer and not that he was the managing trustee. It is true the lower Court has taken this view apparently in view of Ex. P-15, but we can find no justification for it, and so need not consider the matter further. It is enough to say that, if Jagannath's original act was a prudent one, done with authority as manager, then his action in subsequently renewing the loan in the ordinary course of business would prima facie also be prudent. There is nothing to indicate that

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[1] Balwant Rao v. Puran Mal, (1884) 6 All 1=10 I A 90=4 Sar 485 (P C).

[2] New Fleming Spinning and Weaving Co. Ltd. v. Kessowji Naik, (1885) 9 Bom 373.

[3] Sethu v. Subramanya, (1888) 11 Mad 274.

[4] Bhurabhai v. Bai Ruxmani, (1908) 32 Bom 394=10 Bom L R 540.

[5] Chintaman Ravji v. Khanderao Pandurang, A I R 1928 Bom 58=107 I C 705=52 Bom 184=30 Bom L R 45.

he knew at the time of defendant 3's impending insolvency or of his straitened circumstances.

The last contention with respect to Art. 98 was that under it the cause of action does not accrue until the loss has resulted if that is later than the date of the trustee's death. It was argued that there was no loss to the trust estate in this case till it became known quite recently that the money was irrecoverable from defendant 3. This also we are unable to accept. Art. 98 deals with the loss occasioned by a breach of trust. If the original act constituted a breach of trust, then the act of abstracting the money from the trust estate and handing it over to defendant 3 at once occasioned a loss to the estate and gave rise to an immediate cause of action against Jagannath for the breach. Art. 98 does no more than carry this liability on to his estate after his death. It does not contemplate any different cause of action. As a matter of fact, in the view which we take in the cross-objection, it is clear that the loss has now been made good ; but so far as the appeal is concerned, acting on the assumption that there has been a loss and that it is still outstanding, the suit is clearly beyond time. Therefore the decree against defendant 1 in respect of the money claimed will have to be set aside.

Turning now to the cross-objection that relates to the occupancy and absolute occupancy fields in suit. Under the gift by Jagannath to the plaintiff temple, the temple became the malguzar of these lands and Jagannath the tenant. On his death defendant 2 took possession under a will. This will was, as we have said, subsequently invalidated, but in the meanwhile it was a powerful weapon in his hands which he utilised to the utmost. He obtained a deed of relinquishment from Jagannath's daughter, defendant 1, on 3rd March 1927. It is contained in Ex. P-14. The document is executed for consideration, and prima facie operates to blot out all defendant 1's rights to the estate except to the extent of the consideration mentioned therein. Defendant 2 continued in possession for over two years and was accepted as tenant by the landlord temple. Whilst still in possession he surrendered these fields by a registered document (Ex. P.2) dated 24th January 1930. His title consequently determined from that date. After this, on 21st November 1930, defendant 1 again obtained possession, but her title had, by that time, become extinguished, and so her possession was of no avail as against the landlord in this suit. It was first argued that the plaintiffs did not rely on the deed of relinquishment (Ex. P-14) as a part of their title. It is true they did not set it out in the plaint, but the position was clarified in the subsequent pleadings. It is set out in para. 3 of the plaintiffs' rejoinder dated 31st March 1932. It was also argued that the deed of relinquishment does not relate to these lands; but that is an impossible contention in view of the express mention of these fields in the document at the end where the property comprised in it is set forth.

The next contention was that a document of this kind could not be admitted to registration under the Central Provinces Tenancy Act and consequently that it was invalid to extinguish defendant 1's rights. This again, in our opinion, is incorrect. S. 12 (4), C. P. Tenancy Act, prohibits registration of documents which purport to contravene the provisions of that section. When we turn to the body of the section, we find that transfers, except those mentioned later on in the section, are prohibited. Ex. P-14 is not a transfer. It is the settlement of a dispute between two persons who each claimed a right to the holding of a deceased tenant. One of them merely states that for valuable consideration she gives up her claim. That blots out her interest but does not necessarily convey any title to the other party. There is, consequently, no transfer of title and therefore no contravention of S. 12. It follows the document was rightly admitted to registration.

The real contention in this behalf is that the surrender was lis pendens and so cannot affect defendant 1's rights. On 10th January 1929 defendant 1 filed an application for leave to institute a suit in forma pauperis in respect of these tenancy lands. The application was subsequently dismissed at the applicant's own request. It is argued that the filing of this application amounted to an institution of the suit, even though it was subsequently dismissed. We need not enter into that here. The doctrine of lis pendens is given in S. 52, T. P. Act. It is no more than this that any dealing with the property in suit by a party thereto cannot affect the rights of any other party "under the decree or order which might be made therein". The order in the present suit is one dismissing the application. Therefore no rights with respect to this property arise in defendant 1's favour out of this order. It is clear then that S. 52 cannot apply. Moreover, this assumes that the proceedings terminated in her favour and that the compromise gave her all the rights to the land which she was claiming in that suit. All we have on this point is Ex. P-6, a copy of a compromise petition in another case, Civil Suit No. 3 of 1930, the case which defendant 1 had instituted to have the will set aside and possession of Jagannath's estate handed over to her. It shows that the parties compromised by dividing the estate between them. A footnote to the petition states that another suit (the pauper suit) for possession of land is pending and that the land in "the suit" has not been partitioned according to the compromise petition, and then the note concludes:

> When we arrive at a partition regarding these lands, then we will file a deed of compromise in that Court.

The official translation of this passage is incorrect. We have reproduced the true version above. So it is clear that this compromise did not affect the lands in the pauper suit. Then we have Ex. P-9, a copy of the order sheet in the pauper case. It runs thus:

> 29th January 1931. Parties absent. Mr. Pachol is (sic) pleader for applicant files an application stating that the case has been compromised out of Court. Hence this application is dismissed.

It is of course impossible to determine from this what the terms of the compromise were, whether it affected the property in dispute in those proceedings, or indeed whether there was a compromise. The other side was absent, and all that we have is a one-sided statement on behalf of the applicant alone, unaccompanied by any petition or affidavit. The statement may or may not have been true, but it is no proof of the fact that the compromise related to the property which forms the subject matter of this cross-objection and that under it defendant 2 admitted defendant 1's claim and agreed to hand over possession of the tenancy lands to her. The appellant asks us to infer these facts from Ex. D-14 coupled with the evidence of defendant 3 (D. W. No. 1). So far as Ex. D-14 is concerned, it is merely a receipt acknowledging possession of "the moveable and immovable property which has been given by mutual settlement . . . according to sulah-nama". It is perfectly general and does not specify the property which has been handed over. Now, as we have said, there is evidence of only one deed of compromise, and if the present story is correct, there must have been two compromises. The reference to the sulah-nama in the singular therefore negatives the present contention; that is to say this receipt cannot refer to the tenancy lands.

We turn next to the evidence of defendant 3. He swears that the receipt included the tenancy lands; but he also says that "the suit was dismissed after compromise and delivery of possession". But in cross-examination he says that the sulah-nama mentioned in it refers to the sulah-nama filed in Court. Now, as we know, the only sulah-nama which was filed in the Court expressly excluded these lands. As regards these fields, the witness is forced to admit that no sulah-nama was filed and that matter was privately settled. He bases his statement merely on Ex. D-14. As we have shown, Ex. D-14 standing alone leads to no such inference. The witness's statements are unsatisfactory, and we cannot believe that he is speaking about facts within his knowledge. For instance, the reason he gives for the omission of his wife to file a sulah-nama in respect of the pauper suit is that "the land was not divided and compromise could not be filed". The receipt is dated 21st November 1930, and the pauper application was not dismissed till 29th January 1931. If the witness's story that Ex. D-14 included the tenancy lands is true, then not only had a division been effected but possession had also been delivered in pursuance of it. Therefore it is abundantly evident that the witness is guessing violently and not deposing about a compromise which was effected in his presence and to his knowledge. If that is so, then we are in as good a position as he is to make deductions from the known facts. As we have said, they do not establish a second compromise of the kind pleaded by the defendants.

As a matter of fact the second compromise may well have been this: Both parties knew that a large sum was payable out of the estate to the temple, also that rent was in arrears. So they may well have agreed amongst themselves to allow defendant 2 to surrender the tenancy lands and thus to satisfy the sums payable out of the estate. Of course this is conjecture, but there is no reason why the compromise should not have taken this shape rather than the other, and therefore in the absence of proof about the other, we cannot assume that it took the form which the defendant-appellant now says it did. Another consideration also leads us to this conclusion. A compromise usually means that each party is to get something out of it and give up something. As far as we can gather, defendant 1 is said to have obtained all the tenancy lands for which she was then suing. Of course if it was a part of the first compromise which was filed in Court, that might be understandable. But the petition states expressly that it was not, and that a separate compromise had yet to be effected with respect to the tenancy lands. We are therefore of opinion that defendant 1 did not obtain possession under Ex. D-14 and that there is no proof that her present possession of these fields was obtained in pursuance of a compromise of the pauper suit instituted by her, assuming of course that the mere filing of the application amounted to an institution of a suit. Therefore, on all hands the deed of surrender effected by defendant 2 is not affected by the doctrine of lis pendens.

Now, as we have said, defendant 1 did not obtain possession of the fields on her father's death. Even on the defendant's own case she did not get possession till 21st November 1930, more than two years later, and there is no proof that her subsequent possession related to her suit. In the interval she had not paid any rent. On the contrary the landlord had been accepting rent from defendant 2. Therefore, her rights had been long extinguished when she subsequently obtained possession. The deed of surrender (Ex. P-2) has been attacked on the ground that it was a sham transaction. The appellant's case is that it was a unilateral act on the part of defendant 2 for which there was no consideration, and that it was not only never accepted by the temple trustees but they did not even know about it. Now we find that the deed has been registered and attested by two witnesses, and we also find that defendant 2 still supports it in this case. We further find that P. W. 9, Gaurishankar, the secretary of the panch committee, says that he assented to it. On the face of it then the transaction bears all the indicia of genuineness. What then was the object of defendant 2 in behaving in this strange fashion—strange only if the surrender was a sham, but understandable if it was not? No explanation has been offered and as people do not act like this without some definite object in view, we are unable to believe that the deed was never intended to be given effect to. We find that the transaction was a real and genuine one. This is especially so as Ex. P-2, the deed of surrender, recites that it was effected to satisfy the amount of Rs. 5,300 due on Ex. P-1, the bond on which the present suit is founded and which we have discussed at length when dealing with the appeal.

Then as regards the acceptance of the surrender on behalf of the temple, there can be no doubt that P. W. 9, Gaurishankar, purported to act on behalf of the temple, and even if his act was unauthorized at the time, it has subsequently been ratified: the institution of the suit in itself is a sufficient ratification. As regards consideration, since the parties to the transaction uphold it, no stranger can complain of the want or inadequacy of the consideration (27 All 271[6] at p. 289), but apart from that the recitals in the deed indicate its presence. Ex. P-1, the bond, is genuine, so Rs. 5,300 at least of the consideration is obvious. Then, it is not denied that rent was in abeyance. So, even if the portion relating to the grain remains unproved, the bulk of the consideration has been amply established. The deed was also attacked on the ground that it had not been delivered to the trustees and so could not effect a surrender under S. 89, C. P. Tenancy Act. But in the present case we know that defendant 2 was one of the panchas and therefore would prima facie have had authority to hold the deed on behalf of the committee till they were in a position to consider the matter. This is the explanation given in the plaint as well as by defendant 2 in his written statement. In the circumstances that amounted to a sufficient delivery of the deed. Therefore the provisions of S. 89 are satisfied.

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[6] Achal Ram v. Kazim Husain Khan, (1905) 27 All 271 = 32 I A 113=8 O C 155=8 Sar 772 (P C).

The learned Judge of the lower Court has dealt with this matter somewhat perfunctorily. The only reason he gives for holding that the surrender was a sham transaction is that the deed was for grossly inadequate consideration. He has not explained how he arrives at this conclusion. As we have shown, even if we ignore the grain debt, still there was valuable consideration for the transaction, and as the parties to it uphold it, it is not the concern of a stranger to complain of the inadequacy of the consideration. The only other reason that he gives is that the will had already been declared invalid when the surrender was made. There was undoubtedly a large sum payable out of Jagannath's estate to the temple and defendant 1 had already executed a deed of relinquishment giving up all claim to the tenancy lands. Therefore, as we have said, a part of the agreement between them with respect to the tenancy lands may well have been that defendant 2 who was in possession of them should surrender them to the temple in satisfaction of the debts which were payable out of the estate. These are the only two reasons which the learned Judge gives for his conclusion. We are unable to agree with the finding and hold that the transaction was a genuine one.

If then this transaction is upheld, it operates as a satisfaction of the debts due to the temple in respect of Jagannath's breach of trust. Therefore, whatever cause of action the trustees may once have had against him was extinguished by this acceptance of the tenancy lands. The plaintiffs, as we have said, sued in the alternative. They asked primarily for possession and in the alternative for the money. Since we find that their claim to possession must be upheld, it follows, the claim to the money must go. The plaintiffs cannot have both. A difficulty however arises because the money part of the claim has been decreed against defendants 2, 3 and 4 who have not appealed and who have not been joined as respondents in the present appeal, although there is an application by the learned counsel for the respondents for joining them. But we do not think it necessary to do this. Under O. 41, R. 33, we have ample power to set aside the decree against them even though they are not parties to the appeal. Of course no order can be made to their prejudice, but an order exonerating them from liability stands on a different footing. We therefore think it unnecessary to waste further time by issuing notices to them and then formally setting aside the order in their presence. O. 41, R. 33 is, we think, designed to meet just such an eventuality as this.

The result then is that the claim of the plaintiffs for possession of the tenancy lands in suit will be decreed against defendant 1, and the alternative claim for a money decree which has been passed in the lower Court will be dismissed. The decree of the lower Court will be amended accordingly. As regards costs, the parties to the appeal will bear their own costs and defendant 1 will pay the plaintiffs' costs of cross-objection. The costs of the trial Court will be paid as follows : Defendant 1 will pay the plaintiffs' costs and the other defendants will bear their own costs. The claim will be dismissed as against defendants 2, 3 and 4.

D.S./R.K. *Decree modified.*

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## A. I. R. 1938 Nagpur 37

GRILLE J.

*Harswarup Baburam Chaubey*
*Accused* — Applicant.
v.
*Emperor.*

Criminal Revn. Appln. No. 262 of 1937, Decided on 4th August 1937, from order of Dist. Magistrate, Balaghat, D/- 10th May 1937.

**(a) Criminal P. C. (1898), S. 345 (2)—Offence under S. 420, I. P. C.—Composition of.**

An offence under S. 420, Penal Code, can only be compounded with the permission of the Court, and any arrangement entered into between the complainant and the accused before the case comes into Court at all is ineffective. [P 38 C 1, 2]

**(b) Criminal P. C. (1898), S. 345 (2)—Permission for composition—Matter referred to police for opinion—Magistrate, after reply, hearing arguments and exercising his own judgment—Action of calling upon police opinion is not illegal.**

Where upon an application by the parties to allow composition the Magistrate refers the matter to the police for opinion and after receiving the reply hears the arguments on both the sides and does not become subservient to the opinion of the police but exercises his own judgment in the matter, the Magistrate's action in calling upon the opinion of the police is not illegal: *A I R 1937 Nag 114, Expl.* [P 38 C 2]

B. L. Gupta — *for Applicant.*

J. Sen — *for the Crown.*

**Order.**—One Dhaniram, a resident in the Balaghat district, answered an advertisement in a magazine inserted by the present applicant who offered harmoniums for sale V. P. P. He ordered a harmonium and received a registered V. P. P. cover, and it is in respect of this that Dhaniram made a complaint to the police and obtained a stoppage of the payment which would have been made through the postal authorities to the applicant. The applicant's uncle then visited Dhaniram and a compromise was arrived at between them on a payment of Rs. 50 to Dhaniram who professed himself satisfied, and they approached the D. S. P., Balaghat, with the request that the proceedings should be dropped. This the D. S. P. declined to do, and a challan was put up before the Head-quarters Magistrate, Balaghat, under S. 420, I. P. C. The parties then renewed their application to compound the case, urging in the first place that the case had already been compounded and that the Court had no jurisdiction, and in the next place that if it were held that permission to compound was necessary, composition should be allowed. The Magistrate referred the matter to the police for opinion. The police were against composition, and the Magistrate then proceeded to hear arguments on both sides and after having heard arguments declined to allow composition and also declined to defer his orders until the allegations made against the present applicant by the police were substantiated. The District Magistrate was approached to refer the matter to this Court, as it was said that important questions of law were involved. The District Magistrate declined to do so and this application by the accused is the result.

It is contended that as the matter had already been compounded before the challan was put up by the police, no permission of the Court was necessary, as the Court was not seised of the case, and that all that the Court had to do was to record the fact of the compromise. This is an entirely mistaken view of the law. An offence under S. 420, I. P. C., can only be compounded with the permission of the Court, and the effect of the argument is to take the offence out of the category of the offences mentioned in sub-s. (2) and put it within the category of those mentioned in sub-s. (1) of S. 345, Criminal P. C. Sub-s. (7) of that section lays down that no offence shall be compounded except as provided by that section, and it is perfectly clear that any arrangement entered into between Dhaniram and the applicant before the case came into Court at all is ineffective. When the case had been challaned, it was open to the parties to renew their application as indeed they did, but then composition could only be effected with the consent of the Court, which was refused.

It is then argued that the Court has acted in contravention of the directions given by me in A I R 1937 Nag 114.[1] I did not lay down in that case that the Magistrate's action in calling upon the opinion of the police was illegal but that in the circumstances it was improper and reprehensible. In the case before me the Magistrate certainly has not abdicated his own judgment in favour of that of the police as in the case cited, and it is presumed that he asked the opinion of the police as the police themselves had already been approached by the parties before the case came into Court at all. After receiving the reply of the police he heard arguments on both sides, and it is quite clear that he did exercise his own judgment and has not been subservient to the opinion of the police in this matter. The Magistrate is perfectly correct in refusing to delay matters until the suspicions of the police were substantiated.

The application in revision was admitted and a Rule issued as upon the meagre facts on the record it appeared that there might be a case for according sanction to compromise. Unfortunately the learned counsel has been left entirely uninstructed on the facts of the case and has argued on points of law only. Dhaniram who has appeared by counsel, although he supports the applicant and desires that the case should be compromised, has instructed his counsel on a point of fact which appears to be entirely at variance with the applicant's own case as appearing on the record. In the circumstances it is certainly most undesirable that this Court should consider the question whether sanction should at present be given to a compromise or no. It is of course open to the trial Court at any time to give effect to the compromise petition, should it be renewed and should it appear desirable to do so. The result is that the Rule is discharged and the trial must proceed.

S.C./R.K. *Rule discharged.*

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[1] Pratapsingh v. Emperor, A I R 1937 Nag 114 =169 I C 33=I L R (1937) Nag 183=38 Cr L J 689.

## A. I. R. 1938 Nagpur 39

GRILLE J.

*In re Harprashad Hira Lal Bania* — Accused.

Criminal Rev. No. 258 of 1937, Decided on 19th August 1937, on a reference by Addl. Sessions Judge, Saugor.

**Criminal P. C. (1898), S. 345 (2) — Application for permission to compound offence—Magistrate should not refer matter to police authorities — He should exercise his own discretion and should not base his decision on opinion of police authorities.** [*See A I R 1938 Nag 37*]

A Magistrate cannot surrender the discretion to give permission to compound an offence, which vests in him, to any other Court or to any outside agency. Allowing a case to be compounded is a judicial act, and any argument whether composition should be allowed or not must be addressed to the Magistrate in open Court either by the prosecuting counsel or the Prosecuting Inspector on behalf of the Crown or by those who desire the composition. It is improper to refer to police authorities by means of correspondence and to arrive at a decision as the result of that correspondence : *A I R 1937 Nag 114, Rel. on.* [P 40 C 1]

**Order.** — This is a reference from the Additional Sessions Judge, Saugor, recommending that the order of the Subdivisional Magistrate, Rehli, in the course of a trial in respect of an offence under S. 420, I. P. C., refusing permission to compound the case, be set aside. The reasons given by the Additional Sessions Judge are that in refusing to allow the case to be compounded the Magistrate has submitted his own discretion to that of the District Superintendent of Police and has ignored the observations of this Court in I L R (1937) Nag 183.[1] A Rule was issued to show cause why the order of the Magistrate should not be set aside. No one has appeared either on behalf of the accused or of the Crown, although a representation has been received from the District Magistrate, Saugor, in which he has given reasons showing cause against the proposed revision; nevertheless the Crown is unrepresented.

The complainant had made a report at the Garhakota station-house to the effect that he had had a dispute with the accused concerning the sale of some oil-seed and that the accused complained to him that the vessel in which the seed had been measured was beyond the standard size and threatened to report him to the police and induced him to pay Rs. 4, although no consequences resulted from the threat. The police put up a challan against the accused Harprasad under S. 420, I. P. C. The accused was released on bail, and before the date fixed for evidence the complainant asked to be allowed to compound the case. The Magistrate referred the application by way of endorsement to the District Superintendent of Police who eventually replied objecting to the application. On the date fixed for hearing the Magistrate discharged the prosecution witnesses who were in attendance without examining them, as the accused had announced his intention of appealing to a higher Court against the order refusing composition which the Magistrate had passed that day. As the Magistrate had refused to allow the case to be compounded, it is not understood why he did not proceed with it and examine the witnesses who were present and those who had been summoned to attend on the following day. The order of the Magistrate runs as follows :

> In this case the Garhakota police challaned the accused Harprasad Bania of Garhakota for the alleged offence of cheating one Daulat Teli of Rs. 4 on 28th February 1937 by threatening to prosecute the latter as he had a pailee of a large size in use. The offence involved only a petty sum and compromise could have been allowed, but the prosecution objects on the ground that the accused did so while the police constables were near about. If it is so, it shows the daring nature of the accused. Hence I would disallow the compromise application and decide the case on its own merits.

Before the Additional Sessions Judge in whose Court an application was made asking that a reference under S. 438, Criminal P. C., should be forwarded to this Court, it was contended on behalf of the Crown that the offence complained of was one of extortion rather than of cheating and that extortion was not a compoundable offence. This argument reflects very little credit on the police who on this supposition admittedly minimized the offence of extortion to one of cheating, and on the information given by the complainant to the police it is possible that extortion may have been committed. It is apparent, however, that the police on investigation did not consider that there was any extortion, and the argument advanced is an afterthought to support the opinion of the District Superintendent of Police, on which the Court acted, that composition should not be allowed.

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[1] **Partapsingh v. Emperor, A I R 1937 Nag 114 =169 I C 88=I L R (1937) Nag 183=38 Cr L J 689.**

One of the main contentions of the District Magistrate is that the action of the Magistrate in writing to the District Superintendent of Police was perfectly proper and the consultation with the police imperative, as the offence was non-cognizable, and the prosecution was by the Crown. I L R (1937) Nag 183[1] does not lay down that the prosecution in a non-cognizable case is prohibited from protesting against a proposed composition of the offence. It was there pointed out that a Magistrate cannot surrender the discretion which vests in him to any other Court or to any outside agency. Allowing a case to be compounded is a judicial act, and any argument, whether composition should be allowed or no, must be addressed to the Magistrate in open Court either by the prosecuting counsel or the Prosecuting Inspector on behalf of the Crown or by those who desire the composition. It is improper to refer to police authorities by means of correspondence and to arrive at a decision as the result of that correspondence. It is even more improper if the correspondence discloses, as it does in the present case, that the decision depended entirely on the view taken by the police. The concluding portion of the District Magistrate's reply to the notice issued by this Court emphasizes his other main argument that in this particular case there was no evidence that the Magistrate blindly accepted the plea of the complainant, i. e. the Crown. He says:

> The language used by him showed clearly that the Magistrate made himself responsible for the decision to refuse compromise. The statement of the Additional Sessions Judge that the Magistrate would have allowed the composition but for the objection of the District Superintendent of Police is not admitted; nor the statement that the Magistrate's memo of 10th April 1937 indicates that he left the matter entirely for the decision of the District Superintendent of Police. How can the words 'Forwarded to the District Superintendent of Police for favour of opinion' possibly be said to indicate that the Magistrate left the matter entirely for the decision of the District Superintendent of Police? They indicate the exact opposite.

Now, apart from the wording of the Magistrate's order, which certainly indicates the trend of the Magistrate's mind, the District Magistrate is inaccurate regarding the facts on which he bases his contention. The Magistrate's memo of 10th April 1937 did not contain the words "Forwarded to the District Superintendent of Police for favour of opinion." That was the original endorsement dated 3rd April 1937, and being anxious to receive a reply before the hearing of the case which was fixed for 12th April 1937 at Garhakota, the Magistrate wrote on 10th April 1937 to the Prosecuting Inspector as follows:

> Please let me know whether the application for compromise under S. 420, I. P. C., *King-Emperor* v. *Harprasad*, sent to the District Superintendent of Police for permission has been received or not, and whether the permission has been given or not, as the case is fixed for 12th April 1937 at Garhakota where I am proceeding today.

It is difficult to imagine a clearer indication that the Magistrate has placed himself entirely in the hands of the police in the matter of deciding whether he should pass an order allowing the compromise or no. It was to this communication that the learned Additional Sessions Judge referred and it implies a complete abdication on the part of Magistrate of the judicial power with which he has been entrusted. It is true that this communication itself is in the handwriting of a clerk to which the Magistrate has appended his signature, but the Magistrate is responsible for the contents of the note which he signed, and his order indicates also that he was prepared to surrender his own judgment to that of the police. Had the prosecution protested against the proposed compromise in open Court and had the Magistrate come to a decision after hearing both sides, there would have been no objection to a considered order; but to pass an order setting out his opinion that the offence was a minor one and would clearly be compoundable, but refusing to allow permission to compound on a statement made by the District Superintendent of Police, which the Magistrate is not certain that he believes (as is indicated by the words "If it is so"), is to exercise no discretion whatever and to shirk his responsibilities as a Magistrate.

I give no opinion on the merits of the order, had it been passed in the proper way. In view of the positive abandonment by the Magistrate of his own discretion to that of the District Superintendent of Police which, as I have already pointed out in I L R (1937) Nag 183,[1] undermines confidence in the administration of justice, I make the Rule absolute and direct that the compromise be accepted and the accused acquitted.

K.B./R.K. *Rule made absolute.*

## A. I. R. 1938 Nagpur 41

GRILLE J.

*Dayanand Badrinarayan*—Applicant.

v.

*Laxmidas Gopalji Gujrathi and another* — Opposite Party.

Misc. Civil Case No. 31 of 1936, Decided on 27th March 1936, for review of judgment of Grille J. C., in S. A. No. 516 of 1933, D/- 30th October 1935.

**Review — Omission to raise point of law is insufficient ground.**

Omission to raise a point of law is not a sufficient ground for a review. Further, a party who had an opportunity of raising a question but did not raise it cannot ordinarily be allowed to agitate the question in review: *A I R 1922 Pat 119 and 2 Mad 58, Rel. on*; *A I R 1918 P C 92, Disting.* [P 41 C 2]

K. B. Sheorey — *for Applicant.*

**Order.**—This is an application in review against my judgment as Judicial Commissioner, allowing the appeal of the appellant-defendant Laxmidas in Second Appeal No. 516 of 1933. The plaintiffs had taken a contract from one Bansidhar Ramnivas for carting his coal from his coal mine to the railway station and also for extracting coal. The plaintiffs themselves apparently took no interest in the technical side of the contract and engaged one Motilal to do the necessary work on the assurance of Laxmidas, who also stood surety for him. Later they considered Motilal's work unsatisfactory, dismissed him and brought a suit against him and his surety for rendition of accounts and for recovery of such amount as might be found due. A preliminary decree was passed against these defendants, and an appeal against the preliminary decree was dismissed as time barred. On the final decree Motilal took no further action, but the surety Laxmidas preferred an appeal, which was dismissed. A second appeal succeeded. It is now contended in the application for review that the point on which Laxmidas succeeded and as the result of which the suit of the plaintiffs was dismissed, was a question of fact, which the Court of the Judicial Commissioner in second appeal had no jurisdiction to entertain. The other points taken, that the Court should exercise its inherent powers to prevent injustice being done, that the plaintiffs' suit has also been dismissed as against Motilal, who has not appealed, and that they are therefore deprived of a decision which has been given in their favour as against Motilal, are of no effect, as it is clear that the Appellate Court has authority under O. 41, Rr. 4 and 33, to modify a decree in favour of a party who does not appeal as well as in favour of a party who does.

Now the question whether the point on which the decision of the lower Court was reversed was a question of fact or no, was certainly not raised by the respondent in second appeal: on the contrary, he joined issue on the question under discussion with alacrity and defended, or attempted to defend, the position taken up by the Judge of the lower Court. It is urged before me that the point whether the question then before the Court was one of fact or no, can be taken at any time, whether it was urged in second appeal or not urged, and in support of this contention passages have been cited from the Privy Council decision in 46 Cal 189[1]. The passages cited have really no bearing on the point, but merely lay down what is obvious, namely that the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact, and that in second appeal the Court is not entitled to reverse the judgment of the Court below on the ground that on its own view of the evidence tendered it would have come to a different decision on a question of fact. Indeed it has been held in 5 Pat L J 344[2] that omission to raise a point of law is insufficient ground for allowing a review, and in 2 Mad 58[3] it was held that a party who not only had an opportunity of raising a question but did raise it, and in argument abandoned it, cannot ordinarily be allowed to agitate the question in review. Certainly the respondent had every opportunity of raising the question that the manner in which the accounting between the parties had been approached and the decision thereon was a question of fact, and he did not do so. In this view of the case it is sufficient to say that no ground for allowing a review of the judgment has been made out.

It is therefore unnecessary to discuss the argument which has been advanced to show that the decision of the lower Court was correct; but I may here point out that in the judgment in Second Appeal No. 516 of 1933 it was stated that in addition to the unintelligibility of the judgment of the lower Court the plaintiffs had deliberately refrained from producing evidence which lay to their hands and which would have set out approximately, if not entirely, the balance which they claimed. In such circumstances there is ample authority for the proposition that a suit for rendition of accounts cannot be entertained. There was also the plaintiffs' own admission that they had prohibited the defendant, who was their agent, from adjusting accounts with Bansidhar, stating that they would do so themselves. There was no evidence that the plaintiffs had done so, and it was clear that this order from his masters had prevented the defendant from making such statement of accounts as he was capable of making. This view of the case in itself was sufficient ground for entertaining the question of the actual accounting in second appeal. The result is that the application for review fails and is dismissed summarily.

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[1] **Nafar Chandra Pal v. Shukur Sheikh, A I R 1918 P C 92=51 I C 760=45 I A 183=46 Cal 189 (P C).**

[2] **Kamla Prasad v. Kunj Behari, A I R 1922 Pat 119=57 I C 11=5 Pat L J 344=1 P L T 625.**

[3] **Sabapathi v. Subraya, (1878) 2 Mad 58.**

B.D./R.K. *Application dismissed.*

## * A. I. R. 1938 Nagpur 42

STONE C. J. AND VIVIAN BOSE J.

*Ghanaram and others* — Appellants.

v.

*Balbhadra Sai and another* — Respondents.

First Appeal No. 74 of 1934, Decided on 8th April 1937, from decree of Sub-Judge, First Class, Bilaspur, D/- 10th January 1934.

**(a) Civil P. C. (1908), O. 22, R. 4 (3)—Appeal—Death of one respondent—Legal representative not brought on record — Decision cannot affect legal representative.**

Where during the pendency of an appeal from a decree, one of the respondents dies and no attempt is made to bring his legal representative on record, the appeal abates as against him and his legal representative cannot be affected by any decision made in the appeal : *A I R 1929 P C 58, Foll.* [P 42 C 2]

*** (b) Civil P. C. (1908), O. 22, R. 4 (3)—Preliminary foreclosure decree in favour of three persons—Appeal against—During pendency, one of plaintiff-respondents dying—His legal representative not brought on record—Whole appeal abates.**

To decide whether the partial abatement leads to an abatement of the appeal in its entirety, one of the underlying principles is : If a decree can be passed and given effect to in so far as the right of the parties actually before the Court are concerned without interfering with the interests of others, then the suit or the appeal can continue; if not, it abates as a whole : *Case law referred.* [P 42 C 2; P 43 C 1]

In a suit three persons obtained a preliminary decree for foreclosure against some persons upon a mortgage executed by them. The defendants thereupon appealed. During the pendency of the appeal one of the plaintiff respondents died and no attempt was made to bring his legal representatives on record :

*Held* that because of the abatement with respect to the deceased respondent the whole appeal abated. [P 44 C 2]

M. R. Bobde — *for Appellants.*

D. N. Choudhary and P. N. Rudra — *for Respondents.*

**Judgment.**—The three plaintiffs in this suit obtained a preliminary decree for foreclosure against the defendants upon a mortgage executed by them. The defendants thereupon appealed to this Court making all the three plaintiffs respondents. During the pendency of the appeal plaintiff 3, who figured as respondent 3 here, died and no attempt was made to bring his legal representatives on record. The appeal has consequently abated as against him and his legal representatives cannot be affected by any decision made in it. There is no doubt about that and the parties before us are all agreed on this point. In any case the matter is concluded by the decision of their Lordships of the Privy Council in 51 All 267[1] at p. 273. The question now at issue is whether the defendants appellants can continue the appeal as against the other two respondents who claim that the whole appeal has abated. The provisions of the Code of Civil Procedure relating to abatement do not assist us much. Under O. 22, R. 4 (3), read with O. 22, R. 11, the appeal, so far as the statute is concerned, abates only as against the deceased respondent. But that does not solve the problem, for, as observed by Shadi Lal C. J. in 10 Lah 7[2] at p. 10:

> The question whether the partial abatement thus caused leads to an abatement of the appeal in its entirety depends upon general principles.

A great deal of case law has grown around this question and the decisions are not uniform, but the difficulty, in our opinion, arises not so much because of any doubt about the general principles but because of their applicability to particular cases. There can be no question that it is impossible to lay down any general rule which will be of universal application. Each case must be decided on its own facts and it is here that Judges differ.

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[1] Mahomed Wajid Ali Khan v. Puran Singh, A I R 1929 P C 58=114 I C 601=56 I A 80 =51 All 267 (P C).

[2] Sant Singh v. Gulab Singh, A I R 1928 Lah 572=114 I C 417=10 Lah 7=30 P L R 453 (F B).

The underlying principles can, we think, be stated simply as follows: (1) "If a decree can be passed and given effect to in so far as the right of the parties actually before the Court are concerned without interfering with the interests of others, then the suit or the appeal can continue; if not, it abates as a whole. (2) The Court must see that it does not pass a decree which it may find itself incapable of executing owing to the circumstances that the lower Court's decree in favour of the deceased respondent has become final in consequence of the partial abatement of the appeal against him".

These two propositions which have our respectful concurrence are to be found in one form or another in the following cases: 27 N L R 220,[3] 10 Lah 7,[2] 10 Pat 341[4] and 53 Cal 752.[5] In our opinion they go to the root of the matter. It is not necessary to make more than a passing reference to cases which illustrate these propositions. One obvious case is that in which two or more persons jointly obtain a mandatory injunction enjoining the defendants to, say, pull down a wall. If the defendants want to challenge such a decree, they would naturally have to join all the plaintiffs, or in the case of those who have died their legal representatives. Otherwise there would be this inconsistent position; the same decree in respect of the same joint cause of action would give plaintiff *A* a right to pull down the wall on behalf of all the plaintiffs, for be it remembered *A's* right under O. 21, R. 15 is not merely to act on his own behalf but on behalf of all, and the distinction is of importance; cases may arise where *A's* action on behalf of all may give rise to a right to contribution; at the same time the decree would give the defendants, if they succeeded in their appeal, the right to maintain the status quo as against plaintiffs *B*, *C* and *D*: an impossible position. Similar questions appear to arise in cases of partnership, partition and pre-emption. It seems to be conceded in all but the last of these cases, where there is some difference of opinion, that the proceedings cannot continue unless all the parties interested are before the Court. Administration suits afford another example.

The learned Chief Justice of the Allahabad High Court in 48 All 251[6] dealing with a suit for redemption which he treated as being in essence one for joint possession of property, takes a contrary view and holds that the rights of the claimants in such a case are distinct and so can be separated and disposed of individually. We do not doubt that such cases may occur. 10 Lah 7[2] is a case in point. But with the utmost respect we cannot agree that this can be done unless the interests are distinctly severed in either the deed or the decree. If they are not, and a joint decree is passed which is executable under O. 21, R. 15 by one decree-holder on behalf of all, even when his co-decree-holders do not want to proceed and have perhaps compounded with their adversary, we cannot see how he can be deprived of this right by proceedings to which he is not a party. As we say, it is a question of substance and may make a considerable difference to him in the end. Therefore in our opinion the two propositions with which we started are fundamental and on them hangs the fate of the issue we are now considering.

What rights did the decree in the present case give to the deceased plaintiff? First of all the right to obtain the entire decretal amount on behalf of all the decree-holders by a given date; secondly the right to get possession of the entire mortgaged property if the entire amount decreed was not paid within the time allowed. The date fixed for payment was 10th July 1934 and has long since passed. What do the judgment-debtors want in this appeal: at the very least an extension of the time allowed. Even if that were granted and no more, the right of the deceased plaintiff's legal representative to obtain possession of the entire property, which has now accrued, would be affected; and that is the very least that can be done. But the defendants want much more. They want the interests of the mortgagees to be severed and they ask for a right of partial redemption upon payment of a proportionate part of the decretal amount. How can this be done without affecting rights which are now unalterable under the decree? That in itself concludes the matter. But this being a suit on a mortgage for foreclosure, we are able to rest our decision on another ground as well. It is now well settled that:

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[3] Surajmal v. Pyarkhan, A I R 1931 Nag 134=134 I C 679=27 N L R 220.

[4] Mt. Waleyatunnissa Begam v. Chalakhi, A I R 1931 Pat 164=132 I C 100=10 Pat 341=12 P L T 28.

[5] Midnapur Zamindary Co. Ltd. v. Amulya Nath Roy, A I R 1926 Cal 893=95 I C 649=53 Cal 752=43 C L J 401.

[6] Narain Das v. Sheo Din, A I R 1926 All 284=91 I C 859=48 All 251=24 A L J 300.

> A mortgage for an entire sum is from its very purpose indivisible; and that character of indivisibility exists with reference not only to the mortgagee, but also to the mortgagor; save by special arrangement between all the parties interested, neither mortgagor nor mortgagee, nor persons acquiring a partial interest through either, can obtain relief under the mortgage except in consonance with that principle of indivisibility: 22 Mad 209.[7]

Because of this principle, their Lordships of the Privy Council held in 47 Cal 175[8] at p. 179 that when, as here, a mortgage

> effects the conveyance of the real estate to the mortgagees as tenants-in-common, then no redemption can be effected of part of the property by paying to one of the mortgagees her separate debt. It is not a mortgage to each of a divided half but a conveyance to them of the whole property.

They then proceeded to add:

> Where a mortgage is made by one mortgagor to two mortgagees as tenants-in-common, the right of either mortgagee who desires to realize the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree which would provide for all the necessary accounts and payments, excepting that there could be no decree for money entered as between the mortgagee defendant and the mortgagor.

We think, it follows from this, as well as from S. 60, T. P. Act, that a suit on a mortgage cannot lie unless all the parties, or their representatives are joined. The same thing also appears from S. 45, Contract Act; one of several mortgagees cannot, without the consent of the others, release his rights under the mortgage or give a valid discharge to the extent of his share. There may possibly be exception when the mortgage deed itself makes their rights divisible, or when there has been an express severance with consent in the manner contemplated by S. 67 (d), T. P. Act, but we can envisage no other possibility. Even a splitting up of the mortgage security under S. 60 would not have that effect, for all the parties to the mortgage would still have to be there. If then a suit cannot proceed in the absence of a party to the transaction, it is difficult to see how an appeal can. The principles must be the same in both cases and indeed, if we understand it aright, that seems to have been the test applied in 27 N L R 220.[3] Any other view would lead to this incongruity: The legal representatives of the deceased plaintiff would have the right to execute the entire decree on behalf of all the plaintiffs qua mortgagees, whereas the same decree would decide, if the defendants succeed, that they are not mortgagees or at any rate that some of them are not and that consequently the mortgage cannot be enforced in its entirety. We hold therefore that because of the abatement with respect to the deceased plaintiff-respondent, the whole appeal abates.

It was argued however on behalf of the appellants that the plaintiffs formed a joint Hindu family and so the death of one of them does not affect the others, the whole right survives to them. Founding on this hypothesis it was urged that as the two surviving plaintiffs now represent the estate, and as they are already on record, it is not necessary to bring them on record again in a different capacity: 51 Mad 347.[9] In reply to the objection that the surviving plaintiffs are not the only members of the family, even if it be assumed that they are joint (a position which the plaintiffs do not admit because the deceased plaintiff left two sons) it was argued that it is not necessary to bring all a man's legal representatives on record, it is enough if those who are there represent the estate: 59 Mad 660[10] and 10 Pat 341.[4] There is support for these propositions in those rulings but they are not beyond question. There is for example a difference of opinion on the first point between the Madras and the Patna High Courts in these very rulings, but we need not enter into that here, for, in our opinion, the hypothesis on which the two subsequent propositions are based is wrong.

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[7] Huthasanan Nambudri v. Parameswaran Nambudri, (1899) 22 Mad 209.

[8] Sunitibala Debi v. Dhara Sundari Debi, A I R 1919 P C 24=53 I C 131=46 I A 272=47 Cal 175 (P C).

[9] Achutan Nair v. Manavikraman, A I R 1929 Mad 152=109 I C 372=51 Mad 347=54 M L J 675.

[10] Muthuraman Chettiar v. Adaikappa Chetty, A I R 1936 Mad 336=162 I C 214=59 Mad 660.

Their Lordships of the Privy Council have pointed out in 4 Pat 61[11] at p. 66 that once a decree is made in a suit, the parties acquire rights and incur liabilities on the making of it which are fixed unless or until the decree is varied or set aside. The deceased plaintiff consequently acquired rights under the decree in suit which he could have enforced in defeasance, if necessary, of all rules which normally govern the conduct of affairs in a joint Hindu family. Even if the other two plaintiffs had compounded with the defendant against his wishes, he would still have been entitled to execute the whole decree on behalf of all under O. 21, R. 15 as we have already observed. Therefore his rights in this respect were something over and above the usual rights of a mere member of a joint Hindu family. They resembled, though not in all respects, the rights which a co-parcener has of acquiring separate property of his own without forfeiting his position as a member of the co-parcenary. We do not mean to imply that he would thereby have had the right to consider the money or the property as his own self-acquisition: that would depend upon a number of factors about which we know nothing in this case. But he would have been entitled to enforce execution whether the others wanted it or not. To that extent he had acquired a right, and consequently an "estate" within the meaning of S. 2 (2), Civil P. C., which was peculiarly his own. If that is so, then, in our opinion, his sons would succeed to this separate and individual right which he had thus acquired in the same way as they do to the rest of his separate estate. They are the ones therefore who now represent the "estate" which had become so peculiarly his own under the decree, and in their absence the appeal cannot succeed. It is dismissed. But since the dismissal is on a technical point and not on the merits, we award costs only in respect of the preliminary objection which has just succeeded. We fix counsel's fee at Rs. 75 for this purpose and direct the appellants to pay this sum to the surviving respondents in respect of costs.

D.S./R.K. *Appeal dismissed.*

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[11] Lachmi Narain Marwari v. Balmakund Marwari, A I R 1924 P C 198=81 I C 747=51 I A 321=4 Pat 61 (P C).

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## A. I. R. 1938 Nagpur 45

GRILLE J.

*In re Bhullikhan Mansabkhan*
Accused.

Criminal Ref. No. 237 of 1937, Decided on 8th July 1937, by Addl. Sess. Judge, Jubbulpore.

**Penal Code (1860), S. 225-B — Warrant of arrest for recovery of land revenue not bearing seal of Court—Breaking such arrest is no offence.**

If a warrant of arrest for the recovery of land revenue does not bear the seal of the Court issuing it, the warrant has no force and the arrest under it is not legal and breaking such arrest is no offence. [P 45 C 2]

A. R. Khan — *for Accused.*

**Order.** — The applicant has been convicted and sentenced to a fine under S. 225-B, I. P. C., for breaking arrest when he was arrested in execution of a warrant for recovery of land revenue by two revenue peons. His appeal was dismissed, and the Additional Sessions Judge, Jubbulpore, has referred the case to this Court recommending that the conviction be set aside as the warrant of arrest did not bear the seal of the Court and the arrest was consequently illegal.

Now there can be no doubt that a warrant of arrest issued by a Criminal Court must bear the seal of such Court : *vide* S. 75, Criminal P. C., and that an arrest on a warrant which does not bear such a seal is illegal. In the C. P. Land Revenue Act under the provisions of which this arrest was made, there is no direction in the Act itself that a warrant should bear the seal of the Court. Under the rules made under S. 128, Land Revenue Act, by virtue of S. 227 (2) (k) of the same Act, a rule has been made which runs : "Every warrant of arrest shall be in form II appended;" and form II concludes with the sentence "given under my hand and the seal of this office, this day of . . . Revenue Officer"; that is to say, the rules under the Act which have the force of law, lay down that a warrant of arrest shall be in a specific form and no other, and that form provides for the affixing of the seal of the Court which issues it and thus, like S. 75, Criminal P. C., lays stress on the general principle that a process must always bear the seal of the Court from which it issues. The warrant therefore in this case had no force and the arrest under it was illegal, and in breaking arrest the applicant committed no offence. The conviction is accordingly set aside and the fine, which has been realized, must be refunded.

D.S./R.K. *Conviction set aside.*

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## ✻ A. I. R. 1938 Nagpur 46

PURANIK J.

*Kisanlal Ram Niwas Marwadi — Judgment-debtor* — Appellant.

v.

*Naraen and another — Decree-holders* — Respondents.

Misc. Appeal No. 20 of 1936, Decided on 15th September 1937, from order of Fourth Addl. Dist. Judge, Akola, D/- 27th August 1935.

**✻ Practice—Presentation—Court or officer has discretion to accept application presented beyond office hours — Execution application presented to proper officer beyond office hours on last day of limitation — Presentation is proper.**

**It is in the discretion of the Judge or the officer appointed in that behalf to accept an application beyond office hours, or refuse to do so, and if the discretion is exercised in favour of a litigant who unfortunately could not approach the Court or the officer appointed in that behalf during the usual Court hours but did manage to approach him on the last day of limitation and prevailed upon him to accept the presentation on that day, it could not be said that the discretion was not properly exercised. [P 47 C 1]**

**Where an application for execution is presented to an officer appointed to receive such application on the last day of limitation beyond office hours, the presentation is valid. No ratification by the Judge is necessary for such presentation : *34 All 482 (F B) ; A I R 1924 Mad 448 ; A I R 1922 Nag 167 and A I R 1937 Bom 25, Rel on ; A I R 1914 Mad 376, Ref.* [P 47 C 1, 2]**

Nisar Ali and C. Khisty — *for Appellant*.

V. K. Rajwade — *for Respondents.*

**Judgment.**—The only question for decision in this case is whether the application for execution presented on 10th September 1934 which admittedly was the last day of limitation to the Deputy Clerk of Court beyond office hours was a valid presentation. Both the Courts below have held that the application was validly presented as the Deputy Clerk of Court is an officer appointed to receive such applications and could receive the application even beyond office hours. The judgment-debtor appellant argues that the view taken by the Courts below is not correct. I have heard the arguments for both parties and am satisfied that the view taken by the lower Courts is sound.

Under O. 21, R. 10, Civil P. C., an application for execution has to be made to the Court which passed the decree or to the officer (if any) appointed in this behalf. It is not disputed that the Deputy Clerk of Court in this case was such an officer. He had the authority to receive the application but it is argued that he had no authority to receive it beyond office hours and he exceeded his authority in accepting this application at 9 P. M. on 10th September 1934. Civil Circular I-1 is relied on in this connexion. The said Circular states that plaints, memo of appeal and applications should be presented at any time during Court hours to the Court or to such officer as it appoints in this behalf by a formal order in writing (O. 4, R. 1 ; O. 41, R 1 (1) and O. 21, R. 10, Civil P. C.). This Circular does not fetter the discretion of the Court or an officer appointed to receive a plaint, memo of appeal, or an application for execution beyond Court hours if he chooses to do so. It is not disputed that 10th September 1934 was the last day of limitation and the presentation was made to a proper officer on that day. O. 4, R. 1, Civil P. C., or to be more precise O. 21, R. 10, Civil P. C., for the purposes of this application, requires presentation to the Court or the officer appointed in that behalf. This was complied with and the presentation was valid. 34 All 482[1], 47 Mad 312[2] and 19 N L R 23[3] lay down that a presentation of a plaint or a memo of appeal to the Judge after office hours at his residence or at any other place is valid if the Judge accepts it. I do not see any reason why the same rule should not apply to an officer appointed in that behalf. The appellant has drawn my attention to a case reported in 23 I C 360.[4] The report does not give any reasons for the decision and it is difficult to gather the facts of the case from the report. I cannot accept the decision as an authority to guide me in deciding this case. In a recent Bombay case, A I R 1937 Bom 25,[5] Beau-

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1. Din Ram v. Hari Das, (1912) 34 All 482=14 I C 744=9 A L J 743 (F B).
2. Sattayya Padayachi v. Soundarathachi, A I R 1924 Mad 448=79 I C 1017=47 Mad 312=46 M L J 78 (F B).
3. Madhorao v. Manoharlal, A I R 1922 Nag 167 =65 I C 674=19 N L R 23.
4. Appavu Pillai v. Amir Sahib, A I R 1914 Mad 376=23 I C 360.
5. Ratan Jayakisan v. Bapu Hiraji, A I R 1937 Bom 25=166 I C 896=I L R 1937 Bom 136 =38 Bom L R 1196.

mont C. J., dealing with a plaint presented to the Clerk of Court who was authorized to receive plaints to whom the plaint was presented beyond Court hours states as under:

> It has been held both in Allahabad and in Madras, 34 All 482[1] and 47 Mad 312,[2] that the Judge can accept a plaint at any hour he chooses, though outside office hours, and at any place he chooses, and I see myself no reason to doubt that the Clerk of the Court who is a duly constituted officer of the Court with power to accept a plaint under the Bombay Civil Courts Act, can accept that plaint outside office hours and outside the Court buildings, although I do not for a moment suggest that the Clerk is bound to accept a plaint out of Court hours.

This view fully supports the decision of the lower Courts and I entirely agree with the same. It is argued that once the Court lays down that a Judge or an officer appointed in that behalf may, if he chooses, receive a plaint, a memo of appeal or an application beyond office hours, it will necessarily mean 'must'. This argument has been answered by Coutts-Trotter J. in 47 Mad 312[2] at p. 315 and I entirely agree with him. I think it is in the discretion of the Judge or the officer appointed in that behalf to act as he did in this case, or refuse to do so, and if the discretion is exercised in favour of a litigant who unfortunately could not approach the Court or the officer appointed in that behalf during the usual Court hours but did manage to approach him on the last day of limitation and prevailed upon him to accept the presentation on that day, it could not be said that the discretion was not properly exercised.

It was further argued on behalf of the appellant that the officer appointed to receive plaints or applications is not the Judge himself and his act of acceptance of an application beyond Court hours was an act in excess of his powers and could not be valid unless ratified by the Court the same day, and as the Judge in this case did not ratify the action that very day, the presentation cannot be accepted as valid. This argument is fallacious. O. 4, R. 1 or O. 21, R. 10, does not limit the presentation of the plaint or application to the Judge only, but clearly lays down that the presentation may be to the Judge or the officer appointed in that behalf. If the presentation is not to the Judge but to the officer appointed in that behalf, it is a valid presentation and no question of ratification of his act arises, if such an officer accepts the plaint or application on that day though beyond office hours. As I have stated before, both are empowered to receive a plaint or an application and if the Judge can accept presentation beyond office hours there could be no objection for the officer appointed in that behalf to accept it beyond office hours. In this particular case the officer received the application at 9 P. M. and immediately endorsed thereon that it was presented to him that day within time and duly stamped. He also filled in an order sheet on the same date stating that it was so presented. He thus accepted the presentation as valid and no question of ratification by the Judge arises. In view of my observations in the preceding paragraphs, I hold that the presentation of the application to the Deputy Clerk of Court on 10th September 1934 at 9 P. M. and acceptance thereof by him though beyond office hours was a valid presentation. The appeal is therefore dismissed with costs. Pleader's fee Rs. 25.

K.B./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 47

POLLOCK J.

*Kisan Gopal Madan Gopal Marwadi* — Applicant.

v.

*Chunnilal Hanamantram and others* — Non-applicants.

Civil Revn. Appln. No. 295-B of 1935, Decided on 22nd July 1937, from order of Sub-Judge, First Class, Amraoti, D/- 21st September 1935.

**Succession Act (1925), S. 370—Succession certificate claimed to estate of deceased testator—Registered will set up by opponent —Court must first decide whether will was validly executed as it involves question of jurisdiction.**

In a case where succession certificate is claimed by a person to the estate of a deceased testator as heir and reversioner and the opponent sets up a registered will, the Court must first decide whether the will was validly executed and this will not involve a question whether the testator was entitled to dispose of the property mentioned in the will. If the Court decides that the will was validly executed, it has no jurisdiction to grant a succession certificate, and the question of jurisdiction must be decided first. [P 48 C 2]

**J. R. Mudholkar** — *for Applicant.*

**V. K. Rajwade** — *for Non-applicants.*

**Order.** — **Chunnilal, who is the non-applicant in this Court, applied for a succession certificate in respect of a decree**

passed in favour of Radhabai deceased, whose nephew and heir he claimed to be. Kisan Gopal, now the applicant, denied that Chunnilal was in any way related to Radhabai and claimed that in any case no succession certificate could be granted because Radhabai had left a registered will dated 18th November 1930 giving all her property, including this decretal claim, to him, Kisan Gopal. Chunnilal then pleaded that he was the next reversioner of Radhabai's husband, Rambakas, and that the decree had been obtained in a suit arising out of a transaction in a money-lending business which Radhabai had inherited from her husband and which she was incapable of disposing of by will because she had only a widow's interest in it. The lower Court framed the issues: (1) whether Chunnilal was related to Radhabai in the manner alleged; (2) whether Radhabai inherited any money-lending business from her husband or whether this money-lending business was her stridhan property; (3) whether the will dated 18th November 1930 bequeathed the whole estate to Kisan Gopal and whether the validity of the will could be disputed in these proceedings; and (4) who was entitled to the succession certificate. The learned Judge first stated that he would decide issue 3 alone to start with, but subsequently changed his mind and said that he would decide them all together. Against that order Kisan Gopal has come up in revision.

I will assume for the moment that the will (Ex. D-1) dated 18th November 1930 was validly executed by Radhabai without assuming whether she had any power to dispose of the property therein mentioned. Under S. 222, Succession Act, probate of a will shall be granted only to an executor appointed by the will, but the appointment may be expressed or by necessary implication. Here by the will Kisan Gopal was undoubtedly appointed the executor of Radhabai's estate impliedly if not expressly. As the will was made after 1st January 1927, Cl. (c) of S. 57 of the Act applies to it, and therefore under S. 213 (1) no right as executor or legatee can be established in any Court of justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed. No attempt has been made by Kisan Gopal to apply for probate of the will.

Under S. 211 of the Act the executor of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. S. 370 (1) provides that a succession certificate shall not be granted with respect to any debt or security to which a right is required by S. 212 or S. 213 to be established by letters of administration or probate, and S. 372 provides that an application for a succession certificate shall set forth the absence of any impediment under S. 370 or under any other provision of this Act or any other enactment to the grant of the certificate or to the validity thereof if it be granted. It is significant that the application for the succession certificate, which closely follows the form of such application given in No. 10 of the model forms at p. 482 of Mitra's Indian Succession Act, Edn. 2, omitted the statement which appears in that form, that the deceased did not make any will. Therefore it appears to me that where a deceased person has left a validly executed will, all her estate vests in the executor of the will and no succession certificate can be granted in respect of any part of her estate. The grant of such a succession certificate is barred by S. 370. In this case, therefore, the Court must first decide whether the will was validly executed by Radhabai, and this will not involve the question whether she was entitled to dispose of the property mentioned in the will. Chunnilal applied for a succession certificate in respect of her property, that is a decree passed in her favour, and if there is a valid will, no succession certificate can be granted in respect of it. If the Court decides that such a will was validly executed, then there can be no jurisdiction to grant a succession certificate, and the question of jurisdiction must be decided first. The application for revision is therefore allowed with costs, and the lower Court is directed to decide issue 3 first whether such a will was validly executed by Radhabai. Counsel's fee in this Court Rs. 20.

S.C./R.K. *Application allowed.*

## * A. I. R. 1938 Nagpur 49

POLLOCK J.

*Mt. Bhagirathibai w/o Panduji Kunbi — Decree-holder* — Appellant.

v.

*Ruprao Ranuji Kunbi and others — Judgment-debtors* — Respondents.

Misc. Appeal No. 107 of 1936, Decided on 26th August 1937, from order of Addl. Dist. Judge, Amraoti, D/- 29th November 1935.

*** Execution—Question relating to satisfaction of decree—Application by agent of decree-holder to Collector that decree was fully satisfied—Decree-holder alleging fraud by judgment-debtor on his agent—Application to set aside order of satisfaction—Collector can refer such question to Civil Court—Such application comes under S. 47, Civil P. C., and no separate suit is necessary.**

In execution of a decree the agent of the decree-holder along with the judgment-debtor applied to the Collector before whom the decree was sent for execution that the decree was fully satisfied and execution be struck off. Shortly after this the decree-holder applied that his agent was cheated by the judgment-debtor and that the decree was not satisfied. The Collector thinking that it required an investigation into question of law and facts referred it to the Civil Court:

*Held* that the Collector had authority to refer to the Civil Courts under R. 13 (Revenue Book Circular, Vol. 2, S. 3, serial No. 8) of the rules under S. 70 (1), Civil P. C., and that such application raised a question as to the satisfaction of a decree and as such lay under S. 47, Civil P. C., and no separate suit was necessary. [P 49 C 2; P 50 C 1]

V. K. Rajwade — *for Appellant.*

E. M. Joshi — *for Respondent No. 1*

**Order.**—In a suit for partition of joint family property, the Court awarded the present appellant, Mt. Bhagirathi Bai, an allowance of Rs. 150 per annum to be paid by Ruprao and Rs. 150 to be paid by Sadasheo and his son Pundlik, and these payments were made a charge on the family estate. The allowances seem to have been paid up to January 1927, and on 14th April 1931 Mt. Bhagirathi Bai applied for execution of the decree claiming Rs. 600 from Ruprao and Rs. 600 from Pundlik and Dayaram, the sons of Sadasheo. She asked that four fields should be sold subject to her charge, and a C form was eventually sent to the Collector. Before any sale took place, Ruprao and Bhagwantrao, who had been given a power of attorney to represent Bhagirathi Bai in the execution of the decree, filed an application before the Collector stating that the decree had been adjusted as the decree-holder had agreed to accept 8½ acres of land in full settlement of the decree and they asked that the decree be struck off as fully satisfied. Shortly afterwards Mt. Bhagirathi Bai applied to the Collector stating that her agent had been somehow or other cheated by Ruprao and that he had no power to compromise the decree and asking that the compromise should be declared a nullity and the case restored to the file. The Collector decided that this application raised points of law and fact which could be better decided by the Civil Court, particularly as the C form had been returned to the Civil Court. The decree-holder then applied to the Civil Court which held that the matter was not one falling under S. 47, Civil P. C., and that her remedy, if any, was by way of a separate suit to set aside the adjustment.

What the decree-holder is claiming is that the decree has not been fully satisfied, and this appears to me to be a matter relating to the satisfaction of the decree within the words of S. 47. In 19 I A 166[1] their Lordships of the Privy Council stated that they were glad to find that the Courts in India had not placed any narrow construction on the language of S. 244 which is now S. 47. In a somewhat similar case, in 24 All 209,[2] it was held that a separate suit did not lie, as the matter was one relating to the satisfaction of the decree. In that case certain property had been sold in execution and while an objection by the judgment-debtor was pending, the judgment-debtor's son entered into a compromise whereby it was agreed that the decree-holders, who had purchased the property, should accept it in full satisfaction of the decree although the price realised was less; the judgment-debtor subsequently filed a separate suit against the decree-holders for a declaration that the compromise was collusive and invalid and it was held, as I have said, that it was a matter relating to the satisfaction of the decree and that no separate suit lay.

It has been argued that the Civil Court had no jurisdiction to entertain this application, and that if anybody had jurisdiction to entertain it, it was the Collector. It has been conceded that the Collector is not a Court and that he is an official who carried

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**1. Prosunno Coomar Sanyal v. Kali Das Sanyal, (1892) 19 Cal 683=19 I A 166=6 Sar 209 (P C).**

**2. Adhar Singh v. Sheo Prasad, (1902) 24 All 209=1902 A W N 18.**

out certain duties imposed upon him in the execution of decrees. After he has carried out those duties, he returns the case to the Civil Court, and if the Collector is not functus officio, I cannot see how the Civil Court, to whom the case has to be returned, can be said to be functus officio. It may be that the Collector should have determined this application himself, but the note to R. 13 of the rules under S 70 (1), Civil P. C., contained in Revenue Book Circular, Vol. 2, S. 3, serial No 8, states that there is nothing to prevent the Collector from referring any point on which he has doubt to the Civil Court for decision. He referred this point to the Civil Court for decision, and no appeal against that order was preferred.

In my opinion therefore, the Civil Court had power to decide whether the decree had been satisfied, and this was a matter falling within S. 47, Civil P. C. Even if it were held not to fall within S. 47, it was open to the Civil Court under sub-s. (2) to treat the application as a suit, and I see no reason why it should not have been treated as a suit. The appeal is therefore allowed with costs, and the application is returned to the lower Court for disposal. No counsel's fee as no certificate has been filed.

B.D./R.K. *Appeal allowed.*

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## A. I. R. 1938 Nagpur 50

POLLOCK J.

*Kisanlal Sheokaran Marwadi* — Appellant.

v.

*Dinaji Zamaji Marathe* — Respondent.

Misc. Appeal No. 148 of 1937, Decided on 30th August 1937, from order of Addl. Dist. Judge, Amraoti, D/- 16th March 1936.

**Provincial Insolvency Act (1920), S. 4—Insolvency—Transfer by insolvent annulled—Insolvency Court has jurisdiction to enquire into mesne profits payable by transferee.**

Where on the insolvency of a person the transfer made by him in favour of a person has been annulled, the Insolvency Court has, under S. 4, jurisdiction to enquire into the mesne profits payable by the transferee of the insolvent: *9 N L R 182, Disting.* [P 50 C 2]

W. B. Pendharkar and A. V. Khare — *for Appellant.*

S. B. Gokhale — *for Respondent.*

**Order.**—Bablaji and Prithamji were adjudged insolvents on a petition presented by their creditor Kisanlal, and on 27th September 1929 a transfer of survey no. 41/1 made by Bablaji and Prithamji in favour of Sayaji was annulled. Sayaji had transferred this field to Zamaji, the father of Dinaji. On 22nd January 1934 Kisanlal applied to recover mesne profits of this field for four years from 1929-30 to 1932-33, and the Insolvency Court held that the mesne profits were Rs 60 per annum and directed Dinaji to pay Rs. 240. On appeal the learned Additional District Judge held that the Insolvency Court had no jurisdiction to make such an order.

The learned Additional District Judge relied on the decision in 9 N L R 182,[1] where it was held that the Insolvency Court has no power summarily to order a debtor of the insolvent to deposit the amount of the debt into Court. That case may be distinguished on this ground that the debtor denied that he owed anything to the insolvent. In 52 Mad 717[2] it was held that, where the Official Assignee seeks to recover a debt which is not admitted, it is a matter of discretion for the Judge sitting in insolvency whether he should deal with such a claim in the Insolvency Court or refer it to the machinery of the ordinary Courts. S. 4, Provincial Insolvency Act, confers very wide powers on the Courts and those powers are, in my opinion, sufficient to enable the Court to inquire into a case of this sort. Whether it should inquire into or not would be a matter for its discretion, but in the Insolvency Court it was never suggested that an inquiry should not be made. S. 59, Provincial Insolvency Act, to which reference was made in 9 N L R 182,[1] states the duties and powers of a receiver but that does not, in my opinion, limit the power of the Court conferred by S. 4.

It has been contended in this Court that the claim for mesne profits for the year 1929-30 was barred by limitation, and that the estimate of Rs. 60 per annum as the mesne profits failed to take into consideration the land revenue payable for the field. Limitation was not pleaded in the Insolvency Court, and it was open to the Insolvency Court to deal with this matter on an application to which the provision of limitation would not apply. In assessing the mesne profits at Rs. 60 per annum, the Insolvency Court adopted a very moderate figure, and the point that the land revenue had not been considered was not then taken. The respondent Dinaji produced accounts which the lower Courts thought were false, and I think that there is no ground for reducing this figure in second appeal. The appeal must therefore succeed and is allowed with costs throughout. The order of the Insolvency Court is restored. Counsel's fee Rs 10.

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[1] Govind v. Gopala, (1913) 9 N L R 182=22 I C 69.

[2] Official Assignee of Madras v. Narasimha Mudaliar, A I R 1929 Mad 705=118 I C 506 =52 Mad 717=57 M L J 145 (F B).

D.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Nagpur 51

POLLOCK J.

*Tilakchand Ratanlal Marwadi* — Applicant.

v.

*Ramkisan Ganeshdas Marwadi and others*—Opposite Party.

Civil Revn. Appln. No. 151 of 1936, Decided on 30th July 1937, from decree of Judge, Small Cause Court, Hinganghat, D/- 6th December 1935.

**Stamp Act (1899), Sch. 1, Art. 1—Acknowledgment—What is.**

A document is not an acknowledgment within the terms of Art. 1 of Sch. 1 unless it is given with the dominant intent to supply evidence of the debt. The Court has to apply its mind to the question, looking at the document and the surrounding circumstances, what was the intention with which it was given : *A I R 1924 Mad 352, Rel. on.* [P 51 C 2]

V. K. Rajwade—*for Applicant.*

J. R. Mudholkar—*for Opposite Party.*

**Order.**—The plaintiff sued to recover the balance of the price of goods supplied with interest thereon. The goods were supplied in November 1929 and the suit was brought in November 1934, but the plaintiff relied on a letter dated 31st December 1931 for saving limitation. That letter contains an acknowledgment of liability for Rs. 359-0-9 and, if admissible in evidence and binding on the defendants, would undoubtedly save limitation under S. 19, Lim. Act. The Small Cause Court held that the letter was an acknowledgment of a debt within the terms of Art. 1 of Sch. 1, Stamp Act, requiring a stamp of one-anna and that in the absence of a stamp was inadmissible in evidence.

Article 1 of Schedule 1 refers to an acknowledgment of a debt written in order to supply evidence of such debt and a Full Bench of the Madras High Court held in 46 Mad 948[1] that a document is not an acknowledgment within the terms of Art. 1 of Sch. 1, unless it is given with the dominant intent to supply evidence of the debt. It further stated that the Court has to apply its mind to the question, looking at the document and the surrounding circumstances, what was the intention with which it was given. The letter contains the following words :

> Your gumasta came this day and therefore the account of your khata has been tallied up to 10th November 1931 and Rs. 359-0-9 have been found due to you. So you will please enter the same as due. Errors and omissions excepted.

I consider there is nothing in this document or in the surrounding circumstances from which it can be inferred that it was written in order to supply evidence of the debt, and it seems to me to have been written, like the document in the Madras case,[1] to arrive at a statement of account. I do not see that there is anything in the previous conduct of the plaintiff which throws light on the motive of the defendant; still less can the subsequent conduct of the plaintiff supply any key to this motive, and, if the fact that the plaintiff thought that this document gave him a fresh start for limitation indicates anything at all, it would indicate that he thought that this document would be admissible in evidence to save limitation, and was therefore not an acknowledgment of the debt requiring a one-anna stamp under Art. 1 of Sch. 1.

It has been suggested that if a document contains an admission of liability which would save limitation under S. 19, Lim. Act, then it is necessarily an acknowledgment of a debt falling under Art. 1 of Sch. 1. That is not so. In order to fall within the terms of Art. 1 of Sch. 1, the acknowledgment must, as I have pointed out, be written with the intention of supplying evidence of the debt. The application for revision is therefore allowed with costs, and the case is remanded for trial on the merits. The letter of 31st December 1931 is admissible in evidence, and if it is proved to be binding on the defendants it will save limitation. Counsel's fee Rs. 15.

S.C./R.K. *Application allowed.*

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[1] Chandick v. Ananta Lal Damani, A I R 1924 Mad 352=74 I C 1029=46 Mad 948=45 M L J 899 (F B).

## ✲ A. I. R. 1938 Nagpur 52

GRILLE AND VIVIAN BOSE JJ.

*Shaligram Ratanlal Garhewal*
Appellant.
v.
*Emperor.*

Criminal Appeal No. 139 of 1937, Decided on 7th August 1937.

**(a) Criminal Trial — Evidence—Opinion by police officer that witness is young and likely to be upset by questions is receivable as observation.**

The opinion of a police officer that a certain witness is young and he is a type likely to be upset by questioning is a matter of observation and so receivable if not as evidence. [P 53 C 1]

**(b) Criminal Trial—Evidence—Existence of a few small blood stains on shirt or dhoti of accused – Evidentiary value.**

Villagers often have blood-stains on their clothes. Their occupation is of such a nature as to render this inevitable. The existence of a few small blood-stains on a man's shirt or dhoti is not enough to found a conviction in itself, though it is important corroborative evidence when the accused is directly implicated by other evidence or circumstances. [P 53 C 1]

**✲ (c) Criminal Trial—Assessors — Value of their opinions.**

The opinion of the assessors is of course entitled to due consideration, especially of intelligent assessors and especially when they consider a man guilty, for it is so seldom that that happens in capital cases. But they have not the legal training which will enable them to distinguish suspicion from proof. Hence in a case where the evidence against the accused does not travel beyond suspicion, it is not safe to convict the accused on the mere opinion of the assessors. [P 53 C 2]

**✲ (d) Criminal P. C. (1898), S. 517 — Accused acquitted — Property seized from him cannot be confiscated on ground of suspicion without proving that it does not belong to him.**

An order directing that a sum which was seized from the possession of the accused whom the Judge has acquitted to be forfeited to Government on the ground that it has not been satisfactorily accounted for and is tainted with suspicion, is wrong. However strong the suspicion may be, the Crown has no right to confiscate property seized from another's possession without proving that it does not belong to him : *A I R 1927 Cal 532 and 22 Bom 844, Rel. on.* [P 53 C 2]

**(e) Criminal Trial — Judgment — Accused acquitted — Money found in his possession confiscated — Order should be incorporated in judgment.**

Where a Judge in a criminal trial orders a sum seized from the possession of an accused whom he acquits to be forfeited, such order should be incorporated in the judgment or at any rate added as a footnote to it. [P 53 C 2]

E. M. Joshi — *for Appellant.*

M. R. Bobde, Advocate-General — *for the Crown.*

**Judgment.** — Three persons Gangaram, Saligram and Bhola were prosecuted for the murder of one Rama Gosain. The first two have been convicted and sentenced to death while the third has been acquitted. The deceased was found early in the morning of 14th February 1937 lying dead on the verandah of a house situate in an orange garden belonging to one Khuman Patel. He was found naked except for a loin cloth and his clothes, all blood-stained, were found lying around. His few possessions were also on the verandah but had not been disturbed. There cannot be the slightest doubt that he was murdered. He was a sadhu who lived by begging. He had at one time lived in the village where he was killed but had left it some two or three years ago, returning only on and off. His last return was early in February, not long before the murder. This time he took up his abode at the house of Khuman Patel in the orange garden which was situate about a mile out of the village Waraseoni. The motive is said to have been robbery and we think that is probable though a sum of nine annas and six pies was found among his clothes and as we have said his few possessions were undisturbed. It is true there is nothing to indicate that the deceased was possessed of money when he died but there is evidence to show that he had Rs. 40 with him when he came to visit his nephew Ratanlal (P. W. 15) in Magh and also that he lent the witness's father Rs. 20 for the witness's marriage. Of course this does not prove that he had any money with him when he was killed, but it is enough to indicate that others might have thought that he had, and in any case, we can find no other reasonable explanation for the crime. Suspicion centred on the three accused but after examining the evidence we do not think it is legally sufficient to sustain a conviction. It is established that the three accused were seen together three times on the day of the murder, i. e. on 13th. P. W. 2, Sunao, saw them at 10 in the morning near a mahua tree close to the main road about 50 paces from this garden. P. W. 3, Ratan, saw them about noon on the road coming towards the village from the direction of the garden. He does not give us the day or any data from which we can deduce what day it was, but even if it be accepted that he saw them on the day of the murder it does not carry the prosecution case any further. The last time they were seen was late that night about 500 paces from the place of the crime : this was by P. W. 8, Sarawan.

This evidence does establish that they were together and that they had been loitering about the vicinity of the garden most of the afternoon and also in the night. But when we find that this is a main road on which many persons pass to and fro day and night, and that the canal crossing a short distance from the garden is a place of public resort, where people sit together and smoke and talk, these facts are robbed of most of their significance. There is nothing suspicious in the fact that the three were seen so much together, for, P. W. 1, Phagia, says that they are fast friends and are always together. The only other evidence against them is that Gangaram is said to have been upset when questioned by the Sub-Inspector and that his dhoti and shirt are stained with human blood. As regards the first, though the learned Sessions Judge has mentioned this fact in his judgment, we do not think he meant to use it as evidence against Gangaram. We think he was merely explaining how suspicion came to centre on these three persons. In any case the Sub-Inspector tells us that Gangaram is young and that he puts this down to that fact. Of course his opinion as regards that is not evidence but the fact that Gangaram is young and the fact that he is a type likely to be upset by such questioning is a matter of observation and so receivable.

With respect to the blood-stains, the dhoti, article A, has six stains on it of which the largest is $\frac{1}{2}''$ in diameter and the shirt three, of which the largest is $\frac{1}{4}''$. There is no denying the fact that this raises an element of suspicion against the accused, but we do not think it can travel beyond that. Villagers often have blood-stains on their clothes. Their occupation is of such a nature as to render this inevitable. The existence of a few small blood-stains on a man's shirt or dhoti is not enough to found a conviction in itself, though it is important coroborative evidence when the accused is directly implicated by other evidence or circumstances. The evidence against Saligram is even more slender. Three minute stains of human blood were found on his shawl, article E, which was recovered from his house. The learned Sessions Judge seems to have felt this, for he remarks that the case is one on the border line and eventually decides in favour of conviction because of the opinion of the assessors. Without it, we doubt if he would have convicted. The opinion of the assessors is of course entitled to due consideration, especially of intelligent assessors of the kind we find here, and especially when they consider a man guilty, for it is so seldom that that happens in capital cases. But when all is said and done, they have not the legal training which will enable them to distinguish suspicion from proof and as in the present case we are unable to find that the evidence against the accused travels beyond suspicion, we are unable to uphold the convictions and so acquit the accused and direct that they be set at liberty.

We find from the order-sheet of the learned Sessions Judge dated 2nd July 1937 that he has ordered a sum of Rupees 15 which was seized from the possession of Bhola, whom he acquitted, to be forfeited to Government on the ground that it "has not been satisfactorily accounted for and is tainted with suspicion". We think an order of this kind should have been incorporated in the judgment or at any rate added as a footnote to it. As Bhola has been acquitted, the order came to our notice only by accident. In the ordinary way we would not have seen it. In our opinion the order is wrong. The property was seized from Bhola and since he has been acquitted, it must be returned to him. However strong the suspicion may be, the Crown has no right to confiscate property seized from another's possession without proving that it does not belong to him. S. 517, Criminal P. C., confines the powers of confiscation to property "regarding which any offence appears to have been committed or which has been used for the commission of any offence". The learned Sessions Judge has acquitted Bhola on the ground that there is nothing to identify these coins as the property of the deceased. No offence appears to have been committed as regards these coins. Therefore the learned Sessions Judge had no power to make an order of forfeiture. We set it aside and direct that the Rupees 15 be returned to Bhola : 54 Cal 283[1] and 22 Bom 844.[2]

D.S./R.K. *Appeal allowed.*

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[1] Sattar Ali v. Afzal Mahomed, A I R 1927 Cal 582=102 I C 489=28 Cr L J 546=54 Cal 283.

[2] In re Devidin Durgaprasad, (1898) 22 Bom 844.

## ✻ A. I. R. 1938 Nagpur 54

PURANIK J.

*Ramchandra Marotrao Wanjari* — Appellant.

v.

*Ramchandra Gujaba Shrawane* — *Judgment-debtor* — Respondent.

Second Appeal No. 23 of 1935, Decided on 31st July 1937, from decree of Dist. Judge, Nagpur, D/- 20th September 1934.

**(a) Civil P. C. (1908), O. 21, R. 89 — Interpretation—Words "less any . . . . decree-holder" do not refer to withdrawal of sale proceeds deposited in Court but refer to payment out of Court.**

The words "less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder" in O. 21, R. 89, refer to a payment made to the decree-holder out of Court and not to the withdrawal by the decree-holder of the sale proceeds deposited in Court by the auction-purchaser : *23 Bom 723* ; *A I R 1916 Mad 717* ; *A I R 1930 Pat 318* ; *1 C W N 703 and A I R 1933 All 155, Rel. on.* [P 55 C 1]

**✻ (b) Interest — After decree — Sale proceeds deposited in Court are not payable to decree-holder till confirmation of sale — Mortgage decree awarding interest till realisation — Decree-holder is entitled to interest till date of confirmation of sale.**

The amount deposited by the auction-purchaser on the date of sale and on the 15th day after the sale is not intended to be paid to the decree-holder immediately on deposit but on confirmation of the sale. It is on confirmation of sale that the auction-purchaser's title to the property purchased by him is declared though it relates back to the date of the sale. Till then, his title is subject to the proceedings that may be taken by persons interested in the property for setting the sale aside. [P 55 C 2 ; P 56 C 1]

Where therefore a mortgage decree directs the payment of interest on the decretal amount till realisation, the decree-holder is entitled to interest up to the date of confirmation of sale and not up to the date when the sale proceeds are deposited in Court. [P 56 C 1]

R. N. Padhye — *for Appellant.*

**Judgment.**—The only point involved in this second appeal is whether interest on the mortgage decree should be allowed till the confirmation of the sale of the mortgaged property or till the date on which the purchase money was deposited in Court by the auction-purchaser. The decree directed payment of interest on the decretal amount till realisation. The trial Court held that the decree-holder was entitled to interest till the confirmation of the sale, while the lower Appellate Court has taken the view that interest should be allowed only up to the date the purchase-money was deposited in Court by the auction-purchaser. It is against this decision of the lower Appellate Court that this second appeal has been filed here. The lower Appellate Court has not referred to any express provision of law under which it comes to the conclusion that the amount deposited by the auction-purchaser could be withdrawn by the decree-holder on the date on which it was deposited. He expressed an opinion that O. 21, R. 93, Civil P. C., implies that purchase money may be paid to the decree-holder immediately after it is deposited by the auction-purchaser. The Rule reads thus:

> Where a sale of immovable property is set aside under R. 92, the purchaser shall be entitled to an order for repayment of his purchase money, with or without interest as the Court may direct, against any person to whom it has been paid.

I do not think that the lower Appellate Court was justified in holding that there was an implication in this Rule that the money could be withdrawn by the decree-holder before the confirmation of the sale. This Rule is intended to arm the Court with power to order the return of the money to the purchaser in case the same has been paid to any person in the meantime, as it is the duty of the Court to see that the purchaser whose sale is set aside should not in any way suffer and should get back his amount. It should not be read as containing an implication that the decree-holder is entitled to withdraw the purchase money before the confirmation of the sale during the execution proceedings in the executing Court.

Order 21, R. 84, Civil P. C., requires the purchaser to deposit 25 per cent. of the amount of his purchase money immediately after the sale in his favour. R. 85 requires him to deposit the balance on or before 15th day from the sale of the property. R. 86 lays down that if there be any default in depositing the balance on or before the 15th day from the sale of the property, the deposit already made will be forfeited to the Government after defraying the expenses of the sale. It will thus be clear from these Rules that the Legislature intended that the deposit made by the purchaser on the date of the sale continues to be a deposit with the Court and no decree-holder will be entitled to withdraw as soon as it is deposited. If the view taken by the lower Appellate Court be accepted, it will not be possible to give effect to these provisions of law.

Order 21, R. 89 enacts that the judgment-debtor or any person, either owning such property or holding an interest therein, may apply to have the sale set aside on his depositing in Court for payment to the purchaser a sum equal to 5 per cent. of the purchase money and for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder. This Rule also contemplates that the deposit made by the purchaser is at the disposal of the Court for payment to the purchaser in case an application under O. 21, R. 89 is filed and eventually accepted by the Court. No doubt the Rule contains the words "less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder", but these words refer to the payment made to the decree-holder out of Court and not to the sale proceeds deposited in Court and not to the withdrawal by the decree-holder. 23 Bom 723[1] lays down that the term 'received' as used in this Rule contemplates an actual receipt of the amount by the decree-holder. A mere payment into Court of the sale proceeds does not constitute receipts within the meaning of this Rule. The same view has been taken in 39 Mad 429.[2] Where properties are sold in separate lots in execution of a decree, it is not open to the judgment-debtor to apply under O. 21, R. 89 to set aside the sale of some only of such lots. The application must be to set aside the sale of all the lots: 9 Pat 310[3] and 1 C W N 703.[4] In 55 All 123[5] at p. 125, Sulaiman C.J. and Kisch J. stated as under:

> So long as the sale of the other items has not been confirmed, the decree-holder has not even the right to apply to the Court for the payment of the money to him. It is therefore impossible to hold that the decree-holder can be deemed to have received the amount deposited by the auction-purchasers before the sale has been actually confirmed. As a matter of fact, the view taken in some of the other High Courts is that the word 'received' must be taken in its literal sense and it is the actual receipt of the money by the decree-holder and not the deposit of any amount by the auction-purchasers in Court which is contemplated by O. 21, R. 89, Cl. (b). But in any case, it is clear that so long as the decree-holder has not the right to take the money out of Court before confirmation, it cannot be said that the money has been received by him merely because it has been deposited to his credit. In this view of the matter, it seems almost impossible for a judgment-debtor to take advantage of the fact that other sales have taken place on the same date and that auction-purchasers have deposited amounts, and to claim credit for those sums and deduct the same from the amount which he offers to pay. He has to pay the amount in Court within 30 days whereas the confirmation of the sale of the other items cannot take place within that time. If the law were otherwise, a judgment-debtor would be able to pick and choose and apply for the setting aside of the sale of only one of the several items, which may have been sold cheap, on payment of its sale price and penalty, claiming credit for the payment of the sale price of the other items.

The view taken by the lower Appellate Court is contrary to the implications of O. 21, R. 89, Civil P. C. The Civil Procedure Code contemplates proceedings for setting aside sales under O. 21, R. 89, or O. 21, R. 90. The title which the purchaser gets on sale is subject to these proceedings, if any of these proceedings are taken and the sale is set aside. It is but just and proper that the auction-purchaser who has deposited the purchase money in Court should get it immediately from the Court and it does not appear reasonable to ask him to realize from the decree-holder to whom it has been paid immediately on deposit as held by the lower Appellate Court. In many cases this will involve a great risk for the purchaser, as for instance, in a case where the decree-holder is not a man of substance or is in the meantime declared insolvent or runs away with the amount paid to him and has no property. A purchaser would necessarily look to the Court for the return of the amount which has been paid by him in Court subject to the rules laid down in Civil Procedure Code and it is not proper to allow the decree-holder to withdraw those amounts till objections to the confirmation of sale are investigated into and decided, and it is held that the sale is to be confirmed. I am clearly of opinion that the amount deposited by the auction-purchaser on the date of sale and on the 15th day after the sale is not intended to be paid to the decree-holder immediately on deposit but on confirmation of the sale.

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1. Trimbak v. Ramchandra, (1899) 23 Bom 723 =1 Bom L R 215.
2. Karunakara v. Krishna, A I R 1916 Mad 717 =27 I C 952=39 Mad 429=28 M L J 262.
3. Rameshwar Singh Bahadur v. Mongal Prasad Sahu, A I R 1930 Pat 318=125 I C 570=9 Pat 310=11 P L T 880.
4. Kripa Nath Pal v. Ram Lakshmi Dasya, (1897) 1 C W N 703.
5. Mannu Naik v. Mathura Prasad, A I R 1933 All 155=143 I C 127=55 All 123=1932 A L J 1107.

It is on confirmation of sale that the auction-purchaser's title to the property purchased by him is declared, though it relates back to the date of the sale. Till then, his title is subject to the proceedings that may be taken by persons interested in the property for setting the sale aside. It would be unjust to pay the amount to the decree-holder and then leave the auction-purchaser to the risk of realizing it from the decree-holder after the sale is set aside.

In practice, so far as I have been able to ascertain, the amount deposited by the auction-purchaser is not paid to the decree-holder immediately on deposit, but is paid only after the confirmation of sale. If the sale is set aside, the amount is returned to the purchaser. I may also note that if the view taken by the lower Appellate Court were to be accepted, proceedings for rateable distribution contemplated by S. 73 will not be possible. I therefore set aside the order of the lower Appellate Court and hold that the decree-holder was not entitled to receive the amount till after the confirmation of sale. He was therefore entitled to interest up to the date of confirmation of sale. The lower Appellate Court is also not right in saying that the judgment-debtor is not responsible for the delay in the confirmation of sale. The judgment-debtor himself had applied for setting aside the sale under O. 21, R. 90, and had also filed an application under S. 47, Civil P. C. In addition to this, the wife of the judgment-debtor had instituted a suit claiming interest in the property and thus delaying the confirmation of sale. It could not therefore be said that the judgment-debtor was not responsible for the delay in the confirmation of sale. Such a judgment-debtor could not be heard to say that interest should not be allowed to the decree holder till the date of the confirmation of sale. The order of the lower Appellate Court is set aside and that of the trial Court restored. The judgment-debtor will pay the costs of the decree-holder appellant. Pleader's fee Rs. 10.

K.B./R.K. *Order set aside.*

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## A. I. R. 1938 Nagpur 56

GRUER J.

*In re Prithivinath and others*
**Accused.**

Criminal Ref. No. 433 of 1936, Decided on 2nd February 1937, made by Sess. Judge, Hoshangabad, D/- 9th November 1936.

**(a) Criminal P. C. (1898), Ss. 435 and 438—Abstract questions of law should not be referred to High Court—Sessions Court finding no illegality, etc.—There is no ground for reference.**

Abstract questions of law should not be referred to the High Court for decision in pending proceedings. The object of Ss. 435 and 438 is that incidents of incorrectness, illegality or impropriety should be brought to the notice of the High Court, and where the Sessions Court itself considers that there has been no illegality, etc. there is no proper ground for making a reference: *2 All 771 and A I R 1925 All 318, Rel. on.* [P 57 C 1, 2]

**(b) Criminal P. C. (1898), Ss. 28, 30—S. 28 is subject to S. 30, though not mentioned—Object of S. 30.**

Section 28 is subject to S. 30 though not mentioned in it. [P 57 C 2]

The object of conferring special powers on District Magistrate is to accelerate proceedings at the trial by avoiding the delay consequent on commitment to the Sessions Court which sits only at considerable intervals. It is also intended to afford relief to those who have to attend as witnesses in the Court: *7 C W N 457, Rel. on.* [P 58 C 1]

**(c) Criminal P. C. (1898), S. 269—Power of Local Government to exclude Court of Session from taking cognizance of certain offences.**

The wording of S. 269 does not derogate from the power otherwise given to the Local Government to prescribe which offences should not come before the Court of Session. [P 58 C 1]

**(d) Criminal P. C. (1898), Ss. 29 and 269—Ss. 29 and 269 cannot be read together.**

Section 269 cannot be read with S. 29 so as to hold that the Local Government may direct that all or any class of offences not punishable with death shall be tried by jury before the Sessions Court, and not by Magistrates invested with power under S. 30. [P 58 C 1]

**(e) Criminal P. C. (1898), S. 526—Mere fact that case arouses public interest and excitement is no ground for transfer.**

Where the challan does not disclose that the facts of the case are of any extraordinary complexity or involve any specially difficult questions of law, the mere fact that public interest and some excitement has been aroused is no reason for the transfer of the case. [P 59 C 1]

W. R. Puranik — *for the Crown.*

Dr. Hari Singh Gour and W. C. Dutt — *for Accused.*

**Order.**—This is a reference by the Sessions Judge, Hoshangabad, asking for orders on certain points which have arisen in Criminal Case No. 50 of 1936, King Emperor v. Chhotedada, which is pending before Rao Sahib Nirgundkar, Magistrate, First Class, Hoshangabad. Amongst the sections mentioned in the challan are Ss. 333 and 295, I. P. C., which, according to Column 8 of Sch. 2 of the Code, are exclusively triable by the Court of Session. Three of the accused, namely Chhotedada, Bhaironnath and Babulal, have also preferred an application on their own account which is registered as Criminal Revision No. 434 of 1936, while the remaining accused have made an application in similar terms, which is numbered as No. 435 of 1936. In these applications the legality of the trial before the Magistrate is questioned, and transfer of the case to the Sessions Court and trial by a jury are asked for on grounds of expediency. The reference and both these applications have been heard together and this order will dispose of all of them.

The case arose out of certain incidents which occurred in Khandwa at an Ashram of which the accused Chhotedada is said to be the head. The prosecution alleged that a police party was beaten by the accused, and a second party which came to the assistance of the first was also beaten. An objection was taken to the framing of the challan and it has now been revised and made more definite. There were originally 31 accused, but their numbers have now been reduced to 19; the prosecution of the remainder has been dropped. In July of last year, on application by the accused, Bose J. ordered transfer of the case to Hoshangabad, directing that it should be tried by a Magistrate of that district having powers under S. 30, Criminal P. C. Now, in Col. 3 of the present reference the learned Sessions Judge states that "nothing is considered illegal, but clarity for the proceedings is sought so that the trial may proceed smoothly". From the detailed grounds of reference, it appears that the chief point urged before the learned Sessions Judge was that the Magistrate has not in law the power to try such a case and the proper tribunal is the Court of Session with a jury. That is also the point which is mainly agitated here. The learned Government Advocate takes a well-founded objection that the reference by the Sessions Judge was unnecessary and irregular; firstly, because abstract questions of law should not be referred to the High Court for decision in pending proceedings (2 All 771[1] and 47 All 409[2]), secondly, the object of Ss. 435 and 438 is that incidents of incorrectness, illegality or impropriety should be brought to the notice of the High Court, and where the Sessions Court itself considers that there has been no illegality, etc., there is no proper ground for making a reference. The Sessions Judge has so found except with regard to a point about joinder of parties to which reference will be made later. The Sessions Judge should note the above remarks for his future guidance. At the same time this Court is not precluded from dealing with the reference, as the matter has been brought to its notice, and secondly, as I take it, that the accused, although in somewhat hesitating terms, have reasserted the legal objection in their present applications.

Their senior learned counsel first of all attacked S. 30, Criminal P. C., on the ground that the Central Provinces is no longer a territory administered by a Chief Commissioner. This objection was withdrawn when his attention was directed by the other side to S. 31, General Clauses Act. The next contention is that S. 30 does not overrule the Schedule to the Criminal Procedure Code, according to which certain offences are triable exclusively by the Court of Session. Stress is laid on the words in S. 30 "notwithstanding anything contained in S. 29" and it is argued that as S. 28 has not been mentioned it is only S. 29 (which refers exclusively to offences under any other law, not under the Penal Code) which is affected by S. 30. The answer to this is that the Schedule to the Code and S. 28 must obviously be read together, and S. 28 is subject to the other provisions of this Code, that is, it is subject to S. 30. The reference to S. 29 which occurs in S. 30 is explainable historically. S. 29, previous to the Act of 1923, used to read "subject to provisions of S. 447, etc."; now it reads "subject to the other provisions of this Code". Thus a reference to S. 29 was previously necessary in S. 30, and this reference seems to have been retained, although as a matter of fact owing to the above amendment, it would appear now to be *otiose*. S. 30

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1. **Empress of India v. Bhup Singh, (1878) 2 All 771.**
2. **Emperor v. Madho Singh, A I R 1925 All 318 =86 I C 801=26 Cr L J 86=47 All 409=23 A L J 189.**

speaks of "all offences not punishable with death" and must include those that would normally go to the Sessions Court. As pointed out long ago in 7 C W N 457[3]:

> The object of conferring special powers on District Magistrates is to accelerate proceedings at the trial by avoiding the delay consequent on commitment to the Sessions Court which sits only at considerable intervals. It is also intended to afford relief to those who have to attend as witnesses in the Court.

Next it is urged that S. 269, Criminal P. C., only gives the Local Government power to add a jury to the Court and that any notification which goes beyond that, such as those embodied in Criminal Circular No I-25, is ultra vires. It is said that S. 269 does not give a Local Government any right to specify the place of trial and also asserted that Amendment No. 5 to this Circular dated 5th August 1930 has not been published in the C. P. Gazette as required by S. 269. The plain words of S. 269 are that any particular class of offences before a Court of Session may be directed to be tried by a jury. This implies that the offences must be before the Court of Session and cannot derogate from the power otherwise given to prescribe which offences should not come before that Court. Further, this clause speaks of "all or any particular class of offences" and of "any district" and thus gives discretion both as regards the crime and the place of trial. This objection was unsuccessfully raised some years ago by the same learned counsel before Staples A. J. C. in Misc. Petn. No. 82 of 1930.[4] I reproduce the following passage from the order of the learned A. J. C. which in my opinion effectually disposes of the point:

> It is true that under S. 29, Cl. (2), of the Code offences may be tried by any Court constituted under the Code, by which such offence is shown in col. 8 of Sch. 2 to be triable, and according to that column these offences would be triable by the Court of Session. In Cl. (2) however the words 'subject as aforesaid' occur, which mean 'subject to the other provisions of this Code', and that would of course include the provisions of S. 30, by which Magistrates may be empowered to try all offences not punishable with death. I do not therefore think that S. 269 can be read with S. 29 so as to hold that the Local Government may direct that all or any class of offences not punishable with death shall be tried by jury before the Sessions Court, and not by Magistrates invested with power under S. 30. Also it may be noted, as indicated above, that in the notifications the Local Government has, as a matter of fact, been careful to insert the words 'when held before the Court of Session'. Of course, the Local Government could bring about such a result by refusing to invest Magistrates with powers under S. 30, and then there would be no alternative but to have such offences committed for trial to the Court of Session; but, although Government could no doubt effect this result it does not follow that Government has power, when it has invested Magistrates with powers under S 30 to say that those powers shall not be exercised and that under S. 269 all offences, which can be tried by Magistrates invested with powers under S. 30, shall be committed to the Sessions and shall there be tried by a jury; and, as already indicated above, Government has been careful not to make any such order.

As for Amendment No. 5, the learned Government Advocate has not been able to trace publication, but if this amendment is not in order, we should simply have to be bound by the previous para. 10 which on the above view cannot afford any assistance to the applicants' argument. Reference was also made to Criminal Circular No. I-4, R. 6, which was also said to be ultra vires as not being published by notification. Here again the ignoring of this circular would not advance the applicants' plea that Sessions trial by a jury was essential, and I have to remark that this circular does not purport to be under S. 269 but seems to be advisedly framed in an administrative form giving directions to the District Magistrates about the distribution of criminal work which they are empowered to effect under sub-s. (1), S. 17, Criminal P. C. I therefore do not find myself pressed by the argument that the Magistrate had no jurisdiction in this case. It would be strange if an illegality of this nature should have remained unexposed for so many years in a number of provinces. I do not find that there is any difficult or doubtful point of law involved which would justify me in referring the point for decision to a Division Bench as suggested.

Turning now to the applications for transfer on general grounds, I have to note that the learned Government Advocate demurred to the application as not being a formal one complying with S. 526, Criminal P. C. On the other hand, counsel for the applicants says that there is nothing wrong in making this request for transfer as a sequel to their application about jurisdiction. I think the Government Advocate is technically correct, but in the view I am taking of the matter, I do not consider it necessary to refrain from dealing with the application on that score. The applicants would be willing to put in a separate formal application for transfer, but that would serve no useful purpose and would only delay matter.

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[3] Amir Khan v. Emperor, (1903) 7 C W N 457.

[4] Rupchand Debiprasad v. Emperor, Misc. Petn. No. 82 of 1930, decided on 31st October 1930.

The transfer of this case to the Sessions Court is sought for, because it is said to be one involving complicated facts and law and because it has aroused a considerable amount of public interest. It is also said that the accused might set up a right of private defence and allege misconduct on the part of the police and desecration of the Ashram; and further that some officials of a higher rank than the trying Magistrate might be cited as witnesses. On the other hand, the learned Government Advocate points out that the special features of the case were brought to the notice of this Court when the application for transfer from Khandwa was made and it was not then urged that the trial should be before the Court of Session. The present application really amounts to asking for review of the order of this Court passed by Bose J., and there are no grounds proper for such a review. It is said that there is nothing to show that the Magistrate would be unable to deal with the case satisfactorily, and it is urged that the application should be rejected; the challan does not disclose that the facts of the case are of any extraordinary complexity or involve any specially difficult questions of law. The mere fact that public interest and some excitement were aroused at the time is no reason for taking the case away from the Magistrate. He is a Hindu Magistrate of long experience and should be perfectly capable of determining to what extent religious feelings have been lacerated and what bearing that may have on the case as a whole. The officials referred to are said to be the District Magistrate and the Sessions Judge, Khandwa. They are not alleged to be eye-witnesses and it is uncertain whether they will be examined or not. I fail to see how their appearance before him as witnesses, if it takes place, is likely to embarrass the Magistrate or prejudice him in any way. The reasons advanced therefore seem to me to be inadequate and I am unable to grant the application for transfer. I note that the alleged offences took place on 27th February 1936 and as yet no evidence has been recorded. The longer the delay, the more difficult it must be to ascertain the true facts, so that a speedy disposal of the case ought to be welcomed by all concerned. For that reason also, a trial before a Magistrate is preferable to the more lengthy proceedings of committal and subsequent trial by the Sessions Court.

In conclusion reference must be made to the sixth point raised by the learned Sessions Judge who apprehends that the joint trial of all the accused may be illegal if the offences charged do not all form part of the same transaction under S. 239, Criminal P. C. The learned Sessions Judge has correctly indicated the law on the point, and it is for the prosecution to satisfy itself whether the offences alleged were committed in the same transaction or not. That is not a point on which this Court could or should express any opinion at present. The prosecution should duly consider the question and act according to the best of its discretion. The applications for transfer are therefore rejected and the records will be sent back through the Sessions Court to the trial Court for proceeding with the trial.

V.B.B./R.K. *Applications rejected.*

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## A. I. R. 1938 Nagpur 59

VIVIAN BOSE J.

*Namdeo Babusa Patkar* — Appellant.

v.

*Kesheo Tukaram Karanjikar* — Respondent.

Second Appeals Nos. 175-B and 169-B of 1935, Decided on 12th November 1936, from appellate decree of Addl. Dist. Judge, Amraoti, D/- 28th March 1935.

**(a) Berar Land Revenue Code (1928), S. 174 —Pre-emption -Code is exhaustive with respect to provisions of pre-emption—Provisions are based on Mahomedan law—But reference to Mahomedan law can be made only on points where Code is silent.**

Berar Land Revenue Code is exhaustive with respect to the provisions to rights of pre-emption, and so references to the Mahomedan law of pre-emption or the rights prevailing in other Provinces may be misleading, unless this is borne in mind. Of course these rights are based on the Mahomedan law and so it is legitimate to look to that law for assistance upon any matter on which the Code is silent. But in so far as the right is founded on the Code, it must be determined by the Code and not by any other law: *2 N L R 150; 5 N L R 136 and A I R 1927 Nag 296, Rel. on.* [P 60 C 1, 2]

**(b) Berar Land Revenue Code (1928), Ss. 183 (2) and 184 (4) — Pre-emption—'Fair consideration' — Market value Market value is not equivalent to fair consideration and is not criterion in arriving at fair consideration.**

**Under S. 184 (4), the Court is called upon to determine not the market value of the land but**

whether the price is fixed in good faith. The question of market value arises only incidentally. It is to be taken into consideration for determining whether the price was fixed in good faith or not, and it is only after the Court finds that the price was not fixed in good faith that it is directed to go on and determine what the price should be, and in ascertaining this the Court is directed to fix not the market value but a "fair consideration". The "fair consideration" contemplated by S. 182 (4) is not the same thing as the market value. The same construction is to be put upon the expression "fair consideration" as it occurs in S. 183 (2). The market value of the land is not the criterion, however relevant it may be for consideration in determining the fair consideration. [P 61 C 1,2]

**(c) Berar Land Revenue Code (1928), Ss. 183 and 184—Pre-emption—Right is of substitution and not of repurchase—Limitation on substitution explained.**

The right of pre-emption under the Berar Land Revenue Code is not one of the repurchase but of substitution. The only limitation which the Code places on the doctrine of undiluted substitution is that when the amount specified in the notice exceeds the market value or, in the cases of a foreclosure, the alternative given in S. 183 (1) (b), then a fair consideration is to be fixed: *A I R 1935 Nag 195*; *5 N L R 136 and 7 All 775, Rel. on.* [P 62 C 1]

**(d) Berar Land Revenue Code (1928), S. 177 (1) — Price of pre-emption includes costs awarded in foreclosure decree.**

The price of pre-emption includes everything that the mortgagee is entitled to receive at the date of the final decree before the property can be redeemed. Hence it includes also the costs awarded in a foreclosure decree. [P 62 C 2]

J. R. Mudholkar — *for Appellant.*

V. K. Rajwade — *for Respondent.*

**Judgment.**—This judgment will govern Second Appeal No. 169-B of 1935 as well as this appeal, Second Appeal No. 175-B of 1935. The two cases were virtually consolidated in the trial Court, and the evidence was recorded in one of them only. They are both suits for pre-emption. In this appeal, Second Appeal No. 175-B of 1935, an occupant of Survey No. 123/3, mouza Dabh, mortgaged the fields in dispute to the defendant Kesheo and after foreclosure obtained possession on 17th December 1932. In the connected appeal, Second Appeal No. 169-B of 1935, the defendants Tukaram and Atmaram obtained possession on 8th June 1933 from the same persons in similar circumstances of another set of fields. The question in both appeals is the same and relates to the price of pre-emption. The lower Courts have taken the market value of the lands to be the criterion though they have differed about its extent. The only question here is whether this is right. The first point to notice in this connexion is that the Berar Land Revenue Code is exhaustive with respect to these rights, and so references to the Mahomedan law of pre-emption or the rights prevailing in other provinces may be misleading unless this is borne in mind. S. 174 (1) states that

> the rights conferred by this chapter . . . shall be enforceable only in the manner and to the extent provided in this chapter.

Of course, these rights are based on the Mahomedan law and so it is legitimate to look to that law for assistance upon any matter on which the Code is silent: 5 N L R 136[1] at pp. 138 and 139 and 2 N L R 150[2] at p 155. But in so far as the right is founded on the Code, it must be determined by the Code and not by any other law: 23 N L R 94.[3] It will be noticed that the Code follows a definite scheme. In the first place it deals with a situation in which no transfer has yet taken place. Whenever an occupant in a survey number proposes to sell the whole or any portion of his interest in it, he is furnished with an opportunity of giving notice of his intention to his co-occupants and of telling them the price at which he is willing to sell: S. 176 (1). When this is done the other occupants have the right to pre-empt at this price: S. 176 (2). But if they think the price was not fixed in good faith, that is if they think it is too high, then they have the right to go to Court and sue for pre-emption at a price which S. 182 (1) describes as a "fair consideration". When this is done, the first duty of the Court is to ascertain whether the price fixed by the intending vendor exceeds the market value of the land or not. If it does, then the Court is directed to presume that the price was not fixed in good faith and to go on and fix a fair consideration: S. 182 (4). It will be noticed that the intermediate position which arises when the price fixed is less than the market value is not dealt with because it cannot arise when the notice contemplated by S. 176 (1) has been duly served on the co-occupants. They are then bound to pre-empt at that price or not at all. It is only when in their opinion the price has not been fixed in good faith, which can only mean when they consider it exceeds the market value, that the Court can step in and determine what the fair consideration should be.

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[1] Mt. Raljai v. Irbhan, (1909) 5 N L R 136 = 3 I C 923.

[2] Ganpatsa Mahadsa v. Joomabhai, (1906) 2 N L R 150.

[3] Ramchandra v. Rupchand, A I R 1927 Nag 296=103 I C 242=23 N L R 94.

The second thing to be noticed is that the Court is called upon to determine not the market value of the land but whether the price was fixed in good faith. The question of market value arises only incidentally. It is to be taken into consideration for determining whether the price was fixed in good faith or not, and it is only after the Court finds that the price was not fixed in good faith that it is directed to go on and determine what the price should be, and in ascertaining this, the Court is directed to fix, not the market value, but a "fair consideration". In the case of mortgages, similar provisions have been made in Ss. 177 and 178, the former dealing with mortgages by conditional sale and the latter with usufructuary mortgages. Provision is also made for certain kinds of leases in S. 178. The only differences are that here the mortgagee or the lessee, as the case may be, and not the occupant, is given the option of serving the other occupants of the survey number with a notice, and the right to do so arises after and not before the transfer. The price of pre-emption is also different. But, except for these incidental differences, the procedure is the same, and so is the underlying principle. Having dealt with these cases, all of which hinge upon the issue of a notice to the other occupants of the survey number, the Code next turns its attention to cases in which no notice is given. The right of pre-emption is still there and it can be enforced by suit: the Court is directed "to examine the transaction and fix a fair consideration for the interest to be pre-empted". Does this mean that different considerations are now to be applied, and that the market value is to be the price of pre-emption, as the lower Courts have held in the two cases under consideration? I do not think so.

In the first place, the Code does not say so, and I can see no reason for the use of what would be curiously cumbrous language if that was all that was meant. In the second place, the usual canon of construction is that the same words must be construed in the same sense throughout an enactment unless the context shows that something different was intended. Now, as I have said, when a notice has been given, the Court is required to fix a fair consideration under S. 182 (4) and not the market value. Both expressions are used and there would obviously be no point in directing the Court to go on and determine the fair consideration after it had determined the market value, if the two meant one and the same thing. Therefore, it is clear that the "fair consideration" contemplated by S. 182 (4) is not the same thing as the market value, and it follows the expression must be similarly construed in S. 183 (2).

Another consideration leads to the same conclusion. S. 183 (2) speaks of a fair consideration "for the interest to be pre-empted". What does this mean? Sub-s. (1) of S. 183 confers a right of pre-emption in the case of the transfers contemplated by Ss. 176, 177 and 178. As I have shown, these include cases of sale, two varieties of mortgage and certain kinds of lease. The interest to be pre-empted must of course be the interest of the transferee in the case of mortgages and leases, and of the proposed vendee in the case of an intended sale. Now it is obvious that the interest of a lessee for 15 years (one of the cases contemplated by S. 178) cannot be the same as that of an owner of the land. It must be less. Therefore the fair consideration for such an interest must also be less than in the case of an outright sale. It follows the market value of the land is not the criterion, however relevant it may be, for consideration in determining the fair consideration for these various interests. Then again what can the words "examine the transaction" mean except that the Court is to determine the nature of the interest sought to be pre-empted and apply the principles enumerated in S. 182 (1) (b)? If the market value is all that had to be ascertained, an examination of the transaction would be unnecessary.

Now what happens when the notice contemplated by S. 177 is given in the case of a mortgage by conditional sale? The other occupants are given an opportunity to pre-empt at a price which comprises the amount declared to be due by the final decree together with interest on the principal sum secured by the mortgage at the rate specified in the mortgage deed from the date of the notice to the date of the deposit. If this sum exceeds the market value, then the matter can be brought before the Courts under S. 182 (1) (b) in the same way as in the case of a sale. But if it does not then pre-emption can be at this particular price. Why should the pre-emptor be placed in a worse position because the mortgagee fails to carry out the provisions of S. 177 and omits to give the notice mentioned there?

Consider next another clause in S. 182 (1) (b). In the case of a foreclosure under S. 177, the person seeking to pre-empt may show either that the amount stated in the notice was not due under the terms of the final decree or that it exceeds the market value of the interest foreclosed. If the intention was to make the market value the sole criterion of the fair consideration in such cases, it is obvious there would be no point in including the other alternative. The inference is irresistible that when the amount contemplated by S. 177 is less than the market value or if the notice wrongly exaggerates it, then the fair consideration is the amount which the co-occupant could have pre-empted for if the provisions of S. 177 had been duly complied with. It would not be "fair" to place him in a worse position. In my opinion it would be equally unfair to place him at a disadvantage when no notice is given. In any case, if the words "fair consideration" are to be interpreted in the same sense throughout the Act, and if this is the right interpretation in S. 182 (4), as I hold it to be, then it follows this is also the sense in which it should be considered in S. 183 (2).

After all what is pre-emption? As Drake-Brockman J. C. pointed out in 5 N L R 136,[1] at page 139, the idea is derived from the Mahomedan law and at any rate so far as Berar is concerned, the rights given by the Code are to a large extent based on that law. Now we know that under the Mahomedan law the right is not one of repurchase but of substitution: 7 All 775,[4] at page 799 and 7 C P L R 117,[5] at page 120. It is clear the Code must mean the same thing, for it allows the interest of a lessee for a term of fifteen years and also of a usufructuary mortgagee to be pre-empted. The only limitation which the Code places on the doctrine of what I might term undiluted substitution is that when the amount specified in the notice exceeds the market value or in the case of a foreclosure the alternative given in S. 183 (1) (b), then a fair consideration is to be fixed. This question was carefully considered by Staples A. J C. in A I R 1935 Nag 195,[6] and he came to much the same conclusion. I respectfully agree.

In Second Appeal No. 169-B of 1935 the amount declared to be due by the foreclosure decree is Rs. 2571-4-0. This sum is distributed over four fields of which the plaintiff seeks to pre-empt only two, namely Survey Nos. 123/2 and 123/4. I have therefore to determine how much of the sum decreed should be apportioned over the two fields in suit. The only fair way of doing this would be by apportioning the amount in proportion to the respective values of the various fields. The only guide I have for ascertaining this in the present case is the land revenue, and so I proceed to apportion the decretal amount on that basis. The total land revenue payable in respect of these two fields is Rs. 11-7-0 and of the four fields foreclosed is Rs. 34-15-0. It follows that the decretal amount which should be apportioned over the two fields in suit is 183/559 of Rs. 2571-4-0. This works out to Rupees 841-12-0. No question of interest arises because no notice was given by the mortgagees, and also because they have been in possession of the property.

I have been asked to exclude the costs awarded in the foreclosure decree on the ground that S. 177 (1) does not include them. What that section speaks of is "the amount declared to be due by the final decree". It is difficult to ascertain exactly what this means, for a final decree in a foreclosure suit makes no such declaration. But the use of the word "final decree" as opposed to "preliminary decree" appears to indicate that the Legislature intended the price of pre-emption to include everything that the mortgagee is entitled to receive at the date of the final decree, before the property can be redeemed. This seems only fair, and if the right of pre-emption is a right of substitution, as the learned counsel for the appellant claims, and I think rightly, then obviously the pre-emptor must pay everything due to the mortgagee including the costs of the suit unless he considers it exceeds the market value. This figure of Rs. 841-12-0 is more than the market value, which the lower appellate Court finds is Rs. 813-12-0. The finding has been attacked here, but it is based on evidence, and being one of fact is conclusive in second appeal. Since this figure of Rs. 813-12.0 is less than the amount for which the property was foreclosed, in my opinion, the market value is the fair consideration for the interest foreclosed in this case. Second Appeal No. 169-B of 1935 is therefore dismissed with costs.

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[4] Gobind Dayal v. Inayatullah, (1885) 7 All 775=1885 A W N 182 and 228 (FB).

[5] Abdul Razak v. Jagoba, (1894) 7 C P L R 117.

[6] Nathusingh v. Narayansingh, A I R 1935 Nag 195=159 I C 497.

As regards the present appeal, Second Appeal No. 175-B of 1935, five fields with a total land revenue of Rs. 53-12-0 were foreclosed for a sum of Rs. 2,997. Only one of these is in suit, namely Survey No. 123/3, whose land revenue is Rs. 3-13-0. The amount of the decree which should be apportioned to this field is therefore 61/860 of Rs. 2,997, which works out to Rupees 212-9-0. This is less than the market value, which the lower Appellate Court has placed at Rs. 378-12-0, and so is the fair consideration for pre-emption in this case. But court-fees have been paid on the difference between the amount fixed by the lower Appellate Court and that by the first Court. Therefore the lower Appellate Court's decree cannot be reduced below the figure of Rs. 252-8-0 which was fixed by the first Court The result is that this appeal, Second Appeal No. 175-B of 1935, is allowed. The decree of the lower Appellate Court is reversed, and that of the first Court restored. Costs in this and the lower Appellate Court will be paid by the respondent on Rs 126-4-0, which is the amount by which the appeal succeeds.

B.D./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 63

POLLOCK J.

*Khemchand Girdharilal*
Accused—Applicant.
v.
*Emperor.*

**Criminal Revn. Appln. No. 162 of 1937, Decided on 15th April 1937, from order of Sess. Judge, Nagpur, D/- 1st February 1937.**

**(a) Public Gambling Act (1867), S. 5 — No statement in warrant that warrant is issued upon credible information — Warrant is not invalid.**

Where a Magistrate issues warrant under S. 5 upon credible information, the fact that the warrant does not state that the warrant is issued on receipt of credible information cannot make the warrant invalid. [P 63 C 2]

**(b) Criminal P. C. (1898), S. 526 — Magistrate believing information under Public Gambling Act, trying case—Such Magistrate is not person interested under S. 526.**

It is ordinarily undesirable that a Magistrate who believes that the information that a house has been used as a public gaming house is credible should not try the case, but he cannot be said to be personally interested in the case, and S. 526, Criminal P. C., would not apply. [P 63 C 2; P 64 C 1]

**(c) Public Gambling Act (1867), S. 6 Presumption—Persons present at gambling game are presumed to take part in it — When legitimate business is carried on with bets at intervals, such presumption is weak.**

When a gambling game is being played, there is a strong presumption that the persons present are taking part in it; but when bets are being made at intervals and legitimate business is being carried on throughout, the presumption is not a strong one, and if persons found there give a reasonable explanation of their presence, it should ordinarily be accepted. [P 64 C 1]

A. V. Khare and W. B. Pendharkar — *for Applicant.*

**Order.**—The applicant Khemchand has been convicted under S. 3, Public Gambling Act, and he and four others have been convicted under S. 4 of that Act. The Sub-Inspector of Police who had received information that satta gambling was going on at Khemchand's shop, sent Abdul Latif with marked coins to make a bet with Khemchand. This man made his bet and came out and gave a signal to the Sub-Inspector who then searched the shop and found the marked coins there. I see no reason to differ from the findings of the trial Court that the evidence on this point is true. S. 5 of the Act provides that if a Magistrate upon credible information has reason to believe that any house is used as a common gaming house, he may issue a search warrant. It has been argued that, as the warrant issued in this case does not state that it was issued after the receipt of credible information, the warrant was not validly issued. As the Magistrate issued the warrant, he presumably thought that the information was credible and the information turned out in fact to be correct. I think it would be better if the form of the warrant reproduced the wording of S. 5, but S. 5 merely requires that the warrant should be issued after the receipt of credible information. In my opinion therefore the warrant is not invalid on this ground.

Another contention raised is that the case should not have been tried by the Magistrate who issued the warrant. I agree that it is ordinarily undesirable that a Magistrate who believes that the infor. mation that a house has been used as a public gambling house is credible, should not try the case, but I do not think that he can be said to be personally interested in the case, and S. 526, Criminal P. C., would not apply. He merely came to the conclusion that the information given to him was credible, and he had subsequently to decide the case on the evidence given in it. Even if the case had been tried by another Magistrate there would have been the same presumption and the result would have been the same. None of the accused, of whom one is a pleader, objected to their trial by this Magistrate, and I do not think that this is a ground for interfering in revision.

Other objections have been taken to the legality of the warrant, but on this point it is unnecessary to add to what has been said by the learned Sessions Judge. Two satta slips were found under a pile of bahikhatas, but it has been argued that these are not instruments of gaming. The two marked coins were clearly instruments of gaming, and therefore under S. 6, Public Gambling Act, this was evidence that the house was used as a common gaming house. Under S. 6 of the Act, discovery of instruments of gaming is evidence, until the contrary is made to appear, that persons found in the house were present for the purpose of gaming. I see no reason to reject the trial Court's finding that Khemchand and the four other applicants were present at the time when the house was searched, but I agree with the learned Sessions Judge that the convictions of Kisan and Purshottam Narayan Pathak should not be upheld. Kisan has shown that he was working as a tailor in the shop, and Mr. Pathak who is a pleader, has given evidence to show that he was being consulted by Khemchand about some case. When a gambling game is being played there is a strong presumption that the persons present are taking part in it; but when bets are being made at intervals and legitimate business is being carried on throughout, the presumption is not a strong one, and if persons found there give a reasonable explanation of their presence, I think that it should ordinarily be accepted. Both Kisan and Mr. Pathak have given a reasonable explanation; their convictions must therefore be set aside.

Gopi and Multan, the other two applicants, are brothers of Khemchand. They may have known that bets were being made in the shop from time to time and took a risk in sitting in a shop, but it would be unreasonable to expect them to sit on the road merely because bets are occasionally made in the shop. There is no reason to suppose that they took any part in the gaming, and Khemchand was not in need of assistance in noting down the occasional bets made during the course of the day. Gopi and Multan had a reasonable explanation of their presence there and that should be accepted. The convictions of Khemchand are therefore upheld. The convictions of the other four are set aside. The order confiscating the money found with Kisan is also set aside, and the money must be returned to him.

K.B./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 64

POLLOCK J.

*Laxmibai w/o Yeshwantrao Kunbi — Plaintiff* — Appellant.

v.

*Bajirao Vithoba — Defendant* — Respondent.

Second Appeal No. 176 of 1935, Decided on 6th August 1937, from appellate decree of Addl. Dist. Judge, Wardha, D/- 7th December 1934.

**(a) Decree—Compromise—Appeal — Agreement to be bound by evidence of witness—Decree passed on such evidence—Decree is not consent decree and is appealable.**

Consent decrees mean decrees in suits which have been compromised. An agreement to be bound by the evidence of a witness is not agreement to compromise the suit and the suit is eventually decided on the evidence of that witness who may or may not be a party. Such a decree is not a consent decree and is appealable. [P 65 C 1]

**(b) Oaths Act (1873), S. 9 — Pleaders or agents should not offer special oath in absence of parties or express written authority** (*Obiter*).

It is desirable that pleaders or agents should in their own interests be careful not to make offers of special oaths except in the presence of the party or on express written authority to that effect. [P 65 C 1]

R. G. Rao — *for Appellant.*

V. V. Kelkar — *for Respondent.*

**Judgment.**—The suit giving rise to this appeal was brought by Laxmibai to obtain a declaration that a decree passed against her in a previous suit was not binding on her because it had been obtained by fraud. Laxmibai, if not a pardanashin lady, belongs to a class that does not attend Courts, and in the previous suit she was represented by a pleader, Mr. Nagle, who received instructions from Govindrao who was related to her, lived in her house, and had looked after her affairs for many years, but had no power of attorney. Mr. Nagle arrived in Court at one of the hearing and he found that a proposal had been made that a special oath should be taken by the opposite party in that case, Bajirao. Acting on Govindrao's instructions, Mr. Nagle offered on behalf of Laxmibai to be bound by that oath. Bajirao then took the oath and gave evidence, and that evidence under S. 11, Oaths Act was conclusive proof of the matters stated. The case was accordingly decided against Laxmibai.

The contention that there was any fraud has now been abandoned, and I am unable to see how any suit can be brought to set aside the decree in the previous suit. It has been suggested that S. 96 (3), Civil P. C., would prevent an appeal in the previous suit and that therefore a separate suit would lie to set aside that decree. S. 96 (3) merely provides that no appeal shall lie from a decree passed by the Court with the consent of parties. The history of this sub-section is given at page 323 of Mulla's Civil Procedure Code, Edn. 10, and he has shown that it originally formed part of S. 375. Most of S. 375 is now reproduced in O. 23, R. 3 which provides for compromises of suits, and the provision that decrees recording such compromises should not be subject to appeal now finds its place in S. 96 (3). Consent decrees mean, in my opinion, decrees in suits which have been compromised. An agreement to be bound by the evidence of a witness is not an agreement to compromise the suit and the suit is eventually decided on the evidence of that witness, who may or may not be a party. Such a decree is not a consent decree and is appealable. An appeal, for example, might succeed on the ground that the evidence did not justify the decision. Laxmibai's remedy therefore was to appeal against the previous decision and not to bring a separate suit. This appeal therefore fails and is dismissed with costs.

In the view that I have taken, it is unnecessary to decide whether Mr. Nagle had power to offer to be bound by the special oath of the opposite party, but I only wish to say that it is obviously desirable that pleaders or agents should in their own interests be careful not to make such offers except in the presence of the party or on express written authority to that effect. On the question whether they are legally entitled to make such an offer I express no opinion.

B.D./R.K. *Appeal dismissed.*

## A. I. R. 1938 Nagpur 65

VIVIAN BOSE J.

*Sadasheo Balaji and another* — Appellants.

v.

*Firm Hiralal Ramgopal* — Respondents.

Second Appeal No. 273 of 1935, Decided on 22nd December 1936, from appellate decree of Dist. Judge, Wardha, D/- 28th January 1935.

**(a) Hindu Law—Joint family—Trade—Mere agricultural operations are not trade.**

Mere agricultural operations cannot be regarded as a trade. They may become so, if run on modern commercial lines in connexion with a properly established business, but, to term the ordinary agricultural operations of a village in the Central Provinces a trade is to stretch the normal meaning of that word beyond permissible limits: *A I R 1916 Nag 11, Disting.* [P 66 C 2]

**(b) Minor—Alienation by guardian—Benefit of minor—Distinction between such transactions and transactions under S. 68, Contract Act stated.**

It is one thing to lay down set of rules with respect to a transaction which denudes a minor of his property, or a part of it, and quite another to determine whether money and articles supplied to him which add to his property or to his convenience and comfort are necessaries or benefits within the meaning of S. 68. The test of 'fair and proper' can be applied in both cases, but the standard must necessarily differ, for what is fair and proper in the shape of benefits conferred or comforts supplied, may not be fair and proper in the case of an alienation. One important point of distinction between the two classes of cases is this : in the case of an alienation where necessity is alleged, enquiries made in good faith protect the transferee, whereas in the case of necessaries such considerations are irrelevant. Then again an alienation by a minor would be void whatever the purpose for which it was made, but in the case of necessaries supplied to him it is immaterial whether the order comes from him or from his guardian : in both cases the test is precisely the same: the suitability of the goods supplied, or the benefits conferred, having regard to the social status and condition in life of the minor, and to his actual requirements at the time of the transaction : *20 Bom 61, Rel. on; A I R 1938 Nag 109, Ref.* [P 66 C 2; P 67 C 1]

**(c) Contract Act (1872), S. 68—Necessaries—Onus of proof is on creditor.**

In the case of necessaries supplied to an infant, the onus of proof lies on the creditor. He has to show first that goods or the money which represents them are suitable to the condition in life of the infant and secondly that they are suitable to his actual requirements at the time ; or in other words that the infant has not got a supply from other sources : (*1908*) *2 K B 1* ; (*1884*) *13 Q B D 410 and* (*1887*) *19 Q B D 509, Rel. on.* [P 67 C 1]

**(d) Minor—Contract by guardian — Money borrowed for payment of rent due to lambardar—Minor is liable.**

Where a guardian of a minor borrows money for the payment of rent due to lambardar which the minor was bound to pay, the minor is liable under the transaction, as the guardian can do what the minor would himself do : *A I R 1926 Nag 31, Rel. on.* [P 67 C 1]

**(e) Contract Act (1872), S. 68—Necessaries —Term 'necessaries' not confined to goods — It includes other things, whereby minor may profit himself afterwards and also money to obtain these necessaries — Money borrowed for Divali expenses held could not be allowed.**

The term 'necessaries' is not confined to goods. It can include other things such as good teaching and instruction whereby the minor may profit himself afterwards, and also money to enable him to obtain these necessaries. For example, the term includes costs incurred in defending a suit to save the minor's property and to defend him in a criminal prosecution; so also reasonable marriage expenses of a minor himself or a sister or other coparceners and such religious ceremonies as the minor would have had to perform if he had been an adult : *Case law referred.* [P 68 C 1]

But where a guardian of a Hindu minor borrowed money for Divali expenses :

*Held* that the amount would not be allowed as it was not necessary. [P 68 C 2]

A. V. Vazalwar and G. B. Badkas — *for Appellants.*

T. J. Kedar — *for Respondents.*

**Judgment.**—This is a suit with respect to the items set out in para. 1 of the lower Appellate Court's judgment. They have been duly proved by Bansilal (P. W. 1) and so must be accepted as final here. The witness explains why they were incurred, and as he has been believed, no more need be said on this point. The only question is whether the defendants are liable for them. The defendants were minors on the dates on which these liabilities arose, and in every case the transaction was with their mother who was their legal guardian. The learned Judge of the lower Appellate Court holds the defendants, who have now attained majority, are bound, though I am not quite clear on what grounds; his reasoning is a little confused. He has referred to 13 N L R 109,[1] which deals with a family trade or business, and also in 29 N L R 41,[2] which is a case of an alienation by a minor's guardian, and then to S. 68, Contract Act, which deals with necessaries.

The items in suit relate to rent due by the defendants to the plaintiff, who is the lambardar of the village in which the defendants hold certain tenancy fields, for cotton seed advanced for sowing purposes, for money advanced for weeding, for money advanced for the marriages of the defendants, and for a small item of Rs. 67 for expenses in connexion with the Diwali festival. I confess I find it difficult to see how any of these items can be regarded as items in connexion with a family trade or business. I do not think that mere agricultural operations can be regarded as a trade. I do not deny that they may become so if run on modern commercial lines in connexion with a properly established business, but to term the ordinary agricultural operations of a villager in these provinces a trade is to stretch the normal meaning of that word beyond permissible limits. Therefore I do not think 13 N L R 109[1] has any application in the present case. So also as regards the case in 29 N L R 41.[2] It deals with the case of an alienation, and I think the principles which govern such cases are different. It is one thing to lay down set of rules with respect to a transaction which denudes a minor of his property, or a part of it, and quite another to determine whether money and articles supplied to him which add to his property, or to his convenience and comfort, are necessaries or benefits within the meaning of S. 68, Contract Act. I do not deny that the test of 'fair and proper' can be applied in both cases, but the standard must necessarily differ, for what is fair and proper in the shape of benefits conferred or comforts supplied, may not be fair and proper in the case of an alienation.

One important point of distinction between the two classes of cases is this: in the case of an alienation, where necessity is alleged, inquiries made in good faith protect the transferee, whereas in the case of necessaries such considerations are irrelevant: 20 Bom 61[3] at pp. 70 and 71. Then again an alienation by a minor would be void whatever the purpose for which it was made, but in the case of necessaries supplied to him, it is immaterial whether the order comes from him or from his guardian; in both cases the test is precisely the same: the suitability of the goods supplied, or the benefits conferred, having regard to the social status and condition in life of the minor, and to his actual requirements at the time of the transaction. The onus of proof lies on the creditor, as is explained in (1908) 2 K B 1[4] He has to show first that goods or the money which represents them are suitable to the condition in life of the infant,

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[1] Jhitibai v. Tajmal, A I R 1916 Nag 11=41 I C 35=13 N L R 109.

[2] Rao Narayan Rao v. Mulchand, A I R 1933 Nag 109=141 I C 494=29 N L R 41.

[3] Maharana Shri Ranmalsingji v. Vadilal Vakhatchand, (1896) 20 Bom 61.

> and secondly that they are suitable to his actual requirements at the time; or in other words that the infant has not got a supply from other sources.

This second proposition is also to be found in (1884) 13 Q B D 410,[5] and in (1887) 19 Q B D 509.[6] The only other aspect of the law, which it is necessary to consider, is what I might term the respective functions of Judge and jury on these questions. This was settled in (1868) 4 Ex 32[7] and has been lucidly explained in Salmond and Winfield's Law of Contracts, p. 457:

> The Judge must determine whether there is evidence to the jury which may reasonably satisfy them that the things are necessaries. If there is not, he must withdraw the case from the jury; and he ought to do so if the particular article in question is such that in normal circumstances it is not necessary for maintaining the minor in his status of life. The Judge must decide for himself what circumstances are normal.

I cannot put it clearer than that. Turning now to the items in question here. Two of them refer to the rent which the defendants as tenants owed the plaintiff who was their lambardar. Of course they were bound to pay this and so had legal authority to pledge their credit for its due payment, and what they could themselves have done, their guardian could naturally do for them. No question therefore arises about the minors' liability on this score: 24 N L R 54.[8] Then there are three items of cotton seed which were supplied each time in the sowing season. The defendants are agriculturists and considering the extent of their estate, the quantities supplied were by no means abnormal, and Bansilal (P. W. 1) tells us definitely that that much seed was actually required for the purpose. Therefore the first condition which the law imposes is satisfied, and the only thing left is to see whether the minors were already sufficiently supplied with seed. This of course is a question of fact and not of law.

Now, as I have said, the burden of proof is on the creditor, but of course he can discharge it in any of the ways allowed by law. It is not necessary in every case to have direct evidence. In the case of cultivators in these provinces one knows—and of course Judges can take judicial notice of the usual life and habits of the people among whom they live; there is usually no other method of determining what is normal—that cultivators do not ordinarily store seed from year to year for sowing purposes for the following year. Their habit is to sell, and in the case of foodstuffs to sell and eat up all they harvest. Then when seed time comes round again they borrow what they require for sowing their fields and repay in due course from what their industry yields them.

Then we have the evidence of Bansilal (P. W. 1) who states that the minors' guardian came to him along with some of her servants and said that the land would suffer if cotton seed were not given to her. Now of course the fact that the minors' guardian comes and asks for seed and says these things may not always be conclusive in itself to prove that it was really required, but it is a fact to be taken into consideration along with other evidence that ordinarily a guardian looks after the minor's interests, especially as the defendant himself, now that he is major, says that he has full confidence in his mother and gives no details of her extravagance or mismanagement during his minority. It would be placing an impossible burden on the plaintiff to exclude such evidence altogether, and would in the end defeat the very purpose of the rule which is for the protection and benefit of the infant, namely to enable him to live in a reasonable degree of comfort.

Then there is the evidence of the defendant himself as D. W. 1. He says that when he took over the management of the estate, he found it impossible to carry on without borrowing seed for sowing and money for weeding. All this is evidence on which the lower Appellate Court's finding that the seed advanced was necessary can be based. Whether it ought to be enough to discharge the onus in this particular case is not for me to determine. I am not a judge of fact. All that I can decide is whether there is the necessary scintilla of evidence on which a finding can legally be based. I hold there is. The same remarks apply to the money borrowed for weeding the ground, and all that I need say in respect of this is that the term "necessaries" is not confined to goods. It can include other things such as good teaching and instruction whereby the minor may profit himself afterwards, and also money to enable him to obtain these necessaries. For example, the term has been held to include costs incurred in defending a suit to save the minor's property (7 Cal 140[9]) and to defend him in a criminal prosecution (21 Cal 872[10]); so also reasonable marriage expenses of a sister (32 All 325[11]) or other coparceners (32 Bom 81[12]) and such religious ceremonies as the minor would have had to perform if he had been an adult: 20 Bom 61[3] at page 73.

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[4] Nash v. Inman, (1908) 2 K B 1=77 L J K B 626=98 L T 658=24 T L R 401=52 S J 335.

[5] Barnes v. Toye, (1884) 13 Q B D 410=54 L J Q B 567=51 L T 292=33 W R 15=48 J P 664.

[6] Johnstone v. Marks, (1887) 19 Q B D 509=57 L J Q B 6=35 W R 806.

[7] Ryder v. Wombwell, (1868) 4 Ex 32=38 L J Ex 8=19 L T 491=17 W R 167.

[8] Lalchand v. Narhar, A I R 1926 Nag 31=89 I C 896=24 N L R 54.

I turn next to the money borrowed for the marriages. Here again it was borrowed by the guardian, and we have the evidence of Bansilal (P. W. 1) and Mahadeo (P. W. 7) who say that she assured them that the marriages could not be performed unless the money was advanced. This, coupled with the evidence of Maruti (P. W. 5) who states that "she was then in need of money," is enough to furnish foundation for the lower Appellate Court's finding on this point. As regards the law, reasonable marriage expenses of a minor have been upheld in 6 All 417[13] at p. 421 and 3 W R 217.[14] I also agree that they are necessaries. The amount has been considered reasonable by the learned Judge of the lower Appellate Court who is himself a Hindu and so I uphold this item also.

It was argued on the strength of a sentence in P. W. 4's (Mukaji) evidence that this was a kanyadan marriage in which the bride's father bears all the expenses. This was not pleaded, and even if this is the right meaning of that word, all that the witness says is that girl's father "offered his girl in marriage by kanyadan". He does not say that the offer was accepted. I disallow the objection. There remains only the item of Rs. 67 for Diwali expenses. As regards this, I respectfully agree with the observations of Fulton J. in 20 Bom 61[3] at page 73:

> Doubtless, we have to determine what are necessaries according to Hindu ideas, and a pilgrimage may be looked upon as beneficial. But we think we should be extending the meaning of the term "necessaries" very much beyond the meaning that has hitherto been assigned to the word if we were to sanction as a binding charges on the defendant a debt contracted for a pilgrimage not undertaken in discharge of any urgent spiritual duty, which it was obligatory on him to perform.

Of course the festival of Diwali is celebrated among the classes to which the defendants belong, but it can be celebrated in quite a modest way without expending much money. There are no ceremonies in connexion with the festival that the minors would have been bound to perform if they had been adults at such cost. I therefore hold that this was not necessary and disallow the item. The result is that the appeal fails except as regards this item of Rs. 67. The lower Appellate Court's decree will therefore be modified by excluding this sum and interest on it at the rate allowed by the lower Appellate Court, from the decree. As the item bears such a small proportion to the amount for which the appeal fails, it is not worth while apportioning the costs mathematically. I therefore direct that the appellants will bear the respondent's costs of this appeal less Rs. 5 which I apportion towards the appellants' success. The costs in the lower Appellate Court will be paid as decreed by it.

V.B.B./R.K. *Decree modified.*

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## * A. I. R. 1938 Nagpur 68

VIVIAN BOSE AND PURANIK JJ.

*Sadasheo Balaji and another* — Appellants.

v.

*Shankar Govind and others* — Respondents.

First Appeal No. 75 of 1934, Decided on 23rd August 1937, from decree of Addl. Sub-Judge, First Class, Wardha, D/- 27th February 1934.

**(a) Minor—When minor's estate is liable on contract entered into on his behalf by guardian stated.**

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[9] Watkins v. Dhunnoo Baboo, (1881) 7 Cal 140 =8 C L R 433.

[10] Sham Charan Mal v. C. Debya Singh, (1894) 21 Cal 872.

[11] Nandan Prasad v. Ajudhya Prasad, (1910) 32 All 325=5 I C 413=7 A L J 236 (F B).

[12] Suudrabai v. Shivnarayan, (1908) 32 Bom 81 =9 Bom L R 1366.

[13] Makund v. Sarabsukh, (1884) 6 All 417=1884 A W N 144.

[14] Jugessur Sircar v. Nilambur Biswas, (1865) 3 W R 217.

The rule that a minor is not personally liable on the contract entered into on his behalf by his guardian is subject to two exceptions: (1) Where the contract is for necessaries supplied to or on behalf of the minor or money advanced for such supplies; and (2) when the liability is such to which the minor is liable under the personal law to which he is subject. In these two cases a decree can be passed against the estate of the minor: *Case law discussed.* [P 71 C 1]

*** (b) Minor — Liability of minor for advances made to him for necessaries—What creditor must prove stated.**

In a case where creditor seeks to make the estate of the minor liable for advances made for necessaries (including in term advances made for necessary purposes), mere bona fide enquiry by the creditor into the existence of the necessity and advance in good faith thereafter will not suffice, but at the same time the creditor should not be required to prove actual application of the money. To require this of the creditor is to ask him to do the impossible. The creditor is required to prove the circumstances of the minor's estate, the absence of any other source from which the necessity could be met at the time of transaction and the suitability of the necessity having regard to the social status and the condition in life of the minor. If these are established, and the creditor has advanced money for meeting such necessaries after satisfying himself about the same, the creditor is entitled to a decree against the estate of the minor unless it is proved by the other side that the guardian did not actually apply the money for necessary purposes. [P 71 C 2; P 72 C 1]

**(c) Minor—Ratification by major of transaction entered into during minority—Knowledge of material facts is essential.**

For a valid ratification by a major of a transaction entered into during his minority, there must be after majority and after the late minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act which shows an intentional acknowledgment of his liability for the act done on his behalf during his minority: *A I R 1930 P C 278* and *A I R 1936 Nag 127, Foll.* [P 72 C 1]

T. J. Kedar — *for Appellants.*

W. B. Pendharkar — *for Respondents Nos. 1 and 2.*

**Judgment.** * * * *

Before judging the evidence in this case, we think it best to find out and state what the law on the subject is. The evidence in the case can then be judged in the light of the law. It is laid down by the Judicial Commissioner's Court in 2 N L R 25[1] that a guardian cannot in any case bind the minor by a personal covenant as held by their Lordships of the Privy Council in 11 Bom 551.[2] But it is quite conceivable that where money borrowed for a minor has been spent on necessaries, the minor might be liable for the debt not upon the contract but by reason of the money having been so spent. The same view was repeated in a later case, A I R 1927 Nag 196,[3] where Hallifax A. J. C. ruled that a minor is not liable at all on the contract of loan made by his mother, but he is liable under the contract for any sum of money spent on procuring necessaries for him under S. 68, Contract Act. In a recent case, A I R 1933 Nag 285,[4] Pollock A. J. C. lays down the law as under:

> The minor's estate is not liable on a contract executed by his guardian, which does not purport to bind his estate, but that money expended on necessaries may be recovered from his estate under the provisions of S. 68. It is entirely immaterial whether the bond was executed by the minor or his guardian or whether no bond was executed at all; for, the liability of the minor's estate arises not ex contractu but because the money borrowed has been expended on necessaries.

In Second Appeal No. 273 of 1935,[5] decided by one of us (Bose J.) dealing with a similar case, it was held that 13 N L R 109[6] deals with a case of a family trade or business and had no application to a case of a loan incurred on behalf of the minor by the guardian and that the case of alienation by minor's guardian was to be distinguished from a case of an ordinary loan by the guardian on his behalf. It was further held that in cases of alienation where necessity was alleged, inquiries made in good faith protected the transferee, whereas in the case of necessaries such considerations are irrelevant. 20 Bom 61[7] at pp. 70 and 71 was relied on in support of this proposition. The law stated in these cases is correct and is in conformity with the decision of the Privy Council in 11 Bom 551[2] and the principle underlying S. 68, Contract Act.

But there is one more aspect of the case which is not dealt with in these cases but which is stated in 42 Mad 185[8] and accepted by Prideaux A. J. C. in 24 N L R 54.[9] In 24 N L R 54[9] it was held that no decree can be passed against the minor on his estate on a contract entered into on his behalf by his guardian under which no charge is created on the estate, except in cases where the minor's estate would be liable to the obligation incurred by the guardian under the personal law to which he is subject. This latter case is based upon 42 Mad 185,[8] where it was laid down by Ayling and Seshagiri Ayyar JJ., Wallis C. J. dissenting, that on a contract entered into on behalf of a minor by his guardian under which the guardian borrowed but no charge was created on the minor's estate, no decree can be passed against the minor on his attaining majority or his estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject, and that a decree can be passed against the estate of a Hindu minor for a debt contracted by his guardian for the marriage of his sister. 54 Mad 163[10] takes the same view. In a case reported in A I R 1932 Mad 696,[11] their Lordships of the Madras High Court laid down that where it is found that the guardian borrowed money for the purpose of binding the minor's estate, and that he had no other funds available to serve those purposes, the creditor is entitled to be subrogated to the rights of the guardian, and to have direct recourse against the minor's estate. They have further held that money advanced for necessary purposes can be treated as money advanced for necessaries within the meaning of S. 68, Contract Act. It was pointed out in 11 Bom 551[2] that almost all the High Courts have since the authority propounded in 42 Mad 185[8] at pp. 194-195 held that the liability of the minor under the Hindu law is not affected by the fact that the guardian has incurred that obligation: 14 Bom 562,[12] 20 Bom 61,[7] 23 I C 877,[13] 17 Mad 306,[14] 22 Mad 289,[15] 26 Mad 330,[16] 31 Mad 47[17] and 39 Mad 915.[18] With reference to the observations of Lord Hobhouse at p. 561 of 11 Bom 551[2]:

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[1] Tukaram v. Ramchandra, (1906) 2 N L R 25.

[2] Waghela Rajsanji v. Shekh Masludin, (1887) 11 Bom 551 (P C).

[3] Yadorao v. Chandudas, A I R 1927 Nag 196=101 I C 255.

[4] Shrinivasrao v. Baba Ram, A I R 1933 Nag 285=145 I C 350.

[5] Sadasheo Balaji v. Firm Hiralal Ramgopal, *Reported in* A I R 1938 Nag 65.

[6] Jhitibai v. Tejmal, A I R 1916 Nag 11=41 I C 85=13 N L R 109.

[7] Maharana Shri Ranmalsingji v. Vadilal Vakhatchand, (1896) 20 Bom 61.

[8] Ramajogyya v. Jagannadham, A I R 1919 Mad 641 = 49 I C 872 = 42 Mad 185 = 36 M L J 29 (F B).

[9] Lalchand v. Narhar, A I R 1926 Nag 81=89 I C 896=24 N L R 54.

> Now it was most candidly stated by Mr. Mayne, who argued the case on behalf of the respondent, that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law,

Seshagiri Ayyar J. observed in 42 Mad 185[8] at page 195 :

> I do not think that it was intended to lay down by this statement that no rule to the contrary under the Hindu law would be countenanced. The term "Indian law" was meant to apply to the statute law of the land and not to Hindu or Mahomedan law. I am therefore of opinion that the rule laid down in 11 Bom 551[2] was not intended to affect the Hindu law liability of the minor.

He laid down that no decree should be passed against the minor on the contract entered into on his behalf by the guardian under which covenant no charge is created on the estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. This view has been accepted by Prideaux A. J. C. in 24 N L R 54.[9] Pollock A. J. C. however observed in A I R 1933 Nag 285[4] at p. 287 that it is possible that the decision in 24 N L R 54[9] may require reconsideration some day and that the decision of Prideaux A. J. C. may require some further explanation. In view of these remarks of Pollock A. J. C., we have stated in full the view taken and 42 Mad 185[8] on which 24 N L R 54[9] is based. We observe that this decision is correct. The Madras High Court has given good reasons for coming to the conclusion it did, and has rightly pointed out that the liability of a minor under Hindu law is not affected by the fact that the guardian has incurred the obligation. A Hindu minor is under an obligation to perform his sister's marriage ; he is under an obligation to perform certain religious ceremonies, and he is under a pious obligation to pay his father's debts. These and such other obligations are imposed upon him by Hindu law which is his personal law and it will not be proper to relieve his estate of the obligation simply because during his minority his guardian or manager of his estate, as stated in 22 N L R 5,[19] incurs the obligation. The rule that a minor is not personally liable on the contract entered into on his behalf by his guardian is thus subject to two exceptions : (1) where the contract is for necessaries supplied to or on behalf of the minor or money advanced for such supplies ; and (2) when the liability is such to which the minor is liable under the personal law to which he is subject. In these two cases a decree can be passed against the estate of the minor.

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[10] Zamindar of Polavaram v. Maharaja of Pittapuram, A I R 1931 Mad 140=135 I C 17=54 Mad 163=60 M L J 56.

[11] Meenakshi Sundaram v. Ranga Ayyangar, A I R 1932 Mad 696=139 I C 383.

[12] Nathuram v. Shoma Chhagan, (1890) 14 Bom 562.

[13] Siva Narayan Ghosh v. Kamakhya Ghosh, A I R 1914 Cal 500=23 I C 877.

[14] Sundararaja Ayyangar v. Pattanathusami Tevar, (1894) 17 Mad 306.

[15] Sinaya Pillai v. Muni Sami Ayyan, (1899) 22 Mad 289=9 M L J 64.

[16] Subramania Ayyar v. Arumuga Chetti, (1903) 26 Mad 330.

[17] Daivasikamini Pandarasannidhi v. Noor Mahomed Routhan, (1908) 31 Mad 47 = 17 M L J 553.

[18] Krishna Chettiar v. Nagamani Ammal, A I R 1916 Mad 677=30 I C 574=39 Mad 915.

Having thus stated the law regarding the personal liability of the minor, and the circumstances in which his estate can be made liable under a contract entered into by his guardian or manager, we think it necessary to state what evidence the creditor is bound to adduce if he wishes to make the minor's estate liable. The appellant argues that in cases of advances for necessaries, actual proof of the application of the money ought to be adduced, while the respondent contends that proof of bona fide inquiry and advance in good faith on the basis of such inquiry ought to suffice. The respondent relies on 22 All 135,[20] 45 All 77[21] and A I R 1933 Pat 29[22] in support of his contention. These cases no doubt support the respondent, but we are unable to accept the law laid down there. In these cases, the law applicable to alienations has been applied to simple money transactions. Though the distinction is fine, we should like to reiterate what one of us said in Second Appeal No. 273 of 1935.[5] One of us (Bose J.) while deciding S. A. No. 273 of 1935[5] observed as under :

> One important point of distinction between the two classes of cases is this : in the case of an alienation where necessity is alleged, enquiries made in good faith protect the transferee, whereas in the case of necessaries such considerations are irrelevant : 20 Bom 61[7] at pp. 70 and 71. Then again an alienation by a minor would be void whatever the purpose for which it was made, but in the case of necessaries supplied to him, it is immaterial whether the order comes from him or from his guardian : in both cases the test is precisely the same : the suitability of the goods supplied, or the benefits conferred, having regard to the social status and condition in life of the minor, and to his actual requirements at the time of the transaction.
>
> The onus of proof lies on the creditor, as is explained in (1908) 2 K B 1.[23] He has to show first that the goods or the money which represents them are suitable to the condition in life of the infant; and secondly that they are suitable to his actual requirements at the time ; or in other words that the infant has not got a supply from other sources.

This second proposition is also to be found in (1884) 13 Q B D 410,[24] and in (1887) 19 Q B D 509.[25] We adhere to this view expressed in Second Appeal No. 273 of 1935[5] in which the observations made above were with reference to the case of necessaries. While adhering to the view expressed in Second Appeal No. 273 of 1935,[5] we wish to make it clear that these observations have no bearing on a case where a minor's estate is sought to be made liable on a contract entered into by the guardian or manager regarding a liability to which the minor is subject under the personal law as stated in 42 Mad 185[8] and accepted in 24 N L R 54.[9] In a case where a creditor seeks to make the estate of the minor liable for advances made for necessaries (including in term advances made for necessary purposes as stated in A I R 1932 Mad 696[11]), we are of opinion that mere bona fide inquiry by the creditor into the existence of the necessity and advance in good faith thereafter will not suffice, but at the same time we are not prepared to hold that the creditor should be required to prove the actual application of the money. To require this of the creditor is to ask him to do the impossible. The creditor is required to prove the circumstances of the minor's estate, the absence of any other source from which the necessity could be met at the time of the transaction and the suitability of the necessity having regard to the social status and the condition in life of the minor. If these are established, and the creditor has advanced money for meeting such necessaries, after satisfying himself about the same, the creditor is entitled to a decree against the estate of the minor unless it is proved by the other side that the guardian did not actually apply the money for necessary purposes. The burden will in such circumstances shift on the defendants to prove that the guardian instead of using the money for the minor as required used it for his own purposes.

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[19] Kesheo Bharati v. Jagannath, A I R 1926 Nag 81=92 I C 121=22 N L R 5 (F B).

[20] Ram Bharose v. Kallu Mal, (1900) 22 All 185 1900 A W N 12.

[21] Raghubans Upadhya v. Indarjit Singh, A I R 1922 All 526=69 I C 688=45 All 77=20 A L J 886.

[22] Suchit Choudhuri v. Harnandan Singh, A I R 1988 Pat 29=142 I C 88=12 Pat 112=13 P L T 655.

[23] Nash v. Inman, (1908) 2 K B 1=77 L J K B 626=98 L T 658=24 T L R 401=52 S J 335.

[24] Barnes v. Toye, (1884) 13 Q B D 410=53 L J Q B 567=51 L T 292=33 W R 15=48 J P 664.

[25] Johnstone v. Marks, (1887) 19 Q B D 509=57 L J Q B 6=35 W R 806.

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One more contention of the plaintiffs ought to be disposed of before we come to the final part of our decision. It is argued that there was ratification by defendant 1. The trial Court in para. 30 of its judgment under issue 15 has held that ratification by defendant 1 is not proved. The plaintiffs base the plea of ratification on the endorsement of payment of Rs. 50 by defendant 1 at the back of Ex. P.1 and rely on the testimony of P. W. 7 who says that Sadasheo (defendant 1) made the payment with full knowledge. D. W. 6 (defendant) has explained the circumstances under which this endorsement was made. His evidence appears to be acceptable on this point in preference to the evidence given by P. W. 7. He had then just attained majority and made the payment of Rs. 50 to the plaintiffs, at the instance of his mother and endorsed at the back of Ex. P.1 at the instance of the plaintiff Shankar. He similarly replied to the demand made by the plaintiffs at the instance of his mother. There is nothing in that also to indicate any ratification. S. 198, Contract Act, runs as under: "No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective." Effective ratification, as the Privy Council pointed out, necessarily involves knowledge of all the material facts on the part of him who ratifies: A I R 1930 P C 278.[26] Pollock A. J. C. in 31 N L R 243[27] states as under on the same point:

> For a valid ratification by a major of a transaction entered into during his minority, there must be, after majority and after the late minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act which shows an intentional acknowledgment of his liability for the act done on his behalf during his minority.

The evidence of P. W. 7 does not satisfy this test. He merely states that defendant Sadasheo read the bond when he paid Rs. 50 and promised to pay more and endorsed on it. In the first instance we are not prepared to accept this evidence and secondly as it is, it is not sufficient to prove that the nature and effect of the transaction was fully explained to defendant 1 before he endorsed on the back of Ex. P.1. Though we are not prepared to hold that the plaintiffs have succeeded in proving the binding nature of three out of four items in dispute against the estate of the defendants, we cannot ignore one more aspect of the case which strikes us as important. There is no proof that the mother was mismanaging the estate. On the contrary, there is positive proof that she managed it prudently: see Janba (P. W. 8) and Mahadeo (D. W. 4). It is on record that the father died indebted to the extent of Rs. 7000 and the mother as manager paid off those debts and all debts by 1919: see Govinda (D. W. 3), Hari (D. W. 1) and Janba (P. W. 8). The debts in suit were incurred after 1920 and up to 1925, and during this period, the mother performed the marriages of her four children viz. two daughters and two sons. The evidence on record shows that she spent more than Rs. 300 for daughters' marriages and a large sum for son's marriage. It is proved that some house property was improved and rebuilt. In 1923 she purchased a field worth Rs. 4200 for the benefit of the defendants and that field is still with the defendants. It is in evidence that she had Rs. 3200 with her from the income and borrowed Rs. 1000 for the purpose from plaintiffs for which defendants admit liability against the field. It appears to us that the debts were incurred by a prudent manager in the ordinary course of managing the property, though plaintiffs have not been able to prove the specific necessity for the same at every time. It also appears to us that had the guardian not purchased the field in 1923 by using the income saved worth Rs. 3200, all the debts would have been paid off and she would not have been required to borrow anything. Had this course been adopted, the plaintiffs' claim could have been satisfied and the defendants could not have complained of the same. The mother of the defendants thought that the purchase of the field was prudent and that the debts could be paid later. Bad years followed with the result that debts could not be paid off. As the debts remained unpaid in 1923, on account of the purchase of the field worth Rs. 4200 and as a further sum of Rs. 475 had to be borrowed by the defendants' mother, we think it proper to order on the same principle which is accepted by the defendants that the debts in suit except the last item of Rs. 475 were incurred in the ordinary course of management not having been proved to be of a nature binding on the estate of the minor which came to them from their father's time, are certainly binding against the newly acquired property. It is the purchase of that property which is responsible for the continuance of these debts which would have otherwise been paid off and no fresh loan would have been required.

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[26] Bank of Montreal v. Dominion Gresham Guarantee and Casualty Co., A I R 1930 P C 278=128 I C 669 (P C).

[27] Shriram v. Mohanlal, A I R 1935 Nag 127=155 I C 607=31 N L R 243.

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The result is that the appeal partially succeeds.

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As both parties have partially succeeded before us, we order that the parties should bear their own costs of this appeal. The defendants will pay the costs of the plaintiffs in the trial Court and bear their own as already ordered.

D.S./R.K. *Appeal partially allowed.*

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## A. I. R. 1938 Nagpur 73

VIVIAN BOSE J.

*Chhoglal Bulidan Mahesri*—Appellant.

v.

*Nazimbi and others*—Respondents.

Second Appeal No. 114-B of 1935, Decided on 8th March 1937, from appellate decree of Fourth Addl. Dist. Judge, Akola, D/- 23rd March 1935.

**(a) Berar Land Revenue Code (1928), S. 110 (6) — Presumption applies to such entries only as are required by law—Presumption is of correctness of title and not merely of fact that title was asserted on date of application for mutation.**

The presumption under S. 110 (6) does not apply to any and every entry which may happen to find a place in the Record of Rights. It can only apply to such entries as the law says must find place in them. If the necessary steps outlined in the Act are not taken, the presumption under S. 110 (6) cannot be made. But once the presumption is accepted, it follows that the presumption is of the correctness of the title so entered and not merely of the fact that it was asserted on the date of the application for mutation. [P 74 C 1, 2]

**W. B. Pendharkar** — *for Appellant.*

**A. Ahmad** — *for Respondents.*

**Judgment.**—One Syed Gaffor died on 14th February 1920 leaving a widow Nazimbi who is the first plaintiff and two daughters, Rafishabi and Rabiashabi, who are plaintiffs 2 and 3 respectively. He also left three sons. These plaintiffs were therefore between them entitled to a 5 anna 6 pie share in his property, plaintiff 1 getting a 2 anna and the other two plaintiffs 1 anna 9 pies each. They now sue for joint possession of the three fields in suit which formed part of Gaffor's estate to the extent of their respective shares. The suit was instituted on 20th June 1933. The defendant is a mortgagee from one of Gaffor's sons, Syed Hussain. The deed is dated 8th October 1924. In due course the mortgagee sued upon his mortgage and eventually obtained possession on 18th April 1931 under the final decree in Civil Suit No. 258 of 1929. His case is that Syed Gaffor divided his property in his lifetime into three shares and gave each of his three sons one of them. The share which fell to the lot of Syed Hussain comprised the fields in dispute. Consequently it was urged that there was nothing left for the plaintiffs to inherit, so far as these three fields are concerned, when Gaffor died. In any case, the defendant pleads that Syed Hussain held adversely to the plaintiffs from the date of the partition at which they were ignored, and as the defendant and his predecessor have been in possession in their own right for more than 12 years the plaintiffs' claim is barred. The defendant also claimed the protection of S. 41, T. P. Act. With respect to the partition, there are entries in the Record of Rights registers for 1928-29 with respect to each of these three fields. The entries are all the same and are to be found in Exs. D.4, D.5 and D.6. There are similar entries in the mutation register Ex. D-3. They all of them record Syed Hussain as the occupant

> according to partition made by the father Syed Gaffor during his lifetime between Syed Hussain and his brothers Vikram and Syed Munir in the year 1920.

The entry in Ex. D-3 is dated 23rd December 1921 and appears to have been made in consequence of an application dated 16th October 1921. Of course what has been called a partition was not a partition strictly so called. It was a gift by Syed Gaffor to his three sons, but in so far as it effected a division of his property, the term is understandable and was obviously colloquially used. The lower Courts have brushed aside these entries as of no consequence and the question is whether they were entitled to do so. There is a presumption under S. 96-I of the old Berar Land Revenue Code and under S. 110 (5) and (6) of the new, that entries in the Record of Rights and certified entries in the mutation registers are true until the contrary is proved or a new entry is lawfully substituted for them, and it is argued the burden of proof has been wrongly placed, for, the learned Judge of the lower Appellate Court does not hold that the evidence establishes the contrary but brushes aside the entries altogether as of no consequence and disbelieves the oral evidence adduced in support of them. The contention of the other side is that the entries can only speak from the date on which they were made and so the presumption is of the truth of the entry on that date and not with respect to the recitals of past events. I have now to decide which of these is right. The entries in the mutation register were made in the year 1921 and so were made under the old Code of 1896. It may be conceded at once that the presumption under the Act does not apply to any and every entry which may happen to find a place in these documents. It can only apply to such entries as the law says must find place in them. So what we have to see is whether the Code directs a record to be made of the title or right in consequence of which mutation is claimed. I am clear it does.

Section 96-B directs that the Record of Rights shall include among other things all persons who are holders, owners or occupants of the land together with the nature and extent of their respective interests. The next sections deal with cases of devolution. Under S. 96-C any person who acquires any of the rights mentioned above from the person entered in the register, by among other things a gift, has to report his acquisition to the patwari within a given time. The patwari is then directed to enter the acquisition as reported in the register of mutation under S. 96-D. He is also directed to post a complete copy of the entry in chauri or some other public place in the village and also to give written intimation to all persons interested, and if any objections are made they have to be recorded in the register. S. 96-D (6) then directs that a Revenue Officer of a rank not lower than that of a Naib Tahsildar shall test these entries and if found correct certify them.

Therefore it is clear that the person seeking mutation has to disclose his title, that the title itself has to be inquired into and that a record of it has to be made in the mutation register and subsequently certified. Of course, if the necessary steps outlined in the Act are not taken, the presumption under S. 96-I cannot be made, but in the absence of the evidence to the contrary, it must be presumed that official acts were duly and properly performed and therefore that these entries were made and certified after due and proper inquiry. But once that is accepted, it must follow that the presumption under S. 96-I is of the correctness of the title so entered and not merely of the fact that it was asserted on the date of the application for mutation. The lower Appellate Court, as I have said, has brushed aside these entries and the learned Judge holds that he can attach no importance to them "in the absence of satisfactory proof that Syed Gaffor had partitioned his property during his lifetime'. This does not place the burden of proof aright, so I have to revise these findings.

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The appeal succeeds. The decrees of the lower Courts are set aside and a decree dismissing the plaintiffs claim with costs in all the three Courts will now be drawn up.

S.C./R.K. *Appeal succeeds.*

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## A. I. R. 1938 Nagpur 74

POLLOCK J.

*Laxmanrao Parashram Deshmukh*
Applicant.
v.
*Emperor.*

Misc. Criminal Appln. No. 46 of 1937, Decided on 24th June 1937, from order of Addl. Sess. Judge, Nagpur, D/. 8th March 1937.

**Criminal P. C. (1898), Ss. 369, 561-A — Review — S. 561-A confers no power of review.**

There never was inherent power in the High Court to alter or review a judgment in a criminal case, and S. 561-A does not confer such power on the High Court : *A I R 1928 Oudh 402 and A I R 1927 Lah 139, Dissent.*; *A I R 1928 Lah 462; A I R 1933 Cal 870; A I R 1935 All 466; A I R 1936 Oudh 219 and A I R 1935 Pat 426, Rel. on.* [P 75 C 1]

B. R. Mandlekar — *for Applicant.*

**Order.**—This is an application for review of an order passed by me in a criminal case. It has been argued that S. 561-A, Criminal P. C., gives this Court power to review its order passed in a criminal case. S. 369 of the Code provides that there shall be no review in criminal case and S. 561-A merely provides that nothing in this Code shall be deemed to limit or affect the inherent power of the High Court.

I have been referred to the decision in 3 Luck 680[1] holding that S. 561-A gives a power of review in criminal cases. I respectfully disagree with that decision, which was partly based on the decision in A I R 1927 Lah 139[2] which has since been overruled. In my opinion there never was inherent power in the High Court to alter or review a judgment in a criminal case, and S. 561-A will therefore not confer such a power on the High Court. I may refer to the decisions in 10 Lah 1,[3] 61 Cal 155,[4] A I R 1935 All 466,[5] 12 Luck 30[6] and 14 Pat 392.[7] No application for review therefore lies and the application is dismissed.

B.D./R.K. *Application dismissed.*

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1. Emperor v. Shiva Datta, A I R 1928 Oudh 402=111 I C 573=29 Cr L J 893=3 Luck 680=5 O W N 641.
2. Mathra Das v. Emperor, A I R 1927 Lah 139 =99 I C 1039=28 Cr L J 289.
3. Raju v. Emperor, A I R 1928 Lah 462=110 I C 221=10 Lah 1=29 Cr L J 669=30 P L R 247.
4. Dahu Raut v. Emperor, A I R 1933 Cal 870= 1933 Cr C 1481=145 I C 987=34 Cr L J 1100=61 Cal 155=38 C W N 25.
5. Banwari Lal v. Emperor, A I R 1935 All 466 =1935 Cr C 507=157 I C 1044=36 Cr L J 1286=57 All 867=1935 A L J 317.
6. Ram Jas v. Emperor, A I R 1936 Oudh 219= 1936 Cr C 344=160 I C 969=37 Cr L J 362 12 Luck 30=1936 O W N 194.
7. Pem Mahton v. Emperor, A I R 1935 Pat 426 =1935 Cr C 1123=159 I C 241=37 Cr L J 58 =14 Pat 392=16 P L T 683.

## * A. I. R. 1938 Nagpur 75

VIVIAN BOSE J.

*Seth Dawood Haji Ibrahim Kachhi* — *Decree-holder* — Applicant.

v.

*Ramprasad Gangaprasad Bania* — *Surety* — Non-Applicant.

Civil Revision Appln. No. 683 of 1936, Decided on 12th August 1937 from order of Small Cause Court, Betul, D/- 15th August 1936.

**(a) Civil P. C. (1908), S. 145—Ambiguity in surety bond—Construction.**

If there is any ambiguity in the words of a surety bond, the bond must be construed in the light of the order directing the security to be given : *A I R 1934 Cal 569, Foll.* [P 75 C 2]

*** (b) Civil P. C. (1908), S. 145—Surety bond under S. 17 (1), Provincial Small Cause Courts Act—Decree set aside and new decree passed Surety cannot be proceeded against under S. 145.**

Where a surety bond is furnished to set aside an ex parte decree under S. 17 (1), Provincial Small Cause Courts Act, and the decree is set aside and a new decree passed, the surety is not liable and cannot be proceeded against under S. 145, Civil P. C. [P 76 C 1]

K. B. Tare — *for Applicant.*

J. P. Dwivedi — *for Non-applicant.*

**Order.** — The applicant before me obtained an ex parte decree against one Jagannath in the Court of Small Causes at Betul on 20th December 1932. The judgment-debtor thereupon applied to have the ex parte decree set aside under S. 17 (1), Provincial Small Cause Courts Act, and produced the non-applicant as a surety. The ex parte decree was set aside and after trial a fresh decree was passed. The applicant now applies in execution under S. 145, Civil. P. C., against the non-applicant surety. The lower Court holds that the non-applicant is not liable because under the terms of the surety bond he stood surety only till the delivery of judgment. In my opinion this is an impossible construction of the bond. As there is some doubt about the translation, I give the original words so far as they are material. They are: "*Ye jamanat ta faisla mukhadama ke deta ho.*" If there is any ambiguity in their meaning, then, as the Judges of the Calcutta High Court point out in 61 Cal 890[1] at p. 892, quoting a decision of their Lordships of the Privy Council, the bond must be construed in the light of the order directing the security to be given. As the order in this case was passed under the proviso to S. 17 (1), Provincial Small Cause Courts Act, the bond must be construed in the light of those provisions. The proviso states that when there is an application for setting aside an ex parte decree the applicant shall

> at the time of presenting his application . . . give security to the satisfaction of the Court for the performance of the decree.

The question is, what decree does that mean? An ex parte decree or a decree which is later passed in the case. The only decree referred to in the commencement

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1. Mohendranath Banerji v. Satishchandra, 1934 Cal 569=150 I C 985=61 Cal 890.

of the proviso is an ex parte decree and therefore when the later sentences of the same proviso refer 'to the decree' it can only mean the ex parte decree which has been referred to in the earlier part of the proviso. If that decree is set aside, it follows the surety is discharged, for, under S. 17 (2) the only manner in which the surety may be proceeded against is that provided by S. 145, Civil. P. C., and that allows the decree "to be executed against the surety". If there is no decree under which he can be held liable it is obvious he cannot be proceeded against.

Section 17 (1) states that the procedure prescribed in the Code of Civil Procedure shall, save in so far as is otherwise provided by that Code or by the Small Cause Courts Act, apply in all proceedings in the Small Cause Courts. Therefore it is relevant to construe the proviso to S. 17 (1) in the light of similar provisions in the Code of Civil Procedure. When we compare this proviso with the provisions of O. 38, Rr. 2 and 5, the difference between them becomes apparent at once. R. 2 provides that the surety bond shall be for the satisfaction "of any decree that may be passed against him in the suit". The second Rule also makes it clear that the security is for a decree which may be passed in the future. Since the ex parte decree here was set aside the surety was discharged. I therefore uphold the order of the lower Court though not for the reasons given by it and dismiss this application for revision with costs. Counsel's fee Rs. 10.

S.C./R.K. *Application dismissed.*

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## A. I. R. 1938 Nagpur 76

GRILLE J.

*Dattatraya Govindrao Pakode*
Applicant.
v.
*Emperor.*

Criminal Revn. Appln. No. 291 of 1937, Decided on 13th September 1937, from order of Addl. Sess. Judge, Amraoti, D/- 27th May 1937.

**(a) Criminal P. C. (1898), S. 494 — Withdrawal of case — Reasons for giving permission are desirable but not compulsory — Party wanting to set aside order of withdrawal must show injudicious use of discretion in giving consent.**

Reasons no doubt for giving permission to withdraw a case are desirable, but to say that they are essential is overstating the law. The Criminal Procedure Code makes no such requirement, and once the consent of the Court is given, it rests on the party applying to have this decision set aside to show that the consent was given in disregard of the judicial exercise of the discretion which the Magistrate had, to give his consent to the withdrawal : *A I R 1929 Cal 319, Rel. on.* [P 77 C 1]

**(b) Criminal P. C. (1898), S. 494 — Withdrawal of case — Consent of Magistrate is essential** (*Obiter*).

From the mere fact that the police have applied under S. 494 for withdrawal, the Magistrate is not bound to allow the case to be withdrawn. His consent is not immaterial and he must exercise discretion in the matter. [P 77 C 1]

T. J. Kedar — *for Applicant.*

D. T. Mangalmoorti — *for Non-applicant.*

**Order.** — One Sidheshwar Balkrishna had been the agent of one Dattatraya for a number of years and was prosecuted under S. 409, I. P. C. for having misappropriated certain sums of his master's money during the year 1930. After a number of prosecution witnesses had been examined and before a charge was framed, the prosecution put in an application to withdraw the case under S. 494, Criminal P. C. The Magistrate then passed the following order :

> The accused being in the service of Dattatraya as his agent has been alleged to have misappropriated Rs. 269 and other amount of his master in 1930; hence he has been prosecuted under S. 409, I. P. C. The D. S. P. has withdrawn the case; hence the accused is discharged under S. 494 (a), Criminal P. C. All the account-books, etc. should be returned to Dattatraya.

Dattatraya then filed an application in revision in the Sessions Court at Amraoti and the Additional Sessions Judge came to the conclusion that although no reasons had been given by the Magistrate, the discharge was not, to use his own words, "altogether bad in law", and on going through the record he came to the conclusion that there were adequate reasons for discharging the accused. The other point taken, namely that the Circle Inspector who asked for withdrawal of the prosecution had no authority to make the request was also held against the applicant and the application was dismissed summarily.

An application in revision against this order has now been made before me. The point of the competency of the Circle Inspector to file an application to withdraw is easily met. It is clear from

S. 495, Criminal P. C., that an officer of the police not below a certain rank which the Local Government is to prescribe is entitled to conduct the prosecution and is therefore, by the same section, entitled to make an application for withdrawal. The lowest rank prescribed by the Local Government is that of the Sub-Inspector. A Circle Inspector is above that rank, and his appearance in the case under the instructions of the District Superintendent of Police to apply for withdrawal is sufficient to enable him to present the application. Numerous cases have been cited to show that reasons must be given by the Magistrate who, under S. 494, Criminal P. C., gives his consent to a withdrawal of the prosecution. These cases are from the High Court of Calcutta and from the Judicial Commissioner's Court, Nagpur. It is to be noted that this proposition was doubted by Suhrawardy J. in 56 Cal 1023[1] and the opinions of the High Courts of Patna and Lahore and of the Judicial Commissioner's Court in Sind are against this view. Reasons no doubt for giving permission to withdraw a case are desirable, but to say that they are essential is in my opinion over-stating the law. The Criminal Procedure Code makes no such requirement, and once the consent of the Court is given, it rests on the party applying to have this decision set aside to show that the consent was given in disregard of the judicial exercise of the discretion which the Magistrate had, to give his consent to the withdrawal.

Had this case come before me direct in revision from the Court which passed the order, I would have been inclined to set it aside on the ground that no consent has been given and that the Magistrate has assumed that because the police have applied for withdrawal he was bound to allow the case to be withdrawn. The wording of the order implies that the Magistrate considered that his consent was immaterial and that there was no need for him to exercise his discretion in the matter. I have on more than one occasion commented on the habit of the junior magistracy and others of accepting applications and recommendations of the police without exercising their judicial discretion in any way. This application however is against the order of the Additional Sessions Judge who had jurisdiction either to direct a further inquiry or to refuse to direct a further inquiry (*see* 29 Nag L R 201),[2] and the real question before me is whether the discretion of the Additional Sessions Judge has been judicially exercised or no. He has considered the facts of the case and has come to the conclusion that the application to withdraw from the prosecution was justified and that the permission to withdraw, such as it was, was also justified, and he refused to direct a further inquiry. On the merits of the application I am not prepared to say that his decision was incorrect, or that his discretion has been unwisely or unjudicially exercised. The result is that the application fails and the rule is discharged.

B.D./R.K. *Application dismissed.*

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[1] G. V. Raman v. Emperor, A I R 1929 Cal 819 =121 I C 678=56 Cal 1023=31 Cr L J 315 =33 C W N 468.

[2] Kanhaiyalal v. Baijnath, A I R 1933 Nag 78 =1933 Cr C 315=143 I C 77=34 Cr L J 519 =29 N L R 201.

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## A. I. R. 1938 Nagpur 77

NIYOGI J.

*Raghoappa Nagappa* — Applicant.

v.

*Balappa Basappa* — Non-applicant.

Civil Revn. No. 336-B of 1935, Decided on 11th December 1936, from decree of Senior Small Causes Judge, Basim, D/- 24th September 1935.

**Hindu Law — Widow — Debts — Debts incurred by widow whether secured or unsecured bind reversioners if they are of a character binding on husband's estate.**

The debt incurred by a widow, whether secured or unsecured, binds the reversioners if the debt is of a character which is binding on the husband's estate. The Hindu law attaches importance to the character of the debt, such as a debt borrowed for legal necessity or for paying off antecedent debts or for the benefit of the estate or for the performance of obligatory religious ceremonies. It is the character of the debt which is material and not whether the debt is secured or unsecured : *A I R 1936 Bom 59 (F B); 34 Mad 188 and AIR 1929 Nag 191, Foll.* [P 78 C 1, 2]

V. K. Rajwade and A. Ahmad — *for Applicant.*

J. Sen — *for Non-applicant.*

**Order.** — This is a defendant's application for revision of the judgment of the Senior Small Cause Court Judge, Basim, in Small Cause Suit No. 30 of 1935. The applicant, Raghoappa, succeeded as reversioner on the death of Mt. Sonabai who had executed a bond on 12th April 1930 for Rs. 300 in favour of the plaintiff. The lower Court held that the sum of Rs. 300 was required by her for purposes which were binding on the estate which devolved on her from her husband, and decreed the claim in full.

It is urged on behalf of the applicant that the evidence as to payment of Rs. 10 on 7th April 1933 is obscure and unsatisfactory. The importance of this payment lies in the fact that it serves to extend the period of limitation which otherwise would expire on 12th April 1933. It is true, as some witnesses say, that the widow was not keeping good health for some time previously, but that is a circumstance which creates a suspicion that cannot prevail against the positive evidence on the record that she had actually paid Rs. 10 to her creditor, and that she endorsed the payment on the back of the bond, and affixing her finger mark.

Much vigorous argument was addressed on the point whether an unsecured debt incurred by a widow could be enforced against the reversioners. Reference is made to 52 Bom 542[1] and A I R 1933 Nag 285.[2] No doubt the Bombay High Court took the view that a debt incurred by a widow unless it was charged on the estate was not binding on the reversioners; but as appears from the recent case, 60 Bom 311,[3] the Bombay High Court has departed from that view and has come in line with the views of the Madras High Court (*see* 34 Mad 188)[4]; and of the Nagpur Judicial Commissioner's Court in A I R 1929 Nag 191.[5] Personally, I have always held the view that the debt, whether secured or unsecured, must bind the reversioners if the debt was of a character which was binding on the husband's estate. The Hindu law attaches importance to the character of the debt such as a debt borrowed for legal necessity or for paying off antecedent debts or for the benefit of the estate or for the performance of obligatory religious ceremonies. It is the character of the debt which is material and not whether the debt is secured or unsecured. Therefore the only question which called for determination in the lower Court was whether the debt which had been borrowed by Mt. Sonabai was required for purposes connected with the management or the preservation of her husband's estate.

There is sufficient evidence on record to sustain the lower Court's finding that she required Rs. 125 for purchasing a pair of bullocks and a further sum of Rs. 125 to pay off the arrears of her servant Narayan. It is pertinent to notice that the property which devolved on her from her husband was a pan-mala, that is a plantation of betel leaves, which could not be preserved without the employment of servants; and it is indisputable that bullocks would be necessary adjuncts. It must therefore follow that Rs. 250 out of the debt of Rs. 300 borrowed on the bond were such as went either for the benefit or for the preservation of the estate. That leaves outstanding the item of Rs. 50 about which the evidence appears to be somewhat hazy and discrepant. The witnesses are not agreed as to what purpose exactly the sum of Rs. 50 was borrowed for. One says that it was for repairing a well and another says that it was for repairing a well and a wall. It also appears from their evidence that the well was not entirely owned by the widow, and it is not clear how much she would have required for its repairs. I would therefore disallow the item of Rs. 50.

It was faintly argued that in the bond the widow stipulated that the debt would be binding on her estate and her heirs and an argument of a highly technical character was sought to be erected on this recital in the bond by saying that what she meant was that it was binding on her personal estate and on her personal heirs. It has not been shown that she had any personal estate of her own, and in the absence of any proof that she had a personal estate it must be presumed that "by her estate" she meant "the estate which had devolved on her from her husband." The result is that the lower Court's decree is varied by reducing the amount decreed from Rs. 600 to Rs. 500. The applicant will bear the costs of this application. Counsel's fees Rs. 25.

A.L./R.K. *Decree varied.*

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[1] Bhagwantrao Abaji v. Ramnath Kaniram, A I R 1928 Bom 310=111 I C 704=52 Bom 542=30 Bom L R 881.

[2] Sriniwasrao v. Baba Ram, A I R 1933 Nag 285=145 I C 350.

[3] Dhondu Yeshwant v. Mishrilal Surajmal, A I R 1936 Bom 59=160 I C 1046=60 Bom 311=38 Bom L R 6 (F B).

[4] Veerabadra Iyer v. Marudaga Nachiar, (1911) 34 Mad 188=8 I C 1072=21 M L J 320.

[5] Kongski v. Kandaji, A I R 1929 Nag 191=117 I C 266.

## A. I. R. 1938 Nagpur 79

VIVIAN BOSE J.

*Daulatram Nanakram Kalar* — Appellant.

v.

*Panna Shambhu Mali and another* — Respondents.

Second Appeal No. 363 of 1934, Decided on 15th February 1937, from appellate decree of Dist. Judge, Hoshangabad, D/- 16th April 1934.

**Mortgage—Foreclosure—Portion of mortgage security excluded by operation of law — Mortgagee can enforce his whole charge against rest.**

The mortgagor is bound to pay his debt, and when the interests of third parties do not intervene and when the mortgagee has not obtained a portion of the mortgage security for himself, then the mortgage money is enforcible against every portion of the mortgaged property, and the mere fact that a portion of it happens to be excluded from the mortgage security by operation of law cannot affect the mortgagee's right to enforce his whole charge against the rest: *A I R 1936 P C 801 and A I R 1928 Nag 41, Rel. on.* [P 79 C 2]

M. B. Kinkhede and A. R. Kulkarni — *for Appellant.*

N. T. Mangalmoorti—*for Respondents.*

**Judgment.**—The suit out of which this appeal arises is for foreclosure of a mortgage dated 26th May 1915, for Rs. 360, executed by the defendants' father, Shambhu, in favour of the plaintiff's father (Nanakram) and brother (Kundanlal). The defence, so far as it is relevant now, was that the mortgage was fully satisfied by the mortgagees taking the materials of the mortgaged house, together with Rs. 75 in cash from the mortgagor in full satisfaction of the mortgage. Both the lower Courts held that the materials of the house were sold, and that they fetched Rs. 75 and that this sum was credited by the mortgagees towards reduction of the principal debt due under the mortgage. They disbelieved the defendants' story that Rs. 75 had been paid in cash in addition to the price of the materials. In addition to this, the mortgage is also said to have included an ordinary tenancy field and some guava trees standing on it. The mortgagor objected that the mortgage was invalid because the document was incapable of registration, since it included this field and the trees. The lower Appellate Court held that the field had not been mortgaged, but that the trees had been, and remanded the case for a finding as to whether the trees were held on a title different from that of the land. After remand both the lower Courts held that the trees formed a part of the ordinary tenancy holding, and consequently they held that registration of the document was invalid, and so dismissed the plaintiff's claim.

The plaintiff appealed here, and it is now agreed that, under the Privy Council ruling reported in I L R 1936 Nag 104,[1] the mortgage was valid but that the trees must be excluded from it. This raises a question as to whether the mortgagor is entitled to a proportionate reduction of the mortgage money. I confess I am unable to see why this should be. No question arises here about the interest of any third party, and, as between mortgagor and mortgagee, there can be no question of contribution. This rule is to be found in Ghosh's Law of Mortgage (Edn. 5, Vol. 1, p. 399). The mortgagor is obviously bound to pay his debt, and when the interests of third parties do not intervene and when the mortgagee has not obtained a portion of the mortgage security for himself, then it is clear the mortgage money is enforcible against every portion of the mortgaged property, and the mere fact that a portion of it happens to be excluded from the mortgage security by operation of law cannot affect the mortgagee's right to enforce his whole charge against the rest.

Although this question was not expressly decided by their Lordships of the Privy Council, it is to be observed that they enforced the entire claim against the rest of the property. This also seems to have been done in 23 N L R 174,[2] although there is a sentence on page 177 which states that Rs. 150 of the principal amount was to be excluded from the decretal amount. But what the learned Judge said was that this was to be done because he upheld the finding of the Sub-Judge that the defendants were not liable for this sum. He does not say that the mortgagors were entitled to a proportionate reduction because a part of the mortgage security was excluded from the scope of the decree.

The other question which arises because of this fact is the one considered in the lower Court. As I have said, the mortgagee purchased a part of the materials of the mortgaged house, but as I have also pointed out, he credited the price of these materials towards a reduction of the principal. Consequently the mortgagor is in a much better position than he would have been if there had been a proportionate reduction of the mortgage debt. In that view it is unnecessary to decide whether there can be an oral release of a part of the mortgage security without a proportionate reduction of the debt and also whether such a release, if not allowed by law, could be validated either by part performance or estoppel. These were the grounds upon which the learned District Judge proceeded; but it is unnecessary to go into them here.

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[1] Parshram Balaji Deshmukh v. Asaram, A I R 1936 P C 801=164 I C 845=I L R 1936 Nag 104 (P C).

[2] Narayan v. Mahadeo, A I R 1928 Nag 41=104 I C 848=23 N L R 174.

The result is that the appeal succeeds, and a fresh decree will now have to be drawn up. The trees in dispute will be excluded from the mortgage security, and a decree will now be passed on the basis of the accounting given in the decree of the first Court before remand dated 25th November 1930. The due date fixed under that decree is 21st May 1931. A fresh date will now be fixed six months hence. Interest from 21st May 1931 till the date now fixed will run at eight annas per cent. per month. The respondents will pay the costs of this appeal and also the costs in the lower Appellate Court.

S.C./R.K. *Appeal succeeds.*

## A. I. R. 1938 Nagpur 80

STONE C. J. AND NIYOGI J.

*Ramkaran Bondru* — Appellant.

v.

*Surajmal Kanhaiyalal and another* — Respondents.

Second Appeal No. 362 of 1934, Decided on 7th October 1936, from appellate decree of Dist. Judge, Hoshangabad, D/. 31st March 1934.

**(a) C. P. Tenancy Act (1 of 1920), Ss. 6, 105 — S. 6 requires alteration — Absolute occupancy holding pre-empted by landlord — Mortgagee of pre-empted field bringing suit impleading landlord pre-emptor—Pre-emptor discharged — Mortgage suit decreed —Mortgagee purchasing holding in execution of his decree—Suit by mortgagee to recover possession against landlord— Possession of land held could not be given, yet he could recover pre-emption money lying with revenue officer.**

The substantive right of pre-emption given to the landlord under S. 6 (4) (c) is independent of the right of any mortgagee of the tenant right and is paramount. In addition to this the value of the absolute occupancy holding as if it were not mortgaged or charged as fixed by the Revenue Officer is conclusive and cannot be challenged in Civil Court in view of S. 105 (a). [P 81 C 1, 2]

But the Revenue Officer has not been given any special powers to distribute or dispose of the deposit made by the landlord. Consequently S. 105 (a) will not operate to deprive the Civil Courts of their indisputable jurisdiction to direct how the sum deposited by the landlord should be disposed of. [P 83 C 1]

An absolute occupancy tenant's field was sold in an execution of money decree passed against him and under S. 6 the property was pre-empted by the landlord at price fixed under S. 6 (5) free of all incumbrances. A mortgagee of the tenant rights brought a suit on his mortgage after the pre-emption proceedings and obtained a final decree thereon in execution of which he purchased the field for himself. The landlord was discharged from that suit in consequence of his having asserted his paramount title under S. 6. The mortgagee thereafter brought a suit against the landlord for recovering possession of the field, alleging that he not being a party to the pre-emption proceedings, they were not binding on him and as the landlord was a party to his mortgage suit and he having failed to redeem the mortgage, possession could be recovered :

*Held* that the mortgagee could not recover possession, as on pre-emption proceedings taking place, the landlord took the property free of all incumbrances and the mortgage or other charge if any shifted from the holding and went over to the pre-emption price leaving the land free to the landlord. But the mortgagee could recover the money deposited in Court which was only a security substituted for land. And the fact that he had failed to ask for a decree against the pre-emption price in his previous suit on mortgage could not preclude him from doing so. (Change in S. 6 to remedy defect suggested). *A I R 1934 Nag 232, Ref.* [P 83 C 2]

**(b) C. P. Tenancy Act (1 of 1920), S. 6 — Notice — Notice to incumbrancer is not necessary.**

Section 6 does not provide for notice to any incumbrancer and hence it is not imperative on the Revenue Officer to give a notice to any incumbrancer. (Compulsory issue of notice by Revenue Officer of pre-emption proceedings to all incumbrancers is urged by legislative amendment of the section). [P 82 C 1; P 83 C 1]

**(c) Mortgage — Purchaser of mortgaged property —Purchaser is not personally liable — On failure to redeem, right to mortgaged property is lost.**

The purchaser of the mortgaged property is not personally liable to pay anything in excess of the value of the mortgaged property. If the purchaser of the mortgaged property fails to redeem, he loses his right to the mortgaged property which in the case of landlord pre-empting under S. 6, C. P. Tenancy Act (1920) is the pre-emption money : *34 All 63 (P C); A I R 1923 P C 54 and A I R 1932 Cal 775, Rel. on.* [P 82 C 1, 2]

**(d) Interpretation of Statutes—Statute ousting jurisdiction of Civil Court must be strictly construed.**

Statutes ousting jurisdiction of the Civil Courts must be very strictly construed. The Civil Courts must be presumed to have powers except to the extent that they have been taken away expressly by some other statute. It must be presumed that the Legislature does not alter the law beyond what it explicitly declares either by express words or by necessary implication : *A I R 1926 Nag 212 and A I R 1930 Nag 205, Rel. on.* [P 82 C 2; P 83 C 1]

M. R. Bobde and K. B. Tare — *for Appellant.*

K. B. Sheorey — *for Respondents.*

**Judgment.** — This appeal arises out of a suit to recover possession of an absolute occupancy field No. 10 of mouza Nimsari. The facts which led to the suit are as follows : The plaintiff was a mortgagee of the field in suit along with another field, both of absolute occupancy tenure, under a mortgage dated 31st January 1917 executed by the tenant to secure a debt of Rs. 100. The plaintiff obtained on the basis of the mortgage a final decree for sale in execution of which the field in suit was sold and the plaintiff became the purchaser : that was in 1930. After the plaintiff's mortgage but before his purchase in execution, the field in suit was brought to sale by a creditor of the tenant in execution of a simple money decree which he obtained in Civil Suit No. 71 of 1920. The field was purchased by one Sitaram for Rs. 525 in 1922. The landlord exercised his right of pre-emption under S. 6, C. P. Tenancy Act, 1920, in the Court of the Subdivisional Officer, Harda, who in accordance with S. 6 (5) of that Act fixed the value of the absolute occupancy right free of all incumbrances at Rs. 1475. To these proceedings the plaintiff was not a party; nevertheless he made an appeal to the Deputy Commissioner who fixed the value of the holding as if it were unencumbered at Rs. 1430. The landlord appealed to the Commissioner but without success. Thereon he filed a third appeal before the Governor-in-Council and succeeded in getting S D. O.'s order in his favour restored. The Hon'ble the Home Member in his order observed that the S. D. O.'s order did not bind the plaintiff who was a mortgagee and that it was open to him to enforce his rights in any way he thought fit.

It is pertinent to notice here that it was after the pre-emption proceedings that the plaintiff filed his mortgage suit in 1929. In that suit the landlord Harbax (defendants 2 and 3 in this case are his legal representatives) was discharged from the suit in consequence of his having asserted his paramount title as the landlord. In that suit one important fact seems to have escaped the notice of all parties, namely that as a result of the pre-emption made by the landlord, the original security had been converted into the pre-emption price so that the mortgage was lifted from the land and became attached to the pre-emption price. In these circumstances the sale of the holding in pursuance of the final decree for sale could not convey any interest in the holding to the mortgagee-purchaser. Consequently his present suit to recover the holding is obviously misconceived. Both the Courts below after considering all the facts were driven to this conclusion with the result that the suit was dismissed.

The plaintiff has preferred this appeal. A vigorous argument is addressed on his behalf to show that the pre-emption proceeding to which he was not a party did not affect his right as a mortgagee and that the landlord, who was made a party in the mortgage suit, having refused to redeem the mortgage the plaintiff was entitled to possession of the land. Much capital is made out of the observations made by the Hon'ble the Home Member in his order. Our attention is also invited to a case reported in 31 N L R 315[1] in which it was held that when a mortgagee is not made a party to the pre-emption proceedings, he is not bound by the result of the proceedings. The terms of sub-s. 5 of S. 6 leave no room for doubt in our mind that the value of the absolute occupancy right free from incumbrances as fixed by the Revenue Officer is conclusive. S. 6 (4) (c) gives the landlord a substantive right of pre-emption when an absolute occupancy holding is sold in execution of a decree obtained by any person other than the landlord. That right is independent of the right of any mortgagee of the tenant right and is paramount. In addition to this, the value of the absolute occupancy holding as if it were not mortgaged or charged as fixed by the Revenue Officer is conclusive and cannot be challenged in Civil Court in view of S. 105 (a), C. P. Tenancy Act, 1920. It is relevant to notice that the landlord had also a right to pre-empt the tenant right when the holding had been purchased by the plaintiff in execution of his mortgage decree for sale in 1930 as the mortgage though made without his concurrence was effective against him. The landlord in any event was entitled to purchase the holding leaving the mortgagee to work out his rights against the pre-emption price only. When the Subdivisional Officer fixed the pre-emption price without notice to the mortgagee, he had immediately one course open if he thought that the order was illegal. That was to move the superior Revenue Authorities. He followed that course but he failed in the highest Revenue Court which confirmed the S. D. O.'s order and left him to seek his remedy otherwise. Now where can he get his remedy ? It can be only in the Civil Court, but the Civil Court is precluded under S. 105 (a), C. P. Tenancy Act, 1920, from interfering with the S. D. O.'s order fixing the value of the holding unless it is clearly shown that either the S. D. O. had no jurisdiction to fix the price or that the procedure followed by him was flagrantly illegal. It is true that the plaintiff was not given a formal notice of the proceedings, but it is evident from Ex. P-19 that the S. D. O. was aware of the existence of the mortgage in plaintiff's favour. S. 6 does not provide for notice to the encumbrancers and it was therefore not imperative on the officer to give any notice to the plaintiff. Can the S. D. O.'s order be declared illegal because he omitted to do what the law never imposed any obligation on him to do ? We are therefore unable to see how (without overlooking the decision reported in 31 N L R 315[1]) on the facts of the present case we can hold that the order in the pre-emption proceedings was not binding on the plaintiff.

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[1] Ganeshrao v. Madhorao, A I R 1934 Nag 282 =152 I C 214=31 N L R 315.

But it is urged that the effect of the Hon'ble the Home Member's order was to convey the holding to the landlord subject to the plaintiff's mortgage. That order if so interpreted would be contrary to S. 6 (5), C. P. Tenancy Act of 1920 which clearly lays down that a Revenue Officer should fix the value of the right in absolute occupancy holding as if it were not mortgaged or charged and that if the landlord is put in possession under sub-s. 6, the mortgage debt or charge shall be a charge on the purchase money in exoneration of the land. This contention must therefore be overruled. There is also another consideration against the appellant's contention and it is that even on the assumption that the landlord purchased the holding subject to the plaintiff's mortgage, the purchaser of the mortgaged property is not personally liable to pay anything in excess of the value of the mortgaged property. If the purchaser of the mortgaged property fails to redeem, he loses his right to the mortgaged property which in this case is not the holding but the pre-emption price. If authorities are needed to support the proposition that subsequent transferee or a mortgagee of the mortgaged property does not become personally liable to pay, we may refer to 34 All 63,[2] 26 C W N 771[3] and 59 Cal 1314.[4]

In such cases as the present the problem which in the interests of justice demands solution is whether the Civil Courts are entirely powerless to afford the mortgagee such relief as he is clearly entitled to get under the law governing the mortgages. The patent injustice, which entails on the mortgagee, is glaringly illustrated by the order of the Hon'ble Home Member in this case and the judgment of Pollock J. referred to above. The question is indeed easy if the mortgagee pleads in the Civil Court that the Revenue Officer's order fixing the value of the tenancy holding was obtained by fraud or collusion or was ultra vires : *see* S. 44, Evidence Act. But even when no such plea is raised, it appears to us that the Civil Courts are not powerless to administer proper relief to the mortgagees in the circumstances such as the present. It is a well known rule of law that statutes ousting jurisdiction of the Civil Courts must be very strictly construed : 53 Bom 819;[5] 9 Lah 504;[6] 8 Pat 122;[7] A I R 1926 Nag 212[8] and A I R 1930 Nag 205.[9] The Civil Courts must be presumed to have powers except to the extent that they have been taken away expressly by some statute. It must be presumed that the Legislature does not alter the law beyond what it explicitly declares either by express words or by necessary implication. Now let us see to what extent S. 6, C. P. Tenancy Act, impinges on the powers of the Civil Courts. It says that the landlord claiming to pre-empt should apply to the Revenue Officer (sub-s. 4). Then it confers power on the Revenue Officer to fix the value of the holding as if it were unencumbered, and shifts the burden of the mortgage from the land to the purchase money (sub-s. 5); and lastly it requires the landlord to deposit the amount of the purchase money fixed by the Revenue Officer. There it stops. It must therefore be noted that the Revenue Officer has not been given any special power to distribute or dispose of the deposit made by the landlord. Any order passed by the Revenue Officer in this behalf lies beyond the scope of the special powers of the Revenue Officer and consequently S. 105 (a), C. P. Tenancy Act, will not operate to deprive the Civil Courts of their indisputable jurisdiction to direct how the sum deposited by the landlord should be disposed of. Any order affecting the disposal or distribution of the deposit made by the Revenue Officer is therefore liable to be reviewed in Civil Courts as to its legality in view of the ascertained rights of the several claimants. To obviate unnecessary litigation in Civil Courts, the Legislature may well consider the advisability of making it imperative on the Revenue Officer to issue notices to all encumbrancers and others interested in the tenant right. To pass an order behind the back of the person who is to be affected by it is contrary to the fundamental rule of *audi alteram partem*. The inequity is all the greater when the party is deprived of his common law right of recourse to Civil Courts as S. 105 (a), C. P. Tenancy Act, does. It is true that the order is capable of being set aside on proof of fraud and collusion, but it is by no means easy to prove fraud and collusion. We hope that the Legislature will in course of time remedy the defect in S. 6, C. P. Tenancy Act, and thereby put an end to this patent injustice.

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[2] Jamna Das v. Ram Autar, (1912) 34 All 63=13 I C 304=39 I A 7=9 A L J 37 (P C).

[3] Nanku Prasad Singh v. Kamta Prasad Singh, A I R 1923 P C 54=95 I C 970=26 C W N 771 (P C).

[4] Falakrista Pal v. Jagannath Marwari, A I R 1932 Cal 775=140 I C 788=59 Cal 1314=36 C W N 709=56 C L J 187.

[5] Gulam Husain Lalji v. Clara D'Souza, A I R 1929 Bom 471=120 I C 834=53 Bom 819=31 Bom L R 988.

[6] Ali Muhammad v. Hakim, A I R 1928 Lah 121=108 I C 748=9 Lah 504=29 P L R 396 (F B).

[7] Baldeo Das Birla v. Lal Nilmaninath Sahi Deo, A I R 1928 Pat 615=120 I C 765=10 P L T 545=8 Pat 122.

[8] Ganeshdas v. Hiralal, A I R 1926 Nag 212=90 I C 279.

[9] Balaji v. Chindya, A I R 1930 Nag 205=122 I C 703.

In the state of the law as pointed out above, the Civil Courts must exercise their undoubted power to relieve the parties from injustice. That they can do by varying the Revenue Officer's order disposing of the purchase money (as being ultra vires) without interfering with the pre-emption price fixed by the Revenue Officer which is intra vires and therefore not to be interfered with by a Civil Court. The plaintiff therefore has only one alternative remedy, that is to recover his mortgage debt from the pre-emption price which he, in fact, ought to have claimed in his mortgage suit. The question is whether the plaintiff is entitled to that relief in this suit which purports to be one to recover possession. We are conscious of the complexities of the situation in that the suit is not for recovering money but for recovering land. This relief was not asked for in the mortgage suit where it was open to the plaintiff to do so, and that the other persons interested in the holding as landlord, namely the fathers of the two defendants, are not arrayed as parties in the present suit, but notwithstanding these difficulties, we are decidedly of the opinion that the justice lies on the side of the plaintiff and he must be given such relief as he is found entitled to get on the facts proved in the case. The fact that he failed to ask for a decree against the pre-emption price in his previous suit cannot preclude him from recovering that money which is only a security substituted for land. He would have the same right in respect of this sum as he would have in respect of the land. The Courts below being conscious of the plaintiff's right recorded their opinion that the plaintiff should file a separate suit. The absence of the other parties interested in the holding as landlords is immaterial because the pre-emption price was appropriated by Harbax who was the lambardar and was the predecessor-in-interest of the defendants in the present case. Out of the total pre-emption price of Rs. 1475, Rs. 525 were paid to the execution purchaser and Rs. 950 were allowed to be appropriated by the lambardar towards the satisfaction of his own subsequent mortgage. This the lambardar was not entitled to do, as he was bound by the plaintiff's mortgage which became attached to that money after his pre-emption. It is therefore obvious that Harbax was liable to pay Rs. 950 to the plaintiff. Harbax is dead and the defendants who are respondents in this appeal are his representatives. It would be but right that they should be made to pay this amount to the plaintiff who alone is entitled to it.

We therefore set aside the lower Appellate Court's decree and direct that the defendants-respondents do pay Rs. 950 to the plaintiff-appellant. In view however of the wrong stand taken by the plaintiff throughout the litigation, we are of the opinion that the plaintiff is not entitled to any costs. We therefore order the parties to bear their own costs as incurred.

B.D./R.K. *Decree set aside.*

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## A. I. R. 1938 Nagpur 84

STONE C. J. AND VIVIAN BOSE J.

*Hargovind Dullabh Jiwan*—Appellant.

v.

*Kikabhai Rahimatullah and another*—Respondents.

First Appeal No. 137 of 1934, Decided on 9th March 1937, from decree of Addl. Sub-Judge, First Class, Nagpur, D/- 30th June 1934.

**(a) Criminal P. C. (1898), S. 133—Nature of order.**

A conditional order under S. 133 does not amount to injunction. [P 85 C 2]

**(b) Limitation Act (1908), Art. 36—Slander of goods and title—Person making false statement as to habitability of certain house and dissuading people from taking it on rent, is liable in tort—Art. 36 applies to such action.**

Where a person dissuades other persons from taking a certain building on rent by making false statements as to habitability and safety of the building, the person so representing is liable in tort, the tort being analogous to slander of title and falling within the broader description of injurious falsehood. The action is one for misfeasance independent of contract and Art. 36 applies to such action: *A I R 1926 Cal 757, Rel. on; A I R 1930 Bom 572, Disting.*[P 85 C 2; P 86 C 1]

**(c) Tort—Trespass—Complaint before Court for order for compelling plaintiff to pull down his building — Conditional order by Court under S. 133, Criminal P. C.—Court does not act as agent of complainant—Complainant does not trespass against plaintiff.**

Where the defendant brings a complaint before a Court, designed to secure an order directing the plaintiff to pull down his building, whereby the Court issues a conditional order under S. 133, giving the plaintiff the option either to do something or satisfy the Court that he need do nothing, at no time is the defendant using the Court as his agent to attack the plaintiff's property and it would be wrong in such circumstances to regard the complainant before a Magistrate in a matter subject to examination in the Criminal Courts as being a person who is trespassing against plaintiff. [P 86 C 2]

**(d) Central Provinces Civil Circulars— Circular 2-4, Para. 11—Suit dismissed against all defendants with costs—Only one counsel's fee should be awarded to them.**

Where there are more than one defendant, each represented by separate pleader, and there is a simple direction in the judgment that the suit is dismissed with costs, only one counsel's fee should be allowed and the fee is apportionable equally among all the defendants. [P 86 C 2; P 87 C 1]

Sir H. S. Gour and W. H. Dhabe — *for Appellant.*

R. N. Padhye (for No. 1), M. R. Bobde and K. P. Vaidya (for No. 2)— *for Respondents.*

**Judgment.**—In the action from the decree in which this appeal has been brought, the plaintiff claims substantial damages in the following circumstances: The plaintiff owns a building, and in 1928 in place of the building standing on the site, he built a new building of five storeys. The defendants, for reasons which we do not find it necessary to enter into, opposed the construction of this new building unsuccessfully, and in order to succeed in having it removed, they took proceedings before the City Magistrate, Nagpur, designed to secure an order directing the plaintiff to pull down the building. According to the plaint they also, in order to do the plaintiff damage pending the disposal of that proceeding, went about letting it be known that the building in question was dangerous to life and limb and that proceedings were pending which would have the effect of causing the building to be pulled down. As a consequence of one or other of these representations, it is said, defendants have succeeded in preventing anybody from becoming a tenant of that building. The proceedings lasted for a considerable time from 8th November 1928 to 31st August 1929. As a consequence, the plaintiff has suffered serious damage owing to loss of rent which he puts at Rs. 500 a month, the building being a large one, and consequently he claims Rs. 5000 damages for loss of rent and Rs. 1000 for defending the criminal case.

Now it is found in fact that there was no malice in the defendants' action, but the appellant has endeavoured to show that malice or not, this action lies and is not destroyed by the provisions of the Limitation Act. The following Articles have to be adverted to: 42, 23, 36 and 120. Admittedly, Art. 120 does not apply if any of the others do. Art. 42, it is said by the appellant, is the Article that applies if any of those three, 42, 23 or 36, applies. If Art. 42 is not applied, then it is said that Art. 120 applies. Art. 42, Lim. Act, relates to compensation for injury caused by an injunction wrongfully obtained. The time is three years and that time begins to run when the injunction ceases. Here it is said that the injunction ceased on 31st August 1929. The suit was brought on 1st September 1932, and it is common ground that, if that Article applies, the suit is in time, and it is also common ground that if there was an injunction that Article would apply.

In point of fact, in our opinion, no injunction at any time has been granted. The proceedings resulted in an order being made under S. 133, Criminal P. C. That section is a lengthy one, but in broad outline can be stated as providing for the granting by a Magistrate of a conditional order in cases, inter alia, where it is brought to the Magistrate's attention that a building is dangerous and likely to cause injury to persons. The form of the order is to be found in Form 16, Sch. 5, Criminal P. C., and is such that the person to whom the order is directed is required either to do something or to appear and show cause. It is obvious that cases might arise in which it would be dangerous to allow the person to whom such an order is directed to have that choice and accordingly provision is made by S. 142, Criminal P. C., for the granting of an injunction pending the inquiry which the order under S. 133 anticipates will be necessary, if the person to whom that order is directed, instead of doing what the order suggests, elects to show cause. S. 142 accordingly provides that if a Magistrate making an order under S. 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter. The relevant form which such injunction takes is to be found in Form 19 in Sch. 5, Criminal P. C., and is to the following effect:

> I do hereby under the provisions of S. 142, Criminal P. C., direct and enjoin you forthwith to (and then what is to be done is stated) pending the result of the local inquiry by the jury.

If no such injunction be ordered, then apart from the further powers to issue absolute orders under S. 144 or other provisions of the Criminal Procedure Code, it would appear that all that happens is that the person who has been conditionally ordered to do something need do nothing, but he must appear before the Court and satisfy the Court that he need do nothing. If he so satisfies the Court, then nothing happens. If he fails to satisfy the Court, then under S. 137 (3) the order will be made absolute, and the person against whom the order is directed will be compelled to do whatever the Court considers proper in the circumstances. In point of fact, the present plaintiff in that criminal proceeding did appear, did show cause, and did satisfy the Magistrate that no order need be made: and no order was made. From first to last no injunction was issued, and in our opinion therefore, whatever may be the plaintiff's cause of action, it is not for compensation for injury caused by an injunction because no injunction has at any time been made or applied for. That, in our opinion, puts Art. 42 on one side. We observe that the Code itself calls the order under S. 133 a conditional order and that under S. 142 an injunction. The forms are entirely different, and the form in which the conditional order is expressed is such as not to amount, in our opinion, to an injunction.

Next it is said that, assuming that there is no injunction here and assuming therefore that the plaintiff was wrong in saying that he brought the present suit for compensation for injury caused to him by an injunction wrongfully obtained against him by the defendants, one is entitled to see what the real nature of the case is, and if one looks at all the pleadings and the circumstances one finds that the plaintiff has another cause of action founded on the defendants' action in going to intending tenants and dissuading them from taking the building on rent by making false statements as to the habitability and safety of the building. It is said that that is expressly pleaded in para. 4 of the plaint and that so to do is an actionable wrong. We have not heard counsel for the respondents; but as at present advised, we incline to the view that a person who did so represent, if he was actuated by malice, would be liable in tort, the tort being analogous to slander of title and falling within the broader description of injurious falsehood. In 94 I C 444[1] at p. 451 it was held that slander of title falls within Art. 36. The next question arises, if that be the case, is this action in time? Such an action has been said to be a misfeasance, and in order to bring this case within Art. 120, it is said that this is not a misfeasance that falls under Art. 36, nor is it in the nature of malicious prosecution and consequently it does not fall under Art. 23.

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[1] Albert Bonnan v. Imperial Tobacco Co., A I R 1926 Cal 757=94 I C 444=30 C W N 465.

It is said that it is like a misfeasance action against the director of a company under the provisions of the Companies Act, and the notes to Art. 120 in U. N. Mitra's Law of Limitation and Prescription (Edn. 6) have been referred to at p. 1469. We have looked up the case in which it was held, after very lengthy consideration, that in the case of misfeasance proceedings against a director, Art. 120 applies. That case is reported in 54 Bom 226[2] and turns on the view there expressed that Art. 36 does not apply because Art. 36 only relates to malfeasance, misfeasance, or non-feasance, independent of contract, and a director's misfeasance is not independent of contract. It follows directly that if that is the ratio decidendi in the case there relied upon in Mitra's work, such reason does not apply here because the wrong here complained of certainly is independent of contract, and therefore in our view Art. 36 applies. If Art. 36 applies, it is not disputed that this action is out of time.

It has been faintly argued that in some way the cause of action here is in trespass and 16 C L J 34[3] at p. 37 is relied upon. In our opinion this is not a case similar in any way to (1910) 2 K B 244[4] or those other cases relied upon in *Loc. cit.*[3] In the English case the facts were as follows: There was a judgment in favour of *A* directing *B* to pay costs to *A*. *A's* solicitor had two offices one in London and another in the country. Pursuant to that judgment he took out a writ of *fi fa* and endorsed that writ with a direction to the sheriff to levy execution, communicated that writ to the sheriff, and accordingly put the public officer in motion, with the result that the plaintiff's land was entered upon by that public officer purporting to operate under that writ which gave him authority to levy execution. In point of fact, at all material times, though unknown to the solicitor who was in London, that decree had been satisfied by payment into his country office. Their Lordships in the Court of Appeal, England, held that, from the moment of payment, that judgment had ceased to be effective, that consequently one could not act under it, that therefore the solicitor in doing what he had done was not acting under the judgment, and that accordingly the writ of *fi fa* was void ab initio, and that therefore he through the instrument of a public officer was trespassing.

That, in our opinion, if we may say so, appears to follow directly from the premises, but the facts there and the principles applicable there are entirely different from the facts here. Here a person is moving a Court, putting the matter at its highest, or is bringing a complaint before a Court whereby the Court itself moves. As a consequence, the Court orders a certain thing to be done. In truth and in fact, the Court in this case ordered nothing to be done, but gave the present plaintiff the option either to do something or to appear before the Court and satisfy the Court that he need do nothing. As he satisfied the Court, he has in effect done nothing; but at no time were the present defendants using the Court as their agent to attack the plaintiff's property, and in our opinion, it would be wrong in such circumstances to regard the defendants, complainants, before a Magistrate in a matter subject to examination in the Criminal Courts, as being persons who are trespassing against the plaintiff. In our opinion therefore this action fails as being outside the term allowed by the Limitation Act. The question of damages therefore does not arise.

It is finally urged on behalf of the appellant that in this case, though there were two defendants, there was only one defence. It is true that each defendant had a separate counsel, but it is said that, when one finds in the judgment a simple direction that the suit is dismissed with costs, the decree that is drawn up consequential upon the judgment should provide for only one counsel's fee. That view finds support in Circulars 2—4 dealing with legal practitioner's fees, para. 11 of which provides as follows:

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[2] Govind Narayan v. Rangnath Gopal, A I R 1930 Bom 572=127 I C 305 = 54 Bom 226= 32 Bom L R 232.

[3] Bhut Nath v. Chandra Binode, (1912) 16 C L J 34=16 I C 443.

[4] Clissold v. Cratchley, (1910) 2 K B 244 = 79 L J K B 635=102 L T 520=54 S J 442=26 T L R 409.

If several defendants who have a joint or common interest appear by separate practitioners and succeed upon a joint defence, or upon separate defences substantially the same, not more than one practitioner's fee shall be allowed, unless the Court shall otherwise order for reasons to be recorded. If only one fee be allowed, the Court shall direct to which of the defendants it shall be paid, or shall apportion it among the several defendants in such manner as it thinks fit.

Here the Court has not otherwise ordered, and in our opinion therefore only one counsel's fee should be allowed and that fee should be apportioned equally between the defendants. The appeal accordingly fails, save for the alteration aforesaid, and is dismissed with costs.

K.B./R.K. *Appeal dismissed.*

## A. I. R. 1938 Nagpur 87

STONE C. J.

*Sher Mohamad Khan* — Appellant.

v.

*Ramratan Ganeshram Teli and another* — Respondents.

Second Appeal No. 268 of 1935, Decided on 18th February 1937, from appellate decree of Dist. Judge, Raipur, D/- 25th February 1935.

**(a) Hindu Law—Joint family—Presumption is of jointness but no presumption that joint family has any joint property—Such family having property, presumption is any member holds property as member of family and not individually.**

In the case of Hindus, there is a presumption of jointness but there is no presumption that the resulting joint family has any joint property. Once however it is established that such a family has property, the presumption is that all property held by any member is held as a member of the family and not as an individual: *A I R 1926 Nag 889*; *3 M I A 229 (P C)*; *A I R 1923 Mad 262 and A I R 1921 P C 35*, *Rel. on.* [P 88 C 1]

**(b) Hindu Law — Joint family — Self-acquisition — Onus of proof — Existence of joint property and proof of substantial ancestral nucleus—Burden of proof lies on person who claims self-acquisition — Acquirer shown to be carrying on family business—Subsequent acquisitions are joint family property, unless joint property is trivial or income therefrom employed in other ways.**

Where the existence of joint property and a substantial ancestral nucleus is proved, the burden shifts on a person to show how he acquires self-acquisitions or moneys of his own out of which he is able to acquire the suit property. If that nucleus has been proved to be so small that it cannot have been the means leading to the acquisition in question, or where such income is shown to have been employed in other ways, then the fair inference will be that the acquisition is acquired apart from it i. e. as self-acquired. This does not mean that the nucleus must be of such a kind or amount to so much property or money that it can directly be turned into the property in question. If the acquirer is shown to be a businessman deriving his money from business and he is shown to have succeeded to and carried on the family business, that alone will fix his subsequent acquisition with the character of joint family property unless he proves the converse or at least the family business is trivial and can be fairly ignored : *Case law referred.* [P 89 C 1]

B. T. Amlekar and M. R. Bobde — *for Appellant.*

E. M. Joshi — *for Respondent.*

**Judgment.** — This second appeal is brought by defendant 1, Sher Mohamad Khan, against the judgment and decree of the lower appellate Judge before whom this defendant had preferred an appeal against the judgment and decree of the trial Judge. The plaintiff, Ramratan, also preferred an appeal against that part of the trial Judge's judgment and decree that dismissed his suit so far as part of the relief claimed was concerned. The lower appellate Judge allowed the plaintiff's appeal and disallowed first defendant's appeal, with the result that the suit was decreed as prayed. The claim was for a declaration that houses A, B and C are the property of the plaintiff and that no portion of the said property is liable to attachment and sale in execution of first defendant's decree. That decree had been obtained against defendant 2 who is the son of the plaintiff. This claim suit follows upon an objection taken by the plaintiff in execution of first defendant's decree against defendant 2. The objection was dismissed.

The following facts are not in dispute: Defendant 2 and the plaintiff were, at all material times, members of an undivided joint Hindu family. The plaintiff is the father of defendant 2, is now a contractor, and started work as a cart-wheel maker at an early age. His father before him was a cart-wheel maker. House A was bought by plaintiff by a sale deed (Ex. P-1) which shows him as the purchaser and does not mention defendant 2 (who in 1909, the date of the sale deed, would have been about 11 years old). The recited consideration is Rs. 2000. The site of house B was acquired by plaintiff who was the defendant in a suit brought by strangers for possession. He won the suit, but compromised after an appeal was filed on terms that the plaintiffs sold their right, title and interest in the site for Rs. 300. That was on 14th June 1927. Defendant 2 was not mentioned. Upon that site the plaintiff built house B. House C has been built by plaintiff on a site that admittedly was ancestral. The value of the site on which house B was built was put at Rs. 1000 in the plaint in the abovementioned compromised suit (Ex. P-4). In that suit the present plaintiff's defence was based apparently on the fact that his father before him and he had been in possession for many years and had paid no rent. This at least is the effect of part of his evidence. It was on this land that the cart-wheel shop was. The dimensions of the site were some 70 x 80 feet. The Rs. 300, according to the plaintiff, were fixed as being at the same rate as a similar site was sold for nearby.

The plaintiff gives no explanation of how he came to be able to buy or build these houses or sites. He says he inherited a house at Kamptee from his maternal grandfather with whom he lived. He says he inherited no property from his father. This of course is not the point and it is difficult to understand why he was not asked whether there was any joint family property. Joint Hindus do not inherit from their father unless the father has self-acquired property. The plaintiff admitted that (1) his father had a house that was sold by plaintiff's brother about 1901; (2) his father carried on business as a wheel-wright. As we have seen, that business was carried on on the site upon which house B now stands, and plaintiff "inherited" it, i. e. the site from his father; (3) house C stands "on the land of my father". The question is what in law is the proper inference to draw from the above facts.

In my opinion the matter can be stated as follows: In the case of Hindus, there is a presumption of jointness (Mayne, Para. 289); but there is no presumption that the resulting joint family has any joint property: A I R 1926 Nag 389.[1] Once however it is established that such a family has property, the presumption is that all property held by any member is held as a member of the family and not as an individual. In 3 M I A 229[2] their Lordships of the Privy Council at page 240 observed:

> It is allowed that his was a family who lived in commensality, eating together, and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that under these circumstances the presumption of law is that all the property they were in possession of was joint property until it was shown by evidence that one member was possessed of separate property.

See also A I R 1923 Mad 262[3] and 2 Lah 40.[4] The Mitakshara defines self-acquisition as

> that which has been acquired by the coparcener himself without any detriment to the good of his father or mother: Mitakshara, Ch. 1, S. 4, page 2.

It was accordingly held many years ago by the Madras High Court that property inherited from his mother's father is not self acquired: 3 Mad 370.[5] Even however assuming that the property inherited in this case from the maternal grandfather is to be treated as self-acquired property, there is nothing to prove that the houses in suit were purchased out of the moneys realized either by the sale of or the income derived from that property. There is nothing to show what its value was. There is nothing to show what the value of the ancestral site was or the extent of the ancestral cart-wheel business or the value of the ancestral house that was sold. As to the last item, it must be assumed until the contrary be shown that the proceeds of such sale remained with the family. How they were utilized no one can say.

This therefore is a case where it is proved that there was some ancestral nucleus, viz. a site, a business and a house. It is a case where the person in question is shown to have carried on the business and to have been in possession of the ancestral site and the site on which the business was carried on and which, as a consequence of the family occupation, he retained possession of for years rent free. It is a case where admittedly the family had a house which was sold. The person in question, Ramratan, is not shown as getting any property from any other source than (a) his maternal grandfather, and (b) his own exertions. What (a) amounted to is unknown. There is nothing to show that that property (a house) was any more valuable than the house his brother sold.

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1. Birdichand v. Popat Lal, A I R 1926 Nag 389 =95 I C 183=24 N L R 68.
2. Dhurm Das Pandey v. Shama Soondri Dibiah, (1841-46) 3 M I A 229=6 W R P C 43=1 Sar 271=1 Suther 147 (P C).
3. Vadamalai Pillai v. Subramania Chettiar, A I R 1923 Mad 262=71 I C 130.
4. Gokal Chand v. Hukam Chand Nath Mal, A I R 1921 P C 35=60 I C 379=48 I A 162 =2 Lah 40 (P C).
5. Mattavan Chetti v. Sivagiri Zamindar, (1881) 3 Mad 370.

What (b) amounted to is unknown. This is therefore a case where the existence of joint property and a substantial ancestral nucleus is proved. That having been proved, the onus shifts to the other side: 29 All 244;[6] 33 All 677[7] and A I R 1926 Nag 389.[1] If that nucleus had been proved to be so small that it could not have been the means leading to the acquisition in question, then the fair inference would be that the acquisition was acquired apart from it, i. e. was self-acquired.

If the person alleging self-acquisition proves that the nucleus is very small, then the burden also shifts, for in such a case there is no presumption of jointness of subsequently acquired property: A I R 1928 Lah 397[8] and cases there cited: so also where the income from the nucleus is shown to have been employed in other ways: 152 I C 541.[9] Again, if though some ancestral property is shown to exist but that shown is of such a nature that it can be ignored or cannot be regarded as founding an inference that the property in suit could have been derived out of it, then it may well be the property in suit can be regarded as self-acquired, *see* 136 I C 205[10] and cases there cited, especially 33 All 677.[7] The sufficiency of the nucleus must be considered: A I R 1931 Lah 593.[11] This does not however, in my opinion, mean that the nucleus must be of such a kind or amount to so much property or money that it can directly be turned into the property in question. If the acquirer is shown to be a businessman deriving his money from business and he is shown to have succeeded to and carried on the family business, that alone will fix his subsequent acquisitions with the character of joint family property unless he proves the converse or at least that the family business was trivial and can fairly be ignored. Generally expressed, if he is shown to have succeeded to that which, granted work and ability, could turn into the property in question, that property will be deemed to have resulted from what he succeeded to until he shows the converse.

A business, a house and a site being shown here to have belonged to the family, in my opinion the burden shifted to the plaintiff to show how he came by self-acquisitions or moneys of his own out of which he was able to acquire the suit houses. Of course had he established that the sites were acquired and the houses built out of his own self-acquisitions, the resulting acquisitions would have been self-acquisitions. This the plaintiff failed to do, and I am accordingly of the opinion that the appeal succeeds with costs in all Courts.

R.W./R.K. *Appeal allowed.*

## A. I. R. 1938 Nagpur 89

NIYOGI J.

*Ramji and others — Defendants —* Appellants.

v.

*Madki w/o Vithal Kunbi — Plaintiff* — Respondent.

Second Appeal No. 348 of 1935, Decided on 2nd February 1937, from appellate decree of Dist. Judge, Wardha, D/. 29-1-1935.

**(a) Adverse Possession—Co-sharers—Exclusive possession of some is not adverse to other unless former repudiates latter's title —Mere partition does not amount to ouster.**

The exclusive possession of co-sharers cannot be adverse to a person who is also a co-sharer with them unless they repudiate his title. Mere partition between them would not imply denial of his title or his ouster : *A I R 1915 Nag 125, Rel. on.* [P 90 C 2]

**(b) C. P. Tenancy Act (1 of 1920), Sch. 2, Art. 1—Applicability.**

Article 1 of Sch. 2 has no application to a co-tenant claiming to be in exclusive possession of a holding. The ordinary law of limitation applies to such a case. [P 90 C 2]

**(c) Adverse Possession — Guardian and ward—Possession of guardian of ward's property is not adverse to ward.**

Where a guardian is in possession of ward's property, the guardian cannot set up any adverse title. His possession would be deemed to have been that of bailiff or agent on behalf of his ward but not hostile to him : *35 Bom 79 ; A I R 1928 Mad 1113 ; (1854) 43 E R 307 and (1874) 17 Eq 378, Rel. on.* [P 91 C 1]

**R. N. Padhye** — *for Appellants.*

**W. B. Pendharkar** — *for Respondent.*

**Judgment. — This is a defendants' appeal from a reversing judgment of the District Judge, Wardha. The following pedigree will serve to elucidate the facts in the present case :**

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[6] **Lal Bahadur v. Kanhaiya Lal, (1907) 29 All 244=34 I A 65=4 A L J 227 (P C).**

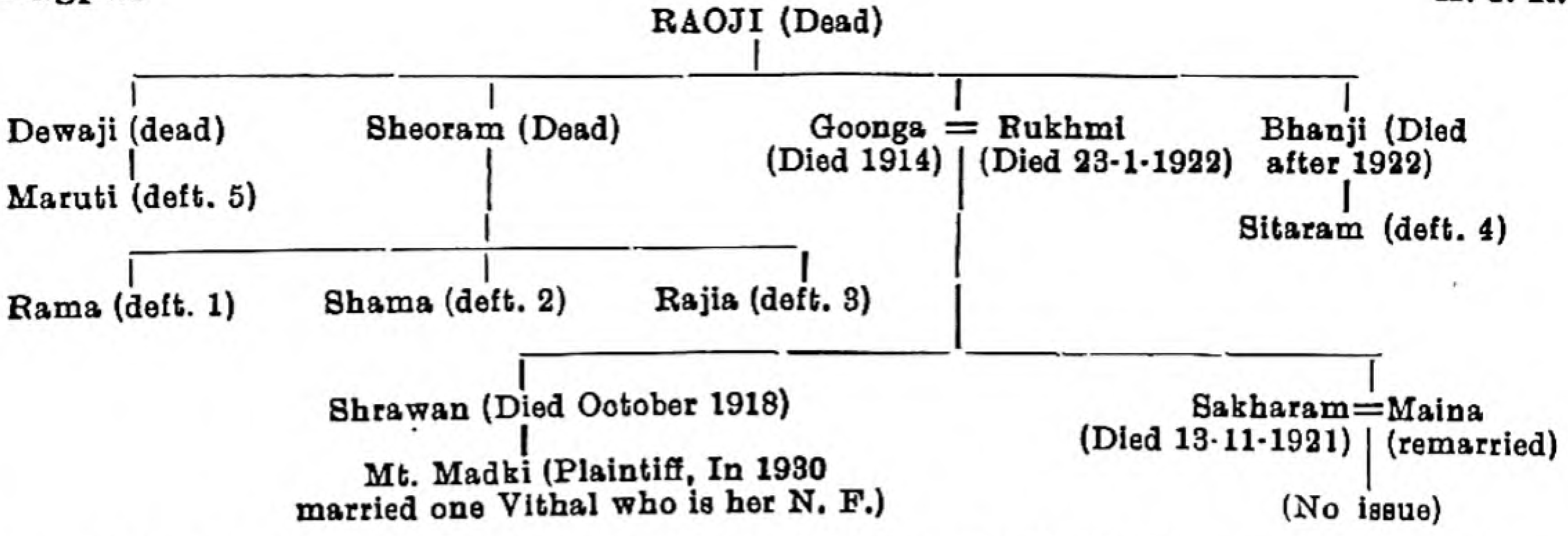
[7] **Ram Kishen Das v. Tanda Mal, (1911) 33 All 677=10 I C 548=8 A L J 728.**

[8] **Kanshi Ram v. Shankar Das, A I R 1928 Lah 397=111 I C 596.**

[9] **Surai Kumar v. Jagannath, A I R 1935 All 67=152 I C 541.**

[10] **Ramiah v. Mahalakshmama, (1932) 136 I C 205.**

[11] **Hari Singh v. Gurbakhsh Singh, A I R 1931 Lah 593=133 I C 487=32 P L R 450.**



The plaintiff Mt. Madki claims, as the daughter of Shrawan, her half-share in certain malik makbuza, absolute occupancy and occupancy lands. These fields devolved on Shrawan and Sakharam on their father's death in 1914. Shrawan died in 1918, subsequent to his wife's death, so that Mt. Madki was left an orphan. She was then a year old and was brought up by her uncle Sakharam. After his death in 1921 she was looked after by her grandmother Mt. Rukhmi who died in 1922. Thereafter she was under the protection of her grand-uncle Bhanji and after him of the defendants. In 1930 she was married to one Vithal who figured as her next friend in the suit. The cause of action was stated to have arisen in 1932 when a demand for delivering possession of her share was refused by the defendants. It is unnecessary to narrate the pleadings in the case as the question which arises upon this appeal is whether the suit was barred by limitation. The suit was dismissed in toto by the original Court but succeeded on appeal in respect of the tenancy holdings. The lower Appellate Court held that the defendants' possession did not become adverse to the plaintiff until 1932 when they refused to comply with the demand made on behalf of the plaintiff to hand over her share to her. On behalf of the appellants who are defendants in the case, it is contended that the suit in view of Art. 1 of Sch. 2 to the C. P. Tenancy Act, 1920, was barred by time. That Article provides two years period of limitation for a suit for possession of a holding of a person claiming to be a tenant from which he has been dispossessed or excluded from possession by any person and says that the limitation runs from the date of dispossession or exclusion.

The question in this appeal is whether the plaintiff was ever excluded or dispossessed from her half-share in the tenancy holding. Both the Courts below while repelling the plaintiff's contention as to partition between Shrawan and Sakharam held that Shrawan's half-share in the holdings, both absolute occupancy and occupancy, devolved on Mt. Madki, his daughter. The appellants are also bound by the lower Appellate Court's finding that after Shrawan's death Sakharam became the plaintiff's guardian, after him Bhanji, and after him the defendants. All those who came into possession of the fields happened to be the guardians of the plaintiff under her personal law. Besides being guardians, they were co-owners with the plaintiff. Was there any dispossession or exclusion from possession by them of their ward and co-owner at any time? There is no positive evidence on the point. It is true that there was something like a partition of these fields between Bhanji and defendants 1 to 3. Maruti, defendant 5, is unconcerned and has taken an indifferent attitude in the present case. The mere fact of partition would imply neither denial of plaintiff's title nor her ouster. The exclusive possession of the defendants who were in fact co-owners with the plaintiff could not be adverse to her unless they repudiated her title which it is not proved they did: *see* 11 N L R 164.[1] It was held in 31 N L R Sup 9[2] that Art. 1 of Sch. 2 to the C. P. Tenancy Act has no application to a co-tenant claiming to be in exclusive possession of a holding and that the ordinary law of limitation applies to such a case. Even granting for the moment that there was an ouster by the defendants of the plaintiff in consequence of the partition in 1922, the suit having been filed within 12 years from that date would not be barred by limitation. Neither Sakharam nor Bhanji had ever set up any hostile title against the plaintiff. Consequently if there be any invasion of plaintiff's title, that occurred only in 1922 when the partition took place.

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[1] Dina v. Bishambhar Singh, A I R 1915 Nag 125=31 I C 464=11 N L R 164.

[2] Abdul Rahiman v. Abdul Wahab, A I R 1935 Nag 120=155 I C 813=31 N L R Sup 9.

Nor can it be overlooked that the defendants and before them Bhanji and Sakharam were in the position of guardians in relation to the plaintiff. During the period of their guardianship, they could not be heard to set up any adverse title : *see* 35 Bom 79.[3] Their possession would be deemed to have been that of bailiff or agent on behalf of their ward but not hostile to her. In 55 M L J 733[4] it was held that the question of limitation does not arise in a case when guardian is himself in possession of the ward's property. It is not open to a person who takes charge of a minor and his property to plead that as regards his property his possession was adverse to him. It was pointed out in that case that so long as a person is in charge of the minor's property as a guardian, that person is only an agent or trustee and cannot set up adverse possession. This view accords with the common law of England which regards whoever enters on the estate of an infant, enters as a guardian or bailiff for the infant : *see* 43 E R 307[5] and also 17 Eq·378.[6] The lower Appellate Court was therefore right in holding that the suit was not barred by time. This appeal stands dismissed with costs. The cross-objections stand also consequentially dismissed with costs.

D.S./R.K. *Appeal and cross-objections dismissed.*

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[3] Vasudeo Atmaram v. Eknath Balkrishna, (1911) 35 Bom 79=8 I C 639=12 Bom L R 956.

[4] Mahalakshmamma v. Suryanarayana, A I R 1928 Mad 1113=117 I C 113=51 Mad 977=55 M L J 733.

[5] Hicks v. Sallitt, (1854) 3 De G M & G 782=2 Eq 818=23 L J Ch 571=18 Jur 915=2 W R 173=43 E R 307.

[6] Howard v. Shrewsbury, (1874) 17 Eq 378=43 L J Ch 495=29 L T 862=22 W R 290.

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## A. I. R. 1938 Nagpur 91

NIYOGI J.

*Secretary of State* — Appellant.

v.

*Mt. Geeta widow of Imam and others* — Respondents.

**Misc. Appeal No. 66 of 1936, Decided on 2nd April 1937, from order of Dist. Judge and Commissioner, Workmen's Compensation, Nagpur, D/- 22nd January 1936.**

**(a) Interpretation of Statutes—Language—Grammatical construction.**

The language of a statute must be construed in its ordinary grammatical sense unless it leads to some incongruity or manifest absurdity. [P 92 C 2]

**(b) Workmen's Compensation Act (1923)—Underlying principle for awarding compensation stated.**

Compensation is not a remedy for negligence on the part of the employer but it is rather in the nature of insurance of the workman against certain risks of accident : (*1924*) *A C 302*, *Rel. on.* [P 92 C 2]

**(c) Workmen's Compensation Act (1923), S. (2) (1) (n) (i)—Interpretation—Expression 'not permanently employed in any office' contemplates servant who does not work continuously or habitually in any office but who has to do occasionally out-door work.**

The expression "not permanently employed in any office of a railway" in S. 2 (1) (n) (i) contemplates such servants as are not required to perform their duties continuously or habitually in the office, that is to say, indoors, but occasionally have to do outdoor work in the course of their employment. The word "permanent" denotes continuity and the expression in its concrete application means not continuously working in any office. The expression permanently employed cannot be construed to have a meaning as opposed to temporarily employed. [P 93 C 1]

A. V. Khare and W. B. Pendharkar — *for Appellant.*

Y. S. Tambe — *for Respondents.*

**Judgment.**—This is an appeal from an order passed by the District Judge, Nagpur, in the capacity of a Commissioner under the Workmen's Compensation Act (8 of 1923). Respondent 1 Mt. Geeta alias Mariambi is the widow of one Imam and respondents 2 and 3 are his daughters. Imam was in the service of the G. I. P. Railway as a peon attached to the Railway Hospital at Nagpur and his duty was to distribute the office dak (post). While he was riding on his cycle in the course of his employment, he collided with another cyclist on 3rd January 1935 and sustained grave injuries which resulted in his death on 3rd May 1935. The respondents lodged a claim for compensation under the Workmen's Compensation Act (8 of 1923) which was upheld by the Commissioner. At the outset I may observe that although I concur in the conclusion of the Commissioner, I do not see my way to accept the process by which that conclusion was reached. The decision turned on the true construction of Cl. (n) of S. 2 (1), Workmen's Compensation Act, which defines the word "workman"—the question being whether the deceased hospital peon was a "workman". The definition is as follows:

> "Workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of employer's trade or business) who is—(i) a railway servant as defined in S. 3, Railways Act, 1890, not permanently employed in any administrative, district or Sub-divisional Office of a railway and not employed in any such capacity as is specified in Sch. 2 or . . . . .

The Commissioner ignored the commas occurring between the words "administrative" and "district" and regarded the word "administrative" as an adjective qualifying "district" and "Sub-divisional" Office. The comma occurs in the authorized official publication, viz. the Unrepealed Acts of the Governor-General in Council and no Judge can afford to ignore it. Nor can I discern any significance in the subtle and what appears to me to a metaphysical distinction between "administrative" and "executive" duties, which, on the view I take, becomes wholly immaterial. The more so, because the learned counsel for the respondents himself realised the supreme difficulty of supporting the course of reasoning pursued by the Commissioner. The issue which arises in the case will become clear by reference to the written statement filed by the District Medical Officer (p. 7-A of the Paper Book). The material portions of the statement are as follows:

> He collided with another cyclist on a road while carrying office dak (Post). I disclaim liability to pay compensation on account of the deceased's death on the following grounds: The deceased was not a workman as defined by S. 2 (1) (n), Workmen's Compensation Act, 1923 in that he was a railway servant but was permanently employed in the District Medical Office, Nagpur.

It is evident that the Railway Company conceded that the deceased was a railway servant but contended that he was not a "workman" for the reason that he was permanently employed in the District Medical Office. The short question therefore is whether the deceased hospital peon fell out of the scope of the definition of workman because he was permanently employed in the District Medical Office. The expression used in S. 2 (1) (n) (i) is "not permanently employed in any administrative, District or Sub-divisional Office of a railway". The Railway Company contends that the expression "permanently employed" means a railway servant who is "permanently engaged" as opposed to one who is "temporarily engaged"; the claimants on the other hand contend that it means one who "habitually or continuously works" in office.

I confess the construction of that expression is by no means easy. The language appears to be clear but involves difficulty in its application. The well-known rule is to construe the language of a statute in its ordinary grammatical sense unless it leads to some incongruity or manifest absurdity. I have therefore to see which of the two interpretations proposed stands this test. The two interpretations proposed by the parties differ in this that while the Railway Company lays emphasis on the duration of the employment, the claimants stress the nature and venue of the employment. If duration of the employment is to be the test, it will logically follow that "a railway servant who is not permanently employed, that is to say, a person who is temporarily employed will fall under the definition of "workman". The result will be that a privilege which is given to a temporary servant is denied to a permanent servant. To put it more concretely, a person working as a substitute for six months in place of a permanent incumbent in the District Office will be entitled to be regarded as a workman while the permanent servant for whom he acts as a substitute will not be a workman. The position becomes still more anomalous if such a rule is applied to the case of Imam, the deceased. Supposing he had been ill for six months and his substitute, who would necessarily be a temporary servant (that is a servant "not permanently employed"), had sustained a fatal injury, the Railway Company on its own interpretation would be bound to admit him to be a workman and pay compensation to his dependants. If so, will it be reasonable to exclude Imam from the purview of the import of the term "workman"?

It is obviously illogical for the Railway Company to say "we will compensate for the loss of the life of a substitute because he was not a permanent servant, but we are not bound to compensate his principal because he was permanent servant." Such a situation is untenable and could not have been intended by the Legislature. Furthermore, it must be observed that the compensation is not a remedy for negligence on the part of the employer but it is rather in the nature of insurance of the workman against certain risks of accident, as was pointed out by Lord Haldane in

(1924) A C 302.[1] Can it be said that a temporary servant is exposed to risks and that a permanent servant is not? If risk is incidental to the employment, there is no reason why the Legislature should be partial in showing its tenderness to the temporary servant only.

The word 'employment' has a twofold meaning: It may mean (1) engagement, that is contract of service, or (2) work in the course of employment. It is in the latter sense that the word appears to have been used in the list of persons described in Sch. 2, Workmen's Compensation Act. The expression "not permanently employed in any office of a railway" contemplates such servants as are not required to perform their duties continuously or habitually in the office, that is to say, indoors, but occasionally have to do outdoor work in the course of their employment. The word "permanent" denotes continuity and the expression in its concrete application will mean not continuously working in any office. I concede that this may appear to be a forced interpretation but it yields a sense which accords with the experience of practical life. To sum up: The plain grammatical meaning of the expression under consideration leads to absurdity; while extending the enacting words beyond their commonplace import yields a rational meaning. The task of making the choice involves me in no difficulty. I have no hesitation in accepting the second interpretation which avoids imputation of an absurd intention to the Legislature.

It is not denied that Imam, the deceased peon, had in the course of his employment, to do outdoor work of going round on his bicycle to deliver the office post. He was a servant who was not continuously or habitually working in the office and therefore he fell within the ambit of the definition of workman in S. 2 (1) (n), Workmen's Compensation Act. His duties resembled those of workmen specified in Sch. 2 (xiii) of that Act. The appeal stands dismissed with costs.

K.B./R.K. *Appeal dismissed.*

## A. I. R. 1938 Nagpur 93

NIYOGI J.

*Umrao Bapu* — Appellant.

v.

*Ramkrishna Bapu and others* — Respondents.

Second Appeal No. 155 of 1935, Decided on 5th April 1937, from appellate decree of Addl. Dist. Judge, Bhandara, D/- 31st October 1934.

**Deed—Construction—Adequate and sufficient description with convenient certainty is necessary—Small errors in description are immaterial — Canons of construction explained.**

If there be an adequate and sufficient description with convenient certainty of what was meant to pass, an erroneous addition to the description will not vitiate it. Where there are two conflicting descriptions of the subject matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable and the least likely to have been mistaken or to have been inserted inadvertently must prevail, if it sufficiently identifies the subject matter. Preference ought to be given to that element of the description of the subject matter which is most consistent with the intention of the parties to be collected from other parts of the deed, illumined if necessary by the surrounding circumstances: *(1849) 4 Ex 591 and 37 Cal 293, Foll.; 18 Bom 283; A I R 1933 Cal 535 and A I R 1934 Nag 280, Ref.* [P 94 C 1, 2]

D. T. Mangalmoorti and N. T. Mangalmoorti —*for Appellant.*

Y. V. Jakatdar and P. A. Pandit— *for Respondents.*

**Judgment.**—This is a plaintiff's appeal from a concurring judgment of the Additional District Judge, Bhandara. The plaintiff's suit was for a declaration that the plaintiff was a joint owner with the defendant to the extent of two annas eight pies share in Duchand and Fazal in mouza Jethbhaoda, Tahsil Sakoli, District Bhandara, and in the alternative for possession of that share in case it was found that the plaintiff was not in possession. The plaintiff and his father together admittedly owned five annas four pies divided share in the abovenamed village comprising 1115·33 acres of Duchand and Fazal areas. The plaintiff's father himself and on behalf of the plaintiff mortgaged this land to the defendant on 23rd October 1918 along with other property. This particular property in dispute was described in the mortgage deed as follows:

**Share of two annas eight pies, together with Duchand and Fazal in mouza Jethbhaoda, Thank No. 344, Duchand area 462·33, rent Rs. 38-5-4 and Fazal area 653, rent Rs. 15. The total area**

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[1] **Upton v. G. C. Railway, (1924) A C 302=93 L J K B 224=130 L T 577=40 T L R 204=68 S J 251=16 B W C C 269.**

of Duchand and Fazal together is 1115·33 and rent Rs. 53-5-4.

The defendant filed Civil Suit No. 43 of 1923 against the plaintiff and obtained a final decree for foreclosure on 28th April 1925 in pursuance of which he took actual possession of the entire area of 1115·33 acres. In the preliminary as well as the final decree, the property was described in the same terms as in the mortgage deed. The defendants applied for mutation describing the property in the same terms. The mutation officer discovered that the description of the Duchand and Fazal area of 1115.33 acres as two annas eight pies share was erroneous and that the area mortgaged constituted in reality five annas four pies share and he therefore ordered that share to be recorded in defendant's name. This order was passed on 14th March 1925. More than five years later the plaintiff filed this suit for a declaration as stated above. Both the Courts below have negatived the plaintiff's claim holding that the actual area intended to be mortgaged was correctly stated and the description of it as two annas eight pies share was an error.

A lengthy argument has been addressed by the learned counsel for the appellant, but I have not the faintest shadow of doubt in my mind that the description of the property as two annas eight pies share was a mistake which is obvious. My attention is invited to 18 Bom 283,[1] 60 Cal 701[2] and A I R 1934 Nag 280[3] and it is pressed that it should be held that what was intended to be mortgaged was two annas eight pies share only. The argument in other words means that although the mortgage deed recites an area of 1115·33, the mortgagor must be deemed to have intended to mortgage only half of that area. The decided cases are relevant not for what they decided but the principle on which the decisions were founded. That principle is to be sought in the well-known maxim *falsa demonstratio non nocet.*

That rule means that if there be an adequate and sufficient description with convenient certainty of what was meant to pass, an erroneous addition to the description will not vitiate it : *see* (1849) 4 Ex 591.[4] In 37 Cal 293[5] at p. 308 the general principle enunciated in an American case was referred to and it was this that where there are two conflicting descriptions of the subject matter of a grant or two conflicting parts of the same description, that which is the more certain and stable and the least likely to have been mistaken or to have been inserted inadvertently must prevail if it sufficiently identifies the subject matter. Then follows the further proposition based on English and American authorities there cited that preference ought to be given to that element of the description of the subject-matter which is most consistent with the intention of the parties to be collected from other parts of the deed, illumined if necessary by the surrounding circumstances and subsequent conduct of the parties. I am in respectful agreement with the exposition of the principle which could not be better expressed than in the terms quoted above.

It is in the light of this principle that the facts will have to be examined. The first question is what was intended to be the security for the debt. The mortgagee would not be concerned with mere description of the share but the extent of the property mortgaged to him. It is the value of the security that would be material and as to what it was is placed beyond any doubt by the mortgagor when he particularized the property as Duchand area 462·33 and Fazal area 653. "The total area of Duchand and Fazal together is 1115·33." There can be no uncertainty about the substance of the property however vague its description in terms of shares may be. That the plaintiff was absolutely certain that the area mortgaged was 1115·33 acres is abundantly clear from his failure to raise in the mortgage suit the plea which is now raised here, to initiate proceedings under S. 47, Civil P. C., when the defendant took actual possession in execution of the entire area in execution of his mortgage decree, and to resist the mutation of five annas four pies share in defendants' names. His own conduct throws a sinister light on the character of the claim urged by him now.

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[1] Tribhovandas Jekishandas v. Krishnaram Kuberram, (1894) 18 Bom 283.

[2] Jalpaiguri Banking and Trading Corporation, Ltd. v. Samaresh Chakrabarti, A I R 1933 Cal 535=145 I C 666=60 Cal 701.

[3] Gourishankar v. Patel Shaiamlal, A I R 1934 Nag 280=153 I C 523.

[4] Morrell v. Fisher, (1849) 4 Ex 591.

[5] Durga Prasad Singh v. Rajendra Narain Bagchi, (1910) 37 Cal 293=4 I C 713=10 C L J 570.

Applying the rule formulated in 37 Cal 293[5] at p. 308, there can possibly be no room for doubt that between the two conflicting descriptions, viz. "two annas eight pies share" and "Duchand area 462·33 and Fazal area 653. The total area of Duchand and Fazal is 1115·33," the latter description is positively the more certain and stable and the least likely to have been mistaken or inserted inadvertently. That the extent of the land intended to be transferred was 1115·33 acres is evident from the fact that the appellant's father mortgaged for himself and on behalf of the appellant. Both had five annas four pies share and if only half of that area was intended to be mortgaged there was nothing to prevent it being recited that two annas eight pies out of five annas four pies share was being mortgaged. The essential thing was the actual area transferred and the description of it in terms of fractional share was surplusage. What vestige of doubt can conceivably arise is set at rest by the appellant's subsequent conduct, which is glaring, in abstaining from objecting to the delivery of possession of the entire area in execution of the mortgage decree. The Courts below were therefore right in holding that the description of two annas eight pies share was an incorrect description. The appeal is dismissed with costs. Counsel's fee Rs. 40.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 95

STONE C. J. AND VIVIAN BOSE J.

*Lalchand Thakurdas* — Appellant.

v.

*Dhanoo Pandu Patil* — Respondent.

**Second Appeal No. 269 of 1934, Decided on 11th February 1937, from appellate decree of Dist. Judge, Nimar, D/- 26th February 1934.**

**(a) Grant—Construction — In grant of land words "and assigns" used — Terms not purporting to make maufi grant — Alienable estate is conferred upon grantee.**

Where the terms of a grant of certain land use expressly the words 'and assigns' and do not purport to make a maufi grant, there can be no ambiguity about the intention of the grant that it confers an alienable estate upon the grantee. [P 96 C 1, 2]

**(b) Grant — No ambiguity in grant — Position before such grant cannot be gone into.**

Where the terms of a grant are not ambiguous, one cannot go beyond it so as to enquire what the position was before there was such a grant. [P 96 C 2]

M. B. Kinkhede and M. R. Bobde— *for Appellant.*

K. B. Tare and B. B. Kaskhedikar — *for Respondent.*

**Judgment.**—This is an appeal by the plaintiff in an action whereby he sought to obtain an account from defendant 1 in respect of the plaintiff's $4\frac{3}{4}$ pies share in a certain village called mouza Daryapur, Tahsil Burhanpur, Nimar District, and for a decree for the amount found due, with consequential relief. The plaintiff derives his title from defendant 2, who sold to the plaintiff $4\frac{3}{4}$ pies share in the village on 10th December 1929. The defendant 1 is the lambardar of the village, and his resistance of the claim is based on the view, alleged by him, that this village is held by him under a title which renders it inalienable. It is common ground that the plaintiff's purchase money has been retained and that the amount sought is the amount which the lambardar ought to have accounted for to the person who has that share which the plaintiff bought from defendant 2 who is a member of the family. It would appear clear that the plaintiff must be entitled to some remedy either against defendant 1 or defendant 2. Defendant 2 in fact does not defend this action. Defendant 1 does not dispute the sale, but only the alienability. In the result however the learned appellate Judge has dismissed the claim with costs against both defendants.

That result is arrived at because it has been held by him as a matter of law that this village forms the subject matter of a service grant by the Scindia Government so as to become inalienable as it falls under S. 6 (d), Transfer of Property Act. He has attached, and properly so, great weight to A I R 1929 Nag 232[1] where it was held that this very village is not attachable, it being the subject of a service grant. The learned appellate Judge, though attaching great weight to that decision, has decided, and again we think rightly, that that decision did not operate by way of res judicata being between different persons. But though he held that that case did not conclude the matter, he was obviously very much influenced by it. But we think that there is an important difference on the facts between that case and this, though the village in question is the same,

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1. Thakurdas v. Dhanrao, A I R 1929 Nag 232= 116 I C 661.

because in that case there was no evidence as to the terms of the grant from the British Government, whereas in this case the grant itself has been produced, and in original is now with the record. That grant is Ex. P-14, and in our opinion, it is that grant that is now the root of title to this village. In the absence of that grant, it was natural to enquire what was the position before the British Government became the owners of the village in question, and that enquiry was embarked upon in A I R 1929 Nag 232,[1] and acting upon the very slight material available, the Court came to the conclusion that this was a maufi village and inalienable. But now that we see from the grant itself what the terms of the grant are, it seems to us to be unarguable that this is inalienable land, because the grant expressly uses the words "and assigns". It does not purport to make a maufi grant, but makes an out and out grant to one Nohun Bawa who, we understand, is the predecessor-in-title, with many links in between, of the present parties. There is nothing ambiguous about Ex. P-14, and in the absence of ambiguity, we do not think it would be right to go behind it and beyond it into the past to see what the terms were upon which this land was held before that grant, so far as the question of alienability is concerned.

We are of course not here concerned as to whether the persons claiming title to this village do or do not render such services as would entitle them to represent to the Government that they should hold this land without payment of revenue. That is not the question at issue in this case. All that is at issue here is whether the plaintiff has got any title, and that depends solely upon whether the subject matter of the sale admittedly made by defendant 2 to him was capable of being sold or whether that transaction was ineffective as relating to an inalienable subject matter. In order to see what the terms of a grant are, it is first necessary to determine what is the root of title; that is, what is the grant ? It has been faintly urged here that the root of title is the grant by Scindia Government. But in our opinion, it is obvious that after the British Crown became possessed of the title to the land in question the rights which the Scindia Government or their grantees possessed passed to the British Government, and the treaty that was made between the two Governments had, for its purpose inter alia, the protection of those persons who had previously held from Scindia Government and whose title had been destroyed. The aim of that treaty was to secure that the titles which they formerly had would be restored, and in order to implement that treaty, an inquiry was made, and following upon that inquiry, grants were made. So far as this particular land and this particular grant are concerned, that inquiry ended with the grant of Ex. P-14. That accordingly, in our opinion, is the beginning of the title.

It may well be—we say nothing as to it—that that title may differ from the title which existed before. The time to take up that question was when it was granted. Certainly, as regards alienability it cannot usefully be urged now that that grant, which expressly uses the words "and assigns", was not the grantee and his assigns, that is to say, that the subject-matter was not alienable. Bearing in mind 13 C P L R 81[2] and S. 87, C. P. Land Revenue Act (1881), it is, in our opinion, the sanad granted by the Chief Commissioner, Central Provinces, some time about 1860 (the sanad is curiously enough left undated) which forms the root of title. Therefore, in the absence of ambiguity, one cannot go beyond it and enquire what the position would have been had there been no such grant, that is, what the position was before there was such a grant. On the question of alienablity, there is no ambiguity, in our opinion the use of the words "and assigns" making it plain that the intention of the grant was to confer an alienable estate upon the grantee. This being our opinion on the true construction of Ex. P-14 it becomes unnecessary to consider whether there is attached to this grant any such condition of service or otherwise as would, were the grant silent on the matter, make the subject matter inalienable either under S. 6, Transfer of Property Act or otherwise. It follows that the appeal succeeds. The decree of the first Court will accordingly be restored and that of the lower Appellate Court set aside. The plaintiff will be entitled to his costs in all courts against defendant 1.

K.B./R.K. *Appeal allowed.*

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[2] Rampershad Tiwari v. Anandilal, (1900) 13 C P L R 81.

## A. I. R. 1938 Nagpur 97

STONE C. J. AND VIVIAN BOSE J.

*Shankar and others*—Appellants.

v.

*Raghoba and others*—Respondents.

First Appeals Nos. 141 and 170 of 1934, Decided on 19th March 1937, from decree of Sub-Judge, First Class, Chanda, D/-30th July 1934.

**(a) Hindu Law — Reversioner — Remote reversioner — Nearest reversioner colluding with widow—Remote reversioner can sue for declaration.**

Where a Hindu widow alienates the property and the nearest reversionary heir has precluded himself in some way by his own act or conduct from bringing a declaratory suit, as by collusive action with the widow, the reversioner in a more remote degree can prosecute a declaratory suit : *6 Cal 764 ; A I R 1914 P C 34 and A I R 1916 Nag 100, Rel. on.* [P 98 C 1]

**(b) Hindu Law of Inheritance (Amendment) Act (1929)—Interpretation—Act is retrospective when it does not prejudice vested rights.**

The rule that an Act has no retrospective effect rests on the presumption that the Legislature does not intend what is unjust ; its chief application is where the enactment would prejudicially affect vested rights or the legality of past transactions, or impair contracts. [P 99 C 1]

Interest of a reversioner is only a contingency or mere spes successionis not amounting to a vested right. Where therefore the reversioners bring a declaratory suit against the living widow of the last male holder dead before the passing of the Act, the Hindu Law of Inheritance (Amendment) Act can be applied as it will not cause injustice : *A I R 1934 Mad 138, Dissent.*; *Case law referred.* [P 99 C 1, 2]

**(c) Hindu Law of Inheritance (Amendment) Act (1929), Applicability—Preamble.**

The Preamble shows that the Act merely alters the order of succession but does not alter the date on which the succession opens out. It is clear, the question about the order of succession is material only when the succession opens out, and so if that event occurs after the Act has come into force, the order given in the Act should apply. [P 99 C 2]

**(d) Hindu Law of Inheritance (Amendment) Act (1929), S. 2—Words "sister" and "sister's son"—Meaning of.**

The word "sister" includes half-sister and consequently, the son of the half-blood and the son of the full blood both fall within the class referred to as "sister's son" in S. 2 of the Act, but it does not follow that in a contest between the son of a sister of the full blood and the son of a sister of the half-blood the two would be deemed equal : *A I R 1933 All 491, Dissent.* ; *A I R 1917 Nag 7, Rel. on.* [P 100 C 1]

**M. N. Jog and N. M. Deshmukh — *for Appellants.***

**M. B. Kinkhede and A. R. Kulkarni (for Nos. 1 to 13) and P. P. Deo (for No. 15) — *for Respondents.***

**Judgment.**—This judgment will govern First Appeal No. 141 of 1934 and also First Appeal No. 170 of 1934. The fight in the case out of which these appeals arise was originally between the four plaintiffs on one side and the defendants on the other. But it has now developed into a three-cornered contest between the first three plaintiffs and the defendants as one set, plaintiff 4 and the defendants as a second set, and the first three plaintiffs and plaintiff 4 as a third set. Defendant 14, who is Narayan's widow, is supporting plaintiff 4 and so must be considered along with him in this contest. The questions now at issue will therefore have to be considered from these different angles.

The suit is to challenge an alienation by Laxmibai, the widow of the last male-holder Narayan. She is still alive, and the main question at issue is : who was the next presumptive reversioner at the date of suit ? The facts are these : One Ragho died leaving three widows, Rukhma, Maina and Tulja, and also a son Narayan and two daughters, Godabai and Kondabai. The first three plaintiffs are Godabai's sons, and plaintiff 4 is Kondabai's son. These facts are accepted by all the parties to the suit. Their stories separate from here. The case of the first three plaintiffs is that Rukhma was the mother of all the children of Ragho, and that therefore all the four plaintiffs are the sons of a full-sister of the propositus. Plaintiff 4 denies this and says that though his mother Kondabai was Rukhma's daughter the mother of the other three plaintiffs was not. He alleges that he is thus the son of a full-sister, and so excludes the first three plaintiffs who are the sons of a half-sister. The defendants' case is that neither Godabai nor Kondabai was a daughter of Rukhma and that all the four plaintiffs are the sons of a half-sister.

It is admitted by everybody that but for the Hindu Law of Inheritance (Amendment) Act (2 of 1929), which came into force on 21st February 1929, the defendants would be the next presumptive reversioners. The alienations in suit consist of gifts by Laxmibai to these defendants. Their case is that the Act does not apply to the sons of a half-sister and so the plaintiffs do not come in under its provisions ; also that the sons of a half-sister are not heirs at all and consequently have no right of suit even if the finding of the lower Court that defendants 1 to 13 are colluding with the widow Laxmibai is right. Dealing with the last point first, it was decided in 14 N L R 82[1] that the position of a step-sister's (that is half-siter's) son is the same as that of a sister's son in the line of heirs. This followed the decision in 15 Mad 300.[2] Even if there were no other reason, we would follow this on the principle of stare decisis; but apart from that, we can see no reason in principle why this ruling should not be followed. When the half-sister's son is regarded in the line of descent and not merely collaterally there can be no doubt that he stands in exactly the same relationship to his grandfather as the full-sister's son and that the two would inherit from the grandfather equally. The succession to the uncle has to be traced eventually through the grandfather, that is, the father of the propositus, and though the sons of a full-sister may exclude those of a half-sister as between themselves, there seems to be no reason in principle why such sons should be excluded from the list of heirs altogether. Therefore following 14 N L R 82[1] we hold that the sons of a sister of the half-blood are heirs, and their position in the line of heirs is the same as that of sons of a sister of the full-blood.

Once that is settled, then so far as the defendants are concerned, it does not matter whether the plaintiffs are the sons of a full or a half-sister. They are in the line of heirs and, in this particular case, would come in immediately after the defendants. Their Lordships of the Privy Council decided in 6 Cal 764[3] and again affirmed the principle in 37 All 45[4] at p. 48, that where the nearest reversionary heir has precluded himself in some way by his own act or conduct from suing, as by collusive action with the widow, the reversioner in a more remote degree can prosecute a declaratory suit of this nature. This rule which was applied by their Lordships as early as 1880 in the above case has long been the practice in these provinces: see 13 N L R 187.[5] Here the first 13 defendants are the alienees, and so they have precluded themselves from challenging the alienation. Consequently, the plaintiffs who are the next in the line of reversion after them, have a right of suit. Of course, if the first 13 defendants or any of them happen to outlive the plaintiffs when the reversion opens out, then this declaration will not affect their rights if they are found to be nearer in the line of succession than the plaintiffs.

It was then urged on behalf of the alienees that the gifts formed part of a settlement made in good faith of a family dispute, entered into with the next presumptive reversioners and that it would be unfair on the part of the plaintiffs to set aside one part of the transaction without giving up any rights which they might possibly have under the other part which formed the consideration for the gifts in question. It is said that the widow Laxmibai gifted the property in suit to the first 13 defendants in various lots in consideration of their undertaking to give her the profits from properties which belonged to them. Therefore the defendants urge that, if the gifts are set aside, it must be declared that the plaintiffs have no right to enforce the undertaking to pay the profits in the *sir* land to the plaintiffs. The plaintiffs agree that this declaration should be made; for, they say that they claim no interest in the profits of the *sir* land and that that is a transaction between the first 13 defendants and defendant 14 with which they have no concern. That in itself would be enough to dispose of the case as against the defendants. But, in our opinion, they are equally out of Court on another ground. Once it is accepted that a sister's son is in the same position in the line of heirs as a half-sister's son, then under S. 2, Hindu Law of Inheritance (Amendment) Act 1929, the plaintiffs would displace the defendants in the line of reversioners. But it is argued that the word "sister" in S. 2 of the Act does not include a half-sister. It may be conceded that that is the sense in which the word "sister" is usually used, but that is only because it is the case which most frequently arises. The word "sister" is a generic term which would include not only a sister of the full-blood or sister germane, as she is sometimes called, but also a sister of the half-blood.

But we would go even deeper than that. The object of the Act was to place a class

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1. Ganno v. Beni, A I R 1917 Nag 7=43 I C 943 =14 N L R 82.
2. Subbaraya v. Kallasa, (1892) 15 Mad 300.
3. Rani Anand Kunwar v. Court of Wards, (1881) 6 Cal 764=8 I A 14=8 C L R 381=4 Sar 195 (P C).
4. Jhandu v. Tariff, A I R 1914 P C 34=27 I C 892=37 All 45 (P C).
5. Mt. Parwati v. Govind Prasad, A I R 1916 Nag 100=42 I C 787=13 N L R 187.

of heirs who occupy a remote place in the line of heirs in a more favourable position. Once it is accepted that the son of a half-sister occupies the same position as the son of a full-sister and consequently falls within that class, and once it is seen that the Hindu law does not speak of them separately in the texts, it must be taken that the Legislature was using language familiar to Hindu lawyers and meant to elevate all the persons who formed that particular class and who are ordinarily designated by the term "sister's sons". For these reasons, we are with respect unable to agree with the Full Bench decision in 55 All 725.[6] It was next argued that the Act applies only to those cases in which the last male holder dies after the passing of the Act, or rather of its coming into force. The lower Court holds that the Act has no retrospective effect, and so has not applied it in this case. A great deal of the argument before us was devoted to this question; but in our opinion no such question arises. The rule about this is given in Maxwell's Interpretation of Statutes Edn. 6, pp. 381 and 383. The learned author points out that the rule rests upon the presumption that the Legislature does not intend what is unjust, and then states that its chief application is "where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts". This is also the rule to be gathered from two decisions of the Privy Council, one in 5 M I A 109[7] at p. 126 and the other in 26 All 119[8] at p. 129. In the present case it is clear that no existing rights or vested interests are affected. As Laxmibai is still alive, no rights have yet vested in any of the reversioners.

The real question, in our opinion, is not whether the Act has retrospective effect—but what is the critical date for ascertaining the reversioners of Narayan—the date of his death, or the date when the succession opens out? The Preamble to the Act in question says:

> Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate.

This merely alters the order of succession but does not alter the date on which the succession opens out. It is clear the question about the order of succession is material only when the succession opens out, and so if that event occurs after the Act has come into force, the order given in the Act should apply. In the argument, stress was laid upon the words "Hindu male" and "dying", and also on the use of the present tense. But that is divorcing these words from their context. When the Preamble is read as a whole, it is clear that the Act merely determines the order of succession and nothing else. The view we take has been adopted in 13 Lah 178,[9] 17 Lah 356,[10] A I R 1934 Pat 324,[11] and A I R 1936 All 507.[12] In our opinion, it follows directly from the decisions of the Privy Council in 38 Mad 406[13] at p. 410, 5 Cal 776[14], at p. 789 and 39 Mad 634[15] at p. 637, where their Lordships explain the nature of a Hindu woman's estate and explain that the interest of a reversioner is only a contingency or mere spes successionis not amounting to a vested right. Consequently, to apply the Act to this case will not cause injustice for the simple reason that the defendants have no vested rights. For these reasons also, we are unable, with the utmost respect, to agree with the decision in 57 Mad 718.[16] With respect to the decision in 58 All 139,[17] which was quoted by the learned counsel for the respondents, that was not a case under the Act in question but under some other Act, and it is evident from the judgments that the learned Judges were dealing with a special set of circumstances and were not laying down any general principle. This is especially evident from the judgment of the learned Chief Justice who has made many reservations with respect to the view taken there.

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[6] Ram Ahdar v. Mt. Sudesra, A I R 1933 All 491=145 I C 529=55 All 725=1933 A L J 680 (F B).

[7] Doolubdass Pettamberdass v. Ramlool Thackoorseydoss, (1851-54) 5 M I A 109=7 Moo PC 289=1 Sar 403 (P C).

[8] Mahammad Abdussamad v. Qurban Hussain, (1904) 26 All 119=31 I A 30=8 Sar 598 (P C).

[9] Shib Das v. Nand Lal, A I R 1932 Lah 361=138 I C 291=13 Lah 178=33 P L R 428.

[10] Shakuntala Devi v. Kaushalya Devi, A I R 1936 Lah 124=162 I C 718=17 Lah 356=38 P L R 673.

[11] Chulhan v. Mt. Akli, A I R 1934 Pat 324=150 I C 1039=15 P L T 707.

[12] Mt. Rajpali v. Surju Rai, A I R 1936 All 507=163 I C 756=1936 A L J 659=58 All 1041 (F B).

[13] Venkatanarayana Pillai v. Subbammal, A I R 1915 P C 124=29 I C 298=42 I A 125=38 Mad 406 (P C).

[14] Moniram Kolita v. Keri Kolitani, (1880) 5 Cal 776=7 I A 115=6 C L R 322=4 Sar 103 (P C).

[15] Janaki Ammal v. Narayana Swami Aiyar, A I R 1916 P C 117=37 I C 161=43 I A 207=39 Mad 634 (P C).

[16] Krishnanchettiar v. Manickkammal, A I R 1934 Mad 188=147 I C 1139=57 Mad 718=66 M L J 70.

[17] Ajodhya Pande v. Mt. Rajna, A I R 1935 All 845=158 I C 888=1935 A L J 934=58 All 139.

As regards the observations of the learned Judges in the Allahabad Full Bench case, 55 All 725[6] at p. 727, we desire to observe that although, in our opinion, a person of full-blood would succeed as against a person of the half-blood in the same degree, this will have no effect on the right of a person to succeed as against a person not falling within that class. The word "sister" includes half-sister according to the view taken in these provinces, with which we respectfully agree, and consequently the son of the half-blood and the son of the full-blood both fall within the class referred to as "sister's son" in the Act. It does not, in our opinion, follow that in a contest between the son of a sister of the full-blood and the son of a sister of the half-blood the two would be deemed equal.

The learned Judges in the Allahabad ruling state that this means the introduction of another person between the sister and the sister's son, namely a half-sister. If the construction we place upon the term "sister's son" is right, then of course, this difficulty does not arise. But apart from that, in our opinion, it would cause more injustice to leave out the son of the half-sister altogether while raising the son of the sister in the order of succession than it would to raise him along with the sister's son. We may observe that the result of placing the interpretation which the Allahabad High Court has placed upon the term "sister's son" would be to shut out a son of the half-sister altogether, unless it is to be assumed that the term "sister" in this Act is used in a sense different from that in which it is ordinarily understood in the Hindu law. As we have said, in our opinion and in the view prevalent in these provinces, that is not so. Therefore we must take it that the Legislature was using the term in the sense familiar to Hindu lawyers. That disposes of the case against the defendants. Whichever view is taken, they are wholly out of the picture.

As regards the rights of the plaintiffs between themselves, the evidence on behalf of the first three plaintiffs consists of P. Ws. 1, 2 and 3. The learned Judge who saw these witnesses has not believed them, and we agree with him that they are worthless. P. W. 1 admits that he never spoke to anyone about Ragho's two daughters, and when asked how then he could have known about their relationship, he merely replied that he knew because he knew. We are unable to consider him a witness who can be relied on in this matter. P. W. 3 does not support the case of these plaintiffs in his cross-examination; for, he says there that Godabai was a daughter of Mainabai, and these plaintiffs themselves do not rely on him any longer. That leaves us with P. W. 2. He says his knowledge is derived from admissions made by Laxmibai and Tuljabai some 40 years ago. But he says that apart from these admissions he already knew the fact. If that is so, it is difficult to see how a stranger who does not appear to have any deep interest in the family can recollect conversations which took place 40 years ago with respect to matters already in his knowledge. As we have said, the Judge of the lower Court who saw these witnesses has disbelieved them and the plaintiffs themselves have not gone into the witness-box. Consequently, we agree that this is not evidence of a kind which compels acceptance.

With respect to plaintiff 4's case, it is to be noted at the outset that he originally sided with the first three plaintiffs and then turned round and set up an exclusive right in himself at a later stage. He has not gone into the box to explain this extraordinary change of front and in the absence of some explanation from him, it is difficult for us to place any reliance on the story now set up on his behalf by one of the witnesses. It is true Laxmibai supports him as 14-D. W. 1 and that as a member of the family by marriage she is an important witness; also it is a strong point in her favour that the Judge who recorded her evidence has believed her. But as against this is her special interest in plaintiff 4. It appears from her evidence that she brought him up as a child, and reading between the lines, one gathers she looked upon him very much as one of her own sons. In view of plaintiff 4's unexplained change of front, we are not able to regard this as strong enough testimony to oust his step-brothers. Therefore we are unable to travel beyond the admissions made in this case, namely that all the plaintiffs are sons of Ragho's daughters but not by the same wife. The further position that they are the sons of a full-sister of the propositus, we hold, has not been established.

The result is that plaintiff 4's appeal, No. 170 of 1934 succeeds as against the defendants and fails as against his co-plaintiffs. It is therefore allowed to that extent. A great deal of the trouble in this case has arisen through the unexplained change of front which plaintiff 4 made. In the circumstances, we think it fair that he should be given only half his costs in this appeal and that they should be borne by defendants 1 to 13. The other appeal, First Appeal No. 141 of 1934 also succeeds as against both the defendants and plaintiff 4. It is therefore allowed and the defendants and plaintiff 4 will pay the appellants' costs half and half, each being separately responsible for a half-share. The first Court's decree will be reversed and a decree will now be passed in favour of all the four plaintiffs jointly as against the defendants. The defendants will pay the plaintiffs half the costs of the suit because they have won on the facts but lost on the law. These half costs will be distributed half and half between plaintiff 4 and the first three plaintiffs. The declaration referred to earlier in the judgment will also be added to the decree.

S.C./R.K. *Decree reversed.*

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## A. I. R. 1938 Nagpur 101

STONE C. J. AND NIYOGI J.

*Syed Fakir Syed Hussain and another* —Appellants.

v.

*Abdul Samad Khan Fazal Khan* — Respondent.

First Appeal No 1-B. of 1934, Decided on 10th March 1937, from order of Addl. Dist. Judge, Yeotmal, D/- 9th Jan. 1934.

**Civil P. C. (1908), S. 144—Applicability—S. 144 does not apply to sureties.**

**Section 144 was not intended to apply to sureties but only to the parties to the suit or their representatives. The surety only undertakes to return the property, namely the material object and not the liability for safeguarding the rights of the owner in respect of the property. If any loss is caused to the owner by reason of the property not being returned in the condition in which it was when it was taken, or if for any other reason the owner suffers damages, that has nothing to do with the execution of the decree as such : *1919 P C 55, Rel. on.*** **[P 102 C 2]**

**M. R. Bobde — *for Appellants.***

**R. N. Padhye — *for Respondent.***

**Judgment.**— This appeal arises out of execution proceedings. In Civil Suit No. 9 of 1926 certain persons who were non-applicants 1 and 2 in the lower Court sued the respondent, Abdul Samad Khan and two others for possession of certain moveable and immovable property and succeeded in the Court of first instance. Pursuant to the decree, they obtained from the respondent possession of the stock in trade in a cloth shop and certain bonds and pronotes of the face value of Rs. 1818 besides some other property. The respondent filed an appeal in the Court of the Judicial Commissioner and obtained an order from that Court ordering the plaintiffs in that suit to furnish security to the extent of Rs. 3000 for the restitution of the property which they had taken possession of in execution of the original Court's decree passed in their favour. On 11th July 1929 the appellants executed a surety bond whereby they undertook to pay a sum not exceeding Rs. 3000 in the event of the respondent's appeal succeeding, and the plaintiffs in that suit not returning to the respondent the immovable property that they had taken into their possession in execution of their decree. The respondent succeeded in his appeal with the result that the decree passed against him was reversed.

The Judicial Commissioner's Court decided the appeal on 5th November 1930 in favour of the respondent in this appeal. On 29th November 1930 he applied to the executing Court for directing the unsuccessful plaintiffs in Suit No. 9 of 1926 to return the property that they had taken in execution. On 2nd October 1931 and 24th November 1931 the plaintiffs in that suit returned the stock of cloth which they had taken in execution. Thereafter on 4th January 1932, respondent 1 applied to the Court for enforcing the liability which the appellants as sureties had undertaken by the surety bond dated 11th July 1929. On 16th April 1932 the bonds and the pronotes were returned to the respondent in this appeal, but by that time the debts due on those documents had become barred by time. The respondent therefore wanted the sureties, namely the appellants to reimburse him for the loss resulting from the bonds and promissory notes having become barred by time and also for the depreciation in the market price of the stock of cloth. The lower Court held that the sureties, namely the appellants, were under their surety bond dated 11th July 1929, liable to pay Rs. 2371-12-0 to the respondent. It is contended on behalf of the sureties, who are appellants here, that they could not be made liable to compensate the defendant for any loss occasioned to him by reason of the delay on the part of their principals in returning the instruments of obligation and the stock of cloth.

Lengthy arguments were addressed on either side, but it appears to us that the question resolves itself into one, whether the case is governed by S. 145 only, or by S. 145 read in conjunction with S. 144, Civil P. C. As this is a case of persons who became liable as sureties for the restitution of the immovable property taken in execution of a decree which was subsequently reversed, the enactment that will apply to this case is S. 145. That section provides that the decree which ultimately became the enforceable decree may be executed against the sureties to the extent to which they had rendered themselves personally liable in the manner provided for the execution of decrees. Now, this section has to be applied in view of the particular terms of the surety bond. In the present case, the surety bonds recite that if the persons who had taken possession of some moveable property in execution of a decree, which was subsequently reversed, did not return to the respondent in this appeal the moveable property which they had taken possession of, then the sureties would be liable personally to pay a sum not exceeding Rs. 3000. Personal liability of the sureties was clearly contemplated to arise in the event of the failure on the part of the persons concerned to return the moveable property to the restitution of which the respondent in this appeal became entitled as a consequence of his having succeeded in his appeal. The moveable property, namely the bonds, pronotes and the stock of cloth were actually returned to the respondent in this case. Consequently so far as the execution of the appellate decree was concerned, it was complete and there was nothing left of the appellate decree to be executed against the sureties. But it is urged on behalf of the respondent that the sureties stood on the same footing as the judgment-debtors and that therefore they, like the judgment-debtors, were liable not only for the restitution of the specific moveable property but also for damages consequent on the failure to return the bonds and promissory notes in time to enable suits being filed for recovering the debts due on them and also for the depreciation in the market price of the stock of cloth. This liability of the surety is sought to be made out in terms of S. 144, Civil P. C. In our opinion, S. 144 was not intended to apply to sureties, but only to the parties to the suit or their representatives. The surety only undertakes to return the property, namely the material object and not the liability for safeguarding the rights of the owner in respect of the property. If any loss is caused to the owner by reason of the property not being returned in the condition in which it was when it was taken, or if for any other reason the owner suffers damages, that has nothing to do with the execution of the decree as such. As the terms of S. 144 itself make it clear, a separate proceeding has to be started against the judgment-debtor for determining the amount of damages or compensation which are consequential on the variation or reversal of the decree. S. 144 is more comprehensive than S. 145. The latter section speaks of the execution of a decree which is varied or reversed, but the former provides for remedies by way of damages or compensation or mesne profits which are not comprised in the decree but are consequential on the variation or reversal of the Subordinate Court's decree. If S. 144 were held to apply to sureties, they will be made virtually parties to the suit, which eventuality is repugnant to S. 145, because it says that the surety shall be deemed to be a party within the meaning of S. 47 only for a limited purpose, namely for the purpose of appeal. It has been held in 43 Mad 325,[1] 51 All 346[2] and 9 Rang 434,[3] that a surety does not become a party within the meaning of S. 47 only because the decree is capable of being executed against him under S. 145, although if an adverse order is passed against him he has a right of appeal from it as if he were a party within the meaning of S. 47. It is thus clear that any attempt to apply S. 144 to the sureties would not only be contrary to the plain terms of that section but also be repugnant to the letter and spirit of S. 145. In our opinion therefore, it would be straining S. 144, beyond its legitimate scope to seek to apply it to sureties. We are fortified in our opinion by the view taken by their Lordships of the Privy Council in 42 All 158[4] at p. 166, where their Lordships observed that Ss. 47 and 144 provide for the decision of questions relating to the execution, discharge or satisfaction of the decree and for restitution including the payment of mesne profits when a decree has been varied or reversed and they enact that any such questions should be determined in the suit and not by a fresh suit, but these sections apply only to the parties or representatives of the original parties and do not apply to sureties.

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[1] Ramanathan Pillai v. Doraiswami Aiyangar, (1920) 7 A I R Mad 75=55 I C 363=43 Mad 325=38 M L J 65.

[2] Ram Kishun v. Lalta Singh, (1928) 15 A I R All 527=112 I C 534=51 All 346=26 A L J 1160.

[3] Siba Singh v. C. V. R. M. Chettyar Firm, (1931) 18 A I R Rang 206=134 I C 509=9 Rang 434.

From the foregoing discussion it is evident that the sureties could not be made liable on their surety bond either under S. 145, Civil P. C., as the moveable property was returned, or under S. 144 as it does not apply to the sureties. The result is that the appeal succeeds and the lower Court's order is reversed. The respondent will pay the costs of the appellants of both Courts. Counsel's fee Rs. 30.

D.S./R.K. *Appeal succeeds.*

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[4] Raj Raghubar Singh v. Jai Indra Bahadur Singh, (1919) 6 A I R P C 55=55 I C 550=46 I A 228=42 All 158=22 O C 212 (P C).

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## * A. I. R. 1938 Nagpur 103

GRILLE J.

*Rahat Ali Amjadali and others* — Applicants.

v.

*Mohamad Murad* — Non-applicant.

Criminal Revn. No. 278 of 1937, Decided on 18th September 1937, from order of Sess. Judge, Jubbulpore, D/- 22nd May 1937.

*** (a) Criminal P. C. (1898), S. 252—Scope explained—Section composed of two parts—First part refers to appearance of accused for first time only—Failure to comply with first part does not vitiate trial—Magistrate's discretion in selecting witnesses cited—When and how discretion should be used.**

The first part of S. 252 refers only to such evidence as is offered on the day when the accused appears or is brought before the Court; it refers only to the initial production of the accused and does not refer to every appearance of the accused. That would be opposed to the plain sense of the section, the object of which is that such evidence as is ready and appears against the accused shall be taken directly he appears in Court. If the case is initiated on a challan, the accused is produced, and the prosecution witnesses on the day fixed. The prosecution witnesses who have been bound over to appear by the police are then examined. Undoubtedly, if it is necessary to adjourn the case, such witnesses still come under the category of "such evidence as may be produced in support of the prosecution" as they were produced on the date of hearing; but, where the case is initiated on a complaint, the phrase "such evidence as may be produced in support of the prosecution" refers only to such witnesses as the complainant may bring with him and who have not been summoned by the Court. Latter part of S. 252 authorizes that what is done in every complaint case under another name, viz. the filing of a list of witnesses whom the complainant desires shall be summoned. When the first stage contemplated in the first part of S. 252 has passed, the hearing of any unsummoned witnesses after that date is a matter within the Court's discretion. The fact that the Magistrate summoned all the witnesses without making a selection or enquiring from the complainant broadly on the points in respect of which they were to depose does not alter the fact that the acceptance of the list filed by the complainant in its entirety is a compliance with the second part of the section. It is only where a list is unduly long and appears to have been filed vexatiously that the Magistracy avail themselves of the power, which the law provides, to scrutinize the list to prevent undue harassment of the accused and an unwarranted prolongation of the trial. [P 104 C 1, 2; P 105 C 1]

Where on the day fixed for the appearance of the accused, the complainant does not bring his witnesses, the Court should examine the complainant, but failure of the Court to do so will not vitiate the trial. There is then no evidence in support of the prosecution and hence latter part of S. 252 will come into play. [P 104 C 2]

**(b) Criminal Trial — Witnesses — Witness bound over not appearing — Court and not party should take steps to compel attendance.**

Where the witnesses who were bound over fail to appear in Court, it is for the Court to take steps to compel their attendance and not for a party. [P 105 C 2]

Fida Husain — *for Applicants.*

J. Sen — *for the Crown.*

**Order.**—One Mohamad Murad brought a case on a complaint against seven accused persons under Ss. 147, 323 and 506, I. P. C. After a preliminary inquiry, the Honorary Magistrate decided to issue process, and on 22nd February 1936 stated on the order-sheet: "Case be registered, summonses shall issue to all accused, case for 18th March 1936". On 17th March 1936 the order-sheet runs: "Complainant and all the accused are present to-day. The case is therefore taken up. Complainant's witnesses shall now be summoned. Accused on bail of Rs. 100 each with one surety for like sum each. Case for 25th March 1936". On 25th March 1936 the Court discharged all the accused, holding that on the evidence which had been adduced (the Magistrate considered it a point worth noting that there was no medical evidence in support of the injuries which the complainant said he had received) no case had been made out. The complainant then applied to the Sessions Court to have the order of discharge set aside and a further inquiry directed. The case in the Sessions Court unfortunately took over nine months and ended in the order being set aside and a further inquiry directed with the instruction that the complainant should be allowed to produce six named witnesses. The reasons for directing a further inquiry were, in short, that the complainant had not been allowed to examine and summon certain witnesses and that permission should have been given. The accused have now put in a revision application against the order of the Sessions Judge. A rule was issued and both the applicants and the Government Pleader have been heard. The order of the learned Sessions Judge cannot be supported as to the order that certain witnesses should be heard who appeared for the first time unsummoned on 29th May, although the case cited by the Magistrate for refusing to hear them, A I R 1934 Nag 156=150 I C 916,[1] is not actually an authority for his action. The learned Sessions Judge has, in my opinion, misconstrued the first part of S. 252, Criminal P. C. He interprets it as meaning that any evidence which is produced on behalf of the prosecution includes any witnesses who may appear, whether summoned or no, up to the time when the prosecution case is closed, and then, somewhat illogically, also adds that the second part of the section does not come into operation until all the evidence to which he has just referred has been taken.

Now a warrant case may come before a Magistrate in two ways: either on a challan, in which case, the witnesses have already been bound over to appear by the police on the date of the trial, or on a complaint, in which case the complainant may bring witnesses with him on the date fixed for trial, i. e. the date on which the accused appears. None of these witnesses —and it is these who constitute "such evidence as may be produced in support of the prosecution"—are summoned by the Magistrate. That may take place later, and it is perfectly plain that the first part of S. 252, Criminal P. C., refers only to such evidence as is offered on the day when the accused appears or is brought before the Court; it refers only to the initial production of the accused, and I cannot accept the contention that it refers to every appearance of the accused. That would be opposed to the plain sense of the section, the object of which is that such evidence as is ready and appears against the accused shall be taken directly he appears in Court. If the case is initiated on a challan, the accused is produced, and the prosecution witnesses on the day fixed. The prosecution witnesses who have been bound over to appear by the police are then examined. Undoubtedly, if it is necessary to adjourn the case, such witnesses still come under the category of "such evidence as may be produced in support of the prosecution" as they were produced on the date of hearing; but, where the case is initiated on a complaint, the phrase "such evidence as may be produced in support of the prosecution" refers only to such witnesses as the complainant may bring with him and who have not been summoned by the Court. It is quite obvious that in the present case on the day when the accused appeared in answer to the summons which had been issued, the complainant appeared and he had no witnesses present ~~with him~~. The Court certainly neglected to examine the complainant on that day, and in so far failed to comply with the provisions of the first part of S. 252; but that would not vitiate the trial. There was, then, no evidence produced in support of the prosecution, and the next part of S. 252 then came into play.

The learned Sessions Judge has held that, as the Magistrate had not actually ascertained from the complainant the names of the persons likely to be acquainted with the facts of the case, the stage contemplated in the first part of the section was still in existence and that until the question had actually been asked, the complainant was at liberty to produce such unsummoned witnesses as he chose. This proposition would mean endless delay and harassment to accused persons, and if the judgment of Wallace J. in 49 Mad 978[2] is to be interpreted as allowing such procedure, I find myself with all respect unable to agree with it. What the second part of S. 252 authorizes is what is done in every complaint case under another name: the filing of a list of witnesses whom the complainant desires shall be summoned. This was done on 18th March 1936, and summonses were issued in respect of the eight persons named in the list. It follows then, that the first stage contemplated in the first part of S. 252 had passed on 18th March, and the hearing of any unsummoned witnesses after that date was a matter within the Court's discretion. The fact that the Magistrate summoned all the witnesses without making a selection or inquiring from the complainant broadly on the points in respect of which they were to depose does not alter the fact that the acceptance of the list filed by the complainant in its entirety was a compliance with the second part of the section. It is only where a list is unduly long and appears to have been filed vexatiously that the Magistracy avail themselves of the power which the law provides to scrutinize the list to prevent undue harassment of the accused and an unwarranted prolongation of the trial. In so far then, as the first part of the learned Sessions Judge's order goes, the argument therein employed for ordering a further inquiry cannot prevail. On the remaining argument the learned Sessions Judge's views are correct, and the complainant has certainly been wrongfully deprived, owing to the failure of the trying Magistrate in carrying out his duty, of the opportunity of examining essential witnesses including the doctor whom he had called. On the date fixed for the recording of evidence of the eight witnesses summoned, five were present, and there is nothing to indicate whether the summonses of the remaining three were served or were not served. As to the three who were not present, the Magistrate, on a subsequent application to have them re summoned, recorded that they were given up as the complainant took no further interest in them and took no action.

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[1] Hajari Tika v. Emperor, (1934) 21 A I R Nag 156=1934 Cr C 660=150 I C 916=35 C L J 1163.

[2] K. C. Menon v. P. Krishna Nayar, (1926) 13 A I R Mad 989=97 I C 643=27 Cr L J 1123 =49 Mad 978=51 M L J 328.

It was certainly the Court's duty to ascertain what had happened in respect of these three witnesses, whether they were served or no, and if they were served, whether the complainant desired to compel their attendance by a warrant or, if not served, whether he desired to summon them afresh. This was not done, and there is no mention in the order-sheet, as there should have been, as to what directions were sought for or given in respect of these witnesses. Further there has been a considerable dereliction of duty in respect of the witnesses, five in number, who actually were present and whose evidence could not be taken owing to the absence through illness of one of the accused. They were bound over for the hearing of the next date, the 30th April 1936. On that day however, according to the Magistrate's order of 14th July 1936, since nothing appears on the order-sheet of 30th April in this respect, only three were present. The absentees were Mr. and Mrs. Marshall who had been bound over and who apparently failed to appear. Their appearance should have been compelled and action taken in respect of their bonds which were apparently forfeited unless the complainant had definitely stated, and if stated, the fact should have been recorded in the order-sheet, that he gave up these witnesses. It is not a question, as the Magistrate says in his order, of the complainant failing to take any action whatever to secure the attendance of his other witnesses. These witnesses had been bound over, and on their failure to appear, it was for the Court to take action on the breach of the Court's order, and not for the complainant. On 25th June the complainant then asked that he should be allowed to examine Wali Mohamad and Lalloo (two of the witnesses whom he had produced unsummoned on 22nd May) and four witnesses, Aziz, Taj Khan, Mr. Marshall and Dr. Mehta, who were in his original list, and the Magistrate rejected the application in respect of all.

The learned Sessions Judge is correct in holding that the complainant is entitled to summon and examine these last four witnesses. In respect of the first two, that (as the witnesses were unsummoned) was a matter for the Magistrate's discretion; he was under no compulsion to examine them. As the continuation of the hearing has now been ordered, I do not propose to interfere with the order of the Sessions Judge directing that the complainant should be allowed to produce and examine these witnesses. The production however must be by way of summons. The rule is accordingly discharged and the inquiry will proceed as directed.

B.D./R.K. *Order accordingly.*

## A. I. R. 1938 Nagpur 106

GRILLE J.

*Syed Habib Syed Ibrahim*
*Accused* — Applicant.

v.

*Emperor.*

Criminal Revn. No. 328 of 1937, Decided on 10th September 1937, from order of Dist. Magistrate, Akola, D/- 11-7-1937.

**Criminal P. C. (1898), S. 195—Tahsildar proposing prosecution under S. 186, Penal Code —Subdivisional Officer recommending under S. 183 — Papers forwarded by Tahsildar to Naib Tahsildar with endorsement "for favour of action"—Communication between Tahsildar and Subdivisional Officer does not amount to complaint as required under S. 195.**

When a warrant for arrears of rent was about to be served on a person, he concealed himself. The Tahsildar made a report of this fact to the Subdivisional Officer, stating that he proposed to lodge a complaint against the person under S. 186, Penal Code, in the Court of Naib Tahsildar. On this the Subdivisional Officer endorsed that complaint might be lodged under S. 183, Penal Code. The file was returned to the Naib Tahsildar by the Tahsildar with an endorsement "for favour of further action". The Naib Tahsildar on this started prosecution, without further and proper complaint :

*Held* that the communications between the Tahsildar and the Subdivisional Officer did not constitute a complaint in writing made by a public officer to a Court having jurisdiction to try the case. The Subdivisional Officer merely instructed the Tahsildar that he might lodge a complaint. No complaint as such had been lodged. No mention of any Magistrate or any Magistrate's Court was made and all that had been done was that the Tahsildar had forwarded to his subordinate executive officer a statement showing that he proposed to lodge a complaint under one section of the Penal Code and that his superior executive officer, the Subdivisional Officer, had overruled him and informed him that he might lodge a complaint under another section. [P 106 C 2]

V. K. Rajwade — *for Applicant.*

**Order.**—This is an application asking that the prosecution of one Syed Habib under S. 183, Penal Code, should be quashed as the complaint was not made as required by S. 195, Criminal P. C., by a public servant in writing. The alleged offence in respect of which the applicant has appeared in Court is that when a warrant for arrears of rent was about to be served on him, he detected the presence of the person about to serve the warrant and shut himself up in his house. On this the Tahsildar, Akola, made the following report to the Subdivisional Officer :

> The report on the enclosed warrant may kindly be seen. The village Barsitakli is notorious for arrears and unless we help the village officers in recovery it will be difficult to recover arrears. The defaulter by his closing the door has done an overt act to obstruct a public servant in discharge of a public function. I therefore propose to lodge a complaint under S. 186, Penal Code, in the Court of Naib Tahsildar (Mr. Joshi).
>
> Submitted to Subdivisional Officer for favour of approval as this concerns the general working of the taluk.

On this, the Subdivisional Officer endorsed: "A complaint may be lodged under S. 183, I. P. C.," and returned the paper to the Tahsildar, Akola, who then added to it: "Forwarded to Naib Tahsildar (Mr. Joshi) for favour of further action". This the trying Magistrate held to constitute a proper complaint under S. 195, Criminal P. C., and he has been supported in this view by the District Magistrate in revision. On a rule issuing from this Court, the District Magistrate considers that it is not necessary for Government to be represented. I am satisfied that the communications between the Tahsildar, Akola, and the Subdivisional Officer do not constitute a complaint in writing made by a public officer to a Court having jurisdiction to try the case. The Subdivisional Officer merely instructed the Tahsildar that he might lodge a complaint. No complaint as such has been lodged.

It is argued that the report of the Tahsildar with the subsequent permission of the Subdivisional Officer to lodge a complaint constitutes a proper complaint in writing. The Tahsildar proposed to lodge a complaint under S. 186, Penal Code; the Subdivisional Officer said a complaint may be lodged under S. 183 of the Code, and the Tahsildar then forwarded the papers to the Naib Tahsildar for favour of further action. No mention of any Magistrate or any Magistrate's Court is made on this sheet of paper, and all that has been done is that the Tahsildar has forwarded to his subordinate Executive Officer a statement showing that he proposed to lodge a complaint under one section of the Penal Code and that his superior Executive Officer, the Subdivisional Officer, has overruled him and informed him that he may lodge a complaint under another section. The Naib Tahsildar then, as a Magistrate, proceeded to take this correspondence as a complaint under S. 183, Penal Code, when the facts set out in the report are entirely incompatible with a complaint under S. 183 although they may be compatible with a complaint having been properly made under S. 186, Penal Code. It is quite

**apparent that no complaint has been made at all and that consequently the Magistrate had no jurisdiction. The proceedings will be quashed.**

B.D./R.K. *Application allowed.*

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## A. I. R. 1938 Nagpur 107

VIVIAN BOSE AND PURANIK JJ.

*Anandi Prasad Rai Devi Prasad* — Appellant.

v.

*Govinda Bapu Sitaram Bapu Kalar* — Respondent.

Misc. Appeal No. 50 of 1936, Decided on 21st June 1937, from order of Dist. Judge, Nagpur, D/- 22nd January 1936.

**(a) Civil P. C. (1908), O. 43, R. 1 (j) and S. 104 — Second appeal — No second appeal lies from order refusing to set aside sale.**

An order refusing to set aside a sale as mentioned in O. 43, R. 1 (j), is appealable as stated in the very beginning of that Order, under S. 104 of the Code. So in view of S. 104 (2), no second appeal lies from such order. [P 107 C 2]

**(b) Civil P. C. (1908), S. 2 (2) (a) and O. 43, R. 1 (j) — Order refusing to set aside sale — Order made appealable under O. 43, R. 1 (j) — Such order is not decree even if passed between parties to proceedings in execution.**

Section 2 (2) (a) lays down that the definition of a "decree" should not include "any adjudication from which an appeal lies as an appeal from an order". An order refusing to set aside sale is made appealable under O. 43, R. 1 (j). Such order therefore, even if passed between parties to proceedings in execution, cannot therefore be regarded as a decree within the meaning of the definition of a "decree" given in S. 2 (2). [P 107 C 2; P 108 C 1]

**(c) Civil P. C. (1908), O. 21, Rr. 69, 92 and O. 43, R. 1 (j) — Sale held till 1 p. m. and adjourned to "an hour or so" without stating reasons for adjournment — Sale held again from 2.30 p. m. to 4 p. m. — Non-specification of exact hour to which sale is adjourned and failure to give reasons for adjournment held not such material irregularities as to take sale out of purview of Code.**

In order to set aside a sale on the ground of material irregularity, the irregularity must be such as goes to the root of the matter and it is of such a nature that no sale of whatever kind contemplated by the Code can be said to have been held. [P 108 C 2]

Where a sale is validly conducted up to 1 p. m. and the sale officer afterwards stayed the sale stating that it would be resumed within "an hour or so" and the sale is resumed again at 2·30 p. m. and finally stopped at 4 p. m. it is unlikely that intending bidders would not return during the three hours after adjournment when the sale was stopped, when it has been specifically stated that it would be resumed within "an hour or so". Even though the failure on the part of the sale officer to specify the exact hour to which the sale is adjourned, and also the failure to record his reasons for such adjournment are material irregularities, in such a case they are not such irregularities as go to the root of the matter and prevent the proceedings from being regarded as a sale within the meaning of the Code : *A I R 1921 Mad 583; 7 All 676; A I R 1925 Cal 201 and A I R 1919 Nag 128, Disting.* [P 108 C 2]

**(d) Civil P. C. (1908), S. 115 — Material irregularity must be in procedure of Court whose order is attacked in revision.**

The material irregularity in cases of revision must be analogous to one in procedure and such irregularity must be of the Court whose order is being attacked in revision. [P 109 C 1]

A. R. Kulkarni — *for Appellant.*

Y. V. Jakatdar — *for Respondent.*

**Judgment.**— This is a second appeal against an order refusing on appeal to set aside a sale on the ground of material irregularities. The learned counsel for the respondent has taken a preliminary objection to the effect that a second appeal does not lie. The facts are these. The sale was conducted in accordance with the proclamation up to 1 P. M. on the date specified. The sale amin then stayed the sale and told the bidders that he was doing so. He also told them that he would resume it in "an hour or so". He returned at 2.30 P. M. and the property was finally knocked down in favour of the decree-holder at 4 P. M. for Rs. 1105. The highest bid at 1 P. M. when the sale was stayed was Rs. 1100. It was made by one Lathumian, who has now been examined as J. D. W. 1. An application was then made on behalf of the judgment-debtor under O. 21, R. 90, Civil P. C. to have the sale set aside, but the Court refused to do so evidently acting under O. 21, R. 92. An appeal was then filed to the District Judge who upheld the order of the first Court.

From O. 43, R. 1 (j), it is evident that an appeal lies against an order refusing to set aside a sale. It is also evident from the opening words of that Rule that the appeal lies under the provisions of S. 104. When we turn to that section we find that no second appeal lies from an order passed under that section. It was argued on behalf of the appellant that the definition of decree given in S. 2 (2) makes orders between the parties to the proceedings in execution appealable under S. 47, but this argument overlooks sub-cl. (a) which says that the definition shall not include "any adjudication from which an appeal lies as an appeal from an order". Consequently it is clear that since the refusal to set aside a sale has been made appealable under O. 43, R. 1 (j), it cannot be regarded as a decree within the meaning of the definition given in S. 2 (2). Therefore no second appeal can lie. It was then argued that these considerations cannot apply when a sale is void ab initio but applies only when the matter falls within the purview of O. 21, R. 90, and we were referred to 44 Mad 35,[1] 7 All 676,[2] A I R 1925 Cal 201[3] and 15 N L R 125.[4] We were also asked to apply the test given in 44 Mad 35[1] and it was argued that what the learned Judges have laid down there is that if the sale is not held under the Rules of the Code then there is no sale whatever under the Code, and consequently there is no proceeding which requires to be set aside under O. 21, R. 92.

So far as that is concerned, there can be no question that the sale in this case was validly conducted up to 1 o'clock in the afternoon, after which it was stayed. The officer conducting a sale has power to stay and adjourn it under O. 21, R. 69. When he does so, the Rule directs him to record his reasons for the adjournment and also to specify the date and hour to which the sale is adjourned. The officer in question did not record his reasons, also instead of specifying the exact hour he merely stated that the sale would be resumed "within an hour or so." So far as his failure to record his reasons for the adjournment is concerned, in our opinion, that would not amount to a material irregularity in this case for it cannot be said to go to the root of the matter, but so far as the other question is concerned it would. When the Code directs a specific hour to be named, it is not fulfilling its directions to say in a vague way that the sale will be resumed "in an hour or so." But that is not enough to justify setting aside the sale under O. 21, R. 90; for, even when there is a material irregularity, the sale cannot be set aside unless the applicant has sustained substantial injury by reason of such irregularity. Before however we deal with this question, it is necessary to decide whether the irregularity even though material was of a nature such as to take the proceedings out of the purview of the Code altogether; in our opinion it was not. The test we think must always be whether the irregularity goes to the root of the matter and is of such a nature that no sale whatever of the kind contemplated by the Code can be said to have been held.

In the cases cited before us that appears to have happened. In 44 Mad 35[1] for instance, the sale was advertised for a certain place and was then held at a different place altogether. It is obvious that no prospective bidder could possibly have divined that the sale would be held at a totally different place. Similar observations apply to the case referred to at p. 39* of that ruling. There the sale had been advertised for a particular time on a date specified and was then held at an earlier hour. No purchaser could reasonably be expected to turn up at an earlier hour and therefore the sale was not held as advertised. Similar conditions obtained in 7 All 676,[2] and A I R 1925 Cal 201.[3] In the former case the sale was conducted at a time and place different from that stated in the proclamation; in the latter, no date of sale was fixed at all. In 15 N L R 125[4] the time of sale was not disclosed. None of these irregularities are present in this case.

As we have said, it is an irregularity not to specify the exact hour to which a sale is to be adjourned, but there can be no doubt that intending purchasers obtained an approximate idea of the hour of resumption from the words used here, namely "after an hour or so." At the most that might mean two hours but it could hardly mean more than that. The sale, as we have said, was stayed at 1 P. M. It was resumed an hour and a half later but was not finally stopped until 4 o'clock in the afternoon, that is two and a half hours after the adjournment. It is impossible for us to believe that any bidder who really wanted to purchase the property would not have returned some time within 2½ hours on being told at 1 o'clock that the sale would be resumed "in an hour or so." Consequently we agree with the lower Court that the failure to specify the exact time of resumption has not resulted in any loss to the applicant. Also such a failure does not go to the root of the matter and does not prevent the proceedings from being regarded as a sale within the meaning of the Code. Consequently, the rulings quoted do not apply in this case and it is impossible to hold that the proceedings do not fall under O. 43, R. 1 (j). Therefore we uphold the objection that no second appeal lies.

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[1] Jayarama Ayyar v. Vridhagiri Aiyar, A I R 1921 Mad 583=59 I C 167=44 Mad 35=39 M L J 188.

[2] Chedami Lal v. Amir Beg, (1885) 7 All 676=1885 A W N 178.

[3] Motahar Hossain v. Mohammad Yakub, A I R 1925 Cal 201=84 I C 700=40 C L J 311.

[4] Narhar v. G. M. Buti, A I R 1919 Nag 128=51 I C 864=15 N L R 125.

* (1889) I. L. R., 16 Cal 794.

We are then asked to deal with the matter in revision, but before we can do that it must be shown either that the lower Courts have failed to exercise a jurisdiction vested in them by law, or that they have exercised it with material irregularity. There can be no doubt that the Courts below had jurisdiction to decide the matter now at issue, and there can equally be no doubt that they have exercised it and come to a decision. So far as "material irregularity" is concerned, the irregularity has of course to be that of the District Judge whose order is being revised. Their Lordships of the Privy Council have pointed out that the irregularity in cases of revision must be analogous to one in procedure. There is no irregularity that we can find in procedure of the learned District Judge, consequently, we are at a loss to understand how we can apply the revisional powers of this Court to his order. As we have said, both the lower Courts find that no loss has resulted from the irregularity complained of and that finding must be accepted in revision. We were asked to believe Lathumiyan who has been disbelieved by both the lower Courts, including the Judge who recorded his evidence, but of course we have no power to do that in revision. Consequently, we are left with the finding that there was nobody prepared to exceed the decree-holder's bid between the hours of 2.30 and 4 P. M. and once that is accepted the appeal regarded as a revision must fail.

It was then argued that the mere fact that nobody turned up at 2.30 when the sale was resumed was enough in itself to cause the sale amin to postpone the sale. We are unable to agree. The sale was duly advertised, persons turned up and bid and because no one was prepared to come back at 2.30 and make any higher bid, it does not mean that the proceedings were vitiated. The appellant addressed us in person at the conclusion of the case and wanted to know how property which had once been marked at Rs. 6000 was sold for Rs. 1105. It is more pertinent to enquire why this query was not addressed to the Courts below which are the Courts of fact. But the reason seems obvious. Rs. 6000 was a gross over-valuation and as nobody was prepared to pay that price it had to be marked down to a lower figure. It fetched only Rs. 700 and Rs. 1000 at two previous auctions, so Rs. 1105 cannot be far off its true value. The appellant also asked for justice to be done and nothing but justice. We might observe in this connexion that the decree in this case was passed as far back as 1930 upon a mortgage of the year 1920 and that the decree-holder has received nothing whatever up to date either on his mortgage or under his decree and that every attempt at execution has been met with delaying tactics. The appellant's learned counsel said that his client was perfectly solvent and had large properties, and the appellant did not contradict this when he addressed us himself, so it is difficult to understand what his plea for justice means. In our opinion justice calls for a speedy settlement of the unfortunate decree-holder's rightful dues. The appeal is dismissed with costs.

A.L./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 109

POLLOCK AND DIGBY JJ.

*Mahtabsingh Pransingh Dangi and others — Judgment-debtors —* Appellants.

v.

*Krishnachandra Seth Tarachand Sharma — Decree-holder —* Respondent.

Second Appeal No. 84 of 1935, Decided on 1st September 1937, from appellate decree of Addl. Dist. Judge, Saugor, D/- 28th November 1934.

**C. P. Debt Conciliation Act (2 of 1933), S. 21—Intimation to Civil Court of pending proceedings before Board is essential—Court can continue proceedings and confirm sale in absence of such intimation.**

Civil Court is not bound to stay proceedings until it has been brought to its notice that there are proceedings pending before the Board by production of a certificate before it. R. 11 of the rules under the Act provides that the Board shall grant a certificate in form No. II suspending proceedings under S. 21 of the Act, and the purpose of this Rule appears to be to enable formal intimation to be given to the Civil Court that proceedings before the Board are pending. In the absence of such formal intimation, it is open to the Court to continue the proceedings. Therefore a subsequent confirmation of sale in execution proceedings will not be barred. [P 110 C 1]

**W. B. Pendharkar** — *for Appellants.*

**A. Razak** — *for Respondent.*

**Judgment.** — In execution of a final decree for sale, the Court directed that part of the mortgaged property, a house, should be sold. Thereafter, the judgment-debtors applied to the Debt Conciliation Board under S. 4, Debt Conciliation Act, to effect a settlement between them and their creditors. The Board issued a certificate under S. 21 of the Act, but that certificate was not filed in the Court until the property had been sold. Thereafter the sale was confirmed. It is now contended that the Court had no jurisdiction to proceed in execution and that the sale was void.

Under S. 21, Debt Conciliation Act as originally enacted, proceedings pending before the Civil Court in respect of any debt for the settlement of which an application has been made shall be suspended until the Board has disposed of the application or an agreement registered under sub-s. (2) of S. 12 has ceased to subsist. We are unable to agree with the interpretation placed on that section by the lower Appellate Court and the section has since been amended. In our opinion, the Civil Court is not bound to stay proceedings until it has been brought to its notice that there are proceedings pending before the Board by production of a certificate before it. R. 11 of the Rules under the Act provides that the Board shall grant a certificate in Form No. II suspending proceedings under S. 21 of the Act, and the purpose of this rule appears to be to enable formal intimation to be given to the Civil Court that proceedings before the Board are pending. In the absence of such formal intimation, it was, in our opinion, open to the Court to continue the proceedings. We therefore hold that the sale was valid. In accordance with the decision in 19 N L J 296[1], the subsequent confirmation of the sale would not be barred by any provision in the Debt Conciliation Act. We therefore hold that the sale and confirmation of the sale were valid and dismiss this appeal with costs. Counsel's fee Rs. 15.

B.D./R.K. *Appeal dismissed.*

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[1] Haji Hasan v. Pannalal, A I R 1937 Nag 98 =169 I C 99=19 N L J 296.

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## * A. I. R. 1938 Nagpur 110

GRILLE J.

*Shivlal Umraosingh Agarwal*—Accused.

v.

*Emperor.*

Criminal Revn. No. 296 of 1937, Decided on 10th September 1937: reference made by Extra Addl. Sess. Judge, Jubbulpore, D/- 19th May 1937.

**(a) Criminal P. C. (1898), S. 162—Investigation not resulting in prosecution—S. 162 not applicable—Formal proof of statements prior to cross-examination is unnecessary.**

Provisions of S. 162 do not apply to statements made in an investigation other than that which results in a trial in which those statements are sought to be used; and even in a case where the provisions of S. 162 do apply, formal proof prior to the cross-examination of the witness on his previous statements is unnecessary : *A I R 1935 Rang 98 and A I R 1937 Bom 60, Rel. on.* [P 111 C 1,2]

*** (b) Criminal Trial—Evidence—Confronting prosecution witnesses with statements made by them to police—Complainant reported against by another making statement before police during investigation — No prosecution — Complainant proceeding against informant—Statements made by complainant to police can be used as against him.**

A person against whom investigation was started on being informed against by another, made certain statements before the police during the investigations. No case was however launched against him. Therefore he brought a complaint against the informant under S. 211, Penal Code. Question was if the complainant could be confronted with the statements made by him to the police in the infructuous investigation:

*Held* that such statements could be so used to confront the complainant in his cross-examination, but in assessing the value of his testimony as elicited by cross-examination, the Magistrate must of course take into consideration the fact that, when the statements which are to be put to him were made, he was in the position of being suspected of a criminal offence. [P 112 C 1]

K. C. Jain — *for Accused.*

J. Sen — *for the Crown.*

**Order.**—The present accused Sheolal had made a report to the police that one Parmu had robbed him of a currency note. The police investigated the matter but the case was not brought to Court. Parmu then filed a complaint against Sheolal under S. 211, Penal Code. A charge has been framed against Sheolal, and after the charge had been framed, when the prosecution witnesses were to be recalled for cross-examination, the question arose whether the statements of these witnesses which they had made in the course of the investigation into the alleged robbery by Parmu could be used and whether the witnesses could be confronted with the statements then made. The Magistrate trying the case held that, although the statements could be so used, the restrictions imposed by Proviso 1 to S. 162, Criminal P. C., particularly that part which says that the statements intended to be used for confrontation must be duly proved, operated, and, as the statements had not been proved by the officer who recorded them, he declined to allow the statements to be used. He also held that Parmu could not be confronted in any case with the statement which he made during the investigation as he was an accused person during that investigation and that S. 162 refers only to statements of persons examined as witnesses by the police and not to statements made by the accused person as such. An application was made in revision to the Additional Sessions Judge, Jubbulpore, who considered that the Magistrate was wrong on both points and has recommended that the decision be set aside. Both Sheolal, the present accused, and the Crown are represented in this Court.

On the first point it is conceded by the learned Advocate-General that there need be no delay in proceeding with the cross-examination of the witnesses because the previous statements have not been formally proved by the police officer who recorded them; if the witnesses admit that they made the statements, no proof is necessary. It has been repeatedly held that the provisions of S. 162, Criminal P. C., do not apply to statements made in an investigation other than that which results in a trial in which those statements are sought to be used; and even in a case where the provisions of S. 162 do apply, it has been held in 13 Rang 1[1] that:

> Those parts of the statement to the police which are used in cross-examination to contradict the witness must be proved and brought on to the record. This can ordinarily be done by the admission of the witnesses that he made the statement or by examination of the police officer who recorded it. If the latter course is necessary in order to avoid delay there can be no objection to allowing cross-examination subject to subsequent proof of the statement.

This opinion was also held by Beaumont C. J. in A I R 1937 Bom 60[2]. Formal proof prior to the cross-examination of the witness on his previous statements is therefore unnecessary. If the statement, if not admitted, is subsequently not proved, the evidence based on it must of course be disregarded. This principle applies whether the provisions of S. 162, Criminal P. C., are applicable to the statement sought to be proved or no. The order of the Magistrate in this respect is accordingly set aside and the cross-examination of the witnesses on the statements said to be made by them at the time of the investigation into the alleged robbery must proceed.

On the second point, the learned Advocate General sustains the action of the Magistrate in declining to allow Parmu to be confronted with the statement which he made in the investigation of the case of robbery, and he has correctly pointed out that in A I R 1931 Cal 637[3], on which the present accused relied as being a case exactly in point, the facts are the exact converse of those before me. What the learned Judge held to be permissible in that case was the use of the statement made by the complainant in the previous investigation and not by the complainant in the case under S. 211, Penal Code. Despite this distinction, which the learned Advocate-General attempts to draw between the present complainants (and the complainant Parmu is certainly a prosecution witness) and other prosecution witnesses on the ground that one was an accused in the previous investigation and the others were witnesses only cannot be maintained. In the first place it has not been disputed and on the view of the authorities it cannot be disputed, that S. 162, Criminal P. C. has no application in this case at all. The use of the statement of Parmu, as of that made by any other person who made a statement during the investigation, is governed by the provisions of the Evidence Act. The learned Advocate General relies on Ss. 160 and 161, Criminal P. C. S. 160 deals with a police officer's power to require the attendance of witnesses, and all that can be deduced from that section is that in an investigation an accused person is not bound to attend if the police require him to do so. Also S. 161 does not prevent the police officer from examining and recording the statement of any person who may subsequently be accused of an offence, since it is therein clearly laid down that

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1. Nga U Khine v. Emperor, (1935) 22 A I R Rang 98=1935 Cr C 307=155 I C 66=36 Cr L J 665=13 Rang 1.
2. Emperor v. Mahomed Adam Chohan, (1937) 24 A I R Bom 60=167 I C 43=38 Cr L J 327=38 Bom L R 1186.
3. Jogesh Chandra Roy v. Surendra Mohan, (1931) 18 A I R Cal 637 = 1931 Cr C 337= 134 I C 1265=33 Cr L J 60=35 C W N 338.

the police officer may orally examine any person who may be acquainted with the facts and circumstances of the case and that such person shall be bound to answer all questions relating to such case put to him by such officer other than questions the answers to which would have the tendency to expose him to a criminal charge or to a penalty or forfeiture. A person who subsequently becomes an accused person can then be questioned by the police; a fortiori can a person who is not brought before the Court at all, and his position in respect of the admissibility of statements made by him differs in no way from that of other prosecution witnesses whose veracity is to be tested in cross-examination in another case not arising out of the investigation in which the statements were made. In assessing the value of his testimony, as elicited by cross-examination, the Magistrate must of course take into consideration the fact that, when the statements which are to be put to him were made, he was in the position of being suspected of a criminal offence. The limitations which the Magistrate has put on the defence must be set aside and the case will proceed as directed in this order.

B.D./R.K. *Order accordingly.*

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## ✻ A. I. R. 1938 Nagpur 112

STONE C. J. AND DIGBY J.

*Bhagwantrao Anandrao Kottakondawar and another — Defendants 1 and 2* — Appellants.

v.

*Damodar Govindrao Chendke and others — Plaintiffs* — Respondents.

First Appeal No. 84 of 1934, Decided on 9th September 1937, from decree of Addl. Dist. Judge, Chanda, D/. 19th February 1934.

**(a) Contract — Penal clause in contract relieved against—Court is not compelled to allow rate of interest not reserved in contract but claimed in suit.**

Where the contract is found to contain a penal clause and it is relieved against, the Court is not compelled to allow a rate of interest not reserved in the contract but claimed in the suit, which rate of interest, had it been reserved in the contract would have had to be given effect to as a contractual term that was not penal. [P 113 C 1]

**✻ (b) Usurious Loans (C. P. Amendment) Act (11 of 1934), S. 2 (a)—S. 2 (a) is not retrospective.**

Laws which have the effect of impairing contracts and affect vested rights must be strictly construed and in the case of such laws especially the Court must lean against giving retrospective effect to their provisions : *Case law referred.* [P 115 C 1]

Applying this principle, S. 2 (a) is not retrospective in operation so as to enable the Court to exercise the wider power to reopen loan transactions made before 15th June 1934, at any rate when the amount due under such a loan has become the subject matter of a litigation instituted before that date. [P 116 C 2]

**(c) C. P. Money-lenders Act (24 of 1937), S. 2—Loan includes mortgage.**

Although a mortgage transaction is correctly described as a transfer, it is also correctly described as a loan transaction and would fall within the term "loan" in its natural sense unless it were excluded from that term. From 19th March 1937 the C. P. Money-lenders Act applies to mortgage transactions made with money-lenders. [P 117 C 1]

**(d) C. P. Money-lenders Act (24 of 1937), S. 9—S. 9 is not retrospective.**

A Court should be very slow to give retrospective effect to S. 9 of the Act 24 of 1937, in the case of a transaction of loan which was not a loan within the meaning of the Act at the time when the suit was brought. [P 118 C 1]

**(e) C. P. Reduction of Interest Act (32 of 1936)—Act is retrospective.**

C. P. Reduction of Interest Act is clearly retrospective in its operation. [P 118 C 2]

R. N. Padhye and D. W. Kathaley — *for Appellants.*

M. R. Bobde, M. B. Kinkhede, D. T. Mangalmoorti and N. T. Mangalmoorti — *for Respondents 1 to 4.*

**Judgment.**—This is an appeal by defendants 1 and 2. The respondents are the plaintiffs and defendant 3. This is a mortgage suit seeking foreclosure in respect of three mortgages. The first, Ex. P-1, is dated 14th July 1922 and was to secure a loan of Rs. 10,000. The second, Ex. P-2, is dated 20th August 1923 and was for a loan of Rs. 14,000. The third, Ex. P-3, is dated 22nd October 1924 and was for a loan of Rs. 10,000. At the time of the suit these sums were alleged to have increased to Rs. 29,544-1-3, Rs. 35,604-6-2 and Rs. 22,350-11-0. Subsequent interest brings the amount, we are informed, to more than Rs. 1,20,000. The plaint was filed on 23rd October 1931. A preliminary decree was passed on 19th February 1934. Appeal was launched and a stay was applied for subject to conditions which have not been fulfilled; and as a consequence of the conditions not being fulfilled and the stay thereupon ending, a final decree was entered on 7th December 1935. These dates are material because of the fact that this appeal raises a question as to what extent, if at all, local enactments dealing with reduction of interest and modification of the usury laws are or are not retrospective and to what extent the laws are applicable. It raises several questions relating to the amount of interest that can be allowed, viz. (1) can more than twice the amount advanced, (i. e. Rs. 68,000) be recovered in any event? (2) Is the interest usurious? (3) Does the Reduction of Interest Act cut down the maximum amount of interest that can be allowed from 1st January 1932 to 6 per cent. compound or 9 per cent. simple? (4) Should not the penal clauses reserving compound interest from the date of the loan be relieved against?

Next, points are raised as to the form of the relief. Firstly, it is said there should be an instalment decree given. Secondly, it is argued that the mortgages in question are not mortgages by conditional sale but are anomalous mortgages and therefore sale rather than foreclosure should be decreed. The next point is that each mortgage should be made redeemable separately and that this has not been provided for. This last point that the mortgages should be made redeemable separately is not contested. It is further agreed that no decree could be given against the house and kothas in mouza Dhaba. Originally the decree included those properties but this has since been put right so that no such point remains for consideration.

Of the above points, the one relating to the penal clause is a short one that can be quickly disposed of. The mortgages provided for interest at 1 per cent. per month. In a certain event (default) this was to increase to Re. 1-8-0 per cent. per mensem from the date of the bond and interest was to be paid on interest. It was not denied that this was a penal clause that could be relieved against but it was said that that increased rate of interest was not claimed; what has been claimed is 1 per cent compound from the date of default, and it is argued that this is not penal. We are however clearly of the opinion that what the Court has to consider is the contract, not the claim. If the contract is looked at, it is found to contain a penal clause which should be relieved against. If it be relieved against, one is not compelled to allow a rate of interest not reserved in the mortgage but claimed in this suit, which rate of interest, had it been reserved in the mortgage, would have had to be given effect to as a contractual term that was not penal. As the security here was admittedly real property worth at the time of the loan far more—even on the plaintiffs's valuation, twice the amount lent—than the loan which it was to secure, we are of the opinion that the most that can be properly allowed, the penal clause having been struck out, is the interest reserved, i. e. 1 per cent. per mensem.

The next question relates to whether the mortgage in question is an anomalous mortgage. The question is stated to be one of great importance by the respondents because these are alleged to be ordinary lahan-gahan mortgages which it is said are universally regarded as mortgages by conditional sale. It is also stated by the respondents in an application made on the ground of its importance that this matter, if it is to be decided at all in this case, should be referred to a Full Bench, that the foundations have not been firmly laid for this discussion because the point was never taken in the lower Court.

We have re-perused the record to see how the matter stands. It may be stated as follows: Issue 3 is "whether the defendants are entitled to a decree for sale instead of the decree for foreclosure?" This question was disposed of by the Court as though it turned entirely on the value of the property, the quantum of indebtedness and the general balancing of equities between party and party. This could only have been done on the assumption that the Court was free to give either one relief or the other. In the case of mortgages by conditional sale, the only remedy is foreclosure. In the case of an anomalous mortgage which, as here (granting these mortgages are such) by its terms confers the right to foreclose, by the Amendment of 1929 (Transfer of Property Act, S. 67) two remedies could alternatively be given, (1) sale, or (2) foreclosure. Thus in the Court below, had the point been taken that this was a mortgage by conditional sale, Issue 3 would have answered itself on its being decided that the mortgages here were mortgages by conditional sale. On the other hand it was not necessary in order to get a decree for sale to establish that they were anomalous mortgages. The point not having been taken in the Court below, we are not going to decide this important and far-reaching question on argument raised for the first time here. The result will be that we shall consider ourselves free, as the lower Court did, to assume that the mortgages are of a type which enables either decree to be passed.

That this course is preferable is clear to us after a very careful examination into the history of the so-called Indian mortgages and the ancient texts relating to securities for moneys lent because our enquiry has disclosed that the argument before us on this point, though full, left out some of the most material considerations necessary to be borne in mind in arriving at a conclusion as to what type of mortgage the lahan-gahan falls within. One very important matter would be to ascertain precisely what the old lahan-gahan mortgage was. The historical examination would have to go back to the position that arose out of 13 M I A 560.[1] The state of affairs in India is stated in a very powerful judgment of Turner C. J. in 4 Mad 179[2] (where the sort of mortgage by conditional sale that is common in South India is considered at page 182.) Following upon the obvious reluctance of Indian Courts to follow the case in 13 M I A 560[1] the law was altered, and Turner C. J., was one of those who advised the authorities responsible for the Bill which, when passed, introduced mortgages by conditional sale. The matter mainly in controversy at that time was to what extent the borrower who had given a security (so put to avoid using the term mortgagor, the whole question being whether the essential ingredient of mortgage, the equity of redemption, existed) had, after a certain time, any equity entitling him, on tendering the amount due, to redeem. As at present advised, all this history would have to be borne in mind when considering such cases as those cited from last century; for example, 1 M H C R 460,[3] 1 Bom H C R 199,[4] 9 Bom H C R 69[5] and 9 Bom H C R 79.[6] So also 8 C P L R 83[7] turns on Bengal Regn. 17 of 1806 and belongs to the period anterior to the legislation now under discussion. The same sort of point (i. e. is there an equity when the contract is of a kind approximating rather to sale than to mortgage) was under consideration in 8 C P L R 113.[8] 25 N L R 187[9] was concerned with the question of the remedy available under the law as it then stood when the transaction is lahan-gahan. In 12 N L R 19,[10] what was being examined was whether in the case of a mortgage where there was no personal covenant there could be a personal decree. In both of the two cases last cited it was stated that lahan-gahan mortgages do not come within the definition of mortgages by conditional sale. As however we are of the opinion, that the point was not raised, it need not here be further dealt with. The result is to leave us free to consider whether there should be sale or foreclosure. The Court has jurisdiction to order a sale in such a foreclosure suit under O. 34, R. 4 (3), Civil P. C. Whether this is a case in which sale should be ordered will depend, inter alia, upon the quantum of indebtedness. That will turn to some extent upon the conclusion arrived at with regard to the retrospective effect of local legislation.

There has been in this province a considerable amount of debt legislation and the policy of the Legislature running throughout this legislation is obviously to relieve debtors from the burden of debt due largely to the high rates of interest which operate in India even in the case of loans secured on immovable property. Thus, even in this case, even though the penal clause has not been applied, and where the interest reserved is not so high as in many a case, an original debt of Rs. 34,000 has grown (if the lower Court's decree stands) in less than 14 years to Rs. 1,20,000. A rate of 4 per cent. which is normal in Europe, would have brought the figure down to Rs. 53,000. The starting point of the debt legislation is the (All India) Act of 1918 (the Usurious Loans Act). That of course applies to this case having been passed long before these transactions were made or this suit instituted. But no relief could be given under the Usurious

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[1] Pattabhiramier v. Venkatarow Naicken, (1869) 13 M I A 560=15 W R 35=7 Beng L R 136 =2 Suther 410=2 Sar 623 (P C).

[2] Ramaswami v. Samiyappanayakan, (1882) 4 Mad 179.

[3] Venkata Reddi v. Parvati Ammal, (1862) 1 M H C R 460.

[4] Ramji Tukaram v. Chinto Sakharam, (1862) 1 Bom H C R 199.

[5] Sankarbhai Gulabhai v. Kassibhai Vithalbhai, (1872) 9 Bom H C R 69.

[6] Krishnaji Keshav v. Ravji Sadashiv, (1872) 9 Bom H C R 79.

[7] Muratsingh v. Ramlal, (1895) 8 C P L R 83.

[8] Laxaman Devideen v. Baju Bai, (1895) 8 C P L R 113.

[9] Mohammad Haji Wali Mohammad v. Ramappa, (1929) 16 A I R Nag 254=119 I C 684=25 N L R 187 (FB).

[10] Govind v. Jagannath, (1915) 2 A I R Nag 63 =33 I C 753=12 N L R 19.

Loans Act here, unless that Act is read as amended by the local Legislature which has made an immense change by altering one word. The scheme of the Usurious Loans Act was to enable Courts to reopen transactions of loan where two concurrent conditions occurred: (1) the interest reserved had to be excessive and (2) the transaction had to be as between the parties, substantially unfair. As a consequence of the Explanation to S. 3 (2), interest alone could amount to sufficient evidence that the transaction was substantially unfair, but it would only do so if it were so outrageous as in itself to prove unfairness. It is not suggested that the interest in this case is of that type. By an amendment made in 1934 by Act 11 of 1934 (S. 2), the local Legislature changed the word "and" in S. 3 (1) of the Act of 1918 into "or". The result is that now a loan transaction may be reopened on the sole ground that the interest is excessive. Further to avoid any difficulty in determining what the meaning of the variable "excessive" is and in order perhaps to avoid the inconvenience of one Judge having one idea and another Judge having another idea on that subject, the Amending Act, S. 3, directs the Court that certain interests are to be deemed to be excessive. One case relates to loans made after a future date to be notified. The other case relates to transactions which come up "in any suit".

The questions are : Does the amendment entitle a Court to apply these provisions in a suit that was instituted before 15th June 1934 the date the amending local Act came into force ? If yes, does it entitle a Court of Appeal to vary a decree passed before the Amending Act came into force ? It will be remembered that this suit was instituted in 1931 and the preliminary decree, now under examination, was passed on 19th February 1934 ; both are thus before the amendment. We take as our starting point the fact that all the laws hereafter to be considered and Act 11 of 1934 in particular, however necessary or desirable, are laws which have the effect of impairing contracts and affect vested rights. Such laws must be strictly construed and in the case of such laws especially, the Court must lean against giving retrospective effect to their provisions: see Maxwell on the Interpretation of Statutes (Edn. 7), page 187. Again, even apart from the nature of the legislation, to quote from Lord Cranworth in 1 Macq H L 736,[11] cited with concurrence by Lord Hatherly in (1878) 3 A C 582[12] :

> Unless there be something in the language, context or objects of an Act of Parliament showing a contrary intention, the duty and practice of Courts of Justice is to presume that the Legislature enacts prospectively and not retrospectively.

He adds :

> There may however be Acts that are evidently on the face of them, by their language and subject matter, intended to be retrospective.

A distinction has of course always been drawn between statutes which relate to procedure and other Acts. As an illustration of the limits of this distinction, the case in 5 M I A 109[13] is instructive. From page 126, it is gathered that the Act in question had been passed after the institution of the suit. The Act then under consideration was striking at wagering transactions, declared such null and void and enacted that "no suit shall be allowed in any Court. . . . . . for recovering", etc. The Judicial Committee expressed their view as follows :

> Their Lordships are of opinion that this legislative Act is not to be construed as affecting existing contracts; at all events, not those contracts on which actions have already been commenced, for, statutes are prima facie deemed to be prospective only. . . . . . . .and there are no words in this Act sufficient to show the intention of the Legislature to affect existing rights.

Again, in (1905) A C 369,[14] their Lordships of the Privy Council held that an Act taking away, in certain matters, the right of appeal to the Privy Council from the Supreme Court of Queensland and replacing that right by a right of appeal to the High Court of Australia was not retrospective ; for, though dealing with litigation, it was not concerned solely with procedure but affected existing rights, namely the right to appeal. It is observed by Lord Macnaghten on behalf of the Board at p. 372 :

> . . . . .It is not disputed that if the matter in question be a matter of procedure only, the position is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. . . . . . .To deprive a suitor in a

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[11] Kerr v. The Marquis of Ailsa, 1 Macq H L 736.

[12] James Gardner v. Edward A. Lucas, (1878) 3 A C 582.

[13] Dollubdas Pettamberdass v. Ramloll Thackoorsevdas, (1851-54) 5 M I A 109=1 Moo P C 239=1 Sar 403 (P C).

[14] Colonial Sugar Refining Co. Ltd. v. Irwing, (1905) A C 369=74 L J P C 77=92 L T 738 =21 T L R 513.

> pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

To the same effect is A I R 1928 Cal 640.[15] In A I R 1927 P C 242,[16] the Privy Council had to consider the effect of the Income-tax (Amendment) Act of 1926 which inserted a provision after S. 66, Income-tax Act, 1922, giving a right of appeal from a High Court to the Privy Council. If retrospective, an appeal lay from the order in question which was passed before the Act came into force; if not retrospective, no appeal lay. It was held not to be retrospective, for, it was not merely concerned with procedure but affected a vested right—the right of a litigant who had got a final order in his favour. This case is all the stronger because their Lordships recognized that the amendment was made to rectify an omission inadvertently made from previous legislation. Passing from general principles to particular cases, it was urged here on the authority in A I R 1936 All 611[17] that in any event here, there could be no re-opening of this transaction because so to do would be to interfere with a decree, viz. the preliminary decree from which this appeal is brought. That case was however concerned with a decree that was final, not a decree under appeal, and is clearly distinguishable. A I R 1936 Cal 127,[18] 41 C W N 499,[19] 63 Cal 368=39 C W N 1213[20] are all concerned with the Bengal Money-lenders Act. They decide, as to the first, that S. 3, and, as to the rest, that S. 4 of that Act, is not retrospective so as to affect loan transactions entered into before the Act came into force.

Applying the principles expressed in the above cases, we are of the opinion that S. 2 (a) of the Amending Act 11 of 1934 is not retrospective in operation so as to enable the Court to exercise the wider power to re-open loan transactions made before 15th June 1934, at any rate when the amount due under such a loan has become the subject matter of a litigation instituted before that date. Another point arises out of the Central Provinces Money-lenders Act, 1934 (Act 13 of 1934). That relates to money-lending transactions. It is not disputed that the mortgagees here are money-lenders within the meaning of that Act and that it relates to loan transactions. It is contested that these are loan transactions within the meaning of that Act. It is disputed that these are loan transactions even within the meaning of that term as the Act now stands. Whether or not that be so, it is strongly contended that these transactions were not loan transactions within the meaning of that Act as it stood at the relevant time, viz. the date of the institution of the suit (23rd October 1931) alternatively the passing of the preliminary decree (19th February 1934), alternatively the passing of the final decree (7th December 1935). The position under the Act is as follows:

The Act affects loans as defined. "Loan" is defined as including an advance which is in substance a loan but does not include inter alia a transaction which is in substance a mortgage or sale of immovable property. That was altered by Act 19 of 1937 by adding to the transactions excepted, "charge". That Act came into force on 12th February 1937 so that on 12th February 1937 the matter stood thus: The Central Provinces Moneylenders Act of 1934 did not apply to a loan transaction which was in substance a charge or a mortgage or a sale of immovable property. By Act 24 of 1937 however the word "mortgage" was struck out. That Act came into force on 19th March 1937 so that on that date the position stood thus: A loan transaction was excluded from the Money-lenders Act if it was in substance a charge on or sale of immovable property. It is said that on that state of fact even as the Act stands at present, a loan transaction would not include a mortgage because a mortgage is not in substance a loan but is in substance a transfer. So to hold would be, in our opinion, to retrace the steps taken by Courts from the middle of last century when the question was being debated as to whether mortgages that looked like out and out transfers were or were not in essence loan transactions so as to entitle the borrower to his equity of redemption. We are clearly of the opinion that although a mortgage transaction is correctly described as a transfer, it is also correctly described as a loan transaction and would fall within the term "loan" in its natural sense unless it were excluded from that term. We are therefore of the opinion that as from 19th March 1937 the C. P. Money-lenders Act applies to mortgage transactions made with money-lenders.

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[15] Sadar Ali v. Dolluddin, (1928) 15 A I R Cal 640=113 I C 49=32 C W N 1130=56 Cal 512=48 C L J 150 (F B).

[16] Delhi Cloth & General Mills Co. v. Income-tax Commissioner, Delhi, (1927) 14 A I R P C 242=106 I C 156=54 I A 421=9 Lah 284 (P C).

[17] Ibne Hasan v. Gulkandi Lal, (1936) 23 A I R All 611=164 I C 325=1936 A L J 919.

[18] Indra Chandra Bag v. Hira Lal Rong, (1936) 23 A I R Cal 127=167 I C 441=40 C W N 696=62 C L J 545.

[19] Lalmohan Rauth v. Kunja Behari Das, (1937) 41 C W N 499.

[20] Brojendra Kumar Dutta v. Sushil Chandra, (1936) 23 A I R Cal 334=163 I C 270=63 Cal 368=39 C W N 1213.

It is next argued that even assuming that it applies to mortgages, it does not apply to decrees passed on mortgages. The argument runs as follows: Where a suit is brought to enforce any right (in this case recoupment of debt by foreclosure) the right on which the suit is launched, once there is a decree is for ever gone. There is a transit in *rem judicatam*. The loan transaction merges in the decree and what is left is a debt of record. A debt of record is not a loan made with a money-lender but an indebtedness created by a decree. There is here not merely a preliminary decree under appeal but a final decree and both are prior to the date upon which the Money-lenders Act of 1934 was made applicable to a mortgage transaction, i. e. 19th March 1937. On the other hand it is urged that though when this suit was launched there was no Money-lenders Act, still it is clear that the relevant S. 9, which we shall come to shortly, is intended to have a retrospective effect, and if it has a retrospective effect so as to affect loans that were made before the passing of the Act, the Act would affect this loan not, it is true, in the Act's original form, but in the form that it now takes. It is argued that that form is the one that has to be looked to in this case which is still being fought. It is observed that an Appellate Court in India, as in England, is a Court that has power to rehear a case, that consequently it is, as though, this case were now being heard for the first time. It is accordingly said that the Court now hearing this case has to apply the law as it at present stands; one has therefore to apply the Money-lenders Act as it at present stands: accordingly "loan" within the meaning of that Act includes a mortgage transaction; and as it so includes a mortgage transaction, one must look to S. 9 to see if that is retrospective in operation so as to sweep in a mortgage transaction that was made before this act was passed. S. 9 gives rise to very considerable difficulties of construction. It is as follows:

> Notwithstanding anything contained in any other enactment for the time being in force, no Court [original or appellate] shall decree in respect of any loan made before this Act comes into force, on account of arrears of interest, a sum greater than the principal of such loan, unless it is satisfied that the money-lender had reasonable grounds for not enforcing his claim earlier.

The words in square brackets were not in the original Act but were included in Act 24 of 1937 and so came into operation on 19th March of this year. S. 10 says:

> No Court shall, in respect of any loan made after this Act comes into force, decree on account of arrears of interest a sum greater than the principal of the loan.

It will thus be seen that the Act is dividing all loans into two categories: (1) those made before 1st April 1935 (on which date the Money-lenders Act of 1934 came into force) and (2) loans made thereafter, i. e. on or after 1st April 1935. In the latter case, no Court can decree more than twice the principal. In the former class of case, Courts were not so limited if the Courts were satisfied that the money-lender had reasonable grounds for not enforcing his claim earlier. The loan transaction of which the Act was speaking in 1934 did not include mortgages. Mortgages were added by Act 24 of 1937 which also added to the word "Court" "original or appellate". The implied reason for interfering with loans made before the Act came into force was to prevent money-lenders, in respect of loan transactions to which the Act then applied from failing to exercise their remedies until the borrower was so immersed in debt as to be unable to extricate himself. It was, so to speak, a punishment meted out to money-lenders who allow their debtors to become more and more entangled. It was an encouragement to the moneylender to sue. It did not apply for nearly two years to mortgage transactions. In any event, in this case there has been no issue and no finding, no evidence and no possibility of evidence being led to enable the money-lender to satisfy the Court that he had a reasonable ground for not enforcing his claim earlier. In our opinion therefore, a Court should be very slow to give retrospective effect to the section in the case of a transaction of loan which was not a loan within the meaning of the Act at the time when the suit was brought.

Applying the cases already referred to and the principles already stated, we are of the opinion that the Amending Act of 1937 is not retrospective in operation and that accordingly these transactions are not in this Court affected by the Central Provinces Money-lenders Act, 1934. The next Act that falls to be considered is the Central Provinces Reduction of Interest Act, 1936. At first it was urged that this Act has not come into effect at all being inchoate because there has been no notification under S. 3 (1). This, however, proved to be an error. Notification No. 1175-xix dated 7th May 1937 having been gazetted providing 31st December 1939 as the *terminus ad quem*. Next a curious point was raised on S. 4 which provides: "Nothing contained in the Usurious Loans Act, 1918, shall apply to any debt falling under S. 3". At the time of argument, it was being debated whether the Act amending the Usurious Loans Act was retrospective. If it were, it was to the interest of the respondent to shut out the Usurious Loans Act by saying that these debts fall within S. 3 (1) and therefore whether amended or not, the Usurious Loans Act ceases to have any bearing on this case. We must however observe that S. 4 of the Central Provinces Reduction of Interest Act, 1936 as it at present stands, may have most unfortunate results. The difficulty is due to the wording of S. 3 (1) which is as follows:

> Notwithstanding the provisions of any law for the time being in force or any agreement or contract between the parties, no debtor shall be liable to pay interest to a creditor on a debt incurred by him at a rate higher than that specified in the schedule for any period between 1st January 1932 and such other date as the Local Government may, by notification, appoint:
>
> Provided that such rate of interest shall be liable to be increased by the percentage rate by which the rate of interest at which the Local Government is able to secure a loan exceeds 4 per cent.

It will be noted that a debt incurred in (say) 1929 would "fall under" S. 3 (1) and might also be such that the Usurious Loans Act would (apart from S. 4) apply. We do not pursue the matter, but we draw the attention of Government to the fact that, in the case put, Courts would appear to be powerless to relieve against excessive interest (except under the very limited powers existing apart from the Usurious Loans Act) for the years 1929, 1930 and 1931. "Debt" for the purposes of this Act has the following artificial meaning: It "includes" all liabilities owing by a person, in cash or kind, secured or unsecured, payable under a decree or order of a Civil Court or otherwise. The Act is clearly retrospective in its operation and, as a consequence of the wording of the Schedule, limits the rate of interest that may be decreed to 9 per cent. simple or 6 per cent. compound on loans of the magnitude of those in this case, this being a secured debt. S. 3 (3) of the Act provides as follows:

> If a decree has already been passed on the basis of a debt and remains unsatisfied in whole or in part, the Court which passed the decree shall, on the application of the judgment-debtor amend it by reducing, in accordance with the provisions of sub-s. (1), the amount decreed on account of interest.

It is said that as a foreclosure decree has been passed and as the mortgage is of a type on which a foreclosure decree alone can be given (conditional sale), the decree has already been satisfied by the passing of a final decree and that therefore not even the Court which passed this decree could amend its decree. As however we are of the opinion for the reasons already given, that sale can be ordered, we cannot regard the debt as wholly satisfied. The respondents have, in opposing any order for sale, urged that the property is not worth the amount of the debt so that on any view, in our opinion, the debt must be regarded as unsatisfied. We do not consider it necessary to drive the appellant to make an application to the trial Court. We have seisin of this case and we shall pass a decree and have therefore power to entertain an application. It is true an application has not been in form made, the point being raised in appeal. The appellant will accordingly put in an application in order that no revenue may be lost to Government, but we will anticipate the result of that application by directing that from 1st January 1932, the interest on these loans be reduced to 9 per cent. per annum.

We are of the opinion that this is not a fit case for an instalment decree in any event. The subject matter of the mortgages is substantial and consists of twelve villages. We are of the opinion that there should be a decree for sale, the respondents being given leave to bid. The penalty clauses in these mortgages being deleted, the interest will be 12 per cent. from the date of mortgage to 1st January 1932 and thereafter at 9 per cent. Six months' time allowed for redemption. The mortgagee having obtained a final decree, that decree must be set aside; but as the final decree was made before the passing of the Reduction of Interest Act, which is the Act which has caused the principal variation in the interest allowed, interest will be chargeable only up to date when mortgagee obtained possession under that decree and the mortgagees will not be accountable for profits thereafter unless and until the property is redeemed and then only for any period they retain possession after redemption. It will be borne in mind that there are three mortgages and each may be separately redeemed. Each side will pay their own costs of this appeal.

D.S./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 119

NIYOGI J.

*Municipal Committee, Akot — Plaintiff* — Appellant.

v.

*Surajmal Shriram Ginning and Pressing Factory now styled as Brijmohan Jamnalal Ginning and Pressing Factory, Akola — Defendants* — Respondents.

Second Appeals Nos. 188-B and 189-B of 1935, Decided on 30th March 1937, from appellate decree of 4th Addl. Dist. Judge, Akola, D/- 30th January 1935.

**(a) C. P. Municipalities Act (2 of 1922), S. 77 (1) — Municipality cannot recover interest separately after arrears of tax have been paid.**

**There is nothing in the C. P. Municipal Act apart from S. 77 which gives a right to the Committee to recover interest on any tax which falls into arrears. The claim for interest which the Committee is entitled to make is ancillary to the claim to recover an arrear of any tax. Interest cannot be regarded as an arrear of tax, nor can it be regarded as "any other money claimable by the Committee" under the C. P. Municipal Act within the meaning of that expression used in S. 77 (1). Consequently the procedure laid down in S. 78 is not available to a Municipal Committee for recovering interest which it claims independently of the amount payable as tax. [P 120 C 2; P 121 C 1]**

**(b) C. P. Municipalities Act (2 of 1922), Ss. 83, 77 (1) – Collection of tax by resort to S. 77 (1) – Deputy Commissioner in appeal under S. 83 can decide whether such levy is legal or not.**

**Where a Municipal Committee collects the tax through the agency of the Magistrate by resorting to the provisions of S. 77 (1), the Deputy Commissioner has full jurisdiction to decide in appeal** whether such levy was or was not according to law. [P 121 C 1]

**(c) C. P. Municipalities Act (2 of 1922), S. 77 —Civil Court has no jurisdiction to entertain claim for interest on Municipal tax.**

The Municipal Committee's right to recover either the tax or any interest on it is not contractual but statutory. When a statute creates that right and provides the procedure for enforcing it and also sets up the tribunal to enforce it, the party who has the right must seek his remedy in the manner and before the authority prescribed by the enactment. In view of S. 77, the Civil Court has no jurisdiction to entertain a claim for interest on Municipal tax: *31 Bom 604 and A I R 1934 All 795, Rel. on*; *16 Cal 159 and 25 Bom 574, Disting.* [P 121 C 2]

**(d) Interest Act (1839), S. 1—Interest cannot be subject matter of suit under Act.**

The Interest Act gives power to the Civil Court but does not create any right to interest in favour of a creditor and it cannot therefore be the subject matter of a suit: *1 C W N 219, Foll.* [P 122 C 1, 2]

R. N. Padhye and M. R. Bobde — *for Appellant.*

W. R. Puranik, K. Rao and M. D. Khandekar — *for Respondents.*

**Judgment.** — This appeal and Second Appeal No. 189-B of 1935 arise out of two suits—Civil Suit No. 2 of 1933 and Civil Suit No. 1 of 1933—instituted by the plaintiff (Committee) against the respondents separately to recover interest on arrears of taxes after the tax had been paid. The suits succeeded in the Court of first instance but were dismissed on appeal. The facts are that on 17th September 1927 the plaintiff — Municipal Committee of Akot enhanced the rate of factory tax with effect from that date. The defendants who are factory owners having been aggrieved by the enhancement of the tax filed a suit for a declaration that the imposition of the enhanced tax was illegal and for a permanent injunction prohibiting the recovery of the tax which was dismissed on 22nd April 1929 and an appeal by them was also dismissed on 22nd November 1929. In the course of the suit a temporary injunction was issued against the plaintiff restraining it from recovering the enhanced tax. The plaintiff Committee demanded the payment of tax by a notice on 15th May 1929 wherein it included a demand for interest at the rate of 12½ per centum per annum on the arrears of the tax and recovered the arrears of tax without interest in November and December 1929 after the order of temporary injunction had been vacated on 21st November 1929. Thereafter the

Committee served on the defendants a fresh notice of demand on 9th February 1930 claiming payment of certain amounts which according to it were due as interest on the arrears of tax. As the defendants failed to pay that amount, the Committee applied to the Magistrate on 3rd April 1930 for recovering the amount by distress and sale of their moveable property in accordance with S. 77, C. P. Municipalities Act of 1922, as applied to Berar. The Magistrate issued the necessary warrant but the defendants preferred an appeal to the Deputy Commissioner and obtained reversal of the Magistrate's order on the ground that the notice of demand for payment of interest simpliciter recoverable on the arrears of tax and the eventual warrant issued by the Magistrate were ultra vires and illegal.

Thereafter the Municipal Committee filed the two suits out of which these appeals arise to recover sums alleged to be due by the defendants on account of interest on the arrears of tax. The main question in this case is whether the plaintiff could recover interest on a tax which was not paid on the due date but was paid later. Under S. 77 (1), C. P. Municipalities Act as applied to Berar

> any arrear of any tax or any other money claimable by the Committee under this Act, together with any sum on account of court-fees which may be fixed by the rules made under this Act, and with interest at the rate of twelve and a half per centum per annum, may be recovered on application of the Committee to a Magistrate having jurisdiction within the limits of the Municipality, and such Magistrate may order recovery by distress and sale of any moveable property belonging to such person within the limits of his jurisdiction. Provided that no interest shall be so recovered in any case in which the Magistrate, for reasons to be recorded in writing, considers it inexpedient that interest should be charged.

The Act provides a special procedure which the Municipal Committee has to follow before applying to the Magistrate for a warrant for recovery by distress and sale of moveable property. That procedure is provided in S. 78 of the Act, whereby it is incumbent on the Committee to cause a bill for the amount due to be delivered to the person liable to pay the sum, and if the bill remains unpaid for 10 days it is empowered to issue a notice of demand for the payment. It is only when the payment is not made within seven days from the service of that notice that the sum due is deemed to be an arrear of tax. Unless and until this procedure is strictly followed, the Committee acquires no right to approach a Magistrate to recover the tax in arrear. In the present case the taxes which had fallen into arrears had already been recovered, as already stated, by December 1929. It was after the recovery of these arrears of taxes that a demand was made under S. 77 for payment of interest which the Committee thought it was entitled to recover for the period between the date on which the taxes were due and the date on which they were paid. The question is whether the Committee had the right to claim interest independently of S. 77 (1), Municipalities Act of 1922. There is nothing in the Municipal Act apart from S. 77 which gives a right to the Committee to recover interest on any tax which falls into arrears. The claim for interest which the Committee is entitled to make is ancillary to the claim to recover an arrear of any tax. S. 77, S. 78 as well as the rules framed under S. 77 (1) only speak of the arrears of Municipal tax which as is evident from sub-s. (1) of S. 78, refers to a tax payable under S. 66, sub-s. (1), Cl. (a) of that Act. S. 66 does not endow the Committee with any right to recover interest as a part of the tax. Interest therefore cannot be regarded as an arrear of tax, nor can it be regarded as "any other money claimable by the Committee" under this Act within the meaning of that expression used in S. 77 (1). Consequently, the procedure laid down in S. 78 was not available to the Committee for recovering interest which it claimed independently of the amount payable as tax. It must therefore follow that the notice of demand made on 9th February 1930 and the subsequent action taken by the Magistrate were contrary to law.

It is urged that the Deputy Commissioner had no jurisdiction to interfere on appeal with the Magistrate's order, right or wrong, legal or illegal. I cannot accede to this contention in view of the provisions of S. 83 of the Act which provide an appeal against the assessment or levy of, or refusal to refund, any tax imposed under this Act to the Deputy Commissioner. The Municipal Committee, it cannot be denied levied the tax, that is to say, collected the tax through the agency of the Magistrate and consequently laid itself open to be brought under the jurisdiction of the Deputy Commissioner on appeal. That officer therefore had full jurisdiction to decide whether the levy of the sum by resorting to the provisions of S. 77 (1) of the Act was or was not according to law. It is contended that S. 83 comes into operation only when the Municipal Committee levies a tax and that the sums which were recovered with interest were not taxes. This argument though plausible is in fact suicidal to the appellant. If it was not a tax and it cannot be recovered as "any other money claimable by the Committee" under the Municipalities Act, then it must follow that the Deputy Commissioner's view that the notice of demand served on the defendants by the Municipal Committee and the warrant issued by the Magistrate were both ultra vires and illegal is right. It is not open to the Committee to put forward this plea as it itself made a demand for payment of that sum as a tax and applied to the Magistrate to recover it as a tax. Since the Municipal Committee itself purported to recover it as a tax, the party aggrieved thereby was indisputably entitled to avail himself of the right of appeal given by S. 83. A faint attempt is made on behalf of the appellant to show that the sum recovered as interest was recovered as "any other money claimable by the Committee" under this Act within the meaning of that expression used in S. 77. I have already pointed out that there is no provision made anywhere in the Municipalities Act to authorize the Municipal Committee to recover interest on any arrear of tax and if that expression were taken to apply to interest which is mentioned in S. 77 (1) it would lead to the result that the Committee would be entitled to recover interest at 12½ per cent. per annum on the sum which it claimed to recover as interest, that is to say the Municipal Committee would be entitled to recover compound interest which could not have been the intention of the Legislature that it should be entitled to do. I am therefore of opinion that the Deputy Commissioner was right in reversing the Magistrate's order on the ground that the Committee was not entitled to recover interest independently of the arrear of tax.

It is urged that it is open to the Civil Court to grant a decree for interest notwithstanding the Deputy Commissioner's order to the contrary, that is refusal to allow the amount to be recovered by summary process of the Act. This contention also must fail for two reasons: (1) because the power to award interest is given by the Municipalities Act to the Magistrate alone and the Committee is not entitled to recover it independently of that enactment; (2) because the Civil Court cannot entertain any claim for interest after a creditor recovers his principal debt, unless it is due under a contract.

Right to recover interest ordinarily arises only on a contract. The interest which is awarded under the Interest Act or by S. 73, Contract Act is entirely at the discretion of the Court. The right may also be given by statute such as S. 80, Negotiable Instruments Act. In the present case, the right is conferred on the Municipal Committee by S. 77 (1) but it has to be enforced according to the special procedure prescribed by that Act. The Municipal Committee's right to recover either the tax or any interest on it is not contractual but statutory. When a statute creates that right and provides the procedure for enforcing it and also sets up the tribunal to enforce it, the party who has the right must seek his remedy in the manner and before the authority prescribed by the enactment. The matter would have been different if the Municipal Committee had derived the right from a source independent of the statute. It was pointed out by Sir Lawrence Jenkins in 31 Bom 604[1] at page 609 that where a special tribunal, out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any, in view of the fact that the party claiming the right derived it only from statute and not independently of it. It appears to me that in view of S. 77, C. P. Municipalities Act, the Civil Court has no jurisdiction in the matter : see A I R 1934 All 795.[2] My attention is invited to 16 Cal 159[3] and 25 Bom 574.[4] But these cases are distinguishable in that the guardian's right to recover possession of his ward and a claim for compensation for wrongful seizure of cattle existed independently of the Cattle Trespass Act and the Guardians and Wards Act, but that is not the case here. Here the Municipalities Act which creates the right also lays down the specific procedure for the enforcement of that right. Now when the statute itself gives a specific and complete remedy by distress and sale of property it must by necessary implication be regarded as ousting the jurisdiction of the Civil Court.

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[1] Bhaishankar v. Municipal Corporation, Bombay, (1907) 31 Bom 604=9 Bom L R 417.

[2] Municipal Board, Bareilly v. Abdul Aziz Khan, (1934) 21 A I R All 795=152 I C 792 =1934 A L J 739.

[3] Shuttrughon Das Coomar v. Hokua Showtal, (1889) 16 Cal 159.

[4] Sharifa v. Munekhan, (1901) 25 Bom 574=3 Bom L R 167.

It is true that if the amount to be recovered cannot be recovered by sale of moveable property and the remedy provided by the Special Act is found inadequate then Civil Court may well be regarded as having jurisdiction. In that case the Civil Court will be giving a remedy which a party concerned was unable to get by following the special procedure laid down by the Special Act as it may well happen, for example when it is found necessary to attach and sell immovable property but that is not the case here. In the present case, the Civil Court is called upon to perform the function of the special tribunal which has been created by the Municipalities Act. It is repugnant to the fundamental policy of law to predicate of two authorities having independent jurisdiction to determine the same matter in issue. Natural justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded for ever between the parties. That is the underlying principle of the well-known maxim *memo debet bis vexari pro unaet eadem causa.* Even on the assumption that the Civil Court has jurisdiction notwithstanding S. 77, Municipalities Act, I am unable to see how the Committee's claim for recovering mere interest after the principal amount had been recovered is tenable. In the circumstances of this case the Civil Court may have the power to award interest either under the Interest Act 32 of 1839 or S. 73, Contract Act. The latter provision cannot apply because the right is not founded on any contract and there has been no breach of it. Under the Interest Act, the Court has a discretion to award interest when a claim is made for recovering any debt or any sum certain payable at a stipulated time but the Municipal Committee has already recovered its debt, assuming that the taxes could be regarded as a debt, after they fell due. The Interest Act gives power to the Civil Court but does not create any right in favour of a creditor and it could not therefore be the subject matter of a suit : see 1 C W N 219.[5] The result is that the appeal is dismissed with costs. As to the cross-objection it relates only to costs. The order as to costs is discretionary with the Court and I see no reason to interfere. The cross-objection is dismissed without any order as to costs.

V.B.B./R.K. *Appeal dismissed.*

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[5] Marshall v. Bengal Spinning and Weaving Co., (1897) 1 C W N 219.

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## ** A. I. R. 1938 Nagpur 122

### FULL BENCH

STONE C. J., VIVIAN BOSE AND DIGBY JJ.

*Balaji Dhumnaji Koshti*—Appellant.

v.

*Mt. Mukta Bai w/o Lahanu Koshti* — Respondent.

Civil Revn. No. 773 of 1937, Decided on 26th October 1937, from order of Dist. Judge, Nagpur, D/- 21st October 1936.

** **(a) Appeal — Memo of appeal insufficiently stamped—Memo rejected—No appeal lies.**

An order rejecting a memorandum of appeal because it is insufficiently stamped is not appealable. It does not fall within the definition of a decree given in S. 2 (2) and has not been made appealable as an order under O. 43, Civil P. C

[P 124 C 1]

** **(b) Court-fee—Revision—Additional fee demanded in appeal—Order is revisable :** *29 N L R 125=A I R 1933 Nag 107=143 I C 84* **(***FB***),** *OVERRULED.*

An order demanding additional court-fees on a memorandum of appeal is always revisable and not merely in the limited circumstances specified in A I R 1933 Nag 107; but an order accepting the court-fees paid is not however revisable : *29 N L R 125=A I R 1933 Nag 107=143 I C 84* (*FB*), *OVERRULED, Case law discussed.*

[P 126 C 1,2]

B. R. Mandlekar—*for Appellant.*

M. R. Bobde—*for the Crown.*

**Order.**—This reference arises out of a suit for partition. The plaint was properly stamped and the case heard and decided. From the resulting decree an appeal was filed. The memorandum of appeal was stamped with Rs. 15, the relief being regarded as incapable of valuation. The Appellate Judge considered that court-fees were payable ad valorem and decided that Rs. 245 was the proper stamp. He therefore gave the appellant time to pay the balance. The appellant paid part of the balance within the time allowed and asked for time to pay the rest. His request was granted but as he did not pay up within the extended time allowed, his memorandum of appeal was rejected. From that order an appeal was filed to this Court and the subject matter of this appeal was valued at Rs. 260. This is a mistake. The figure the appellant really had in mind was Rs. 230, that is to say, the difference between the Rs. 245 demanded by the Appellate Court and the Rs. 15 actually paid, but he affixed a court-fee label of Rs. 4 only. The office objected and the matter was referred to the Taxing Judge who in turn referred the question to a Full Bench. The questions involved here have had a chequered career in these provinces. Different Judges have taken different views and the matter was once referred to a Full Bench of the Judicial Commissioner's Court in First Appeal No. 143 of 1934.* The question before them was not quite the same as the one here because in the case before them the plaint was rejected and not a memorandum of appeal as here. The suit there had been instituted on a ten-rupee stamp and the first Court demanded Rs. 745. The appeal lay to the Judicial Commissioner's Court and the memorandum of appeal there was also stamped with Rs. 10. The Full Bench decided by a majority of two Judges to one that the court-fees in appeal were payable ad valorem on the subject matter of the suit and not merely on the difference between the fees paid and the amount demanded, that is to say they held that the same court-fee is payable on the appeal as on the plaint. But they also held that it was impossible to determine what the subject matter of the suit was until the appeal had been heard on the merits. Therefore they ordered the appeal to continue on the Rs. 10 paid and pointed out that if the appeal was successful then the suit would continue without payment of further court-fees, but if it failed then it would be open to the appellant to file a fresh suit on payment of Rs. 745. The implication was, of course, that if the appeal failed, then it followed that the order of the first Court demanding an additional Rs. 735 was right and if it was not complied with within the time allowed the order rejecting the plaint would not be open to further challenge.

It was assumed by the Taxing Judge (Bose J.) in his order of reference that the present case was similar because he assumed that there was no difference for these purposes between a plaint and a memorandum of appeal. This we think is wrong although there are a larger number of rulings collected at p. 44 of Vol. 1 of Chitaley's Civil Procedure Code which take that view. Our reasons are given in a provisional order which we made at a previous hearing when we thought the matter required reconsideration. For the sake of convenience we reproduce them here :

> Under the provisions of S. 107 (2), Civil P. C., an Appellate Court (subject to certain limitations not here applicable) has the same powers and purposes and the same duties, as nearly as may be as an original Court. This does not, in our opinion, turn a plaint into a memorandum of appeal or a memorandum of appeal into a plaint, though the respective Courts hearing the case will have similar powers in disposing of that case.
>
> It has been held in Calcutta, 59 Cal 388[1] and Allahabad, A I R 1929 All 75[2]—*see* however 15 All 367[3]—that where a memorandum of appeal is improperly stamped, the correct course is to return it, and if returned, it may be re-presented later properly stamped, and if out of time for that reason, the Court, on being properly moved, may make orders saving the appeal. It may well be that O. 41, R. 3, empowers the rejection of an insufficiently stamped memorandum of appeal: A I R 1929 All 75.[2] It was pointed out however in 59 Cal 388[1] that a memorandum of appeal and a plaint are not the same.
>
> An order rejecting a plaint under O. 7, R. 11, is prima facie not a decree, for it does not conclusively determine the rights of the parties, nor is it a formal expression of an adjudication determining any right of any party in respect of any matter in controversy. S. 2 (2), Civil P. C., however directs that this type of order shall be deemed to be a decree. This is a mode of indicating that it is not, apart from the statute, a decree but is by the statute, ordered to be treated as a decree. Accordingly such an order is appealable. Were it not for this, it would not be appealable either as a decree (because it is not a decree) or as an order (because it does not fall within Order 43).

The question then which we now have to determine is whether such an order is open to revision. It has been held by a Full Bench of the Judicial Commissioner's

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* Ganpati v. Venkatesh, *Reported in* (1935) 22 A I R Nag 83=157 I C 186 (F B).

[1] Jnanadasundari Shaha v. Madhabchandra Mala, (1932) 19 A I R Cal 482=138 I C 643 =59 Cal 388.

[2] Brijbhukhan v. Tota Ram, (1929) 16 A I R All 75=118 I C 228=50 All 980=26 A L J 1199.

[3] Rudra Prasad v. Baijnath, (1893) 15 All 367= 1893 A W N 115.

Court in 29 N L R 125[4] that it is not unless the error is so gross and palpable as to amount to a failure to exercise jurisdiction. A previous decision of Hallifax A. J. C. to the contrary in A I R 1927 Nag 256[5] at p. 258 was overruled. We confess there is much to be said for this point of view although logically we find it difficult to see how a mere error can ever amount to a failure to exercise jurisdiction even if it is gross and palpable. Their Lordships of the Privy Council have often said that a Court has jurisdiction to decide right as well as wrong and when dealing with second appeals state that if jurisdiction is exercised then there can be no interference on questions of fact "however gross or inexcusable the error may seem to be' provided there is no error or defect in the procedure: 18 Cal 23[6] at p. 30. However, apart from this, we were so impressed with the difficulties in the way of holding that such orders are revisable that we adjourned the appeal to see whether it was not possible to devise a more appropriate remedy. It seems that it is not, so we now have to decide whether we agree with 29 N L R 125,[4] a question we left open in our provisional order. This was outside the scope of the original reference, but during the course of the argument, at one of the previous hearings, we thought it advisable to include this matter as well.

Before examining the question on its merits, we will consider for a moment the effect of following 29 N L R 125.[4] As we have said, an order rejecting a memorandum of appeal because it is insufficiently stamped is not appealable. It does not fall within the definition of a decree given in S. 2 (2) and has not been made appealable as an order under O. 43. If it is not revisable either then it must stand and will naturally have to be accepted as correct throughout all subsequent stages of the litigation because it is the final order on that point, made by a Court of competent jurisdiction. The order consequent on this, if the money is not paid within the time allowed will not be revisable either,

> for at that stage, when it must be assumed that the former order is right since it cannot be challenged, the Court is merely exercising the powers it is directed to exercise under O. 7, R. 11, read with S. 107 (2) and exercising them aright.

(We quote again from our previous order.) The result is that the litigant has no means of testing the correctness of a direction given to him by an Appellate Court to pay a particular stamp on a memorandum of appeal.

To quote from our order again :

> This we feel is not proper. It is not desirable that litigation should end in so unsatisfactory a fashion or that litigants should, without remedy, be compelled to pay a sum which may be beyond their resources save at the cost of great sacrifices which in law ought never to have been demanded. Of course we cannot misapply the law in order to avoid injustice or inconvenience, but if there is a loophole of escape from such an intolerable situation it certainly behoves us to find it.

There is a considerable body of judicial opinion which considers that such orders are revisable. Can they all be as wrong as the Full Bench of the Judicial Commissioner's Court indicates ? Is there nothing to be said for their point of view ? Let us examine the position closely. A party comes to Court and having paid the proper fee and having punctiliously observed all the other rules imposed upon him asks the Court to decide his case and settle the dispute between his opponent and himself. What does the Court do ? It refuses to hear him. It refuses to look at his case. Instead of investigating his grievances it decides something quite different and enters into a question not between him and his opponent but between him and the Crown. Is that not a refusal to exercise jurisdiction ? Or alternatively is it not a grave defect in procedure to refuse to proceed with a claim or an appeal on a plaint or a memorandum which is properly stamped ? Their Lordships of the Privy Council decided in 43 Bom 507[7] at p. 518 :

> The Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State. This is evident from the character of the Act, and is brought out by S. 12, which makes the decision of the first Court as to value final as between the parties, and enables a Court of Appeal to correct any error as to this, only where the first Court decided to the detriment of the revenue.

Therefore they refused to allow a defendant to utilize the provisions of the Act to obstruct his opponent, and refused to entertain his objection raised for the first time in appeal that the Court had no jurisdiction to proceed upon an insufficiently stamped plaint. It is clear then that a question of this kind is only a side-issue. It is not inter partes and does not invalidate a decision simply because the plaint or the memorandum of appeal was understamped. Of course, Courts undoubtedly have jurisdiction to determine the amount of court-fees payable and to reject the memorandum of appeal if it is insufficiently stamped, and so it is possible that the High Court has no power of interference under S. 115 (a). Can it then invoke Cl. (c)? Here also the matter is circumscribed by the decision of their Lordships of the Privy Council in 40 Mad 793[8] at p. 799. The illegality or irregularity must in some way affect either jurisdiction or at least the procedure of the Court as is explained in 41 Cal 323[9] at p. 338 and I L R (1936) Nag 73[10] at p. 77. But is that not just what the order in the present case does? What exactly does it mean? It makes the payment of a certain sum of money a condition precedent to the hearing of the case. However much the Court may have jurisdiction to make such an order, if the effect of it is a refusal to proceed to trial at all in circumstances when the Court is bound to do so, it must, we think, be regarded as an irregularity which affects either jurisdiction or procedure within the meaning of Cl. (c) and within the meaning of their Lordships' decision; and inasmuch as it is not merely incidental and interlocutory but finally and and effectively shuts the plaintiff out from all hope of redress in the suit itself the error must be regarded as material.

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[4] Nathu v. Ratansingh, (1933) 20 A I R Nag 107 =143 I C 84=29 N L R 125 (F B).

[5] Harihar Rao v. Salu Bai, (1927) 14 A I R Nag 256 = 103 I C 268.

[6] Durga Chowdhrani v. Jewahir Singh, (1891) 18 Cal 23=17 I A 122=5 Sar 560 (P C).

[7] Rachappasubrao v. Shidappa Venkatrao, (1918) 5 A I R P C 188=50 I C 280=46 I A 24=43 Bom 507 (PC).

There can, we think, be no doubt that it is a material irregularity to refuse to try a case when a plaint or a memorandum of appeal is properly stamped. The reason which prompts the Court to act in the way it does is immaterial: A I R 1936 Nag 157[10] at p. 160. It may have jurisdiction to decide a certain matter in the first instance but if the effect of its decision is finally to shut out a trial altogether on a mere matter of procedure, when it ought never to have been so shut out, then we think that such an error must be regarded as a material irregularity. We might add that even according to the Nagpur Full Bench the application would have to be entertained and heard. It cannot be rejected in limine. It is impossible to determine whether an error is so gross or palpable as to amount to a refusal to exercise jurisdiction until the matter has been thrashed out on the merits. Once it is done and it is found on examination that the document in question was properly stamped then we find it difficult to resist the conclusion that the error, whether it be gross and palpable or not, has resulted in a clear refusal to exercise jurisdiction; that is to say not the jurisdiction to determine the amount of court-fees payable which is in reality a purely administrative function though judicially performed and is only a matter of procedure, but to exercise the only jurisdiction for which the Courts exist, namely to settle disputes between the parties and to administer justice according to the laws of the land.

These observations must not be carried too far. We are dealing with exceptional circumstances and our decision must not be carried beyond its legitimate confines. We stress the fact that there has been no investigation of the dispute between the parties at all in this case; no decision inter partes. There has been a refusal to proceed with the trial because of an omission on the plaintiff's part to comply with a condition imposed by the Court in a matter which in substance is purely administrative and procedural, though, as we have said, the functions are judicially exercised. That is very different from a case in which the Court entertains the suit and decides it upon some preliminary point arising between the parties such as limitation. We do not mean to cast any doubt upon the rulings which decide that such questions are not open to revision. In 54 Cal 338[11] their Lordships justified interference on questions of procedure pure and simple. The question at issue was whether the land in suit which was in possession of the defendant, had been included in the mortgage deed from which the plaintiff derived his title. Both sides admitted that it belonged to the mortgagor, but the defendant pleaded that as it had not been included in the deed, the mortgagor was a necessary party even though the plaintiff claimed no relief against her and even though she

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8. Balakrishna Udayar v. Vasudeva Ayyar, (1917) 4 A I R P C 71=40 I C 650=44 I A 261=40 Mad 793 (PC).

9. Sheo Prosad Bungshidhur v. Ramchunder Haribux, (1914) 1 A I R Cal 888=23 I C 977 =41 Cal 323.

10. Devidas v. Nilkanthrao, (1936) 23 A I R Nag 157=164 I C 848=I L R (1936) Nag 73.

11. Umed Mal v. Chand Mal, (1926) 13 A I R P C 142 = 99 I C 749 = 53 I A 271 = 54 Cal 338 (P C).

would not be affected by the suit. The plaintiff replied that it had been included in the deed and so no question of joining the mortgagor arose. The first Court decided in the plaintiff's favour. There was no question that it had jurisdiction to do so but their Lordships held that in the circumstances which obtained there, it was an irregularity in procedure to decide the question in the absence of the mortgagor. The reasons which prompted the irregularity were thus immaterial.

The Calcutta, Madras, Allahabad and Patna High Courts construe an order demanding additional court-fees in this sense and so consider it revisable. They look upon it as a refusal to exercise jurisdiction unless a condition imposed by the Court is fulfilled. That being so, they consider that they have the right to examine the conditions imposed and see whether the refusal was legally justifiable: 14 C W N 932,[12] 51 Mad 664,[13] 48 M L J 514,[14] 55 All 274,[15] and 3 Pat 930[16] at page 942. But they refuse to interfere when the Court decides the question of court-fees in favour of the plaintiff or the appellant, as the case may be : 56 Mad 744.[17] It is to be observed that in most of these cases the application in revision was entertained even though the demand for additional court-fees was made in the first Court and even though the order consequent on this, namely rejecting the plaint, would have been appealable as a decree under S. 2 (2). On the whole then, though with considerable doubt, we respectfully differ from 29 N L R 125[4] to this extent. We consider that an order demanding additional court-fees on a memorandum of appeal is always revisable and not merely in the limited circumstances specified in that decision but we agree that one accepting the court-fees paid is not revisable because then there is no refusal to proceed with the appeal and because as their Lordships held in 43 Bom 507[7] at page 518 jurisdiction is not then affected nor is the other side damnified. The question referred by the Taxing Judge does not therefore arise. As we have said the order in question is not appealable but is revisable. The memorandum of appeal will therefore be treated as an application for revision and for that there is a fixed court-fee.

B.D./R.K. *Answer accordingly.*

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[12] Ramrup Das v. Sujaram Das (1910) 14 C W N 932=7 I C 92=12 C L J 211.

[13] Kulandaivelu Nachiar v. Ramaswami Pandia Thalavan, (1928) 15 A I R Mad 416=108 I C 539=51 Mad 664=55 M L J 345.

[14] Sudalimuthu Pillai v. Soma Sundaram Pillai, (1925) 12 A I R Mad 722 = 87 I C 25 = 48 M L J 514.

[15] Lakshmi Narain Rai v. Dip Narain Rai, (1933) 20 A I R All 350=148 I C 152=55 All 274=1933 A L J 311.

[16] Mani Lal v. Durga Prasad, (1924) 11 A I R Pat 673 = 80 I C 667=3 Pat 930 = 5 P L T 425.

[17] Secy. of State v. Raghunathan, (1933) 20 A I R Mad 506=144 I C 516=56 Mad 744 = 65 M L J 25.

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## A. I. R. 1938 Nagpur 126

POLLOCK, J.

*Mt. Nathabai, w/o Bansilal Marwadi — Plaintiff* — Applicant.

v.

*Baijnath Kunjilal and another — Defendants* — Non-applicants.

Civil Revn. Appln. No. 864 of 1936, Decided on 29th July 1937, from order of Dist. Judge, Akola, D/- 23rd November 1936.

**Civil P. C. (1908), S. 24 — Fact that Judge has decided point of law in previous case is no reason for transfer in subsequent case involving same point.**

The mere fact that the Judge has decided a particular point of law in a previous case is no reason for a transfer in a subsequent case involving the same point ; otherwise a Judge would eventually become unfit to decide most cases. If the question is one partly or wholly of fact, still less does there seem to be any reason for a transfer because the decision will depend upon the evidence in the particular case : *A I R 1930 Lah 176, Rel. on.* [P 127 C 1]

V. K. Rajwade and M. B. Kinkhede — *for Applicant.*

E. M. Joshi—*for Non-applicants.*

**Order.**—The main question in the suit out of which this application for revision arises is whether the defendant is the validly adopted son of the late Bansilal, the plaintiff's husband. In a recent case, in which the present plaintiff was not a party, the learned Additional District Judge, before whom the present suit is pending, decided that the present defendant was the validly adopted son of Bansilal. The plaintiff has therefore applied for a transfer of the case to some other Court, alleging that she fears she will not get an unbiased decision. I entirely agree with the view expressed by Shadi Lal C. J. in A I R 1930 Lah 176[1] that the mere fact that the Judge has decided a particular point of law in a previous case is no reason for a transfer in a subsequent case; otherwise a Judge would eventually become unfit to decide most cases. If the question is one partly or wholly of fact, still less does there seem to be any reason for a transfer because the decision will depend upon the evidence in the particular case. In the present suit, the decision will depend mainly on the evidence, which has not yet been given. The plaintiff, I think, apprehends not that she will not get a fair trial but that she will not get a favourable decision. I therefore hold that there is no ground for transfer and reject the application with costs. Counsel's fee Rs. 25.

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[1] Sammun v. Jawahir Singh, A I R 1930 Lah 176=124 I C 687.

D.S./R.K. *Application rejected.*

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## A. I. R. 1938 Nagpur 127

VIVIAN BOSE J.

*Bhagwandas Guru Baba Ramdas* — Appellant.

v.

*Prayagdatta* — Respondent.

Second Appeals Nos. 126-B and 132-B of 1935, Decided on 26th October 1936, from appellate decree of Second Addl. Dist. Judge, Amraoti, D/- 29th January 1935.

**(a) Berar Inam Rules (1859), R. 4—Holder of service inam under R. 4 can make alienation for period of tenure of his office.**

As regards the general law, the mahant of a temple can alienate for the period of his own life. When he does so, it binds him although it does not bind his successor. It is open to his successor, when he succeeds to the office, either to ratify his predecessor's action or to set it aside: *A I R 1922 P C 123* and *A I R 1933 P C 75*, *Rel. on.* [P 127 C 2]

The same principle applies to grant under Rr. 5 and 6 of Berar Inam Rules and also to grant under R. 4 which is not fundamentally different from Rr. 5 and 6 in respect of alienation by holder for period of his life. The only possible bar to alienation is public policy. But as it is not against public policy for the mahant of a temple to alienate for the period of the tenure of his office under the general law, it can hardly be so in cases under R. 4. Of course, if the act amounts to a breach of trust, or to mismanagement, the public at large or the beneficiaries, or those interested as the case may be, have their remedies under the law. But the mere alienation does not amount to a breach of trust. Thus the holder of service inam under R. 4 can make an alienation for period of his life though the rights of resumption which Government may choose to exercise are unaffected. [P 128 C 2; P 129 C 1]

**(b) Berar Inam Rules (1859), R. 14 (2) — Interpretation—Service grants may be alienated in suitable cases.**

It is true R. 14 (2), Berar Inam Rules, states that service grants are not liable to be alienated; but the interpretation which those who framed this rule have placed upon it is clearly that such alienations may be allowed in suitable cases. [P 128 C 2]

K. V. Brahma — *for Appellant.*

N. T. Mangalmurti — *for Respondent.*

**Judgment.**—This judgment will govern the two connected appeals, this and Second Appeal No. 132-B of 1935. The facts in both cases are similar. In the case out of which the present appeal, Second Appeal No. 126-B of 1935, arises the plaintiff's predecessor, Baba Ramdas, who was the mahant of the Maroti temple at Amraoti, gave a permanent lease of the plot in dispute to one Ramsaran on 9th October 1922. In the other case, the plaintiff himself gave a similar lease on 11th June 1926 to the same man. Both sites form part of a field which was given as a service grant to this temple of Maroti at Amraoti. Baba Ramdas died in 1923, and was succeeded by the plaintiff who is the present mahant. Ramsaran then mortgaged the two plots now in dispute in the two cases to the defendant, Prayagdatta who foreclosed and obtained possession on 20th December 1932. The point which arises for decision is the same in both cases, namely whether the holder of a service inam, under R. 4 of the Berar Inam Rules, can make a permanent alienation of the property.

As regards the general law, apart from R. 4, it is clear that the mahant of a temple can alienate for the period of his own life, or to be more accurate, for the period of the tenure of his office. It is possible he can make an alienation to enure beyond that in cases of necessity; but at any rate, it is clear he can make the alienation for this period. When he does so, it binds him although it does not bind his successor. It is open to his successor, when he succeeds to the office, either to ratify his predecessor's action, or to set it aside. This has been decided by their Lordships of the Privy Council in 44 Mad 831[1] and in 12 Pat 251.[2] Stanyon A. J. C. came to much the same conclusion in 6 N L R 72[3] and Mitra A. J. C. in 9 N L R 188[4] and also in 14 N L R 12[5] with respect to inams under R. 5. I applied similar principles to a grant under R. 6 in Second Appeal No. 403 of 1934.[6] So the only question now is whether grants under R. 4 stand on a different footing. Of course, there is an outstanding difference. Grants under Rr. 5 and 6 are personal in their nature, personal to the grantee and his family, while those under R. 4 are of a more public nature, where the primary consideration is the upkeep of a religious or charitable institution. But unless considerations of public policy supervene, I confess I am unable to see any fundamental distinction so far as this particular point of management is concerned, though of course there would be on many other matters. Revenue Book Circular, S. 6, Serial No. 2, R. 8, explains that :

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[1] **Vidya Varuthi v. Balusami Ayyar, (1922) 9 A I R P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).**

[2] **Ram Charan Das v. Naurangi Lal, (1933) 20 A I R P C 75=142 I C 214=60 I A 124=12 Pat 251 (P C).**

[3] **Krishnaji v. Menawar Ali, (1910) 6 N L R 72 =6 I C 821.**

> Grants in perpetuity or for more than one life even though no condition is expressed, were always made by Government with the object of maintaining the family of the grantee in a suitable station of life.

While

> the object of a service grant is to maintain the institution for whose service it is granted by the application of the income from the grant.

To that extent at least each savours of a trust, but as I explained in Second Appeal No. 403 of 1934,[6] Government contemplates alienation for the lifetime of the holder in the case of grants under Rr. 5 and 6, though they reserve to themselves rights of resumption in such cases. They appear to contemplate similar alienations under R. 4 as well, and if anything, express themselves in even clearer terms :

> Service grants are inalienable under S. 14 (2) of the Rules and, if a grantee alienates his grant, Government is entitled to resume it. But the object of a service grant is to maintain the institution for whose service it is granted by the application of the income from the grant, and if this object can satisfactorily be attained by a reasonable arrangement, resumptions would not ordinarily be enforced. Each case must be dealt with on its own merits.

Therefore, so far as these rules are concerned, they place no limitation on alienation. All they do is to reserve to Government full powers of resumption and lay down a general set of rules for the guidance of their officers, without however binding them to anything rigid and inflexible. It is true, R. 14 (2) states that service grants are not liable to be alienated; but the interpretation which those who framed this rule have placed upon it is clearly that such alienations may be allowed in suitable cases. The phrasing of this rule is significant. It is that such grants are not "liable to be alienated", not that they cannot be alienated. That in my opinion contemplates cases in which alienation may be permissible. This is borne out by Cl. 6 of the Revenue Book Circular which I have quoted above, which is in these terms :

> The Chief Commissioner has the sole power to decide authoritatively whether a grant shall be resumed or not, and all doubtful cases must be reported, through the Commissioner, for his orders.

As I pointed out in my previous decision, Cl. (7) sets out some of these doubtful cases and among them includes cases of alienation. It seems to me the rules would hardly refer to such alienations as doubtful matters if the intention had been entirely to prohibit them. I gather also that this is the general tenor of the law from the decision of their Lordships of the Privy Council in 3 Bom 186,[7] 59 Cal 1[8] and 47 All 385.[9] I have explained these cases in my former decision, and so need not repeat here what I said there. Therefore, the only possible bar to alienation is public policy. But if it is not against public policy for the mahant of a temple to alienate for the period of the tenure of his office under the general law and it can hardly be when their Lordships of the Privy Council have twice upheld such alienations once in 44 Mad 831[1] and once in 12 Pat 251[3] *loc. cit.*—I am unable to see how different conditions can supervene in cases under R. 4, when, as I have said, the rules themselves contemplate such alienations. But I emphasize again that any rights of resumption which Government may choose to exercise are unaffected. Of course, if the act amounts to a breach of trust, or to mismanagement, the public at large or the beneficiaries, or those interested as the case may be, have their remedies under the law. But I confess I find it difficult to see how the defaulting trustee can expect to derogate from his own grant by complaining of his own wrong. However, whatever the law as regards that may be, it is clear from the decision of the Judicial Committee which I have just quoted that the mere fact of alienation does not amount to a breach of trust, and nothing has been suggested in this case beyond the fact that the law itself prohibits such alienations. So these other questions about a breach of trust and the like do not arise here.

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[4] Aman Ali v. Imambi, (1913) 9 N L R 188=22 I C 89.

[5] Narsinghdas v. Aladadkhan, (1918) 5 A I R Nag 234=43 I C 384=14 N L R 12.

[6] Yadao Nilkant Deshpande v. Jankidas, *Reporetd in* (1937) 24 A I R Nag 202=170 I C 78.

[7] Gulabdas Jugjivandass v. Collector of Surat, (1878) 3 Bom 186=6 I A 54=3 Sar 889 (P C).

[8] Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Ltd., (1931) 18 A I R P C 160 = 132 I C 727 = 58 I A 215 = 59 Cal 1 (P C).

[9] Rajindra Narain Singh v. Mt. Sundar Bibi, (1925) 12 A I R P C 176=87 I C 295=52 I A 262=47 All 385 (P C).

Turning now to the cases in question, in the connected case covered by the appeal (Second Appeal No. 132-B of 1935) the alienation was by the plaintiff himself, and he can obviously not derogate from his own grant. So far as the present suit is concerned, it is established that the plaintiff has been accepting rent from Ramsaran from 1923 when he succeeded to the office down to the year 1930, and in this very suit, he sues for arrears of rent for the years 1930-31 and 1931-32. As I have said, the plaintiff had the option in 1923, when he succeeded to the office of mahant, either to ratify his predecessor's grant or to repudiate it. It is abundantly evident from his conduct that he has chosen to ratify it. Having made his election, he is now bound by it. His suits were therefore rightly dismissed in the lower Courts. The appeals are dismissed with costs in both cases.

D.S./R.K. *Appeals dismissed.*

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## A. I. R. 1938 Nagpur 129

STONE C. J. AND DIGBY J.

*Ahsan Hussain Abdul Ali Bohari, Proprietor Abidi Shop — Plaintiff* — Appellant.

v.

*Maina wife of Nathu Telanga and another — Defendants* — Respondents.

Letters Patent Appeal No. 13 of 1936, Decided on 23rd August 1937, from appellate decree of Niyogi J., D/- 13th August 1936.

**(a) Transfer of Property Act (1882), Ss. 100 and 52—Charge created by decree—Whether charge binds bona fide purchaser for value without notice should be decided with reference to law of estoppel by record.**

Where a charge is created by a decree, the correct way of approaching the matter whether the charge is binding on bona fide purchaser for value without notice, is not to found the rights of the charge holder upon any provisions of the Transfer of Property Act but upon the law of estoppel by record. [P 130 C 1]

**(b) Decree — Effect of — Cause of action merges in decree — Maxim transit in rem judicatam.**

When a decree has been passed in a suit, the cause of action merges in the decree. This is as *transit in rem judicatam*. Thereafter the rights which founded the relief claimed for ever go and they are replaced by the rights created by the decree. After the decree, the old rights are replaced by the new. The new rights spring from the decree : *(1877) 4 Ch D 33 ; A I R 1936 P C 63 and 34 Cal 150 (P C), Foll.* [P 130 C 1]

**(c) Estoppel—By record.**

Transfer of Property Act does not purport to cut down estoppels by record. [P 130 C 2]

**(d) Estoppel—Decree—Decree binds parties and privies—Meaning of 'privy' explained.**

A decree passed by a Court binds not only parties to the suit, but also their privies ; and the term privy in this connexion means partaker who is not a party and includes all who claim or derive title from one who is party to the suit : *(1894) 1 Ch 578 and (1803) 3 East 346, Ref.* [P 130 C 2 ; P 131 C 1]

**(e) Estoppel—Charge created by a decree binds persons claiming through party to decree even though bona fide without notice of charge.**

Where a charge is created by a decree, apart altogether from the consideration whether or not a charge amounts to an interest in the property, the charge created by the decree must bind a person who claims through the party against whom the decree has been passed, although such person acquires the property without notice of the charge. [P 131 C 1]

R. K. Rao — *for Appellant.*

V. V. Kelkar and M. R. Bobde — *for Respondent 1.*

**Judgment.** — This Letters Patent appeal from the judgment of Niyogi J. has covered a wide ground and was, if we may say so, very well argued by counsel for the appellant who made every point without wasting one minute of the Court's time. He said very little about the one point in the judgment that we consider unassailable. The judgment proceeds on three grounds each of which, if sound, is sufficient to uphold it, namely : (1 )A charge created by a decree even under the provisions of the Transfer of Property Act before its amendment is binding on bona fide purchasers for value without notice. (2) The principle of lis pendens applies and that precludes a transfer that will limit the rights of parties to the suit and on that ground the bona fide purchaser will be bound by the charge. (3) The principle of estoppel applies.

We do not consider it desirable to review the very conflicting case law that falls to be considered if 1 and 2 are to be fully examined. We find considerable difficulty in the way of treating a charge, however created, under the provisions of the Transfer of Property Act before its amendment, as in some way creating an interest which encumbers the land. On the facts and pleadings here, and bearing in mind that at the pleadings' stage the defence based on lis pendens was withdrawn, we prefer not to base any conclusion on lis pendens. We think the correct way of approaching this matter is not to found the rights of the charge holder, when the charge is created by a decree upon any provision of the Transfer of Property Act, but upon the law of estoppel by record. It is a well settled principle that, when a decree has been passed in a suit, the cause of action merges in the decree. This is known as *transit in rem judicatam*. Thereafter the rights which founded the relief claimed for ever go and they are replaced by the rights created by the decree. So viewed, it will be seen that it matters not at all whether the maintenance holder had a claim for maintenance because she was a Hindu widow having a widow's estate or whether she was a wife or whether she or he founded on some other ground. After the decree, the old rights are replaced by the new. The new rights spring from the decree. The person now has a right to maintenance because the decree gives her that right; the person has a charge because the decree creates a charge in her favour: (1877) 4 Ch D 33.[1] See also 15 Pat 210[2] at p. 218 and 34 Cal 150[3].

The judgment not only creates a right; it works an estoppel. From this angle, judgments are divisible into two categories: (a) judgments in rem (which attract S. 41, Evidence Act), and (b) other judgments. Without examining all the differences and the marks by which a judgment may be sorted into this class or that, it may be said that the judgment creating the charge in the suit in which, inter alia, maintenance was claimed falls into the second class. Further, the relevant difference between the two classes is that judgments in rem are binding against all the world and other judgments (or decrees) are only binding on parties and their privies. But what is meant by the expression "parties and their privies"? Does it include bona fide transferees from a party without notice? If the answer is yes, there is nothing more to be said in this case: for then the position will be as follows: A suit is brought by *A* against *B*. That suit ends with a final decree. That decree decrees that *B* shall pay *A* maintenance at so much per month for life and gives *A* a charge on *B*'s property to secure the payment of that monthly sum. Later *B* sells the subject matter of the charge to *C* who buys bona fide for value and without notice of the charge. The question is: Is the charge effective against *C*?

Now if *C* is a privy of *B*, in the above use of that word, he is as much bound by the judgment as *B* and the land charged is as much charged in his hands as it was when in *B*'s hands and all difficulties about the nature of charges in India and about the construction of the Transfer of Property Act become irrelevant; for it matters not in the least how they are resolved it being quite clear that the Transfer of Property Act is not purporting to cut down estoppels by record. The true position that emerges is that the privy cannot be heard to say or lead evidence to prove that the land is not charged. Obviously if this be so, there can be no foundation for a declaration that it is not charged. In our opinion, the term "privy" in this connexion is a term of the law meaning a partaker who is not a party, that is, in this connexion, it includes all who derive title to the land, the subject of the charge, from one who was a party to the suit by the decree in which the land was charged. That is to say there is here privity of estate the transferee here being in the position of the feoffee in the illustrations given of privity in the estate by Lord Coke in his work upon Littleton's Tenures: *See* Edn. 19, Vol. 11, Ss. 667, 352a. Thus as Romer J. observed in the course of the argument in (1894) 1 Ch 578[4] at p. 593: "judgment in an action between *A* and *B* could not prima facie affect *C*. But it does affect *C* if he is privy in estate, claiming through *B*:" *See also* the note on (1803) 3 East 346[5] in Smith's Leading Cases, Vol. II (Edn. 13), page 673.

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[1] Re European Central Railway Co.; Ex Parte Oriental Financial Corporation, (1877) 4 Ch D 33=46 L J Ch 57=35 L T 583=25 W R 92.

[2] Kusum Kumari v. Debi Prosad, (1936) 23 A I R P C 63=160 I C 285=63 I A 114=15 Pat 210 (P C).

[3] Sundar Koer v. Rai Sham, (1907) 34 Cal 150 =34 I A 9=11 C W N 249=5 C L J 106 (P C).

[4] Mercantile Investment and General Trust Co. v. River Plate Trust, Loan and Agency Co., (1894) 1 Ch 578=63 L J Ch 366=8 R 791 = 70 L T 131=42 W R 365.

But it may be said that this very suit is for a declaration that the decree "is not binding and is not executable against the house described in Sch. A." There is also the prayer that it be declared "that defendant 1 is not entitled to the maintenance .... fixed by Civil Suit No. 193 of 1927." This latter prayer is founded on the allegation that the decree should be set aside as collusive and fraudulent. That has been found against. The prayer that the decree is not executable against the house according to the pleadings is founded on the allegation that the maintenance holder had become unchaste and so has lost her right to maintenance, alternatively that the maintenance should be reduced because the family had become poor and so the maintenance holder has partly lost her right to maintenance. These allegations are not sustained, but we are now asked to say that the house acquired by the plaintiff from the party in the suit in which maintenance was awarded and in which maintenance was charged on the house is not bound by that charge because the plaintiff acquired without notice of the charge. There is clearly no ground for setting aside the decree. Thus the decree stands. So standing, no party to that suit could escape the burden created by it to pay maintenance and to have the house charged as security for that payment. A privy to such a party is, in our opinion, in like case. If he can set aside the decree, well and good. If he cannot, he can neither be heard to say that the charge is not binding or that the maintenance is not payable. It is still clearer that he cannot get a declaration of the type here sought. The learned Judge from whose judgment this appeal is brought says :

> Now a decree passed by a Court, it must be admitted, binds not only the parties to the suit but also their privies, that is those who claim under the parties to the suit. The plaintiff in the present case claiming as he does under the appellant's husband cannot be heard to dispute the binding character of that decree as against him. Apart altogether from the consideration whether or not a charge amounts to an interest in the property, the charge created by the decree must bind a person who claims through the party against whom the decree has been passed.

We agree. So agreeing, that is sufficient to uphold the judgment. We say nothing as to the other grounds of the decision. We should have considered it our duty to do so had the case been one for further appeal, but the value is here only Rs. 1500 and the point of construction relates to an Act in its unamended form which Act has long since been amended. The appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 131

GRUER J.

*Emperor.*

v.

*Pannalal Bhikharilal Sunar* — Accused.

Criminal Revn. No. 477 of 1937, Decided on 25th November 1937, on reference made by Dist. Magistrate, Hoshangabad, D/- 5th November 1937.

**(a) Criminal Trial — Sentence — Fine.**

It is inexpedient to impose a fine when there is no hope of realization. [P 131 C 2]

**(b) C. P. Borstal Act (9 of 1928), S. 5 — Order for further detention in default of payment of fine is illegal.**

Section 5 authorizes detention in lieu of transportation or imprisonment. There is no provision however for further detention in default of payment of fine and hence an order for further detention in default of payment of fine is illegal. [P 131 C 2]

**Order.**—In this case a Junior Sub-Divisional Magistrate has ordered a youth of 17 to be detained in the Borstal Institute for two years and also to pay a fine of Rs. 10 with one month's further detention in the Borstal Institute in default. The learned District Magistrate who refers the case has correctly pointed out that it was inexpedient to impose a fine when there was no hope of realization. S. 5, C. P. Borstal Act, authorizes detention in lieu of transportation or imprisonment and to that extent the order is correct. There is no provision however for further detention in default of payment of fine, and to that extent the order is illegal. There was no compulsion to impose fine also and in the circumstances it was improper to do so. The reference is accepted and the order directing payment of fine and further detention in default is set aside.

K.S./R.K. *Reference accepted.*

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[5] Outram v. Morewood, (1803) 3 East 346 = 7 R R 473.

## A. I. R. 1938 Nagpur 132

STONE C. J. AND NIYOGI J.

*Dulan Bai — Plaintiff* — Appellant.

v.

*Sundersao and another—Defendants*— Respondents.

Misc. Appeal No. 14 of 1933, Decided on 23rd March 1936, against order of Addl. Dist. Judge, Nagpur, D/- 13th April 1933.

**(a) Arbitration — Award—Award purporting to be a considered award — It does not cease to be award merely because it is cast in terms agreed upon by parties.**

It is not correct to say that an award which purports to be the considered award of the arbitrators, is no award simply because it appears that the arbitrators cast it in the form they did, because of an agreement arrived at by the parties: *22 All 224, Rel. on.* [P 132 C 2]

**(b) Arbitration — Award—Party accepting award having fully understood it and acting on it — He is estopped from challenging it even if it is a compromise and not award.**

Where a party to an award has not merely signed it as an award, (an award he understood, an award he agreed with, and an award he accepted) but also has acted under it, he is estopped from challenging it and it is not open to a Court to go into evidence which has for its purpose the impugning of such award: *24 All 164, Rel. on.* [P 133 C 1]

Even if it were not an award but merely a compromise acted under, the doctrine of estoppel would still apply: *A I R 1918 P C 70, Rel. on*; *A I R 1915 All 140*; *A I R 1919 Mad 374 and A I R 1934 Bom 6, Disting.* [P 133 C 1]

M. B. Kinkhede, M. R. Bobde and A. V. Khare — *for Appellant.*

R. N. Padhye and M. D. Khandekar — *for Respondents.*

**Niyogi J.** — This is an appeal by the plaintiff from the order passed by the Additional District Judge, Nagpur, in Civil suit No. 6 of 1931, refusing to record an award under S. 104 (1) (f), Civil P. C. The point that has been raised before us turns upon the effect of the award made in the arbitration, the terms of which are to be found in Ex. P-23. The defendants in this action wrote on the award as follows:

> The panchas have this day read out to us, all parties, a final decision about our dispute. Having ourselves read the written award of the panchas and having understood it, we agree to it and accept it. So we have made signatures on it.

Thereafter the defendants obtained possession of part of the property dealt with in the award and allocated to them by the award. That property together with other disputed property was at that time under attachment by a Magistrate under the powers conferred by S. 146, Criminal P. C. That section empowers a Magistrate to attach property

> until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof, provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute.

The Magistrate in this case, this award having been made, was induced to raise the attachment by the defendants on their stating to him that the dispute had been settled by compromise. As a consequence, the defendants obtained possession and the property was awarded to them. The plaintiff in this action seeks to have that award filed. The objection taken by the defendants is that the award is no award because at the time the arbitrators purported to make it they were functus officio. It is said they had become functus officio because the parties had compromised and had informed the arbitrators of that fact. The arbitrators accepted the compromise and then proceeded to do what, according to the defendants, they had no power to do, i. e. to cast the terms of the compromise in the form of an award. Thus the award is impugned on two heads, (1) that the arbitrators had ceased to be arbitrators at the time when the award was given and (2) that they did not exercise independent minds in arriving at the award but merely copied terms which were told to them as the terms of the compromise between the parties. We may add that there is a litigation on foot which seeks a determination of the question whether there was a compromise at all, and that dispute is one raised by the present defendants. The present argument urged by the defendants however seeks to remove jurisdiction from the arbitrators on the basis that there was a compromise.

In our opinion, assuming that it is permissible to consider evidence which has for its purpose the invalidating of this award, although the party impugning it has accepted it and acted under it, it is not correct to say that an award which as here purports to be a considered award of the arbitrators, is no award simply because it appears that the arbitrators cast it in the form they did because of an agreement arrived at by the parties. See 22 All 224.[1] In our opinion however it is not open to us to go into evidence which has for its object the impugning of this award. The defendants have not merely signed it as an award, an award they understood, an award they agreed with, and an award they accepted, but they have acted under it. In these circumstances we are of the opinion that they are estopped from challenging it. As was pointed out in 24 All 164[2] at pp. 168 and 169:

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[1] Gobardhan Das v. Jai Kishen Das, (1900) 22 All 224=1900 A W N 52.

> Even if the award were bad by reason of the arbitrator having exceeded his powers, the respondent is precluded by his own conduct from impeaching it. He has chosen to accept and act on it as if it were a good and binding award ; he has taken all the advantages it gave him, and we cannot now allow him to say that he is not bound by it.

Even if it were not an award but merely a compromise acted under, the doctrine of estoppel would still, in our opinion, apply. See 40 All 487.[3] As regards the cases that were relied on by the defendants we observe that 28 I C 298[4] and 53 I C 283[5] are not cases in which the question of estoppel was discussed. 35 Bom L R 1101[6] does consider the question of estoppel. That case however in our opinion can be distinguished on the facts, for, there the so-called award that was acted under had been given by arbitrators after they had already given an award. The Court held that the first award was the final award and that the arbitrators were functus officio when they made a fresh award which was consequently no award. Apart from distinguishing that case on the facts, we are not to be understood as going the length that that case went as regards the power of a person who has acted under a document purporting to be an award to impugn that award. It follows therefore that, in our opinion, this appeal succeeds with costs. The award is accordingly directed to be filed, and there will be a decree in the action in the terms of the award. The defendants will pay the appellant's costs in both Courts. Pleader's fee is fixed at Rs. 100.

D.S./R.K. *Appeal allowed.*

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2. Brij Mohan Lal v. Shiam Singh, (1902) 24 All 164=1901 A W N 208.
3. Kanhai Lal v. Brij Lal, (1918) 5 A I R P C 70 =47 I C 207=45 I A 118=40 All 487 (P C).
4. Dina v. Harikishan Das, (1915) 2 A I R All 140=28 I C 298=13 A L J 302.
5. Subramania Iyer v. Kalyanasundaram Iyer, (1919) 6 A I R Mad 874=53 I C 283.
6. Parshottamdas v. Kekhushru, (1934) 21 A I R Bom 6=149 I C 824=35 Bom L R 1101.

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## * A. I. R. 1938 Nagpur 133

GRILLE J.

*Emperor*

v.

*Vithu* — Accused.

Criminal Revn .No. 398 of 1936, Decided on 7th January 1937, on reference by Sess. Judge, Akola, D/- 24th October 1936.

*** Criminal Trial—Cognizance—Cognizance can be taken of person taking part in offence though not specifically mentioned in complaint — But where complainant expressly wishes that such person should not be prosecuted, prosecution as regards him should not be considered.**

Cognizance is taken of an offence and not of the individual offenders, and it would ordinarily follow, that once a complaint has been made according to the provisions of the Criminal P. C., cognizance can be taken in respect of the offenders named in the complaint and also others who may be shown to have taken part in the transaction, although no complaint has been specifically made against them : *A I R 1936 Pat 346, Rel. on.* [P 134 C 1]

But, where from the complaint it is clear that the complainant expressly wishes that prosecution against one of such persons is undesirable, the prosecution as regards him should not be considered. [P 134 C 1]

W. R. Puranik — *for the Crown.*

**Order.** — Three persons, Wamanrao, Manikrao and their servant Vithu, drove their carts over a road that was under construction. The coolies on the work objected, and an altercation arose and in consequence Wamanrao and Manikrao made a false report at the Tamgaon police station that the coolies had robbed them of the sum of Rs. 7. This report was also signed by Vithu. A complaint was then made by the station-house officer in writing under S. 211, I. P. C., against Wamanrao and Manikrao. Although it was stated in the written complaint that the servant Vithu had participated in signing the false report, the complaint was definitely made against Wamanrao and Manikrao alone, and when the station-house officer was examined in Court, he stated that he had lodged the complaint against Wamanrao and Manikrao only under the orders of the A. S. P. Tamgaon, and that he was unable to give any reason why no complaint had been made against Vithu. The Magistrate before whom the complaint was made, ordered all three persons to be summoned and convicted them all of an offence under S. 182, I. P. C. The Sessions Judge, Akola, has referred the case with the recommendation that the conviction of Vithu should be set aside, as no complaint was lodged against him, and that consequently the Magistrate could not take cognizance of the offence so far as he was concerned.

Notice was issued to show cause why the conviction should not be set aside. No one has appeared in support of the rule, but an appearance has been made for the Crown in order to oppose the rule. It is pointed out by the learned Government Advocate—and correctly pointed out—that cognizance is taken of an offence and not of the individual offenders, and it would ordinarily follow that, once a complaint has been made according to the provisions of the Criminal Procedure Code, cognizance can be taken in respect of the offenders named in the complaint and also others who may be shown to have taken part in the transaction, although no complaint has been specifically made against them. This has been held in 15 Pat 26,[1] and the learned Sessions Judge is in error in supposing that the absence of the name of Vithu in the operative part of the complaint will be sufficient to take away the jurisdiction of the Magistrate to try him. There remains however a further consideration, and that is that it was clearly the intention of the officer making the complaint, and of his superior officer who directed him to make it, that Vithu who was merely a servant of one of the principal offenders, should not be prosecuted, and the reason for not wishing to prosecute him is obvious and fair, since he was acting under duress. This has been recognized by the Magistrate in inflicting a lesser sentence on him. Although the Court had power to proceed against Vithu as well as against the other two persons, it is clear that the complainant had expressly considered it undesirable to prosecute Vithu, and the prosecution, so far as he was concerned, should not have been considered. It would have been otherwise had it not been possible to deduce such an express wish from the complaint and the examination of the officer who made it. In the circumstances, the reference is accepted, although not for the particular reason advanced by the learned Sessions Judge. The rule is accordingly made absolute, and the conviction of Vithu is set aside and the fine paid by him will be refunded.

D.S./R.K. *Rule made absolute.*

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[1] Jugeshwar Singh v. Emperor, (1936) 23 A I R Pat 346=1936 Cr C 539=164 I C 86=37 Cr L J 898=15 Pat 26=17 P L T 234.

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*** * A. I. R. 1938 Nagpur 134**

## FULL BENCH

STONE C. J., POLLOCK AND VIVIAN BOSE JJ.

*Amrut and others — Plaintiffs —* Appellants.

v.

*Mt. Thagan — Defendant —* Respondent.

Second Appeal No. 582 of 1934, Decided on 21st December 1937.

**(a) Hindu Law — Succession — Sister is bandhu.**

Although sister is not a sagotra, she is a bhinnagotra sapinda, that is to say, she is a bandhu : *5 Mad 241, Ref.* [P 139 C 1]

*** * (b) Hindu Law of Inheritance Amendment Act (2 of 1929) — Sister includes half-sister—Hence where parties are governed by Benares School of Mitakshara Law half-sister is heir.**

(Per *Stone C. J. and Vivian Bose J.*)—It is contrary to the underlying ideas of the Mitakshara and of the society whose laws were there expressed to attach any particular importance, legally, to the fact that one daughter was born of one wife and another of another. To let in one as being the whole sister of the father's son (the propositus) and exclude another as being the half-sister altogether is not founded on any ascertainable principle or binding text. It is not right so to construe the Hindu Law of Inheritance Amendment Act as to give it an entirely different effect province by province according to the judicial opinions expressed on a highly debatable subject as to the ground for the inclusion or exclusion of sisters from the succession. It is not a codifying Act but an Act which purports to alter the order amongst Hindu heirs and it is desirable to see who were, before the Act heirs. Regarding the purpose of the Act of 1929 and considering the pre-existing law it can be concluded that 'sister' includes 'half-sister.' Hence where the parties are governed by Benares School of Mitakshara law, a half-sister is an heir under Act 2 of 1929: *Case law discussed.* [P 140 C 1, 2]

(Per *Pollock J. concurring*)—The Act must be read as part of the Hindu law as a whole and wherever a sister and sister's son are entitled to inherit, then the half sister and half-sister's son are also entitled to inherit on the general principle that the Hindu law recognizes no difference between the full blood and half blood except in a competition inter se. A sister succeeds as the father's daughter, and a half-sister having the same father is therefore an heir if the sister would be an heir. The word 'sister' should be interpreted as 'father's daughter'. [P 141 C 2; P 142 C 1]

**(c) Hindu Law — Half-sister and step-sister —Difference.**

There is a wide difference between a half-sister and a step-sister. A step-sister is not related by blood at all. [P 141 C 1]

**(d) Interpretation of Statutes — Language and scope of Act clear — Preamble cannot extend or restrict it.**

The Preamble cannot either restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt, and it is not unusual to find that the enacting part is not exactly co-extensive with the Preamble. [P 141 C 2]

Dr. Sir Hari Singh Gour — *for Appellants.*

M. B. Kinkhede and D. N. Choudhari — *for Respondent.*

### Order of Reference

**Pollock and Digby JJ.**—The property in dispute belonged to one Dulli. On his death in 1898, it passed to his mother, Mt. Maina, who died in 1930. The plaintiffs, who are Dulli's half-sisters by the same father but a different mother, claimed the property as Dulli's heirs. The parties are admittedly governed by the Benares School of Mitakshara law. It is conceded that the Hindu Law of Inheritance (Amendment) Act 2 of 1929 applies, and this Act provides that a son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother. The lower Appellate Court differing from the first Court, held that the term 'sister' does not include a half-sister, and therefore dismissed the plaintiffs' suit. A Full Bench of the Allahabad High Court in 55 All 725[1] held that the term "sister" in Act 2 of 1929 does not include a half-sister, and this decision has been followed in 11 Luck 148[2] and 1937 A L J 767.[3] We do not think it necessary to add anything further to what has been said in these two cases, and we think that if "sister" were given the meaning that it ordinarily has in the English language it probably would not include a half-sister, though it may be noted that S. 27, Indian Succession Act makes no distinction between the full blood and the half blood. Sir Hari Singh Gour, however, contended on behalf of the plaintiffs, who are the appellants in this Court, that Act 2 of 1929 must be read as part of the Hindu law and that as a general rule Hindu law recognizes no difference between the full blood and the half blood except in a competition inter se: *see* A I R 1937 Lah 11.[4] This aspect of the case was hardly considered in any of the above decisions.

Before Act 2 of 1929, the sister was recognized as a gotraja sapinda in Bombay entitled to succeed after the paternal grandmother. In Madras she was recognized as a bandhu entitled to succeed, but only after all male bandhus. The right of a sister to succeed in Bombay was based partly on the Mitakshara and partly on the Mayukha. The right of a brother to succeed under the Mitakshara is laid down in the following placita of S. 4 of Ch. 2 in that work. In Colebrooke's translations the placita run as follows:

> 1 On failure of the father, brethren share the estate. Accordingly Manu says, 'Of him, who leaves no son, the father shall take the inheritance or the brothers.'
>
> * * * * * * *
>
> (5) Among brothers, such as are of the whole blood take the inheritance in the first instance under the text before cited: 'To the nearest sapinda, the inheritance next belongs.' Since those of the half blood are remote through the difference of the mothers.
>
> (6) If there be no uterine (or whole) brothers, those by different mothers inherit the estate.

There is an annotation by the learned author on the word "brethren" in placitum 1 as follows:

> The commentators, Nanda Pandita and Balam Bhatta, consider this as intending 'brothers and sisters 'in the same manner in which 'parents' have been explained 'mother and father.' They observe that the brother inherits first: and in his default, the sister. This opinion is controverted by Camalacara and by the author of the Vyavaharamayukha.

The interpretation of the word "brethren" in the placitum as including sisters was accepted in Bombay but nowhere else.

There is also placitum 5 in S. 5 of Ch. 2 which runs as follows:

> On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue, inherit. In this manner must be understood the succession of kindred belonging to the same general family and connected by funeral oblations;

and there is an annotation to this effect:

> Nanda Pandita, preserving the common reading says, 'Kinsman (bandhu) are sapindas; and these may belong to the same general family or not. . . The daughters of the father and other ancestors must be admitted, like the daughter of the man himself, and for the same reason.

On the strength of this text and the previously cited text, the sister was held entitled to succeed in Bombay as a gotraja sapinda as the father's daughter, but nowhere else was she ever recognized as an heir except in Madras where she was recognized as a bandhu though not entitled to succeed if any male bandhu existed.

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[1] Ram Adhar v. Mt. Sudesra, (1933) 20 A I R All 491=145 I C 529=55 All 725=1933 A L J 680 (F B).

[2] Mt. Kabootra v. Ram Padarath, (1935) 22 A I R Oudh 382=155 I C 94=11 Luck 148=1935 O W N 545.

[3] Mt. Sahodra v. Ram Babu, (1937) 24 A I R All 655=171 I C 792=1937 A L J 767.

[4] Guranditta v. Mt. Jiwani, (1937) 24 A I R Lah 11=168 I C 948=38 P L R 80.

From placita 4 and 5, S. 4, Ch. 2 of the Mitakshara quoted above, it is clear that the term "brothers" includes half-brothers. In 1 Bom H C R 117[5] which was upheld by the Privy Council in 9 M I A 516[6] at p. 520 and in 3 Bom 353[7] the right of a sister to inherit in Bombay was based on both the Mitakshara and the Mayukha. In 4 Bom 188[8] it was remarked that as the term "brother" includes a half-brother the term "sister" must include a half-sister and that a half-sister on the paternal side comes as fully within the term "daughter of the father" as a full sister, and it was held that a half-sister was therefore entitled to inherit. Similarly in Madras in 15 Mad 300[9] it was held:

> The position of the step-sister's (half-sister's) son cannot be distinguished from that of the sister's son. . . The relationship between the maternal uncle and his sister's sons or step-sister's (half-sister's) son is alike that of sapindas, for, in both cases, there is a common grandfather and 'the relation of sapindas arises from connexion as parts of one body.'

In 29 N L R 204[10] the Privy Council held that the principle stated in the Mitakshara, Ch. 2, S. 4, placita 5 and 6, with regard to the preference of the whole blood to the half blood is applicable to all sapindas in the same degree of consanguinity, and in 59 Cal 576[11] they held that in a Hindu family governed by the Benares school of the Mitakshara law the father's half-sister's sons have precedence as heirs to the mother's sister's sons. In the course of that judgment their Lordships remarked:

> Having regard to the general scheme of the Mitakshara, the preference of the whole blood to the half blood is confined to members of the same class, or to use the language of the Judges of the High Court in 19 All 215[12] to 'sapindas of the same degree of descent from the common ancestor.' In their Lordships' opinion, the principle of this decision applies equally in the case of bandhus, not descended from a common ancestor, but claiming merely on the basis of propinquity. Again the Mitakshara (Ch. 2. S. 4, placita 5 to 7) definitely prefers a half-brother to the son of a full brother : see 12 Bom H C R 65;[13] and there seems to be no doubt that under Dayabhaga the sons of a step-sister share equally with the sons of a full sister : 11 Cal 69.[14] There is, so far as their Lordships can see, no reason why a different rule should be thought to prevail in the Benares school.

The position then is as follows. Where the sister has been recognized as an heir, either as gotraja sapinda in Bombay or as a bandhu in Madras, the half-sister has also been recognized as an heir entitled to succeed next after the sister. The sister's son is recognized as a bandhu, and it appears from the decision of the Privy Council in 59 Cal 576[11] that a half-sister's son is entitled to succeed after the full sister's son. A Division Bench of the Lahore High Court in A I R 1937 Lah 11[4] in holding that a half-sister's son was an heir, held that this was so under the general principle of Hindu law which recognizes no difference between the full blood and the half-blood so far as either sapindas or bandhus are concerned except in a competition inter se.

In 55 All 725[1] the learned Judges stated:

> If we hold that "sister" in S. 2 of Act 2 of 1929 includes a half-sister, we shall be putting a sister and half-sister in the same category. Further, we shall be introducing a 'half-sister' between the words 'sister' and 'sister's son' . . . Ordinarily it would be repugnant to the notions of Hindus to recognize a woman as a sister who has not the same father as the person himself.

Now until quite recently, the remarriage of widows among Hindus was almost, if not entirely, unknown, and it probably never occurred to any Hindu that a man could have a half-brother or half-sister by the same mother and by a different father. The term "uterine brother" is clearly used in the Mitakshara in the passage cited above as equivalent to a full brother and the term "sister" was understood by Nanda Pandita to be equivalent to the father's daughter. "Uterine sister" in Hindu law would therefore appear to mean a full sister, and "consanguine sister" a half-sister by the same father. The term "step-sister" seems to have been inadvertently used in some reports as equivalent to "half-sister", though in our opinion the strict meaning of step-sister is the daughter of a step-parent by an earlier marriage, i. e., no relation at all. If "sister" were interpreted

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5. Vinayak Anandrav v. Lakshmibai, (1862) 1 Bom H C R 117.
6. Venayeck Anandrow v. Luxoomabaee, (1861-63) 9 M I A 516=3 W R P C 41 (P C).
7. Sakharam v. Sitabai, (1878) 3 Bom 353=1879 Bom P J 355.
8. Kesserbai v. Valab Raoji, (1879) 4 Bom 188.
9. Subbaraya v. Kylasa, (1892) 15 Mad 300.
10. Garudas v. Laldas, (1933) 20 A I R P C 141=142 I C 807=60 I A 189=29 N L R 204 (PC).
11. Jotindra Nath Roy v. Nagendra Nath Roy, (1931) 18 A I R P C 268=135 I C 637=59 Cal 576=58 I A 372=61 M L J 442 (PC).
12. Suba Singh v. Sarafraz Kunwar, (1897) 19 All 215=1897 A W N 53.
13. Krishnaji Vyanktesh v. Pandurang, (1875) 12 Bom H C R 65.
14. Bhola Nath Roy v. Rakhal Dass Mukerji, (1885) 11 Cal 69.

as equivalent to father's daughter, then the above objections by the Allahabad High Court would be met. The objection taken in 11 Luck 148[3] that if the word "sister" used in S. 2 of the Act, were to include a half sister, then the full sister as well as the half-sister must take together is also met by applying the general principle of Hindu law that the full blood succeeds in preference to the half-blood. A further objection in 1937 A L J 767[3] that to interpret the word "sister" as including "half-sister" would have the effect of putting a half-sister above a full sister's son appears to us not necessarily conclusive, for where a sister was entitled to succeed, her half sister succeeded immediately after her, both succeeding before the full sister's son in Bombay and both succeeding after all male bandhus in Madras.

The question raised is a difficult and important question of Hindu law which we think ought to be decided by a Full Bench. We would therefore refer the following point for a decision by a Full Bench:

"Where the parties are governed by the Banares School of Mitakshara law, is a half-sister an heir under Act 2 of 1929"?

Let the papers be laid before the Hon'ble the Chief Justice for the constitution of a Full Bench.

## OPINION.

**Stone C. J. and Vivian Bose J.**—This matter comes before the Full Bench on a reference, by a Division Bench, of the following question:

> "Where the parties are governed by the Benares School of Mitakshara law, is a half-sister an heir under Act 2 of 1929"?

This question has already been considered by a Division Bench of this High Court in First Appeal No. 141 of 1934[15] which case was not brought to the attention of the referring Bench. In that case the question was answered in the affirmative. That decision largely turned on two considerations: (1) a single Judge decision of the Judicial Commissioner's Court 14 N L R 82[16] following 15 Mad 300[9] which held that a half-sister's son has the same position as a sister's son in the line of heirs and (2) the true construction of the Act.

It may be noted at the outset that 14 N L R 82[16] also decides that under the Benares Mitakshara neither the sister, the step-sister (presumably what is meant is half-sister) nor the step-mother is an heir. In support of this latter proposition, Madras, Bombay, and Allahabad cases are relied upon. As Act 2 of 1929 is an Act altering the order of inheritance under Hindu law, and as its Preamble speaks of "the order in which certain heirs of a Hindu male" are entitled to succeed, it is said that it is quite impossible to so read its provisions as to bring into the line of succession any class outside the class of heirs before the Act was passed. So to do would cause the Act not merely to vary the order but to introduce new heirs. It is further said, half-sisters are not and never were heirs according to the Benares School of the Mitakshara. This very wide statement is founded on 14 N L R 82,[16] which, as above observed, is a single Judge decision. There are observations of Bose A. J. C. in 5 N L R 161[17] at p. 162 which at first sight point the same way but what the learned Judge was there considering was whether sisters come immediately after brothers. Such a claim founded on the alleged meaning of "bhratarah" as including not only brothers but sisters was treated as a matter no longer open to argument. It was indeed concluded by a decision of the Privy Council: 11 M I A 386.[18] It does not follow that because there the attempt failed to make the term "brother" include "sister", a sister is not in the line of heirs in another place for another reason. She may get into the line of heirs as a consequence of another Privy Council decision: 12 M I A 448.[19] The learned Judge in 5 N L R 161[17] also laid emphasis on the fact that a sister is not named in the order of succession and to construe "bhratarah" as meaning both "brother" and "sister" would let in a sister's son at a very early stage whereas bandhus they come in after gotraja sapindas and samanodakas. 10 C P L R 65[20] is a very short single Judge decision which regarded it as settled law that under the Mitakshara a son's daughter does not inherit: W R F B 75.[20a] The learned Judge adds:

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15. Shankar v. Raghoba *reported in* (1938) 25 A I R Nag 97=172 I C 858.
16. Ganno v. Beni, (1917) 4 A I R Nag 7=48 I C 948=14 N L R 82.
17. Mt. Lochan Bai v. Babai, (1909) 5 N L R 161 =4 I C 786.
18. Thakoorain Sahiba v. Mohun Lall, (1866) 11 M I A 386=7 W R 25 (P C).
19. Giridhari Lal v. Government of Bengal, (1867) 12 M I A 448 = 1 Beng L R P C 44 (P C).
20. Vithal Narain v. Ganpat Rao, (1897) 10 C P L R 65.

20a. Koomud Chunder Roy v. Seetakanth Roy, W R F B 75.

The view held by the Madras High Court in 17 Mad 182[21] to the effect that a grand daughter is a bandhu has never been "followed in these Provinces."

7 N L R 116[22] is a case governed by the Bombay School. There is however a statement at p. 120 that is relied upon :

> But the Hindu law is full of anomalies, and, in all but the Bombay School of law, the sister is no heir, though her son and grandson are admitted to be bandhus.

This is a misstatement, for, besides Bombay, Madras has long since admitted sisters to the line of heirs. This decision does not turn upon any modification of the Mitakshara by any text of special local authority; indeed reliance is placed upon a Dayabhaga case. The above are the cases in the Judicial Commissioner's Court which have to be borne in mind when considering whether half-sister or even full sister fall within the class of heirs in any province. 5 Mad 29[23] which is sometime quoted as an authority for the view that step-mothers and half-sisters are not, under the Mitakshara, in the line of heirs, actually decides that neither has a superior right to the grandson of the great grandfather of the propositus. Their Lordships observe at p. 30:

> The right of the half-sister to succeed is put forward as an alternative . . . . but we may at once say that, in competition with the claims of one who is a sapinda to deceased, though divided, a sister cannot succeed according to the law generally recognized in the Presidency of Madras: see 8 M H C R 88.[24]

It is quite clear that the Court was not purporting to decide that a sister cannot succeed for 8 M H C R 88,[24] which decided that a sister is an heir, is relied upon. It is the position of the sister that is being considered. In Madras the view (based on the text of Baudhayana) prevailed until 1874, that a woman is not within the line of heirs unless specially named. That view was however abandoned first in the case of a sister, in the above-mentioned case in 8 M H C R 88.[24] The history leading up to that decision is sketched out in 5 Mad 241[25] where the texts are also considered. The first position taken up may be stated in steps, as follows: (1) heirs rank as sagotra, sapindas, samanodakas, and bandhus ; (2) under the Mitakshara only those persons specially mentioned in Ch. 2, S. 6 Mitakshara can be included ; (3) sisters are not included ; (4) sisters are therefore not in the line of heirs etc.

That chain of reasoning was broken at its second link by a decision of the Judicial Committee in 12 M I A 448[19] to the effect that Ch. 2, S. 6, Mitakshara does not purport to contain an exhaustive enumeration of all bandhus who are capable of inheriting. This ruling caused Madras to take a new view of the position : see 5 Mad 241[25] at p. 243. That decision established the right of the sisters' son but it did more. It made it necessary to find some way of determining whether a person though not named in the texts was or was not in the line of succession and, if in, where.

Before 1868 (the date of the decision of 12 M I A 448[19]) an effort had been made to bring in the sister by regarding " brother" as including "sister". That attempt failed as a consequence of the Privy Council ruling in 11 M I A 386[18] at p. 403. In the Central Provinces, we have seen how that attempt failed in 5 Nag L R 161[17]. The next way out was the one that eventually succeeded in Madras. Granted that the list of bandhus given in Mitakshara Chap. 2, S. 6 is not exhaustive, one has to find some other test. In Bombay 5 Bom 110[26] stress was laid on Manu:

> To the nearest Sapinda male or female after him in the next degree the inheritance next belongs : then on failure of sapindas and their issue, samanodaka or distant kinsman shall be the heir.

It will be seen that within the class of sapindas propinquity or nearness is made the test. In 8 M H C R 88[24] nearness was made the test also in the case of samanodakas and bandhus. Thus many years ago, the following positions had been reached in Madras based on the Privy Council decisions : (1) The Mitakshara does not restrict inheritance to named classes. (2) In determining who, not being within a named class, should next succeed one considers nearness. (3) Nearness does not displace the order sagotra, sapindas, samanodakas, bandhus.

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21. Ramappa Udayan v. Arumugath Udayan, (1894) 17 Mad 182=4 M L J 30.
22. Ramji v. Nursha, (1911) 7 N L R 116 = 11 I C 907.
23. Kumaravelu v. Virana Goundan, (1882) 5 Mad 29.
24. Kutti Ammal v. Radakristna Aiyan, (1876) 8 M H C R 88.
25. Lakshmanammal v. Tiruvengada Mudali, (1882) 5 Mad 241.
26. Lallubhai Bapubhai v. Cassibai, (1880) 5 Bom 110=7 I A 212=7 C L R 445=4 Sar 164 (P C).

As was pointed out in 5 Mad 241,[25] at p. 248, there were, under the old texts, two classes of heirs: (1) Samanagotra sapindas (sagotra sapindas) or (2) bhinnagotra sapindas. The sister is clearly a sapinda. At an early date, the sages regarded her as a sagotra sapinda, but the fact that marriage took her outside the gotra, and gave her new hearth gods, caused her to lose her status as sagotra sapinda and become classed as a bhinnagotra sapinda. Mayukha set himself against this tendency, but though he has affected the position in Bombay, he has not affected it in the Central Provinces. But although she is not in as a sagotra, she is bhinnagotra sapinda. That is to say, she is a bandhu. As Sir Charles Turner observes in 5 Mad 241[25] at p. 250:

> As a Bhinnagotra Sapinda a sister falls within the definition of Bandhu, and except on the construction of the rule respecting female inheritance, that it absolutely excludes all but certain excepted females, and does not merely postpone their claims, there seems no sufficient reason for refusing her the position to which this Court has declared her entitled.

And again

> The Hindu law, which showed itself so jealous as to escheat as to prefer the right of the companions of a trader to the right of the King, appears also to have admitted the right of all women whose claims had, on other grounds sustainable, been postponed to male members of the family. A son, a son's son, the son of a grandson, or like them a brother or his offspring, or a sapinda or his issue, become entitled, O King ! to perform the funeral rites. On failure of these, the offspring of a samanodaka, or after them kinsmen on the mother's side, connected by the funeral cake, or by the oblation of water. But if both families be extinct, the rites, O King ! must be performed by women, or the obsequies of the deceased must be celebrated by intimate companions. Let the King cause obsequies to be performed for him who leaves no kinsmen nor wealth. (Vishnupurana, Dig., Bk. VI Verse 514).

Jagannadha observes on this text :

> If both families, that of the father and that of the mother be extinct, obsequies shall be performed by women, meaning daughters of the family and the rest.

After that, there follows in Madras a long series of cases including in the list of heirs women or persons deriving from women : 14 Mad 149,[27] (son's daughter), 13 Mad 10[28] and 15 Mad 421[29], (father's sister), 17 Mad 182,[31] (daughter's daughter), 21 Mad 263,[30] (brother's daughter) all the above come after male bandhus : 31 Mad 321.[31]

In determining who are "nearest" amongst sapindas one has two, at least, tests to choose from : (1) nearness in blood (2) spiritual efficacy. There have also been considered two important sub-divisions within the classes : (1) the superiority of the whole to the half blood, (2) the superiority of the paternal to the maternal blood. The case law is considered in A I R 1935 Mad 1017[32] and it is not necessary to re-state it here. The matter is only adverted to here, because if the cases are considered (and the observations of the Judicial Committee in 37 All 604[33] and in 61 M L J 442[11] are particularly important) it will be found that the greatest importance is attached to connexion in blood with an ancestor (male) and capacity to offer oblations. As will be seen from the texts cited above, even women can offer oblations if there is no one else and they come in after all males capable of offering oblations unless named.

If the right to inherit is so founded, it is apparent that a daughter by one wife and a daughter by another wife are, vis-a-vis the father, exactly on a parity, and, though one is postponed to the other on the principle that the whole blood is preferred to the half-blood each is equally near to a brother by the same father. (As Haridas J. observed in 4 Bom 37[34] at p. 47), illegitimate sons and legitimate sons, according to the old text writers, were brothers, "not only in the popular, but also in the legal acceptation of the term." Their Lordships of the Judicial Committee cite from this judgment with approval another passage in 18 Cal 151[35] and do not disapprove of any part of it. A Bench of this High Court relied on it in Second Appeal No. 132 of 1934.[36]

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[27] Nallanna v. Ponnal, (1891) 14 Mad 149=1 M L J 46.

[28] Narasimma v. Mangammal, (1890) 13 Mad 10.

[29] Chinnammal v. Venkatachala, (1892) 15 Mad 421=2 M L J 86.

[30] Venkatasubramaniam Chetti v. Thayarammah, (1898) 21 Mad 263.

[31] Venkata Narasimha Appa Rao v. Surnani Venkata Purusshothama Jagannadha Gopala Raw, (1908) 31 Mad 321=18 M L J 409.

[32] Navaneetha Krishna Marudappa v. Collector of Tinnevelly, (1935) 22 A I R Mad 1017=160 I C 647=69 M L J 682.

[33] Buddh Singh v. Laltu Singh, (1915) 2 A I R P C 70=30 I C 529=42 I A 208=37 All 604 (P C).

[34] Sadu v. Baiza, (1879) 4 Bom 37 (F B).

[35] Jogendro Bhupate Hurrochundra Mahapatra v. Nityanand Man Singh, (1891) 18 Cal 151=17 I A 128=5 Sar 596 (P C).

[36] Bhagwantrao Jairam v. Punjaram Sadashiv, *reported in* (1938) 25 A I R Nag 1.

It is contrary to the underlying ideas of the Mitakshara and of the society whose laws were there expressed to attach any particular importance, legally, to the fact that one daughter was born of one wife and another of another. Monogamy forms no part of the Hindu system. A man and many wives and concubines might be living together and all the children would be regarded as the children of the man, a distinction being made between the rights of the legitimate and illegitimate (but not to the exclusion of the latter) but none between the children of one wife and of another. To let in one as being the whole sister of the father's son (the propositus) and exclude another as being the half-sister altogether (there could be no such thing as a legitimate maternal half-sister) and even though there be no sister, seems to us not founded on any ascertainable principle or binding text, once one has got rid of the idea that inheritance of females is restricted to named classes.

On the other hand in some provinces it has been held that a sister is not an heir. This is the old Madras view which, in view of 11 M I A 386,[18] could not be arrived until 12 M I A 448[19] opened the way in the manner we have seen. In our opinion however, it is not necessary to show that "sister" is an heir in every part of India according to the current judicial opinion. It would be giving the Preamble to the Act under consideration an undue weight to make its application, so far as sisters are concerned, to any particular province depend upon whether Judges in that province have or have not admitted sisters within the class of heirs under the Hindu law. Indeed, the question we have to consider is not whether sisters are included and their position improved but whether half-sisters are included. It is not, in our opinion, right so to construe this Act as to give it an entirely different effect province by province according to the judicial opinions expressed on a highly debatable subject as to the ground for the inclusion or exclusion of sisters from the succession.

Next it is said that here we are not concerned with ancient texts but with a modern statutory amendment and we are pressed with the observations of the Privy Council in 23 Cal 563[37] at p. 572. What the Judicial Committee was there stating was that when an Act purports to be codifying the law it is destructive of its purpose to construe its provisions not according to their plain meaning but in the light of the pre-existing law. So to do brings in the very doubts and difficulties that the codification sought to settle.

Here we are not dealing with a codifying Act but an Act which purports to alter the order amongst Hindu heirs and it is desirable to see who were, before the Act, heirs. If sisters were but half-sisters were not, it might well be difficult to bring half-sisters in. We have examined the law as it stood before the Act and we have arrived at the conclusion that, at least as regards some Provinces of British India, both sisters and half-sisters were in the line of succession, though very low down in the line, before the Act was passed. But it is said though it may be that one of the sages writing a thousand years ago amidst a society where, at least amongst the wealthy, polygamy was the usual condition would, when speaking of "brother" or "sister" think in terms of the children of the same father, it is very different when a modern Hindu lawyer drafts an Act and when the Legislature passes it. Such an Act must be construed according to its plain intent. It is said there is nothing ambiguous about the word "sister."

As to this, we see no reason to differ from the view taken in First Appeal No. 141 of 1934,[15] viz. that the word "sister" includes "half-sister" (that is to say, a sister by the same father). In that case we declined to follow 55 All 725.[1] After this present judgment was written, our attention has been called to 18 Lah 525[38] where a Bench of the Lahore High Court also refused to follow 55 All 725.[1] We concur in the view there expressed (at p. 534) that the conclusion in 55 All 725[1] is expressed too broadly.

We accept the view that in its strictest meaning, "sister" means sister of the whole blood. But a Dictionary of the size and authority of Webster gives the primary meaning of sister as follows :

> A female who has the same parents with another person, or who has one of them only. In the latter case she is more definitely called a half-sister.

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[37] Norendra Nath v. Kamal-Basini, (1896) 23 Cal 563=23 I A 18=6 MLJ 71=6 Sar 663 (P C).

[38] Rameshwar v. Mt. Ganpati Devi, (1936) 23 A I R Lah 652=166 I C 753=I L R (1937) 18 Lah 525=39 P L R 529.

Of course there is a wide difference between a half-sister and a step-sister. A step-sister is not related by blood at all.

It is a far cry from the rules of succession in Hindu law to a Workmen's Compensation Act, but it may be pertinent to note that in 60 Cal 820[39] it was held that "unmarried" included "widowed" when used in the Workmen's Compensation Act. The Court observed that statutes should be construed so as to advance the remedy provided by the Act. So in A I R 1931 Lah 752[40] it was held that "brother" and "sister" as used in the Workmen's Compensation Act include "half-brother" and "half-sister". This conclusion was arrived at on the analogy of S. 27, Succession Act.

On the other hand, a Full Bench of the Rangoon High Court in 9 Rang 46[41] held that the term "brother" in the Workmen's Compensation Act does not include "half-brother" but this was so held because the Workmen's Compensation Act was treated as a quasi-penal statute so that its terms had to be given a restricted meaning. Otherwise, it would appear from the judgment that the English rule announced in (1853) 10 Hare 63,[42] (1888) 57 L J Ch 790[43] and (1903) 1 Ch 138[44] would have been followed, viz. that "brother" or "sister" includes brother or sister of the half-blood. We do not place reliance on those English cases however, because they were concerned with voluntary dispositions by private persons to which somewhat different canons of construction apply. In Termes de la ley "Demy-Sangue" is stated to include "brothers by the fathers' side" "brothers by one mother". In 9 Rang 46[41] at p. 48 it was observed that "brother" strictly means the son of the same parents but is often extended to mean the son of either parent in common. It is there added "whether the term is to be taken in its primary or secondary sense depends in each case upon the context in which it is found". With this observation we agree, and applying it here, regarding the purpose of the Act of 1929, considering the pre-existing law, noting the reasons given for the conclusion arrived at in First Appeal No. 141 of 1934,[15] we conclude that "sister" includes "half-sister". The reference is accordingly answered in the affirmative.

**Pollock J.**—I agree that the question referred to us should be answered in the affirmative. I desire to add only a few words. On the strength of the Preamble of Act 2 of 1929, "An Act to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate", it has been argued that if the sister was not an heir before this Act came into force, the Act would not make her an heir because the Act was intended merely to alter the order in which the persons who had previously been recognized as entitled to succeed and not to create new heirs. The contention seems to me to be devoid of substance. In the first place, as has been already pointed out, the Act applies to provinces where the sister was not regarded as an heir as well as to provinces where she was regarded as an heir and the Preamble was designed to apply to both. Secondly, the meaning of S. 2 read with sub-s. (2) of S. 1 seems to be clear at least in this respect that where the Mitakshara law applies the persons mentioned in S. 2 are entitled to succeed in the order so specified next after a father's father. In (1899) A C 143,[45] Lord Davey stated at p. 185: "Undoubtedly"—I quote from Chitty L. J.'s judgment, words with which I cordially agree—

> it is settled rule that the Preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms.

The Preamble cannot either restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt, and it is not unusual to find that the enacting part is not exactly co-extensive with the Preamble: *see* Maxwell's Interpretation of Statutes, 7th Edn. p. 39.

For the reasons given in the order of reference, I think that this Act must be read as part of the Hindu law as a whole, and it has been shown in the order of reference that wherever a sister and sisters's son are entitled to inherit then the half-sister and half-sister's son are also entitled to inherit on the general principle that the Hindu law recognizes no difference between the full blood and the half blood except in a competition inter se. A sister succeeds as the father's daughter and a half-sister having the same father is therefore an heir if the sister would be an heir. By interpreting "sister" as "father's daughter" the difficulties raised in 55 All 725,[1] 11 Luck 148[2] and 1937 A L J 767[3] would disappear. To exclude the half blood where the full blood is entitled to succeed would, in my opinion, be contrary to the general principle of Hindu law, and S. 2 of Act 2 of 1929 should be interpreted, so far as it is possible, in accordance with the notions of Hindu law. I would therefore answer the question referred to us in the affirmative.

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[39] Soleman Bibi v. East Indian Railway, (1933) 20 A I R Cal 356=1933 Cr C 494=143 I C 154=60 Cal 820=37 C W N 453.

[40] Dependants of Kartar Singh, In the matter of, (1931) 18 A I R Lah 752=1931 Cr C 1040=133 I C 554.

[41] In the matter of Maung Kyan, (1931) 18 A I R Rang 173=1931 Cr C 669=131 I C 784=9 Rang 46 (F B).

[42] Grieves v. Rawley, (1853) 10 Hare 63=22 L J Ch 625.

[43] In re Reed, (1888) 57 L J Ch 790=36 W R 682.

[44] In re Cozens, (1903) 1 Ch 138=72 L J Ch 39=87 L T 581=51 W R 220.

[45] Powell v. Kempton Park Racecourse Co. Ltd., (1899) A C 143=68 L J Q B 392=80 L T 538=47 W R 585=15 T L R 266=63 J P 260.

D.S./R.K. *Answered in affirmative.*

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## A.I.R. 1938 Nagpur 142

POLLOCK J.

*Chandrabhaga Bajirao 'Deshmukh* — Appellant.

v.

*Anandrao Vyankatrao Deshmukh and another* — Respondents.

Second Appeal No. 211-B of 1933, Decided on 10th April 1937, from appellate decree of Addl. Dist. Judge, Yeotmal, D/- 28th July 1933.

**(a) Transfer of Property Act (1882), S. 123 —Applicability—Berar — Gift of immovable property before Act applied to Berar — Gift is governed by Hindu law and delivery of possession is necessary—Gift by registered instrument but without delivery of possession is invalid.**

A gift of immovable property before the applicability of the Transfer of Property Act to Berar is governed by Hindu law and so delivery of possession is essential to make the gift valid. A gift therefore made by a registered instrument but without delivery of possession in such a case is invalid and does not convey a valid title to the donee : *Case law referred.* [P 143 C 1]

**(b) Registration Act (1908), S. 17—Relinquishment—Property of value over Rs. 100—Deed unregistered— Document does not confer valid title on transferee.**

Where a person relinquishes his right in immovable property of value more than Rs. 100, by an unregistered deed, such document does not confer valid title on the person in whose favour the relinquishment has been made though such person may hold possession thereof against the whole world except the true owner. [P 143 C 2]

**(c) Hindu Law—Joint family—Presumption —*A* and *B*, brothers, members of joint family acquiring property—Property recorded first in *B's* name as manager — On his death recorded in *A's* name alone — *B's* widow not protesting then—*A* mortgaging property on four occasions— Suit by *B's* widow for possession of half share therein—Property held joint property with incident of survivorship —*A* alone held entitled to it on *B's* death.**

Two brothers, *A* and *B*, members of a joint Hindu family, acquired jointly certain property. There was no evidence to show where this money came from or there was any nucleus of the joint family property. The property was first recorded in the name of *B* as manager of the joint family. After his death it was recorded in the name of *A* alone without any protest from *B's* widow. Subsequently *A* mortgaged it on four occasions. Later on *B's* widow brought a suit for possession of a half share thereof as belonging to her husband :

*Held* that the presumption arose that the parties intended to treat the property as joint property with incident of survivorship. *A* was therefore alone entitled to it on *B's* death by survivorship. [P 144 C 1]

J. R. Mudholkar — *for Appellant.*

V. V. Kelkar and M. R. Bobde — *for Respondents.*

**Judgment.**—This is a plaintiff's appeal arising out of a suit for possession of a half-share in a field survey No. 154, area 32 acres, 34 gunthas, in mauza Tuptakli in the Amraoti District. This field belonged at one time to Mt. Rajabai. On 1st October 1904 she executed a registered deed of gift in respect of this field in favour of her sister's sons Bajirao who was the husband of the plaintiff Chandrabhaga and Anandrao, defendant 1. It must now be taken as settled that she did not deliver possession to her nephews and there are documents on record which show that on 28th January 1907 she leased the field out to other persons. On 22nd March 1907 she sold this field by registered sale deed to the Ramchandra Sansthan of Tuptakli for Rs. 1000. This Sansthan was placed in possession and remained in possession for nearly 12 years. Rajabai died some time between 1907 and 1919. On 25th February 1919 the Sansthan accepted Rs. 800 from Bajirao and Anandarao and abandoned its claim to the field. Bajirao and Anandrao entered into possession and the field was first recorded in the name of Bajirao as manager of the family and after his death on 18th March 1920 in the name of Anandrao alone. The plaintiff who is Bajirao's widow contends that Bajirao and Anandrao were tenants-in-common of this field and that on the death of Bajirao she became entitled to a half-share. The present suit to enforce that right was not brought until 15th July 1931. The suit failed in both the lower Courts.

The first point to be decided is whether the gift which was not accompanied by delivery of possession was valid. The Transfer of Property Act was not applied to Berar until 1907. Under Hindu law, which therefore applies, a gift is not valid unless it is accompanied by delivery of possession. It has however been argued that this is a question which can arise only between the donor and the donee and I have been referred to the decision of the Privy Council in 11 Cal 121[1] and other cases. In the case before the Privy Council the donor was not in possession at the time when she made the gift. She did all that she could to complete the gift, and she admitted the gift in the suit. In 11 C P L R 11[2] the donor's widow supported the gift in the suit. The decision in A I R 1923 Nag 195[3] was apparently a decision under the Transfer of Property Act; so also was the decision in 49 Bom 388.[4] In 27 Bom 31[5] the donor was not in possession at the time of making the gift and there was no attempt made by the donor to revoke the gift. In the present case the circumstances are very different. The donor was in possession at the time when she made the gift and within three years she sold the property to the Ramchandra Sansthan, which was equivalent to a denial of the gift. In my opinion therefore the gift passed no valid title to Bajirao and Anandrao. When the Sansthan abandoned its right to the field it had a valid title, and no registered document was executed which extinguished its title or created a title in Bajirao and Anandrao. The Sansthan executed an unregistered receipt (Ex. P.2) which mentioned that there had been a gift to Bajirao in 1904, and that in consideration of the receipt of Rs. 800 from Bajirao, it had relinquished its claim to the field and recognized Bajirao as the full owner of the field. It has been suggested that the delivery of possession which followed this transaction was a delivery that validated the gift of 1904, but I think that it is impossible to hold that this delivery of possession was in pursuance of the deed of gift which had been made more than 14 years before. When the Sansthan executed this receipt and handed over possession, it had a perfectly valid title, which it professed to give up for Rs. 800; but, as there was no registered deed creating title in Bajirao and Anandrao, they acquired no valid title, though it is possible that they might have resisted any attempt by the Sansthan to regain possession by virtue of the doctrine of part performance.

It therefore follows that Bajirao and Anandrao had no title when they entered into possession on 25th February 1919, and on this ground the lower Appellate Court seems to have held that the plaintiff's claim must fail. It has however apparently not noticed that Anandrao, and defendant 2 (who claims through him), have exactly the same title as Bajirao had. When Bajirao and Anandrao were placed in possession by the Sansthan, they were entitled to maintain that possession against the whole world except the true owner. If Bajirao and Anandrao were tenants-in-common, then on Bajirao's death the plaintiff as his widow was entitled to whatever rights Bajirao had in the field, and she also was entitled to maintain that possession against all the world except someone with a better title. Anandrao's title to the field was no better than Bajirao's and it is not open to him to say that the plaintiff's suit must fail because she has no title, when he bases his title on the same transactions as she does. The question then narrows to this. Whether Bajirao and Anandrao were tenants-in-common or joint tenants of this field. They acquired possession of the field, though not title, by the payment of Rs. 800 to the Sansthan. There is no evidence to show where this money came from or whether there was any nucleus of joint family property. There is a finding, which is not now disputed, that Bajirao and Anandrao were members of a Hindu joint family, and apparently they were the only members of that family. In Sarkar's Hindu Law at page 341, Edn. 7 it is stated:

> When two or more undivided brothers or other collateral sapindas who had not inherited any

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[1] Kalidas Mullick v. Kanhaya Lal, (1885) 11 Cal 121=11 I A 218=4 Sar 578 (P C).

[2] Kishen Rao v. Mt. Rukhma, (1898) 11 C P L R 11.

[3] Krishna Bai v. Debi Singh, A I R 1923 Nag 195=71 I C 409.

[4] Atmaram Sakharam v. Vaman Janardhan, A I R 1925 Bom 210=87 I C 490=49 Bom 388=27 Bom L R 290 (F B).

[5] Joitaram v. Ramkrishna, (1903) 27 Bom 31=4 Bom L R 754.

ancestral nucleus, or had taken no aid from such nucleus if any, acquire and amass wealth solely by their joint personal exertion and skill in carrying on a trade, or otherwise, then it depends entirely on their intention whether they should hold the property as tenants-in-common like strangers entering into a partnership, or as members of a joint family, clothing the same with the legal qualities and incidents of joint family property, chief among which is survivorship.

In 27 Mad 32[6] at page 35 the learned Judges stated :

> The family is not shown to have had any ancestral property but it acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary, it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship.

In the present case after the field had been acquired from the Sansthan, it was recorded in the name of Bajirao as manager of the family. The presumption therefore arises that the parties intended to treat this property as joint property. The plaintiff Chandrabhaga seems to have understood that the property was joint family property because she allowed it to be recorded in the name of Anandrao alone after the death of Bajirao, and between 1920 and 1926 Anandrao mortgaged it on four occasions. My conclusion therefore is that the property was joint property and that on the death of Bajirao it devolved by survivorship on Anandrao alone. The plaintiff's suit must therefore fail. The lower Courts have held that Sonba, defendant 2 to whom the property was mortgaged by Anandrao and who has since foreclosed his mortgage, would be protected by S. 41, T. P. Act. The plaintiff, no doubt, stood aside and allowed Anandrao to appear as the owner of the property, but that is not enough in order to obtain the protection of S. 41. A transferee must allege and prove that he took reasonable care to ascertain that the transferor had power to make the transfer. In the present case there is no allegation or evidence that Sonba made any enquiry whatever into Anandrao's power to mortgage the property. Sonba therefore would not be protected by S. 41. The appeal therefore fails and is dismissed with costs. Counsel's fee Rs. 50.

A.L./R.K. *Appeal dismissed.*

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[6] Gopalasami Chetti v. Arunachellam Chetti, (1904) 27 Mad 32.

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## A. I. R. 1938 Nagpur 144

POLLOCK J.

*Baliram Shiwappa Komti and another* —Appellants.

v.

*Narayan and others* — Respondents.

Misc. Appeal No. 14-B of 1935, Decided on 10th August 1937, from order of Addl. Dist. Judge, Yeotmal, D/- 20th November 1934.

**(a) Berar Land Revenue Code (1928), S. 129 —S. 129 does not take away right of easement or other civil right—Person relying on easement may not apply under S. 129.**

S. 129 does not take away a right of easement or any other right acquired under the ordinary civil law. It merely gives the Deputy Commissioner power to give a right of way over the boundaries of other survey numbers, but it is open to persons who have a right of way acquired by easement to rely on their rights and not to apply to the Deputy Commissioner under S. 129. [P 145 C 1]

**(b) Berar Land Revenue Code (1928), S. 129 —Interpretation.**

The proceedings of the Berar Legislative Council cannot be referred to, in order to interpret the meaning of S. 129. [P 145 C 1]

E. M. Joshi — *for Appellants.*

D. R. Baxy — *for Respondents 1 and 2.*

**Judgment.**—The plaintiffs sued to establish a right of way from the village to their fields. This way runs partly over the boundaries of survey numbers of others and partly through the fields of others. The trial Court treated the suit as one to establish this right of way as an easement. The issue framed was whether the plaintiffs or their predecessors-in-title were using the ways for more than 20 years openly and as of right, and it held that the plaintiffs were entitled to this easement. On appeal the Additional District Judge held that the litigation was under S. 129 (3), Berar Land Revenue Code, and remanded the case for de novo trial, apparently under O. 41, R. 23, which can apply only if the suit has been disposed of on a preliminary point.

S. 129, Berar Land Revenue Code, gives the Deputy Commissioner power to decide claims by persons holding land in a survey number to a right of way over the boundaries of other survey numbers having regard to the needs of cultivators for reasonable access to their fields, and subsection (3) of that section gives any person aggrieved by the decision of the Deputy

Commissioner a right to institute a civil suit within one year to have it set aside or modified. There had been an application in this case to the Naib-Tahsildar who held that no relief could be given to the plaintiffs under S. 129 because the way that they claimed lay not altogether over the boundaries but lay in part through the fields of others. The plaint was badly drafted, probably by a petition-writer, but it is clear that the plaintiffs relied on a right of easement and the issue framed shows that the claim was understood in that sense.

Now S. 129 can never have been intended to take away a right of easement or any other right acquired under the ordinary civil law. It merely gives the Deputy Commissioner power to give a right of way over the boundaries of other survey numbers but it is open to persons who have a right of way acquired by easement to rely on their rights and not to apply to the Deputy Commissioner under S. 129. Here S. 129 would not apply to the entire right of way claimed by the plaintiff and the plaintiffs are therefore driven back on their claim of easement. The position has been entirely misunderstood by the learned Additional District Judge and I may also point out that the proceedings of the Berar Legislative Council cannot be referred to in order to interpret the meaning of S. 129. The appeal is therefore allowed and the case must go to the learned Additional District Judge for decision. The costs of both parties in this Court must be paid by the respondents. No counsel's fee as no certificate has been filed.

S.C./R.K. *Appeal allowed.*

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## * A. I. R. 1938 Nagpur 145

STONE C. J. AND PURANIK J.

*Laxman Anandrao and others* — Applicants.

v.

*Ramchandra Wasudeo Agasti* — Non-applicant.

Misc. Civil Case No. 11 of 1936, Decided on 11th October 1937, from judgment and decree of Subhedar, A. J. C., D/. 23rd October 1935 reported in A I R 1936 Nag 29.

*** Civil P. C. (1908), O. 47, R. 1—Review does not lie if Judge has overlooked apposite law : *A I R 1928 Nag 305=113 I C 896, Overruled*—Review does not lie where Judge has gone wrong in law unless error is apparent on face of record—Grant to Inamdar attracting Inam Rules in Berar Code—Judge holding that inam grant enures for benefit of his sub-grantees and exempting their estate from attachment—View though wrong review does not lie.**

The view that review lies if the Judge overlooks the apposite law is wrong. A Judge is supposed to know the law. There is only one correct view of the law though there may be many opinions as to what that view is. A Judge is assisted in arriving at the correct opinion by the argument of counsel. Whether counsel is helpful or not, whether the Judge has in mind or not a particular point, the Judge is supposed to have it in mind. If he makes a mistake his judgment proceeds on "an incorrect exposition of the law". It makes no difference whether that mistake is due to inadvertence, forgetfulness, ignorance, or other error unless that mistake or error is apparent on the face of the record, that is, amounts to an error which can be disclosed without referring to anything beyond the record : *A I R 1928 Nag 305=113 I C 896*, **Overruled.** [P 146 C 2; P 147 C 1]

The Judges are always bound by their oath to apply the law. If they fail to do so because they have overlooked a provision of law, their judgment proceeds on an incorrect exposition of the law and is not capable of review under O. 47, R. 1. Distinction cannot be drawn between a real blunder and a debatable point. All law is equally clear if the Judge is sufficiently able and equally difficult and doubtful if he is sufficiently inexperienced : *A I R 1924 Mad 98 and A I R 1937 Rang 56, Dissent.* [P 147 C 1]

The omission to raise a point of law is insufficient ground for allowing a review : *A I R 1938 Nag 41, Approved.* [P 147 C 1, 2]

Where land was granted by the Crown to an inamdar in a form that attracted the Inam Rules in the Berar Code and in particular Rr. 5, 11 and 15 and the Judge nevertheless held that the representatives of the donees from the predecessor in title of the inamdar had an estate that could not be attached as though they were inamdars :

*Held* that though the view was erroneous, review could not lie against it: *A I R 1922 P C 112, Rel. on.* [P 148 C 1]

K. B. Brahma — *for Applicants.*

T. L. Sheode — *for Non-applicant.*

**Order.**—This is an application to review a judgment delivered on 23rd October 1935* by a learned Additional Judicial Commissioner. The matter comes before another Court because that Judge has retired. The point of law is reasonably plain and can be stated thus : Land was granted by the Crown to a grantee in a form that attracted the Inam Rules in the Berar Code and in particular Rr. 5, 11 and 15. As a result, the inamdar-grantee is entitled to get a certificate which would give protection against attachment. In this case the ancestors of the inamdar-grantee had given a portion of the subject-matter of the grant to the ancestors of the plaintiff who claims protection from attachment for the subject-matter of this suit. The inam was however conferred on the inamdar-grantee and not upon the person entitled as representative of his grantee. The representative of that person did not apply to the Inam Commissioner, did not get the certificate given to inamdars, was consequently not called upon to pay a quit rent and receive a freehold estate as provided by R. 5: see also Rr. 11 and 15. The learned Judge nevertheless held that the representatives of the donees from the predecessor-in-title of the inamdar had an estate that could not be attached as though they were inamdars.

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* *Reported in* (1936) 23 A I R Nag 29 =161 I C 784.

We have little doubt that in so deciding, the learned Judge arrived at a wrong conclusion. That however does not dispose of this matter. This is a review. The question to what extent error of law can be raised in review is not without difficulty, and we have had our attention drawn to 25 N L R 104[1] at p. 106, A I R 1928 Nag 305,[2] 28 N L R 221,[3] A I R 1929 Nag 185,[4] 46 Mad 955,[5] A I R 1937 Rang 56,[6] 23 N L R 53[7] and finally the decision of the Judicial Committee in 3 Lah 127.[8] 3 Lah 127[8] is a decision of a Full Bench of the Judicial Committee of the Privy Council. From the arguments and a reference in the judgment it is clear that their Lordships considered the mass of conflicting decisions which existed, a conflict which probably was the reason for constituting a Full Bench, so as to set at rest finally this kind of question. The actual judgment is short but we think it establishes the following propositions: (I) Rule 1 of O. 47, is definitive of the limits within which review is permitted. (II) "Any sufficient reason" in that Rule means a reason sufficient on grounds analogous to those specified immediately before. (III) Procedure by way of review is different from procedure by way of appeal and arises only when there is, (a) new material overlooked by excusable misfortune, (b) mistake or error apparent on the face of the record, (c) other sufficient reason analogous to (a) or (b). (IV) It is not sufficient to found review that the Judge whose judgment is under review had "proceeded upon an incorrect exposition of the law" (see p. 132 as read in with p. 135).

This case was followed in 23 Nag L R 53[7] by a Bench of the Judicial Commissioner's Court and it was there held that V. a mistake of law is not in itself a sufficient mistake or error apparent on the face of the record to warrant a review. In that case review was sought on the ground that the decision was based on a judgment since overruled. It was laid down as an expansion in 3 Lah 127[8] that (see p. 55): VI. It is not sufficient that the mistake of law is due to following a bad precedent i. e. a precedent since overruled or reversed.

On the other hand a different view has been taken in 29 C W N 148[9] and 3 Pat 134.[10] In the latter case the decision proceeded on the ground that the overruling of the case relied on was "new matter." It was conceded that there was no error apparent on the face of the record. We are of the opinion that different considerations might well arise according as the decision followed and later reversed or overruled was or was not binding on the Court. This point does not arise for determination in this case.

On the other hand in A I R 1928 Nag 305[2] a learned Judicial Commissioner held that review lies where the Judge does not apply "the apposite law." That is, though it does not lie if he takes a wrong view or if he misinterprets the law, it lies if he overlooks "the apposite law." In our opinion this view is wrong and must be overruled. A Judge is supposed to know the law. There is only one correct view of the law though there may be many opinions as to what that view is. A Judge is assisted in arriving at the correct opinion by the argument of counsel. Whether counsel is helpful or not, whether the

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1. Mukundsa v. Motiram, (1929) 16 A I R Nag 73=116 I C 645=25 N L R 104.
2. British Equitable Assurance Co. Ltd. v. Rajaram, (1928) 15 A I R Nag 305=113 I C 896.
3. Mt. Rukhmabai v. Ganpatrao, (1932) 19 A I R Nag 177=140 I C 409=28 N L R 221.
4. Sheikh Kawdu v. Berar Ginning Co. Ltd., Akot, (1929) 16 A I R Nag 185=116 I C 427.
5. Murari Rao v. Balvanth Dikshit, (1924) 11 A I R Mad 98=76 I C 342=46 Mad 955=45 M L J 309.
6. Maung Po Hla v. Ma Ngwe Sint, (1937) 24 A I R Rang 56=167 I C 449.
7. Ramchandra v. Govindrao, (1925) 12 A I R Nag 266=87 I C 125=23 N L R 53.
8. Chajju Ram v. Neki, (1922) 9 A I R P C 112=72 I C 566=49 I A 144=3 Lah 127 (P C).
9. Brindaban Chandra v. Damodar Prosad, (1925) 12 A I R Cal 304=85 I C 65=29 C W N 148.
10. Garabini Kumarin v. Surja Narain Singh, (1924) 11 A I R Pat 250=75 I C 177=3 Pat 134=5 P L T 52.

Judge has in mind or not a particular point, the Judge is supposed to have it in mind. If he makes a mistake his judgment proceeds on "an incorrect exposition of the law." It makes no difference whether that mistake is due to inadvertence, forgetfulness, ignorance, or other error unless that mistake or error is apparent on the face of the record, that is, as we understand it, amounts to an error which can be disclosed without referring to anything beyond the record.

A I R 1929 Nag 185[4] raises a different point, viz. whether a Court which fails to observe a mandatory provision of an Act can review its judgment so as to give effect to such a provision. We observe that Judges are always bound by their oath to apply the law. If they fail to do so because they have overlooked a provision of law, their judgment proceeds on an incorrect exposition of the law and is not capable of review under O. 47, R. 1. That decision being a Bench decision, we say nothing more than that, on its facts, it is distinguishable. There is no question of any statutory mandatory provision here.

46 Mad 955[5] (see also A I R 1937 Rang 56[6]) apparently proceeds on the view that there is a difference between a real blunder and a debatable point. With respect, we are unable to agree. All law is equally clear if the Judge is sufficiently able and equally difficult and doubtful if he is sufficiently inexperienced. To one Judge a point in (say) Hindu law may seem transparently clear. To the same Judge a point in (say) tort may appear extremely doubtful. To another Judge of equal ability, differently trained, the first point may seem difficult and the second easy. To the ideal Judge both would appear perfectly plain.

In 25 N L R 104[1] at p. 106 Macnair, A. J. C. held that failure to notice a section in the Civil Procedure Code bore an analogy to a mistake or error apparent on the face of the record and was therefore within the expression "any other sufficient reason" as limited by 3 Lah 127.[8] If this means that an error dehors the record is analogous to an error apparent on the face of the record, we are unable to agree. It appears to us to be a case of a Judge proceeding on an incorrect exposition of the law. We respectfully agree with Grille J's. observations in I L R 1937 Nag 392[11] following 5 Pat L J 344,[12] that omission to raise a point of law is insufficient ground for allowing a review. We see no difference in principle between the case where counsel has failed to bring a point of law to the attention of a Court which is supposed to know it (however artificial such a fiction may be) and the case where the Judge has failed to notice it (which means that counsel has failed to bring it to the attention of the Court).

As examples of errors of law which are apparent on the face of the record we would cite 65 M L J 173[13] (appeal by creditor against order rejecting proof; Judge dismisses appeal and annuls the adjudication), and 6 Rang 794[14] (judgment delivered without notice to the parties). We are of the opinion that the rule in 3 Lah 127[8] whether "technical" or not (see 47 All 361[15]) is clear and is binding. It comes to this, that so far as O. 47. R. 1 is concerned, (we say nothing as to S. 151, which gives to a Court wide power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court) because a Judge has gone wrong in law that is no ground for a review, though it may found an appeal unless it be an error of the following order:

Let the erroneous conclusion of law be X. Let the correct conclusion of law be Y. If X is a proposition that, quite apart from the record, is erroneous, the Judge has proceeded on an incorrect exposition of the law and his error cannot be corrected in review under O. 47, R. 1. If X is erroneous because it proceeds on a premiss that can be shown from the record to be erroneous and which if it had been considered would result in conclusion Y and not X then it may be an error apparent on the face of the record and can be corrected in review. Whether this would be the appropriate remedy would, in our opinion, depend on the particular circumstances. If, even assuming a correction in the premiss, Y does not follow if one applies the train of thought contained in the judgment to the corrected premiss, then it may well be that it is not a case for review but for appeal, for the Judge's train of thought is wrong as well as his premiss.

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[11] **Dayanand Badrinarayan v. Laxmidas Gopalji, (1938) 25 AIR Nag 41=ILR 1937 Nag 392.**

[12] **Kamla Prasad v. Kunj Behari, (1922) 9 A I R Pat 119=57 I C 11=5 Pat L J 344=1 P L T 625.**

[13] **Chinna Venkatappayya v. Punnayya, (1933) 20 A I R Mad 631=145 I C 8:6=65 M L J 173 (F B).**

[14] **Maung Sein Myi v. Maung Tun Pe, (1929) 16 A I R Rang 70=114 I C 687=6 Rang 794.**

[15] **Narain Das v. Chiranji Lal, (1925) 12 A I R All 364=86 I C 168=47 All 361=23 A L J 56.**

In the present case the learned Judge had the same counsel before him and, we are told, had the same argument addressed to him. He refers in his judgment to the crucial R. 5, he does not mention Rr. 11 or 15 possibly because in his view, viz. that an inam grant to an inamdar enures for the benefit of his sub-grantees, they cease to be of importance. That this is a wrong view of the law we have little doubt, but were we to review that judgment for that reason, we should be doing the very thing that was stigmatized as wrong in 3 Lah 127.[8] We accordingly dismiss the review application but we make no order as to costs.

D.S./R.K. *Application dismissed.*

## ✲ A. I. R. 1938 Nagpur 148

STONE C. J. AND PURANIK J.

*Pandurang Gadiba Kunbi and others — Plaintiffs* — Appellants.

v.

*Abdul Hussain Isaji Bohri and another* — Respondents.

Second Appeal No. 72 of 1935, Decided on 12th October 1937, from appellate decree of Dist. Judge, Wardha, D/- 1st November 1934.

**✲ Civil P. C. (1908), S. 145—Father becoming liable as surety for decree passed against stranger — Interest of surety's sons can be taken in execution.**

The five propositions laid down in *A I R 1924 P C 50* are not exhaustive: *A I R 1924 P C 50, Explained.* [P 148 C 2]

Section 145 permits the execution of a decree (passed against a stranger) against the surety as though it were a decree passed against the surety though it may be that he is a party only for a limited purpose. Hence where a father has become liable as surety for a decree passed against a stranger, the interest of surety's sons can be taken in execution of the decree. The fact that the decree-holder has power to sue the surety instead of taking recourse to execution under S. 145 does not preclude the decree-holder seeking a shorter and less expensive remedy of execution under S. 145. [P 149 C 1, 2]

M. R. Bobde—*for Appellants.*

R. G. Rao and T. J. Kedar — *for Respondents Nos. 1 and 2 respectively.*

**Judgment.** — This second appeal raises a question as to the power of a decree-holder to take in execution the interest of the sons where the father has become liable as surety to an extent mentioned in the surety bond in the event of the dismissal of an appeal (No. 11 of 1928 on the file of the Judicial Commissioner's Court, Nagpur) brought by the defendant against the plaintiff. The sons took objection under O. 21, R. 58 when the decree-holder sought to execute the decree against their interest. The objection was overruled and this suit was brought within a year under the provisions of O. 21 R. 63. Two points were mentioned by the learned Advocate-General on behalf of the appellants. The first was as to whether certain items of the property were ancestral. It was said that five of the fields were not ancestral. This turns on the legal position that arises where property descends to a widow with a woman's limited estate which widow has a son who predeceases her leaving a son. The learned counsel, in our opinion quite rightly, feeling that the legal position was not sufficiently strong to merit the development of an argument along those lines, abandoned it and saved our time without any loss to his client. We are obliged to him and we wish that this wise discretion were more often exercised.

That leaves outstanding the other point which has its foundation in the Privy Council decision in 46 All 95[1] which is the case that lays down the famous five propositions about which there has been so much discussion in the various High Courts of India particularly in the Allahabad High Court. It is said that those are exhaustive propositions, that the only one that touches this case is proposition (2), and that proposition (2) limits the case where a son's interest may be taken in execution to the case where there has been a decree passed against the father following upon a debt which was not incurred by the father for an immoral purpose. In our opinion, the five propositions are not exhaustive and do not purport to be. What their Lordships were doing there was examining a number of somewhat conflicting cases of the High Courts of India and laying down certain propositions with a view to clarifying the position that arose out of those cases, and the propositions, which are expressly stated to result from that examination, are to be found at

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[1] Brij Narain Rai v. Mangla Prasad, (1924) 11 A I R P C 50 = 77 I C 689 = 51 I A 129 = 46 All 95 (P C).

p. 104. There may of course be other cases in which the sons may be liable for their father's debts. The foundation of the argument therefore disappears. Were it proper to regard those propositions as exhausting the possibilities, then it is argued that this is not a case of a decree against the father because the decree was made against strangers and the father is only made liable under S. 145, Civil P. C.; he is not made liable as a party, nor is he made liable as a person against whom a decree is passed, for, he is only to be deemed to be a party for a limited purpose; and though the decree may be executed against him, it is not a decree made against him, but a decree made against strangers that can be executed against him in the manner provided. That is the argument. Admittedly there is no case on the point, which in itself is surprising if this argument be sound, because this is the sort of position that must have arisen thousands of times in India of a father becoming liable as a surety and a decree-holder seeking to execute the decree against the surety by attaching joint family property under the provisions of S. 145.

In our view S. 145 permits the execution of a decree (passed against a stranger) against the surety as though it were a decree passed against the surety. It is not denied that, if a decree were passed against the surety, in the execution of that decree, it would be possible to take the sons' interest. This may be very hard, and it is urged that it is a hardship imposed by the rules of Hindu law and should not be extended to make liable the sons' interest as a consequence of the provisions to be found in a statute. Our view being, however, that the decree can be executed against the surety as though the decree had been passed against him (though it is not, and though it may be that he is a party only for a limited purpose), it follows directly that the sons' interest can be taken. It was urged that the contrary seems to follow from the fact that admittedly the decree-holder, instead of enforcing his rights by execution under S. 145, could sue the father. If the father were sued, it is not contested that the resulting decree passed against him could be enforced against his sons. The fact that there is a power of suit does not, in our opinion, preclude the decree-holder seeking a shorter and less expensive remedy, and the fact that such a suit would end in a decree that could be executed against the share of the sons strengthens the view that the decree could be executed against the share of the sons in the first place under S. 145. In all these circumstances, we are of the opinion that the learned Judge, Mr. Paranjpe, who has given a very careful judgment, was correct in the view he took. The appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 149

STONE C. J. AND PURANIK J.

*J. Cook and others* — Appellants.

v.

*G. H. Cook and others* — Respondents.

Misc. Appeal No. 68 of 1934, Decided on 8th October 1937, from order of Addl. Sub-Judge, First Class, Jubbulpore, D/-. 8th August 1934.

**(a) Jurisdiction — Objection to — Courts should not encourage frivolous objections as to valuation of suit – Objections based on over-valuation or under-valuation must be raised at earliest possible opportunity and where issues are settled at or before such settlement.**

Ordinarily a Court should not encourage frivolous objection as to the valuation of a suit on the part of defendants, if they are raised only with a view to protract litigation. [P 152 C 1]

Objections based on over-valuation or under-valuation must be raised at the earliest possible opportunity and in all cases in which issues are settled at or before such settlement as laid down in S. 21, Civil P. C. In a case in which there has been a deliberate over-valuation or deliberate under-valuation with a view to give jurisdiction to a particular Court that matter has to be investigated into, if an objection is raised at the earliest possible opportunity. The objections regarding valuation are in many cases such as are difficult to decide as value of a particular property is after all a matter of opinion and may vary; where the objection raised is of a nature which would show that the valuation put by the plaintiff is not grossly wrong but prima facie bona fide, it does not appear necessary for a Court to enter upon an elaborate enquiry regarding the valuation. If the over-valuation or under-valuation appears on the face of the plaint and is patent, it is the duty of the Court to return the plaint to the plaintiff to present it to the proper Court under O. 7, R. 10, but if it is not patent on the face of the plaint but objection is taken by the defendant that the property is over-valued or under-valued the Court may require the plaintiff to show that the suit has not been over-valued if there are prima facie grounds for showing that the suit is not properly valued, but not otherwise: *21 Mad 271, Foll.* [P 150 C 2]

**(b) Partition—Suit for—Value for purpose of jurisdiction—Value of share claimed and**

**not value of entire property is value for purpose of jurisdiction.**

The value of the share claimed and not the value of the entire property is the value for the purpose of jurisdiction in a suit for partition where the plaintiff claims partition and separate possession of his share : *15 C P L R 81 ; 33 Bom 658 ; 20 Mad 289 ; A I R 1933 Oudh 547 ; A I R 1929 Rang 211 and A I R 1924 Nag 86, Rel. on ; A I R 1923 Pat 342 and A I R 1925 Cal 320, Not foll.* [P 151 C 1]

D. N. Choudhuri — *for Appellants.*

K. B. Sheorey — *for Respondent 1.*

**Order.** — This is an appeal against an order returning the plaint for presentation to the proper Court. Plaintiffs sue the defendants for partition and separate possession of the properties in suit in which plaintiffs claim 17/30ths share after deducting 33 per cent. which is not the subject-matter of this suit. Plaintiffs valued the claim at Rs. 5100, the same being the value of plaintiffs' share. The defendants raised an objection that the claim was over-valued and that the proper value of the plaintiffs' share would be Rs. 2657-10-8 and this should determine the jurisdiction of the Court. The defendants contended that on proper valuation of the claim the suit was triable by the Subordinate Judge, Second Class, at Katni, and not by the Subordinate Judge, First Class, Jubbulpore, in whose Court the suit was instituted. The property which is the subject-matter of dispute consists of two factories known as Murwara Factory and Bhagwan Factory including the lands in which the factories stand, buildings and machinery.

The trial Court came to the conclusion that the value of the plaintiffs' share in these properties is Rs. 2839 and that the claim was triable by the Subordinate Judge, Second Class, Katni, and returned the plaint for presentation to the proper Court by its order dated 8th August 1934. The plaintiffs feeling themselves aggrieved by the decision have filed this appeal. Counsel for the appellants has raised two contentions before us : (1) that in a suit for partition and separate possession of joint property, the value of the entire property and not the value of the share to be partitioned determines the jurisdiction and as this value is admittedly more than Rs. 7000 the claim was triable by the Sub-Judge, First Class, Jubbulpore, and the order returning it is wrong ; (2) the trial Court was wrong in excluding from consideration the fact that the lands are quarry lands and they should have been valued as such and that the decision of the Court below valuing the lands at Rs. 15 per acre is wrong. They ought to have been valued at Rs. 100 per acre at the least and so valued the claim will be within the jurisdiction of the Court where it was laid.

Before dealing with the contentions raised before us, we wish to point out that objections regarding jurisdiction based on over-valuation or under-valuation have to be raised at the earliest possible opportunity, and in all cases where issues are settled at or before such settlement as laid down in S. 21, Civil P. C. S. 15, Civil P. C., lays down that every suit shall be instituted in the Court of the lowest grade competent to try it. In a case where there has been a deliberate over-valuation or deliberate under-valuation with a view to give jurisdiction to a particular Court that matter has to be investigated into if an objection is raised at the earliest possible opportunity. The objections regarding valuation are in many cases such as are difficult to decide as value of a particular property is after all a matter of opinion and may vary ; where the objection raised is of a nature which would show that the valuation put by the plaintiff is not grossly wrong but prima facie bona fide, it does not appear necessary for a Court to enter upon an elaborate enquiry regarding the valuation. If the over-valuation or under-valuation appears on the face of the plaint patent it is the duty of the Court to return it to the plaintiff to present it to the proper Court under O. 7, R. 10, but if it is not patent on the face of the plaint but objection is taken by the defendant that the property is over-valued or under-valued, the Court may require the plaintiff to show that the suit has not been over-valued if there are prima facie grounds for showing that the suit is not properly valued but not otherwise: 21 Mad 271.[1]

In the case before us though the objection regarding over-valuation was not taken by the defendants at the earliest possible opportunity before issues were framed, the Court below has allowed the objection to be raised and has enquired into it and has come to a decision that there has been an over-valuation. Such a course was not really permissible but we are satisfied in this particular case that the Court was justified in entertaining the objection at a later stage as there was an omission on the part of the plaintiffs to file Ex. P-52, which at once showed that the valuation as put on the plaint of this suit was deliberately exaggerated with a view to bring the case in the Court of the First Class Sub-Judge at Jubbulpore. The Court also thought it necessary to enquire into the question as the plaintiffs did not object to its being raised in proper time. Turning to the contentions raised by the appellants before us, the contention that the value of the entire property in dispute and not the value of the plaintiffs' share in it which they wish to claim by a partition as the criterion is based on 52 Cal 128[2] and 2 Pat 432[3] at p. 435. No doubt in the two cases to which our attention was invited the view has been taken that the value of the entire property determines the value for the purpose of jurisdiction, but the view that has been taken in the Judicial Commissioner's Court as early as 1902 is to be found in 15 C P L R 81[4] where it was laid down that the value of the share and not the value of the entire property is the value for the purpose of jurisdiction of a suit in a suit for partition where the plaintiff claims partition and separate possession of his share. This is also the view that has been taken by all other High Courts in India: *See* 24 All 381,[5] 33 Bom 658,[6] 20 Mad 289,[7] A I R 1933 Oudh 547,[8] A I R 1929 Rang 211[9] at p. 212 and 20 N L R 43.[10] The preponderance of authority is therefore in support of the view that the value of the share which the plaintiffs claim is the value for the purpose of jurisdiction, and the Judicial Commissioner's Court in Nagpur has taken that view. In this particular case the plaintiffs themselves in all probability following the decisions of the Judicial Commissioner's Court in these Provinces valued the claim in the Court below according to the value of the share which the plaintiffs claim and not the value of the entire property as now contended before us for the first time. We see no reason to differ from the view taken in the Judicial Commissioner's Court and overrule the first objection.

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[1] **Koti Pujari v. Manjaya, (1898) 21 Mad 271.**

The next contention raised by the appellants is regarding the value of the land in which the plaintiffs claim share. It is contended that the lands on a part of which the factories in suit stand are quarry lands and as such are very valuable; the estimate of the Court below, viz. Rs. 15 per acre, is very low and it is contended that the Court below should have valued this land at Rs. 100 per acre at least. Under S. 213, Land Revenue Act, Government is the owner of all minerals, mines and quarries and the lower Court was justified in valuing this land without taking into consideration the fact that it is quarry land. The owners of these lands have no right whatsoever in the quarries in these lands. They are entitled only to the surface. The lower Court has rightly remarked that these lands are not cultivating lands but such as do not yield any income whatsoever. The plaintiffs examined a number of witnesses to prove that the value of these lands is at rates varying from Rs. 100 per acre to Rs. 200 or even more, but these statements were made by them treating the lands as quarry lands. The plaintiffs' own witness P. W. 6 who was a Patwari of the village had to admit in cross-examination that no one would care to purchase the lands without the quarries; it therefore necessarily follows that the value of the lands without the quarry is practically nil, and this is what the defendants contended. The Court below has taken on an average Rs. 15 per acre for such lands. We are of the opinion that the estimate of the lower Court in this respect is not incorrect. The values of the other items of the property were not disputed before us. We therefore uphold the finding of the Court below regarding the values of the properties in dispute as found by it. Apart from the valuation arrived at by the Court below on the evidence on record, we have on record an admission by the plaintiffs as contained in Ex. P.52 in which the plaintiffs and defendants both put down the value of these two factories including the lands, machinery and everything appurtenant thereto at Rs. 7000, namely Rs. 5000 for the Murwara factory and Rs. 2000 for the Bargwan factory. The defendants by their supplementary statement dated 31st March 1933 drew the attention of the Court and the plaintiffs to this document Ex. P.52 which was admitted by all the parties as correct in Civil Suit No. 23 of 1925. According to this document the value of the plaintiffs' share, namely 17/30ths share after deducting 33 per cent. would come to Rs. 2657-10.8. When their attention was drawn to this document the plaintiffs admitted that this was the value that was mentioned in that document but stated that they were not bound by it and that the correct valuation is Rs. 10,000 for Murwara factory and Rs. 3500 for the Bargwan factory. The plaintiffs have not been able to show as to why they were not bound by the statement made in this document. Since this statement was made, it is clear from the evidence on record that the factories being not in working order have depreciated in value. The finding of the Court below therefore that the plaintiffs have overvalued the claim is such as cannot be challenged in appeal, and the value arrived at by the Court below is proper in the circumstances of the case and in consonance with the statement of the parties made in the previous suit. The second contention raised by the appellants has therefore no force and fails.

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[2] Rajani Kanta v. Rajabala Dasi, (1925) 12 A I R Cal 320=85 I C 870=52 Cal 128=29 C W N 76.

[3] Ranjit Sahi v. Muhammad Qasim, (1923) 10 A I R Pat 342=72 I C 916=2 Pat 432=4 P L T 257.

[4] Jafar Hussen v. Abdul Kader, (1900) 15 C P L R 81.

[5] Wajih-ud-din v. Waliullah, (1902) 24 All 381 =1902 A W N 88.

[6] Dagdu v. Totaram, (1909) 33 Bom 658=4 I C 243=11 Bom L R 1074.

[7] Velu Goundan v. Kumaravelu Goundan, (1897) 20 Mad 289=7 M L J 30.

[8] Harbhan Dat v. Ladli Saran, (1933) 20 A I R Oudh 547=146 I C 582=9 Luck 219=10 O W N 1196.

[9] Ma Fatima v. Monin Bibi, (1929) 16 A I R Rang 211=118 I C 122=7 Rang 164.

[10] Bhaddoo v. Saddoo, (1924) 11 A I R Nag 86= 81 I C 766=20 N L R 43.

Ordinarily a Court should not encourage frivolous objections on the part of the defendants' valuation if they are raised only with a view to protract litigation and had we not been satisfied in view of the admission of the plaintiffs regarding the values of the property as made in the previous suit, we would not have entertained the objections. In view of that admission and in view of the false claim that is being made for valuing the lands as quarry lands we are satisfied that this is a case in which over-valuation of the claim is grossly exaggerated deliberately with a view to have the case tried in a Court of higher jurisdiction though the suit was really triable by a Sub-Judge, Second Class, at Katni, which is the proper place for the trial of such a suit. As both the contentions raised by the appellants have failed and there is no other contention raised before us the appeal is dismissed with costs. Counsel's fee Rs. 50.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 152

VIVIAN BOSE AND PURANIK JJ.

*Dalchand Mulchand and others* — *Plaintiffs* — Appellants.

v.

*Hasanbi w/o Ali Razakhan and others* — *Defendants* — Respondents.

First Appeal No. 138 of 1934, Decided on 26th July 1937, from decree of Sub-Judge, First Class, Chhindwara, D/- 30th April 1934.

**(a) Deed — Contents — Proof — Certified copy.**

The contents of a document can be satisfactorily established by producing a certified copy. [P 153 C 2]

**(b) Deed — Execution — Burden of proof— When document is admitted to bear signature, and if nothing else is known, execution can be proved by mere signature — Burden shifts upon person alleging execution nugatory.**

The initial burden of proving execution of a document when it is denied is upon the person alleging execution. But if nothing else is known then the mere fact that a document is admitted to bear a certain signature and that it comes from proper custody ought to be enough to raise an inference that it was signed with the intention of execution. This inference arises in India directly from S. 114, Evidence Act. Persons do not ordinarily sign documents without intending to execute them : that is not the common course of human conduct, nor yet the common course of their public or private business. Consequently if any person wants to rely on an exceptional circumstance, if he wants to show that in some particular instance the ordinary rule was abrogated surely he must prove it and thus the burden shifts on him : *A I R 1924 Nag 103 and 9 N L R 8, Dissent.* [P 154 C 2; P 155 C 1]

**(c) Deed—Execution—Proof.**

It would be a serious thing to hold that execution cannot be proved except by direct evidence. [P 154 C 1]

**(d) Deed — Person having right to convey property conveying it to his wife in lieu of dower debt — Recitals in deed stating that consideration passed — Persons claiming through transferor claiming that consideration did not pass and property in fact belonged to them — Onus to show this is on them.**

A person having an undoubted right to convey certain property conveyed it to his wife in lieu of dower debt and the recitals in the deed of conveyance said that consideration did pass. The persons claiming through him claimed that consideration did not pass and the property in fact belonged to them :

*Held* that the burden to show this was on them and they were in no better position than the transferor through whom they claimed : *13 C P L R 1*; *13 C P L R 69*; *A I R 1926 P C 77 and A I R 1927 PC 237*, *Rel. on.* [P 156 C 1]

**(e) Deed — Validity — Transfer by person having authority — Recitals stating that consideration did pass — Mere fact that consideration is wrongly stated will not invalidate deed.**

Where a person having an undoubted right to transfer certain property conveys it to his wife in lieu of dower debt and the recitals in the deed of conveyance state that consideration did pass, the mere fact that the consideration is wrongly stated in the deed will not be enough to invalidate the deed : *27 All 271* (*P C*), *Rel. on.* [P 156 C 2]

D. T. Mangalmoorti — *for Appellants.*

A. V. Wazalwar — *for Respondents 1 to 6 and 8 to 10.*

**Judgment.**—This appeal arises out of a suit for foreclosure of a mortgage dated 7th July 1924 executed by the first five defendants and one Ayadat Ali Khan who is now dead. The first two defendants were major at the date of the mortgage and the remaining mortgagors were minors. They were represented in the transaction by their mother, the first defendant, Mt. Hasan Bi. The litigation was carried up to the Court of the Judicial Commissioner which upheld the mortgage, that is to say its execution, the passing of consideration and the absence of fraud, but held that the minor defendants were not bound as their mother had no power to alienate their shares. The case was therefore sent back to ascertain the extent of the minors' share in the mortgaged property. The appeal is thus confined to the house property claimed in paras. 1 (g), 5 and 6 of the plaint.

The plaintiffs' case is that these houses belonged exclusively to the minors' mother Mt. Hasan Bi. The allegation is that these properties were transferred to her by her husband in lieu of dower by two deeds of which Exs. P.45 and D.47 dated 2nd October 1912 and 31st August 1920 are copies. The originals are with defendant 1 who did not produce them though noticed to do so, therefore the plaintiffs tendered secondary evidence in the shape of certified copies obtained from the Registration Department. These two deeds are attacked by the defendants (who are the respondents 3 to 5 here) as sham transaction (the word actually used is bogus) entered into with a view to deprive two of the transferor's sons of their inheritance. They urged that they were not meant to be acted on and were never given effect to. Dealing with this question first, the learned Judge of the lower Court threw the burden of proof on the plaintiffs and held that they had not proved the execution of these documents and also that satisfactory secondary evidence of their contents had not been given. As regards consideration he held that the extent of the Mehr fixed had not been proved.

We confess we are at a loss to understand how the contents of a document can be more satisfactorily established than by producing a certified copy. Even the defendants themselves have not questioned the accuracy of these copies or thrown any doubt upon them. If they had wanted to do so they could easily have produced the originals. In the circumstances we are surprised at the comment of the learned Judge about this matter. Turning to the question of execution, the defendants admit that they signed the deed. Defendants 3, 4 and 5, are the only ones interested in this question and the pleading on their behalf is as follows :

> The recitals of the mortgage deed that their houses were assigned to Hasan Bi in lieu of her Mehr by registered deed of transfer dated 2nd October 1912 and 31st August 1920 are not true. That since before the year 1910 there was ill-feeling between Khan Bahadur Ali Raza Khan and his sons Walayat Ali Khan and Umardaraz Khan due to certain family affairs. Khan Bahadur Ali Raza Khan with a view to deprive these people from inheritance of his property executed the above two bogus assigned deeds in favour of Mt. Hasan Bi which were never intended to be acted upon by anybody.

In our opinion this is an admission which throws the burden of proving the sham nature of the transaction upon the defendants who assert it. We are aware that there is authority to the contrary. In 20 N L R 7[1] for instance it was held that an admission by the defendant that a document bears his signature coupled with an assertion that it had been placed upon a blank piece of paper upon which the rest of the document was fraudulently scribed was not an admission of execution and so the burden of proof lies upon the plaintiff. One of us (Bose J.) recently came to the opposite conclusion in Second Appeal No. 208-B of 1935. In view of this conflict of opinion we think it desirable to examine the question at length. We however take the liberty of freely reproducing the reasons and language of the unreported judgment. As an abstract proposition it is beyond doubt that the initial burden of proving execution when it is denied is upon the plaintiff. The real question we have to decide here is not that but whether this onus can be discharged by mere proof of signature: not proof of execution as such but by bare proof of signature. With the utmost respect for the learned A. J. C. who decided 20 N L R 7[1] we think it can.

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[1] 1. Devidas v. Mamooji, A I R 1924 Nag 103=78 I C 104=20 N L R 7.

Quite apart from all technical considerations what is the inference that an ordinarily careful person would draw from a letter or document which he knows or is assured bears a man's signature? Which is more in accordance with the ordinary course of human affairs? What is the common course of business?—to sign a blank piece of paper and hand it over to strangers, or, as here, solemnly to execute deed with no intention of acting on them, or to affix one's signature to a document one has read and understood, or had explained, in token of execution with the full intention of giving effect to it? We think it would be a serious thing to hold that execution cannot be proved except by direct evidence. What is to happen when everybody who can speak about the matter is dead and the document is less than 30 years old? How often does anyone but the executant see a cheque or a promissory note signed? What can a plaintiff do in such cases but adduce bare proof of signature, and yet according to the view in 20 N L R 7,[1] which was a case of a promissory note, that would not be enough.

We are aware this view does not stand alone. An earlier ruling of the Nagpur Judicial Commissioner's Court in 9 N L R 8[2] at p. 9 is to the same effect:

> The mere fact that a piece of paper purports to have been bought in the plaintiff's name and to bear his signature is by itself no indication that he executed it.

This is also the view of the Rangoon High Court in 5 Rang 527.[3] A number of rulings in various unauthorized reports are to the same effect. A I R 1931 Pat 219,[4] 20 A L J 672[5] and A I R 1933 Pat 129.[6] With the utmost respect we cannot agree.

We have no quarrel with the general proposition that proof of signature is not necessarily proof of execution and that an admission that a document bears a man's signature is not necessarily an admission of execution. The circumstances of the case may negative such an inference. We fully realize that quite apart from fraud cases may arise in which a document is signed without any intention of present execution; for instance, a man might sign a fully drawn up contract and put it in his pocket without having any intention of executing it. He may have signed with the intention of delivering it at some later date if a certain event should happen and of tearing it up if it should not. That of course would not amount to execution, not even to conditional execution. It would not create even a contingent interest in the subject-matter of the instrument. But surely if nothing else is known then the mere fact that a document is proved to bear a certain signature and that it comes from proper custody ought to be enough to raise an inference that it was signed with the intention of execution. Surely it is evidence by which execution can in conceivable circumstances be proved.

This seems to be the view of the learned author of Taylor's Evidence, Vol. 1, p. 142:

> Courts are in general bound to presume prima facie in favour of the deeds which appear to have been duly executed.

In our opinion this inference arises in India directly from S. 114, Evidence Act. Persons do not ordinarily sign documents without intending to execute them: that is not the common course of human conduct, nor yet the common course of either public or private business. Consequently if any person wants to rely on an exceptional circumstance if he wants to show that in some particular instance the ordinary rule was abrogated surely he must prove it. See also S. 106, Evidence Act. If it is accepted that mere proof of signature constitutes prima facie evidence of execution, that it does furnish the necessary scintilla of evidence which would in a jury trial prevent the case from being withdrawn from the jury, then who would fail if nothing else is known beyond the one fact that a document bears a man's signature and comes from proper custody? Surely the person who asserts that the usual course of business was not followed in that particular case. This is the view of the Allahabad High Court in 50 All 145.[7] Ashworth J. quotes the following passage from Pipson on Evidence which we think lays down the right rule:

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[2] Mahadeo v. Vithoba, (1913) 9 Nag L R 8=18 I C 853.

[3] Hoe Moh v. Seedat, A I R 1927 Rang 319=105 I C 361=5 Rang 527.

[4] Ramlakhan Singh v. Jog Singh, A I R 1931 Pat 219=134 I C 695=12 P L T 233.

[5] Pirbhu Dayal v. Tula Ram, A I R 1922 All 401=68 I C 809=20 A L J 672.

[6] Sundar Chaudhari v. Lalji Chaudhri, A I R 1933 Pat 129=145 I C 698=14 P L T 727.

> The burden of proof may be shifted not alone by rebuttable presumptions of law but by presumptions of fact of the stronger kind or indeed by any species of evidence sufficient to raise a prima facie case.

Even A I R 1931 Pat 219,[4] which takes the opposite view, states that the fact that the defendant's thumb impression appears on a document is "a very strong piece of evidence in favour of the plaintiff." If it is and if nothing more is known then why should it not be legally sufficient to discharge the initial onus? The learned A. J. C. who decided 20 N L R 7[1] also looks at the matter in another way. He says that an admission made by a defendant that a piece of paper bears his thumb impression when qualified by the statement that it had been affixed to a blank piece of paper must be used subject to the qualification or not at all. Here again, with the utmost respect, we think the rule has been misunderstood. It was expounded by the Privy Council in 39 Bom 399[8] at p. 409 and all that their Lordships said was that:

> An admission in a pleading cannot be dissected in the same way as a witness's testimony can. If it is made subject to a condition it must be either accepted subject to the condition or not accepted at all.

The claim in their Lordships' case was based on a promissory note. The defendants pleaded that by an oral agreement the parties had agreed that the defendants' liability should cease on a certain date. The plaintiff's case was that the liability was to cease only if full security for the loan were furnished by that date and as it had not been furnished the liability still remained. What then was the admission? Merely this: that a collateral oral agreement had been entered into between the parties. There was no admission about the terms of the agreement, and as the question of liability turned on that point their Lordships naturally held that the plaintiff's admission that there had been an agreement about the cessation of liability could not be dissected to mean that it was unconditional and in accordance with the terms pleaded by the defendants.

This is not the case here and as we view the matter was not the case in 20 N L R 7.[1] In that case the plaintiff's statement when analyzed consisted of three separate assertions of fact: (1) that the thumb impression in question was the defendant's, (2) that it had been affixed to the document in question as opposed to the piece of paper on which it appeared, and (3) that it had been so affixed in token of execution. The defendant admitted the first of these three statements and denied the other two. As regards the first there was no qualification whatever. Of course this was not an admission of liability and not an admission of execution. It was merely admission of the one fact that the thumb impression on the paper was the defendant's. That being so, as we view the law the plaintiff was not called upon to prove that fact. But if that is accepted then according to our view an inference arises under the law about execution and not because of any admission made by the defendants: an inference that the thumb impression had been affixed in token of execution. The plaintiff would succeed if nothing more is known not because the defendants had admitted execution but because the plaintiff has established a prima facie case.

So also in the present case. The fact that the documents in question bear the executant's signatures is unconditionally accepted. There is no qualification in the pleadings about that fact. That in our opinion is enough to discharge the initial onus which lay on the plaintiffs to prove execution and the burden then shfited to the defendants to prove the special circumstances which according to them rendered this execution nugatory. We cannot see how the plaintiff can be put in a worse position than he would have been if the defendant had denied both signature and execution. In such a case surely the moment the plaintiff proved the signature the burden would shift to the defendant to show that it did not import execution. If the defendant admits the signature and denies execution then all that happens is that the plaintiff is relieved of the necessity of proving the signature, but except for that he is in exactly the same position as he was before.

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[7] Sita Ram v. Nanku, A I R 1928 All 16 = 106 I C 250=50 All 145=25 A L J 833.

[8] Motabhoy Mulla Essabhoy v. Mulji Haridas, A I R 1916 P C 2=29 I C 223=42 I A 103 = 39 Bom 399 (P C).

Turning next to the question of consideration, both Exs. P.45 and D.47 purport to have been executed for the satisfaction of a dower debt. On the face of the documents their considerations must be taken to have passed. The defendants who are now challenging these transactions claim through the executant who was their father. There can be no doubt that he had the right to convey and that the defendants had no interest in the properties at that date. That being so, the burden of proving that consideration did not pass when the recitals say that it did is on the defendants. They can be in no better position than the transferor through whom they claim. We are in respectful agreement with the decisions in 13 C P L R 1[9] and 13 C P L R 69[10] at p. 70 on this point. Therefore so far as the plaintiffs are concerned, they have established a prima facie case and for the moment need go no further. The burden is now on the defendants to show that the properties which on the face of the document purport to have been conveyed to their mother and which their father had an undoubted right to convey, in fact belong to them : see 4 Rang 518[11] at p. 520 and 5 Rang 852[12].

It is urged that their Lordships have laid down a different rule in A I R 1930 P C 255.[13] We do not think so. That was a case under O. 21, R. 63, Civil P. C., and the usual rule was applied, namely that the burden of proof lies on the plaintiff who has lost in the objection proceedings. No objection proceedings intervened here and so we are not hampered by the special rule which applies there. A I R 1933 Nag 185[14] was also a case under O. 21, R. 63 and so need not be considered any further. Turning now to the defendants' evidence their case rests almost wholly on an entry in a diary of which Ex. 3 D.7 is a copy. The original has been filed a Ex. P.17 in a suit between two of the sons of K. B. Ali Raza Khan, who is the husband of the first and father of the remaining defendants. It purports to have been made on 21st March 93 and states that the Khan Bahadur's second marriage was performed with the first defendant on a Mehr of Rs. 300. It is argued that if this is true then it is impossible to accept the recitals in Exs. P.45 and D.47, one of which purports to have been in satisfaction of a Mehr debt of 1000 and the other of Rs. 400.

We doubt if this would be enough. It is clear that the Khan Bahadur never at any time repudiated either transaction. It is equally clear that the first defendant upheld them in 1924 when the mortgage in suit was executed and that she still upholds them. She repudiated the mortgage on a number of grounds in her pleadings but not these documents. In her evidence as D. W. 3 she not only claimed to be in possession of the two documents but also said that her husband had executed them in her favour. In the circumstances, we doubt if the mere fact that the consideration is wrongly stated in the two deeds, if fact it be, would be enough to invalidate them: see 27 All 271[15] at p. 289. But we need not go so far as that. We are not prepared to accept this statement in the diary at its face value though we agree that the handwriting of the late Khan Bahadur has been duly proved.

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The result is that the appeal succeeds, our view being that the remaining defendants have no interest in the house property in appeal. Costs will be paid by the defendants 3, 4 and 5.

D.S./R.K. *Appeal allowed.*

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[9] Burkur Ram v. Lalji Ram, (1900) 13 C P L R 1.

[10] Nandlal v. Krishnaji, (1900) 13 C P L R 69.

[11] Maung Po Kin v. Maung PoShein, A I R 1926 P C 77=96 I C 142=4 Rang 518 (P C).

[12] V. E. A. R. M. Firm v. Maung Ba Kyin, A I R 1927 P C 237=105 I C 788=5 Rang 852.

[13] Mohammad Ali Md. Khan v. Mt. Bismillah Begam, A I R 1930 P C 255 = 128 I C 647 (P C).

[14] Mannoolal v. Nandkishore, A I R 1933 Nag 185=143 I C 419.

[15] Achal Ram v. Kazim Husain Khan, (1905) 27 All 271=32 I A 113=3 Sar 772=8 O C 155 (P C).

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## * A. I. R. 1938 Nagpur 156

VIVIAN BOSE AND PURANIK JJ.

*Pandit Krishna Rao Dattatraya Phalke* —Appellant.

v.

*Trimbak and others* — Respondents.

Misc. Civil Case No. 100 of 1937, Decided on 13th July 1937, from judgment and decree of Addl. Dist. Judge, Saugor, D/- 28th February 1935.

**✲ (a) Limitation Act (1908), S. 5—Court is entitled to look into conduct of party before date when appeal ought to have been filed.**

The Court while exercising the discretion vested in it will necessarily look into the conduct of the appellant and will only exercise its discretion in favour of a person who is found to be diligent and not in favour of one who is guilty of laches or negligence till the date when the appeal ought to have been filed: *Case law referred.* [P 159 C 2]

**(b) Limitation Act (1908), S. 5—Negligence of party — Negligence on part of pleader's clerk is negligence on part of appellant—Appellant is not entitled to extension of time.**

The appellant solely relied upon the advice of his pleader's clerk who gave him the information carelessly about the duration of vacation of the Court and in consequence filed his appeal beyond the period of limitation :

*Held* that as the pleader's clerk was the agent of the appellant, negligence on the part of the clerk amounted to negligence on the part of the appellant and hence time could not be extended under S. 5: *A I R 1917 Lah 407*; *A I R 1927 Pat 232*; *A I R 1925 Oudh 189 and 5 N L R 25, Rel. on*; *A I R 1929 Cal 240 and A I R 1924 Bom 399, Disting.*; *Case law referred.* [P 161 C 1]

**(c) Limitation Act (1908), S. 5—Discretion of Court — Court must be fully satisfied of justice of grounds on which extension of time is to be granted—Court must also be satisfied that applicant was diligent and not negligent —Extension of time cannot be granted merely out of benevolence.**

When the time for filing the appeal has once passed, a very valuable right is secured to the successful litigant and the Court must therefore be fully satisfied of the justice of the grounds on which the appellant seeks to obtain an extension of time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained. The period for preferring an appeal cannot be extended simply because the appellant's case is hard and calls for sympathy, nor will the Courts extend the period of limitation merely out of benevolence to the party seeking relief. A Court in granting the indulgence must be satisfied that there was diligence on the part of the appellant and that he was not guilty of any negligence whatsoever: *30 Bom 329*; *34 Cal 216 and A I R 1933 Lah 681, Rel. on.* [P 161 C 2]

**(d) Limitation Act (1908), S. 5 — Duty of applicant—Burden of proving sufficient cause lies on applicant.**

It is the duty of a litigant to know the last date on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in S. 5, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. [P 161 C 2]

**A. V. Wazalwar** — *for Appellant.*

**T. L. Sheode and W. B. Pendharkar** — *for Respondents.*

**Order.**—This memo of first appeal was presented on 2nd July 1935 on a court-fee of Rs. 15 on which the office put up a note that the memo was time-barred by 17 days and that the same was not duly stamped. The question of court-fee was argued before Niyogi J., and he held by his finding dated 9th July 1936 that ad valorem court-fee was payable and granted the appellant time to make up the deficiency. The court-fee was accordingly paid and the question for decision now is as to whether this memorandum of appeal should be admitted, the delay in its presentation by 17 days being condoned. Along with the memorandum of appeal the appellant filed an application under S. 5, Lim. Act, requesting the Court to condone the delay in filing the appeal. The purport of the application is as under:

> The appellant is a resident of Gwalior and ignorant of the practice of the Judicial Commissioner's Court at Nagpur. He conducted the litigation out of which this present appeal arose with the help of his pleader Mr. B. L. Seth at Saugor. He applied for certified copies of judgment and decree and received them on 7th June 1935. The applicant was informed by the clerk of Mr. B. L. Seth that the Judicial Commissioner's Court would re-open on 2nd July 1935. As the appellant-applicant had no reason to suspect any deception or ignorance on the part of the pleader's clerk he depended upon this information as true and deputed Mr. N. N. Parnerkar, pleader of Gwalior, to go to Nagpur and to have the appeal filed. On 24th Mr. Parnerkar went to Nagpur and learnt on enquiry that the High Court had really re-opened on 17th June 1935 and that the appeal was time-barred. He immediately sent a letter and a telegram to the appellant to come to Nagpur, but the latter being ill and some members of his family also being ill he could not come.

On these facts the appellant claimed indulgence under S. 5, Lim. Act, and prayed that the appeal be admitted by ignoring the delay. The postcard received from the pleader's clerk intimating that the Judicial Commissioner's Court re-opened on 2nd July 1935 and an affidavit from Mr. Parnerkar accompanied this petition. In para. 2 of the affidavit filed by Mr. Parnerkar the allegations are these :

> On 26th I received a wire stating only that the letter was sent. I received the letter on 27th and in the evening I saw Mr. A. V. Wazalwar, Advocate, Nagpur. He also confirmed my view that the appeal was time-barred and stated that if extension of time was to be applied for, a detailed affidavit of the circumstances under which the appellant was misled will have to be given. I was waiting for the appellant on 28th and 29th June on which date I received a letter from him that he was possibly coming but not definitely because he was ill. I waited till evening. Since he did not come, I asked Mr. Wazalwar to make arrangements for filing the appeal on my affidavit. I sent an express telegram to the appellant Krishnarao to come at once to Nagpur. 30th June and 1st July being holidays the appeal could not be filed before 2nd July 1935.

Later on 11th July 1935 a further affidavit by the appellant himself was placed on record. We will refer to the contents of this affidavit later on where necessary. The judgment in this case was delivered on 28th February 1935. An application for copies of the judgment and decree was filed on 15th March 1935. The copies were stopped for want of funds on 28th March 1935. Subsequent advance was paid on 4th April 1935 and the copies were actually delivered on 6th April 1935. It appears from the affidavit of the appellant that the pleader's clerk informed him on 11th April 1935 that the certified copies were received. He expected to receive them from him and waited till some time in June when he asked him to send them by V. P. parcel. He received the V. P. parcel on 7th June 1935 with a letter informing him that the Court reopened on 2nd July and that he should go to Saugor by 16th or 17th June for filing the appeal. The applicant in his affidavit states that on receipt of the certified copies he wanted to go to Saugor by 16th or 17th June, but as he was ill he could not go. He learnt that Mr. Parnerkar pleader was going to Pachmarhi for some business. He therefore met him and asked him if he could go to Nagpur to consult a pleader on his behalf. Mr. Parnerkar raised the question of limitation and he replied that he had a letter from his pleader's clerk that the Judicial Commissioner's Court, Nagpur, re-opens on 2nd July 1935 and it would not matter much if Mr. Parnerkar reached Nagpur on 25th June and arranged for the filing of the appeal. On 25th June he received a telegram from Mr. Parnerkar to file an affidavit. The wording of the telegram is as under:

> Inform Falke case strong appeal time-barred but still possible if letter giving wrong information produced. Come personally or send somebody with power to file affidavit or at least send the letter no time to waste arrange for money wire reply soon at Bhumralkar mental hospital Nagpur.

The applicant proceeds to say in his affidavit that on receipt of this telegram he could not immediately arrange to leave Gwalior as he was ill and his daughter was also ill and that he informed Mr. Parnerkar accordingly and sent the letter which he received from the clerk of the pleader to Mr. Parnerkar. This letter of the applicant is not on record. The applicant explains his inability to go to Nagpur and file the affidavit till 11th July 1935 by stating that a telegram for remitting money was sent to him on 28th June 1935 but he did not get it. Thereafter he received a letter on 5th July from Pachmarhi asking him to explain why he did not turn up as required to file an affidavit and that he should go even now. He thought Mr. Parnerkar was still at Pachmarhi and sent him a telegram that he was going there. He went up to Itarsi. As he did not meet Mr. Parnerkar there he returned to Gwalior and sent a telegram to Mr. Parnerkar, one at Nagpur, and another to Pachmarhi. He received a reply on 8th July asking him to go to Nagpur. He reached Nagpur on the 9th and wanted to see Mr. Wazalwar and learnt that he had gone to Ramtek and would return on the 10th night. It is thus that he could not file the affidavit till 11th July 1935. Along with the affidavit the applicant filed the postal envelope in which he received the certified copies from Saugor, telegram from Nagpur dated 25th June 1935, a copy of the telegram dated 30th June 1935 which he says was not received by him, and a certificate from a native physician of Lashkar dated 6th July 1935, stating that Mr. Falke the applicant, was ill between 16th to 30th June 1935. These are all the allegations that have been made on behalf of the appellant and it is on the basis of these allegations that we are requested to condone the delay in filing the appeal. The respondent denies the allegations and contends that this is not a fit case in which delay could be condoned as the appellant-applicant is guilty of laches and has not acted bona fide and is thus not entitled to the indulgence claimed by him.

It is strenuously urged on behalf of the appellant-applicant that the circumstances disclosed in the application and the affidavits very clearly make out a case of "sufficient cause" within the meaning of the phrase as used in S. 5, Lim. Act, and that the applicant should be granted the indulgence and his appeal should be treated as filed within time. A I R 1931 Cal 298[1] is relied upon to show that the real delay for which he is accountable is the delay after the time when the appeal ought to have been filed and not the delay before that date. It is therefore urged that his conduct before 17th June 1935 should not at all be

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1. Karali Charan v. Apurba Krishna, A I R 1931 Cal 298=132 I C 169=58 Cal 549=34 C W N 1119.

taken into consideration in deciding whether he is entitled to the indulgence or not. He has to account for the time that elapsed between 17th June and 2nd July 1935 when the appeal was actually presented. This delay is accounted for in the first instance by the letter received from the clerk of the pleader at Saugor wherein it was stated that the Judicial Commissioner's Court would re-open on 2nd July. The appellant argues that he had no reason to disbelieve the statement made therein and thus acted bona fide in relying upon it and sending Mr. Parnerkar by about 24th or 25th June for arranging the filing of the appeal. It is admitted, however that on 25th June he got information that the appeal was time-barred. The inaction on the part of the appellant between 25th June and 2nd July is accounted for by the illness which prevented him from coming to Nagpur. The appellant thus claims that sufficient cause has been shown by him. He relies on A I R 1926 Nag 503[2] wherein Prideaux A. J. C. observed as under :

> I think that in the present case the delay ought to be excused. It is obviously not the applicants' fault that their appeal was presented late. They relied on what their pleader told them, and the mistake is apparently an honest mistake, though due to carelessness on the part of the pleader. It seems to me that sufficient cause for the application of S. 5, Lim. Act, has been made out.

With due deference we do not agree with the view expressed in A I R 1926 Nag 503[2]. This decision is against the trend of the recent decisions of the Judicial Commissioner's Court and also the decisions of other High Courts in India. If the pleader who advises acts without due care and attention, the client who acts on the advice of such a pleader is not entitled to the benefit of S. 5, Lim. Act : *see* A I R 1934 Nag 52,[3] 29 N L R 295[4] at p. 297, 9 Luck 193[5] and lastly 59 Cal 781[6] wherein the entire case law on the subject and rulings of all the High Courts have been fully considered. We agree with their Lordships of the Calcutta High Court in saying :

> From a review of the Indian and English decisions on the subject there appears to be no authority for the view that a mistake of a legal adviser, however gross and inexcusable, if bona fide acted upon by a litigant, will entitle him to the protection of S. 5, Lim. Act.

A I R 1931 Cal 298[1] cited on behalf of the appellant no doubt lays down that the appellant is not accountable for his conduct till the last day on which he could have filed the appeal, but even there Graham J. had expressed a different view and had held that the conduct of the appellant was such as would disentitle him from obtaining the benefit of S. 5, Lim. Act. A similar view has been taken in A I R 1930 Nag 121[7] wherein it is stated that an appellant who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefor, is guilty of negligence and is not entitled to an extension of time if some unexpected or unforeseen contingency prevents him from filing the appeal within time : 12 N L R 171[8] was followed. The Court while exercising the discretion vested in it will necessarily look into the conduct of the appellant and will only exercise its discretion in favour of a person who is found to be diligent and not in favour of one who is guilty of laches or negligence. It is only in that view that the conduct of the appellant becomes relevant. In this case we find that though the decision was given in February 1935 and though the copies were obtained in April 1935, the appellant did not care to consult a lawyer, but depended upon the advice of a pleader's clerk to send the copies to him. It appears that the pleader's clerk did not send the copies till the applicant asked him to send them by V. P. parcel. In the postcard from the pleader's clerk, it is stated that the V. P. parcel was for Rs. 24, Rs. 20 being the balance of fee due to the pleader, Rs. 2 for obtaining copies, and Rs. 2 for postage. This shows that this applicant had not paid his pleader fully, had not also paid for the copies fully and in all probability it is on that account that the delivery of copies to him was delayed by the clerk of the pleader till the applicant asked him to send the copies by V. P. parcel. This is a negligent conduct on the part of the appellant and can be taken into account in deciding whether he should be granted the indulgence.

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[2] Baban v. Emperor, A I R 1926 Nag 503=96 I C 857=27 Cr L J 1001.

[3] Nareshwar v. Chabildas, A I R 1934 Nag 52=144 I C 41.

[4] Ramrao v. Santoshrao, A I R 1933 Nag 219=145 I C 760=29 N L R 295.

[5] Mithoo Lal v. Jamna Prasad, A I R 1933 Oudh 523=146 I C 127=9 Luck 193 = 10 O W N 1154 (F B).

[6] Surendramohan Ray v. Mohendranath Banerji, A I R 1932 Cal 589=140 I C 662=59 Cal 781 =36 C W N 420.

[7] Hakimla v. J. C. Gammon, A I R 1930 Nag 121=119 I C 679.

[8] Kedarnath v. Zumberlal, A I R 1916 Nag 39 =37 I C 503=12 N L R 171.

This applicant admittedly carried on litigation in the Central Provinces for about three years at Saugor. At no time in the history of the Judicial Commissioner's Court, Nagpur, has the Court re-opened in the month of July after the summer vacation. It is difficult to understand why the pleader's clerk should have stated in his letter dated 5th June 1935 that the Nagpur Judicial Commissioner's Court would re-open after vacation on 2nd July 1935, and we cannot understand the applicant when he says that he implicitly relied upon the statement of the pleader's clerk. The applicant himself should have known after three years' litigation in the Provinces the date on which the Court re-opened after the vacation. At any rate it was very easy for him to find out the exact date by other enquiries instead of depending upon the letter of a pleader's clerk for the purpose. In any case it was his duty to verify the information given by the pleader's clerk and it was not proper on his part to have accepted the statement as correct. No affidavit from the said clerk of the pleader is filed before us. Fraud on the part of the pleader's clerk is not alleged before us. In the absence of fraud on his part in giving 2nd July 1935 as the day on which the Court re-opened and as it is not probable that any pleader or his clerk in the Central Provinces could have stated 2nd July as the date of re-opening of the Judicial Commissioner's Court had he given due care and attention in stating it, the only conclusion that we can draw is that this pleader's clerk acted with gross negligence and carelessness in stating 2nd July 1935 as the date of re-opening of the Judicial Commissioner's Court. In a case, 37 I C 828,[9] where the appellant relied upon an unauthorized publication known as the "Legal Diary" and being misled by it as to the duration of the Chief Court's vacation presented his appeal beyond the period of limitation, it was held that the cause shown was not sufficient as the applicant had not acted with due care and attention. The pleader's clerk could not be in a better position than an unauthorized published legal diary. In A I R 1927 Pat 232[10] while declining to extend time under S. 5, Lim. Act, their Lordships of the Patna High Court stated that the negligence of the agent is the negligence of the principal and no distinction could be made between the two. In that case also the appellant threw the whole blame on the clerk of the pleader who appeared for him in the Court below.

We find similar observations in A I R 1925 Oudh 189.[11] In fact the mistake of a pleader's clerk is held to be the mistake of the party himself. Practically the same view was taken in 5 N L R 25.[12] A I R 1929 Cal 240[13] was cited on behalf of the appellant, but we find that that was decided upon the peculiar circumstances of that case. Due diligence on the part of the appellant and his bona fide belief that it was not necessary for him to file an appeal against the final order when he was prosecuting an appeal against an earlier order were the circumstances that led to the exercise of the discretion in favour of the appellant in that case. The facts of that case are dissimilar and do not in any way help the appellant in this case. 48 Bom 442[14] was also referred to in argument on behalf of the appellant for the proposition that a party upcountry would naturally take the advice of his local pleader as to the time when he could file an appeal and would naturally rely upon the advice so tendered, but reading the judgment fully it will be found that the mistake of the pleader in that case was such as could have been committed by the pleader with due care and attention. It was held that even a diligent pleader might overlook an obscure section in an amendment which had come into force a few months before he was consulted. It was mainly on this ground that the delay was condoned and time extended. The Nagpur Judicial Commissioner's Court did not accept even this view and such a mistake was held to be not constituting sufficient cause within the meaning of S. 5, Lim. Act: see A I R 1924 Nag 279.[15]

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[9] Jai Dal Mal v. Amar Nath, A I R 1917 Lah 407=37 I C 828.

[10] Gopal Patwa v. Digambar Singh, A I R 1927 Pat 232=101 I C 448.

[11] Ganesh Dat v. Hirde Bihari, A I R 1925 Oudh 189=83 I C 484.

[12] Vithia v. Sakhya, (1909) 5 N L R 25=1 I C 904.

[13] Kamiruddin Mallik v. Bishupriya Chowdhurani, A I R 1929 Cal 240=119 I C 383=33 C W N 76.

[14] Nagindas Motilal v. Nilaji Moroba, A I R 1924 Bom 399=80 I C 862=48 Bom 442=26 Bom L R 395.

[15] Padamraj Fhulchand v. Mitsui Bushan Kesha, Limited, A I R 1924 Nag 279=78 I C 154.

We are therefore of opinion that the appellant-applicant was wrong in relying upon the advice tendered to him by his pleader's clerk and should not have allowed himself to be misled by that advice. The advice was given recklessly and without due care and attention and as he was in the eye of law an agent of the appellant and as his negligence is the negligence of the appellant himself, the appellant must suffer for the negligence on his part. The present appeal should have been filed on 17th June on which date the Court reopened after vacation and it not having been so filed till 2nd July and there being no sufficient cause shown for the delay in filing it, the appeal cannot be admitted for hearing.

Even if we were to hold that the appellant was not aware till 25th June that his appeal was time barred and could not be called upon to explain the delay up to 25th June, we feel that the explanation for delay that has been offered for the period between 25th June and 2nd July is also of a nature which cannot be accepted to enable us to condone the delay on his part. In the affidavit that was filed with the petition of appeal by Mr. Parnerkar it is stated that it was on 29th that Mr. Parnerkar received a letter from the applicant stating that he was possibly coming but not definitely because he was ill. It appears that the appellant did not put forward his illness as an excuse immediately after he received a telegram from Mr. Parnerkar on 25th. The letters addressed to Mr. Parnerkar are not on record. The certificate of illness from a native physician that has been filed on record is dated 6th July 1935. It was evidently obtained after the appeal was filed and it has been brought to our notice that the physician who granted the certificate has scored out the word "hamare" in the certificate thereby indicating that he does not say that the appellant was under his treatment. A certificate obtained from a native physician some time after the appeal has been filed in which the physician himself does not say that he treated the patient is of no evidentiary value and cannot be relied upon. We are not therefore satisfied that the appellant was suffering from illness of such a nature as would prevent him from coming to Nagpur immediately after 25th for filing the appeal. When the time for filing the appeal has once passed, a very valuable right is secured to the successful litigant and the Court must therefore be fully satisfied of the justice of the grounds on which the appellant seeks to obtain an extension of time for attacking the decree and thus perhaps depriving the successful litigant of the advantages which he has obtained: 30 Bom 329[16] at p. 330, 34 Cal 216[17] at p. 221 and 14 Lah 656.[18]

It is the duty of a litigant to know the last date on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in this Section the burden rests on him of adducing distinct proof of the sufficient cause on which he relies: 41 Mad 412[19] at p. 417. We have shown that the appellant in this case has failed to make out sufficient cause for the indulgence claimed by him. It is regrettable that we have to take this view in a case in which the interest involved is very substantial and the appellant was asked by this Court to pay a court fee stamp of the value of Rs. 500 or more which he has paid. The period for preferring an appeal cannot be extended simply because the appellant's case is hard and calls for sympathy, nor will the Courts extend the period of limitation merely out of benevolence to the party seeking relief. A Court in granting the indulgence must be satisfied that there was diligence on the part of the appellant and that he was not guilty of any negligence whatsoever; that not having been done in this case the appeal must be held to be time barred. The application for condoning the delay is thus rejected and the appeal is dismissed with costs. Counsel's fee Rs. 100.

K.B./R.K. *Appeal dismissed.*

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[16] Karsondas Dharamsey v. Gungabai, (1906) 30 Bom 329=7 Bom L R 965.

[17] Sarat Chandra Bose v. Saraswati Debi, (1907) 34 Cal 216=5 C L J 380.

[18] Kanhaya Lal Sardha Ram v. Baldeo Das, A I R 1933 Lah 681=146 I C 45=14 Lah 656=34 P L R 937.

[19] Krishnasami v. Ramasami Chettiar, A I R 1917 P C 179=43 I C 493=45 I A 25=41 Mad 412 (P C).

## * A. I. R. 1938 Nagpur 162

VIVIAN BOSE J.

*Ahamadali Fakruddin Bohri and others* — Applicants.

v.

*Mulla Fidaali Sultanali Bohri* — Non-applicant.

Civil Revn. No. 356 of 1937, Decided on 29th September 1937, from order of Second Sub-Judge, second Class, Nagpur, D/- 5th April 1937.

*** Court-fees Act (1870), S. 7 (xi) (cc)—*P*, purchasing house and asking *D*, a tenant of his predecessor to attorn to him—*D* repudiating *P's* title, setting up his own—*P* serving him with notice to vacate and on refusal bringing suit for recovery of house — S. 7 (xi) (cc) held did not apply—Court-fees should be paid on market value of property and that is the value for purposes of jurisdiction.**

Section 7 (xi) (cc) applies only to suits by landlord for recovery of immovable property from his tenant, which includes a tenant holding-over after the determination of the tenancy. [P 162 C 1]

*P* purchased a house and asked *D* who was a tenant of his predecessor to attorn to him. *D* repudiated *P's* title and set up a title of his own. On *D* continuing to set up his own title *P* served him with a notice to vacate the premises in the event of his not paying the arrears of rent and on his refusal to do so brought a suit for recovery of the house from *D*. The suit was based on title and was not one between landlord and tenant.

*Held* that S. 7 (xi) (cc), did not apply and court-fees were to be paid on the market value of the property and that was the value for purposes of jurisdiction. *P* having terminated *D's* tenancy because of the right vested in him under S. 111 (g), T. P. Act, *D* ceased to be a tenant and became a trespasser ; *D* having set up an adverse title in himself could not be said to be holding-over. [P 163 C 1]

B. R. Mandlekar — *for Applicants.*

S. R. Mangrulkar — *for Non-applicant.*

**Order.**—The only question I have to determine here is whether the suit has been properly valued in the lower Court for purposes of jurisdiction. It is argued on behalf of the applicants that under S. 8, Suits Valuation Act, the value for purposes of jurisdiction is the same as that for purposes of court-fees and according to him S. 7 (xi) (cc), Court-fees Act applies. That Section applies only if the suit is by a landlord for recovery of immovable property from his tenant, which includes a tenant holding over after the determination of the tenancy. The question then is whether the plaintiff claims to be the landlord of the defendants and whether the defendants are in fact tenants holding over after the determination of the tenancy. In para. 4 of the plaint the plaintiff sets forth these facts. He states that he purchased the house from two persons under a sale deed dated 30th October 1934. Defendant 1, it appears, was a tenant of the plaintiff's predecessor and the remaining defendants are the sons of defendant 1, and for present purposes they must be treated on the same footing as the first. After the purchase, the plaintiff informed defendant 1 of his purchase and asked him to attorn to him but the defendants repudiated the plaintiff's title and set up a title in themselves.

Thereafter the plaintiff twice called upon the defendants to attorn by registered notices dated 12th April 1934 and 21st April 1934, at least those are the dates given in the plaint, though it is apparent from the sequence of events stated in para. 4 that there is some mistake. I am told that the correct dates are 12th April 1935 and 21st April 1935. The plaint will therefore be corrected. When these notices were given the defendants still refused to comply with them and continued to set up an adverse title. The second notice dated 21st April 1935 also calls upon the defendants to vacate the premises in the event of their not paying up the arrears of rent. Consequent on this refusal to vacate the plaintiff has instituted this suit. It is not clear from the plaint whether the suit was instituted in the character of a landlord against a tenant holding over or in the character of an owner of the property against a trespasser who was setting up an adverse title. This was cleared up on 5th August 1936 when the plaintiff stated that his suit was based on title and was not one between a landlord and a tenant. I quite agree that the plaintiff cannot be allowed arbitrarily to bring a suit in one character when the facts show that he obviously has been claiming in another. The question is whether the facts disclose one set of affairs or the other.

Under S. 111 (g), T. P. Act, a tenancy determines by forfeiture, if the tenant renounces his character as such by setting up a title in himself and the landlord gives him a notice in writing of his intention to determine the lease. The plaint clearly sets out that the defendants had set up an adverse right in themselves ever since his purchase and continued to do so in spite of his notices. It also states that in the notice dated 21st April 1935 there is a clear intimation to them to vacate the premises, which of course can only mean that he has made up his mind to determine the tenancy. The fact that an option is left to the defendants to continue as tenants by paying up the arrears of rent can make no difference to this, for, if they do not choose to exercise the option given to them, then, the condition of forfeiture obviously obtains. In the circumstances, it is clear from the facts given, coupled with the statement made on 5th August 1936, that the plaintiff had determined his tenancy because of the right vested in him under S. 111 (g). In those circumstances the defendants ceased to be tenants and became trespassers. When a person is a tenant holding over he continues in his character as a tenant and the law implies a contract of tenancy which the parties have not actually made. This, of course, cannot obtain when the tenancy has been determined because the tenant sets up an adverse title in himself and refuses to consider himself a tenant. That being so, the lower Court rightly decided that S. 7 (xi) (cc), Court-fees Act, does not apply. If it does not apply then the other alternative comes into operation, viz. that court-fees must be paid on the market value of the house and then that becomes the value for purposes of jurisdiction. The matter has therefore been rightly decided by the lower Court and I dismiss the application with costs. Counsel's fee Rs. 20.

R.M./R.K. *Application dismissed.*

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## * A. I. R. 1938 Nagpur 163

STONE C. J. AND VIVIAN BOSE J.

*Keshao Rao Bapurao and another — Defendants* — Appellants.

v.

*Sadasheorao Dajiba — Plaintiff —* Respondent.

Second Appeal No. 350 of 1934, decided on 22nd October 1937, from appellate decree of Dist. Judge, Raipur, D/- 21st April 1934.

**(a) Second Appeal—Allegation as to caste or community cannot be challenged for first time in second appeal at stage of argument.**

In a country like India where the people are so intensely community-conscious and where the caste or community to which a man belongs, affects not only his social status but that of his family, if an allegation about the caste or community does not produce an immediate retort, it is too late to challenge it at the stage of argument in second appeal. [P 164 C 2]

*** (b) Hindu Law — Applicability — Maharashtrians in Chhattisgarh – Law applicable to Hindus in that locality is not Mayukha.**

It is beyond doubt historically that a race or tribe of people known as Maharashtrians were not in Chhattisgarh in C. P. first, and even now are not so numerically or politically predominant in that tract as to justify the inference that they have so impressed their particular phase of Hindu ideas and usages upon the people as to make the Mayukha the prevalent law of the locality so far as Hindus resident there are concerned. [P 165 C 1]

**(c) Hindu Law — Lex loci of Central Provinces – Determination.**

It is impossible to make a sweeping assertion that this or that is the *lex loci* of the Central Provinces as a whole without finding out whether the influences at work which impressed themselves upon a particular locality to such an extent as to make them the predominating factors in determining its law and usages, were also at work elsewhere and were equally successful. [P 165 C 2]

**(d) Hindu Law—Succession—Succession is to be determined according to personal law of deceased – Principle to determine law in case of migration stated.**

The law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question. Prima facie any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu law recognized in that province. But this law is not merely a local law. It becomes the personal law, and part of the status of every family which is governed by it; consequently where any such family migrates to another province governed by another law, it carries its own law with it. Of course if nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place. In that sense only is domicile of importance. But if more is known, then in accordance with that knowledge, his personal law must be determined, unless it can be shown that he has renounced his original law in favour of the law of the place to which he migrated. So great is the tenacity with which Hindus hold to their ancient usages and follow their ancient traditions and customs that mere length of time in itself makes no difference: *Case law referred.* [P 166 C 1]

**(e) Hindu Law—Texts — Commentaries — Value of.**

Commentaries on Hindu law are only commentaries. They do not enact; they explain and are evidence of the congeries of customs which form the law: *A I R 1921 P C 59, Foll.* [P 167 C 1]

*** (f) Hindu Law—Schools of law—Benares and Bombay Schools—Maharashtrian in C. P. — Exact origin of family not traceable — He is governed by Bombay School: *A I R 1930 Nag 267=123 I C 907, Overruled.***

**Wherever a family is found clinging to its individuality and retaining its identity as Maha-**

rashtrian, it must be presumed until the contrary is shown that it hailed from the race or group of people known as Maharashtrians and carried the law of Maharashtra with them. Therefore a Maharashtrian Brahmin resident in the Central Provinces is to be governed by the Bombay interpretation of Mitakshara when migration is not proved in the sense that exact origin of the family cannot be traced : *A I R 1930 Nag 267 = 123 I C 907*, **Overruled** ; *Obiter in A I R 1934 Nag 59, Dissent.* ; *Cas law referred.* [P 164 C 1 P 167 C 1, 2; P 169 C 1]

D. N. Choudhuri — *for Appellants.*

M. R. Bobde — *for Respondents.*

**Stone C. J.**—I have had the advantage of perusing the judgment about to be delivered by Bose, J. If I may say so, this judgment is so weighty and lucid an exposition of the branch of law in question that it is not necessary for me to add anything except to say that I agree with it.

**Vivian Bose J.**—The question in this appeal is whether a Maharashtra Brahmin, resident in the Central Provinces, is to be governed by the Bombay or the Benares interpretation of the Mitakshara when migration is not proved in the sense that the exact origin of the family cannot be traced. The property in dispute which is situate in Chhatisgarh in the Central Provinces belonged to one Madhobhat. He diedl eaving two daughters, Mt. Salubai and the plaintiff, Mt. Mainabai. Salubai mortgaged her half share to the defendants on 22nd July 1921 and the mortgagees obtained a final decree for foreclosure against Salubai's daughter, Salubai then being dead, and obtained symbolical possession. Mainabai now sues for a declaration that Salubai having died the property has passed to her by survivorship. If the Benares view obtains, then she must succeed, but if Madhobhat was governed by the Bombay law then the plaintiff's suit must fail. Therefore what I have to determine is whether the Bombay or the Benares interpretation of Mitakshara is to apply. Mt. Mainabai was a party to the previous litigation and she carried the matter up to the Judicial Commissioner's Court where it was decided that as Mainabai's share was not mortgaged, she could not be affected by the suit, and so the suit was dismissed against her and the question of her rights including the question now at issue, was left at large. The judgment is not clear on these points but that is the interpretation which both sides accepted in their pleadings and it was the assumption on which the appeal was argued before us.

It appears from para. 3 of the appellate judgment in the previous suit, (Ex. D.8) that the proceedings were conducted there on the assumption that Madhobhat was a Maharashtra Brahmin and this also seems to have been the assumption throughout the present litigation though it was denied before us by the learned counsel for the plaintiff-respondent. We find for instance that the defendants made the following statement on 8th March 1932 :

> That the family of Dadaji Joshi migrated from Bombay Presidency and they being Maharashtra Brahmins their family is governed by the Bombay School of law.

The plaintiff's reply to this was :

> It is denied that the plaintiff or her ancestors were governed by the Bombay School of law. They were not persons who migrated to these Provinces from the Bombay Presidency but they were governed by the *lex loci* namely the Mitakshara.

It will be seen then that the defendants made two distinct assertions in their statement, namely (1) that the family had migrated from the Bombay Presidency, and (2) that they were Maharashtra Brahmins. The plaintiff when replying to this did not challenge the second assertion though he did the first, and this seems to have been the position in the lower Appellate Court as well, for the learned Judge writes as if this was an accepted fact. After holding that migration had not been proved he continued :

> The fact that the plaintiff's families are Maharashtra Brahmins and had settled in Berar still does not make them as governed by the Mayukha.

In a country like India where the people generally are so intensely community-conscious and where the usual reply to the question 'who are you', is not a name but a caste, we have no doubt that an allegation of this kind would have produced an immediate retort if untrue. The question is of such vital importance to them. Whether a daughter gets a limited interest or an absolute estate is only a side issue, but the caste or community to which a man belongs : that is an entirely different matter. It affects not only his social status but that of his family. It affects their dinings and their marriages and their deaths ; it affects their social and religious customs and beliefs, and in a sense even what they conceive to be their life after death. I therefore think it is now too late to challenge through the mouth of counsel at the stage of argument in second appeal the assertion that Madhobhat was a

Maharashtra Brahmin. Consequently what I have to determine is exactly what that phrase connotes. It is clear that it cannot mean one of the original residents of the locality, for, it is historically incontrovertible that the place where this family resides and has its domicile, namely Chhattisgarh, is not and never has been known as Maharashtra, though the Mahrattas did penetrate as far as that and were in power there for a short time ; in fact the British obtained this stretch of land from them. It is equally beyond doubt historically that a race or tribe of people known as Maharashtrians were not there first, and even now are not so numerically or politically predominant in this tract as to justify the inference that they have so impressed their particular phase of Hindu ideas and usages upon the people as to make that the prevalent law of the locality so far as Hindus resident there are concerned. Their advent to this part of India can be traced to comparatively modern times, and though it is possible that a few stray families may have been there even in the earliest times, they could not have come except as immigrants.

Whatever else the term Maharashtra may mean, it must connote either a geographical entity or a race or tribe of people. If it is clear that Chhattisgarh was never known as Maharashtra, and if it is equally beyond doubt that a race or tribe of people known as Maharashtrians never inhabited this area as a race or tribe, then it follows that any Maharashtrian who was found in these parts must have come as an immigrant, either he himself or his ancestors, and the fact that his family has retained its individuality intact as Maharashtrians must mean that they have not been absorbed into the particular strata of Hindu society prevalent and predominant in the locality. It must mean that they have carried with them their own law and their own usages from wherever it is that they came and preserved them as carefully as they have their own identity. Another thing is also clear. These provinces were not either a geographical or a political unit till the advent of the British, and even then were not taken over wholesale, but were slowly amalgamated by the addition of tracts of territories from time to time from different persons and for different reasons. On the other hand Hindu religion and culture, its laws and traditions, with its varying usages and differing interpretations, had crystallised as entities long before this time. Therefore we have to visualise the scene as it existed before the British Era. It does not follow that the ideas then prevailing in one section of the area now known as the Central Provinces were equally prevalent in another. It is impossible to make a sweeping assertion that this or that is the *lex loci* of the Provinces as a whole without finding out whether the influences at work which impressed themselves upon a particular locality to such an extent as to make them the predominating factors in determining its law and usages were also at work elsewhere and were equally successful.

The origin of the term Maharashtra is obscure. Russel in his Tribes and Castes of the Central Provinces, Vol. 4. p. 129, is of opinion that the balance of authority favours the view that it was the native name of Bombay and that it was derived from that of the caste which resided there. He quotes Wilson in support of this. On the other hand he puts forward an alternative theory which he considers less probable, namely that it is a corruption of Maha Rashtrakuta and came to be so called after the Rashtrakuta Rajput Dynasty of the 8th and 9th Centuries. His objections to this alternative view have weight. He points out that countries or tracts are seldom named after ruling dynasties and also that the name Maharashtra was known in the 3rd century B. C. long before the Rashtrakutas became prominent. As against this, is the fact that countries often receive the names of the races who inhabit them. The name India itself is the most prominent illustration of that ; the land of the Hindus. Gajarashtra or as it is now known Gujrat, the country of the Gujars, and Saurashtra or Surat, the country of the Sauras, are other examples But none of this is conclusive and no historian of repute seems to be willing to commit himself to a definite conclusion. See Cambridge History of India, pp. 602 and 603 : The Imperial Gazetteer of India, p. 439 ; Grant Duff's History of the Mahrattas (S. M. Edward's Edition, 1931) Vol. 1, pp. 42 and following. The question is also complicated by a large outflow of propaganda in which the Mahrattas have been putting forward claims to Rajput origin with growing insistency, and the matter has been litigated in the Courts on more than one occasion. See 48 Mad 1,[1] where such claims were doubted and 52 Bom 497[2] where they were accepted. In this state of uncertainty, I feel it is impossible to decide this case on historical or ethnographical grounds. In fact, as Madgaonkar J. remarked at p. 502 of the Bombay decision just cited :

> The difficulty is so great as perhaps to justify a doubt if the ordinary Courts of law are fitted to decide such questions unless the Legislature is prepared to lay down general rules for application in cases such as the present.

All we can hope to do here is to evolve a sound working rule which will fit in with the customs, ideas, and feelings of the peoples it is to affect and at the same time conform to general legal principles. These general principles have often been expounded by their Lordships of the Privy Council. In 16 N L R 187[3] at p. 189 they state :

> It is absolutely settled that the law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question.

Then they quote a passage from Mayne's Hindu law which is to the following effect :

> Prima facie any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu law recognized in that province . . . . . . But this law is not merely a local law. It becomes the personal law, and part of the status of every family which is governed by it ; consequently where any such family migrates to another province governed by another law, it carries its own law with it.

After this their Lordships proceed :

> Of course, if nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place. In that sense only is domicile of importance. But if more is known, then in accordance with that knowledge his personal law must be determined, unless it can be shown that he has renounced his original law in favour of the law of the place to which he migrated.

In an earlier case in 29 Cal 433,[4] their Lordships remarked at p. 452 that :

> The tenacity of such customs, even under the strain of migration, has been repeatedly recognized by the law in questions such as the present. Accordingly the question being primarily one of personal as distinguished from geographical custom it is of the first importance to inquire into the origin of the family.

Migration in that case had been more than a hundred years back (see p. 440); so far back indeed that all that the parties had to go on was tradition, and yet the learned Judges of the High Court whose judgment was upheld remarked that once migration is established

> strong proof is required from the person making the assertion that they have abandoned the one and adopted the other. (See p. 440.)

So great is the tenacity with which Hindus hold to their ancient usages and follow their ancient traditions and customs that mere length of time in itself makes no difference. In 29 Cal 433,[4] as I have observed, the migration was over 100 years back and the family had settled down in its new environment for four generations. In 2 M I A 132[5] it was six generations. In 50 Cal 898[6] eight or nine centuries had elapsed and in 50 Cal 370[7] four centuries. In 12 M I A 81[8] it was "many generations ago" and their Lordships remarked that . . . "an adherence to family usages is a strong oriental habit" and that "generally the love of them increases with their long prevalence."

Bearing this in mind what is the significance of a family continuing to call itself Maharashtrian even though settled in a land which is not Maharashtra and among, what for these purposes may be termed, an alien people? What do we mean when we refer to a man in this connexion, as a Chinaman or an Englishman or a Maharatha or a Bengali? Surely this : that it indicates his racial origin, using the word "racial" in a loose and popular sense; that it shows either that his ancestors originated in the geographical area from which his racial or tribal name is derived or that he belongs to a particular racial group or at any rate to a particular community. This is especially so among Maharashtrians who are not one whit

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1. Maharaja of Kolhapur v. Sundaram Ayyar, (1925) 12 A I R Mad 497=93 I C 705=48 Mad 1.
2. Subrao Hambirrao v. Radha Hambirrao, (1928) 15 A I R Bom 295=113 I C 497=52 Bom 497 =30 Bom L R 692.
3. Balwant Rao v. Baji Rao, (1921) 8 A I R P C 59= 57 I C 545=47 I A 213=48 Cal 30=16 N L R 187 (P C).
4. Parbati Kumari Debi v. Jagadis Chunder Dhabal, (1902) 29 Cal 433=29 I A 82=6 C W N 490=8 Sar 205 (P C).
5. Rutcheputty Dutt Jha v. Rajunder Narain Rae, (1837-41) 2 M I A 132=2 Suth 1=1 Sar 161 (P C).
6. Ramesh Chandra v. Mohammed Elahi Buksh, (1924) 11 A I R Cal 383=79 I C 309=50 Cal 898.
7. Sarada Prasanna Roy v. Umakanta Hazari, (1923) 10 A I R Cal 485=77 I C 450=50 Cal 370=37 C L J 233.
8. Soorendranath Roy v. Mt. Heeramonee Burmoneah, (1867-69) 12 M I A 81=10 W R 35 =1 Beng L R 26=2 Suth 147=2 Sar 372 (P C).

behind the rest of India in their homogeneity and pride of race, in their love of their own great traditions and in what one might almost term their clanishness, using that term in its finer sense. When therefore we find the great bulk of Maharashtrians governed by the view of Mitakshara prevailing in Bombay, what does it indicate? Surely this : that these people wherever they came from, whatever their origin, carried with them from place to place this particular law and that it has now become predominant in certain parts of Bombay only because they are the predominant people there. In fact, Russel and Wilson, whom I have already quoted, consider that the term "Maharashtra" is itself derived from the caste which resided there.

Their Lordships of the Privy Council point out in 16 N L R 187[3] at p. 191 that the reason why the Courts in Bombay and those in other parts of India have arrived at different results is because of the dominating influence of particular commentaries and then they explain :

> Further it must always be remembered that the commentaries are only commentaries. They do not enact; they explain and are evidence of the congeries of customs which form the law.

Their Lordships then correct Drake-Brockman A. J. C., who thought that the law had been enunciated for the first time by a Bombay decision "as if it were a statute." They point out that it was nothing of the sort and that it was only declaratory of the law as it had existed, and quote earlier Bombay decisions which refer to the Bombay view of the Mitakshara as in accordance with "pre-existing tradition in that Court and in the local profession in Bombay." It must follow from this that the Mayukha did not create the Bombay view and that even though it was written by Nilkanth in the 17th century he merely recited the customs and usages which he found in vogue around him and knowing "the tenacity with which oriental races cling to their age-long traditions" it can only mean that this was always the law of the Maharashtrians, whoever they were, wherever they came from.

If that is so, then wherever we find a family clinging to its individuality and retaining its identity as Maharashtrian, it must be presumed until the contrary is shown that it hailed from the race or group of people known as Maharashtrians and carried the law of Maharashtra with them; the law which according to the reasoning of their Lordships has always been their law and which has been as characteristic of them as their racial or communal identity, as distinct as their name. I am fortified in this by the fact that not one single case has been cited from other parts of India to show that any single family of Maharashtrians has ever been governed by the Benares school. Even in these provinces, beyond Second Appeal No. 270 of 1877, there is not a single case which is based on an examination of evidence showing that there is a large volume of custom or usage or tradition in respect of Maharashtrians generally in a particular locality, or even in respect of any particular family, which makes them subject to the Benares view.

The earliest case in the Central Provinces dealing with this question was decided on 26th October 1877. It is Second Appeal No. 270 of 1877 and is reported in the Columned Digest of Civil Rulings between 1862-1877 issued in 1877. The report there is scanty, but from the original judgment it appears that the plaintiff admitted that the family had originally migrated from Western India, but claimed that the migration was some three or four centuries before the suit and so the family must be assumed to have acquired a fresh domicile in the Nagpur country, and therefore must be taken to be governed by the Benares school. The learned Judicial Commissioner after referring to an article on Nagpur in the Central Provinces Gazetteer came to the following conclusion :

> It is thus clear that even if the Hindu settlors from Upper India came in sufficient numbers to stamp their religion and laws upon the indigenous communities (the Gonds)—which there is no reason to believe—they were subsequently outnumbered and swamped by a large volume of immigration from the West and that prevailing and characteristic element in the population is now, and has been for at least a century, the Maratha. Why then should it be supposed that a Maratha Brahmin family, settling among a mainly Maratha population, and taking service under a Maratha prince, should adopt the law and customs of a comparatively small body of Hindustani immigrants? These Hindustanis had never had exclusive or dominant possession of the country. They merely constituted one out of many streams of immigration, directed by a Gond prince into a Gond country. It may be presumed that even on their first arrival, they had enough to do to hold their own, and it would be contrary to reason to suppose that scattered cultivating bodies, or even occasional Government Officials and artisans, such as made up their numbers, should have imposed

their law, first upon the country to which they came as humble settlors (and not the only settlors) and then upon a vastly larger body of conquering invaders. I think it probable then that the Maratha conquerors found the country unoccupied by any of the Hindu schools of law and that they had no temptation or inducement to depart from their own Codes.

After this he proceeded to examine the evidence and found that the bulk of it supported the view that the Bombay law prevailed among the Nagpur Maharathas and accordingly applied to Hindu law of Western India. This decision then which is based on an examination of historical records as well as on the evidence produced in that case decides that the *lex loci* in the Nagpur District is the law of Western India. Attempts were made in later cases to apply this to all Hindus in the southern part of the Central Provinces. It succeeded so far as Marathas in Wardha were concerned in a case quoted in 11 C P L R 49[9] at p. 54 but has since been confined to Maharathas in the Nagpur area only and not to Hindus generally. Except for this, the *lex loci* in these provinces has been held to be the Benares law: *See* 2 C P L R 18,[10] 11 C P L R 49[9] and 14 N L R 82.[11]

The next ruling is Second Appeal No. 420 of 1882 decided on 19th February 1883. It is reported as case No. 3½ in the volume of select cases published in 1886-1888. It was accepted there that the parties had come from Poona, but the learned Judicial Commissioner decided as a matter of law, and not on an examination of evidence about custom, that the conclusion of the Bombay Judges was wrong. He therefore applied the Benares view. This is exactly what their Lordships of the Privy Council overruled in 16 N L R 187[3] The next case is reported as No. 23 in the same compilation. It is Second Appeal No. 159 of 1885 and was decided on 30th January 1886. Here again it was assumed throughout that the family had come from the Bombay Presidency. The learned Judicial Commissioner stated that there was nothing to show from what part of the Presidency they had come but "being Maharatha Brahmins it is most probable that they come from the Poona District, or the Konkan from whence most of the Maharatha population in this Province has come." He then examined the law afresh and after coming to the same conclusion as his predecessor in the ruling just cited, namely case No. 3½ above followed it Drake Brockman A. J. C. who followed these decisions in 1 N L R 154[12] fell into the same error and was expressly overruled by their Lordships of the Privy Council in 16 N L R 187.[3] There is no other decision that I know of till A I R 1930 Nag 267.[13] That was decided after the Privy Council and the learned Additional Judicial Commissioners came to the conclusion that the Privy Council did not warrant the view that the mere fact that a man is a Maharattha or a Maharashtra Brahmin means that he is governed by the Bombay school of law. They held that persons are primarily governed by the *lex loci* of their residence and rejected the view that the Bombay law is the *lex loci* of Hindus resident in the southern part of the Province. Consequently they applied the Benares school.

With the utmost respect I do not think that this is what the Privy Council said. As I have already pointed out, they stress the fact that the personal law must be applied in every case where it is known, and it is only when it is not possible to ascertain that, that the law of the domicile is applied, and then only as a last resort, and even then only because it is assumed that it is the personal law. This is the view that I took in 30 N L R 322[14] and I still think it is right. There is however an obiter in that ruling which upholds A I R 1930 Nag 267[13] on the ground that the Benares interpretation of the Mitakshara has so repeatedly been applied to Maharashtrian residents of the Central Provinces that it has now come to be regarded as their personal law by them. These remarks were not necessary for the decision of that case and were made somewhat hastily without a careful examination of the position. Now that I have examined all the authorities, I can only find three decisions before the Privy Council and one after it on this point. The Privy Council would have applied the

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[9] Deorao Zamindar v. Mt. Sakhu Bai, (1898) 11 C P L R 49.

[10] Hiralal v. Mt. Tani Bai, (1889) 2 C P L R 18.

[11] Ganno v. Beni, (1917) 4 A I R Nag 7=43 I C 948=14 N L R 82.

[12] Narayan v. Govind Narayan, (1905) 1 N L R. 154.

[13] Ramchandra v. Ramabai, (1930) 17 A I R Nag 267=123 I C 907.

[14] Kasamsha v. Babanrao, (1934) 21 A I R Nag 59=148 I C 188=30 N L R 322.

Benares law in 16 N L R 187[3] if this assumption has been correct, and the solitary decision after their Lordships' ruling, namely A I R 1930 Nag 267,[13] can hardly be said to have changed the current of these men's lives, especially as it has never been officially reported. I therefore dissent from the obiter in 30 N L R 322[14] and would overrule A I R 1930 Nag 267.[13] The result is that the appeal succeeds. The Bombay rule applies and so the plaintiff's claim must fail. The decree of the lower Appellate Court is accordingly reversed and that of the first Court restored. The costs of this appeal and of the appeal in the lower Appellate Court will be paid by the plaintiff-respondent.

V.B.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Nagpur 169

PURANIK J.

*Municipal Committee, Nagpur* — Appellant.

v.

*Ratanlal Ganusao Kalar*—Respondent.

Misc. Appeal No. 22 of 1936 Decided on 8th October 1937, from order of First Addl Dist. Judge, Nagpur, D/. 25th October 1935.

**(a) Land Acquisition — Appeal — Land acquired for Municipality—Owner of land contesting acquisition proceedings — Reference under S. 18, Land Acquisition Act—During pendency, owner instituting civil suit for declaration that acquisition proceedings were invalid and obtaining final order in his favour—Parties discharging Collector—Subsequent order of Court awarding damages against Municipality Municipality held had locus standi to appeal from such order.**

Certain land was acquired by the Government for a Municipality. The owner of the land contested the acquisition proceedings and did not accept the award whereupon the Acquisition Officer made a reference under S. 18, Land Acquisition Act During the pendency of the reference, the owner instituted a civil suit for declaration that the acquisition proceedings were invalid and obtained a final order in his favour. After this order the parties agreed to discharge the Collector who represented the Government from the proceedings. Subsequently the Court purporting to act under S. 48 of the Act made an order directing the Municipality to pay damages to the owner. The Municipality appealed to the High Court and a preliminary objection was taken that it was only the Secretary of State who could file an appeal and not the Municipality:

*Held* (overruling the objection) that after the final order declaring the acquisition proceedings to be invalid the proceedings and the reference arising therefrom came to an end. After discharge of the Collector from the proceedings the only parties before the Court were the owner and the Municipality. The party affected by order awarding damages was Municipality and it alone had the locus standi to file an appeal.

[P 170 C 2; P 171 C 1]

**(b) Land Acquisition Act (1894), S. 48—Proceedings and reference under S 18 coming to end by reason of declaration that they were invalid—This does not amount to voluntary withdrawal by Government — Even assuming that it does, Civil Court has no jurisdiction to award compensation under S. 48 (2).**

Section 48 contemplates a voluntary withdrawal by Government before possession is taken. It is not intended to cover a case in which there is no such withdrawal but the proceedings came to an end as they were found to be invalid. In such a case the proceedings automatically drop and the aggrieved party is left to choose his remedy in ordinary Civil Court against the party who committed the wrong against it. Even assuming that as a result of the declaration by a competent Civil Court that the original award was invalid the Government abandoned the proceedings which amounted to withdrawal though not voluntary, S. 48 does not at once vest the Civil Court with jurisdiction to determine the compensation payable to the owner for the loss occasioned to him by the proceedings. The power is given to the Collector under S. 48 (2).

[P 171 C 2; P 172 C 1, 2]

W. S. Barlinge — *for Appellant.*

W. H. Dhabe — *for Respondent.*

**Order.** — The facts of the case briefly are: The Municipal Committee, Nagpur, wanted to acquire a piece of land on which stood some structure and moved the Government for acquisition in the usual course. Ratanlal, the owner of the property, appeared before the Land Acquisition Officer and contested the proceedings. He did not accept the award with the result that the Land Acquisition Officer made a reference to Civil Court under S 18, Land Acquisition Act. During the pendency of these proceedings, the owner of the property instituted a civil suit against the Municipal Committee and the Government for a declaration that the land could not be acquired and the proceedings for acquisition were invalid, Civil Suit No. 163 of 1930. The suit was decreed, and an appeal filed by the Municipal Committee against the decision also failed. The Municipal Committee did not prefer a second appeal. As the owner of the house instituted a civil suit for a declaration that the acquisition proceedings were invalid, the Additional District Judge before whom the reference came up for investigation and decision stayed his hand till the decision of the suit and the appeal. After the decision in first appeal, the

Collector through his pleader stated before the Court that he should be discharged from the proceedings. The owner of the house agreed to discharge him and the Court passed an order on 26th October 1934 discharging the Collector. By this time the Municipal Committee had not decided to drop the proceedings and was still considering whether a second appeal should be filed. The Additional District Judge therefore adjourned the case to 11th January 1935. On 11th January 1935, the Municipal Committee stated to the Court that it was decided not to file a second appeal. On 11th January 1935 the position thus was that the owner of the house, Ratanlal, had obtained a final order in his favour that the land acquisition proceedings started by Government were invalid.

The reference that arose out of these proceedings and which was then pending before the Additional District Judge came to an end and the Additional District Judge should have in the ordinary course dropped the proceedings, but the owner of the house filed an application requesting the Additional District Judge to award to the owner compensation against the Municipal Committee, Nagpur, for wrong done by the proceedings and damages on account of the dismantling of the house that stood on the site. He claimed Rs. 875. This application was resisted by the Municipal Committee and it was urged that the Court had no jurisdiction to enquire into the question of damages and costs. The learned Additional District Judge by his order dated 25th October 1935 held that the Court had jurisdiction to determine the amount of compensation payable to the appellant on account of damages sustained and to allow the amount with costs of the proceedings in his Court but it could not allow the costs incurred in the Collector's Court. The Court came to this conclusion on its interpretation of S. 48, Land Acquisition Act. The Court finally awarded Rs. 194-14-0 to the owner of the house and directed the Municipal Committee to pay the same to the owner of the house. This petition of appeal or revision is filed against this order by the Municipal Committee, Nagpur, through the Collector, Nagpur. This case is registered in this Court as Miscellaneous Appeal No. 22 of 1936. It was filed as an application for revision under S. 115, Civil P. C., by the Municipal Committee, Nagpur, by its Secretary through the Collector. The Deputy Commissioner, Nagpur, endorsed thereon "forwarded". The petition was presented in this Court by the agent of the Municipal Committee on 7th December 1935 with a power of attorney in his favour by the Municipal Committee. Later on, he filed a fresh power on 9th December 1935 from the Deputy Commissioner, Nagpur, authorizing him and Mr. Barlinge to file the petition and conduct the same. On the motion hearing it was registered and admitted as a miscellaneous appeal.

A preliminary objection is raised by the respondent that this appeal by the Municipal Committee is incompetent. It is argued that in all cases under the Land Acquisition Act, the Secretary of State is the proper party and he alone can file an appeal or revision and the Corporation or the Committee at whose instance the acquisition is made has no locus standi. Reference was made to S. 50, Land Acquisition Act and 9 Lah 667[1] and 7 N L R 88.[2] I am of the opinion that neither S. 50, nor any of the cases cited, have any bearing on the facts of the present case. I have stated the facts fully in paras. 1 to 4 of this order and it will be clear therefrom that as soon as the owner of the property obtained a final declaration through Civil Court that the land acquisition proceedings were invalid, the proceedings and the reference arising therefrom came to an end. During the pendency of the reference, all parties agreed to discharge the Collector who represented the Government from the proceedings and Government thus ceased to be a party to the proceedings on and after 26th October 1934. Thereafter the only parties before the Court were the owner of the property and the Municipal Committee, Nagpur, on whose behalf the proceedings were started. On 1st November 1935 the owner of the property asked the Civil Court to award damages and costs against the Municipal Committee, Nagpur, and the Court purporting to act under S. 48 of the Act has awarded the same against the Municipal Committee, Nagpur, by its order which is the subject matter of this appeal or revision. The party affected by the decision is the Municipal

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[1] Collector and Chairman, District Board, Gujranwala v. Hira Nand, (1929) 16 A I R Lah 10=111 I C 477=9 Lah 667=29 P L R 268.

[2] Collector of Akola v. Anand Rao, (1911) 7 N L R 88=11 I C 690.

Committee, Nagpur, and not the Collector representing the Government, and in the peculiar circumstances of the case, the Municipal Committee, Nagpur, alone could move this Court.

The said Committee filed this petition as an application under S. 115, Civil P. C., and contends that the Court below acted without jurisdiction. Though this case is registered as an appeal, counsel for the Municipal Committee still persists in saying that it should be treated as a revision, and in the alternative it is argued that if it be considered necessary that the appeal or application for revision should be filed by the Collector as representing the Government it may be treated as so filed on 9th December 1935 when the Collector authorized its filing. In 7 N L R 88[2] it was laid down that the Collector is the agent of Government and an application or appeal filed by him is for all practical purposes filed by Government and can be dealt with as such. If the decision of the Court below be regarded as an award, and if it be necessary that an appeal ought to be filed by Government against it, the present petition can undoubtedly be treated as an appeal filed on 9th December 1935, and it is within time, but I prefer to hold that the Government represented by the Collector was discharged from the proceedings on 26th October 1934 as per order of the Court of that date in the order sheet and that thereafter rightly or wrongly the only parties before the Court were the owner of the property and the Municipal Committee and the former has succeeded in obtaining an order against the latter which is the subject-matter of dispute before this Court. The Municipal Committee, Nagpur, could under the circumstances move this Court, in revision and as the order that has been passed by the Court, though purporting to be one under S. 48 of the Act is, as I will show later, without jurisdiction and interference in revision is justified. I overrule the preliminary objection.

The procedure adopted by the lower Court is not at all justified by law. At the instance of the Municipal Committee, Nagpur, the Government started land acquisition proceedings of the property belonging to the non-applicant (respondent) and gave an award. As the owner of the house did not accept the award but asked for a reference, the Collector made the reference under S. 18, Land Acquisition Act, but thereafter the owner obtained a decision that the land acquisition proceedings started by Government were invalid. This decision was binding on all parties including Government. The necessary consequence of this decision was that the Land Acquisition proceedings and the reference under S. 18 terminated and the Additional District Judge became functus officio. He had no jurisdiction thereafter to entertain any application from the owner of the house and award him damages and costs as he purports to have done under S. 48, Land Acquisition Act. The learned Additional District Judge's interpretation of S. 48, Land Acquisition Act is erroneous on the face of it. He contends that as the Government has abandoned the acquisition as a result of the civil suit by which the acquisition proceedings were held to be invalid, it must be deemed to have withdrawn from the acquisition and therefore compensation can be awarded by him under S. 48, Land Acquisition Act. S. 48, Land Acquisition Act runs thus :

> 48 (1). Except in the case provided for in S. 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.
>
> (2). Whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.
>
> (3). The provisions of Part 3 of this Act shall apply, so far as may be, to the determination of the compensation payable under this section.

It is contended on behalf of the Municipal Committee Nagpur, that this is not a case in which there is a withdrawal by Government as contemplated by S. 48 of the Act, but the proceedings have come to an end by the declaration granted by the Civil Court in Civil Suit No. 163 of 1930 and thus the Additional District Judge to whom a reference was made became functus officio. I am of the opinion that this contention is correct. S. 48 of the Act does not at all come into play in this case. S. 48 contemplates a voluntary withdrawal by Government before possession is taken. It is not intended to cover a case in which there is no such withdrawal, but the proceedings came to an end as they were found to be invalid. In such a case the proceedings automatically drop and the aggrieved party is left to choose his remedy in ordinary Civil Court against the party who committed the wrong against it. The Land Acquisition Act does not provide a cheap remedy for such a grievance. The lower Court failed to notice that the jurisdiction it exercises under the Land Acquisition Act is a restricted one and the Civil Court has no right to widen it and act in contravention of the provisions of the Act. In this particular case there was an award, which, not having been accepted, a reference under S. 18 of the Act was made to determine the correct amount of compensation payable but subsequently the award itself was declared invalid by a decree of a competent Court with the result that the reference that was made also terminated. I fail to see how S. 48 of the Act can be used to justify the action taken by the Court below. The said section refers to a different case altogether. S. 48 contemplates a case where Government withdraws from the acquisition before possession is taken. It then states that in such a case the Collector shall determine the amount of compensation due for the damages suffered by the owner in consequence of the notice of any proceedings thereunder and shall pay such amount to the person interested together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land. It further states that the provisions of Part 3 of this Act shall apply, so far as may be, to the determination of the compensation payable under this section. Provisions of Part 3 are the provisions which deal with references to Court and the procedure.

The language of the section is plain and clearly indicates what is to be done by whom and when. There must be firstly a withdrawal by Government from acquisition, then the Collector should determine the compensation payable consequent on such withdrawal and in case the award of such compensation is not accepted, the party dissatisfied with the award may apply for reference to Civil Court and on such a reference the provisions of Part 3 will, so far as may be, apply. I am of the opinion that there was no withdrawal by Government of the acquisition in this case as contemplated by S. 48 and this Section does not come into play. Even assuming that as a result of the declaration by a competent Civil Court that the original award was invalid the Government abandoned the proceedings which amounted to withdrawal though not voluntary, S. 48 does not at once vest the Civil Court with power to determine the compensation payable to the owner for the loss occasioned to him by the proceedings. The power is given to the Collector under S. 48 (2). It is only when the Collector exercises his powers under S. 48 (2) that the person dissatisfied with his award may apply for reference and S. 48 (3) further says that the provisions of Part 3 will apply, so far as may be, to such references. The learned Additional District Judge has usurped the functions of the Collector and has himself made the award under S. 48 (2). He was not empowered to do so and has clearly acted without jurisdiction. Their Lordships of the Privy Council in 6 M I A 133[3] at p 155 state as under:

> Whenever jurisdiction is given to a Court by an Act of Parliament or by a Regulation in India and such jurisdiction is only given upon certain specified terms contained in the Regulation itself it is a universal principle that these terms must be complied with in order to create and raise the jurisdiction, for, if they be not complied with, the jurisdiction does not arise.

The above principle applies to the case. S. 48, Land Acquisition Act, conferred the power on the Collector to determine the compensation after the withdrawal and not on the Civil Court. No Civil Court could therefore assume jurisdiction to determine it, if it be considered that there was a withdrawal. I am therefore clearly of the opinion that while dealing with a case referred to it under S. 18 of the Act which came to an end automatically the moment it was held by a competent Court that the award out of which the reference was made was invalid, the Civil Court dealing with the reference had no power to determine the compensation payable to a party much less compensation payable to the party for damage suffered in consequence of the proceedings. Such power is vested in the Collector only in cases of withdrawal by Government from acquisition before possession is taken and if the Collector makes an award in such a case and thereafter a reference is made to Civil Court that reference can be dealt with by Civil Court, but otherwise it has no jurisdiction under the provisions of the Land Acquisition Act.

The Court below as soon as it was appraised of the fact that the award which

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3. Nusserwanjee Pestonjee v Meer Mynoodeen Khan, (1854-57) 6 M I A 134 (P C).

gave rise to the reference before it was declared invalid ought to have dropped the proceedings and returned the papers to the Collector. It became functus officio and could not entertain at that stage an application from the owner of the property for compensation for damage sustained in consequence of the proceedings taken against him. Such an application was not triable and should have been rejected. The Court below acted without jurisdiction in entertaining the application and passing an order in favour of the owner. This is pre-eminently a case in which interference either in appeal or an application under S. 115, Civil P. C., is called for. I set aside the order of the lower Court and dismiss the application of the owner filed by him in the lower Court on 1st November 1935. The result is that this petition is allowed with costs. Pleader's fee Rs 25 which will be paid to the Municipal Committee, Nagpur, which is held by me to be the proper party filing this petition.

D.S./R.K. *Order set aside.*

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## * A. I. R. 1938 Nagpur 173

STONE C. J. AND PURANIK J.

*Abdul Rashid Abdulla Khan Musalman* — Appellant.

v.

*Dr. Syed Minhazul Hasan Naiwuddin Musalman and another* — Respondents.

First Appeal No. 71 and Misc. Appeal No. 45 of 1935, Decided on 31st August 1937, from judgment of Dist. Judge, Wardha, D/. 9th November 1934.

**(a) Practice — Stay of suit — Proceedings stayed by order from Appellate Court adjourned from time to time in view of date fixed for hearing and following it—Stay order vacated—Parties must appear on date following.**

Where proceedings in a trial Court are stayed by order of the Appellate Court, and the trial Court in consequence of such an order adjourns the proceedings from time to time in view of the date fixed for hearing in the Appellate Court and following on such dates, once the matter before the Appellate Court is disposed of and the stay order vacated, and the parties are aware of the same, the date following to which the proceedings stand adjourned in the trial Court becomes effective and the parties are bound to appear before the trial Court on such date. If any of the parties fail to appear on such a date, the Court will be justified in proceeding ex parte against such party. [P 174 C 1, 2]

*** (b) Succession Act (1925), Part 9, Ch. 1, S. 218—Enquiry under Chapter 1—Nature of —Assumption regarding one of two religions (Christian or Mahomedan)—Effect of — No presumption that assumption is correct.**

Questions whether the testator is Mahomedan or Christian, his relationship and his disposing power over the subject-matter of the will are irrelevant in probate proceedings. If in fact on such a contest, the Court proceeds on the assumption that the testator was either Mahomedan or Christian, or that he was in a particular relationship to one of the parties, such assumptions do not in any slight degree raise any presumption thereafter that the assumptions are correct. [P 174 C 2]

*** (c) Succession Act (1925), Part 9, Ch. 1, S. 218—Mahomedan—Will disposing of share exceeding disposing power — Will can be admitted to probate.**

A Mahomedan will can be admitted to probate although it purports to deal with more than the share over which the testator has disposing power. If however more than that share is disposed of by the will, the position of the executor with regard to the excess will be different in kind from what it would be if the testator had power to dispose of the whole. The Court of probate has no jurisdiction to determine any such question or any other question of title : *A I R 1933 Cal 116 (P C) ; A I R 1930 Oudh 272 ; 28 Bom 644*; and *9 N L R 152, Foll ; A I R 1928 Rang 307, Ref.* [P 175 C 2; P 176 C 1]

Fida Husain and D. R. Buxy — *for Appellant.*

D. N. Choudhari and Abdur Razak Khan — *for Respondents 1 and 2, respectively.*

**Judgment.**—First Appeal No. 71 of 1935 and Miscellaneous Appeal No. 45 of 1935 both arise out of probate proceedings taken by Dr. Hasan, the non-applicant in Miscellaneous Appeal No. 45 of 1935, as executor of the will of the deceased lady who had by her will made him an executor. The probate proceedings had a somewhat chequered history owing to the fact that there was litigation proceedings between the caveator and the person propounding the will with the result that the record in the probate proceedings was for a time in the Judicial Commissioner's Court and a stay order staying the probate proceedings was passed on or about 14th April 1934. On that date the learned District Judge in whose Court the probate proceedings were proceeding was ready to dispose of the case which had reached the stage that all the applicants' witnesses had been heard and on that date they closed their case. Having closed their case, Mr. Nagle appeared for the non-applicant and said that he had received a telegram stating that the stay order had been passed. The learned District Judge on that information considered it undesirable to proceed with the case although the stay order had not been transmitted to him. He adjourned the case accordingly to 21st April 1934, and by that date the stay order had been received. The matter was adjourned. The learned Judge had also been informed that the Judicial Commissioner's Court was disposing of the matter on 10th August 1934. That date was subsequently altered to 31st August 1934 and later to 9th October 1934, and we accordingly find the probate proceedings in the District Court being adjourned to 25th August 1934, 29th September 1934 and 3rd November 1934.

On 9th October the present non-applicant was present in the Judicial Commissioner's Court when the matter was disposed of and was therefore aware that the stay order had come to an end and that the date fixed in the District Court, 3rd November 1934, was effective. He had however launched some other miscellaneous appeal, and he says that he imagined the miscellaneous appeal would involve the retention of the records in the Judicial Commissioner's Court until after 3rd November 1934, as the miscellaneous appeal was fixed for hearing on 14th November 1934. That is his explanation for failing to appear on 3rd November 1934, and for failing to instruct his pleader to make any sort of representation whatsoever to the Court. He, knowing that the case was fixed for 3rd November 1934 and that the stay was at an end and that therefore the Court would take up the case on 3rd November 1934, simply left the District Court completely at a loss to know why it was that no one was appearing for him when the case was duly called on. The Court went out of its way to send for the pleader, Mr. Nagle, who came and said that he had no instructions. The Court did not then and there pass orders on 3rd November 1934, but adjourned the matter to 9th November 1934 when the non-applicant was again absent and judgment was delivered.

There was a subsequent application to restore the case. That application was rejected, and the miscellaneous appeal is against that rejection. We see no reason whatever to interfere with the discretion of the learned District Judge in this matter. The non-applicant knew that the stay was at an end. He knew that the case was liable to be called on and he should have appeared. That disposes of the Miscellaneous Appeal No. 45 of 1935 and leads to a consideration of First Appeal No. 71 of 1935, which is an appeal from the ex parte decree passed admitting this will to probate. The learned Judge's judgment is founded upon abundant evidence sufficient to prove the will and its due execution and the testamentary capacity of the testatrix; and the attack is indeed hardly made along the lines that the evidence is inadequate but is made along two avenues, one based on the conclusion of the learned District Judge on a preliminary issue, the other founded upon Mahomedan law. To understand the first it is necessary to state a few facts. The testatrix Mt. Khurshed Samavi Begum, was admittedly born a Mahomedan. She died, it is said, on the one side a Christian, or, as it is said on the other side, a Mahomedan. The side, i. e., of the non-applicant, which alleges that she was a Mahomedan, also alleged that when a little girl she married the non-applicant, and having married the non-applicant (which marriage, it is alleged, was never dissolved), she was not free to marry the applicant. The applicant, on the other hand, says that the fact of conversion to Christianity dissolved her first marriage, if she was ever married to the non-applicant, that she subsequently married the applicant in a Christian Church in Calcutta, and that the child that she died in delivering is the child of that marriage. Whereupon the questions are raised: Was she a Christian or a Mahomedan? Was she the wife, at the time of her death, of the non-applicant? Had she disposing power over all the property the subject matter of the will? The learned Judge decided, for reasons which we will consider a little later, that all these questions were irrelevant in probate proceedings and consequently put on one side all such matters, and assumed, without deciding, that she was a Mahomedan and was married to the non-applicant. He then proceeded to consider the case on those assumptions. This was, of course, a perfectly proper proceeding, and does not in the slightest degree raise any presumption hereafter that that assumption is correct.

But it is said before us that, having assumed for the purpose of determining the preliminary issues that this woman was a Mahomedan and married to the non-applicant, the learned Judge had allowed his judgment in this matter to be coloured by a lot of evidence directed to prove that she was a Christian and the wife of the applicant. In our opinion, after reading the evidence and reading the judgment, it is obvious that the learned Judge has done no such thing. It is true that at one point he uses language which makes one think that he had overlooked the fact that he was proceeding on the assumption that this lady was a Mahomedan married to the non-applicant. It appears in para. 3 of his judgment beginning with the words "Mr. Pathak himself understands Urdu" and ending up "from whence it was obtained by this Court." But although the learned Judge has there used language that makes one doubt whether he had fully in mind the assumptions under which this case was necessarily proceeding it is also clear from his judgment and from the evidence that the witnesses were being called to prove the execution of the will. And they were proving that this lady was a literate lady capable of writing a will, and she had written this will, that two respectable witnesses, one of whom had suggested amendments to the will which had been accepted and entered by the lady, were present to witness the will, that another respectable man went with her to the Registry where she handed over the will to the District Registrar, that she was at the time perfectly well, that she feared she might die because she was expecting a first delivery at an age which for an Indian lady is advanced for a first delivery and she had been warned that her confinement would be difficult, that she in fact underwent a serious operation, not because she had any illness, but because she submitted to a Cæsarean operation which is designed to enable a difficult confinement to be overcome, an operation which in some cases, as in this proves fatal to the mother but which usually secures, as here, the life of the child; and that it was with this danger in prospect that she made a will. The will in question appears to be the kind of will, apart from the fact that it makes no mention of the expected child, which a woman, circumstanced as this lady was, would be likely to make. There is, of course, no evidence the other way, and it seems to us to be obvious that with such evidence before him, the Judge was justified in arriving, and indeed compelled to arrive, at the conclusion he did.

The second avenue above mentioned raises a point of law. It is said that the preliminary issue was disposed of on certain assumptions. However wrong, however far from the truth, those assumptions were, they control the matter so far as this case is concerned. One of the assumptions is that this was a Mahomedan lady, and that if she were a Mahomedan lady, she could not leave all her estate to anybody by will. It is said that the most she could leave would be a third. 6 Rang 542[1] is relied on for that proposition which we are prepared to accept without any authority being cited. From that it is argued that this will should not be admitted to probate because the effect of so admitting it to probate will be to confer upon the executor a title to the whole estate; that this Probate Court should have gone into the question of title, should have first of all decided whether the testatrix was a Mahomedan, and if it had found that she was a Mahomedan, should have proceeded to delimit her share, dividing the estate up into thirds and declaring an intestacy as to two-thirds. In our opinion, that is not the position that arises in such a case. If a reference is made to the Privy Council decision in 33 Cal 116[2] it will be found from the observations at pp. 128 and 129 that a Mahomedan will can be admitted to probate although it purports to deal with more than the share which the testator had disposing power over. If however more than that share is disposed of by will, the position of the executor with regard to the excess will be different in kind from what it would be if the testatrix had power to dispose of the whole estate. The same point, but more expressly stated, was decided in A I R 1930 Oudh 272[3] following upon 28 Bom 644.[4] That case, which decided that a Court of Probate is not concerned with title, is in consonance with the decision of the Judicial Commissioner's Court reported 9 N L R 152[5]

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1. E. C Jeewa v. Yacoob Ally, (1928) 15 A I R Rang 307=114 I C 303=6 Rang 542.
2. Kurrutulain Bahadur v. Nazbat-ud-dowla Abbas Hossein Khan, (1906) 33 Cal 116=32 I A 244=1 C L J 594=9 C W N 938=8 Sar 889 (P C).
3. T. Nathon v. Mrs. A. S. Nathon, (1930) 17 A I R Oudh 272=123 I C 220=7 O W N 373.
4. Ochavaram Nanabhai v. Dolatram Jamietram, (1904) 28 Bom 644=6 Bom L R 966.
5. Cullen v. Mrs. Elkins, (1913) 9 N L R 152=21 I C 599.

where it was decided that a District Court in its capacity as a Court of probate has no jurisdiction to determine any question of title regarding the property of which the will purports to dispose; nor has it jurisdiction to determine whether the testator had or had not a disposing power over the property or to go into the question of the void or valid nature of such bequests. That also seems to us, apart from authority, to be clear when one bears in mind the purpose of probate and the history of probate. It would be in the highest degree inconvenient, in our opinion, to confuse these two kinds of dispute. In our opinion therefore there is nothing in the second objection to the learned Judge's conclusion and the appeal must be dismissed with costs, the miscellaneous appeal also being dismissed. One set of costs. Counsel's fee Rs. 50.

V.B./R.K. *Appeal dismissed.*

## A. I. R. 1938 Nagpur 176

STONE C. J. AND PURANIK J.

*Mt. Kariman and others* — Applicants.

v.

*Bahoransingh and others* — Non-applicants.

Civil Revn. No. 729 of 1935, Decided on 1st September 1937.

**Civil P. C. (1908), O. 33, R. 1 — Possession of occupancy holding can be taken into consideration — Nature of value of right discussed.** *21 N L R 98=A I R 1925 Nag 438=90 I C 949, Overruled.*

Possession of an occupancy holding can be taken into consideration in deciding whether an applicant to sue in forma pauperis is possessed of sufficient means to enable him to pay the court-fee prescribed by law: *21 N L R 98=A I R 1925 Nag 438=90 I C 949*, **Overruled;** *(1874) 9 Ch A 143 and A I R 1927 Cal 309, Ref.* [P 177 C 1, 2]

The position in such a case stands as follows: The property in question is the right which an occupancy tenant has in occupancy land. That right is restricted by the C. P. Tenancy Act and may be described as being limited to working the land, surrendering the land and transferring the land to a limited class in two modes (1) by subletting and (2) by transfer. The right of surrender may or may not be valuable. The right to transfer is to a co-tenant and the tenant's nearer heirs, and may or may not be valuable. If it is valuable and of such a value as to exceed the limit which a pauper applicant is permitted to have if his application is to succeed obviously the application would fail. If it is not so valuable then it would succeed. Which it is a question of fact. [P 177 C 1, 2]

B. L. Gupta — *for Applicants.*

H. N. Gokhale — *for Non-applicants.*

### Order of Reference.

**Pollock J.** — This is an application from an order refusing the applicants leave to sue in forma pauperis. The court-fee required is Rs. 237 and it is clear that the applicants must be held to be paupers within the meaning of O. 33, R. 1, i. e. persons not possessed of sufficient means to pay this fee, unless an occupancy field of which they are the tenants can be taken into consideration. In 21 N L R 98[1] the Judicial Commissioner's Court held that the ownership or possession of an occupancy holding does not operate as a bar to an applicant's suing in forma pauperis under R. 1 of O. 33. The reason for this decision is stated by the learned Additional Judicial Commissioner at p. 101 as follows:

> I may therefore say that an ownership of property, devoid of the right of free transfer, is for all intents and purposes, only a nominal ownership, because it is not capable of immediate conversion into what may be termed the wherewithal or sinews of war to enable the pauper to fight out the battle with his opponent in a Civil Court.

The question whether an occupancy holding is convertible into cash seems to me, with due respect, to be one of fact. It has been argued that the ability of an occupancy holder to convert his holding into cash depends on the will of the lambardar and this of course is correct, but it does not necessarily follow that it cannot be converted into cash, and it is, in my opinion, for the occupancy-holder to show that it cannot be converted into cash. The ability of a person to convert any property into cash depends on his ability to find a purchaser and it may be impossible for him to do so. I therefore respectfully dissent from the view expressed in 21 N L R 98[1] and would refer the following point to a Division Bench for decision:

"Should the possession of an occupancy holding be taken into consideration in deciding whether an applicant to sue in forma pauperis is possessed of sufficient means to enable him to pay the court-fee prescribed by law?"

Let the papers be laid before the Hon'ble Chief Justice for orders constituting a Division Bench.

### Order of Division Bench.

This matter comes before the Bench on a reference from Pollock J. in the following terms:

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[1] Chandan Singh v. Laxman, (1925) 12 A I R Nag 438=90 I C 949=21 N L R 98.

**Should the possession of an occupancy holding be taken into consideration in deciding whether an applicant to sue in forma pauperis is possessed of sufficient means to enable him to pay the court-fee prescribed by law ?**

The learned Judge's difficulty is expressed by him to be due to a decision reported in 21 N L R 98[1] at p. 101 where it was laid down by the learned Additional Judicial Commissioner as follows :

> I may therefore say that an ownership of property, devoid of the right of free transfer, is for all intents and purposes, only a nominal ownership, because it is not capable of immediate conversion into what may be termed the wherewithal or sinews of war to enable the pauper to fight out the battle with his opponent in a Civil Court.

That conclusion appears to be arrived at by considering the meaning of the term 'property'. As property is treated as a right unrestricted in point of disposition the learned Additional Judicial Commissioner appears to have considered that if it is restricted in point of disposition it would not amount to property, or putting the matter on a broader basis his view might perhaps be expressed thus : that what one is considering in a pauper application is whether in point of fact the applicant has got the means to fight the case: and it may be said that he has not the means to fight the case although he has got property if that property cannot be turned into money or credit. In England the matter came up for consideration in (1874) 9 Ch A 143[2] where it was laid down that a farming tenant who has valuable crops on his farm, but no other property, will not be admitted to defend in forma pauperis, although he has in the suit been restrained from selling or removing the crops. On the other hand, in Calcutta in A I R 1927 Cal 309[3] it has been held that a chose in action is not property where it consists of a debt due to a wife from a husband by way of prompt dower on the ground that the wife in such a case has no power of disposal of the property in question and cannot be said to be possessed of property.

In this case the position stands as follows : The property in question is the right which an occupancy tenant has in occupancy land. That right is restricted by the Central Provinces Tenancy Act and may be described as being limited to working the land, surrendering the land, and transferring the land to a limited class in two modes, (1) by subletting and (2) by transfer. The right of surrender may or may not be valuable. The right of transfer is to a co-tenant and the tenant's nearer heirs, and may or may not be valuable. If it is valuable and is of such a value as to exceed the limit which a pauper applicant is permitted to have if his application is to succeed obviously the application would fail; if it is not so valuable then it would succeed. Which it is is a question of fact. The question is accordingly answered in the affirmative, and the matter is referred back for disposal in the light of that answer. Costs in the case.

V.B.B./R.K. *Reference answered in the affirmative.*

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## A. I. R. 1938 Nagpur 177

POLLOCK J.

*Sabasha and others* — Appellants.

v.

*Baba Narayan Lokras and others* — Respondents.

Second Appeal No. 47-B of 1935, Decided on 20th October 1937, from appellate decree of First Addl. Dist. Judge, Akola, D/- 7th February 1935.

**(a) Customary right—Right to use ghats of tank for immersing tazias is customary right and not easement.**

The right to use the ghats of a tank for the purpose of immersing tazias at muharram is a customary right and not an easement : *A I R 1933 Nag 74, Rel. on.* [P 179 C 1]

**(b) Customary right—Proof—Mahomedans immersing tazias at Muharram in two ghats in tank for such length of time as to suggest that the usage has become customary law of the place — Custom is certain and invariable and is not unreasonable — Mere possibility of increase in number of tazias will not make it unreasonable.**

In order to establish a customary right it is not necessary to show that it has been exercised since time immemorial. It is sufficient to show that it has been openly enjoyed for such a length of time as suggests that, by agreement or otherwise, the usage has become a customary law of the locality. It is not necessary to prove enjoyment of the right for a period of 20 years. [P 180 C 1]

**Where therefore the Mahomedans have been immersing their tazias at Muharram in two ghats of a tank for such a length of time as to suggest that the usage has become the customary law of the place, they have a customary right to use the ghats for immersing their tazias. There is nothing**

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[2] Ridgway v. Edwards, (1874) 9 Ch A 143=29 L T 906=22 W R 288.

[3] Mabia Khatun v. Sheikh Satkari, (1927) 14 A I R Cal 309=100 I C 264=45 C L J 68.

unreasonable in the custom and it is sufficiently certain and invariable. The mere possibility that the number of tazias immersed may eventually increase so much as to prove a nuisance, is too remote to make the custom unreasonable : *17 All 57 ; 23 Bom 666 and A I R 1923 Cal 200, Rel. on.* [P 180 C 1, 2]

Fida Hussain—*for Appellants.*

V. K. Rajwade, K. V. Brahma, M. R. Bobde and V. D. Kale — *for Respondents.*

**Judgment.**—This litigation arises out of a quarrel between the Hindu and Mahomedan communities of Basim over a tank situated on the outskirts of that town. The suit giving rise to this appeal was brought by persons representing the Hindu community against persons representing the Mahomedan community, and the relief sought was a perpetual injunction restraining the Mahomedans from immersing their tazias at any of the 10 ghats on the banks of this tank. Their suit succeeded in both lower Courts and the defendants have now preferred this second appeal. The first point to be decided is who owns the tank. The Hindus contended and the lower Courts have found that they are the owners. The Mahomedans contended that the Mahomedans owned it or, alternatively, that it belonged to Government. The tank, which is known as the Padma Tirtha, is situated in S. No. 318 outside Basim, and its origin is lost in the mists of antiquity. In the Gazetteer of the Hyderabad Assigned Districts compiled by Sir A. C. Lyall in 1870, the author relates the legendary origin of this tank, how a king called Wasuke was cured of leprosy by bathing in a pool outside the town and how in gratitude he enlarged it into a tank which is now known as the Padma Tirtha and took up his residence in the town which was then called Wasukipur and subsequently became known as Wasim or Basim. There is no evidence to show who built the tank or when it was built or to whom the land belonged, but the tank is an undoubtedly very ancient one which has long been regarded by Hindus as holy. There is a provision in S. 41, Berar Land Revenue Code, that all lands, tanks etc., and all rights therein which are not the property of persons are the property of Government. The plaintiffs rely on acts of user throughout a very long period. There is no evidence to show when the ghats were built, but it has been established that on various occasions since 1883 the ghats have been repaired or rebuilt and that silt has been taken out of the tank by the Hindu community at their own expense. The land surrounding the tank which forms the rest of S. No. 318 has been built on by the Hindu community. Dharamashala and a well were built in about 1883 and the Dharamashala has since been enlarged on various occasions. There are Hindu tombs, some of which are memorials of satis and must date back to at least about 1850, and there are Hindu temples, one of which, even according to the witnesses of the defendants, must have been built more than 60 years ago at least. In the tank itself, there is a platform on which there is the linga of Mahadeo. The contention that the tank belonged to the Mahomedan community was withdrawn in this Court, and the defendants contented themselves with the contention that the tank was a public tank belonging to Government. It does not appear that Government ever claimed to own the tank, and the report of the Tahsildar in 1928 shows that this tank was under the management of Hindus and was repaired by them and that no income was derived from it by the Municipal Committee.

Both communities claim to have used the tank in various ways, apart from those mentioned above, but I do not think that these various uses are inconsistent with Government ownership or that they are of much assistance in deciding this case. The defendants have relied on certain documents as tending to show that the tank is a public tank. In the Prati book of 1871 (Ex. p. 11) the tank is described as Government under the column headed "Government or Inam"; but that, I think merely indicates that the land had not been granted as an inam. In the Faisalpatrak of 1877 (Ex. D.1) there is a remark in the remarks column that the tank had been given gratis to all the people in the village and this no doubt is a document that favours the defendants' case but I do not think that it is conclusive and the remark was probably intended to explain why no rent was recorded. At various times there have been applications by Hindus for permission to bury persons on the banks of the tank and to build on the land. Applications to bury would probably be necessary even if the Hindus were the owners of the land as the land was not set apart as a burial ground, and applications to build on the land might well be made if the land was not definitely recorded as the property of any person. In 1914 in the Record of Rights, Ex. D-4, the land was recorded as F class; but this does not necessarily mean that the land was not allotted to a particular community. In 1920 the Sub-divisional Officer demarcated the boundary between S. No. 318 and the adjoining S. No. 319, which had been used as the Mahomedan burial ground, as there had been some encroachment on S. No 318; this cannot help the defendants.

After careful consideration of all the evidence on the record, I have come to the conclusion that in the absence of any claim by Government to this tank, the decision of the lower Courts that it belongs to the Hindu community should be upheld. The next question that arises is whether the Mahomedans have proved a customary right to use any of these ghats for the purpose of immersing their tazias at Muharram. The right claimed is clearly, in my opinion, a customary right and not an easement, the distinction between which I explained in 29 N L R 85.[1] The lower Appellate Court has found that the Mahomedans started to immerse their tazias from ghats Nos. 1 and 2 of this tank probably in about 1910 and that they continued to do so without any dispute until 1925. The plaintiffs had contended that there was no immersion before 1915, but that contention has been clearly disproved. In 1925 there was a protest by Mahadeo Gadge (P. W. 26). As a Hindu festival was going to coincide more or less with Muharram in that year, he raised the objection that the Mahomedans should not be allowed to immerse their tazias in the tank that year. He intended to hold a meeting in order to urge this objection, but that was prohibited by the S. D. O. and the Mahomedans immersed their tazias in the tank without any objection on the part of the Hindus. Apparently annoyed by this protest, the Mahomedans however immersed their tazias not merely from ghats Nos. 1 and 2, as they had regularly done in the past, but from all the ghats, and this aroused some ill-feeling on the part of the Hindus. An attempt was made to settle the dispute but the proposed compromise fell through. In the following year 1926 the Mahomedans immersed their tazias from all the ghats except Nos. 8 and 9, which are just in front of the Hindu temples. From the evidence of Abdul Masjid (D. W. 112) it appears that the police stopped the tazias from going to those two ghats. In 1927 there was again a dispute and Mr. Hoyle, the District Magistrate, failed in his attempt to get the two communities to come to any agreement ; he passed orders that the Mahomedans should be allowed to immerse their tazias from all ghats and this they did under police supervision. Shortly afterwards there was a serious Hindu-Mahomedan riot and the feelings between the two communities appear to have been much strained ever since. Since then police arrangements have always been made to supervise the immersion of tazias, and since this suit was brought in June 1929, just after the Muharram of that year, the tazias have been immersed in accordance with interlocutory orders passed by the Court.

The evidence of Mr. Middleton-Stewart (D. W. 125), who was Assistant Superintendent of Police at Basim in 1910 and whose evidence has been substantially accepted by the lower Courts, shows that the Mahomedans immersed their tazias from some of the ghats of this tank in 1910 and that he made the usual police arrangements, with the object of preventing quarrels between the various Mahomedan processions rather than any communal quarrel. It is quite clear from his evidence that 1910 was not the first year that the Mahomedans immersed their tazias in this tank and the finding of the lower Appellate Court is merely that the immersion began in about 1910. There is therefore no definite finding of fact binding on me in second appeal that the immersion began for the first time in 1910. In 1925 there was the protest by Mahadeo Gadge which I have mentioned, but there is nothing to show that this was anything more than a purely individual protest and the evidence produced shows that the Mahomedans were allowed to immerse their tazias in that tank that year without any obstruction by the Hindus. There is not much evidence to show what happened in 1926, but it has not been shown that there was any obstruction to the Mahomedans immersing their tazias from ghats Nos. 1 and 2, and the same applies to the following year 1927. In 1928 an order was passed by the District Magistrate, Mr. Banerji, in the course of which he stated :

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[1] Ganpat v. Narayan, (1933) 20 A I R Nag 74=142 I C 158=29 N L R 85.

☞ It is admitted that tazias were being immersed in the tank even before 1925. The dispute is regarding the number of ghats that were being used. Last year my predecessor tried to bring about a compromise by inducing the Mahomedans to give up the two steps adjoining the Hindu temples on one side of the tank. The Hindus however did not agree to this;

and he finally passed an order that the tazias would be immersed from all the ghats, as had been done in the previous year.

As regards ghats Nos. 1 and 2 therefore the position is that the Mahomedans started immersing their tazias there before 1910 and continued to do so without any objection on the part of the Hindu community until the suit was brought in 1929. In order to establish a customary right, it is not necessary to show that it has been exercised since time immemorial. It is sufficient to show that it has been openly enjoyed for such a length of time as suggests that, by agreement or otherwise, the usage has become a customary law of the locality: *see* 17 All 87,[2] 23 Bom 666[3] and A I R 1923 Cal 200.[4] It has not been laid down, so far as I am aware, that enjoyment for a period of 20 years must be proved, and the learned Additional District Judge misunderstood the decision in 17 All 87[2] when he said that such a proposition was there laid down. In my opinion the length of time during which the tazias have been immersed from ghats Nos. 1 and 2 is such as to suggest that this usage has become the customary law of the place and that therefore the Mahomedans have a customary right to use these two ghats in this way. As regards the other ghats, it is clear that they never used them for this purpose till 1925 and that therefore no customary law to use them has been proved. An objection has been taken that the alleged custom is not reasonable, certain and invariable. There is nothing unreasonable in it, and it is in my opinion sufficiently certain and invariable. The number of tazias may have increased slightly, though this is not clear, and it may be that the same tazias are not always immersed from the same ghats. However that may be, the customary right claimed by the Mahomedans to immerse their tazias from ghats Nos. 1 and 2 is sufficiently certain and invariable to comply with the requisites of the law. As regards reasonability the mere possibility that the number of tazias immersed may eventually increase so much as to prove a nuisance seems, to use the words in 23 Bom 666[3] at p. 672, too remote to enable me to describe as unreasonable the custom in dispute.

The appeal therefore partially succeeds, and the decree will be modified so as to grant the plaintiffs a perpetual injunction restraining the Mahomedans from immersing their tazias from any of the ghats of the Padma Tirtha except ghats Nos. 1 and 2 over which the Mahomedans have a customary right to immerse their tazias. As success and failure in this suit has been fairly equally divided, I think it fair that the parties should bear their own costs throughout.

R.M./R.K. *Order accordingly.*

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## * A. I. R. 1938 Nagpur 180

VIVIAN BOSE J.

*Ramprasad Jagbandhoo and others* — Plaintiffs — Applicants.

v.

*Anandi Brindawan Rawat* — Non-applicant.

Civil Revn. No. 655 of 1935, Decided on 20th October 1937, from order of the Court of Small Causes, Mahasamund, D/- 17th September 1935.

**(a) Limitation Act (1908), Art. 64—Account stated—Items on both sides must be shown.**

Before a document can be used as an account stated, it must be shown that there were items on both sides of the accounts: *A I R 1934 P C 147, Ref.* [P 181 C 1]

**(b) Interpretation of Statutes — Provision should not be made nugatory.**

Law must be interpreted in a way which will not render one of its provisions entirely nugatory. [P 181 C 2]

*** (c) Contract Act (1872), S. 25 (3)—Promise to pay must be in writing.**

Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3): *A I R 1923 Bom 183; 124 I C 624 and A I R 1928 Nag 124, Dissent.* [P 181 C 2]

**(d) Limitation Act (1908), S. 19—Acknowledgment should be made within time—Suit however must be based on original cause of action and not on acknowledgment.**

A document as an acknowledgment under S. 19, cannot operate to save limitation unless it has been executed within time; also in such a case the suit must be found on the original cause of action. The document itself cannot be used as the basis of the suit. [P 181 C 2]

D. N. Choudhuri — *for Applicants.*

K. K. Gandhe — *for Non-applicant.*

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[2] Kuar sen v. Mamman, (1895) 17 All 87=1895 A W N 10.

[3] Mohidin v. Shivlingappa, (1899) 23 Bom 666 =1 Bom L R 170.

[4] Ali Mohammad v. Sk. Katu, (1923) 10 A I R Cal 200=70 I C 263=36 C L J 280.

**Order.**—This suit was instituted on 22nd March 1935 for money due on a bond said to have been executed in 1929. The bond itself has not been produced nor do we know the exact date of its execution. In so far, however, as the cause of action can be said to be founded on the bond, as is now argued by the learned counsel for the applicant, it is beyond time. But he says limitation is saved by reason of Ex. P-1, dated 8th April 1932. The plaintiff wants to use this document in one of three ways: (1) as an account stated, (2) as an acknowledgment and (3) as a promise to pay under S. 25 (3), Contract Act. The relevant portion of the document runs thus:

> On making accounts, Rs. 506-9-3 is due by me to the creditor, Jaghandhu, Malguzar . . . on account of bond and parol debt, this 8th day of April 1932. So this receipt is executed in order that it may stand as evidence and be of use when necessary.

It is admitted that there were no repayments and there is nothing to indicate that there were items on both sides of the account. Their Lordships of the Privy Council have laid down in 56 All 376[1] at p. 385 that

> the essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and by treating the items so agreed on the one side as discharging the items on the other side pro tanto, go on to agree that the balance only is payable. Such a transaction is in truth bilateral.

It is clear then that before a document can be used as an account stated, it must be shown that there were items on both sides of the account. In so far as S. 25 (3), Contract Act, is concerned a promise made in writing to pay the debt must be present. In the present case there is no promise to pay the debt made in writing in Ex. P.1. It is argued that an acknowledgment always implies a promise to pay, 2 N L R 130[2] at p. 133, and that therefore if an acknowledgment is in writing the implied promise to pay must be incorporated as a part of the acknowledgment itself and therefore that will attract the provisions of S. 25 (3), Contract Act.

It is true, several Courts have taken this view. There is for instance 46 Bom 24[3] in which however the question was not discussed at length and all that the learned Judges stated was that if an acknowledgment implies an unconditional promise to pay then they could see no reason why it should not form the basis of a suit. With all due respect, the reason, as I see it, is that the promise itself must be in writing and if it is implied then it is not in writing. The Judicial Commissioner's Court of Nagpur also took the same view in the following cases: 13 N L J 102;[4] A I R 1925 Nag 9[5] and A I R 1928 Nag 124.[6] They are all based on the same reasoning and two of them at least follow the Bombay decision.[3] As I have said, with the utmost respect I am unable to agree. Apart from the fact that S. 25 (3) requires a promise to pay in writing, this interpretation would render S. 19, Lim. Act, with its stringent provisions entirely superfluous. There would be no point in requiring an acknowledgment to be made within limitation if resort could always be had to S. 25 (3) of the Contract. It is to my mind obvious that the law must be interpreted in a way which will not render one of its provisions entirely nugatory. Therefore with the utmost respect, I am unable to accept these decisions and hold that unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3).

Regarding the document as an acknowledgment under S. 19, Lim. Act it cannot operate to save limitation unless it has been executed within time; also in such a case, the suit must be founded on the original cause of action. The document itself cannot be used as the basis of the suit. In the present case the suit is not founded on the bond. The plaint states distinctly that accounts were made on 8th April 1932, of the old dealings and Rupees 506.9-3 was found due and so a "receipt", Ex. P.2, was executed. The cause of action is stated to have accrued on 8th April 1932, and not on the date of the bond. In para. 6 of the plaint the plaintiff states that he relies on the original "receipt" dated 8th April 1932 and states distinctly that no other papers have to be filed or are relied on. Nothing can be clearer than that. The suit is not founded on the bond

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1. **Bishun Chand v. Girdhari Lal, (1934) 21 A I R P C 147=150 I C 6=61 I A 273=56 All 376 (P C).**
2. **Maniram Seth v. Seth Rupchand, (1906) 33 Cal 1047=33 I A 165=2 N L R 130=10 C W N 874=4 C L J 94 (P C).**
3. **Chunilal v. Laxman Govind, (1922) 9 A I R Bom 183=68 I C 923=46 Bom 24=23 Bom L R 606.**
4. **Gopal Das v. Ramnath, (1930) 124 I C 624=13 N L J 102.**
5. **Sitaram v. Nandram, (1925) 12 A I R Nag 9=78 I C 234.**
6. **Fadalilal v. Roopchand, (1928) 15 A I R Nag 124=106 I C 661.**

but it is founded exclusively on the "receipt". Therefore the suit as framed does not attempt to use the "receipt" as an acknowledgment, probably because it was not within time.

It was argued however that the plea of limitation was not taken and that the plaintiff has been taken by surprise and therefore I am asked to remand the case to enable the plaintiff to prove the exact date of the bond as was done in 53 All 963[7] and 56 All 281.[8] I am satisfied that the plea was taken and that it was fully understood by the plaintiff. The suit, as I have said, is not founded on the original cause of action and Ex. P-1 was used as a mere acknowledgment. All that the defendant could do in reply to such a plaint was to state that the suit based on a mere acknowledgment is not maintainable. It was the plaintiff's duty if he wanted to rely on the original cause of action and to use Ex. P-1 as an acknowledgment to save time, to show the date of the original cause of action and thus to show that Ex. P-1 was executed within limitation. This he did not do and so of course the defendant could not plead to it.

However the plaintiff attempted to do this in his reply and stated that "the acknowledgment in the suit is within time from the original dealings and the claim is maintainable." It is clear then that he realized the importance of the question of limitation and raised the issue himself. Of course technically he ought to have asked for permission to amend the plaint but I am not holding that against him here. The point is that the question was raised and since it was not inserted in the plaint it was not necessary for the defendant to make a formal reply. At the next hearing, namely 20th July 1935, the plaintiff asked for permission to amend his plaint as he wanted to add one more person as a defendant. The learned Judge ruled this out on the ground that "the claim is now barred against her". As I have said, the acknowledgment was executed on 8th September 1932. Therefore on 20th July 1935, the claim could not have been barred against this defendant if Ex. P-1 had been executed within limitation. Therefore the question of limitation was forcibly brought home to the plaintiff's mind. He was represented throughout by a pleader and I see no reason why any further opportunity should be given to him to prove that Ex. P-1 was executed within the period of limitation from the original cause of action. This would only lead to perjury.

I am sure that the matter was not placed in this way in the plaint because Ex. P-1 was not executed within limitation, and I am equally sure that the plaintiff did not ask his witnesses the necessary questions about the date of the bond because both he and his pleader knew that it was of no use. The application for revision fails and is dismissed with costs. Counsel's fee Rs. 20.

B.D./R.K. *Application dismissed.*

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[7] Abdul Rafiq v. Bhajan, (1932) 19 A I R All 199=137 I C 243=53 All 963=1932 A L J 77.

[8] Bal Krishna v. Deb Singh, (1934) 21 A I R All 76=149 I C 571=56 All 281=1933 A L J 1530.

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## A. I. R. 1938 Nagpur 182

STONE C. J.

*Suganchand Hazarilal Parwar* — *Plaintiff* — Appellant.

v.

*Lukhe More Kori and another* — *Defendants* — Respondents.

Second Appeal No. 123 of 1935, Decided on 17th September 1937, from appellate decree of Addl. Dist. Judge, Saugor, D/- 31st October 1934.

**Partnership—Suit for accounts—Partnership dissolved by death of partner — Surviving partner selling partnership property —Remedy of representative of deceased partner is to take general partnership account and not claim share in property sold.**

Where a partnership is dissolved by the death of a partner, the representatives-in-interest of the deceased partner have an interest in and a lien upon the partnership assets and can claim the taking of account as upon dissolution caused by the death of the deceased. If the surviving partners alienate any property whether immovable or moveable, the representatives of the deceased partner will have in respect of that property a lien for the amount due to them on the taking of accounts. Where therefore on the death of a partner the surviving partner sells property belonging to the partnership, the true remedy of the representative of the deceased partner, is to claim the taking of a general partnership account. It is not open to him to claim a share in the property sold. [P 183 C 1, 2]

M. R. Bobde—*for Appellant.*

A. V. Khare and W. B. Pendharkar—*for Respondents.*

**Judgment.**—In my opinion, this appeal fails. It is against a decree dismissing the suit as misconceived. The suit is brought by the son and representative in interest of one Hazarilal who was a partner with defendant 2, and the claim is for a half-share in a house which, after the death of Hazarilal, defendant 2 sold to defendant 1. The reason the claim has failed is that both the lower Courts have come to the conclusion that the plaintiff's true remedy is to sue for partnership accounts. I think that they are right, but I would prefer to put the matter a little differently from the way in which it is expressed in the Courts below.

In the first place, this is not a case that falls under the Partnership Act. It falls under the old Contract Act. The true position, as I understand it, where a partnership is dissolved by the death of a partner, is that the representatives-in-interest of the deceased partner have an interest in and a lien upon the partnership assets and can claim a taking of accounts as upon dissolution caused by the death of the deceased. If the surviving partners alienate any property, whether that property be in normal cases immovable or moveable, the representatives of the deceased partner will have in respect of that property, a lien for the amount due to them on the taking of accounts. The matter was very clearly dealt with by the Court of Appeal in England in (1906) 2 Ch 427,[1] where their Lordships inter alia decided that as regards the power of a surviving partner to deal with partnership assets, no distinction could be drawn between real estate and personal estate, that it is not only the right but the duty of a surviving partner to realize the assets for the purpose of winding up the partnership. This case was relied on in an Indian case by the Privy Council in 57 Mad 931[2] at p. 947. It follows directly that if the house was partnership property, then on the death of one partner the other partner would be entitled to sell that house. The representatives of the deceased partner have a lien on all partnership assets for the amount found due to them on the taking of partnership accounts. The true remedy of the personal representatives of the deceased partner is accordingly the taking of a general partnership account. That has not been sought here. It is quite impossible to know on the issues raised here what is due, if anything, to the estate of the deceased. In any case no title to the house which has been sold could be established.

I am asked to let in a claim for the taking of accounts. That would be allowing a new cause of action long since time barred to be pleaded and this I have no power to do. I observe that the defendants do not allege any final taking of partnership accounts after the dissolution by death which occurred in 1921. They allege that partnership thereafter continued and that accounts were taken between the deceased's brother who was then (as manager of the family, formerly managed by the deceased) the defendants' partner and the defendants, this final taking of accounts being in 1926. This is of course an entirely different kind of accounting from that now sought by the plaintiff. This case has expanded to the extent it has as the result largely of allegations made by defendant 2 that the house belonged to him as the consequence of its being transferred in settlement of the balance found due to him on the taking of final accounts. This has caused costs to be incurred unnecessarily. Those allegations have been found against. I will not in any way interfere with the order as to costs in the Courts below, but so far as the costs of this appeal are concerned, each side will bear its own costs. The appeal is dismissed.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 183

STONE C. J. AND DIGBY J.

*Dattaji Parashramji Kunbi* — Applicant.

v.

*Bhagirathi w/o Panduji Kunbi and others—Defendants*—Non-applicants.

Civil Revn. Appln. No. 32-B of 1934, Decided on 29th July 1937, from order of Addl. Sub-Judge, First Class, Amraoti, D/- 8th January 1934.

**Court-fees Act (1870), S. 7 (iv) (c)—Suit for declaration that lands were not liable to charge under certain maintenance decree—Relief involves amendment of maintenance decree — S. 7 (IV) (c) applied and not Art. 17 (iii) of Sch. 2.**

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[1] Bourne In re ; Bourne v. Bourne, (1906) 2 Ch 427=75 L J Ch 779=95 L T 131 = 54 W R 559.

[2] Govindoss v. Official Assignee, Madras, (1934) 21 A I R P C 138=150 I C 1=61 I A 257 = 57 Mad 931 (P C).

A person was a bona fide purchaser for value of lands which were found to be burdened with a charge of a maintenance decree. The person brought a suit for a declaration, "that the lands were not liable for the maintenance charge." Question was whether S. 7 (iv) (c) or Art. 17 (iii), Sch. 2 of the Court-fees Act applied:

*Held* that the relief although asked for a mere declaration, yet it involved the consequential relief of amendment of the maintenance decree and hence S. 7 (iv) (c) applied: *A I R 1915 Mad 948, Rel. on and Explained.* [P 184 C 2; P 185 C 1]

K. K. Gandhe and B. L. Gupta — *for Applicant.*

D. B. Najbille and V. K Rajwade — *for Non-applicants.*

**Order.**—This raises a point under the Court-fees Act, the question being whether the plaint should be stamped in accordance with the provisions of S. 7 (iv) (c) or whether it may be stamped in accordance with the provisions of Sch. 2, Art. 17 (iii), Court-fees Act. The former applies where consequential relief is sought; the latter applies where consequential relief is not sought. It is said that here no consequential relief is sought. The material facts are as follows: Many years before the plaintiff's title arose, a certain widow in a certain partition suit was, by a decree passed in that partition suit to which of course the present plaintiff was not a party, given maintenance and had the maintenance right charged upon the subject-matter of the subsequent transfer to the plaintiff. The plaintiff now asks in this suit for a declaration that those lands "are not liable to maintenance charge of defendant 1". It is urged before us relying on 55 All 274,[1] 26 All 606[2] and 30 Cal 788[3] that this is one of those cases where a simple declaration without any consequential relief is sought and that consequently Art. 17 (iii) of Sch. 2 applies. Indeed it is said that of the cases relied upon by the learned Judge, who has held that S. 7 (iv) applies, namely 38 Mad 922,[4] 25 N L R 52[5] and 16 N L R 84,[6] two of them, 38 Mad 922[4] and 16 N L R 84[6] are cases where consequential relief was in fact sought.

In our opinion, what the decision of the Full Bench of the Madras High Court in 38 Mad 922[4] amounts to is this: It does not matter how you frame your prayer. What matters is what must be done in order, if that prayer be granted, to make the granting of it effective. Consequently, it was there decided that, if it is sought to have a deed declared not binding, for example because it has been obtained by fraud, a Court acting properly would not leave the matter at large by merely declaring that the deed was not binding, but it would send for the deed in order that it be delivered to the Court to be cancelled. That is the proper way in which such a contest would end, and if it ended in that way, the plaintiff would have obtained two reliefs: (1) the declaration, and (2) the cancellation of the document; and he would get that in point of fact, even though he only asks for the declaration, especially if he put, as he has done here, a subsequent prayer for such relief as the Court may think fit. In this particular case that ancillary prayer is worded differently and as follows: "Any other proper and lawful declarations be made." The effect however would be the same. In all such cases although all that is asked for is a declaration, the prayer involves consequential relief. If that be so, then S. 7 (iv) (c) applies.

The question then arises whether this is one of those cases. Now it is said by counsel for the appellant that the plaintiff is not here asking for the decree to be amended; he is not here asking for the land to be declared free of the charge; he admits that the decree is binding; he admits that it created a charge; he admits that the land is burdened by that charge. The position that the plaintiff takes is that the land while in his ownership, he being a bona fide purchaser for value, is absolved from that charge. If that be so, then it follows directly that the decree is not impugned and it would not be a matter that would be relevant to this case to enquire whether that decree was obtained by coercion or fraud. If we take that point of view of this case, we think the result would be a simple claim for a declaration. We put on one side the prayer for other proper and lawful declarations. We say nothing as to the possibility of

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1. Lakshmi Narain Rai v. Dip Narain Rai, AIR 1933 All 350=148 I C 152=55 All 274=1933 A L J 311.
2. Ganga Ghulam v. Tapeshri Prasad, (1904) 26 All 606=1904 A W N 198.
3. Zinnatunnessa Khatun v. Girindra Nath Mukerjee, (1903) 30 Cal 788.
4. Arunachalam Chetty v. Rangaswamy Pillai, A I R 1915 Mad 948=28 I C 79=38 Mad 922 =28 M L J 118 (F B).
5. Baburao v. Balajirao, A I R 1929 Nag 71 = 118 I C 465=25 N L R 52.
6. Baldeoprasad v. Ghasiram, A I R 1920 Nag 243=56 I C 360=16 N L R 84.

making such a declaration. But in our view the declaration prayed for is not of the nature indicated in the argument. It is to the effect that the land is not burdened by the maintenance charge not merely while in the ownership of the plaintiff but generally; and if this declaration were given, it would free this land for ever in whosesoever hands it may be of this maintenance charge; and we do not see how that could be done without amending the decree in the partition suit. We therefore think that this falls within the kind of case which was being considered in 38 Mad 922[4] at p. 926. As however the plaintiff urges before us that the remedy he really seeks does involve simply a declaration and does not involve any attack upon the partition decree, it would seem that his present suit is wrongly framed. He is therefore given liberty to withdraw this suit and bring a suit properly framed. This must not in any way be regarded as an indication that we regard such a declaration as it is now said is required as possible. We think it right indeed to say that, as at present advised, it would seem that the plaintiff's remedy, if any, would appear to be against his vendor. He will of course, as a condition of this indulgence and in any event pay to the other side all the costs incurred.

B.D./R.K. *Order accordingly.*

## A. I. R. 1938 Nagpur 185

STONE C. J.

*Sidnath Sheoshankar* — *Defendant* — Appellant.

v.

*Mt. Jasoda Bai wife of Lalta Prasad* — Respondent.

Second Appeal No. 453 of 1933, Decided on 17th April 1936, from Appellate decree of Addl. Dist. Judge, Bilaspur, D/. 16th August 1933.

**(a) C. P. Tenancy Act (1 of 1920), S. 49 — Widow executing deed of gift of sir lands and immediately after executing deed of surrender in favour of grand-daughter — Surrender is void.**

**Where a widow who owns a share in a village executes a deed of gift of her *sir* and khudkhast lands in favour of her grand-daughter and immediately after executes a deed of surrender in her favour of the *sir* lands, the deed of surrender is void as being in contravention of the provisions of S. 49, C. P. Tenancy Act : *A I R 1916 P C 59, Rel. on.*** **[P 185 C 2; P 186 C 2]**

**(b) Practice—Duty of Court — Transaction void as being contrary to policy of statute—Court should take notice of nullity.**

Whenever it appears that a transaction is void as contrary to the policy of a statute the Court should take notice of the nullity and proceed accordingly. [P 186 C 1]

**(c) Deed — Construction — Rules regarding construction of wills do not apply necessarily to deeds of gift inter vivos — Rule of construction in case of deed of gift inter vivos stated.**

Rules for the construction of wills made by a male in favour of a female do not necessarily apply to gifts inter vivos made by a Hindu woman to her grand-daughter. The presumption in the case of a will made by a male in favour of a female turns on the estate which, on the death of the male, a woman normally takes. In the case of a deed of gift inter vivos, it is necessary to consider the terms of the gift and only in case of ambiguity to fall back upon surrounding circumstances. The rules of construction in the case of wills and deeds are different in many respects : *35 Cal 896 (P C) and 2 I A 7 (P C), Ref.* [P 186 C 1, 2]

G. R. Deo — *for Appellant.*

Fida Hussain — *for Respondent.*

**Judgment.** — In my opinion so far as *sir* land is concerned this appeal fails. The argument proceeds on the basis that under the C. P. Tenancy Act proprietary rights in *sir* land can be transferred only with the sanction of the revenue officer which admittedly was not obtained here. It is urged however that if such sanction is not obtained the proprietor becomes expropriated but retains right of occupancy. That right of occupancy cannot be transferred but can be surrendered to the malguzar. It is further urged that on the donee being put in possession, the donee became the malguzar and thereupon the surrender operated to divest the plaintiff donor of her rights as occupancy tenant. Here the essential facts are that the plaintiff became entitled to a certain village share (not here now in contest) in *sir* and khudkasht lands. She later executed a deed of gift (Ex. D.2) and, I am told, at the same time a deed of surrender (not in the paper book) in favour of her grand-daughter whose father was dead. The defendant is the daughter's husband. The daughter died. The defendant said thereafter the plaintiff gave him the land by a form of gift by solemn vow called sankalp. That the plaintiff denies and seeks possession of the lands alleging that the gift was for the daughter's life only. The trial Court dismissed the claim. The Appellate Court refused to consider the question whether such a gift and surrender were void as contrary to the C. P. Tenancy Act on the ground that the claim was not based upon the gift being void, but reversed the trial Judge's decree on the ground that the gift was of a life estate only. I am of the opinion however that whenever it appears that a transaction is void as contrary to the policy of a statute, the Court should take notice of the nullity and proceed accordingly. In my opinion this case falls directly within 39 All 173,[1] where the Judicial Committee observed: (their Lordships were dealing with the Agra Tenancy Act which on this point pursues a similar policy):

> It cannot be doubted that the policy ....... is to secure and preserve to a proprietor whose proprietary rights ... are transferred otherwise than by gift or by exchange between co-sharers ... a right of occupancy in his 'sir' lands .... and that such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee.

Their Lordships had already pointed out that this policy could not be defeated by selling and then as part of the same transaction surrendering. Substitute for 'selling', 'giving' and one immediately has the present case. As regards the khudkasht land, the plaintiff's right depends upon whether the gifts were absolute or for a life-estate. The plaintiff lays stress on 2 I A 7.[2] That case was a case of a devise by will by a male to his widow. The rule there laid down for the construction of wills was applied to the case of a daughter by the Judicial Committee in 35 Cal 896.[3] I do not however consider that rules for the construction of wills made by a male in favour of a female necessarily apply to gifts inter vivos made by a Hindu woman to her grand-daughter. The presumption in the case of a will made by a male in favour of a female turns on the estate which, on the death of the male, a woman normally takes. In the case of a deed of gift inter vivos, it is necessary to consider the terms of the gift and only in case of ambiguity to fall back upon the surrounding circumstances. The rules of construction in the case of wills and deeds are different in many respects. The operative words in this deed are :

> I have gifted away to her all my rights and privileges pertaining to the above estate .... that is all the rights which I hold at present .... No person whosoever has any claim to this share, gifted away; nor shall anybody have any hereafter.

That appears to me quite clearly to amount to a gift of all the plaintiff's right, title and interests, whatever that may be. Thereafter, whoever else may claim, she may not. To that extent the claim fails and the appeal succeeds. As to the point relating to gift by oath (sankalp) that is obviously hopeless so far as the *sir* land is concerned and in view of the above does not arise so far as khudkasht land is concerned. Proportionate costs throughout.

K.B./R.K. *Appeal succeeds.*

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## A. I. R. 1938 Nagpur 186

POLLOCK J.

*Shyamsunder Ramdas* — Applicant.

v.

*Abdul Sattar Haji Abba Abdul Karim* — Non-applicant.

Civil Revn. Appln. No. 729 of 1936, Decided on 20th July 1937, from order of Second Sub-Judge, Second Class, Harda, D/- 28th September 1936.

**Civil P. C. (1908), S. 20—Coal merchant residing in Hoshangabad District, by correspondence, asking commission agent at Bombay as to terms of business without indicating business he was going to transact —Letter by commission agent intimating his terms of business held not offer to be accepted in Hoshangabad and cause of action therefore held did not arise in Hoshangabad District.**

When a merchant or commission agent sends his quotations or terms of business to other people it is merely an intimation on his part of his readiness to transact business with them on those terms. [P 188 C 1]

Where a merchant residing in Hoshangabad District asked, by correspondence, a commission agent in Bombay what his charges were for selling coal and the commission agent wrote a letter stating his charges in detail and saying "let us have your transaction once. Then you shall have reliance on us" :

*Held* that the letter written by the commission agent stating the terms on which he did business was not an offer but an intimation of offer. The fact that the letter included the words "let us have your transaction once" would not convert it into an offer to be bound by acceptance for there had been no indication up till then what business the merchant residing in Hoshangabad wished to transact. The cause of action therefore did not arise in Hoshangabad District but in Bombay: *A I R 1932 Bom 291, Rel. on*; *Case law discussed.* [P 188 C 1]

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[1] Moti Chand v. Ikramullah Khan, A I R 1916 P C 59=39 I C 454=44 I A 54=39 All 173 (P C).

[2] Mahomed Shumstool v. Shewukram, (1874) 2 I A 7=14 Beng L R 226=22 W R 409=3 Sar 405 (P C).

[3] Radha Prosad Mullick v. Ranee Moni Dassi, (1908) 35 Cal 896=35 I A 118=12 C W N 729=8 C L J 48 (P C).

K. B. Tare — *for Applicant.*

J. Sen and B. L. Gupta — *for Non-applicant.*

**Order.**—The plaintiffs, who are merchants of Banapura in the Hoshangabad District, sent a wagon of charcoal to the defendant, who is a commission agent in Bombay, to be sold by him on commission. There was a dispute about the price which led to the present suit. The suit was filed in the Court of Subordinate Judge, Second Class, Harda, in the Hoshangabad District, and the question is whether that Court has jurisdiction, or in other words, whether any part of the cause of action arose in the Hoshangabad District. It has been suggested that the sale proceeds were payable to the plaintiffs at Banapura, but that plea is clearly untenable. The question then is whether the contract was made at Banapura or Bombay. The contract was made by correspondence. The plaintiffs wrote to the defendant on 6th April 1935, asking whether the price of coal was likely to go up and what his charges were for selling it. The defendant gave a brief reply, and the plaintiffs wrote again. To this letter, the defendant wrote on 15th April (Ex. P.3), stating his charges in detail and saying: "let us have your transaction once. Then you shall have reliance on us." To this, the plaintiffs replied on 27th April, (Ex. D.4), saying that they were sending the railway receipt for a wagon load of coal, which they had despatched some three days before, and asking him to take delivery and sell it. The defendant replied on 29th April (Ex. P.6) saying that he had received the railway receipt and would attend to the order when the wagon arrived. The lower Court has held that the defendant's letter (Ex. P.3) was an offer and that this offer was accepted by the plaintiffs' letter (Ex. D.4). It therefore held that the contract was completed at Banapura.

In revision it has been contended that the letter (Ex. P.3) was merely a statement by the defendant of the terms on which he was prepared to do business and that the plaintiffs' reply (Ex. D.4) was the offer. Most of the cases cited before me are distinguishable. In 17 N L R 1[1] the plaintiffs from Hinganghat wrote to the defendants at Bombay asking them to quote prices for specified quantities of specified goods, and the defendants replied stating their prices and asking to be favoured with an order: it was held that this reply was an offer. That case is clearly distinguishable because the quantities and rates were specified. In the present case, the plaintiffs merely asked on what terms the defendant did business, and until they despatched the wagon load they had not indicated what business they proposed to entrust to the defendant. In A I R 1923 Nag 167,[2] the facts are very much closer to those of the present case. There the plaintiff, who resided at Yeotmal, wrote to the defendants, who were commission agents at Bombay, saying that he had 100 bales ready for sale and asking the terms on which the defendants would sell them: it was held that the defendants' reply stating in a printed form the terms on which they did business was an offer to sell those 100 bales. With due respect I must confess to some doubt whether that case was correctly decided, but it is on the facts distinguishable from the present case. The decision in A I R 1924 Nag 308[3] is not in point because in that case accounts had to be rendered and money to be paid at Khamgaon where the constituent lived, and the defendants, who were commission agents in Bombay, could therefore be sued in Khamgaon. In 9 Lah 455[4] it was stated at p. 458:

> It is settled law that a suit by a principal against a commission agent who has agreed to execute an order placed with him by correspondence must be instituted at the place where the commission agent carries on his business and that the principal cannot sue him at the place from where he sent the order.

With due respect, this proposition seems to me to be too widely stated, and it is difficult to see why the commission agent should not be sued at the place from where the order was sent if in fact the contract was made at that place. In 46 All 465[5] the point at issue was whether the money was payable at the place where the order was sent, and that decision is not relevant to the present case. The decision in 56 Bom 324[6] is precisely in point. There the plaintiffs, who were commission agents in Bombay, wrote to the defendants, who were merchants of Ghaziabad, stating their terms of business and the defendants sent orders to buy wheat and linseed which was carried out by the plaintiffs. Beaumont C. J. at p. 334 stated the law thus :

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[1] Mill Stores Trading Co. of India Ltd. v. Mathuradas, A I R 1921 Nag 42=57 I C 696 =17 N L R 1.

[2] Chhaganlal v. Aboobaker Abdur Rahman & Co., A I R 1923 Nag 167=72 I C 465.

[3] Joharimal Rudmal Adtia Firm, Bombay v. Sunderlal Narayandas, A I R 1924 Nag 308= 78 I C 991.

[4] Bhamboo Mal v. Ram Narain, A I R 1928 Lah 297=109 I C 28=9 Lah 455=29 P L R 406.

[5] Tika Ram v. Daulat Ram, A I R 1924 All 530 =80 I C 661=46 All 465=22 A L J 591.

> It was argued by Mr. Coltman on behalf of the respondents that the letter written by the plaintiffs to the defendants stating the terms on which they were willing to do business was an offer to act as agents, which offer was accepted by the subsequent orders given by the defendants, and that the contracts were accordingly made in Ghaziabad. I do not take that view of the matter. I think that the letter written by the plaintiffs was simply an intimation as to the terms on which they were prepared to do business, and that no contract of any sort was made at Ghaziabad. The defendants did not bind themselves to give the plaintiffs any business, nor did the plaintiffs bind themselves to accept any business which was offered;

and Rangnekar J. at pp. 343 and 344 stated :

> In my opinion it makes not the slightest difference whether the plaintiffs wrote in the first instance a letter to the defendants containing their usual terms of business or whether they sent their usual terms of business in answer to an inquiry from the suit firm from Ghaziabad. It seems to me that when a merchant or commission agent sends his quotations or terms of business to other people it is merely an intimation on his part of his readiness to transact business with them on those terms.

I am in respectful agreement with those remarks, and it appears to me that the letter (Ex. P.3) written by the defendant stating the terms on which he did business was not an offer but an intimation of offer. The fact that the letter included the words "let us have your transaction once" would not, I think, convert it into an offer to be bound by the plaintiffs' acceptance, for, there had been no indication up till then what business the plaintiffs wished to transact. I therefore hold that the contract was made in Bombay and not in Banapura, and that the Court at Harda has no jurisdiction to try the present case. The application for revision is therefore allowed, and the plaint must be returned to the plaintiffs for presentation in the proper Court. The defendant will get his costs in this Court and in the lower Court. Counsel's fee in this Court Rs. 20.

D.S./R.K. *Revision allowed.*

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[6] Devidatt Ram Niranjandas v. Shriram Narayandas, A I R 1932 Bom 291=137 I C 381=56 Bom 324=34 Bom L R 236.

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## A. I. R. 1938 Nagpur 188

VIVIAN BOSE J.

*Krishnarao Gopalrao Naik and another — Plaintiffs* — Appellants.

v.

*Secretary of State and another* — Respondents.

Second Appeal No. 9 of 1935, Decided on 5th August 1937, from appellate decree of Addl. Dist. Judge, Balaghat, D/- 29th September 1934.

**(a) C. P. Local Self-Government Act (4 of 1920), S. 23 (1)—S. 23 (1) applies to any market coming under S. 2 (2).**

Section 23 (1), C. P. Local Self-Government Act, applies to any market which corresponds to the definition of market given in S. 2 (2) of the Act whatever it may happen to be called. [P 189 C 1]

**(b) C. P. Local Self-Government Act (4 of 1920), S. 23 (3) — Any person prejudicially affected by notification under S. 23 (1) can sue under S. 23 (3).**

Any person, whose rights are prejudicially affected in some way by the notification under S. 23 (1) of the C. P. Local Self-Government Act, is entitled to sue under S. 23 (3) and the Notification must be cancelled if the prejudice is established. [P 189 C 1]

**(c) C. P. Local Self-Government Act (4 of 1920), S. 23 (1) and (3) — Rights of owner of market are curtailed by custom— Suit by owner of market under S. 23 (3) to cancel notification under S. 23 (1)—Grounds alleged being that his rights were affected by levy of fees and toll and his right to levy fees for nistar were infringed — Wazibularz showing that no person had right to make collections from bazar—Jungle, tank and wells lying outside market boundary — No suit held lay under S. 23 (3).**

In general, the owner of a market has a right to levy fees and tolls which are usually known as stallage, picoage, pennage and rent and no one can erect a stall on any portion of the land or otherwise claim exclusive occupation of it without a license from the owner. But these rights can be curtailed in various ways one of which is custom. The word 'control' as used in connotation with market means to manage or to regulate, but, in the case of markets these rights are very considerably curtailed. The only right which the owner has is to levy fees and tolls and if that is taken away by custom or statute or other means his right of control in this sense vanishes. [P 189 C 2; P 190 C 1, 2]

A suit was brought by the owner of a market to cancel the Notification by Government issued under S. 23 (1), C. P. Local Self-Government Act on the ground that his rights were affected by levy of fees and toll and that his rights to levy fees for nistar were infringed by the Notification. According to the wazib-ul-arz of the village no person had right to make collections from the bazaar; the jungle, tank and wells lay outside the boundaries of the market:

*Held* that the rights of the owner were not affected by the Notification and the suit did not lie under S. 23 (3). [P 190 C 2]

**R. M. Bhagade** — *for Appellants.*

**M. R. Bobde**, Advocate-General and R. N. Padhye — *for Respondents Nos. 1 and 2 respectively.*

**Judgment.** — This is a suit under S. 23 (3), Central Provinces Local Self-Government Act of 1920 for the cancellation of a Notification under sub-s. (1). Other reliefs are also claimed in the alternative but primarily the suit is for the cancellation of this Notification. Under S. 23 (1), the Local Government is given power to order by Notification that the right of levying fees and tolls and of controlling any market shall vest in the District Council and independent Local Board. Niyogi A. J. C. holds, and I respectfully agree with him, that this applies to any market which corresponds to the definition of market given in S. 2 (2) of the Act whatever it may happen to be called. As soon as this is done, the market then becomes a public market within the meaning of the Act: see S. 2 (3). The consequences of this are explained by Stone C. J. in I L R (1937) Nag 246.[1] The exclusive right to levy tolls and fees and to control the market vests in the District Council.

Section 23 (3) of the Act gives to certain persons, not specified there, the right to avoid these consequences by instituting a suit within six months for the cancellation of the Notification. Exactly who may institute such a suit is not indicated nor yet the grounds on which it can be founded. But under the general law of the land, no suit can be brought except by a person whose rights have been prejudicially affected in some way. I take it then that such persons are entitled to sue, and from that I deduce that the Notification must be cancelled if the prejudice is established. It follows that the rights of Government to issue such a Notification are not absolute. Government cannot prejudicially affect another's vested interests by such a Notification under this Section if that other chooses to sue within the time allowed. If he does not, then, of course, as Niyogi A. J. C. points out, his right of protest goes and he loses whatever rights he might once have had in this respect. But, if he does sue, then the intention of the Legislature is that the Courts should intervene and protect him by cancelling or amending the Notification. The question therefore narrows itself down to this. Have the plaintiffs any rights which have been prejudicially affected by the consequences which this Notification invokes? That cannot be answered until we know what the plaintiffs' rights are and to what extent they are affected by the Notification. As regards the first point, I dealt with this matter in I L R (1937) Nag 148.[2] Quoting from Halsbury's Laws of England, Vol. 20 p. 20, I said:

> The owner of a market or fair has as a rule the right to remove it, whenever he thinks fit, to a new place, provided he observes certain limitations ... in the absence of a statute the right to hold a market or fair is an incident of the ownership of the land.

Also in general, the owner has a right to levy fees and tolls which are usually known as stallage, piccage, pennage, and rent and no one can erect a stall on any portion of the land or otherwise claim exclusive occupation of it without a license from the owner. But—and this point I had no occasion to touch before—these rights can be curtailed in various ways one of which is custom. In the present case these limitations are to be found in the village wazib-ul-arz (Ex. P-1). It says "nobody has right to make collection from the bazar." Therefore in so far as the Notification directs that "the right of levying fees and tolls" in this market shall vest in the District Council it does not infringe any of the plaintiffs' rights, for, as we have seen they have none. Apart from this the matter is res judicata. The question was expressly raised and decided in a previous suit between the same parties. Ex. 2 D.1 is the judgment in the case and it was upheld on appeal and second appeal.

It is argued that if the plaintiffs have no such rights then nobody else has any either and that to that extent the Notification is ultra vires. But that is not the point for consideration here. As I have said, unless the plaintiffs can show that their rights have been infringed, this suit cannot lie. The plaintiffs have not pleaded that any fees or tolls are to be levied from them, and so it is clear that they are not affected. Whether others are affected or not is no concern of theirs. They have their remedies and if they are content not to pursue them the plaintiffs cannot do so on their behalf. The matter was also placed in another way. It was argued that if fees and tolls are now levied, it may prevent vendors from coming to the market and so will prejudicially affect the plaintiffs' revenues from other sources, for, the crowds which assemble at the market gather produce from their jungle and take water from their tanks and wells for all of of which they charge. Therefore it is argued that although this income is not directly derived from the market, it flows indirectly from it and any diminution in the extent of the crowds which gather there will react on the plaintiffs' general income. It is enough to state that these facts have not been pleaded nor have they been adverted to in the lower Courts. In the absence of investigation, it is impossible to determine whether there is any reasonable foundation for this fear and whether the injury apprehended is not too remote. I cannot allow this question to be raised now especially as it was not even raised in the grounds of appeal before me.

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[1] **Mt. Bayabi v. District Council, Nagpur, (1936) 23 A I R Nag 259=165 I C 849=I L R (1937) Nag 246.**

[2] **Gabrulal v. Thakurlal Amolsingh Rajpal, (1937) 24 A I R Nag 62=168 I C 215=I L R (1937) Nag 148.**

The only other matter the Notification deals with is the control of the market It vests this in the District Council also. Does this infringe any of the plaintiffs' vested rights? The answer naturally depends upon the meaning of the word 'control' and the various rights it involves. As I see it, control as used in this connotation can only mean to manage or to regulate. In the abstract one form of control will of course involve the right to decide who may enter the market and who may not : the right in other words inherent in the owner of the soil to issue licences to those who want to occupy his land, but in the case of markets these rights are very considerably curtailed. The law is stated in these words in Halsbury's Laws of England, Vol. 20, page 6 :

> At all times when a market ought lawfully to be held, every member of the public has, of common right, the liberty to enter and frequent the market place for the purpose of bringing thither and there exposing for sale and selling, or of buying, such commodities as are vendable in the market.

Therefore it is clear that the only right which the owner has left to him is to levy fees and tolls and if that is taken away by custom or statute or other means his right of control in this sense vanishes, and we are left with the general right to decide which of two or more persons shall occupy a particular site when there is a dispute between them. It can mean no more than that for the only remaining rights of control would be a right to police the place and that of course is a Sovereign right vested in the State alone : 39 Cal 615[3] at p. 661. As regards this the right to decide such disputes between two rival vendors about the plot of ground they are to occupy is vested in the village mukaddam under the wazib-ul-arz (Ex. P-1). It says, "The village mukaddam settles disputes of the baithaki bazars, etc". There has been no allegation throughout the case that the plaintiffs' rights qua mukaddam have been infringed ; there is not even an allegation that he is the mukaddam ; also I doubt whether such a suit would lie. But I need not enter into that now as the question has not been raised.

The last point is about the plaintiffs' right to levy fees for nistar. They argue that the Notification infringes such rights. I was not able to pin the plaintiffs' learned counsel down to any exact enumeration of these rights. All I could gather was that they related to the jungle, to a tank and to certain wells. The jungle and the tank lie outside the boundaries of the market and so the Notification does not affect any right the plaintiffs may have there. I gather the wells are also outside but it makes no difference. The Notification only touches the rights to levy fees and tolls in connexion with this market. The wazib-ul-arz says the plaintiffs have no such right. If these collections form a fee or a toll in connexion with markets, then the plaintiffs have been acting illegally ; if however they do not form part of such fees or tolls then they are not touched by the Notification and all I have to decide here is whether the plaintiffs' vested rights are affected by this Notification. I find they are not. It follows, no suit for cancellation of the Notification can lie. The decision of the lower Courts is right. I dismiss the appeal with costs.

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[3] Bir Bikram Deo v. Secy. of State, (1912) 39 Cal 615=39 I A 31=13 I C 965=16 C W N 362=15 C L J 633 (P C).

S.C./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 191

PURANIK J.

*Tanba Yadorao Wani — Judgment-debtor* — Appellant.

v.

*Chandrashankar Balkrishnappa and another — Decree-holders* — Respondents.

Second Appeal No. 576 of 1934, Decided on 6th August 1937, from appellate order of Addl. Dist. Judge, Bhandara, D/- 4th September 1934.

**Limitation—Application for substitution of name in decree is step-in-aid and saves limitation.**

An application for substitution of names in place of the original decree-holder is a step-in-aid of execution and saves limitation: *A I R 1927 Nag 308, Rel. on*; *A I R 1933 Sind 341, Dissent.*; *A I R 1922 Mad 79 held overruled by A I R 1926 Mad 1178 and A I R 1927 Mad 288.* [P 192 C 1,2]

D. T. Mangalmoorti and N. T. Mangalmoorti — *for Appellant.*

A. B. Jamdar — *for Respondents.*

**Judgment.**—The decree out of which the present proceedings arise was passed on 26th March 1928. An application for substitution of names of the transferees of the original decree-holders was filed on 8th December 1930, and it appears from the record in the case that later on an application for execution was also filed on 3rd January 1931 and the two applications were co-related. The names of the transferees were substituted but the application for execution was dismissed as infructuous on 15th April 1931. Later on a fresh application for execution was filed on 12th December 1932 by the fresh transferees of the decree. The judgment-debtor did not object to the substitution of the names of the transferees but contended that the application for execution is barred by time. Both the Courts below relying on 24 N L R 36[1] have held that the application dated 8th December 1930 was a step-in-aid of the execution and the present application was within time.

The only question which arises for decision in this appeal is whether the application made by the respondents' predecessor-in-title for substitution of their names as decree-holders on 8th December 1930 was a step-in-aid of execution and whether the respondents decree-holders' application for execution presented on 12th December 1932 was in time. The judgment-debtor appellant contends that the decision of the Courts below is not correct and relies on certain rulings of other High Courts in support of his contention. The main contention is that an application for substitution at a time when no execution application is pending cannot be regarded as a step-in-aid of execution and will not save limitation.

No doubt under O. 21, R. 16, Civil P. C. an application for execution can be filed by the transferee of the decree but as observed in 31 N L R Sup 111[2] at p. 119 an application for substitution is implied in such an application. Moreover, as pointed out in 24 N L R 36[1] at p. 38 there is nothing in the Civil Procedure Code which prohibits a Court from entertaining an application for substitution of legal representatives in place of the deceased decree-holder or judgment-debtor and such an application is a step-in-aid of execution under Art. 182, Cl. (5), Lim. Act. This decision is referred to with approval in 31 N L R Sup 111.[2] What is said about bringing on record the legal representatives of the deceased decree-holder or judgment-debtor ought to apply to the substitution of a transferee in place of the original decree-holder: See 31 Mad 234,[3] at p. 235. On a plain reading of Art. 182, Cl. (5) which runs as follows:

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|---|---|---|
| For the execution of a decree or order of any Civil Court not provided for by Art. 183 or decree by S. 48, Civil P. C., 1908. | Three years. | 5. (Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree or order. |

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[1] Ramchandra v. Uka, A I R 1927 Nag 308=103 I C 279=24 N L R 36.

[2] Radhakisan v. Daudas, A I R 1935 Nag 230=160 I C 309=31 N L R Sup 111.

[3] Annamalai Mudaliar v. Ramier, (1908) 31 Mad 234=18 M L J 24.

there is nothing in it which contemplates the pendency of an execution application when an application to take some step-in-aid of execution of the decree or order is made. The rulings which lay down this principle do not therefore appear to be correct. The appellant relies on 45 Mad 466[4] at p. 471 and further points out that 47 Mad 641[5] was also a case where execution application was pending and argues that this view should be accepted. He also relies on A I R 1933 Sind 341,[6] but 45 Mad 466,[4] does not appear to have been accepted as good law even in Madras: see 50 Mad 49[7] and 50 Mad 403.[8] 7 Pat 708,[9] is an authority for the proposition that it is not necessary that an execution application should be pending when an application for step-in-aid of execution is taken and Art. 182, Cl. (5) does not require this. A I R 1933 Sind 341,[6] no doubt lays down that an application by a transferee to be brought on record without asking for execution of a decree is not an application in accordance with law, as it is not an application for execution of the decree. This view is not in accordance with the view taken in 24 N L R 36,[1] and on a plain reading of Art. 182, Cl. (5), I respectfully dissent from the view taken in that case.

What is a step-in-aid of execution has been the subject matter of voluminous case law on the subject and as observed by Venkatasubba Rao J. in 53 Mad 390[10] that the Legislature may well, with the aid of the decided cases, catalogue the applications which, in its opinion, ought to serve as steps-in-aid of execution, as otherwise the wording is so uncertain that it leads to a fruitless discussion. However that may be, it has been held in several cases that an application for substitution of names in place of the original decree-holder is a step-in-aid of execution and saves limitation: 29 All 301,[11] 3 Pat 596,[12] 50 All 621[13] and 24 N L R 36[1] relying upon these cases I hold that the previous application made by the transferees for substitution of their names in place of the original decree-holder was an application for step-in-aid of execution and the present decree-holder transferees are entitled to rely upon it under Art. 182, Cl. (5), Lim. Act. The decision of the lower Appellate Court is correct.

I may observe in passing that in this particular case soon after an application for substitution was made an application for execution was filed by the transferees on 3rd January 1931 and the applications for substitution and execution were heard by the Court together. Evidence has been given in this case to prove that such applications were made and were before the Court. The appellant's counsel before me was not prepared to argue the effect of this execution application on his contention and wanted me to send back the case to the lower Appellate Court as it has not taken that into consideration. Though I am of opinion that the contention of the appellant is fully met by this application for execution dated 3rd January 1931, I do not rest my decision on that point but hold that even if there be no application for execution but a mere application for substitution of names, that is sufficient to enable the decree-holder to treat it as a step-in-aid of execution. In this view of the case it is not necessary for me to send back the case to the lower Appellate Court. The appeal fails and is dismissed with costs. Counsel's fee Rs. 15.

B.D./R.K. *Appeal dismissed.*

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[4] Kuppuswami Chettiar v. Rajagopala Aiyar, A I R 1922 Mad 79=70 I C 324=45 Mad 466 =42 M L J 303.

[5] Rajitagiripathy v. Bhavani Sankaram, A I R 1924 Mad 673=80 I C 103=47 Mad 641=47 M L J 4.

[6] Devraj v. Fatehchand, A I R 1933 Sind 341= 147 I C 470=27 S L R 314.

[7] Krishna Pattar v. Seetharama Pattar, A I R 1926 Mad 1178=98 I C 156=50 Mad 49=51 M L J 480.

[8] Kannan v. Avvulla Haji, A I R 1927 Mad 288 =99 I C 677=50 Mad 403=52 M L J 1.

[9] Jagdeo Narain Singh v. Bhubaneshwari Kuer, A I R 1928 Pat 612=118 I C 582=7 Pat 708 =9 P L T 817.

[10] Vappu Rowther v. Sivakataksham Pillai, A I R 1930 Mad 588=128 I C 577=53 Mad 390=58 M L J 406.

[11] Pitam Singh v. Tota Singh, (1907) 29 All 301 =4 A L J 184=1907 A W N 74.

[12] Mt. Bhagwanta Kuer v. Zamir Ahmad Khan, A I R 1924 Pat 576=78 I C 766=3 Pat 596 =5 P L T 451.

[13] Mohan Singh v. Jagat Singh, A I R 1928 All 299=109 I C 412=50 All 621=26 A L J 417.

## A. I. R. 1938 Nagpur 193

PURANIK J.

*Anandrao and another* — *Decree-holders* — Appellants.

v.

*Bendu Ziteba Patil* — *Judgment-debtor* — Respondent.

Second Appeal No. 575 of 1934, Decided on 9th August 1937, from appellate decree of Dist. Judge, Nagpur, D/- 4th September 1934.

**Civil P. C. (1908), S. 47—*X* mortgaging his khudkasht fields reserving cultivation rights in *sir*—Fields becoming *sir* in meanwhile — Suit on mortgage—Decree describing fields as khudkasht—Decree-holder taking possession of same fields standing as *sir*—Application to restoration of possession lies under S. 47—Such application is not res judicata if such contention is not made before trial Court.**

*X* had mortgaged his khudkasht fields. Before a suit was brought on the mortgage *X* acquired *sir* rights in those fields which were then recorded as such. The mortgage very clearly stated that cultivating right in *sir* however was not transferred. Mortgagee obtained a decree which mentioned in it the old khudkasht numbers, but in execution took possession of the same fields then standing as *sir*; *X* applied for restoration contending that mortgagee was not entitled to have his cultivating rights in *sir*:

*Held* as the mortgagee had taken more than what he was entitled to under the decree the application was covered by S. 47, and no separate suit was necessary: *A I R 1934 Nag 241 and A I R 1924 Nag 155, Rel. on.* [P 193 C 2; P 194 C 2]

*Held further* that *X's* contention was not res judicata as it was not at all necessary for him to raise the point in the trial Court. [P 194 C 2; P 195 C 1]

D. T. Mangalmoorti and N. T. Mangalmoorti — *for Appellants.*

P. P. Deo — *for Respondent.*

**Judgment.**—In execution of his decree the decree-holder took possession of fields Nos. 149, 114, 115 and 140 belonging to the judgment-debtor which were *sir* when the decree-holder entered into possession. These fields were the mortgagor's khudkasht when they were mortgaged, but subsequently in the current settlement they were recorded as *sir*. They bore this character when the suit was filed, but in the suit and the decree the old numbers of the fields were given and their right was shown as khudkasht. The mortgage in suit did not purport to transfer the cultivating rights in *sir* land, and in the decree that was passed it was very clearly stated that the cultivating rights in *sir* land are not decreed. It appears that as the fields were described as khudkasht in the decree, the decree-holder obtained possession thereof. The judgment-debtor thereafter applied to the Court under S. 47, Civil P. C., requesting the Court to restore him to possession of the cultivating rights in the fields which were *sir* and cultivating rights whereof did not pass to the decree-holder. The lower Appellate Court came to the conclusion that the judgment-debtor is entitled to be restored to such possession. Against this order of the lower Appellate Court, this second appeal is filed to this Court. The cultivating rights do not pass to the decree-holder is conceded by the appellants' counsel in view of this Court's ruling in 29 N L R 142[1] and A I R 1934 Nag 241=17 N L J 100[2] with reference to S. 45 of the old C. P. Tenancy Act and S. 49 of the present C. P. Tenancy Act, but it is contended that the judgment-debtor has chosen a wrong forum for restoration to possession. It is argued that the application of the judgment-debtor under S. 47 under which it is held to be tenable is not the section under which the judgment-debtor should be given any relief. His remedy lies in a separate suit. It is further contended that the judgment-debtor ought to have raised this plea before the passing of the decree and as he failed to raise it he cannot be allowed to raise it in subsequent execution proceedings.

Taking the first contention for examination it will be found that it is not tenable. It is not disputed that if the decree-holder takes into possession under the decree some property in excess of what has been granted to him by the decree, it will be a matter relating to execution. By the decree, cultivating rights in *sir* lands were expressly excluded and yet in execution of his decree the decree-holder has taken possession of the judgment-debtor's cultivating rights in *sir* lands. This was surely in excess of what the decree gave him. In A I R 1928 Lah 936,[3] it has been clearly laid down that if the decree-holder takes possession of property not covered by the decree an application under S. 47 lies and the judgment-debtor can be restored to possession. Sir Dinshah Mulla in his Civil Procedure Code, Edn. 10, p. 170, gives several cases on the point under the head

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[1] Rajeshwar v. Mt. Rukhma, A I R 1933 Nag 104=142 I C 603=29 N L R 142.

[2] Vishwanath v. Bapu Jagannath, A I R 1934 Nag 241=151 I C 1062=17 N L J 100.

[3] Amir-ud-Din v. Mt. Khairi, A I R 1928 Lah 936=110 I C 859.

"Property wrongly taken in execution". The appellant's counsel however contends that inasmuch as the fields in suit were mentioned in the decree, it could not be said that this is not the property covered by the decree; but what was described in the decree was the field property bearing old numbers as khudkasht, and it was also stated therein that cultivating rights in *sir* lands have not been decreed. It could not therefore be argued that the decree-holder has taken possession of what is mentioned in the decree. In execution of his decree for certain old khudkasht numbers he has actually taken possession of certain new *sir* fields belonging to the judgment-debtor. This was never decreed in his favour. The appellants rely upon 17 N L R 84,[4] 28 N L R 250[5] and A I R 1928 Nag 100[6] in support of his argument. 17 N L R 84[4] was a case in which the plaintiff auction-purchaser sued for actual possession of the *sir* lands and for cancellation of the settlement entry in that behalf regarding those fields. That was a case where a new cause of action was alleged by the plaintiff. Moreover it was held that the decree gave cultivating rights in *sir* and such a decree was properly executed. Their Lordships of the Privy Council confirmed the view of the Judicial Commissioner that the suit was not barred by S. 47, Civil P. C. 28 N L R 250[5] was a case of an auction-purchaser who did not apply for possession under O. 21, R. 95. It was held in that case that S. 47, Civil P. C., does not bar the suit. In A I R 1928 Nag 100[6] the facts show that what had been directed by the warrant was possession of proprietary rights and the decree-holder thereafter took possession of the cultivating rights, and in the circumstances of the case it was rightly held that S. 47 was not the appropriate provision of law under which the judgment-debtor could claim restoration to possession. There are certain observations in the case which were obiter and cannot afford a sufficient authority for the appellants to say that the question involved in the present appeal cannot be agitated in execution proceedings. On the contrary in A I R 1924 Nag 155[7] the question arose in execution proceedings and was allowed to be agitated. In A I R 1924 Nag 241[2] it was observed that if the decree-holder applies to take possession of property which he was not entitled to take possession of in execution of his decree, the judgment-debtor can apply under S. 47 for retention of such possession. As I have already pointed out, the decree in the case did not grant him possession over cultivating rights in *sir* and if those cultivating rights have been taken possession of by the decree-holder, the judgment-debtor can come up under S. 47, Civil P. C. and ask the Court to restore him to possession. This contention of the appellant therefore fails.

The second contention is about res judicata. It is argued that the defendant in the suit should have raised the contention that the fields in suit have become *sir* since the execution of the mortgage and the cultivating rights thereof did not pass and could not be decreed in favour of the plaintiff, this not having been stated they are debarred from agitating this question in execution. It was really the duty of the plaintiff to have stated in the plaint the corresponding new numbers of the fields that were mortgaged to him with the proper character that they bore as required of him under the Circular of this Court (Civil Circular I-6). He did not choose to state in a straightforward manner what the actual facts were. He led the Court to believe that cultivating rights in *sir* lands were not the subject-matter in dispute. In fact they were excluded by the terms of the mortgage deed and in the decree that followed there is an express mention that the cultivating rights in *sir* lands did not pass. The defendant on these allegations of the plaintiff was not called upon to make any statement regarding his cultivating rights which were expressly reserved by his mortgage deed and to which the decree-holder did not lay claim by a suit. If in spite of this, the decree-holder sued for foreclosure or sale of certain old numbers describing them as khudkasht, though in fact they were *sir* at the time, the defendant could very well sit quiet and allow him to do so knowing fully that there were no such numbers as described in the plaint bearing the character of khudkasht and the decree-holder even if he were to obtain a foreclosure decree as against such numbers will not be able to disturb his cultivating rights in *sir* lands. He was not therefore bound to agitate this question before the decree was passed and could not be precluded from agitating it when the decree-holder in execution of such a decree takes possession of his cultivating rights. I hold that the defendant is not barred by the principles of res judicata from agitating this question by an application under S. 47, Civil P. C. As both the contentions raised by the appellant have been found against him, the appeal fails and is dismissed with costs. Counsel's fee Rs. 25.

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[4] **Ghulabsingh v. Ballabhdas, A I R 1921 P C 13=61 I C 769=48 I A 220=48 Cal 591=17 N L R 84 (P C).**

[5] **Chotelal v. Sarwan, A I R 1932 Nag 140=140 I C 683=28 N L R 250.**

[6] **Laxminarayan v. Shridhar, A I R 1928 Nag 100=105 I C 420.**

[7] **Bhimraja v. Mukundilal, A I R 1924 Nag 155 =76 I C 637.**

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 195

PURANIK J.

*Sheoram and another — Defendants —* Appellants.

v.

*Mulchand Bindraj Oswal — Plaintiff* — Respondent.

Second Appeal No. 363 of 1935, Decided on 31st July 1937, from appellate decree of Addl. Dist. Judge, Balaghat, D/- 30th March 1935.

**(a) Res judicata—Correctness of decision is immaterial in considering whether it operates as res judicata—Previous decision on question of law can be res judicata in subsequent suit.**

The correctness or otherwise of a judicial decision has no bearing upon the question whether it does or does not operate as res judicata. A party taking the plea of res judicata has to show that the matter directly and substantially in issue has also been directly and substantially in issue in a previous suit and has been heard and decided. The principle of res judicata is not to be ignored merely on the ground that the reasoning whether in law or otherwise of the previous decision can be attacked on a particular point. It is not correct to say that a previous decision on a question of law is not res judicata in a subsequent suit : *A I R 1933 Mad 925 ; A I R 1928 Cal 777 (F B) and A I R 1932 Nag 90, Rel. on ; (1926) A C 94, Disting.; A I R 1927 All 505, Dissent.; Case law referred.* [P 196 C 1]

**(b) Civil P. C. (1908), S. 11, Expl. 4—Suit for rent—Tenant alleging some other person to be landlord—Existence of previous rent decrees in favour of landlord against tenant in respect of same holding operates as res judicata.**

**In all cases for recovery of rent the relationship of landlord and tenant is the foundation of a decree and therefore when such a suit is decreed the Court must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. [P 197 C 1]**

**Where therefore in a rent suit brought by the landlord the tenant denies the relationship of landlord and tenant and pleads that he is a tenant of some other person and it is found that there are many rent decrees against the tenant in favour of the landlord in respect of the holding the decision in previous suits operates as res judicata under S. 11, Expl. 4 :** *A I R 1927 All 145 ; A I R 1925 Cal 427 ; A I R 1936 Pat 556 ; A I R 1918 Nag 262 and 11 All 148, Rel. on.* [P 197 C 1]

K. B. Sheorey — *for Appellants.*

W. B. Pendharkar — *for Respondent.*

**Judgment.**—This second appeal arises out of a suit for recovery of rent by the plaintiff-respondent as lambardar against the defendants who are occupancy tenants of the holding in the patti. The defendant pleaded that the plaintiff though a lambardar of the patti is not entitled to sue for the rent of the land in suit which was formerly *sir*, as the exproprietor of the land in suit is under the law the landlord of the defendants and he alone is entitled to sue. The plaintiff in reply denied the facts alleged and urged that he has been recovering rents from the defendants for the last several years and instituted several suits for recovery of rents from the defendants and those suits were decreed and that the right of the plaintiff as landlord of the fields in suit must be deemed to have been finally settled between the parties and cannot be re-agitated in this litigation. He thus pleaded the bar of res judicata under S. 11, Expl. 4, Civil P. C. Both the Courts below have accepted this plea and decreed the claim. The defendants come up in second appeal and urge that the decision of the lower Courts that the defendants were debarred from challenging the title of the plaintiff as landlord under S. 11, Expl. 4, Civil P. C. is erroneous. It is argued before me that the previous decision is one on a point of law and is not res judicata and much more so in a rent suit in which the liability is a recurring one.

It is not however disputed that the plaintiff suing as lambardar has obtained several decrees against the defendants for the rent of the holding in dispute. It is also not disputed that the defendants never challenged the title of the plaintiff for recovering rent of the holding in those suits and that the decrees were passed and rents realized by the plaintiff. The defendants however contend that the omission to raise the plea in the former suits should not debar them in raising the plea in this suit. It is argued that what was decided in the former suits was a decision on a question of law and there is no res judicata on an issue of law. My attention has been invited to certain decisions wherein it is laid down that a previous decision on a point of law is not res judicata.

The appellants relied on (1926) A C 94[1] at p. 100 and 49 All 918[2] at p. 923 in support of their argument that an erroneous decision on a point of law is not res judicata. (1926) A C 94[1] is a case under English law and what is stated therein is that a decision on a question at least regarding the interpretation of a statute does not operate as res judicata. In 49 All 918[2] Ashworth J. lays down that where the law forbids a certain thing being done in a suit, no amount of failure by a defendant in previous suits to plead the positive bar created by Legislature will prevent its being taken up in a subsequent suit. It is thus apparent that in both those cases the decision turned upon an abstract question of law. The Privy Council decision is not one under S. 11, Civil P. C., and the view taken in 49 All 918[2] at p. 923 is not shared by the other High Courts in India. I may refer particularly to A I R 1932 Nag 90,[3] 65 M L J 684[4] and 56 Cal 723.[5] In the last case the full implication of S. 11, Civil P. C., has been very clearly brought out by Rankin C. J. in laying down that correctness or otherwise of judicial decision has no bearing upon the question whether it does or does not operate as res judicata. A party taking the plea of res judicata has to show that the matter directly and substantially in issue has also been directly and substantially in issue in a previous suit and has been heard and decided. The principle of res judicata is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, of the previous decision can be attacked on a particular point. I respectfully concur with the view taken in 56 Cal 723[5] and hold that it is not correct to say that a previous decision on a question of law is not res judicata in a subsequent suit. The appellants relied on A I R 1922 Lah 329[6] and the cases cited therein, and in particular on 22 Bom 669[7] and 30 Mad 461.[8] On a proper study of the case in A I R 1922 Lah 329[6] it will be found that the ultimate decision as given by their Lordships of the Lahore High Court which is stated at p. 334 turned not on the point as to whether an issue of law was res judicata or not but upon the facts of that particular case. The decision is thus stated at p. 334:

> The question of the permanent nature of the tenancy is not res judicata inasmuch as the Divisional Judge did not come to any definite decision on the point. Even if he had however we do not think it could operate as res judicata inasmuch as the finding could not have been attacked on appeal by the plaintiff in whose favour a decree had been passed.

30 Mad 461[8] referred to in A I R 1922 Lah 329[6] and relied on by the appellants before me has been expressly dissented from the Madras High Court in 65 M L J 684[4] to which I have already made a reference and the view taken in 22 Bom 669[7] does not seem to have found favour with the Bombay High Court, as will be clear from the later cases, 45 Bom 1260[9] and 33 Bom L R 1443=A I R 1931 Bom 570.[10] I am however of opinion that in the present case it could not be argued that what was decided in a previous case was a question of law. I am distinctly of opinion that the previous decision is one on a mixed question of law and fact. Whether plaintiff is the landlord or any other person is the landlord of the defendants would necessarily depend upon pleas and proof of facts in the case. It is not disputed that in the previous suits the plaintiff asserted that he was the landlord of the defendants' holding. The defendants admittedly did not dispute this assertion on the part of the plaintiff. On the facts admitted therefore the decision was that the relationship between the parties is that of landlord and tenant. To the facts as admitted the law was applied and a decree was granted to the plaintiff. The facts that are now being stated by the defendants in this suit challenging the plaintiff to sue them for rent were such as might have been stated by them in the former suit and ought to have been stated by them if they wanted to challenge the

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[1] Broken Hill Proprietary Company v. Municipal Council of Broken Hill, (1926) A C 94=95 L J P C 33=134 L T 335.

[2] Manohar Lal v. Baldeo Singh, A I R 1927 All 505=103 I C 379=49 All 918=25 A L J 582.

[3] Madhorao v. Hiralal, A I R 1932 Nag 90=138 I C 161.

[4] Maharaja of Jeypore v. Ramamurthy, A I R 1933 Mad 925=148 I C 221=57 Mad 73=65 M L J 684.

[5] Tarini Charan v. Kedar Nath, A I R 1928 Cal 777=115 I C 593=56 Cal 723=33 C W N 126=48 C L J 327 (F B).

[6] Moti Sagar v. Dhanna Mal, A I R 1922 Lah 329=72 I C 177.

[7] Chamanlal v. Bapubhai, (1898) 22 Bom 669.

[8] Mangalathammal v. Narayanswami Aiyar, (1907) 30 Mad 461=17 M L J 250.

[9] Sitaram Sakharam v. Laxman Vinayak, A I R 1921 Bom 87=64 I C 162=45 Bom 1260=23 Bom L R 749 (F B).

[10] Kesheo v. Gangadhar, A I R 1931 Bom 570=135 I C 470=33 Bom L R 1443.

title. This not having been done, a decision in favour of the plaintiff in the former suit was given. The defendants in the present litigation for the first time state the fact that the land in suit was originally *sir* and belonged to a particular co-sharer in the village and that that co-sharer having sold his proprietary interest became an exproprietary occupancy tenant of the land in suit with the result that the exproprietary occupancy tenant became the tenant of the exproprietor and not of the entire proprietary body. It is only on his establishing these facts that the law as stated in 23 N L R 160[11] will apply. As I have already shown the plaintiff has denied these facts and pleaded a bar of res judicata under S. 11, Expln. 4. It will thus be clear that the decision in the previous case or cases cannot be regarded as a decision on a mere question of law, nor the decision of the present case depends on a pure question of law without going into the facts as stated by the defendant. These facts might and ought to have been stated in the previous case. The previous decision therefore bars the present plea.

It has been laid down in several cases that in all cases for recovery of rent the relationship of landlord and tenant is the foundation of a decree and therefore when such a suit is decreed, the Court must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. This being so, the decision of the previous suit operates as res judicata. I rely upon A I R 1927 All 145,[12] A I R 1925 Cal 427,[13] 11 All 148[14] (a case of recurring liability), A I R 1936 Pat 556[15] and 1 N L J 137.[16] I hold therefore that the defendants are debarred from challenging the title of the plaintiff under S. 11, Expln. 4, and that the decision of the lower Appellate Court on this point is correct.

It is however argued that if the facts as stated by the defendants in the present case be true and if the defendants are to be held barred by res judicata from pleading these facts the Court in accepting the plea of res judicata will be perpetuating a great injustice. It is also argued that a great hardship will result to the defendants if the view of the lower Appellate Court is accepted as correct. It is stated that the defendants will have to pay the same rent twice over, namely to the lambardar who is now suing for its recovery and to another person who is also a landlord in view of the law taken in 23 N L R 160.[11] I have not the least doubt that the Courts should not lend their support in perpetuating injustice, but I do not find that any injustice will be perpetuated by the decision that is given in the case, nor would any hardship result to the defendants in any manner. The defendants have not paid the rent for the years in suit to the other alleged landlord of theirs. The plaintiff alone has sued them for such rents. The other person is not now entitled under law to sue the defendants for such rent. His claim, if any, is long barred by time. The defendants are not called upon to pay the same rent twice over to two different persons.

Section 68, C. P. Tenancy Act, enacts that if a tenant in any case is doubtful as to the person entitled to receive rent payable in money, such tenant may apply to a Revenue Officer for permission to deposit the amount of rent which he believes to be due. S. 70 states that if it appears to the Revenue Officer that the applicant is entitled to make the deposit under S. 68, he shall receive such deposit and give a receipt therefor. Such receipt shall operate as an acquittance for the amount of the rent payable by the tenant and deposited by him, in the same manner and to the same extent as if such amount had been paid to the person to whom it was due. The defendants can resort to these provisions of the C. P. Tenancy Act, with respect to the rent for the years that follow the period for which the suit has been instituted and this will avoid all complications for the defendants. I do not think that any hardship will be caused to the defendants or any injustice will be perpetuated. The result is that the appeal fails and is dismissed with costs.

K.B./R.K. *Appeal dismissed.*

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[11] Bari Bahu v. Ganesh Singh, A I R 1928 Nag 89=106 I C 429=23 N L R 160.

[12] Sardar Singh v. Mt. Bal Kuer, A I R 1927 All 145=98 I C 981.

[13] Shib Chandra Talukdar v. Lakhi Priya Guha, A I R 1925 Cal 427 = 85 I C 123 = 40 C L J 507=29 C W N 253.

[14] Balkishan v. Kishan Lal, (1889) 11 All 148 = 1889 A W N 42.

[15] Prithi Singh v. Ram Saran Mahto, A I R 1936 Pat 556=165 I C 623=17 P L T 633.

[16] Banwarilal v. Gangaprasad, A I R 1918 Nag 262=1 N L J 137.

## * A. I. R. 1938 Nagpur 198

STONE C. J. AND NIYOGI J.

*Shridhar Bhagwanji Teli and another —Defendants* — Appellants.

v.

*Sitabai, w/o Bhagwanji Teli — Plaintiff* — Respondent.

First Appeal No. 75 of 1933, Decided on 30th September 1936, from decree of Addl. Dist. Judge, Wardha, D/- 11th March 1933.

*** (a) Hindu Law—Maintenance — Widow—Suit for—Court should take debts of family into account while determining maintenance — Family consisting of three brothers, one of them being widow's deceased husband—Widow taking into adoption her husband's brother's son — One of remaining brothers separating from family but rest of the family remaining joint—Maintenance is payable from whole of joint family property and not from property allotted to adopted son—Arrears of maintenance may be at lesser rate — Interest to be awarded on arrears should be at Court rate and running from date of decree.**

In arriving at the figure of maintenance to be allowed to a Hindu widow, the Court should take into account the debts with which the family is burdened : *A I R 1933 Lah 901; A I R 1927 Mad 1092; A I R 1922 Nag 127 and A I R 1929 P C 128, Rel. on.* [P 200 C 1]

Where the family formerly comprised of three brothers, one of them being the widow's deceased husband and the widow takes into adoption her husband's brother's son and subsequently one of the remaining brothers (other than the one whose son is taken into adoption) takes his share and separates from the family but the rest of the family remains joint, the widow is entitled to maintenance from the whole of joint family and not merely from the income of the property allocated to her adopted son as the share of his adoptive father at the time of the determination of the share of the brother who has separated. The widow is, under the circumstances of the case, entitled to be treated generously in the matter of maintenance. [P 200 C 2]

The arrears of maintenance to be awarded to the widow need not necessarily be at the same rate at which the Court has fixed the future maintenance and may be at a lesser rate. The Court has discretion in the matter : *A I R 1932 Nag 11; A I R 1918 Bom 122; 21 All 183 and A I R 1932 Mad 408, Rel. on.* [P 201 C 1]

As regards the interest to be awarded on the arrears of maintenance, the Court should follow the usual course in such matters and should allow the Court rate of interest from the date of decree. [P 201 C 2; P 202 C 1]

**(b) Hindu Law—Maintenance—Widow—Suit for — Family joint at all material times—Costs and maintenance are payable from joint family.**

Where in a suit for maintenance by a widow, the family has been found to be joint at all material times, both costs and maintenance are payable from joint family and not by any individual member. [P 202 C 1]

M. B. Kinkhede, A. V. Khare, W. B Pendharkar and A. R. Kulkarni—*for Appellants.*

T. J. Kedar and R. G. Rao — *for Respondent.*

**Judgment.**—This is a defendants' appeal in a widow's suit for maintenance. The learned Judge has passed a decree giving the plaintiff a variety of remedies nearly all of which are given against defendant 1, and nearly all of which are challenged in this appeal. The facts can be shortly stated, although they are somewhat complicated. The family of one Vishram comprised three sons, Yeshwant (who is defendant 2), Mahadeo (who is not a party) and Bhagwan (who is the deceased husband of the plaintiff). Yeshwant had a son Shridhar, whom, when the plaintiff Sitabai had become a widow, the plaintiff adopted. That was in 1919. Following that adoption, there was a suit to contest the adoption which ended in the adoption being upheld in 1921.

Nothing material transpired thereafter until April 1925 when the family comprising Yeshwant, Mahadeo, and Sridhar, entered into a partition arbitration which resulted in the family property being separated into three lists, one of which showed the property belonging to Yeshwant, the second that of Mahadeo, and the third that of Sridhar who was then a minor and was being represented by Sitabai who was stated in the adopted son's property list to be his guardian. There was another list relating to debts. Most of the debts had been incurred by Mahadeo and he was made responsible for far more than a third share of the total indebtedness; and Sridhar was made responsible for far less than a third of the indebtedness, his liability being fixed at Rs. 4000 odd. Hardly had the partition arrangement been come to when there was obviously a dispute between Yeshwant on the one hand and the plaintiff, the widow, on the other hand. The genesis of that dispute appears to be that the plaintiff, not unnaturally, thought that this was a separation between the three branches, that the result of it would be that Sridhar would be separate and that she would be his guardian. Yeshwant took another view. He took the view that the lists were merely for the purpose of determining Mahadeo's share, that he and Shridhar would remain joint and that, as a consequence, he was the guardian as being the eldest male member of the joint Hindu family. The matter went as far as a suit, and Yeshwant was successful in maintaining that position. As a consequence, Sitabai found herself a widow, not the guardian of her son and on bad terms with the family. Thereafter things became worse, apparently; she left the place where she had been residing and eventually is found in the Bombay Presidency, having, in the meantime, got possession of two fields.

There has been a considerable amount of argument devoted to in what capacity and how she got possession of those two fields. It is said by the appellants that she got them because it was part of the partition arrangement that she should have these fields in lieu of maintenance. Therefore, it is said that the amount of maintenance has been amicably settled, and that that amount is prima facie the just amount, and that what she should be given by way of maintenance is the value of those fields, if not the income from the fields themselves; and if she is given a sum of money in lieu of possession of the fields, in calculating that sum of money, one should take into account the reduced value of land in this Province owing to the bad times that have been continuing since 1930. On the other hand it is said that these fields were not given to her at any time; they were not given to her by the arbitrators who settled the lists in the partition proceedings; and that the story that is told by five of the defendants' witnesses (D. Ws. 6, 10, 14, 15 and 19), including one of the arbitrators, is a mere after-thought which has its genesis in the fact that one of the plaintiff's witnesses let it out, in the course of his examination, that the plaintiff had been given these fields.

In our opinion, the matter can best be decided by looking at the pleadings. If in truth and in fact this widow had been given these fields as a matter of amicable agreement in respect of her maintenance at the time of partition, whatever else was or was not left out in the written statement, this would never have been left out. It goes to the very root of her claim and is the easiest possible way of disposing of her claim. Yet when we look at the written statement, we find the matter is put in an entirely different way by the defendants. What is said in para. 5 (2) is that after she had left Fatehpur in December 1924, she was first of all supplied with provisions and money. Then she was discontented. "She then selected the two fields that are with her now." That selection is stated in the written statement to be because

> defendant 2 then proposed to her that she might take one or two fields of her choice and maintain herself.

That is in point of time before the partition. It tells a story of an arrangement between the widow and defendant 2. It makes no mention whatsoever of the arbitrators, and it does not relate the settlement to the partition proceedings. Bearing in mind that that is the pleading, bearing in mind that that is not borne out by the evidence, bearing in mind that the evidence is not related in any way to any pleading, the only possible inference is that the story told by the defendants is not true, and although admittedly the evidence given by the plaintiff herself is so conflicting and confused as to be unreliable throughout, we are of the opinion that the probability is that her original possession of these two fields is neither due to amicable arrangement, nor is it due to her seizing the fields, except in the sense that at the time when she was seeking to be declared guardian of her infant son by adoption, she endeavoured to get possession of her infant son's share which she was treating as a separate share which had fallen to her on partition. That share comprised two fields at Narsingpur, two fields at Thar and three fields at Fatehpur. She got hold of the two fields at Narsingpur; she went to get hold of the fields at Thar, when she was set upon by defendant 2's men, given bruises on the front and back of her head which might have been caused by stones or some other blunt implement, and thereafter gave up the struggle. She did not proceed to Fatepur and invite another beating, and remained in possession of the two fields at Narsingpur. It is not however, in our opinion, necessary to so hold for the purpose of this appeal. All that is necessary for us to say is that we are not satisfied that there was any amicable settlement at any time with the widow in lieu of maintenance; nor was there any amicable arrangement with regard to the quantum of maintenance at all.

It remains therefore to consider what in the circumstances of this case is a fair rate of maintenance to award to this lady, whether she should get that same rate for arrears back to the time when she ceased to be maintained in the joint family house, whether she is entitled to be allowed the expenses of Rs. 1000 which she incurred for her daughter's marriage, whether she is entitled to an allowance in respect of debts which she incurred, as she says, for her maintenance, what the future rate of maintenance should be, whether any allowance should be made for the fact that after the suit was instituted as we now know times have been hard in the Central Provinces for agriculturists, whether the rate of interest allowed by the learned Judge is correct, whether the order as to costs is correct, and whether the decree as to defendant 1's share alone being bound is correct. The easiest point is the one as regards the daughter's marriage. It is hardly disputed that she incurred an expense exceeding the amount that she has been allowed. The amount that she has been allowed is Rupees 1000. It is said, that is too high because in the past daughters in the family have been married for expenses between Rs. 600 and Rs. 800. In our opinion, there is no reason to interfere with the learned Judge's conclusion on this head.

The most important point is as to the quantum of the maintenance that she should be allowed. The learned Judge, in our opinion, has arrived at a correct figure while making, in the course of his enquiry, two mistakes which nearly cancel one another. The one mistake that he has made, in our opinion, is that he has put on one side the indebtedness of the family as a matter that should not be considered in arriving at the figure. There are many cases which suggest that this is not right. We refer to 15 Lah 9,[1] 53 M L J 176[2] and A I R 1929 Nag 127[3] and we are also inclined to the view that the same position is taken by the Privy Council in 8 Pat 840,[4] although the matter did not there directly arise, and there is no decision to that effect. But their Lordships appear to have assumed that debts should be taken into account. On the other hand, the learned Judge, not unnaturally, having regard to the terms of the lists made in the partition arrangement, seems to have had his mind influenced by the fact that the appellants were really separate and that this maintenance being maintenance for the widow of the boy's adoptive father, should be charged solely on those items of property that have been allocated to the boy's share; and accordingly, he not only gives a decree against those items of property only, but he regards only the income from that part of the family property in arriving at the total income out of which maintenance is to be paid.

In our opinion, in a case such as the present, the widow is entitled to maintenance from the joint family property, that is from the property as shown in the lists 1 and 3; and the income from that property in a bad year would be round about Rs. 2500 and in a good year would be round about Rs. 5000. Those figures are, in our opinion, low. They are founded on the defendants' admissions. The learned Judge was not only entitled, but bound, to found himself on those admissions, because of the paucity of the plaintiff's evidence due, very largely, in our opinion, to delay and reticence on the part of defendants in producing books. However that may be, the plaintiff's evidence is poor, so poor that one cannot act upon it in this respect and one is bound to act upon the defendants' admissions. It would be idle to assume that it is probable that these admissions tell the whole truth as to the income of this family. Taking the income, however, on that basis of Rs. 5000 a year, bearing in mind the fact that the family is burdened with some Rs. 12,000 of debts, the result, in our opinion, is that the most that can be given to this woman by way of maintenance is Rs. 600 a year. That is the figure that the learned Judge has given her. He has given her that amount for a reason that we think is right. He has observed that this is a case where she should be treated generously in the matter of maintenance, as was pointed out in 1 N L R 33,[5] owing to the fact that she has adopted defendant 1 as her son.

The next question that arises is with regard to arrears of maintenance. It may well be urged that the learned Judge has decided, following the rules laid down by the Privy Council in 8 Pat 840,[4] that this particular lady is of a station in life and that the particular family has an income which justifies the allowing to that lady for maintenance Rs. 600 a year, that that figure would be always the same for all years wherein the income was the same, and consequently, in determining the arrears we should do, what the learned Judge in this case has done, that is take the maintenance as fixed at Rs. 600 a year. Then consider what she, in fact, got. She did not get Rs. 600 for those years, but she got a varying figure dependent on the letting value of the lands that she had taken. The figure for the five years, therefore, is Rs. 600 multiplied by 5, less the total made up of all the sums she received in respect of those two fields. That is what the learned Judge has done, and in his discretion, he was entitled to do it. But he does not appear to have exercised any discretion in the matter. He has assumed that because he fixed the future maintenance at Rs. 600, therefore in arrear it must also be Rs. 600, less what she had received from the fields. Again there is a long series of cases to the effect that arrears may be at a less rate, and that the Court has a discretion in the matter. It is not necessary to cite any other than 27 N L R 347[6] at p. 352, 43 Bom 66,[7] 21 All 183[8] and A I R 1932 Mad 408.[9]

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[1] Mt. Champa v. Official Receiver, Karachi, (1933) 20 A I R Lah 901=149 I C 693=15 Lah 9=36 P L R 450.

[2] Jamna Bai Ammal v. Balakrishna Tawker, (1927) 14 A I R Mad 1092=102 I C 101=53 M L J 176.

[3] Kamtabai v. Umabai, (1929) 16 A I R Nag 127 =117 I C 209.

[4] Ekradeshwari Bahuasin v. Homeshwar Singh, (1929) 16 A I R P C 128=116 I C 409=56 I A 182=8 Pat 840 (P C).

[5] Raja Ratan Singh v. Rani Beni Bai, (1905) 1 N L R 33.

The learned Judge's judgment on this head is sought to be supported by the fact that the widow had, as a matter of fact, incurred debts for maintenance over these years. Those debts would appear to have been incurred by her—for what purposes, is not proved—round about the year 1925, but they end with a bond (Ex. P-4) which purports to be a bond executed in favour of the lender in respect of past loans in the name of the minor, through his guardian, the plaintiff. In other words, the plaintiff has not paid out any sum of money to the lender; she has, as guardian, executed a bond in favour of the lender. It may be —we say nothing as to it—that she is not liable on that bond, because she does not purport to be the person made liable by that bond, save in the role as guardian. It is the minor who is the party to the bond through his mother, the guardian, and it would, in our opinion, be unfair to decree in this suit a sum of money on the basis that the widow has discharged that liability when it may be, for all we know (we say nothing as to it), that the creditor suing on that bond would not make her liable but would make the minor liable. If that were so, the result would be that the minor's share would be burdened twice. It may be, of course, that neither is liable. We say nothing as to that. We therefore think that it is only fair to reduce the amount given for arrears by the figure of Rs. 874-6-3 and in lieu give the plaintiff a declaration that if she be held liable, after contest, under the bond (Ex. P-4), or for loans made to her for maintenance purposes by the therein mentioned creditor, she shall be indemnified by the defendants against such liability. That reduces the figure found by the learned Judge for arrears roughly to Rs. 1000. Even that figure, we think, is a little too high, and we are not prepared to give the widow, as regards arrears before 1930, more than Rs. 500.

As regards interest, the learned Judge has given interest at 1 per cent. per mensem on the thousand rupees borrowed for the daughter's marriage. That is the rate we are told the family borrows money at. We see nothing wrong in allowing interest which is the interest the plaintiff has herself contracted to pay in respect of the loan. The next item relates to interest on arrears. The learned Judge has given at 8 annas per cent. per mensem from the date of judgment until it is paid. We think it proper to vary it to Court rate from the date of suit. The next relates to arrears of maintenance. The position as regards maintenance stands as follows: As we have said the Court found that Rs. 600 a year was the fair rate of maintenance, but the woman was then in possession of the two fields, Nos. 138 and 41, and he allowed Rs. 200 in respect of those fields, making a net liability of Rs. 400 a year in cash to be paid to the lady, unless and until she returned the fields. In fact, we are informed she returned the fields in 1933, and also in point of fact she has not received anything by way of maintenance since this suit was filed to the present day. The learned Judge, anticipating some difficulty on the part of the lady in getting her maintenance paid to her, made an order that in default of payment, the **arrears will carry interest at 8 annas per cent. per mensem, with effect from 1st May** of the year in which it has fallen due. We think that it is preferable to follow the usual course in such matters and allow Court rate of interest from the date of decree.

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[6] Mt. Laxmibai v. Sambha, (1932) 19 A I R Nag 11=136 I C 280=27 N L R 347.

[7] Karbasappa v. Kallava, (1918) 5 A I R Bom 122=47 I C 626=43 Bom 66=20 Bom L R 823.

[8] Raghubans Kunwar v. Bhagwant Kunwar, (1899) 21 All 183=1899 A W N 22.

[9] Venkataratnamma v. Seetaratnam, (1932) 19 A I R Mad 408=138 I C 287.

Next, the learned Judge has come to the conclusion that the person that is behind all this trouble is defendant 2. We have little doubt that the learned Judge is right in so finding. But the result of so finding has been that he has imposed upon defendant 2 the costs, even as he has imposed upon defendant 1 the liability for maintenance. Both are, in our opinion, technically wrong, because at all material times it is a joint Hindu family, and consequently both costs and maintenance are payable by the joint Hindu family, and not by either defendants 1 or 2. There has been no suggestion before us that it is necessary to pass a personal decree in this matter since the estate is able to pay both the charges that the decree imposes upon the joint family property as a whole. The decree will, accordingly, be modified in this respect by making the joint family property liable both for the arrears and the maintenance and interest and costs, and the expenses of the marriage. Substantially, the appeal has failed and is dismissed with costs. It is true there is no appeal by the plaintiff against that part of the decree which imposes the main burden upon defendant 1 alone; but we vary the decree, acting under the provisions of O. 41, R. 33.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 202

POLLOCK J.

*Ramchandra Govind Kale — Plaintiff* — Appellant.

**v.**

*Mishrimal Chandanmal Marwâdi and others — Defendants* — Respondents.

Second Appeal No. 389 of 1937, Decided on 26th August 1937, from appellate decree of Second Addl. Dist. Judge, Amraoti, D/- 10th March 1937.

**Berar Alienated Villages Tenancy Act (1921), S. 76 (3)—Suit for arrears of rent — Period of limitation is three years.**

A suit for arrears of rent by an ijardar against a permanent tenant is limited to a period of three years and is governed by S. 76 (3), and not by S. 22. [P 202 C 2; P 203 C 1]

V. K. Rajwade — *for Appellant.*

**Judgment.** — The plaintiff, who is the ijardar of the village Pimpri sued to recover the rent of fields in that village for six years from 1929-30 onwards. The suit was brought in June 1935 and the lower Courts have held that the claim for arrears of rent for the first three years is barred by limitation. They passed a decree against defendant 1, whom they held to be a permanent tenant of the fields, for the arrears of rent for the last three years. Against that decision the plaintiff has now appealed. He relies on S. 22 of the Berar Alienated Villages Tenancy Law which provides that the produce of every holding in the cultivation of a tenant shall be deemed to be hypothecated for the rent payable in respect of such holding by such tenant and by every person intermediate, and he therefore claims that Art. 120 and not Art. 110, Limitation Act, applies. "Produce of holding" is defined in S. 21 as

> (a) crops and other products of the earth standing or ungathered on the holding; and (b) crops and other products of the earth which have been grown on the holding and have been reaped or gathered and are deposited on the holding or on a threshing ground, or are stored, by a tenant of the land on which they have grown within the village in which the holding is situate or the tenant resides.

Now in June 1935 when this suit was brought there were no crops standing or ungathered on the holding, and the plaintiff's right of hypothecation could be exercised only against those crops which had been reaped or gathered and were deposited or stored in the village. He had no right against crops which were ungrown and had not come into existence. I agree with the lower Appellate Court that this is the clear meaning of Ss. 21 and 22, and the method laid down in S. 23 by which a landlord can exercise his lien against the removal of such produce shows that it cannot be exercised on account of an arrear of rent which has been due for more than one year.

Section 76 (3) provides that notwithstanding anything contained in Arts. 120 and 132, Limitation Act, the period of limitation for a suit by a landlord for an arrear of rent due by an ante-alienation tenant shall be three years. Now under S. 45, the rent of an ante-alienation tenant is a first charge on the holding and therefore, but for the provision in S. 76 (3), the period of limitation for a suit for arrears of rent would be much more than three years. It appears that the Legislature intended that no suit for arrears of rent should be brought after three years and that it considered that it was unnecessary to make any such provision for suits for arrears of rent for other than ante-alienation tenant for in such cases there would be no charge against the holding but there would be merely a hypothecation of the produce then in existence. The suit was rightly held barred by limitation as regards the first three years, and the appeal is dismissed without notice to the respondents.

B.D./R.K. *Appeal dismissed.*

## A. I. R. 1938 Nagpur 203

VIVIAN BOSE J.

*Kanhaiyalal Hajarimal Kotecha Marwadi — Plaintiff* — Applicant.

v.

*Govinda Tukaram Kunbi — Defendant* — Non-applicant.

Civil Revn. No. 798 of 1936, Decided on 1st October 1937, from decree of Small Cause Court, Kelapur, D/- 5-10-1936.

**C. P. Debt Conciliation Act (2 of 1933 as amended by Act 15 of 1936), Ss. 7-A, 8 (1), 8 (2)—Application for conciliation for debt by debtor—Notices issued to creditors — Creditors forming joint Hindu family, two of them being major and third minor—Mother of minor described as his guardian both in application and in notices issued to creditors — No guardian appointed according to O. 32, Civil P. C., to represent minor — Board refusing to accept major members as representing minor and passing an order discharging minor's share — Suit by assignee of debt for its recovery—Action of Board held to be without jurisdiction — Civil Court held to have jurisdiction to consider procedure followed by Board and to deal with minor's share.**

When S. 7-A of the Act does not apply, the Civil Courts have jurisdiction to consider whether the Board acted with jurisdiction or not in a particular matter. [P 203 C 2]

On an application under the Act by a debtor, notices were issued to the creditors who formed a joint Hindu family but two of whom were major and the third a minor. The mother of the minor was described as his guardian both in the application and in the notices. No one appeared on behalf of the minor. The Board refused to accept the other two major members of the family as representatives of the minor and without appointing a guardian for the minor under O. 32, Civil P. C., passed an order under S. 8 (2) discharging the minor's share of the debt. On a suit being instituted by an assignee of the debt for its recovery, the lower Court dismissed the suit with respect to the minor's share in the debt holding that it had no jurisdiction to question the procedure of the Board :

*Held* that the action of the Board was without jurisdiction and was not a mere irregularity in procedure. The minor was not represented by a properly appointed guardian under O. 32, Civil P. C., and had been prejudiced by reason of his non-representation. The Civil Court had jurisdiction to consider validity of the procedure followed by the Board and it could proceed in respect of the minor's share : *20 N L J 203, Rel. on; 30 Cal 1021, Ref.* [P 204 C 1]

A. V. Wazalwar and V. D. Kale — *for Applicant.*

G. R. Pradhan — *for Non-applicant.*

**Order.**—The plaintiff is an assignee of a promissory note executed by the defendant in favour of three persons, Nemichand, Chhaganmal and Mulchand, who formed a joint Hindu family. The defendant Mulchand was and still is a minor. After the execution of the note the defendant applied to the Debt Conciliation Board. Notices were issued to the two major creditors and to the mother of the minor who was described both in the application and in the notice as their guardian and they were called upon to file a statement under S. 8 (1), C. P. Debt Conciliation Act within two months. No one appeared on behalf of the minor Mulchand and so the Debt Conciliation Officer passed an order under S. 8 (2) discharging Mulchand's share, that is to say 1/3rd of the debt. This was on 8th August 1935. After this the three creditors assigned the note to the plaintiff on 5th April 1936 and he has instituted the present suit and asks for a decree for the whole amount. The lower Court while holding that the Debt Conciliation Board is bound to appoint a guardian in respect of a minor holds that the Civil Courts have no jurisdiction to question the procedure of these Boards and so dismissed the claim to the extent of 1/3rd. It has been held in 20 N L J 203[1] that when S. 7-A of the Act does not apply, the Civil Courts have jurisdiction to consider whether the Board acted with jurisdiction or not in any particular matter. The question which I have now to determine is whether failure to appoint a guardian under O. 32, Civil P. C., is merely an irregularity in procedure or goes to the root of jurisdiction.

It is elementary that no Court has power to proceed against a person who is not before it or in the case of a minor who is not properly represented. O. 32 prescribes the method by which the representation of a minor is to be effected. R. 47 of the Rules framed under the C. P. Debt Conciliation Act, 1933, states that in the case of a minor the Board and the parties concerned shall, "so far as may be", follow the procedure laid down in O. 32, Civil P. C. If that is not done and a minor is not represented at all then, of course, the action of the Board in passing any order against him is naturally without jurisdiction. But their Lordships of the Privy Council have held in 30 Cal 1021[2] at p. 1031 that if a minor is effectively represented in the proceedings then a mere omission to record a formal order of appointment of a guardian is an irregularity in procedure and the proceedings will not be a nullity unless prejudice to the minor is shown by reason of that defect in procedure. The position then narrows down to this. Can the minor Mulchand be said to have been effectively represented in the proceedings before the Board? As I have said the application mentioned his mother as his natural guardian and notice was actually issued to her. Will that be enough? In my opinion not, unless there has been a proper and formal order of appointment. Such orders cannot be made behind the back of the proposed guardian. It is necessary in all such cases that the guardian should consent to it and therefore unless the Court is satisfied that the person mentioned is ready and willing to accept the office of guardian, mere notice to appear which is ignored would not be effective in securing the representation of a minor.

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[1] **Lachmansing v. Durgaprasad, (1937) 20 N L J 203.**

Then there is the fact that the other members of the joint family were major and that they could have represented the minor in certain circumstances. But here it is evident that the Board refused to accept them as the representatives of the minor. Though the debt on the promissory note was a joint and several debt, it considered that the statement furnished by them was not enough and so acted under S. 8 (2). Therefore in my opinion it is clear both that there was no representation of the minor and also that he has been prejudicially affected by reason of his non-representation. It follows that the action of the Board was without jurisdiction and was not a mere irregularity in procedure. I therefore set aside the order of the lower Court and direct that the case proceed in respect of the minor's share which has not been decreed. I am not in a position to determine whether all the defences open against the minor have been raised or not and so I leave that to the lower Court to deal with. Costs of this Court will follow the event. Counsel's fee Rs. 10.

R.M./R.K. *Order set aside.*

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## A. I. R. 1938 Nagpur 204

PURANIK J.

*Mt. Hazrabi w/o Shaikh Naboo Musalman and others — Defendants —* Appellants.

v.

*Mt. Fatmabi w/o Shaikh Ismail Musalman — Plaintiff —* Respondent.

Second Appeal No. 401 of 1935, Decided on 27th August 1937, from appellate decree of Dist. Judge, Nagpur, D/- 19th June 1935.

**(a) Registration Act (1908), S. 35, Cl. 3 (b)—Registration of deed—Subsequent plea of insanity by executant at time of execution—Effect of endorsement by Registration Officer.**

Registration is a solemn act and if there is a registration endorsement it shows that necessary formalities required by law have been complied with. Consequently where the effect of a document registered is sought to be avoided by the party executing the same by pleading insanity at the time of the execution of the same, the registration endorsement cannot be discarded or ignored in deciding the issue about the mental condition of the party when the deed was executed. The decision in ignorance of or discarding same will not bind the second Appellate Court: *33 Cal 537 (PC) and A I R 1927 Bom 228, Ref.* [P 209 C 1, 2].

**(b) Practice — Evidence—Plaintiff adjudged sane at date of suit—Finding not challenged by appeal—Litigation continued—Point cannot be raised at stage of evidence.**

Where a plaintiff to a suit is adjudged to be sane at the date of the suit and he has not challenged that finding but continued the litigation as sane it is not open to him to argue that he is an alleged lunatic at the stage when evidence was to be given. [P 209 C 2]

**(c) Contract Act (1872), S. 12 — Party executing deed seeking to avoid it on ground of insanity at date of execution — Pleadings and evidence must be scrutinized before deciding issue of mental condition — Decision without doing so will not bind Court in second appeal.**

Where a party executing a deed seeks to avoid the effect of the same by pleading insanity at the time of executing the same, it is of utmost importance that the pleadings and evidence of parties on record are scrutinized with advertence to the law of contract as contained in S. 12; where the trial Court and the final Appellate Court fail to bear this in mind while deciding the case the decision of the final Appellate Court of fact on the issue of insanity will not bind the Court in second appeal. [P 208 C 2]

**(d) Civil P. C. (1908), O. 6, R. 10—Plea of insanity—Circumstances need not be pleaded—General insanity may be led to prove unfit**

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[2] Walian v. Banke Behari Pershad Singh, (1903) 30 Cal 1021=30 I A 182=8 Sar 512 (P C).

**mental condition at time of execution of deed—Duty of final Appellate Court of fact stated.**

Though it may be that a party seeking to avoid the effect of a deed by pleading insanity at the time of execution of the deed is not bound to plead circumstances from which he was bound to establish insanity and though it is permissible for him to lead evidence in proof of general insanity from which an inference of unfit mental condition at the time of the deed could be drawn and the burden lay on the opposite party to prove the contrary, that does not absolve the Court from the liability to scrutinize the pleadings of the parties when pleas have been made and if these pleas appear to be destructive of the case of usual insanity it will not be proper for the final Appellate Court of fact to infer usual insanity from the statement of some witnesses ignoring the pleading : *A I R 1924 P C 130, Ref.* [P 208 C 1, 2]

**(e) Practice—Evidence — Evidence has to be appreciated with reference to pleas, previous statements and conduct of parties.**

The evidence on record has to be appreciated with reference to the pleas and previous statements and conduct of parties and not in ignorance of the same and when the final Appellate Court of fact has failed to do this it cannot be said that it has arrived at a finding of fact binding on the second Appellate Court. [P 208 C 1, 2]

**(f) Practice — Judgment — Hotly contested suit—Trial Judge must deal with facts and evidence elaborately and arrive at proper findings on issues.**

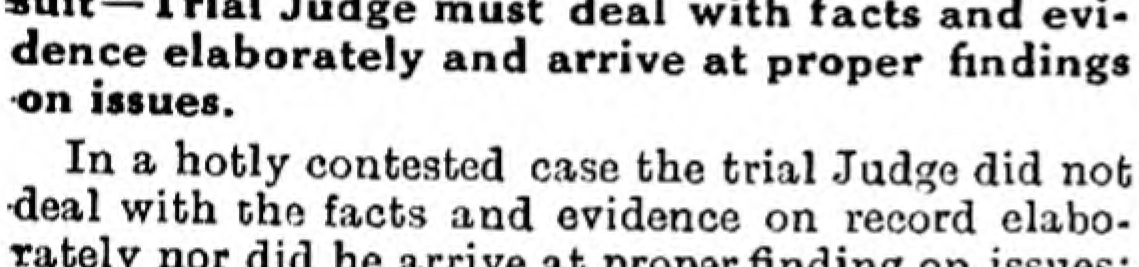
In a hotly contested case the trial Judge did not deal with the facts and evidence on record elaborately nor did he arrive at proper finding on issues; the documents placed on record by either side were not exhibited as required by the circulars so that it was difficult to understand which of them could be treated as proved or admitted :

*Held* that the judgment amounted to summary disposal of the case and was not justified. [P 206 C 1, 2]

M. B. Kinkhede, R. M. Bhagade and V. R. Gharpure — *for Appellants.*

Fida Hussain and Nisar Ali — *for Respondent.*

**Judgment.**—The facts of this case may be briefly stated as under : The following genealogy will show the relationship of the principal parties to the dispute :



Sheikh Nabbu died in 1920 leaving behind a house in Sitabaldi, Nagpur, which is the subject-matter of dispute. On his death his heirs were Rahimatbi 6 annas, Fatmabi 6 annas and Hazrabi 4 annas under the law by which the parties are governed. Hazrabi the widow of the deceased is alleged to have obtained possession of the property according to plaintiff in 1920 on the death of Sheikh Nabbu, but according to defendant 1 at the end of 1924 after she and the present plaintiff as co-plaintiff had instituted Civil Suit No. 75 of 1923 for possession against those that were in wrongful possession. Thereafter Rahimatbi instituted Civil Suit No. 45 of 1925 for partition and possession of her 6 annas share. Mt. Hazrabi, defendant 1, and the present plaintiff were defendants in the case but the present plaintiff was ex parte. Ex. D-2 is the judgment in that suit. Rahimatbi obtained possession of her 6 annas share subject to payment of proportionate share of mehr and funeral and medical charges. Before the final decree was passed in the case, defendant 1, sold the property to Laduram by sale deed dated 14th August 1930. In this sale Hazrabi stated that the present plaintiff Fatmabi had executed a deed of gift in her favour on 22nd April 1925 and by virtue of that gift she had become the owner of Fatmabi's share. Plaintiff's husband thereafter served notices on Hazrabi and Laduram and informed them that steps will be taken to recover possession of the property to the extent of the share owned by his wife, the present plaintiff.

The present suit was instituted on 2nd August 1932 by plaintiff Fatmabi alleging herself to be a minor and a lunatic through her next friend, her husband, for possession of her 6 annas share in the house against defendant 1 Hazrabi and defendant 2, who claimed to be in possession on the basis of the sale deed dated 14th August 1930. The plaintiff's case is that defendant 1 is in possession since the death of Sheikh Nabbu and is accountable for mesne profits to the plaintiff to the extent of her share. She alleged that there has been a decision in Civil Suit No. 45 of 1925 where it was held that defendant 1 had to recover dower debt of Rs. 1000 and five dinars and funeral and medical charges against the estate, but the defendant Hazrabi had paid herself off out of the profits of the property and she was thus responsible to pay to the plaintiff whatever she holds by way of mesne profits on account of the plaintiff. She valued this claim for mesne profits, tentatively at Rs. 100.

The defendants raised a preliminary contention that the plaintiff was neither a minor nor a lunatic and was not entitled to sue through a next friend. It has been held that she was neither a minor nor a lunatic at the institution of the suit. Plaintiff then signed the plaint herself and continued the litigation. On merits the defendants pleaded that the plaintiff had no cause of action for suit as she gifted her share to defendant 1, on 22nd April 1925, by a registered deed of gift and defendant 1 as owning both shares transferred the same to defendant 2. In the alternative it was pleaded that if for any reason the gift be found to be not binding on plaintiff, the plaintiff could not recover her share without contributing her share towards mehr, funeral and medical charges and litigation expenses incurred by defendant 1. It was further pleaded that defendant 1 spent some amount for plaintiff's marriage and that too has to be paid before she could recover possession.

The plaintiff denied the gift and alleged that she was insane during the period the gift deed was executed. She further pleaded that the gift deed was not pleaded in Civil Suit No. 45 and the defendant is bound by res judicata from pleading it now. She stated that defendant 1 had recovered her dower and funeral expenses and medical charges out of the rents and profits of the house recovered by her and nothing was due. With respect to litigation expenses she pleaded that they were not found in the former suit and could not be claimed in this litigation. She denied that anything was spent for marriage. In any case she pleaded that without payment of court-fee the defendants were not entitled to claim a set-off of these items in this litigation against the rents and profits claimed by her.

On these pleadings, after hearing evidence, the trial Court held that the plaintiff was an idiot when the gift deed was executed and it was void. It declared plaintiff entitled to claim possession of her share and ordered an enquiry into the profits of plaintiff's share and the expenses incurred for marriage and litigation. By an earlier finding in the case it was held that the defendants could not agitate the questions decided in the previous suit, Civil Suit No. 45 of 1925. The trial Court passed a preliminary decree for partition and rendition of accounts. The decision of the trial Court on the points involved in the case strikes me as a summary disposal of the case. The learned Judge has not dealt with the facts and evidence on record elaborately nor has he arrived at proper findings on the issues in the case. The documents placed on record by either side have not been exhibited as required by the circulars and it is difficult to understand which of them are such as can be treated as proved or admitted. This sort of disposal of a hotly contested case was not justified.

Against the decision of the trial Court the defendants preferred an appeal before the District Judge and the plaintiff filed cross-objections. The learned District Judge dismissed the appeal filed by the defendants but allowed the cross-objections and decreed that plaintiff is entitled to immediate partition and possession of her share in the property from defendants 2 to 4 who are the representatives of the original purchaser defendant 2, Laduram. He further ordered an enquiry into the mesne profits of the house as between plaintiff and defendant 1, permitting defendant 1 to claim a set-off regarding proportionate share of dower debt and marriage expenses but not with respect to costs of litigation. Against this decree of the lower Appellate Court, the defendants have filed a second appeal before this Court and the plaintiff has filed cross-objections.

The first contention raised by the defendants-appellants before me is that the decision of the lower Appellate Court that Mt. Fatmabi was insane when the deed of gift dated 20th April 1925 was executed is not such as can be accepted in second appeal. It is argued that this finding has been based on wrong assumption and a mistake regarding the onus of proof. It is further argued that the lower Appellate Court did not appear to be aware of the instructions in Registration Manual and the proper bearing of S. 12, Contract Act, and the presumption permissible under S. 114, Evidence Act. The finding is thus vitiated and should not be given effect to. The respondent contended that the decision is one of fact and cannot be challenged in second appeal.

Whether the plaintiff was insane when she executed the deed of gift dated 20th April 1925 is the most important issue in the case, and in order to arrive at a proper decision on the point, pleadings and evidence of the parties require a thorough scrutiny with reference to the law of contract as contained in S. 12, Contract Act. I may at once say that both the Courts below have failed to bear this in mind while deciding the case. The trial Court, as already observed by me, has in a summary manner held that Mt. Fatmabi was an idiot when the deed was executed, holding at the same time, on the basis of the evidence given by the defendants' witnesses that the deed was duly executed. The lower Appellate Court has no doubt dealt with the point in greater detail and has given its reason for arriving at the conclusion that Mt. Fatmabi was insane when the gift deed was executed but I am not satisfied with its statement of the circumstances of the case and it appears to me that it has not borne in mind the provisions of S. 12, Contract Act, and other provisions of law bearing on the several aspects of the case as I will presently show.

In para. 4 of his judgment the learned District Judge states "it is admitted by the appellants that Fatmabi does get fits of insanity particularly during child birth". There is absolutely no justification for this statement anywhere in the pleadings nor is it contended before me that such an admission was made on behalf of the appellants before the lower Appellate Court. The first pleading of the defendant regarding the mental state of Mt. Fatmabi was made on 19th April 1932 when the plaintiff claimed to sue as a lunatic through a next friend. Defendant 1 in her statement dated 19th April 1932 stated that the plaintiff was not a lunatic and could not be allowed to sue through her next friend. She added:

> It is true that the plaintiff was suffering for sometime during her third child birth of hysteria which lasted for six months. Since then she is quite like an ordinary woman with no touch of insanity. It is denied that the plaintiff is lunatic. Her age is 28.

There is no other pleading by the defendant on the point of insanity which could enable the lower Appellate Court to start with an admission on the part of the appellants before it, as stated by it, in the beginning of para. 4 of its judgment. This is on the very face of it a wrong assumption of fact. The learned District Judge then proceeds to state in para. 4 of his judgment the contention of the appellants (defendants) that the burden lay on the plaintiff to establish that she was insane when the deed of gift was executed but without deciding whether this contention is correct or not, viz. without deciding whether the burden lay on the plaintiff as contended by the defendants, he proceeds to examine the evidence led on behalf of the appellants before him, viz. the defendants. This is not fair to the defendants. They wanted the Court to hold that the burden lay on the plaintiff to prove that she was mentally incapable of understanding the gift deed when it is alleged to have been executed but without deciding the contention he proceeds to examine the defendants' evidence and after discarding the same, deals with the evidence given by the plaintiff and after discarding a major portion thereof relies on some statements made by Kazi Abdul Sattar (P. W. 5) and Alexandar (P. W. 3) and jumps to the conclusion in para. 10 of his judgment:

> On the evidence it must be held Fatmabi was generally of unsound mind and that the burden lay on the defendant to prove that she was of sound mind when the gift deed was executed and this has not been done.

He then deals with the evidence given by the defendants and comes to the conclusion that the defendants have failed to discharge the burden that lay on them and holds that Fatmabi was of unsound mind when the deed of gift was executed. The entire treatment of the subject in paras. 4 to 10 is objectionable and clearly shows that the Judge has not approached the case properly. There is no scrutiny of the pleadings of the parties and the evidence on record with advertence to S. 12, Contract Act.

Long arguments were addressed before me by counsel for both sides, each one trying to convince me that the burden of proof lay on the other party in the circumstances of the case; which of the contentions is acceptable is really for the lower Appellate Court to state with reference to the pleadings in the case but this has not been done. The defendant-appellants after having pointed out to me the wrong assumption at the beginning of para. 4 of the judgment, took me through the pleadings of the parties and attempted to show that congenital idiocy was never pleaded as held by the trial Court and no foundation for the case that plaintiff was usually mad was laid in the pleadings but on the contrary the plaintiff's pleadings were destructive of the same. It was argued that in the plaint, para. 6 which was filed on 2nd August 1932 it was pleaded "the plaintiff has become a lunatic since more than three years"; this should be construed as meaning more than three years but less than four years and if so construed it will mean that she became mad some time in 1928 and was not therefore mad in 1925 when the deed of gift was executed.

The other side wants me to hold that more than three years is loosely stated and it may mean for any period more than three years. The plaintiff's counsel further urges that insanity at the time of gift deed is definitely pleaded later on in the pleadings and it is also hinted that insanity is in the family from which an inference of a plea of usual insanity should be drawn. This contention is met by the other side by pointing out several facts and also the deposition of plaintiff's husband recorded on 25th February 1932 in which he stated that "the plaintiff is a lunatic for the last five years but for the last four years she is absolutely mad" which conclusively indicated that plea of general insanity was never intended to be advanced by the plaintiff and that she was not insane in 1925. It is argued that even the plea that she was insane when the present suit was instituted was negatived by the Courts and plaintiff has been throughout litigating as a sane person. The lower Appellate Court has failed to take into consideration the fact that it is pleaded by the defendants that in 1923 and 1924 there was a litigation for possession of this house by defendant 1 and plaintiff as co-plaintiffs and the plaintiff did not deny this. This litigation was presumably by plaintiff as sane and major and thus gives a lie to the alleged plea of general insanity being advanced or proved. I have referred to these arguments before me only to indicate that the pleadings of the parties and the circumstances of the case required scrutiny by the lower Appellate Court with particular reference to S. 12, Contract Act. This is wanting in this case and the decision cannot be said to be legal and binding on me in second appeal.

The learned counsel for the respondent referred me to O. 6, R. 10, Civil P. C., and A I R 1934 P C 130[1] and argued that he was not bound to plead circumstances from which he was to establish the insanity of plaintiff at the time of the gift deed and even if it be necessary, it has been sufficiently hinted at and it was permissible for him to lead evidence in proof of general insanity from which an inference of unfit mental condition of the plaintiff at the time of the deed could be drawn and burden lay on the other side to prove the contrary. This may be perfectly true but it does not absolve the Court from the liability to scrutinize the pleadings of the parties when pleas have been made and if these pleas appear to be destructive of the case of usual insanity it will not be proper for the final Appellate Court of fact to infer usual insanity from the statement of some witnesses, ignoring the pleadings of the parties and even the previous sworn statement of plaintiff's husband. The evidence on record has to be appreciated with reference to the pleas and previous statements and conduct of parties and not in ignorance of the same and when the final Appellate Court has failed to do this it could not be said that it has arrived at a finding of fact binding on second Appellate Court. I have already shown above how the lower Appellate Court started with a wrong assumption of admission on the part of the appellants and ignoring the provisions of S. 12, Contract Act and without deciding the question of burden of proof raised by the appellants proceeded to discuss the appellants' evidence and then the plaintiff's evidence. I object to the treatment accorded by the lower Appellate Court to the question at issue and hold that it is not legal and as such the decision is not binding on me.

It was also argued on behalf of the respondent that the lower Appellate Court had to decide a simple issue whether plaintiff was insane when the deed of gift was executed in 1925. P. W. 5 established that she was insane in 1921 and under law there was a presumption that this state of mind continued until the contrary is established. This not having been done the lower Appellate Court was justified in holding that she was insane in 1925 when the deed was executed. This argument may be perfectly sound if there be nothing else on record but as I have already indicated the other side has brought to my notice several facts before and after 1921 and before 1925 which if accepted by the lower Appellate Court are destructive of the presumption that may arise from the proof of insanity of the plaintiff in 1921. Even plaintiff's pleadings are alleged to be destructive of this presumption. I want the lower Appellate Court to scrutinize all these facts and pleadings before deciding the issue one way or the other.

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[1] Someshwar Dutt v. Tribhavan Dutt, (1934) 21 A I R P C 130=149 I C 480=61 I A 224=9 Luck 178 (P C).

The appellant's counsel further argued that the plaintiff appeared before the District Judge in 1922 and there is nothing on record of that case Ex. 1 D-1 to show that she was insane and though there was a quarrel over the question who should give her away in marriage or the place where the nika should be performed none of her near relations who appeared in the case even suggested that she was a lunatic. The lower Appellate Court should not have lightly discarded this incident. It is for the lower Appellate Court to deal with this aspect of the case which is different from the one stated by it in its judgment.

The lower Appellate Court has not attached any importance to the registration of the deed of gift where plaintiff took part in presenting the deed for registration and admitting its execution. The lower Appellate Court has discarded this incident as not of great consequence on the ground that registration officer is too busy a person to note the mental condition of persons bringing documents to him for registration. This is ignoring S. 35, Cl. 3 (b), Registration Act, which enjoins on the registering officer a duty to refuse registration of a document if it appears to him that the executant is a lunatic. The instructions contained in the C. P. Registration Manual are very specific and require the registration officer to record an admission of execution not merely by a nod from the executant as the trial Court thinks or hurriedly being very busy as the lower Appellate Court holds but after making quite sure of the reality of the admission, not only by reading out the document to the executant but by obtaining his answers with a view to note that the executant has really admitted. A reality of admission and not a farce of admission as stated by the lower Appellate Court is required by these rules (C. P. Registration Manual, page 5, No. 14, page 8, R. 29). It must be presumed that officers follow the Act and the Rules and as their Lordships of the Privy Council pointed out in 33 Cal 537[2] at page 544, registration is a solemn act and if there is a registration endorsement, it shows that necessary formalities required by law have been complied with. The lower Appellate Court in ignorance of these rules of law has discarded the registration endorsement as of no consequence in deciding the issue about the mental condition of the plaintiff when the deed of gift was executed. Such a decision is not binding on the second Appellate Court: *see* 51 Bom 258.[3]

One more point bearing on this question of insanity of plaintiff in 1925 which was argued before me and appears to be of importance is the application dated 8th August 1934 in which the plaintiff stated that she did not understand the nature of oath but was willing to go into the box if the Court so desired. No order was passed on this application by the trial Court and the lower Appellate Court states in para. 11 of its judgment that the trial Court was right in not passing any order on it. The appellants before me wish to draw an adverse inference from the absence of the plaintiff from the box, while the respondent contends that as the plaintiff is an alleged lunatic her evidence is insufficient either way and no adverse inference should be drawn. He relies on Halsbury's Laws of England, Vol. 21, pp. 273, 294 and 296, paras. 473, 505 and 510. The plaintiff is adjudged to be sane at the date of suit and she has not challenged that finding but continued the litigation as sane. It is not open to her to argue that she is an alleged lunatic at the stage when her evidence was to be given. At any rate some order by the trial Court on that application after putting it to the other side was necessary. The lower Appellate Court was not justified in holding that no order could be passed on that application. In supporting the decision of the lower Appellate Court, the learned counsel for the respondent referred me to A I R 1935 Cal 671[4] and argued that the deed of gift is alleged to be executed by an illiterate pardanashin lady and the burden was rightly thrown on the defendants. I have not been able to find any pleas on this point in the trial Court and cannot accept this new argument for the first time in second appeal.

I have so far dealt with the arguments of parties on the question of insanity of the plaintiff when the deed of gift was executed on 20th April 1925 and have indicated that the decision of the lower Appellate Court on this important issue contained in paras. 4 to 11 of the judgment is not such as can be accepted in second appeal. The lower Appellate Court has ignored the principles underlying S. 12, Contract Act and has also ignored the provisions of Registration Act and the instructions given in Registration Manual. It has failed to consider properly whether the case fell within the purview of Clause 2 of S. 12, Contract Act or Cl. 3. A proper scrutiny of the pleadings of the parties and the circumstances of the case as disclosed by the previous conduct of the parties, and the evidence on record has not been made with the result that the decision arrived at by the lower Appellate Court cannot be accepted. As both parties attach great importance to the decision on the point and as it is proper that the lower Appellate Court should deal fully with the case with advertence to the remarks in this judgment, I set aside the finding and remand the case to the lower Appellate Court for a fresh decision of the question.

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[2] Gangamoyee Debi v. Troiluckhya Nath Chowdhry, (1906) 33 Cal 537=33 I A 60=3 C L J 349=10 C W N 522 (P C).

[3] Rangavva v. Sheshappa, (1927) 14 A I R Bom 228=101 I C 416=51 Bom 258=29 Bom L R 327.

[4] Benoy Krishna Sadhukhan v. Panchanan Sadhukhan, (1935) 22 A I R Cal 671=159 I C 133=40 C W N 45=62 C L J 99.

The result is that I allow the appeal and cross-objections and set aside the decree of the lower Appellate Court and remand the case to the lower Appellate Court for a fresh decision of the appeal and cross-objections with advertence to the remarks in this judgment. Costs including the costs in this case will abide the result.

V.B./R.K. *Case remanded.*

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## A. I. R. 1938 Nagpur 210

VIVIAN BOSE J.

*Krishna Kumar Brijbhooshan — Defendant* — Applicant.

v.

*Radhelal Biharilal— Plaintiff* — Opposite Party.

Civil Revn. No. 15 of 1937, Decided on 9th September 1937, for revision of findings of Sub-Judge, First Class, Betul, D/- 1st December 1936.

**(a) Civil P. C. (1908), S. 115—'Case' includes interlocutory orders.**

The word 'case' used in S. 115 is wide enough to include an interlocutory order and the High Court will interfere even in the case of such orders provided they otherwise fulfil the requirements of S. 115: *A I R 1919 Nag 150 and A I R 1931 Nag 17, Foll.; 7 N L R 49, held no longer good law.* [P 210 C 2]

**(b) Civil P. C. (1908), S. 115—Order allowing person to sue as pauper is revisable.**

An order allowing a person to sue as a pauper is revisable if it otherwise fulfils the provisions of S. 115: *AIR 1923 All 577, A I R 1933 All 295 and A I R 1930 All 758, Foll.; 32 All 623, Expl.; 7 N L R 49, held impliedly overruled.* [P 211 C 1]

**(c) Civil P. C. (1908), O. 33, Rr. 5, 6 and 7 —Notice issued under R. 6 — Opposite party has right to adduce evidence regarding matter specified in R. 5.**

Where notices have been issued under R. 6, the opposite party has a right to adduce evidence and to be heard in connexion with any matter specified in R. 5; and the High Court will interfere in revision under S. 115 (c) if the opposite party is prevented from defending himself on any of those grounds: *A I R 1935 Nag 168, Ref.* [P 211 C 2]

**(d) Civil P. C. (1908), O. 33, R. 5 (b) and (c)—Opposite party opposing application on grounds in R. 5 (b) and (c)—Primary burden is on party opposing.**

Where the opposite party opposes the application on any of the grounds under O. 33, R. 5 (b) or (c), the primary burden of proof is on the opposite party (defendant). [P 212 C 1]

D. N. Choudhary — *for Applicant.*

W. B. Pendharkar, B. T. Amlekar and A. Razak — *for Opposite Party.*

**Order.** — This is an application for revision against an application allowing the plaintiff to sue as a pauper. A preliminary objection is raised to the effect that no such application lies and I am referred to 7 N L R 49.[1] I am of opinion that the ruling is no longer good law. The decision is based on the assumption that no revision lies against an interlocutory order. The learned Additional Judicial Commissioner followed 32 All 623.[2] So far as interlocutory orders are concerned, it has now been decided in 15 N L R 21[3] and 27 N L R 251[4] that the word 'case' used in S. 115, Civil P. C., is wide enough to include an interlocutory order and that the High Court will interfere even in the case of such orders provided they otherwise fulfil the requirements of S. 115. Therefore, since the only foundation on which 7 N L R 49[1] is based has now been cut away, it follows the ruling cannot be regarded as good law any longer.

So far as 32 All 623[2] is concerned it has been interpreted by the Allahabad High

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1. Sitai v. Tanai, (1911) 7 N L R 49=10 I C 471.
2. Muhammad Ayab v. Muhammad Mahmud, (1910) 32 All 623=6 I C 831=7 A L J 741.
3. Amolaksao v. Govindrao, (1919) 6 A I R Nag 150=49 I C 34=15 N L R 21.
4. Laxmandas v. Chunnilal, (1931) 18 A I R Nag 17=130 I C 145=27 N L R 251.

Court in 52 All 927[5] and the learned Judges state that the earlier case did not decide that no revision lay nor did they decide that a pauper application is an interlocutory matter. This is also the view in 45 All 548[6] as well as in 55 All 216.[7] They are all agreed that an order in respect of a pauper application is revisable in a suitable case whether the application is granted or rejected, and I also respectfully agree. I do not think that it is necessary to refer this question to a Bench because the two later Nagpur rulings which I have cited virtually overrule 7 N L R 49,[1] that is to say, they decide that the only ground upon which the decision proceeded is wrong, and if I follow the two later decisions, then the only logical corollary is that an order allowing a person to sue as a pauper is revisable if it otherwise fulfils the provisions of S. 115, Civil P. C.

Turning now to the merits, the applicant complains that he was not allowed to prove that the pauper plaintiff had entered into an agreement with reference to the subject-matter of the proposed suit under which another person has obtained an interest in the property. If this is so, then of course there has been a material irregularity in procedure within the meaning of S. 115 (c). The scheme of O. 33 is clear and has been explained in 31 N L R 386.[8] There is first of all a preliminary stage in which the Court proceeds ex parte. At that stage the Court scrutinizes the application and is empowered, if it thinks fit, to examine the applicant or his agent. R. 5 then directs that after this has been done the Court shall reject the application if it finds any of the five grounds mentioned in that Rule to exist. If not it issues notice to the opposite party and the Government Pleader

> for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof.

After the notices have been issued and a date fixed, the Court is then directed by R. 7 to examine the witnesses produced by either party on the date so fixed and then after hearing this evidence it is again directed to reject the application if any of the prohibitions specified in R. 5 exists. It is clear then that the applicant has a right to adduce evidence and to be heard in connexion with any matter specified in R. 5.

When notice was issued to the applicant before me he filed a detailed statement showing that the property in suit, namely nine villages, had been transferred to one Ramshankar pleader by two deeds of gift. There was also an agreement entered into at the same time to the effect that this Ramshankar was to return two of the villages to the pauper applicant after the mutation proceedings. If this is so, then clearly there is an agreement, either because of the deeds of gift or because of them coupled with the other agreement alleged referring to the subject-matter of the suit in which this Ramshankar has obtained an interest in the property. The plaintiff declined to plead to this except to the extent of saying that Ramshankar had nothing to do with the filing of the pauper suit (petition), which of course evaded the definite allegations made about the deeds of gift. He said the matter related to the merits and so was irrelevant at that stage. It was not irrelevant. It may or may not have related to the merits as well but that was neither here nor there. It was most pertinent to the inquiry then under consideration. Any way he had the opportunity to plead to the definite allegations and refused to do so.

When the pauper applicant entered the witness box the other side wanted to cross-examine him about these transactions and he was prevented from doing so on the ground that the matter related to the merits of the case. It follows that he has not been allowed to defend himself on the very ground on which the Code says he may. Therefore interference under Section 115 (c) is most decidedly called for. It was argued that the questions the applicant before me was shut out from asking have not been specified in the order. That is so, but reading the pleadings and the plaintiff's reply together the matter is in my opinion beyond doubt. I therefore allow the application and remand the case to the lower Court for a determination of the matters which arise out of the written statement of the applicant before me (non-applicant in the lower Court) in so far as they are relevant to O. 33, R. 5 (b). The

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5. Sumatra Devi v. Hazari Lal, (1930) 17 A I R All 758=126 I C 1=52 All 927=1930 A L J 901.
6. Shauran Bibi v. Abdus Samad, (1923) 10 AIR All 577=73 I C 538=45 All 548=21 A L J 441.
7. Piare Lal v. Bhagwan Das, (1933) 20 AIR All 295=145 I C 436=55 All 216=1933 A L J 110.
8. Baliram v. Mt. Sitabai, (1935) 22 A I R Nag 168=157 I C 294=31 N L R 386.

pauper applicant has not yet pleaded to these matters and so I consider it just that he should be allowed to do so. But since he having had the opportunity to plead to the issue refused to do so, he will pay the entire costs of this inquiry whatever its result, and if he is still allowed to sue as a pauper, payment of these costs will be made a condition precedent to the hearing of the suit. If he still refuses to plead or attempts further to evade the issue he will be given no further opportunity and the Court will then be at liberty to draw such inferences from his conduct as appear to it to arise therefrom bearing in mind the observation of their Lordships of the Privy Council in 40 Mad 402[9] at pp. 408-409 and bearing in mind S. 106, Evidence Act. The primary burden of proof will of course be on the defendant and the issues will be so cast, but if that is discharged by the adduction of prima facie evidence whether by cross-examination of the plaintiff himself or his witnesses or otherwise, then the law I have referred to above will come into operation. Modern litigation is intended to be a fair and square fight with all the cards on the table and any tendency to conceal facts or to evade a straight issue must be sternly discouraged. The parties stated on 15th August 1936 that they had no documents to produce, but that statement was probably made with reference to the pauper's refusal to plead to these facts and the Court's omission to frame an issue about them. In any case since it is now clear that the matter is relevant and since the proceedings are being re-opened to that extent, I think it right that both sides should be allowed to file such documents as they desire with reference to this issue. The costs of this revision will be paid by the non-applicant before me. Counsel's fee Rs. 30.

V.B./R.K. *Case remanded.*

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[9] Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, (1917) 4 A I R P C 6=39 I C 659=44 I A 98=40 Mad 402 (P C).

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## * A. I. R. 1938 Nagpur 212

STONE C. J. AND PURANIK J.

*Mt. Semabi w/o Wazir Musalman — Judgment-debtor*—Appellant.

v.

*Ganpatrao Yadorao Pande — Decree-holder*—Respondent.

Misc. Appeal No. 278 of 1936, Decided on 29th October 1937, from order of Fourth Addl. Dist. Judge, D/- 9-11-1936.

*** (a) Civil P. C. (1908), S. 47, O. 21, Rr. 97, 103—S. 47 should be construed liberally — Decree-holder auction-purchaser continues to be party to suit till delivering possession to him — Judgment-debtor offering resistance to delivery of possession and raising question relating to nature of right purchased—Such question falls under S. 47—Appeal lies from order passed in relation to such question—Case is not governed by O. 21, R. 103.**

Section 47 should be construed liberally. A decree-holder purchasing the property sold in execution of his decree with the permission of the Court retains his character of a party to the suit and continues to be a party to the suit till the delivery of possession to him of the property purchased by him and if any question is raised by the judgment-debtor at the time of delivery of possession relating to the nature of the rights purchased and resistance to delivery of possession is offered, the question will be one relating to the execution, discharge and satisfaction of the decree, arising between the parties to the suit and falling under S. 47 and an appeal would lie from an order passed in relation to the question. The case is not governed by O. 21, R. 103 : *Case law discussed.* [P 215 C 2 ; P 216 C 1]

**(b) Civil P. C. (1908), O. 21, Rr. 95, 96, 97, 98 and 99, S. 47—R. 95 and subsequent rules in O. 21 relating to delivery of possession to decree-holder, or auction-purchaser fall under order relating to execution of decrees and orders.**

Order 21, Rule 95 and the subsequent rules in O. 21, relating to delivery of possession to the decree-holder or auction-purchaser fall under an Order relating to the execution of decrees and orders. When a question arises as to the kind of possession to be delivered, it is a question relating to the execution of the decree : *A I R 1926 Cal 798, Rel. on.* [P 216 C 1]

**(c) Civil P. C. (1908), Ss. 2 (2), 47—Case of judgment-debtor fighting with decree-holder auction-purchaser falls under S. 47 — Order passed against judgment-debtor is decree.**

The case of a judgment-debtor when he is fighting with the decree-holder auction-purchaser falls under S. 47 and an order passed against the judgment-debtor is a decree under S. 2 (2) and as such appealable. [P 216 C 1]

R. N. Padhye—*for Appellant.*

R. G. Rao—*for Respondent.*

**Order.**—The facts of this case out of which this appeal arises briefly stated are as under :

In Civil Suit No. 134 of 1931, decided on 31st August 1931, the plaintiff obtained a money decree against the defendants, who are the legal representatives of one Wazir Muhammad, to the extent of the assets of the deceased in their hands. In execution the decree-holder attached a house belonging to the deceased which was in the possession of the judgment-debtors as his legal representatives. Judgment-debtor 1, who is the widow of the deceased Wazir Muhammad, filed an application stating that she was in possession in lieu of dower debt of Rs. 5000 and was entitled to retain possession till that debt was paid off. She claimed a declaration of this right before the sale took place and this application was held to be one falling under S. 47, Civil P. C., by the executing Court by its order dated 7th January 1933. Later on parties agreed that the fact that judgment-debtor 1 claims to be in possession of the property in lieu of dower debt of Rs. 5000 and claims to retain such possession till the dower debt is paid off should be mentioned in the proclamation of sale and the property be sold. The Court passed an order accordingly on 12th August 1933. This order is in consonance with the view taken in 27 N L R 389.[1] Thereafter the property was sold and purchased by the decree-holder himself. The decree-holder then applied to be placed in possession of the property. Judgment-debtor 1, who had given notice of her right to retain possession of the property in lieu of her dower debt of Rs. 5000 till the debt was paid off, resisted delivery of possession. Thereupon the decree-holder applied to the Court under O. 21, R. 97, complaining of the resistance by the judgment-debtor. The latter in reply urged that she had already notified her right of retention before the sale was held and the decree-holder having purchased with notice of this right could not claim khas possession of the property so long as her debt was not paid off. The executing Court investigated the claim and came to the conclusion that the judgment-debtor could not resist delivery of possession. Against this order an appeal was preferred by the judgment-debtor in the Court of the Additional District Judge, Nagpur. A preliminary objection was raised by the decree-holder auction-purchaser that no appeal lay. This preliminary objection prevailed in the lower Appellate Court and the appeal was dismissed on 9th November 1936. Against this decision the present appeal is filed in this Court.

The lower Appellate Court holds that the dispute relating to delivery of possession between the decree-holder auction-purchaser and the judgment-debtor resisting the possession is not one relating to the execution, discharge or satisfaction of the decree and the matter is thus outside the scope of S. 47, Civil P. C., and no appeal lay against the order which was one under R. 98 of O. 21, Civil P. C. The judgment-debtor-appellant contends that the view taken by the lower Appellate Court is wrong and that it ought to have been held that the question is one arising between the parties to the suit in which the decree was passed and related to the execution, discharge and satisfaction of the decree and that it fell under S. 47, Civil P. C., and an appeal could lie against the order. The decree-holder auction-purchaser on the contrary contends that a dispute relating to delivery of possession between the decree-holder auction-purchaser and the judgment-debtor resisting delivery of possession after the sale is not a matter relating to the execution, discharge or satisfaction of the decree and cannot be regarded to be one between the parties to the suit. S. 47, Civil P. C., does not apply and no appeal lies.

The decision of the dispute raised in this case is not free from difficulty. High Courts in India have taken different views. Sir Dinshah Mulla in his Civil Procedure Code, Edn. 10, pages 179 and 180, refers to the controversy on the subject. According to the view taken by the High Court of Madras and by a Full Bench of the High Court of Calcutta, the decree-holder retains his character of a party to the suit though he is also the purchaser, and the question as to delivery of possession is a question relating to the execution, discharge or satisfaction of the decree within the meaning of S. 47, Civil P. C. The two conditions laid down by the section are therefore satisfied and a separate suit for possession is barred under S. 47 : 25 Mad 529,[2] 26 Mad 740,[3] 28 Mad 87,[4] 43 Mad 107,[5] 53 Cal 781[6] and 59 Cal 117.[7] According to the other view, which is the view taken by a Full Bench of each of the High Courts of Allahabad, Patna, Bombay, Lahore, Rangoon and the Chief Court of

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[1] **Kalekhan v. Mt. Hura, (1932) 19 A I R Nag 18 =136 I C 239=27 N L R 389.**

[2] Kashinatha Ayyar v. Uthumansa Rowthan, (1902) 25 Mad 529=12 M L J 1.

[3] Kattayat Pathumay v. Raman Menon, (1903) 26 Mad 740=13 M L J 237.

[4] Sandhu Taraganar v. Hussain Sahib, (1905) 28 Mad 87=14 M L J 474.

[5] Vevindramuthu Pillai v. Maya Nadan, (1920) 7 A I R Mad 324=54 I C 209=43 Mad 107= 38 M L J 32 (F B).

[6] Kailash Chandra Tarapdar v. Gopal Chandra Poddar, (1926) 13 A I R Cal 798 = 95 I C 494 =53 Cal 781=30 C W N 649 = 43 C L J 345 (F B).

[7] **Kalipada Mukherji v. Basantakumar Dutta, (1932) 19 A I R Cal 126=138 I C 177=59 Cal 117=35 C W N 877.**

Oudh, a decree-holder purchaser stands on the same footing as a purchaser who is a stranger so that he may proceed either by an application under O. 21, R. 95 or by a separate suit for possession. This view proceeds on the ground that S. 47 does not apply either because the question as to the delivery of possession is not one relating to execution, discharge or satisfaction of the decree or because a decree-holder after he becomes purchaser of the property can no longer be said to be "a party to the suit" : 31 All 82,[8] 50 All 670,[9] 1937 A L J 889,[10] 10 Pat 670,[11] 48 Bom 550,[12] 54 Bom 479,[13] 1 Lah 134,[14] 8 Rang 162[15] and 3 Luck 182.[16] According to the view taken in Calcutta and Madras, the application for delivery of possession falls under S. 47 and the order made on the application amounts to a decree, S. 2 (2), and is appealable as such. According to the other view, S. 47 does not apply to the case and the application is entirely one under O. 21, R. 95 and no appeal lies from an order made upon such application.

The only cases directly bearing on the point decided by the Court of the Judicial Commissioner, Nagpur, are A I R 1927 Nag 294[17] decided by Sir Charles Findlay J. C., and A I R 1933 Nag 369,[18] decided by Staples A. J. C. In both these cases it was laid down that the question such as the present one, arising between the decree-holder auction-purchaser on the one hand and the judgment-debtor on the other though arising at the time of delivery of property to the decree-holder auction-purchaser was one between the parties to the suit and related to the execution, discharge and satisfaction of the decree. In 27 N L R 10,[19] Jackson A. J. C., while dealing with a case instituted by the judgment-debtor claiming to hold the property attached as mahant of a matha, held that such a suit was not barred by S. 47 inasmuch as the judgment-debtor claimed the property attached as vesting in him in a different character. He however observed that an objection by the judgment-debtor that the property belonged to him and not to the deceased whose estate he represented will be one under S. 47, Civil P. C. In 28 N L R 250,[20] MacNair J. C. ruled that a suit by a decree-holder auction-purchaser who had not resorted to the speedy remedy of being placed in possession under O. 21, R. 95 was not barred by S. 47, Civil P. C. He however observed that it is quite possible that in a case in which the decree-holder auction-purchaser wants possession as against the judgment-debtor

> question relating to the execution, discharge or satisfaction of the decree may arise, for example a question whether the property of which possession is sought was or was not sold or the nature of the rights which were brought to sale,

and he further observed that "it may be that in a separate suit such points cannot be determined". In other words, he was not laying down a general proposition that in no case could it be said that the question though one relating to delivery of possession of the property was not such as did not relate to the execution, discharge and satisfaction of the decree. In 31 N L R 217,[21] Gruer A. J. C. distinctly laid down that a decree-holder does not cease to be a decree-holder merely by becoming an auction-purchaser and a question which arises between the decree-holder auction-purchaser and the judgment-debtor is one that arises between the parties within the meaning of S. 47, Civil P. C.

It will thus be seen that in the Court of the Judicial Commissioner, Nagpur, the view that has found favour is the one accepted by Madras and Calcutta High Courts and not the one taken by the other

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[8] Bhagwati v. Banwari Lal, (1909) 31 All 82=1 I C 416=6 A L J 71 (F B).

[9] Mohsin Raza Khan v. Haidar Bakhsh, (1928) 15 A I R All 368=115 I C 869=50 All 670=26 A L J 498.

[10] Kedar Nath v. Arun Chandra Sinha, (1937) 24 A I R All 742=172 I C 57=1937 A L J 889=I L R (1937) All 921 (F B).

[11] Tribeni Prasad Singh v. Ramasray Prasad Chaudhuri, (1931) 18 A I R Pat 241=133 I C 337=10 Pat 670=12 P L T 423 (F B).

[12] Hargovind Fulchand v. Bhudar Raoji, (1924) 11 A I R Bom 429=83 I C 932=48 Bom 550=26 Bom L R 601 (F B).

[13] Hira Lal Mohan Lal v. Ramchandra, (1930) 17 A I R Bom 375=125 I C 703=54 Bom 479=32 Bom L R 619.

[14] Brij Lal v. Durga, (1920) 7 A I R Lah 159=56 I C 254=1 Lah 134=132 P L R 1920.

[15] J. A. Martin v. S. M. Hashim, (1930) 17 A I R Rang 61=126 I C 209=8 Rang 162.

[16] Gaya Bakhsh Singh v. Rajendra Bahadur Singh, (1928) 15 A I R Oudh 199=110 I C 83=3 Luck 182=5 O W N 108 (F B).

[17] Balaji Kashinath v R. B. Anandrao, (1927) 14 A I R Nag 294=103 I C 335.

[18] Nathu Harishankar v. S. Fatusa, (1933) 20 A I R Nag 369=147 I C 582.

[19] Fatechand v. Mahant Ganeshgir, (1930) 17 A I R Nag 293=128 I C 401=27 N L R 10.

[20] Chotelal v. Sarwan, (1932) 19 A I R Nag 140=140 I C 683=28 N L R 250.

[21] Deviprasad v. Waziruddin, (1935) 22 A I R Nag 30=156 I C 995=31 N L R 217.

High Courts. The cases in 27 N L R 10[19] and 28 N L R 250[20] in which a separate suit was held tenable were cases in which either the judgment-debtor was claiming the property in a different legal character and not for himself (27 N L R 10[19]), or the decree-holder auction-purchaser in the separate suit did not raise any question relating to the execution, discharge or satisfaction of the decree and had not applied under O. 21, R. 95, Civil P. C., (28 N L R 250[20]). In both these cases however, the Judges have clearly stated that there can be objections even between decree-holder and the judgment-debtor or decree-holder auction-purchaser and the judgment-debtor which will fall within S. 47, Civil P. C., and the objection such as the one that is raised in the present case by the judgment-debtor, viz. one relating to the nature of the rights that were brought to sale is stated to be one which will fall under S. 47 in 28 N L R 250[20] at p. 253. The only case of this Court which was referred to at the hearing as laying down the contrary is 19 N L J 296[22] where Pollock J. held, with respect to the question whether the executing Court had power to confirm the sale after the issue of the certificate under S. 15, C. P. Debt Conciliation Act, that after the sale had been held subsequent proceedings arise only between the judgment-debtor and the auction-purchaser and that since the decree-holder plays no part in these proceedings they cannot be termed execution proceedings. He further held that in such cases there is nothing in the Proviso to S. 21 as amended to prevent a Court from confirming the sale. In the body of the judgment the learned Judge observes as under:

> It is true that in this case the decree-holder is himself the auction-purchaser but that makes no difference in principle . . . . After the sale had been held and the sale price had been set off against the judgment-debt or deposited in Court, subsequent proceedings for confirming the sale are proceedings between the judgment-debtor and the auction-purchaser just as proceedings for the delivery of possession to the auction-purchaser. In these proceedings the decree-holder plays no part and in my opinion these proceedings do not amount to executing a decree so as to fall within the ambit of Proviso to S. 21, C. P. Debt Conciliation Act.

This case was decided with reference to the provisions of the C. P. Debt Conciliation Act, Ss. 15 and 21. The learned Judge was not dealing with a question arising between decree-holder auction-purchaser and judgment-debtor and relating to the nature of the rights brought to sale in execution of the decree. What is stated in this case cannot therefore be held to apply to the facts of the present case. The observations regarding the nature of proceedings for delivery of possession are merely obiter and had nothing to do with the facts of that case. Thus after going through all the cases referred to above we are of the opinion that the decision of the lower Appellate Court that no appeal lay is not correct and not in consonance with the view that prevailed in the Court of the Judicial Commissioner, Nagpur.

Our main reasons for arriving at this decision and preferring the view of law taken in Madras and Calcutta to the other view are as under: (1) Their Lordships of the Privy Council in 19 Cal 683[23] observed :

> It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244 (now S. 47).

Section 47 has therefore to be liberally construed and when it is a matter of choosing between two divergent views we choose to accept the one which interprets S. 47 liberally as required by their Lordships of the Privy Council. (2) The decree-holder auction-purchaser stands on a different footing from a stranger purchaser. As soon as the sale is confirmed, no doubt the title of the purchaser becomes absolute but no sale can be said to be complete without delivery of possession. The decree-holder auction-purchaser, who purchases with the permission of the Court under O. 21, R. 72, cannot be said to have obtained the benefit of his money due under the decree until he gets possession of the property of the judgment-debtor purchased by him. The decree-holder auction-purchaser thus continues to be a party and if any question is raised by the judgment-debtor at the time of delivery of possession, relating to the nature of the rights purchased and resistance to delivery of possession is offered, surely it will be a question relating to the execution, discharge and satisfaction of the decree arising between the parties to the suit and thus falling within S. 47, Civil P. C.; (3) O. 21, Civil P. C., relates to execution of decrees and orders. R. 95 and the subsequent Rules which relate to delivery of possession to the decree-holder or auction-purchaser thus fall under an Order relating to execution of decrees and Orders. As observed in 53 Cal 781[6] at p. 795 when the question arises as to the kind of possession to be delivered, it is a question relating to the execution of the decree. (4) O. 21, R. 103 runs as under :

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[22] **Haji Dada Kachhi Mallik Haji Wali Mohammad v. Pannalal,(1937) 24 A I R Nag 98=169 IC 99=19 N L J 296.**

[23] **Prosunno Kumar Sanyal v. Kali Das Sanyal, (1892) 19 Cal 683=19 I A 166=6 Sar 209 (P C).**

> Any party not being a judgment-debtor against whom an order is made under R. 98, R. 99 or R. 101 may institute a suit to establish the right which he claims to the present possession of the property ; but subject to the result of such suit (if any), the order shall be conclusive.

The judgment-debtor against whom an order may be pronounced under O. 21, R. 98 is not included amongst the persons entitled to challenge the order by a suit and yet he may be vitally interested and may be justly offering resistance to the delivery of property. It will be absurd to hold that he is not entitled to sue and that he has no right of appeal. We think that the case of a judgment-debtor when he is fighting with the decree-holder auction-purchaser falls under S. 47, Civil P. C., and an order passed against the judgment-debtor will be a decree under S. 2 (2) and as such appealable. We are not concerned with deciding what will be the remedy of a judgment-debtor if a stranger auction-purchaser is ranged against him and an adverse order is passed against the judgment-debtor under O. 21, R. 98. If an adverse order is passed against the stranger auction-purchaser he can challenge the order by suit under O. 21, R. 103, but what about an adverse order against the judgment-debtor? R. 103 does not speak of a suit by judgment-debtor challenging the order. Is he precluded from challenging it? The question does not arise for decision in this case and we do not wish to express any opinion on the point. In the present case the fight is between the judgment-debtor on the one hand and the auction-purchaser decree-holder on the other and does relate to execution, discharge and satisfaction of the decree, and as such the case falls under S. 47 and is not governed by the terms of O. 21, R. 103. The order is therefore appealable. We therefore hold that the lower Appellate Court was wrong in holding that no appeal lay against the order. We set aside the order of the lower Appellate Court and order it to re-admit the appeal under its original number and proceed to decide it on merits in accordance with law. Costs to abide the event. Rs. 40 counsel's fee.

R.M./R.K. *Appeal allowed.*

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## A. I. R. 1938 Nagpur 216

VIVIAN BOSE J.

*Kisangopal Hariram Marwari* — *Creditor* — Applicant.

v.

*Umrao Kesheo Rao and others* — Non-applicants.

Civil Revn. No. 528 of 1936, Decided on 6th September 1937, from order of Dist. Judge, Nagpur, D/- 20th June 1936.

**(a) Revision—Judgment of lower Appellate Court superficial—No consideration of evidence —Only superficial points considered—Interference in revision held necessary.**

Where there had not been any real consideration of the evidence at all before the lower Appellate Court and all that the Judge did was to seize hold of a rule of law about the burden of proof, a rule which incidentally loses most of its significance when there is evidence for consideration and then to seize hold of two or three superficial points in the case and rest content with that :

*Held* that that was not what an Appellate Judge was there for, especially when he was reversing a well considered finding of a lower Court and that interference in revision was necessary. [P 217 C 1]

**(b) Insolvency—Annulment — Primary onus of proof is on receiver or petitioning creditors though real facts are known to insolvent—After prima facie case is proved, insolvent's evidence is most important.**

It can be inferred from the usual course of human conduct that a party who has evidence in his possession favourable to his case will not fail to produce it. This principle is particularly important in insolvency proceedings where the primary burden of proof is on the receiver or the petitioning creditor while knowledge of all the essential facts is usually with the other side. It is not meant by this that the primary burden can be abrogated. Of course the person seeking annulment must produce prima facie proof before he can hope to succeed, but having done so the attitude of the other side is of the utmost importance in judging the truth of his story and his good faith. [P 218 C 1]

**(c) Insolvency — Fraudulent transaction — Direct evidence generally impossible—Circumstantial evidence can be found in conduct of parties— Court therefore must examine all evidence in detail.**

The fraudulent nature of the transaction in insolvency cases can scarcely ever be proved by direct evidence. The petitioning creditor or the receiver has to rely on circumstantial evidence in most cases, and usually that is to be found only in the conduct of the parties. It is therefore more than ever the duty of the Court carefully to examine all the surrounding circumstances, and in any case if a Judge considers that the burden of proof lies on a particular party it is incumbent on him at least to examine the facts on which that party's case is based. [P 219 C 1]

R. R. Dandige — *for Applicant.*

A. R. Kulkarni — *for Non-applicant No. 1.*

**Order.** — On 4th November 1931 one Ganpat applied for being adjudged insolvent. About a year before, namely on 29th November 1930, Ganpat mortgaged his entire property to Umrao, the non-applicant before me. Two of Ganpat's creditors filed applications for annulment of this mortgage. One of them is the applicant here and the other has been added as the second non-applicant. The first Court after considering the evidence came to the conclusion that the transfer was a fraudulent one and so annulled it. The Appellate Court reversed this decision and upheld the mortgage. The creditor Kisangopal whose application was being considered applies to have that order revised under S. 75, Provincial Insolvency Act.

The question decided was of course one of fact and ordinarily there would have been no ground for interference, but the judgment of the lower Appellate Court bears signs of superfluity on the face of it and I am not satisfied that the learned Judge has examined the evidence and applied his mind to it. I want to make it clear that this is not because he has not written as much as he might have about the matter, or because he has not actually referred to this piece of evidence or that. None of that would vitiate his judgment. In fact even if it was clear that he had overlooked some of the evidence or had omitted to consider it, even then I would not have interfered if there had been a fair and substantial consideration of the case and I was satisfied that the evidence omitted from consideration would not be likely to have influenced his decision. But here there has not been any real consideration of the evidence at all. All that the learned Judge has done has been to seize hold of a rule of law about the burden of proof—a rule which incidentally loses most of its significance when there is evidence for consideration—and then to seize hold of two or three superficial points in the case and rest content with that. That is not what an Appellate Judge is there for, especially when he is reversing a well considered finding of a lower Court. The judgment, as I say, bears signs of superfluity on the face of it. The body of the decision is contained in para. 2 of the judgment, and consists of 30 typewritten lines; of these 30 lines 8 are devoted to a criticizm of the first Court on a point on which it had criticized the transferee non-applicant for not producing certain documents. In dealing with this the learned Appellate Judge states :

> It appears to me however that the Judge has lost sight of the fact that the appellant had mentioned these documents in his list of document relied on.

There is no such list. Counsel on both sides have carefully searched the record, so has my reader and so have I. It is also evident from another sentence in the judgment relating to the same matter that the learned Judge is relying on another abstract proposition of law, namely the one enunciated by their Lordships of the Privy Council in 37 All 557[1] at p. 566 and followed by me in I L R (1936) Nag 142[2] at p. 145. But what has been overlooked is the important words "not forming any part of his case". The claim in the case before their Lordships was for possession of a house which the plaintiff said she owned. Her case was that she had let it out to the defendants at a monthly rent and that when she gave them notice to quit they refused to do so. The defendants denied that they were tenants and claimed the house in their own right. The plaintiff did not produce her account books. There was no allegation that she had a set of books relating particularly to this house; all that was claimed was that she had accounts relating to her general estate, but the High Court drew an inference adverse to her because she had not produced these accounts. Their Lordships of the Privy Council pointed out that there was nothing to indicate that these books, if produced, would have contained entries relating to this house. They said that they may or may not have done so, but considered the possibility, a very remote one, —because it is quite possible for a person to keep a set of accounts relating to his or her general estate, which would ordinarily be managed by an agent, and yet keep no account of the rent of a house which he or she lets out herself. In these circumstances of course no adverse inference could be drawn. Before that can be done, it must be established, either directly or by reasonable inference, that the document withheld does in fact relate to the case of the party withholding it.

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[1] Bilas Kunwar v. Desraj Ranjit Singh, (1915) 2 A I R P C 96=30 I C 299=42 I A 202=37 All 557 (P C).

[2] Premraj v. Nathumal, (1936) 23 A I R Nag 130 =164 I C 740=I L R (1936) Nag 142.

When however the documents do relate directly to a party's case the position is very different. Then even though the burden of proof is on the other side an adverse inference can be drawn. What is usually overlooked in these cases is the decision of their Lordships in 40 Mad 402[3] at p. 408:

> A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion an inversion of sound practice for those desiring to rely on a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.... The best assistance to a Court of justice would have been a scrutiny of these documents, and their Lordships feel free to conclude that if they had been by their entries confirmatory of the defendants' view, the defendants would have brought them into Court. This part of the case, which in their Lordships' view is of considerable importance, is not referred to in the High Court.

Apart from the fact that it can be inferred from the usual course of human conduct that a party who has evidence in his possession favourable to his case will not fail to produce it, the matter can also be looked at from the point of view of S. 106, Evidence Act. I might add that this principle is particularly important in insolvency proceedings where the primary burden of proof is on the receiver or the petitioning creditor while knowledge of all the essential facts is usually with the other side. I do not mean by this that the primary burden can be abrogated. Of course the person seeking annulment must produce prima facie proof before he can hope to succeed, but having done so the attitude of the other side is of the utmost importance in judging the truth of his story and his good faith. I do not deny that all these matters are ordinarily ones of fact but when, as here, the question has really been decided on the burden of proof alone and everything else brushed aside as of little or no consequence, interference is called for.

The documents in the present case distinctly relate to the transferee's case. The consideration of the mortgage which the creditor was seeking to annul was not paid in cash and consisted of three parts: Rupees 1221 being the sum due to the transferee himself by the mortgagor; Rs. 879 due to one Santosh, and Rs. 900 due to one Lahanoo.

These two persons are related, or rather connected by marriage to the insolvent. The transferee undertook to pay off their debts and says he actually did so. In his statement dated 11th July 1934 he says that the moneys due to these two persons were due on promissory notes which were given over to the insolvent. In his examination as a witness, he amplifies this by stating that these promissory notes, which he now calls receipts (obviously a slip of the tongue), were handed over to him and that he then took them and handed them over to his mortgagor, the present insolvent. For his own protection he took two fresh receipts evidencing the payments he made to Santosh and Lahanoo. These are the receipts which he did not produce at the beginning of the proceedings and about which the first Court very rightly commented. When he himself was being examined as the very last witness in the case he produced a receipt purporting to be executed by Santosh and said that he had lost the other. Lahanoo was not examined in the case at all and Santosh who was examined by the petitioning creditor as A. W. 3 was not asked a single word about this or any other receipt; also when asked about the promissory note upon the strength of which the insolvent is said to have advanced him the money he denied that he had executed any document at all: not even a receipt. "I took no receipt from the insolvent for the Rs. 800 at all or any bond, etc."

All these significant facts which the learned trial Judge examined with care and which he refers to in his judgment are brushed aside in the Appellate Court, not because on a careful survey of the evidence the learned Judge considered that the word of the transferee was believable in spite of these defects—I could not have interfered if that had been the case—but as an abstract matter of law because the burden of proof lay on the other side. All that the learned Judge says about the evidence is this:

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[3] Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, (1917) 4 A I R P C 6=39 I C 659=44 I A 98=40 Mad 402 (P C).

Santosh himself was examined as a witness by the respondent as A. W. 3 and he supports the appellant's contention as far as the money paid to him is concerned. He has not been declared hostile, which remark also applied to the evidence of the insolvent himself as A. W. 2. Although the insolvent may be related to Santosh and Lahanoo who benefited from the mortgage deed he does not appear to be related to the appellant. Relationship in itself is not sufficient to prove a document between relations to be fraudulent or bogus. I can see no reason therefore for coming to the conclusion that the mortgage deed is a fictitious document.

It is impossible to accept a judgment of this kind as legal. It has to be borne in mind that the fraudulent nature of the transaction in insolvency cases can scarcely ever be proved by direct evidence. The petitioning creditor or the receiver has to rely on circumstantial evidence in most cases, and usually that is to be found only in the conduct of the parties. It is therefore more than ever the duty of the Court carefully to examine all the surrounding circumstances; and in any case if a Judge considers that the burden of proof lies on a particular party it is incumbent on him at least to examine the facts on which that party's case is based. It is not enough to say that a couple of witnesses who belong to the other side but whom he has been forced to call as his own because the burden of proof lies on him, support his opponent. Of course they will, but that is not the question at issue. What has to be determined is whether they are telling the truth; whether the facts elicited and their own conduct show that their story is false, and this can only be determined by a careful consideration of the entire evidence; not from a couple of stray sentences in their depositions.

In the present case we find that the transferee did not produce important documentary evidence in support of his case at the proper stage and we also find that the man who is supposed to have executed one of these documents was not asked a word about it in his evidence. We also find a serious contradiction between Santosh on the one side and the transferee and the insolvent on the other about the nature of the loan which Santosh is said to have advanced to the insolvent. We find in addition that neither the transferee nor the insolvent is giving the Court that assistance which it is entitled to expect. Where did the transferee get all this money from? He does not attempt to enlighten us and yet the witnesses who had preceded him tell us that he is not a money lender, that he is a man of little status, that he was not in a position to advance these sums (Pilaji A. W. 5), that he was not in a position to obtain a loan on credit (Motilal A. W. 4) and that he cannot even pay off his own debts. Thus Gopal, A. W. 1, states that he has owed the shop of Bhagwatram-Mohanlal Rs. 63 since 1929 on his own account, and Rs. 263 along with another Bhola "since 3 years", which takes us back to 1931. In spite of continual dunning he has not paid. Motilal, A. W. 4, states that he borrowed Rs. 25 from Meghraj-Kundanmal on 17th September 1931, Rs. 45 on 30th October 1931, another Rs. 25 on 1st October 1932 and Rs. 40 on 21st October 1932 by pledging his ornaments. It is true these sums have been repaid, but a man who is driven to pledge his property continually for the sake of petty sums like these cannot be worth much. These are all independent witnesses except Pilaji, who is interested and their evidence stands wholly unrebutted.

Lahanoo and Santosh are in no better state. Gopal, A. W. 1, tells us that Lahanoo has owed his shop Rs. 1000 on a mortgage since 8th June 1932 and another Rs. 500 since the Diwali of 1930. Pilaji, A. W. 5, tells us that Santosh is also indebted to others though he does not give details. He also says that Umrao, the transferee, is a friend and neighbour of the insolvent, and that affords an explanation for his conduct in helping the insolvent in this matter. A. W. 5, Pilaji, tells us that the mortgage covers all the insolvent's attachable property and the insolvent as A. W. 2 is forced to admit that this is true. In these circumstances I have not the slightest difficulty in upholding the finding of the first Court about the fraudulent nature of the conveyance. I allow the application. The order of the Appellate Court is reversed and that of the first Court annulling the transfer restored. Costs will be paid by the non-applicant transferee throughout. Counsel's fee Rs. 20.

B.D./R.K. *Application allowed.*

## A. I. R. 1938 Nagpur 220

POLLOCK J.

*Digambar Ambadas Sabnis* — *Judgment-debtor* — Appellant.

v.

*Kishandas Goverdhandas Gujrathi* — *Decree-holder* — Respondent.

Misc. Appeal No. 258 of 1936, Decided on 10th September 1937, from order of Addl. District Judge, Ellichpur, D/- 8th September 1936.

**(a) Berar Inam Rules (1859), R. 5, Cl. (5) — "The benefits of Cl. 2, R. 5."**

The words "the benefits of Cl. (2), R. 5" in R. 5, Cl. (5) appear to be mistaken for "the benefits of Cl. 3, R. 5" : *A I R 1930 Nag 24, Rel. on.* [P 221 C 1]

**(b) Berar Inam Rules (1859), R. 6, Cl. 4 — Inam granted for past services — Cl. 2 of R. 6 does not apply — Abandonment of reversionary interest by Government — Inamdar gets freehold estate which is attachable asset in hands of his son.**

Where fields are granted for past services and are not inams granted in lieu of land, Cl. 2 of R. 6 does not apply and consequently Cl. 2 of R. 5 does not operate. Under Cl. 4 of R. 6, the abandonment of the reversionary interest possessed by Government in the inam connotes the grant of a freehold estate to the inamdar which is an attachable asset in the hands of his son in execution of a decree against his father. [P 221 C 2]

**(c) Berar Inam Rules (1859), R. 14 (2) — Berar Revenue Book Circular, Vol. 2, S. 1, Serial No. 2 — Service inam fields may be alienated.**

Under Berar Revenue Book Circular, Vol. 2, S. 1, Serial No. 2, it is contemplated that service inam fields may be alienated and all that the Government will ordinarily do in such cases is to resume the grant or in other words impose the full assessment. [P 221 C 2]

K. V. Brahma — *for Appellant.*

V. K. Rajwade and V. D. Kale — *for Respondent.*

**Judgment.** — This judgment will also dispose of Miscellaneous Appeal No. 259 of 1937. Certain fields, which are described as service inam fields, have been attached in execution of a decree against Ambadas, now deceased, the father of the appellant Digambar. He contends that these fields are not the assets of the deceased Ambadas in his hands and are not attachable. The lower Courts have held that the land in question is alienable and attachable. The fields were originally granted to the ancestor of Ambadas in return for the services that he rendered as sabnavis. These services ceased to be rendered after the cession of Berar in 1853. The Inam Investigating Officer recommended in 1865 that the land should be continued in rent free for the life of the claimant and that of his cosharer and at quarter assessment to their descendants. The recommendation of the Commissioner was as follows :

> In consideration of possession extending over 200 years I would continue this service grant in perpetuity at half rates of assessment;

and it was so continued. The question what rights were actually conferred upon the family depends upon the interpretation of the Berar Inam Rules. Rule 2 classifies the various classes of inams and the present inam obviously falls under:

> Class 4th—Grants by former Governments for service—
>
> *First.*—As pargana service grants, whether by money or land, whether now rendered or partially rendered or discontinued.

Service inams are dealt with in Rule 6. Assuming that Cl. 2 of R. 6 applies, that would make Clause 2 of R. 5 applicable. Cl. 2 of R. 5 is as follows :

> 2. If the present incumbent is a descendant of the original grantee, the inam will be continued to him hereditarily subject to the following conditions :—
>
> *First.* — Successions limited to direct lineal heirs and undivided brothers ;
>
> *Second.*—The inam escheats to Government on failure of such heirs ;
>
> *Third.*—Future alienation of the inam is prohibited.

(We are not concerned with the fourth condition as that has been subsequently abrogated.) Cl. 4 of R. 6, which undoubtedly applies to the present case, runs as follows :

> It shall be optional with the Government to require the services of these classes as originally intended, or to dispense with them. If wholly dispensed with, the inam shall nevertheless be confirmed to the holders as inams subject to the payment of a quit-rent, not exceeding the highest rate above provided for personal inam. This quit-rent will be charged in commutation both of the service thus discontinued, and of the reversionary interest possessed by Government in the inam.

The decision of this case turns mainly on what is meant by the reversionary interest possessed by Government in the inam. D. B. K. V. Brahma for the appellant contended that this merely means that the first and second conditions in Cl. 2 of R. 5 would be abrogated but the third would remain. If so, it is difficult to see how Cl. 2 and Cl. 4, R. 6 can be reconciled; Cl. 2 states that the conditions in Cl. 2, R. 5 would apply and Cl. 4 states that two out of three of them would not apply. Cl. 2, R. 5 is subject to the qualification contained in Cl. 3 and the following clauses which give an option to the inamdar to convert this restricted tenure into a freehold, with the full powers of alienation by gift, sale, adoption, or otherwise, by consenting to the payment of the annual quit-rent. It then goes on to say:

> If the inamdar is a youth, with reasonable prospect of having lineal heirs, an annual quit-rent, amounting to one-eighth of the estimated assessment of the land will be considered a sufficient compromise for the right of reversion possessed by Government.

Similarly Cl. 5, R. 5 provides that if the present incumbent is not a descendant of the original grantee, he will be allowed to benefits of Cl. 2, R. 5, but without the option of refusal; and in commutation of the rights of Government, a quit-rent will be imposed on the inam varying from one-eighth to one-half of the estimated assessment. As pointed out by Macnair A. J. C. in 25 N L R 107,[1] "the benefits of Cl. 2, R. 5" appear to be a mistake for "the benefits of Cl. 3, R. 5". In such a case the incumbent is obliged to pay a quit-rent which may vary from 1/8th to 1/2 of the estimated assessment in order to acquire a freehold estate.

The words "a sufficient compromise for the right of reversion possessed by Government" in R. 5, Cl. 3 and "in commutation of the rights of Government" in Cl. 5 appear to mean that the inamdar gets a freehold estate. I do not think that it is possible to interpret the words "the reversionary interest possessed by Government in the inam" in Cl. 4, R. 6 in any other way. Cl. 2, R. 6 provides that inams granted in lieu of lands or money stipends, commonly called Huqs and Russums of offices, such as Deshmukh, Deshpandia and others, the service of which has either been dispensed with or otherwise discontinued shall be disposed of according to Cl. 2, R. 5. It is difficult to gather what is meant by "in lieu of lands or money stipends". R. 8 explains the term "inam" as applying to all land held entirely free of land-rent or on a favourable quit-rent, and Cl. 5, R. 9 gives the Government power to determine whether grants for pargana or village service shall be wholly commuted into land inams or wholly into percentage on the revenue payable in money, or partly by inam and partly by money. The term appears to be used as meaning a grant of land and I must confess I find it difficult to understand what is meant by "inams granted in lieu of lands". It occurred to me that it might mean inams granted in the form of lands, but I can see no real justification for interpreting it in that way. The fields now in dispute were granted for past services and were not in my opinion an inam granted in lieu of land. If that is so the difficulty of having to reconcile the conflicting provisions of Cls. 2 and 4, R. 6 disappears. Once it is held that Cl. 2, R. 6 does not apply and therefore that Cl. 2, R. 5 does not apply, the natural interpretation of Cl. 4 is that the abandonment of the reversionary interest possessed by Government in the inam connotes the grant of a freehold estate to the inamdar.

I have been referred to Cl. 2, R. 14 which provides that service grants are not liable to be alienated by purchase or otherwise. In Berar Revenue Book Circular, Vol. 2, S. 1, Serial No. 2, instructions are given to the Tahsildar and Naib-Tahsildar how to deal with alienations. It is stated:

> Service grants are inalienable under R. 14 (2) of the Inam Rules and if a grantee alienates his grant Government is entitled to resume it.

This seems to contemplate that service inam fields may be alienated and all that the Government will ordinarily do in such cases is to resume the grant or in other words impose the full assessment. Whether Government is entitled to impose the full assessment in this case is not a matter now before me. For these reasons I hold that Ambadas held a freehold right in the fields attached and that they are therefore Ambadas's assets in the hands of his son Digambar, the appellant. The appeals therefore fail and are dismissed with costs Counsel's fee Rs. 20.

D.S./R.K. *Appeals dismissed.*

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[1] Abdul Latif v. Mansinghrao, (1930) 17 A I R Nag 24=118 I C 878=25 N L R 107.

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## A. I. R. 1938 Nagpur 221

STONE C. J. AND PURANIK J.

*Jagarao Annaji Deshpande* — Applicant.

v.

*Balwant Tukaram Kalvikar* — Non-Applicant.

**Misc. Civil Case No. 86-B of 1935, Decided on 13th September 1937, from Judgment of Subhedar A. J. C., Nagpur, D/- 31st August 1935.**

**(a) Review—Judge taking mistaken view of law is not sufficient ground.**

It may be possible to argue that a review lies if a positive rule of law is ignored but to say that a review lies because the apposite law is not applied is to state the proposition very widely. The mere fact that the Judge in deciding a case has taken a mistaken view of law is not sufficient to enable a party to come up with an application for review under O. 47, R. 1, Civil P. C. : *Case law referred.* [P 223 C 2; P 224 C 1]

**(b) Civil P. C. (1908), O. 47, R. 1—Review —'Sufficient reason' — Meaning explained — Meaning of 'apparent on face of record' explained.**

The words "for any other sufficient reason" in O. 47, R. 1, have been interpreted as meaning reason sufficient on grounds at least analogous to those specified immediately previously. In all applications for review based on mistake or error or any sufficient reason the applicant has to show a mistake or error apparent on the face of the record or a mistake or error analogous thereto. Where a Court applies a particular statute to a given set of events whereas on the said date it is obvious from the record that a wholly different statute applies, it may be a mistake apparent on the face of the record : *A I R 1924 Mad 98 ; A I R 1928 Lah 919 and A I R 1934 P C 213, Rel. on.* [P 224 C 2]

R. M. Bhagade — *for Applicant.*

K. B. Sheorey and W. K. Sheorey — *for Non-Applicant.*

**Order.** — This is an application for review of the judgment of the Additional Judicial Commissioner, Nagpur, in Second Appeal No. 94-B of 1933 decided on 31st August 1935. The facts of the case may be briefly stated as under. One Udaji who owned the field in suit died indebted to two creditors Ganpat and Tukaram. On Udaji's death his widow Mainabai adopted Appa in 1921, but in 1922 she instituted a suit and obtained a decree declaring the adoption of Appa to be invalid on the ground that he was an orphan when adopted and later on obtained possession of the property from him. In the meantime the creditor Ganpat's son, Sadasheo sued Appa as the alleged adopted son of Udaji as his legal representative for recovery of the debt due to him, and obtained a decree in the Small Cause Court on 20th February 1923 and in execution of that decree attached and sold the field in suit which was purchased by one Abaji who obtained possession thereof on 8th July 1924. Abaji transferred the field to the decree-holder Sadasheo on 15th July 1924 and later on Sadasheo's son sold it to the present plaintiff on 24th June 1929. The other creditor Tukaram instead of instituting a suit against Appa, the alleged adopted son, took a mortgage of the field in suit in satisfaction of his debt from Appa on 18th April 1921, and Tukaram's son Balwant instituted a suit for foreclosure on its basis joining Sadasheo as a party as he was a subsequent purchaser. Sadasheo pleaded paramount title and got himself discharged. A decree for foreclosure was passed against the mortgagor and Balwant obtained possession on 30th November 1927. A dispute regarding possession followed with the result that proceedings under S. 145, Criminal P. C. were started and Balwant's possession was confirmed and Sadasheo was directed to file a civil suit. It is thus that Sadasheo's transferee, the present plaintiff, instituted a suit against Balwant for a declaration of his title to the property and recovery of possession thereof. Balwant resisted the suit by denying the title of the plaintiff and urged that the plaintiff's predecessor-in-title not having sued the proper legal representative of Udaji, the decree and the subsequent sale were a nullity and did not clothe him with a title and consequently the plaintiff had no title to the property. He also urged that his mortgage was admitted by the plaintiff's predecessor-in-title when he purchased the property in auction and he was estopped from denying the same.

The trial Court held that the plaintiff had title to the property but he was debarred from challenging the mortgage and dismissed the suit. The Appellate Court did not agree with the view that the plaintiff was debarred from challenging the mortgage and decreed the claim. The case then came up in second appeal before the Additional Judicial Commissioner, Nagpur. The Additional Judicial Commissioner by his judgment dated 31st August 1935, held that though the suit in the Small Cause Court was instituted against Appa as the legal representative of the deceased Udaji, the decree that was passed was one personally against Appa and could not legally be executed by a sale of the field which did not belong to Appa, and the plaintiff's predecessor-in-interest could not acquire any title by its purchase. He further held that at any rate it was the duty of the plaintiff's predecessor-in-title, after the adoption of Appa was declared invalid, to have brought on record the proper legal representative of the deceased Udaji before putting the property to sale. This not having been done, the sale in favour of the plaintiff's predecessor was a nullity. Lastly he held that the plaintiff's predecessor-in-title and therefore the plaintiff was precluded from questioning the invalidity of the mortgage. In this view of the case the decree of the lower Appellate Court was set aside and the plaintiff's suit was dismissed. Against this decision this application for review is filed.

It is urged that there are mistakes apparent on the face of the record within the meaning of O. 47, R. 1, Civil P. C., which vitiate the decision. It is argued that in deciding that the decree against Appa was a personal one, the learned Additional Judicial Commissioner ignored the fact that the suit against Appa was instituted in his capacity as the legal representative of Udaji and not in his personal capacity. 10 Pat 305[1] is relied on for the proposition that in such a case it is the duty of the Court to interpret the decree with reference to the pleadings and judgment. It is further urged that the decision that it was necessary to bring on record the proper legal representative after the adoption was declared invalid is not correct in law and that the view that the mortgage could not be challenged is also erroneous. The view taken in 10 Pat 305[1] may be correct and it is quite possible to argue that the view taken by the learned Additional Judicial Commissioner that a decree passed in such circumstances is a personal one is erroneous in law, but we cannot accept the contention that this is a mistake or error apparent on the face of the record permitting us to review the judgment passed by the learned Judicial Commissioner. The learned Judicial Commissioner has in para. 2 of his judgment referred to the fact that the suit against Appa was instituted against him in his capacity as the legal representative of the deceased Udaji. He was thus perfectly alive to the fact that it is in that view that it was being argued that the decree passed against him should be regarded as one passed against the legal representative of the deceased, but in spite of that fact he has come to the conclusion in para. 5 of his judgment that the decree against Appa was against him personally. The decree, Ex. P-7, does not state that it is passed against Appa as the legal representative of the deceased Udaji or that it is binding against him only to the extent of the assets of the deceased Udaji.

Presumably it is on this decree that the Judge has come to the conclusion that it is a personal one and the Judge was not persuaded to accept the view that in such a case the decree should be regarded as one passed against Appa in his capacity as the legal representative of the deceased Udaji. This may be an error of law, and the mere fact that the Judge in deciding a case has taken a mistaken view of law is not sufficient to enable a party to come up with an application for review under O. 47, R. 1, Civil P. C. Their Lordships of the Privy Council in 3 Lah 127[2] have clearly laid down that it is no ground for review that the judgment proceeds on an incorrect exposition of law. In A I R 1933 Mad 662[3] it is laid down that a Court has jurisdiction to decide a point of law wrongly as well as rightly and the review cannot be granted because the judgment or order proceeds on an incorrect exposition of law. The same view was expressed in 23 N L R 53,[4] in A I R 1925 Nag 362[5] and in A I R 1929 Nag 58.[6] The applicant, however, urges that though in para. 2 the Judge has referred to the fact that Appa was sued in his capacity as the legal representative of Udaji that fact was forgotten when coming to the conclusion that the decree passed against him was a personal one. We do not think that we can assume any such mistake on the part of the Judge. He was perfectly alive to the fact that he was sued in his representative capacity, but Ex. P-7 which is the decree in the case led him to hold that it was a personal one. As we have stated, he may be wrong in his law regarding the interpretation of such decrees, but that is no reason for interference in review.

The next two points decided by the Judge are mere questions of law, and the mere fact that it is argued before us that those questions of law have been wrongly decided and the view taken there was erroneous will not enable us to review the judgment. A Court hearing an application for review has no jurisdiction to order a review because it is of the opinion that a different conclusion of law should have been arrived at: A I R 1930 Bom 317[7] and 55 All 196.[8] The applicant has brought to our notice the case in 28 N L R 221[9] where Grille A. J. C. laid down that an omission to consider important facts which are on record being analogous to a mistake apparent on the face of the record is a sufficient reason for entertaining an application for review under O. 47, R. 1, Civil P. C. The facts of that case do not present any analogy to the facts of the present case. The only fact which is said to be ignored by the learned Additional Judicial Commissioner is that the suit was instituted against Appa in his capacity as the legal representative of the deceased. We have shown that the Judge was not ignorant of the fact, as he specifically stated it in para. 2 of his judgment, but in spite of that fact he came to the conclusion that the decree must be regarded as a personal one. 28 N L R 221[9] has therefore no application to the facts of the present case. The applicant's counsel has invited our attention to 46 Mad 955,[10] 10 Lah 184[11] and A I R 1928 Nag 305.[12] In 46 Mad 955[10] review was granted as a positive rule of Hindu law was ignored, and in 10 Lah 184[11] review was granted on the ground that a positive rule of limitation was ignored. A I R 1928 Nag 305[12] lays down that a review may lie if the Judge has not applied the apposite law to the facts of the case.

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[1] Sukhdeo Prasad Narain Singh v. Madhusudhan Prasad Narayan Singh, (1931) 18 A I R Pat 177=132 I C 871=10 Pat 305=12 P L T 75.

[2] Chhajju Ram v. Neki, (1922) 9 A I R P C 112 =72 I C 566=49 I A 144=3 Lah 127 (P C).

[3] Sitapati Rao v. Sitabayamma, (1933) 20 A I R Mad 662=145 I C 993=65 M L J 387.

[4] Ramchandra v. Govindrao, (1925) 12 A I R Nag 266=87 I C 125=23 N L R 53.

[5] Jagannath v. Srinivas, (1925) 12 A I R Nag 362=88 I C 112.

[6] G. I. P. Ry. v. Harakchand, (1929) 16 A I R Nag 58=112 I C 653.

It may be possible to argue that a review lies if a positive rule of law is ignored but to say that a review lies because the apposite law is not applied is to state the proposition very widely. O. 47, R. 1, permits an application for review to be filed if there is a mistake or error apparent on the face of the record or for any other sufficient reason. The words "for any other sufficient reason" have been interpreted by their Lordships of the Privy Council in 3 Lah 127[2] and recently in 56 All 634[13] as meaning "reason sufficient on grounds at least analogous to those specified immediately previously". In all applications for review based on mistake or error or any other sufficient reason the applicant has to show a mistake or error apparent on the face of the record or a mistake or error analogous thereto. What is a mistake or error on the face of the record has been explained in A I R 1927 Nag 252[14] by the same Judge who laid down the law in A I R 1928 Nag 305[12] in these words:

> Where a Court applied a particular statute to a given set of events whereas on the said date it was obvious from the record that a wholly different statute applied, it may be a mistake apparent on the face of the record.

It is only on these principles that 46 Mad 955[10] and 10 Lah 184[11] were decided. If in stating that an application for review lies if apposite law is shown not to have been applied, the learned Judge meant to say a positive rule of law is ignored as stated by him in A I R 1927 Nag 252,[14] the view may be reconcilable; otherwise the view is likely to lead to the impression that in all cases decided it could be argued that the proper exposition of law is ignored and review will have to be granted, though their Lordships of the Privy Council in 3 Lah 127[2] have clearly laid down that this is not the proper interpretation of O. 47, R. 1. It is not shown that any statute has been ignored or a positive rule of law disregarded. As none of the cases cited by the applicant's counsel apply to the facts of the present case we need not discuss them further in this case. As we have shown that this is a case in which it could at the most be argued that the Judge was mistaken in law or has arrived at an erroneous decision on the points of law involved in the case no application for review lies. The application is therefore dismissed with costs. Counsel's fee Rs. 50.

B.D./R.K. *Application dismissed.*

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[7] Girdharlal v. Kapadvanj Municipality, (1930) 17 A I R Bom 317=128 I C 19=32 Bom L R 610.

[8] Balkrishan v. Bundia, (1933) 20 A I R All 274 =146 I C 756=55 All 196=1933 A L J 75.

[9] Mt. Rukhmabai v. Ganpatrao, (1932) 19 A I R Nag 177=140 I C 409=28 N L R 221.

[10] Murari Rao v. Balavanth Dikshit, (1924) 11 A I R Mad 98=76 I C 342=46 Mad 955 = 45 M L J 309.

[11] Debi Sahai-Gulzari Mal v. Basheshar Lal-Bansi Dhar, (1928) 15 A I R Lah 919=112 I C 540 =10 Lah 184=30 P L R 696.

[12] British Equitable Assurance Co. v. Rajaram, (1928) 15 A I R Nag 305=113 I C 896.

[13] Bisheshwar Pratap Sahi v. Parath Nath, (1934) 21 A I R P C 213=151 I C 41 = 61 I A 378= 56 All 634 (P C).

[14] Laxman v. Mt. Shevantibai, (1927) 14 A I R Nag 252=102 I C 6.

## * A. I. R. 1938 Nagpur 225

STONE C. J. AND NIYOGI J.

*Vasant Rao Shankar Rao Subhedar — Plaintiff* — Appellant.

v.

*Beharilal Motiram and another — Defendants* — Respondents.

First Appeal No. 39 of 1934, Decided on 21st December 1936, from decree of Second Sub-Judge, First Class, Saugor, D/- 22nd December 1933.

*** (a) Hindu Law—Suit against widow on promissory note—Issue as to binding nature of debt not raised and evidence in respect of it not tendered—Suit must be regarded as personal against widow and only widow's interest can be taken in execution—Adoption by widow few days before judgment would make no difference in legal position.**

Prima facie if a Hindu widow is sued on a promissory note and no prayer is to be found which shows that she is sued as representing the estate, the case must be regarded as personal. The fact that the debt is of a kind that is binding on the estate makes no difference. In determining the nature of the suit, it is better to regard not the intention of the plaintiff but the object of the suit, i. e. the matter which the Court is called upon to decide. Hence if the binding nature of the debt is not put in issue and evidence is not tendered in that respect, the suit must be regarded as a personal suit against the widow and the suit being personal the decree must be personal and hence only the widow's interest can be proceeded against in execution. The mere allegation of a fact which shows that the loan was made for a legal necessity would not be sufficient to make the suit a representative one. The legal position described above would not be altered by the adoption by a widow a few days before the judgment. If the suit against the widow is brought against her in her representative capacity, then the estate being bound, the adopted son's interest would be bound. On the other hand, if the suit is personal and he is not a party, neither he nor his estate is bound: *Case law discussed.* [P 229 C 1, 2; P 230 C 1]

**(b) Contract Act (1872), S. 72—Suit against Hindu widow on promissory note — Personal decree passed—Estate attached in execution—Objection by owner that execution could proceed only against widow's interest and not against whole estate dismissed—Property put to sale—Owner paying decretal amount to avoid sale—Money so paid can be recovered back.**

A suit was brought against a Hindu widow on a promissory note and a personal decree was passed against her. In execution of the decree, the decree-holder attached the estate whereupon the owner of the estate raised an objection that the decree-holder could not proceed against the whole estate in execution as the decree was personal against widow. The objection was dismissed and the estate was put to sale. The owner therefore paid the decretal amount to avoid the sale:

*Held* that the money so paid could be recovered back as money paid under compulsion. The fact that the person paying could have been made liable for the amount paid, had suitable proceedings been taken, made no difference: *40 Cal 598 (P C)* and *7 Cal 648, Foll.* [P 230 C 1]

W. B. Pendharkar and R. R. Dandige — *for Appellant.*

M. R. Bobde — *for Respondents.*

**Judgment.**—This appeal raises a point of some difficulty. The essential facts are simple. One Venkatrao had four sons. The eldest, Shanker Rao, died separate from his brothers leaving two widows, one Shantabai and another (whose name does not matter) who had a daughter. At the time of his death, there were surviving three separated brothers of whom the eldest was Bhargav Rao. Money being required for the marriage of the aforesaid daughter, Shantabai arranged a loan with a money-lender who took as personal security for that loan a promissory note made by Bhargav Rao to which note Shantabai put her name. The loan not being repaid, the lender sued on the note (C. S. 48 of 1929 in the Court of the First Subordinate Judge, First Class, Saugor). The case proceeded ex parte against Shantabai. Bhargav Rao (his name in that case is spelt Bhargao Rao) merely claimed some small set-off and asked for time. The judgment ends:

> It is accordingly ordered and decreed that the sum of Rs. 4229-3-6 and proportionate costs of the suit be paid by the defendants to the plaintiff in six months and that interest be paid on Rs. 4000 at 6 per cent. per annum from the date of the suit to the date of payment.

That judgment was delivered on 9th November 1929; a decree was drawn up in conformity with that judgment and execution proceeded. Prior to that judgment two events occurred: (1) There was an attachment effected of the widow's estate before judgment. (2) On 23rd October 1929 Shantabai adopted Vasant Rao, minor son of Bhargav Rao, to her deceased husband, Shanker Rao. In the execution proceedings Vasant Rao, as adopted son to Shanker Rao, objected to the taking in execution of the widow's estate being the four annas share in a certain village. His case was that upon adoption the widow's estate terminated, that he thereupon became the owner, that the suit C. S. 48 of 1929 was against the widow personally, that the decree was a personal decree, that it could only be executed against the widow's property and that at all material times the widow's property did not include the said four annas share, her interest therein being a widow's estate, being divested by the adoption aforesaid. The objection was dismissed. The order dismissing states that:

> The only question is whether the debt had been incurred by Shantabai for performing the marriage of her step-daughter Pramila or not.

That question being resolved it was regarded as necessarily following that "the objector who was adopted after the transaction cannot by any means avoid it". The nature of the action was not apparently considered. Vasant Rao now brings this action under the powers conferred by O. 21, Rule 63. The result in the lower Court is that the suit is dismissed with costs. It is necessary to add a few further facts. The plaintiffs in C. S. 48 of 1929 on 2nd September 1931 as decree-holders had the case struck off as unsatisfied. That, it is said, resulted in the attachment which had been obtained very early in the litigation as an attachment before judgment terminating. Thereupon on 4th October 1931, another attachment was effected and the C Form was sent to the Collector for execution. Then there was the above mentioned abortive objection. That having failed, the four annas share was advertised for sale in execution. To avoid that sale the present plaintiff paid the decretal amount which then came to Rs. 5454-10-0. He now claims that back as money paid under compulsion of law. An examination of the plaint in C. S. 48 of 1929 shows that it was in form an action upon a promissory note. Two passages only need be quoted:

> 1. The defendants took a loan of Rs. 4000 from the plaintiffs on 17th December 1928 at Saugor for the marriage of Premabai (elsewhere referred to as Pramila) the daughter (it should be step-daughter) of defendant 2 (Shantabai) on the hand-note in suit, and agreed to repay the amount on demand . . .
>
> 7. The plaintiffs pray that a decree for Rupees 4301-5-6 with costs of the suit be passed in plaintiff's favour against the defendants; and interest etc. . . .

As above observed an ordinary money decree was passed. No question was raised before us as to the binding nature of the debt. It was not disputed that the loan was for a step-daughter's marriage and that such a loan would bind the estate. What is urged by the plaintiff-appellant is that the decree being a personal decree all that can be taken in execution is the property of the judgment-debtor and that this four annas share is not her property; that to reach the estate in which she had, when the debt was incurred, when the suit was launched, and when the attachment before judgment was effected, a widow's estate, it is necessary so to frame the suit against her as to evince an intention to bind the estate. Even this, it was urged, would not avail because, pending the suit, she was divested and the transvestitive act of adoption is not subject to the rules of lis pendens. On the other hand, no attempt was made before us to maintain the position that the plaintiff was a "constructive" party to C. S. 48 of 1929 (see Issue 1). No attempt has been made before us to maintain that a payment made under protest is a voluntary payment. The respondents rely on the fact that when suing a widow in possession of a widow's estate there is, it is said, no way of so framing the action as to show an intention of binding the estate. She has, it is said, the estate, she makes it liable for necessary debts and a successful action against her, though the action be personal and the decree a money decree, enables the estate to be pursued. It is urged that the only way in which reversioners or others who obtain the estate, after the widow's estate has become divested by adoption or terminated by death, can challenge the right of such a decree-holder to take the estate in execution is by showing that the debt is not binding on the estate. It is said if the debt is binding on the estate the estate can be taken; if the debt is not binding, the estate as distinct from the widow's interest, cannot be taken.

The matter is by no means easy owing to a decision of the Privy Council which, though extremely short, is binding upon us. In order to evaluate that decision, it is necessary to state the vital facts in that case as they appear in A I R 1925 Cal 401.[1] The decision of the Judicial Committee is reported in A I R 1927 P C 41.[2] We have been at pains to condense the facts, we believe accurately, as follows: *X*, a father, left *M*, an unmarried daughter, who on *X's* death succeeded to a Hindu woman's estate in the estate left by *X*. *X* left debts. In respect of one, *R K N* sued and obtained a decree. To pay off that decree *K*, the guardian of *M* (who was a minor), borrowed on simple money bond. No charge on the estate was created. That bond was renewed by another simple money bond. That bond was sued on, *K* and *M* being defendants. An ex parte decree was obtained against *M* in terms similar to the one here passed. In execution of that decree properties, part of the estate, were sold and purchased by *R. K. N.* *R.K.N.* died leaving a son. *M* died. The reversioner of *X's* estate sued the son of *R. K. N.* The point was: "Did the sale in execution pass the whole estate or only *M's* limited estate"? A Bench of the Calcutta High Court observed as follows:

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[1] Dayamoyee Ray v. Lalit Mohan, (1925) 12 A I R Cal 401=82 I C 1001.

[2] Lalit Mohan v. Dayamoyi Roy, (1927) 14 AIR P C 41=105 I C 469 (P C).

> It is possible that although no charge was created, the original debt having been for lawful purposes, the creditor might have recovered his debt from the estate left by Bharat, if he had chosen to do so. But in order to make the estate liable he ought to have framed his suit in a proper manner. What he asked for was simply to have a personal decree against Monomohini and the guardian who was made defendant 2. The Court passed a decree against the minor alone. It does not appear anywhere that the minor was made a party to the suit as representing her father's estate.

On appeal their Lordships of the Privy Council upheld that decision in a judgment that can be quoted verbatim. It is as follows:

> Their Lordships are of opinion that the judgment of the High Court is right for reasons given by that Court and especially for the reasons (stated in the above quotation). Their Lordships will only add to this that they have been very much struck by the different framing of the two suits, the suit against the father's estate in which the original debt was created, and the suit against Monomohini and her guardian.

Not unnaturally that decision, which is binding on us, is strongly relied upon by the appellants. It is said on the other side that their Lordships could not have intended by that short judgment to work a revolution in the law relating to execution in this country, and to show that it would work a revolution we have been invited to consider the principles controlling this branch of law as developed in a long series of cases. We accordingly pass to review the cases. 34 Mad 188[3] at p. 196 considers what estate passes where, in execution of a simple money decree obtained against a widow on a debt incurred for legal necessity, the subject-matter of the widow's estate is sold. Is the reversioner bound? It is to be understood that the question is posed assuming that the widow is not sued in her representative capacity. After an exhaustive consideration of the cases as they stood at that date (1910), the Bench of the Madras High Court at pp. 204 and 205 summarize the law. They point out when the sale would bind the estate. They observe at p. 205 as follows:

> If the coparceners or reversioners were not parties to the suit, and the . . . . widow was not sued as representing the estate, and the decree was not against the estate but a personal decree, and the coparceners or reversioners were not joined in the execution proceedings, it would be open to them to contend that the judgment debt was not such that their shares or interests could be sold in execution thereof.

As an example of a personal suit (where a mortgage suit could have been brought) resulting in a decree which their Lordships of the Privy Council held only bound the widow's estate, *see* 11 M I A 241[4]; as an example of a suit against a widow as representing the estate of the last male holder where their Lordships held the whole estate was bound, *see* 14 M I A 605.[5] Cases like 6 W R 303[6] turn on what was sold. On the other hand, 5 Cal 148[7] seems to turn on the nature of the debt, not the kind of decree. Conversely in 3 Cal 198[8] though the debt was for legal necessity, it was held that, as the decree was against the father and the son was not made a party, the father's interest alone could be sold in execution. Their Lordships relied on 11 M I A 241[4] and 1 Cal 133.[9] So far it appears (apart perhaps from 5 Cal 148[7]) that the same principle is found underlying all the cases. We now turn to 10 Cal 985.[10]

There their Lordships of the Judicial Committee observed that although a widow's estate was for some purposes a limited estate, yet for other purposes she represented the whole estate. But they resolve the question as to whether on the sale of the right, title and interest of the widow in execution of a decree obtained against her the whole estate, i. e., the inheritance in the family estate as distinct from the widow's estate, passes by considering the nature of the suit brought against her. There it was urged, and so found, that the debt of the widow was not a mere personal debt but a debt incurred in protecting the interests of all those who had any interest in the family estate, as well as her own right. It was held (see p. 988) that the suit was brought upon a cause of action not personal to her but upon one which affected the whole inheritance. The plaintiff's action was not to make the widow personally liable but to obtain possession of the plaintiff's father's share by inheritance in the ancestral property of which she had been deprived under colour of an alleged gift. A decree having been obtained in such a suit against the widow their Lordships held that the estate sold in execution was the whole inheritance and not merely the widow's estate. Relying on this case and others referred to in 6 C L J 490[11] at page 519, Mookerjee J. laid down the test to be applied in order to determine the interest which passes on a sale in execution of a decree against a Hindu widow as follows: Is the suit one brought against the widow upon a cause of action personal to herself or upon a cause of action which affects the whole inheritance? That observation was made in a case which arose out of a mortgage suit upon a mortgage which was so worded as to be consistent with either the view that the limited estate (a Hindu woman's estate) or the inheritance was charged. The Court applied (p. 519) as a test the nature of the debt; if the loan was for the protection of the estate, then the mortgage and, following action thereon, the decree, were construed as binding the estate.

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[3] **Veerabadra Aiyar v. Marudaga Nachiar, (1911) 34 Mad 188=8 I C 1072=21 M L J 820.**

[4] Nugenderchunder Ghose v. Kaminee Dossee, (1866-67) 11 M I A 241=8 W R 17=2 Suther 77=2 Sar 275 (P C).

[5] General Manager of the Raj Durbhanga v. Maharajah Coomar Ramaput Sing, (1870-72) 14 M I A 605=17 W R 459=10 Beng L R 294=2 Suther 575=3 Sar 117 (P C).

[6] Kisto Moyee Dassee v. Prosunno Narain Chowdhry, (1866) 6 W R 303.

[7] Suraj Bunsi Koer v. Sheo Persad Singh, (1880) 5 Cal 148=6 I A 88=4 C L R 226=4 Sar 1 (P C).

[8] Deendyal Lal v. Jugdeep Narain Singh, (1877 3 Cal 198=4 I A 247=1 C L R 49=3 Suther 468=3 Sar 730 (P C).

[9] Baljun Doobey v. Brij Bhookun Lall, (1875) 1 Cal 133=2 I A 275=24 W R 306=3 Suther 207=3 Sar 541 (P C).

[10] Jugul Kishore v. Jotendro Mohun Tagore, (1884) 10 Cal 985=11 I A 66=4 Sar 553 (P C).

Ameer Ali J. in 60 Cal 1236[12] at p. 1244 based his exception to the rule following his second proposition upon the above case in 6 C L J 490[11] *loc cit* and upon two old cases 7 Beng L R 213[13] and 15 Beng L R 142.[14] That observation is as follows: Proposition 2. Debt of a widow. Suit against a widow on her own debt. Rule: Estate not liable; Exception to Rule: Necessity. 7 Beng L R 213[13] was a case where what was sold was the right and interest of the widow following upon a personal decree against her. It was held that if the suit debt was one incurred for necessity the sale might pass the entire estate. This case cannot in our opinion be reconciled with many later cases and is in conflict with A I R 1927 P C 41.[2] 15 Beng L R 142[14] on this branch of the case follows 11 M I A 241,[1] where, as we have seen, the estate sold in execution of a decree obtained in a suit against a widow was held to be limited to the widow's estate. However in that case their Lordships observed at page 267:

> They (the Board) leave unimpaired the general rule that in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindu widow is the proprietress, she will . . . . . represent and protect the estate, as well in respect of her own as of the reversionary interest.

Apart from 14 Pat 518,[15] A I R 1932 Mad 185,[16] A I R 1935 Mad 145[17] and 60 Bom 311,[18] the above, together with the cases therein cited, appear to exhaust the case law on the subject. As to 14 Pat 518[15] at page 540 *et seq* the observations there do not advance the matter beyond the rule laid down in *Jugal Kishore's case.*[10] So far as this present point is concerned, 60 Bom 311[18] is concerned with the question as to in what circumstances a widow's contract binds the estate in the hands of a reversioner and decides that such circumstances are not limited to the case where the contract creates a charge but includes cases where the contract debt is an unsecured debt incurred for legal necessity. There the widow incurred a debt for what was assumed to be necessity. She gave a promissory note to secure repayment. She then died and the reversioner was sued, the purpose of the suit being to recover the amount from the estate of the widow's husband in the possession of the reversioner. The case is an important one. It is the decision of a Full Bench of the Bombay High Court. It decides that a widow's unsecured debts, incurred for necessity, are binding on the estate so that, if the widow dies, the person who as reversioner had come into the enjoyment of the estate may be sued thereon. That decision means that here the plaintiff could, had he known of this adoption, have joined the son; it suggests that the suit could have been framed against the widow in her representative capacity (see the quotation at pp. 322 and 323) as representing the husband who is deemed to live in her. It does not carry the matter further.

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[11] **Roy Radha Kissen v. Nauratan Lall, (1907) 6 C L J 490.**

[12] **Nagendrabala Dasee v. Panchanan Mourie, (1934) 21 A I R Cal 162=149 I C 1053=60 Cal 1236.**

[13] **Bistobehari Sahoy v. Baijnath Prasad, (1871) 7 Beng L R 213=16 W R 49.**

[14] **Mohima Chunder Roy v. Ram Kishore Acharjee, (1875) 15 Beng L R 142=23 W R 174.**

[15] **Parbati Kuer v. Baijnath Prasad, (1936) 23 A I R Pat 200=155 I C 213=14 Pat 518=16 P L T 713.**

[16] **Sethurama Ayyar v. Varadaraja Ayyar, (1932) 19 A I R Mad 185=136 I C 773.**

[17] **Lakshmana v. Muthu Chellia Goundan, (1935) 22 A I R Mad 145=155 I C 574=68 M L J 104.**

[18] **Dhondo Yeshwant v. Mishrilal Surajmal, (1936) 23 A I R Bom 59=160 I C 1046=60 Bom 311=38 Bom L R 6 (F B).**

A I R 1932 Mad 185[16] is said to have explained A I R 1927 P C 41.[2] In that case it was held that where a suit is filed against a limited owner as a simple money claim, and no issue is raised whether the debt is binding on the estate, then the question whether a sale in execution will bind the reversioner will depend upon whether the suit can be regarded as a proceeding against the estate; the plaintiff to establish that should make it clear that he asks for a decree against the whole interest. In order to construe it as a representative suit some indication, however slight, must be found to show that the creditor intended so to frame it; if the suit is in form only a simple money claim against the limited owner, then though the debt was incurred by reason of necessity the reversionary interest is not bound. That is a single Judge decision. In A I R 1935 Mad 145[17] a Bench of the Madras High Court held that when a suit is instituted on a promissory note it is prima facie a personal claim. We believe the above may be summarized as follows: The unsecured debt of a Hindu widow incurred for legal necessity is binding on the estate. She not only has her widow's estate but for certain purposes represents the inheritance. Any action against her upon that debt may or may not be launched and pursued in a way which shows that she is being sued as representing the inheritance. Prima facie, if she is sued on her bond and no prayer is to be found which shows that the widow is sued as representing the estate the case must be regarded as personal. The fact that the debt is of a kind that is binding on the estate makes no difference. The suit being personal, the decree must be personal and being personal, only the widow's property, including her widow's estate, can be proceeded against in execution. In determining the nature of the suit it is, we think, better to regard not the intention of the plaintiff but (to use the Judicial Committee's phrase) the object of the suit, that is, the matters which the Court is called upon to decide. If the binding nature of the debt is put in issue and evidence is tendered so that the Court could hold that the debt is binding then the inference may be drawn that the suit is brought as a representative suit. If there is, as here (and as in A I R 1932 Mad 185[16]), an allegation in the plaint which can be construed as raising the case of legal necessity, that is certainly not enough, if (as in A I R 1932 Mad 185[16] and here) it appears that the plaintiff was proceeding under a misapprehension which, while entertained, would make a representative suit inappropriate. In A I R 1932 Mad 185,[16] the mistaken belief was that the widow had an absolute estate.

In this case the plaintiff thought defendant 1 was the reversioner so that defendant 1 and defendant 2 between them had an absolute estate. Indeed a mere allegation of a fact which shows that the loan was made for a necessary purpose is not enough. It is necessary to have an issue as to the binding character of the debt and to follow that up with proof. Then, the issue as to the binding nature of the debt being taken, the Court can answer that issue in favour of the plaintiff. Here the promissory note was put in evidence and it states the purpose of the loan, viz. to pay for the marriage of Prema Bai. Upon that point of necessity, however, no issue was taken, and no adjudication made. The whole suit was fought as a personal action in debt. Against the widow it proceeded ex parte. The decree was a simple money decree. We cannot regard it as being different in kind from the decree in A I R 1927 P C 41.[2] The facts here are weaker than in that case. We arrive at this result with regret but we are of the opinion that any other conclusion would be contrary to A I R 1927 P C 41,[2] a decision which is binding upon us. Does the fact that the adoption took place some few days before judgment was delivered make any difference? The direct effect of that adoption is of course to divest the widow of her estate, and consequently, to make the decree infructuous. If it had been established that the adoption was a fraud, then other considerations would apply. In the absence of such proof, we find it difficult to see how the fact of this adoption makes any difference to the legal position. If the suit against the widow is brought against her in her representative capacity, then the estate being bound, the adopted son's interest would be bound : 15 N L R 24[19] and 16 Cal 40.[20] On the other hand, if the suit is personal and he is not a party neither he nor his estate is bound.

The next point concerns the effect of the attachment before judgment and the later attachment. Here a few dates make for lucidity. The attachment before judgment was before 23rd October 1929 on which date the boy was adopted. Judgment was delivered on 9th November 1929. Decree is of the same date. The attachment before judgment was lifted on 2nd September 1931 and a new attachment effected on 4th October 1931. It is to that attachment that objection was taken and to avoid the sale in execution that the payment was made. In these circumstances, whether or not S. 64 would prevent the property passing from the adopting mother to the adopted son, a point on which we express no opinion, its effect was terminated when, on 2nd September 1931, the attachment was lifted and with it the bar, if bar existed, preventing the divesting of the widow. Finally, the plaintiff having paid, is he entitled to recover the money back? On this branch of the case, we consider that the matter is covered by two rulings of the Judicial Committee, 40 Cal 598[21] and 7 Cal 648.[22] The fact that the person paying could have been made liable for the amount paid had suitable proceedings been taken, makes, in our opinion, no difference. He had to pay or lose the property. Had he lost the property and sued for a declaration that the property could not be taken in execution, he would have won and got back the property. It follows that the appeal succeeds. It is, however, an action completely lacking in merits. No interest is allowed and the decree will be for Rs. 5454-10-0 with Rs. 100 costs only.

D.S./R.K. *Appeal allowed.*

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[19] Ganpatrao v. Mt. Laxmi Bai, (1918) 5 A I R Nag 1=43 I C 64=15 N L R 24.

[20] Hari Saran Moitra v. Bhubaneswari Debi, (1889) 16 Cal 40=15 I A 195=5 Sar 198 (P C).

[21] Kanhaya Lal v. National Bank of India Ltd., (1913) 40 Cal 598=18 I C 949=40 I A 56 (P C).

[22] Dulichand v. Ramkishen Singh, (1881) 7 Cal 648=8 I A 93=4 Sar 245 (P C).

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## A. I. R. 1938 Nagpur 230

VIVIAN BOSE J.

*Laxmanprasad Thakur Ram Sao Agarwala* — Applicant.

v.

*Govind Prasad Rameshwarnath Tahutdar and another, Receiver* — Non-applicants.

Civil Revn. No. 659 of 1936, Decided on 29th October 1937, from order of Dist. Judge, Raipur, D/- 12th August 1936.

**(a) Provincial Insolvency Act (1920), S. 56—Pleader representing party should not ordinarily be appointed Receiver.**

In absence of any special circumstances, it is objectionable to appoint a pleader who represents a party in the proceedings as Receiver by allowing him to throw up his brief in the middle of a case. [P 231 C 1]

**(b) Provincial Insolvency Act (1920), Ss. 20 and 56 — Proceedings following adjudication are not invalidated merely because adjudication is set aside — Receiver appointed under S. 56 is entitled to be paid for his work — He does not become ad interim Receiver merely because adjudication is set aside.**

The proceedings following an order of adjudication are not invalidated simply because the order of adjudication is set aside on appeal. A Receiver appointed under S. 56 by the Court on an adjudication is entitled to be paid for the work done by him although the adjudication order be subsequently set aside. Where the Receiver is clearly appointed under S. 56, the mere fact that the appointment is determined later on as a result of the adjudication order being set aside, does not make the Receiver an ad interim Receiver appointed under S. 20 : *10 All 166 (P C), Rel. on.* [P 231 C 2; P 232 C 1]

**(c) Provincial Insolvency Act (1920), S. 56 (1) (b)—Rules in Judicial Commissioner's Circular No. 16, Part 2, p. 52— Order under S. 56 appointing Receiver only fixing rate of remuneration and not source or time for payment — Order must be construed in light of S. 56 (1) (b) read with rules on p. 52 of Judicial Commissioner's Circular No. 16, Part 2 — Money is to be paid out of assets of debtor and is not payable till realization or distribution of assets —Realization or distribution not possible, order of adjudication having been set aside — Receiver is entitled only to quantum meruit at 5 per cent. of assets realized.**

Where an order under S. 56 appointing a Receiver only fixes the rate at which remuneration is to be paid to the Receiver but does not specify the source from which the remuneration is to proceed or the particular time for payment, such an order must be considered in the light of S. 56 (1) (b) read with the rules framed under S. 79 (2) (a) and mentioned on p. 52 of the Judicial Commissioner's Circular No. 16, Part 2 and the money is to be paid out of the assets of the estate and is not payable until there has been either realization or distribution. If the realization or distribution of the assets cannot take place on account of the order of adjudication having been set aside in appeal and the order as it stands becomes inexecutable, a *quantum meruit* is all that the Receiver can claim. Ordinarily he is entitled to 5 per cent. of the assets realized and the money is payable out of the estate of the debtor : *8 Mad 29, Rel. on.* [P 232 C 1, 2]

V. V. Kelkar — *for Applicant.*

D. T. Mangalmoorti and N. T. Mangalmoorti — *for Non-applicant 1.*

D. N. Choudhuri—*for Non-applicant 2.*

**Order.** — This order will govern Civil Revision No. 658 of 1936 as well as this revision. Both arise out of the same set of insolvency proceedings. Laxmanprasad, the applicant in this revision, applied to have the non-applicant Govindprasad and his brother Ajodhyaprasad adjudged insolvents. Neither of them opposed the application and an order of adjudication was passed on 5th July 1932. A Receiver, Mr. Chaube, who is non-applicant 2 here, was appointed on 12th July 1932 and the question at issue is about his remuneration. He appears to have been the petitioning creditor's pleader up to this date for on 16th July 1932 the order-sheet states that

> Mr. Chaube is permitted to withdraw from the case and cease to be a pleader representing Laxmanprasad. He is appointed Receiver, having executed a surety bond for Rs. 20,000.

But the order-sheets have been written in such a slovenly manner by the learned Judge who took over charge of the case that it is difficult to make out who is who. This is the first time that Mr. Chaube's appearance is indicated at all, but as hardly any appearances have been noted throughout the order-sheets and as the learned Judge has not troubled to indicate who appears for whom when he has noted an appearance, it is not possible to comment on this appointment. Ordinarily it is objectionable to appoint a pleader who represents a party in the proceedings as Receiver by allowing him to throw up his brief in the middle of a case, but there may be special circumstances here which do not appear on the record justifying this procedure; so I will not say anything more about it. As regards the remuneration, the order is to the following effect :

> The remuneration will be Rs. 150 a month or 5 per cent. of the assets realized up to a maximum of Rs. 200 a month.

A second order dated 3rd August 1932 states :

> The T. A. allowed to the Receiver is that of a 2nd class officer. The Receiver is empowered to engage a clerk on Rs. 35 p. m. and will put up the name for sanction.

There is no special direction that the money is to be paid from any particular source, so, of course, the order must be read subject to the usual rules which govern such matters. The first Court directed that the money should come out of the estate because the appointment was made for the purpose of protecting the estate. The Appellate Court takes the opposite view and says that the money must be paid by the petitioning creditor Laxmanprasad. Therefore he has come up in revision here. In any ordinary case there would have been no difficulty but another creditor, one Ramkishorelal, challenged the order of adjudication and it was eventually set aside on 28th February 1934 and so of course the Receiver's appointment terminated. He actually worked from 5th July 1932 to 28th February 1934 and now claims Rs. 4100-15-3 as his remuneration at the rates fixed. His record of achievement during the 18 months he was there is certainly not impressive. The total realizations made by him are, I am told, in the neighbourhood of Rs. 1000, so as matters have turned out the arrangement has benefited nobody but the Receiver though it may have proved economical in the long run if the order of adjudication had not been set aside. However, that is immaterial for if the Receiver is legally entitled to be paid on what now turns out to be a lavish scale, the Court must of course uphold his rights.

The applicant Laxmanprasad and the non-applicant Govindprasad in this revision, and Ajodhyaprasad in the other, whose adjudication as insolvents was set aside argue that the Receiver is not entitled to anything because the adjudication has been set aside. In the alternative they state that he is only entitled to a *quantum meruit*. There can, I think, be no doubt that all the proceedings following the adjudication are not invalidated simply because the order was set aside on appeal. The position in certain respects is analogous to that which obtained in 10 All 166[1] at p. 172. Their Lordships of the Privy Council drew a distinction between the actual parties to proceedings which are reversed on appeal and those who come in as strangers and act on the faith of an order or decree which at the time was valid. Therefore there can be little doubt that the

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[1] Zain-Ul-Abdin Khan v. Muhammad [illegible]ar Ali Khan, (1888) 10 All 166=15 I A 12=5 Sar 129 (P C).

Receiver is entitled to be paid and the only question is how much and by whom. As I have said the order does not specify the source from which the remuneration is to proceed, nor, indeed, does it specify any particular time for payment though it fixes a rate. As the remuneration has not been paid every month, and since the Receiver appears to have made no effect during the 18 months he was there to obtain payment in that way and since the usual rule is otherwise I take it from the conduct of all concerned that the order only fixes the rate of payment and not what in other circumstances might have been construed as a direction for payment month by month. This is particularly so as the order refers to alternatives neither of which would be capable of determination until the entire assets had been realized.

Section 56 (1) (b), Provincial Insolvency Act is the section which empowers the Court

> by general or special order to fix the amount to be paid as remuneration for the services of the Receiver out of the assets of the insolvent.

The order must naturally be construed in the light of this section read with the rules framed under S. 79 (2) (a) which we find in the Judicial Commissioner's Circulars No. 16, Part 2, p. 52. When we do that, it becomes evident that the intention was that the source of payment was to be assets of the insolvent. It was argued that this section could not apply because in the circumstances the Receiver must be taken to have been only an ad interim Receiver appointed under S. 20, but I cannot agree. There was not the slightest doubt in anybody's mind at the time of appointment that Mr. Chaube was to be the Receiver contemplated by S. 56 and so there can be no question that the order was passed under that section. The mere fact that the appointment was determined later as a result of the Appellate Court's decision on another matter cannot change the order of appointment from one section to the other. The relevant rule, namely No. 13, framed under S. 79 (2) (a), and reproduced in the Judicial Commissioner's Civil Circulars II-16, p. 52 runs thus:

> A Court when fixing the remuneration of a Receiver shall, as a rule, direct it to be in the nature of a commission or percentage of which one part shall be payable on the amount realized, after deducting any sum paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividends.

This also contemplates that the money is to come out of the assets of the estate and that it is not to be payable until there has been either realization or distribution. This is also the view in 8 Mad 79[2] at p. 81. Of course the order in question does not follow the type of order contemplated by that rule, but in so far as the source of payment is concerned everything indicates that it was to be from the assets of the estate. Now as regards the amount payable and the time for payment it is clear that the sum to be paid was unascertainable until realization of the assets. It is therefore equally clear that no payment was contemplated until that contingency should occur. Because of the order of the Appellate Court the contingency contemplated cannot now arise and therefore the order as it stands is inexecutable. The time for payment under the order has not arrived and cannot now ever arrive, nor is it possible to ascertain how much should be paid. In these circumstances a *quantum meruit* is all that the Receiver can claim. The position is much the same as in contracts where a contract becomes void because a contingency contemplated becomes impossible. How much should that be? The ordinary rule is that he should get 5 per cent. of the assets realized and I think that is a fair sum to allow. That is what was done in 8 Mad 79[2] in similar circumstances.

As regards the source of payment, it is, as I have said, the assets of the estate. Assets means "all a man's property of whatever kind which may be used to satisfy debts or demands existing against him": Ghosh's Provincial Insolvency Act, p. 283, Edn. 7. It seems best then in the circumstances that the money should be made payable out of the debtor's estate. The orders of the lower Courts are reversed and the case remanded to the first Court for payment to the Receiver as his remuneration, a sum equal to 5 per cent. on the amount actually realized by him, the said sum being payable out of the debtor's estate. In view of the peculiar circumstances of this case there will be no order as to costs.

R.M./R.K. *Application allowed.*

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[2] Official Assignee v. Ramalinga, (1885) 8 Mad 79.

## A. I. R. 1938 Nagpur 233

VIVIAN BOSE J.

*Chetanlal Purshottam Singh Daoo* — *Plaintiff* — Appellant.

v.

*Dau G. S. Gupta and others* — *Defendants* — Respondents.

Second Appeal No. 146 of 1935, Decided on 21st December 1936, from appellate decree of District Judge, Raipur, D/- 5th October 1934.

**(a) Civil P. C. (1908), S. 2 (2) — Suit by lambardar against certain persons for charge against property in their hands for arrears of land revenue paid by him — Some of them discharged from suit as no charge was found— Order discharging them, held amounted to decree and was appealable.**

A lambardar brought a suit against certain persons for recovery of the amount of revenue paid by him to the Government and a charge on the property in their hands. The Court found that there was no charge on the property in the hands of some of them and therefore discharged them from the suit :

*Held* that the order discharging the defendants from the suit was a final adjudication of the most important point of issue between the parties and therefore amounted to a decree within the meaning of S. 2 (2) and was appealable : *A I R 1930 Nag 122; A I R 1919 Mad 871 and A I R 1931 All 333, Rel. on; A I R 1926 Nag 75, Dissent.* [P 234 C 1 ,2]

**(b) Civil P. C. (1908), O. 41, R. 1—Provisions are mandatory — Omission to attach copy of decree is fatal to appeal — Omission to attach copy of judgment which Court has not decided to dispense with — Appeal is incompetent.**

The provisions of O. 41, R. 1 are mandatory and an omission to attach a copy of decree is fatal to the appeal. As regards judgment it is for the Court to decide whether a copy of judgment may be dispensed with or not and the matter is not optional with the litigant and if the Court does not dispense with it and if a copy of judgment is not filed, the appeal is incompetent : *A I R 1928 Nag 131; A I R 1927 Lah 49; A I R 1918 All 394 and A I R 1923 Mad 482, Rel. on.* [P 234 C 2; P 235 C 1]

**(c) Limitation Act (1908), S. 5—Provisions of S. 5, whether can be applied in second appeal for first time** *(Quære).*

Whether the provisions of S. 5, can be applied in second appeal when there is no application to that effect in the lower Appellate Court. [P 235 C 1]

D. N. Chowdhary — *for Appellant.*

A. Razak and W. B. Pendharkar — *for Respondents.*

**Judgment.**—In this appeal we are concerned with defendants 3, 4 and 5 only. Defendant 3 obtained a decree against the first and second and in execution brought the property in suit to sale. It was purchased by defendant 4 and he sold it at a later date to the third. Defendant 5 is a mortgagee holding under a document executed by defendants 1 and 2. The suit is to enforce a charge which the plaintiff claims against the property in the hands of these defendants and arises in this way. The plaintiff and defendants 1 and 2 are brothers who owned the villages in suit. In the year 1927 there was a private partition between them, but, in spite of this, the plaintiff, who was the lambardar, continued to be lambardar and as such was responsible for the revenue of all the villages. Government recovered this from him and so he now sues for the amounts which he paid on behalf of the villages assigned to the share of defendants 1 and 2 and claims a charge on these properties. It is clear then that the other defendants were not added as merely formal parties. The plaintiff claimed a distinct relief against them and in fact they are the ones concerned with what is really the main relief, namely the charge, and this appeal in itself shows the plaintiff's anxiety to obtain a substantial relief against them. Defendants 3 and 5 contested the case on the merits and challenged the plaintiff's figures and also contended that in any event the plaintiff could not, as lambardar, claim a charge on the village for which he had paid land revenue. Defendant 4 did not appear and the case proceeded ex parte against him. The first Court framed a preliminary issue and decided on 19th April 1934 that no charge could be claimed in these circumstances. The learned Judge therefore discharged defendants 3, 4 and 5 and the case proceeded against the first and second alone. Two days later the claim was decreed against them. The plaintiff appealed against this decree asking for an enhancement of the amount awarded and also for a charge against the entire property. He impleaded defendants 3, 4 and 5 although they were not parties to the decree, having been discharged from the suit two days earlier. The lower Appellate Court enhanced the amount of the decree against defendants 1 and 2 and also allowed a charge against the property in their hands. But as regards the other three, the learned Judge held there was no charge and so dismissed the appeal against them. The plaintiff appeals again and wants a charge against the property in their hands as well.

Objection is taken at the outset to the maintainability of the appeal. It is urged that the order discharging these defendants was a decree within the meaning of S. 2 (2), Civil P. C., and as no appeal was filed against it, the proceedings in the lower Appellate Court were a superfluity against these three defendants and so no appeal can lie here. It was also urged that, though the appeal in the Court below, if regarded as one against the order of 19th April 1934 as well, was within time, it was bad because no copy of the order which amounted to a decree was filed and this is imperative under O. 41, R. 1.

There is a good deal to be said for this point of view, and so far as these Provinces are concerned, Subhedar A. J. C. decided in 26 N L R 24[1] that an order passed in almost identical circumstances amounted to a decree and as such was appealable. It is true Findlay A. J. C. held the contrary in a ruling which has not been published in the authorized reports, A I R 1926 Nag 75.[2] But the only reason he gives is that, since O. 1, R. 10 (2) uses the word "order," and not "decree, an adjudication under it cannot be a decree. I prefer the view taken in the authorized report, and respectfully agree with Subhedar A. J. C. that an order made in such circumstances amounts to a final adjudication of all the matters in issue between the parties to that adjudication. The reason why these defendants were discharged was because the Court considered there was no charge, and that of course was the most important point at issue between the plaintiff and these defendants, in fact, between all the parties to the suit. How then can that be anything but a final adjudication so far as the plaintiff and these three defendants are concerned? What more was left to be done? The order was obviously a final one in the first Court so far as the suit was concerned, and equally obviously it would operate as res judicata.

The reasoning of Findlay A. J. C. would cut out appeals against all non-appealable orders even when they amount to a final adjudication. It would run counter to a large body of authority which construes certain non-appealable orders as decrees, and in my opinion, there would be no need for a definition of the word "decree" if all decrees are to be confined to cases in which the Code expressly refers to them as such. The view of Subhedar A. J. C. is also the view in 42 Mad 219[3] and 53 All 466.[4] As I said, I respectfully agree with it, and dissent from the view of Findlay A. J. C. in A I R 1926 Nag 75.[2] Once it is accepted that the order amounts to a decree, then it was appealable, and the plaintiff was not competent to include the appeal against it in his appeal against the decree which was ultimately passed against a different set of persons. S. 105 of the Code is governed by its opening words, "save as is otherwise expressly provided". The express provision in this case is to be found in S. 96. So S. 105 can have no application to orders which amount to decrees.

It is argued that in this particular case the order of 19th April 1934 was actually embodied in the decree which was passed two days later, and so the appeal was competent on that score. It is true the names of these three defendants were included in the heading of the decree, but it is clear that in all such cases one must look to the substance and not to the mere form of a decree or order. The decree gives complete effect to the judgment of 21st April 1934 but not to the order of 19th April 1934. It merely recites as a fact that the other defendants have already been discharged. It passes no order either for or against them; nor does it give effect to the order for costs which had been made in their favour on 19th April 1934. It is quite clear that this decree was not intended to give final effect to the adjudication of 19th April 1934; nor in fact did it do so. The only point left then is whether the appeal which was filed in the lower Court can be considered an appeal against the earlier order as well as one against the later. It was within time and fulfilled all the requirements of an appeal, except that no copy of the order appealed from was appended to the memorandum. O. 41, R. 1 is mandatory. A copy of the decree appealed from has to be filed in every case, and so also a copy of the judgment, unless the Appellate Court chooses to dispense with it. It is pointed out in A I R 1928 Nag 131[5] that even as regards the judgment the matter is not optional with the litigant. It is for the Court to decide whether the judgment may be dispensed with or not, and consequently, if the Court does not decide to dispense with it and a copy is not filed, the appeal is incompetent. This is also the view of the Allahabad, Lahore and Madras High Courts: 40 All 12,[6] 7 Lah 539[7] and 44 M L J 279.[8] Whatever may be said about a copy of the judgment being optional, there is no ambiguity in the Code about the necessity for filing a copy of the decree. The omission to do that in this case was therefore fatal to the appeal.

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[1] **Punjaji v. Jairam, A I R 1930 Nag 122=127 I C 887=26 N L R 24.**

[2] **Shankar Rao v. Raghunathrao, A I R 1926 Nag 75=89 I C 331.**

[3] **Rama Rao v. Raja of Pittapur, A I R 1919 Mad 871=49 I C 835=42 Mad 219=36 M L J 169.**

[4] **Sher Ali v. Jagmohan Ram, A I R 1931 All 333=131 I C 548=53 All 466=1931 A L J 181.**

[5] **Ramchandra Rao v. Mayaram, A I R 1928 Nag 131=106 I C 57.**

I was then asked to apply the provisions of S. 5, Lim. Act. It is doubtful whether I can do so in appeal, when there was no application filed in the lower Appellate Court. But even here there is no application before me and no affidavit. Even if there were, it would be difficult to see how I could allow it now. The decision in 26 N L R 24[1] was published in 1930, four years before the order in question, and it is well known that a published ruling takes precedence over an unpublished one or one published in an unauthorized report, especially when it is given four years later. Then, as regards the filing of the copy, the words used in O. 41, R. 1 are too clear to admit of any doubt. Consequently, either carelessness, or more probably a desire to evade payment of a double set of court-fees was responsible for what happened. In either case, I would not be able to apply the provisions of S. 5. The appeal in the lower Appellate Court was therefore rightly dismissed. I dismiss this appeal also with costs.

K.B./R.K. *Appeal dismissed.*

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[6] Qasim Ali Khan v. Bhagwanta Kuar, A I R 1918 All 394=42 I C 888=40 All 12=15 A L J 801.

[7] Nur Din v. Secy. of State, AIR 1927 Lah 49=97 I C 187=7 Lah 539=27 P L R 698.

[8] Sundaram Aiyar v. Muthuramalinga Sathupathi, A I R 1923 Mad 482 = 72 I C 308=44 M L J 279.

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## * A. I. R. 1938 Nagpur 235

GRILLE J.

*Sheikh Haidar Sheikh Rahimmo Attar Musalman* — Applicant.

v.

*Syed Issa Syed Rahiman Musalman and others* — Non-applicants.

**Criminal Revision No. 281 of 1937, Decided on 25th September 1937, from order of Addl. Sessions Judge, Amraoti, D/- 26th April 1937.**

**(a) Child Marriage Restraint Act (1929), S. 5 — Negotiations or other preliminary acts are not punishable.**

Section 5 takes account only of performing, conducting or directing a child marriage, that is to say, the actual marriage ceremony itself, and not of any negotiation, preparation or any other preliminary acts. [P 236 C 1]

*** (b) Child Marriage Restraint Act (1929), S. 5 — Solemnization of child marriage outside British India is not punishable.**

Section 3 of Penal Code postulates that before any person can be tried in British India for an offence committed beyond British India, there must be in existence a law making him liable to be so tried. The solemnization of a child marriage outside British India is not an offence under the Child Marriage Restraint Act, since there is no provision in the Act nor in any part of the Penal Code that participating in such a marriage is an offence when committed outside British India : *A I R 1935 Bom 437, Approved; Dictum in A I R 1937 Mad 273 held obiter and dissented.* [P 237 C 1]

*** (c) Penal Code (1860), S. 108-A — Abetting performance of child marriage outside British India is not abetment within meaning of S. 108-A.**

The word 'offence' in S. 108-A denotes an act or acts made punishable under Penal Code. A child marriage celebrated outside British India is not an act punishable under the Penal Code and hence its abetment is not punishable as an abetment within the meaning of S. 108-A. [P 237 C 1,2]

**(d) Child Marriage Restraint Act (1929), S. 6 — Promotion of marriage performed outside British India is not punishable.**

Section 6 must have reference only to the promotion of a marriage referred to in Ss. 4 and 5, that is to say a marriage that is prohibited. As such marriage is not prohibited when performed outside British India, the promotion of such a marriage cannot be made punishable under the Child Marriage Restraint Act itself. [P 237 C 2]

P. N. Rudra — *for Applicant.*

T. J. Kedar — *for Non-applicants.*

**Order.** — Sheikh Haidar, the applicant sought to prosecute the five non-applicants for offences said to be punishable under Ss. 4, 5 and 6 of Child Marriage Restraint Act of 1929. The allegation was that Syed Issa, non-applicant No. 1 had married a minor girl in Hyderabad (Deccan) and that the marriage was attended by his brothers, non-applicants Nos. 2 and 3, his mother, non-applicant No. 4, and by the girl's mother, non-applicant No. 5. The bridegroom, the bride's mother and Syed Yusuf, one of the bridegroom's brothers, alone are said to have taken any part in the ceremony, but it was contended that all of them in British India (that is to say, in the Amraoti district where the parties reside) helped in the preparation for wedding and therefore abetted the commission of the offence which took place outside

British India and are liable on that account. The District Magistrate, Amraoti, dismissed the complaint under S. 203, Criminal P. C., holding that in respect of the substantive offences made punishable under Ss. 4 and 5, Child Marriage Restraint Act, no conviction could be had as the offences were committed outside British India where the Act did not apply. So far as the alleged abetment in British India was concerned, the learned District Magistrate held that there was no section in the Act making abetment punishable and that, as the Act aimed only at punishing the principals in a marriage of this kind when performed in British India, it would be illegal to punish any abettors, particularly when the offence was committed outside British India.

An application in revision was made in the Court of Session, Amraoti, and the Additional Sessions Judge rejected the application, holding that the Act applied only to marriages prohibited by the terms of the Act when taking place in British India. He also held that the punishment provided in the Penal Code for those who in British India abet offences which are committed outside British India has reference only to offences which can be shown to fall within the term "offence", if committed in British India or outside it. The applicant has preferred another application in revision in this Court. It is urged that the non-applicants were liable for prosecution under the Child Marriage Restraint Act and that, as they had decided to perform the marriage while they were in British India, they were guilty under the Act even though they chose to perform the marriage outside British India, and that in any case they were guilty of abetting an illegal marriage. The ground taken that the marriage was in essence performed in British India, as all the preliminaries were there settled although the actual marriage took place outside British India, can be disposed of immediately by reference to S. 5, Child Marriage Restraint Act which takes account only of performing, conducting or directing a child marriage, that is to say, the actual marriage ceremony itself, and not of any negotiation, preparation or any other preliminary acts.

The main point for consideration, then, is whether taking part in any marriage which is prohibited by the terms of the Act by a native Indian subject of His Majesty beyond British India, is an offence which can be punished in British India. The learned counsel for the applicant states that the celebration of such a marriage is an offence, wherever committed, because the Act contains no words of a restrictive character in this respect. This appears to be begging the question particularly as S. 1 (2) says that the Act extends to the whole of British India, including British Baluchistan and the Sonthal Pargannas, which would indicate the opposite of the suggestion of the learned counsel. Reliance is then placed on Ss. 3 and 4, Penal Code. The very words of these sections postulate the existence of a law that an act constituting an offence in British India shall also be an offence when committed outside British India. S. 3, Penal Code, runs :

> Any person liable, by any law passed by the Governor-General of India in Council, to be tried for an offence committed beyond the limits of the said territories shall be dealt with according to the provisions of this Code for any act committed beyond the said territories in the same manner as if such act had been committed within the said territories,

and S. 3 is operative only so far as offences punishable under the Penal Code are concerned, since S. 4 with the explanation :

> In this section the word "offence" includes every act committed outside British India, which, if committed in British India, would be punishable under this Code

is a law, such as S. 3 postulates, passed by the Governor-General of India in Council, making a person liable to be tried for an offence committed beyond the limits of British India. If, then, it is sought to find authority for a child marriage solemnized outside British India to be made punishable in British India, the sanction must be sought in a law passed by the Governor-General of India in Council. No such provision occurs in the Child Marriage Restraint Act, although there are provisions of the kind which S. 3, I. P. C. requires in the Railways Act 12 of 1890, and the Telegraph Act ~~12 of~~ 1885. Reliance is placed on the decision of a single Judge of the Madras High Court in A I R 1937 Mad 273[1] for the proposition that the application of the Child Marriage Restraint Act is universal and that, wherever the offence is committed, it is an offence punishable in British India. The dictum was not essential to the determination of the case which turned on the question whether the parties were punishable because the marriage was celebrated in a locality in Masulipatam which they mistakenly supposed not to be British territory but which in fact is so. The dictum runs :

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[1] Sreeramamurthy v. Ranganayakulu, (1937) 24 A I R Mad 273=168 I C 736=38 Cr L J 587 =(1937) 1 M L J 388.

> This penal law (the Child Marriage Restraint Act) applies not only to the celebration of such marriages within British India by any one but also the celebration of such marriages even outside British India by native Indian subjects ;

and then reliance is placed on S. 3, I. P. C., which is quoted, and there is no further discussion beyond a reference to S. 188, Criminal P. C., which are purely procedural and depend for their application on the fact whether an offence has actually been committed or no : *vide* 59 Bom 545.[2] With the greatest respect I consider the dictum in the Madras case, which is obiter, to be based on a misconception of the wording of S. 3, I. P. C., which, as I have already stated, postulates that before any person can be tried in British India for an offence committed beyond British India, there must be in existence a law making him liable to be so tried. Any offence which is punishable under the Penal Code is an offence when committed by a native Indian subject of His Majesty outside British India, but I am in entire and respectful agreement with the judgment of Beaumont C. J. in 59 Bom 745[3] that the contraction of a child marriage outside British India is not an offence under the Child Marriage Restraint Act, since there is no provision in the Act nor in any application of any part of the Penal Code that participating in such a marriage is an offence when committed outside British India.

On the question of the liability of the non-applicants for abetting a marriage of this nature, reliance is placed on S. 108-A, I. P. C., which runs :

> A person abets an offence within the meaning of this Code who, in British India, abets the commission of any Act without and beyond British India which would constitute an offence if committed in British India.

The language of this section would at first appear to favour the applicant's contention; but S. 40, I. P. C., shows that the word "offence" used in S. 108-A denotes only "a thing made punishable by this Code". Certain chapters and sections are mentioned in S. 40 in which the word "offence" has a more extended meaning denoting things punishable under the Penal Code or under any special or local laws. Although S. 109 of the Code appears within this category, S. 108-A does not, and the word "offence" therefore in S. 108-A denotes an act or acts made punishable under the Penal Code, which a child marriage celebrated outside British India is not. S. 6, Child Marriage Restraint Act, must, in my opinion, have reference only to the promotion of a marriage referred to in Ss. 4 and 5, that is to say, a marriage that is prohibited. As such marriage is not prohibited when performed outside British India, the promotion of such a marriage cannot be made punishable under the Child Marriage Restraint Act itself. And finally, though the point is of little import in view of the law which renders a prosecution nugatory, the application of S. 108-A, Penal Code is inadmissible in this case, as by virtue of S. 196, Criminal P. C., no Court can take cognizance of an offence punishable under that section unless upon a complaint made by order of Government, which has not been sought in this case. The result is that I hold the decision of the District Magistrate to be correct and the application in revision fails.

D.S./R.K. *Application dismissed.*

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## A. I. R. 1938 Nagpur 237

STONE C. J. AND DIGBY J.

*Sahebchand Harakchand and another —Plaintiffs*—Appellants.

v.

*Battasrao Ramji Mali Kondalkar and others—Defendants*—Respondents.

First Appeal No. 91 of 1934, Decided on 26th August 1937, from order of Sub-Judge, First Class, Nagpur, D/- 20th February 1934.

**(a) Decree—Construction—Appellate decree.**

Where there is an appellate decree, that is the decree that has to be construed, and that decree takes the place of the lower Court's decree : *A I R 1926 P C 93 and A I R 1927 P C 25, Foll.* [P 238 C 2]

**(b) Decree — Rights of decree-holder depend on interpretation of decree.**

The rights of the decree-holder under a decree mainly depend upon the interpretation of the decree : *A I R 1919 All 297, Foll.* [P 239 C 1]

**(c) Mortgage — Costs — Decree for costs against puisne mortgagee — Decree can be executed personally.**

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[2] Sakharam Raoji v. Emperor, (1935) 22 A I R Bom 233=1935 Cr C 658=157 I C 859=59 Bom 545=36 Cr L J 1268=37 Bom L R 362.

[3] Narayan Mudlagiri v. Emperor, (1935) 22 A I R Bom 487=1935 Cr C 1305=159 I C 923=59 Bom 745=37 Bom L R 885.

Unless there is anything in the decree to show that the normal right of the litigant to recover costs personally against his opponent is taken away, where costs are given against a puisne mortgagee, such costs can be executed personally against the mortgagee, and such right is independent of and exists whether or not O. 34, R. 6, Civil P. C. is applicable, and is founded on the broad ground that where a Court orders costs to be paid, the costs have to be paid, and the obligation to pay is not in any way dependent upon the mortgaged property proving sufficient or insufficient: *A I R 1931 Rang 181 and A I R 1931 Rang 153, Foll.; A I R 1926 All 722; 35 Cal 431; A I R 1932 Mad 155 and A I R 1931 Rang 153, Ref.* [P 239 C 2]

B. R. Mandlekar — *for Appellants.*

S. P. Deshpande — *for Respondents Nos. 3 and 4.*

**Judgment.**—The appellant is the plaintiff in a mortgage suit. The relevant facts are as follows: The plaintiff sued a variety of defendants. There was a death, and after the death, the defendants were as follows: defendants 1 and 2, the mortgagor and his son; defendant 3, second mortgagee. The plaintiff sued on the mortgage and joined defendant 3 as second mortgagee. Defendants 1 and 2 put in no written statements but were examined in the case. Defendant 3 put in a written statement which raised a ground of defence based on S. 83, T. P. Act. That is to say, he alleged that he had deposited in Court by way of tender a sufficient sum to satisfy the mortgage. The question therefore that fell to be decided was whether the sum so deposited was sufficient or not. The trial Court held that it was, and accordingly, while giving plaintiff a decree on the mortgage, so framed it that it was directed against the mortgaged property and defendants 1 and 2. So far as the costs were concerned, as the plaintiff had lost on the only matter of contest, the plaintiff was ordered to pay his own costs and to pay the defendant's costs. The plaintiff appealed. On appeal it was found that the tender was insufficient. Consequently the defence based on tender failed, and accordingly the contesting defendant 3 was found liable to pay the plaintiff's costs not only of the appeal but also of the trial. Owing however to the way the appellate decree was drawn up, the resulting decree runs as follows: (The words underlined (italicized) are consequent upon the alterations made in appeal. Though costs were ordered to be paid by the plaintiff in the first Court, the common form "principal, interest and costs" was left unaltered without costs "being struck out" and the figure for principal and interest was Rupees 5082-4-6. That was turned into Rupees 8521-12-0 on appeal and that figure included costs.):

> It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to *14th March 1932*, is *Rupees 8521-12-0* and that such amount shall carry interest at the rate of 6 per cent. per annum until realization, and it is decreed as follows:
>
> 1. That if the defendant pays into Court the amount so declared due on or before the said *14th March 1932*, the plaintiff shall deliver up to the defendant, or to such person as he appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him or by those under whom he claims.
>
> 2. That if such payment is not made on or before the said *14th March 1932*, the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, and that the balance, if any, be paid to the defendant. Plaintiff will have right to apply for a personal decree in respect of the deficit, if any, against defendant 1 only. The rest of the plaintiff's claim is dismissed.
>
> 3. That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree against defendant 1 only for the amount of the balance.
>
> *Note.—The costs of the original suit have been included in the decretal amount as per Sch. A.*

In point of fact the mortgaged property has proved insufficient. The question is whether a personal decree in respect of the costs awarded by the Appellate Court can be given. It has been urged that there was no appeal from the part of the lower Court's decree stating that the plaintiff will have a right to apply for personal decree in respect of the deficit, if any, against defendant 1 only, and accordingly plaintiff is now barred from seeking to have a personal decree in respect of the deficit against defendants 2 and 3. The answer given to that is that what is being sought here is costs, and there was no question of costs in the lower Court because costs were given in favour of the plaintiff only in appeal. It would seem clear that where there is an appellate decree, that is the decree that has to be construed, and that that decree is the one that takes the place of the lower Court's decree: 6 Pat 24[1] at p. 28 and 8 Lah 253[2] at p. 255. It is also clear that considering the rights of the decree-holder under a decree will mainly depend upon the interpretation of the decree : 41 All 473.[3]

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[1] Jowad Hussain v. Gendan Singh, (1926) 13 A I R P C 93=98 I C 499=53 I A 197=6 Pat 24 (P C).

[2] Fitzholmes v. Bank of Upper India Ltd., (1927) 14 A I R P C 25=100 I C 22=54 I A 52=8 Lah 253 (P C).

One question raised is whether the plaintiff is prevented from obtaining a personal decree as to costs because of the wording of O. 34, R. 6; or whether quite apart from O. 34, R. 6, having been given costs, he is entitled to recover those costs personally if the mortgage security proves insufficient to pay the total amount due under the mortgage decree. It has been urged that the liability on which a personal decree can be founded is a personal covenant in the mortgage, and that therefore nobody who is not a privy by contract can have a personal decree given against him for any part of the order passed in the mortgage suit including the order as to costs. In our opinion that is not so. The foundation of a personal liability for the debt is doubtless the personal covenant to repay. That is the thing which personally binds the mortgagor and in respect of which he can be made personally liable when a decree is issued, if he has so contracted. But there can be a personal decree for costs in cases in which there is no personal covenant and no contract. That a non-mortgagor can be made to pay costs personally has been decided in 55 Mad 332[4] : *see also* 9 Rang 186[5] at p. 201. But doubtless in all these mortgage cases the policy of the law and the practice of the Courts is to require the person who has got a mortgage decree to pursue first the property and he is not permitted at the same time to pursue the person. He is not therefore allowed to proceed against the property in respect of the debt for which that property is encumbered and at the same time, as he would otherwise be free to do, pursue the person in respect of the personal liability to pay costs. Consequently the mortgagee must proceed in the first instance against the mortgaged property even though his decree is one which can, in part, be executed personally against the mortgagor or against the non-mortgagor : 35 Cal 431.[6]

Thus, so far as costs are concerned, unless there is anything in the decree of the Appellate Court in this case to show that the normal right of the litigant to recover costs personally against his opponent is taken away, we are in agreement with the views expressed by the Rangoon High Court in A I R 1931 Rang 181[7] at p. 183 and A I R 1931 Rang 153[5] to the effect that where costs are given against a pusine mortgagee as here, such costs can be executed personally against the mortgagee, and we agree such right is independent of and exists whether or not O. 34, R. 6 is applicable, and is founded on the broad ground that where a Court orders costs to be paid, the costs have to be paid, and the obligation to pay is not in any way dependent upon the mortgaged property proving sufficient or insufficient : *see also* 48 All 682.[8] But here owing to the form the decree takes this right is lost. The costs have been included in the sum of Rs. 8521-12-0 decreed. The decree specifically restricts the mode of recovering that sum. There has been no application to modify the decree under the said section or otherwise, and we do not wish to say anything to encourage such an application which might have very unfortunate results for the applicant. As matters stand at present, we find, on looking carefully into the decree as it stands in its final form, that the learned Judge was right in his conclusion though his reasons were wrong. The appeal is accordingly dismissed with costs. Counsel's fee Rs. 40.

V.B./R.K. *Appeal dismissed.*

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[3] Amina Bibi v. Rama Shankar Misra, (1919) 6 A I R All 297=50 I C 730=41 All 473 =17 A L J 582.

[4] Rajagopalaswami Naicken v. Palaniswami Chettiar, (1932) 19 A I R Mad 155=135 I C 578=55 Mad 332=62 M L J 93.

[5] Maung Po Mya v. M. A. S. Firm, (1931) 18 A I R Rang 153=133 I C 225=9 Rang 186.

[6] Raj Kumar Singh v. Sheo Narain Singh, (1908) 35 Cal 431=12 C W N 364=8 C L J 152.

[7] C. A. M. K. Chettyar Firm v. P. R. P. L. S. Chettyar Firm, (1931) 18 A I R Rang 181= 133 I C 93.

[8] Het Ram v. Raja Dutt Prasad Singh, (1926) 13 A I R All 722=96 I C 592= 48 All 682.

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## A. I. R. 1938 Nagpur 239

VIVIAN BOSE J.

*Nagpur Glass Works Co. Ltd. and others — Defendants* — Applicants.

v.

*Shree Onama Glass Works Co. Ltd., Gondia — Plaintiff* — Non-Applicant.

Civil Revn. No. 570 of 1937, Decided on 23rd September 1937, from order of 1st Sub-Judge, 2nd Class, Jubbulpore, D/- 12th July 1937.

**Civil P. C. (1908), O. 7, R. 14 (2), O. 11 R. 15—List of documents referred to in O. 7**

**R. 14 (2) is not part of pleadings or affidavit—Defendant cannot insist to inspect them before filing written statement.**

Whether a party proceeds under O. 11, R. 15 or under O. 11, R. 18 (2) he must act promptly, and delay in itself may be a good ground for refusing to grant time for the filing of the written statement until after the inspection has been made. [P 241 C 1]

Where the documents of which inspection is sought have not been referred to in the pleadings or affidavits of the plaintiff and appear only in the list filed under O. 7, R. 14 (2) the defendant, unless he proceeds under O. 11, R. 18 (2) cannot insist that he has a right to inspect these documents before he can be called upon to file his written statement: *A I R 1931 Mad 825; 18 Bom 368 and 32 Bom 152, Dissented.* [P 240 C 2 ; P 241 C 1]

W. V. Deshpande and G. D. Dhavle — *for Applicants.*

**Order.**—This is a suit for defamation in which the plaintiff, after setting out the defamatory passages to which he objects, filed the usual list of documents, namely those on which the case is based and those on which he relies as evidence in support of his claim. The defendant insists that he has a right to inspect these documents before he can be called upon to file his written statement and relies on O. 11, R. 15, Civil P. C., and on A I R 1931 Mad 825,[1] 18 Bom 368[2] and 32 Bom 152.[3] I have not seen the unreported ruling but with respect am unable to agree with the reported decisions in the wide form in which the rule is stated there. Under O. 11, R. 15, Civil P. C., a party is entitled to give the other side notice to produce for his inspection all documents referred to in the pleadings or affidavits of his opponent. The word "pleading" is defined in O. 6, R. 1 to mean a plaint or a written statement and O. 7, R. 1 gives the particulars which a plaint must contain. The documents on which the pleading is not founded but which are only to be relied on as part of the evidence in the case do not find a place there. They are mentioned in O. 7, R. 14 (2) which states that all such documents shall be entered in a list to be "added or annexed to the plaint". This list does not have to be verified and it is clear from these rules that it does not form a part of the plaint; also it does not have to be made on oath and so cannot be an affidavit either. O. 6, Rule 2 states that a pleading

shall contain, and contain only, a statement in a concise form of the material facts which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

Since the list referred to in O. 7, R. 14 (2) is confined to documents which are relevant only as evidence and not as part of the party's case it is clear they are excluded from the scope of pleadings. O. 6, R. 9, on the other hand, deals with documents which form part of a party's case. It is enough as regards them to set out the effect of their contents as briefly as possible without setting out the whole, unless of course the precise words are material. The object of O. 11, R. 15 is to enable the other side to see the whole of such a document unless the privilege specified in that Rule is claimed. It is elementary that a document must be read as a whole and so in the ordinary way and in the absence of special privilege a person who relies on a document would be bound either to annex it to his statement or to set out its contents in full. O. 6, R. 9 introduces a modification only as a time-saving device. It is still open to the other side to see the whole document if he wants to do so. All he has to do in such a case is to serve a notice on his opponent under O. 11, R. 15 and it is not necessary for him to obtain either the permission or the assistance of the Court. In such a case of course the written statement need not be filed until the whole document has been seen. As I have said O. 6, R. 9 is only a time-saving device and is not meant to abrogate the ordinary rule that a party is entitled in the absence of privilege to see the whole of the document before he is called upon to reply to it. But documents which are not relied on in the pleadings are in a different category. Since they do not form any part of the pleading, the other side has not to plead to them any more than he has to plead to any of the other evidence which is to be produced in support of his opponent's case. It is therefore entirely unnecessary as a general rule to see these documents before he files his own statement.

I do not say it will never be necessary. It may in certain circumstances but then the procedure laid down in O. 11, R. 18 (2) must be observed. A regular application has to be made to the Court and it has to be accompanied by an affidavit containing the particulars specified in the Rule. The Court has then to be satisfied of the necessity for such inspection and is directed to

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1. Ramanathan v. Annamalai, (1931) 18 A I R Mad 825=135 I C 745=55 Mad 421=61 M L J 704.
2. Ram Dyal Saligram v. Nurhurry Balkrishna, (1894) 18 Bom 368.
3. Khetsidas v. Narotumdas, (1908) 32 Bom 152=9 Bom L R 1084.

refuse permission "if it is not necessary either for disposing fairly of the case or for saving costs". The language is mandatory and the Court is left no discretion if these facts are not disclosed in the application and not satisfactorily established by the affidavit. Of course these rules do not state the exact stage at which this application must be made and it is for the Court to decide in each case whether inspection should be granted before or after the filing of the written statement. In some cases it may be desirable to allow inspection before the written statement is filed and in other after and of course in still other not at all.

This much however is certain : whether a party proceeds under O. 11, R. 15 or under O. 11, R. 18 (2) he must act promptly and delay in itself may be a good ground for refusing to grant time for the filing of the written statement until after the inspection has been made. It is of course impossible to lay dawn any hard and fast rule but these observations form a general guide. In the present case since the documents of which inspection is sought have not been referred to in the pleadings or affidavits of the plaintiff and appear only in the list filed under O. 7, R. 14 (2) the defendant should have proceeded under O. 11, Rule 18 (2) if he wanted to inspect them. No application of the nature required by that rule was filed in the lower Court, nor was there any affidavit and even here no facts are disclosed which would entitle the defendant to inspection. Therefore the lower Court was right in refusing to grant further time for the filing of the written statement. I dismiss the application without notice to the other side.

D.S./R.K. *Application dismissed.*

## A. I. R. 1938 Nagpur 241

STONE C. J. AND PURANIK J.

*Madhorao Dinkarrao and another* — *Defendants* — Appellants.

v.

*Laxmibai w/o Heramb* — *Plaintiff* — Respondent.

Misc. Appeal No. 140 of 1936, Decided on 15th October 1937, from order of Addl. District Judge, Bhandara, D/- 20th June 1936.

**(a) C. P. Land Revenue Act (3 of 1917), S. 169 (1) (a) and (b)—Partition—Party asked by competent Sub-divisional Officer to file civil suit within six months—Case kept pending —Order sent to Deputy Commissioner for information—Order of Deputy Commissioner asking case to be filed—Order of Sub-divisional Officer under sub-s. (b) cannot be varied by Deputy Commissioner in his administrative capacity to one under sub-s. (a)—Order of Sub-divisional Officer stands as final.**

In a partition proceeding before a competent Sub-divisional Officer, he passed an order under S. 169 (1) (b) as follows : "A is asked to establish his rights in Civil Court by filing suits within six months from this date. Till then the case be kept pending. Record forwarded to Deputy Commissioner for information." Deputy Commissioner endorsed on this as follows : "Case need not be kept pending so long. It be filed. Parties can re-open it in due course." Question was if Deputy Commissioner's order was final or that of the Sub-divisional Officer's and did the superior officer's endorsement convert the Sub-divisional Officer's order from S. 169 (1) (b) to S. 169 (1) (a) :

*Held* that the order of the Sub-divisional Officer under S. 169 (1) (b) was final and that the Deputy Commissioner to whom the order was sent for information had no right to vary it in any way so as to bring it under S. 169 (1) (a), as the order was sent to him not by way of appeal or revision but in his administrative capacity only for information and the endorsement by Deputy Commissioner was his administrative act : *A I R 1923 Nag 306, Rel. on.* [P 243 C 2 ; P 244 C 2]

**(b) C. P. Land Revenue Act (3 of 1917), Ss. 169 (1) (b), 220 (n)—Order to file civil suit within six months—Suit filed beyond that period—Civil Court cannot entertain such suits being barred by S. 220 (n).**

Where under an order under S. 169 (1) (b) a party is asked to file a civil suit within six months but he fails to do so and files it beyond that period the Civil Court cannot entertain the suit, it being barred under S. 220 (n). Such party has to face the consequences under S. 169 (2) (b) and take his chance before Revenue Court : *A I R 1924 Nag 275 and A I R 1933 Nag 340, Rel. on.* [P 245 C 1 ; P 247 C 1]

M. R. Bobde — *for Appellants.*

W. H. Dhabe — *for Respondent.*

**Judgment.**—This appeal arises out of a suit instituted by the plaintiff Laxmibai for a declaration that the *sir* and khudkasht fields possessed by her in mouza Kakepar in Bhandara District belong to her exclusively and the defendants who are the cosharers in the said village have no right to claim a share therein in partition proceedings. The plaintiff in her plaint stated that the defendants had filed an application for partition of the village in Revenue Court and laid claim to a share in the lands in suit and that the plaintiff had objected to the partition of the *sir* and khudkasht lands and claimed them to be her exclusive property. In the plaint the cause of action was stated as having accrued on 21st January 1935 when the defendants claimed a partition of these lands and thus cast a cloud on plaintiff's title which necessitated the institution of the present suit under S. 42, Specific Relief Act. The plaint has studiously avoided a reference to any order passed by the Revenue Court in this respect. The suit was filed on 18th December 1935. The defendants raised a preliminary objection and stated that the plaintiff was ordered by the Revenue Court in partition proceedings to file a civil suit within six months under S. 169 (b) to get her exclusive title to the lands in dispute established, that the order was passed on 18th February 1935 and as the present suit was filed more than six months after the order and not within the six months as provided for under S. 169 (b) the Civil Court could not entertain it. The plaintiff in reply admitted that the order was passed on 18th February 1935 and that she failed to institute her suit under S. 169, Land Revenue Act within six months of the order but maintained that her claim for declaration was one under S. 42, Specific Relief Act and independently of S. 169 of the Act and as such was tenable and governed by six years' rule of limitation under Art. 120, Lim. Act. The failure to institute the suit ordered by the Revenue Court was not a bar to the maintainability of the present suit.

The trial Court came to the conclusion that the suit was not tenable and dismissed it. The lower Appellate Court has construed the order as one falling under S. 169 (a) and not (b) and has held that the suit is tenable. Against this decision of the lower Appellate Court the present appeal is filed. The order of the Revenue Court to which reference is made in the Courts below and in argument is Ex. D-1 in the case. The date of final order in the case is shown as 18th February 1935. On this date the S. D. O., Mr. S. V. Naydu, who was the officer dealing with the partition case passed the order directing Laxmibai to go to Civil Court and get it declared that she is the exclusive owner of the *sir* and khudkasht lands and that she was entitled to have them allotted to her Patti in the imperfect partition. He ended his order with the following sentence.

> **I grant her time for six months for this purpose under S. 169 (1) (b). Till then this case will pend.**
>
> **Camp Lakhni.** **(*Sd.*) S. V. Naydu,**
> **D/- 18th February 1935.** **S. D. O.**

This order bears an endorsement :

> **Submitted to D. C. for information.**
>
> **(*Sd.*) S. V. Naydu,**
> **18th February 1935.** **S. D. O.**

There is a further endorsement by D. C. as under :

> Seen. It is no use keeping the case pending for six months. It may be filed. Applicant can renew it after the Civil Court decision.
>
> (*Sd.*) M. C. Combrie,
> D/- 22nd February 1935. D. C.

As stated by us, this order has been construed by the lower Appellate Court as one under S. 169 (1) (a) which empowers the Revenue Court to decline to grant the application for partition till the question is decided by competent Court or lawful award or compromise. The appellants have raised two contentions before us : Firstly, it is contended that the lower Appellate Court erred in holding that the order of the Revenue Court was one under S. 169 (1) (a) and not under S. 169 (1) (b) ; and secondly, it ought to have been held that the order not having been complied with and the suit not having been instituted as directed, the Civil Court had no jurisdiction to entertain it.

The first contention of the appellants which relates to the construction of the order depends mostly upon the view that may be taken of the endorsement by the Deputy Commissioner dated 22nd February 1935 which we have reproduced in full. Under S. 164, Land Revenue Act, an application for imperfect partition is to be made to the Deputy Commissioner but by S. 23, C. P. Land Revenue Amendment Act, the powers which the Deputy Commissioner is empowered to exercise under Chap. 11 in partition cases under S. 161 to S. 186 have been delegated to Sub-divisional Officers and it is so specifically mentioned in Sch. 2, Land Revenue Act, such Sub-divisional Officer must be an Assistant Commissioner of the First Class as stated in S. 12, Land Revenue Act. On reference to the Notification in the C. P. Gazette No. 516-342-XII, dated 18th February 1926, we are satisfied that Mr. S. V. Naydu who dealt with this partition case was an Assistant Commissioner, First Class, exercising the powers of a Sub-divisional Officer and he was thus fully competent to pass final orders under Ss. 161 to 186, Land Revenue Act, under Chap. 11 thereof. The heading of the order (certified copy whereof is filed as Ex. D-1) shows that the date of final order of the case is mentioned as 18th February 1935 and not 22nd February 1935 which is the date on which the Deputy Commissioner, Bhandara, made an endorsement thereon.

The Sub-divisional Officer being empowered to exercise powers under Ss. 161 to 186, Land Revenue Act could and did pass an order in this case which is clearly one under S. 169 (1) (b). The lower Appellate Court however holds by reason of the endorsement dated 22nd February 1935 that the final order was passed by the Deputy Commissioner, Bhandara, on 22nd February 1935 and inasmuch as the Deputy Commissioner ordered that the case be not kept pending for 6 months as ordered by the Sub-divisional Officer but should be filed and further stated "the applicant can renew it after Civil Court decision" the order was one under S. 169 (1) (a). The lower appellate Court, in its order, does not dispute the fact that the order of the Sub-divisional Officer was one under S. 169 (1) (b), but it is of the opinion that the Deputy Commissioner was dealing with the case and passed the final order on 22nd February 1935 and though the Deputy Commissioner does not say anywhere that he was converting the order under S. 169 (1) (b) into one under S. 169 (1) (a) the interpretation to be placed on the order is that it is one under S. 169 (1) (a). We are of the opinion that the lower Appellate Court is wrong in its interpretation of the order. The plaintiff in her plaint has not referred to any order but states that an objection was raised in the partition proceedings and the cloud was thrown on her title with the result that she was instituting the present suit under S. 42, Specific Relief Act. One of the reliefs claimed by her is a declaration that the lands in suit are exclusively owned by her and that they are not liable to partition as claimed by the defendants. When the defendants urged that the suit was not instituted within six months of the order passed by Mr. Naidu on 18th February 1935, the plaintiff in her rejoinder dated 12th February 1936 para. 2 stated as under :

> It is admitted that the Sub-divisional Officer Bhandara passed an order on 18th February 1935 that the plaintiff should institute a suit against the defendants to get the matter decided in a Civil Court and that the plaintiff has failed to institute within six months a civil suit under S. 169, Land Revenue Act. But that does not take away the plaintiff's right to institute a suit for declaration independently of that section and the present suit is not under S. 169, Land Revenue Act but is one under S. 42, Specific Relief Act, etc., etc.

In the grounds of appeal urged in the memorandum of appeal filed on behalf of the appellants there is no ground urging the construction that the order was one under S. 169 (1) (a) and not (b) as seems to have been actually urged before the lower Appellate Court. The parties to the litigation and in particular the plaintiff were at any rate clearly of the opinion that if the case be regarded as one directed by S. 169, Land Revenue Act, the effective and final order directing it was the order passed by the Sub-divisional Officer on 18th February 1935 till it was argued before the lower Appellate Court that the Deputy Commissioner's order should be regarded as final and should be construed as one under S. 169 (1) (a). This is clearly an afterthought but as it is matter of construction and the lower Appellate Court has accepted the contention raised by the appellant before it, we are examining it in second appeal. When carefully examined, it will be found that the construction placed upon the order by the lower Appellate Court is not correct.

We have shown that under law Mr. S. V. Naidu, the Sub-divisional Officer, had the power to deal with the case under Ss. 161 to 186, Land Revenue Act. In exercise of these powers conferred on him he passed an order under S. 169 (1) (b) directing the present plaintiff to establish in a competent Civil Court her exclusive right to the *sir* and khudkasht lands and obtain a declaration that they were not liable to partition as between her and the other cosharers in the partition proceedings. The Deputy Commissioner of the District to whom the proceedings were submitted by the Sub-divisional Officer for information had no power under law to vary the order unless in appeal or revision. No appeal was filed before him by any party and it could not be argued that he varied the order suo motu under his powers under S. 39, Land Revenue Act. Under S. 39, Land Revenue Act, the Deputy Commissioner had no power to vary the substantive order affecting any question of right between private persons without having given to the parties interested notice to appear and be heard in support of such order : vide S. 39 Proviso. It is not shown to us that the parties appeared before the Deputy Commissioner or that any notice was served on any of the parties to the litigation. An order under S. 169 (1) (a) or (b) is an order which affects a question of right between private persons cannot be disputed. The order that was passed by the Deputy Commissioner, Bhandara, on 22nd February 1935 was not therefore an order which in any way affected or varied the substantive order passed by the Sub-divisional Officer on 18th February.

It appears to us that the Sub-divisional Officer who is subordinate to the Deputy Commissioner of the district submitted the case for the information of the Deputy Commissioner. This is what the Sub-divisional Officer clearly says in his endorsement and the Deputy Commissioner who is the administrative head of the district without in any way varying the substantive order under S. 169 (1) (b), merely stated in his administrative capacity that, as the order under S. 169 (1) (b) is passed, it was not necessary to keep the case pending on the file. S. 169 (1) (b) nowhere says that the case should be kept pending by the partitioning officer and in all probability on that ground the Deputy Commissioner as the administrative head of the district stated that the case be filed. He added "the applicant can renew it after the Civil Court decision." This addition should not be construed to mean that he converted the order passed by the Sub-divisional Officer from S. 169 (1) (b) to an order under S. 169 (1) (a). S. 169 (1) (a) contemplates an order declining to grant the application until the question in dispute has been determined by competent Court or is settled by a lawful compromise or award. The Deputy Commissioner does not use any such words. It appears to us that having stated that the case be filed instead of it being kept pending he wanted to make the position clear by saying that it did not mean that the partitioning officer has declined to grant the application under S. 169 (1) (a) but the application could be renewed after the decision of the Civil Court, presuming that the order directing the institution of the civil suit within six months will be complied with and a decision from Civil Court will be obtained. An order couched in somewhat similar language was held to be one under S. 169 (1) (b) and not (a) in 6 N L J 205[1] at page 206.

We have to presume that the Deputy Commissioner was passing only such order as he was competent to pass. We have shown that he could not have varied the order of the Sub-divisional Officer. When a partitioning officer acts under S. 169 (1) (a), the partition proceedings come to an end. When he acts under S. 169 (1) (b) the proceedings are postponed. When they are postponed, the partitioning officer may in his discretion keep them pending or send them to the record room to be taken up at the instance of the party who wants to proceed with them stating whether the order is complied with or not. The order to keep the case pending is purely an administrative act and not a judicial one. The direction of the Sub-divisional Officer stating that the case will pend till then was only an administrative direction to his office to keep it pending on the file and this administrative direction only has been changed by the Deputy Commissioner in his administrative capacity as the head of the district. In this view of the case and in view of the fact that till the stage of argument before the lower Appellate Court the plaintiff and her counsel regarded the order passed by the Sub-divisional Officer on 18th February 1935 as the final order in the case binding between the parties, we hold that the decision of the lower Appellate Court that the order of the Deputy Commissioner is the final order in the case and that it is an order under S. 169 (1) (a) is not correct. The operative order in the partition case was passed by the Sub-divisional Officer on 18th February 1935 and it was one under S. 169 (1) (b), Land Revenue Act.

Admittedly no civil suit was instituted within six months as required by S. 169 (1) (b), Land Revenue Act. S. 169 (2) (b) enacts that if such party fails to comply with the requisition the partitioning officer shall decide the question against him. The plaintiff having failed to comply with the order of the partitioning officer has vested that officer with jurisdiction to decide the question against her. This brings us to the next question, viz., whether the Civil Court is debarred from entertaining the present suit instituted by the plaintiff long after the expiry of six months as provided for in S. 169 (1) (b). The trial Court has held that such a suit is barred and had not the lower Appellate Court taken a wrong view of the order that was passed by the Deputy Commissioner in the case and held that the order was one under S. 169 (1) (a) it is clear that he too would have thrown out the suit as not tenable. This question however was argued before us at some length and we proceed to decide the same. S. 220 (n) runs as under:

> **Except as otherwise provided in this Act or in any other enactment for the time being in force no**

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[1] **Laxman v. Kesheo, (1923) 10 A I R Nag 306= 73 I C 1021=6 N L J 205.**

Civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the Governor-General in Council, the Chief Commissioner or any Revenue Officer is, by this Act empowered to determine, decide or dispose of and in particular and without prejudice to the generality of this provision no Civil Court shall exercise jurisdiction over any of the following matters:

(n) the partition or union of mahals or patti.

Chapter 11 is the chapter which deals with partition or union. S. 169 is one of the sections in this chapter. It was in exercise of the powers vested in him under S. 169 (1) (b) that the partitioning officer directed the present plaintiff who raised a question of title before him, to get the question decided within six months. Having directed this way, the partition was postponed. S. 169, Cl. 2 (b), directs that if the order is not complied with, the partitioning officer shall decide the question against the party failing to comply with the direction. It thus follows that the question of title raised by the plaintiff before the partitioning officer and which under the powers vested in him he had directed the plaintiff to get established by instituting a suit within six months, on pain of deciding it against her if she failed to comply with that order shall now be determined by the partitioning officer against her, as she failed to comply with the order.

The plaintiff in her plaint has claimed a relief for a declaration that the lands are not liable to partition between herself and the defendants who seek to get them partitioned in the revenue proceedings is clear from the plaint. Had she instituted this suit within six months as directed by the partitioning officer, the Civil Court had jurisdiction to try the suit, but as she failed to institute the suit as directed within six months, S. 169 (2) (b) empowers the partitioning officer to decide the question against her. The revenue Court being thus empowered to decide this question against her, the Civil Court cannot decide the same in a suit instituted by the plaintiff after the expiry of the period of six months as the plaintiff wants it to do by the present suit. To hold otherwise will lead to a conflict of jurisdictions and anomalous and undesirable results. The Revenue Officer partitioning the property being clothed with jurisdiction by S. 169, Cl. 2 (b) to decide the question against the party who failed to comply with its direction, S. 220, Land Revenue Act, comes into play and ousts the jurisdiction of the Civil Court, for, it provides that except as otherwise provided in this Act no Civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the Governor-General in Council, the Chief Commissioner or any Revenue Officer is by this Act empowered to determine, decide or dispose of.

The provisions of the U. P. Revenue Act are in many respects similar to the provisions of the C. P. Land Revenue Act. Practically the same provisions are to be found in the U. P. Act as are contained in Ss. 169 and 220, C. P. Land Revenue Act. While dealing with a case of this nature in 49 All 873[2] at p. 876 their Lordships of the Allahabad High Court observed :

> When no suit within the time allowed by that section and in compliance with it has been instituted, the Civil Court cannot go on with the inquiry. If such a thing were allowed, the result may be that the Revenue Court may ignore the Civil Court's decree which would be altogether ineffectual and futile.

The learned advocate for the respondent relies on 19 N L R 11[3] and argues that the jurisdiction of Civil Court is not barred, but a careful reading of the case discloses that the learned Judicial Commissioner was dealing with an order under S. 169 (1) (a) and was careful enough to point out the difference between the two orders. At page 13 he states that

> the order of a Revenue Officer declining to make a partition or to proceed therewith until the question of the partition has been decided does not amount to an order to any of the parties to file a civil suit and does not confer on a Civil Court jurisdiction which did not previously reside in it.

This clearly means that if the order be one directing any party to file a civil suit such an order has to be complied with within the statutory period and will be an order conferring a special jurisdiction on Civil Court. If there be no such order, Civil Court's ordinary jurisdiction under S. 9 is not taken away.

The question is discussed at great length in 20 N L R 145[4] which is noticed with approval by a Bench of the Judicial Commissioner's Court in 29 N L R 350.[5] The question is not really one of limitation as stated in those cases but one of jurisdiction. No doubt the suit has to be instituted within the statutory period of six months which cannot be extended under S. 14, Lim. Act as stated in those cases but the main point is that on expiry of the period of six months if no suit is instituted the Revenue Officer alone has the exclusive jurisdiction to decide the question under S. 169 (2) (b) and against the party who failed to comply with the order and in view of this jurisdiction conferred on the Revenue Officer the jurisdiction of the Civil Court to decide the same question is ousted by S. 220, Land Revenue Act.

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[2] Nirban Singh v. Bari Bitta, (1927) 14 A I R All 484=103 I C 87=49 All 873=25 A L J 541.

[3] Dongarsingh v. Vishwanathsingh, (1923) 10 A I R Nag 86=71 I C 205=19 N L R 11.

[4] Labhuasao v. Chetan, (1924) 11 A I R Nag 275 =79 I C 161=20 N L R 145.

[5] Mt. Mohankuar v. Bhagatram, (1933) 20 A I R Nag 340=149 I C 622=29 N L R 350.

It is further contended on behalf of the respondent that there is nothing in S. 169 (2) (b) which suggests that the decision of the Revenue Officer will be final or conclusive. It is argued that while dealing with a summary decision taken under S. 169 (1) (c) it is clearly stated that, subject to the institution of the civil suit within six months of the decision, the order of the Revenue Court will be conclusive but no such words are used with respect to a decision taken under S. 169 (2) (b). This argument is not sound and the reason is apparent. Every order of a Revenue Officer can be appealed from under S. 33 or revised under S. 39. If no suit is instituted within six months the Revenue Officer shall decide the question against the party failing to file the suit but this decision of the Revenue Officer is open to appeal or revision to higher authorities. This is not so with respect to a decision taken under S. 169 (1) (c). It is expressly so provided in S. 169, Cl. (3). This order is conclusive subject to a decision of a Civil Court if a suit be instituted within six months and is not otherwise subject to appeal or revision. We are of the opinion that it is on account of this difference between the two cases that the order passed by the Revenue Officer under S. 169 (2) (b) is not declared to be conclusive.

No doubt the expression "questions of title or of proprietary rights" as used in S. 169 is a very general one and has formed the subject of several important decisions. 17 C P L R 5[6] and 17 C P L R 129[7] are the leading cases on the point, but it is in view of the use of this expression that the Legislature have thought it fit to give the Revenue Officer a wide discretion in dealing with such cases. Any of the three courses stated in S. 169, Cl. (1) (a), (b) or Cl. (1) (c) can be adopted according to the nature of the question of title. If the question be one which prima facie shows that the applicant for partition is not entitled to apply for partition, the Revenue Officer may decline to entertain the application till the question is decided. If the question is of a nature which prima facie shows that one of the parties has a weak case but at the same time the question is such on which the Revenue Court should not pronounce an immediate opinion, such a party is to be directed to institute a suit within six months under S. 169 (1) (b). If however the question is such as can easily be dealt with, the Revenue Officer may proceed to decide it summarily. In the first place the question is left at large, in the second case an opportunity is granted to a contesting party to have it decided by instituting the suit within the statutory period, failing which a decision against him shall be pronounced and, in the third case, the decision is final subject to the result of the suit to be instituted within six months. The first two orders are subject to appeal or revision but not the third. These wide discretions having been given to the Revenue Court, there is really no chance of any litigant suffering. A litigant who is particular about his rights has got to be vigilant. His right to litigate in a Civil Court is not taken away but is to a certain extent for obvious reasons restricted. In this view of the case we agree with the observations in 20 N L R 145[4] at page 150 :

> If a recorded proprietor of a village or mahal or patti finds that there exists a dispute between himself and another cosharer as regards the liability or otherwise of certain lands to partition, the co-sharers have two courses open. They or any of them may at once institute a suit in a Civil Court for a declaration to that effect, and such a suit will not be barred from the cognizance of the Civil Courts, because it is not a matter covered by S. 152 (n), Central Provinces Land Revenue Act. There is nothing also in any other provisions of the said Act which can be said to take away by necessary implication the jurisdiction of the Civil Court in a matter like this.
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> But if, instead of resorting to this civil remedy, and securing a decision of the Civil Court on the question in dispute, in the first instance, any of the recorded proprietors were to make his election to have recourse first to the summary remedy of a partition through Revenue Courts and thus invoke the exclusive jurisdiction of the Revenue Officer for partitioning the estate under the Land Revenue Act, and an objection raising questions of title or of proprietary right or any other question which it is essential to decide finally before the partition can be proceeded with, were to be raised in those summary revenue proceedings, then both the parties are bound to submit to the necessary

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[6] Seth Birdhichand v. Mt. Kaim Bi, (1904) 17 C P L R 5.

[7] Govind Rao v. Narayan Rao, (1904) 17 C P L R 129.

consequences flowing from the selection of the remedy, and regulate their further procedure in the manner laid down by that Act. The questions raised not having already been determined by a Court of competent jurisdiction, the partitioning officer has the option of following any of the three courses laid down under S. 169, sub-s. (1) of the New Land Revenue Act.

As already stated by us this case has been noticed with approval in 29 N L R 350[5] and has been accepted as enunciating proper law in these provinces. 19 N L R 11[3] is clearly distinguishable as pointed out by us before and is not in any way in conflict with 20 N L R 145.[4]

If a party fails to comply with the order passed by a Revenue Court under S. 169 (1) (b) he must face the consequence as stated in S. 169 (2) (b) and take his chance before Revenue Courts. He has no right of coming to the Civil Court and claim a decision on the same point which he failed to litigate by instituting his suit within the statutory period. Such a suit is not then tenable. If the suit were maintainable, conflict of jurisdictions will follow and the decree of the Civil Court can be disregarded by the Revenue Court, a result which no Civil Court will appreciate. Moreover, if the suit were maintainable in the Civil Court, the finality of partition proceedings as contemplated by the Legislature would be entirely at the mercy of a co-sharer, whose own omission and inaction will entitle him to re-open the entire partition proceedings and the adjudication of titles involved therein by a suit in Civil Court at his choice at any time he chose. This could not have been the intention of the Legislature: 7 Luck 716[8] at p. 730.

For the reasons stated by us in the foregoing paragraphs, we are of the opinion that the plaintiff's suit which seeks a declaration that the lands in suit are not partible in revenue partition as claimed by the defendants not having been filed within six months as provided for in S. 169 (1) (b) and as directed by a competent Revenue Court dealing with the partition of the village in which the lands in suit are situate, is not tenable and is liable to be dismissed with costs. The appeal is allowed, the decision of the lower Appellate Court is set aside and that of the trial Court restored. The plaintiff-respondent will bear her own costs and pay those of the defendants-appellants in all the three Courts.

B.D./R.K. *Appeal allowed.*

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[8] Bajrang Bahadur Singh v. Beni Madho Baksh Singh, (1932) 19 A I R Oudh 199 = 137 I C 606=7 Luck 716=9 O W N 488 (F B).

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## A. I. R. 1938 Nagpur 247

STONE C. J.

*Rama Yado Teli* — Appellant.

v.

*Dhekal Jana Teli and others* — Respondents.

Second Appeal No. 443 of 1933, Decided on 28th September 1937, from appellate order of Dist. Judge, Nagpur, D/- 22nd July 1933.

**(a) Insolvency — Question of title — Duty of Courts — Court should decide questions of title only in very simple cases—Where there is real difficulty or dispute as to title, parties should be referred to regular suit.**

Courts should be a little careful in disposing of all matters in insolvency which have the effect of deciding the title alleged to reside in third parties, so as to defeat such title and bring the property within the estate of insolvent. Only in very simple cases, should title suits be in effect disposed of on motion; and normally where there is any real difficulty or dispute, where either an Official Receiver or a creditor is challenging the apparent title of stranger so as to bring the property within the estate of the insolvent, the proper course will be to refer the parties to a suit : *A I R 1930 P C 265; A I R 1931 P C 75; A I R 1929 Mad 705 (F B) and A I R 1932 Mad 167, Rel. on.* [P 248 C 1, 2]

**(b) Provincial Insolvency Act (1920), S. 28(2) —*D* adjudged insolvent —*D* leasing out his fields —Creditor of *D* bringing notice of motion alleging that *D* had leased field on half produce rent and claiming attachment of other half—Lessee's contention that lease was on rental basis found to be false — Lower Court's order holding that creditors were entitled to all produce held to be improper—Lessee held entitled to half produce.**

On *D* being adjudged an insolvent, one of *D*'s creditors brought a notice of motion alleging that *D* had leased his fields on half produce rent and claiming attachment of the other half which was alleged to belong to *D*. The lessee alleged that the land was let on a rental basis and that he was entitled to all the crops. The lease was found to be sham, and the lower Court passed an order to the effect that the estate was to get the whole produce :

*Held* that the motion being moved on the basis of the fact that the lessee was entitled to half the produce, it was not proper for the lower Court to pass an order which had the effect of bringing the whole of the produce into the estate and that the lessee was entitled to half the produce. [P 248 C 2]

G. R. Pradhan — *for Appellant.*

Y. V. Jakatdar and R. G. Rao — *for Respondents 1 and 3 respectively.*

**Judgment.** — One Doma, son of Soma, was adjudged an insolvent. One of Doma's assets comprised two occupancy fields that were under cultivation. Doma admittedly leased those fields. The question at first arose whether the lease was on a half profit (as the mover alleged) or on a rental basis (as the lessee alleged). The lessee put forward a lease which showed that the land was let on a rental basis. It was then stated by the mover that that lease was a sham. That has been so found. With that finding I am not concerned. The relief given however was as though it followed that the lessee was not a lessee at all. Obviously the conclusion should have been that the real lease was on a half profits basis. Here the notice of motion headed "Claim for Insolvency" was made by one creditor, namely Dhekal (respondent 1 hereto) through his agent Narain. It must be taken that he moved on behalf of creditors generally. The notice of motion stated that the insolvent had leased his two fields Nos. 48-2 and 56-1 to one Rama Teli on a half produce rent, that Doma Teli was accordingly entitled to half the produce and that the crops were ready to be cut in 20 days. The apparent object of the notice of motion was to bring to the notice of the Insolvency Court the fact that half of those crops would become a part of the insolvent's estate. The relief sought is that half the crops may be attached and realized. To that application Rama responded urging that he was entitled not to half but to the whole. In support he put forward a lease reserving a money rent. If that were found to be true, it would mean that Rama was entitled to all the crops. That notice of motion for realising half the crops made by one creditor appears to have been turned by the Court into a title suit which had to determine whether or not a particular lease was a fraud, and it has ended in the lower Appellate Court holding that, despite the affidavit supporting the motion, there was no lease at all, and that therefore the creditors must get more than they asked for, and the estate, instead of getting half the produce, should get the whole.

Some little care, in my opinion, is necessary in disposing of all matters in insolvency which have the effect of deciding the title alleged to reside in third parties so as to defeat such title and bring the property within the estate of the insolvent. The matter once was differently viewed in India from the way that Courts must now view it owing to the decisions of the Privy Council in (1931) A C 67[1] and 9 Rang 170.[2] Further, the extent of S. 7, Presidency Towns Insolvency Act, which is somewhat similar in purpose to S. 4, Provincial Insolvency Act (and has been regarded as allowing the Insolvency Courts in Presidency Towns to consider questions of title), has been the subject of much consideration within recent years, and it may now be regarded as established that only in very simple cases should title suits be in effect disposed of on motion and that normally where there is any real difficulty or dispute, where either an Official Receiver or a creditor is challenging the apparent title of a stranger so as to bring property within the estate of the insolvent, the proper course will be to refer the parties to a suit: 52 Mad 717[3] and 55 Mad 385.[4] Those difficulties, however, do not here really arise because here there is not even a motion before the Court which raises the question of title. There is merely a motion before the Court (in which the mover is called the non-applicant) for the attachment of half the produce of two fields. That motion either fails wholly or in part, or succeeds wholly or in part. It is difficult to see how it could end in an order which has the effect of bringing the whole of the produce into the estate. The original motion was by a person saying that the land was leased on half share basis; the objector said it was leased on a rental basis. It has been decided that it was not leased at all simply because a piece of evidence, a lease on certain terms, has been held to be a sham document.

In appeal before me counsel for Rama only asks that so far as one half of the produce is concerned that should be left with him. In my opinion, he is clearly entitled to that because the motion was moved on the basis that Rama is entitled to a half. The order will be varied accordingly. I am informed that respondents 10 to 12 have died and it is said the appeal abates against them. They are creditors. Their addition and subtraction to the list of parties seems to me to make no difference. The original motion was moved by a creditor on behalf of creditors generally. He could not be allowed to move on any other basis. 27 N L R 179[5] does not apply. This is not an application under S. 53, Provincial Insolvency Act. The costs of this appeal will come out of the estate.

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[1] Official Assignee, Estate of Cheah Soo Tuan v. Khoo Saw Cheow, (1930) 17 A I R P C 265=128 I C 662=(1931) A C 67=100 L J P C 45 =(1929-30) B & C R 270=144 L T 130.

[2] Official Receiver v. P. L. K. M. R. M. Chettyar Firm, (1931) 18 A I R P C 75=131 I C 767=58 I A 115=9 Rang 170 (P C).

[3] Official Assignee, Madras v. Narasimha Mudaliar, (1929) 16 A I R Mad 705=118 I C 506=52 Mad 717=57 M L J 145 (F B).

[4] Chinnappa Mudali v. Official Assignee, Madras, (1932) 19 A I R Mad 167=135 I C 585=55 Mad 385=62 M L J 103.

R.M./R.K. *Order accordingly.*

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[5] Ramchandra v. Ramchandra, (1931) 18 A I R Nag 153=134 I C 687=27 N L R 179 (F B).

## A. I. R. 1938 Nagpur 249

POLLOCK J.

*Motilal Rukhabsa Lad — Plaintiff —* Appellant.

v.

*Mt. Kashibai w/o Sadashivrao Shastri and another — Defendants*—Respondents.

Second Appeal No. 260-B of 1935, Decided on 20th August 1937, from appellate decree of Addl. District Judge, Ellichpur, D/- 31st August 1935.

**(a) Transfer of Property Act (1882), S. 53—One creditor taking all of debtor's property for consideration—Transfer cannot be set aside under S. 53.**

It is open to one creditor to take all his debtor's property and so defeat the claims of other creditors, if he can do so, and such a transfer, if really made for consideration, cannot be set aside under S. 53. Such a transaction can be challenged only in insolvency proceedings : *A I R 1937 Nag 1 ; A I R 1932 Nag 33 and A I R 1915 P C 115, Foll.* [P 250 C 1,2]

**(b) Transfer of Property Act (1882), S. 53—Part of consideration non-existent—Object to defraud creditors—Transfer is wholly void and can be set aside under S. 53.**

A transfer though for a consideration, is wholly void if part of the consideration was non-existent and the result is to place the property beyond the reach of the creditors. Such a transaction falls within the ambit of S. 53 : *A I R 1930 Lah 1027, Foll.* [P 250 C 2]

**(c) Transfer of Property Act (1882), S. 53—Principle applies to moveable property.**

The principle contained in S. 53 applies to transfers of moveable property : *10 Cal 616 ; 30 Mad 6 ; A I R 1914 P C 137 and A I R 1932 Rang 13, Foll.* [P 251 C 1]

**(d) Transfer of Property Act (1882), S. 53—Transfer challenged as bogus and fraudulent—Proof required stated.**

Where a transfer is challenged as bogus and fraudulent, it is open to the person impugning the transfer to allege either that the transfer was a sham transaction executed without consideration and not intended to take effect or that it was a transaction executed for consideration and intended to take effect but made in order to defraud the creditors of the transferor by taking the property out of their reach. [P 249 C 2]

**D. T. Mangalmoorti** — *for Appellant.*

**Dr. D. W. Kathalay**—*for Respondent 1.*

**Judgment.**—This is a plaintiff's appeal arising out of a suit under O. 21, R. 63, Civil P. C., brought by the plaintiff to establish his right to a decree passed in favour of Ramchandra, defendant 2, and ostensibly assigned by him to the plaintiff. Ramchandra obtained his decree on 16th June 1932 for Rs. 1577-6-0 and on 6th July 1932 he executed a document assigning this decree to the plaintiff Motilal for an ostensible consideration of Rs. 1500. In the meantime Laxmibai, defendant 1, had brought a suit on 30th June 1932 against Ramchandra for over Rs. 900 due on a bond; on 8th July 1932 Laxmibai applied for attachment before judgment of the decree obtained by Ramchandra, and on 17th July the decree was attached; an objection by the plaintiff to the attachment was dismissed. Laxmibai pleaded in the usual way that the transfer of the decree was "bogus and fraudulent." I am not sure how far the parties or the lower Courts really appreciated the meaning of these terms. In a case of this sort, it is open to the person impugning the transfer to allege either that the transfer was a sham transaction executed without consideration and not intended to take effect or that it was a transaction executed for consideration and intended to take effect but made in order to defraud the creditors of the transferor by taking the property out of their reach. In this Court the controversy has centred mainly about whether there was consideration or not. The consideration consisted of three principal items: Rs. 1016-10-0 said to have been due by Ramchandra's brother Babya to the plaintiff Motilal, Rs. 300 said to have been due by Ramchandra to Kalyansa, and Rs. 125 said to have been due by Ramchandra to Wardhasa. In the plaintiff's accounts Ramchandra's account was squared up on 9th November 1931, i. e. at Diwali, and these three items were debited to him and Rs. 300 and Rs. 125 were credited to Kalyansa and Wardhasa respectively.

There is a clear finding of fact that Ramchandra's debts to Kalyansa and Wardhasa were fictitious. It has been objected that there was no pleading to this effect. The defendant Laxmibai denied the consideration for the transfer and pleaded that the transfer was "bogus and fraudulent." It was clearly understood by the plaintiff that he had to prove the consideration for the transfer, and no objection on this ground was taken either in the lower

Appellate Court or even in the memorandum of appeal in this Court. The lower Appellate Court's finding has been challenged on the ground that Wardhasa was wrongly disbelieved because he said that Ramchandra borrowed Rs. 125 from him in Adhik Asarh of Sambat 1987. The lower Appellate Court stated that there was no Adhik Asarh in Sambat 1987, and according to the calendar that is strictly correct. It seems however that by Sambat 1987 the witness meant the year ending in Diwali 1931 i. e. Sambat 1987-1988. It is however clear that the lower Appellate Court would have come to the same conclusion in any case, and I think that the grounds given by it for believing that these items were never borrowed are sound. That finding of fact must therefore be upheld.

The next item is Rs. 1016-10-0 owed by Ramchandra's brother Babya to the plaintiff. There is a finding, which is not challenged, that Ramchandra and Babya, neither of whom was examined, were separate. The khata, on which Rs. 1016-10-0 was due, was maintained in the name of Babya alone and the plaintiff contended that Ramchandra was liable for this amount on the ground that they were joint. There was no good reason why Ramchandra should agree to accept liability for his brother's debts when he owed money himself. The lower Appellate Court has remarked that the entry in the plaintiff's accounts could have been made at any time and it is curious that the plaintiff on 9th November 1931 should have agreed to pay off Kalyansa and Wardhasa as at that time Ramchandra had not obtained his decree and was apparently not in a position to pay his debts. There is no clear finding how far the transfer in suit was for consideration. The lower Appellate Court remarked that part of the consideration may be genuine but it is clear that the intention of the parties to the document was to put the decree out of the reach of creditors.

Now it is open to one creditor to take all his debtor's property and so defeat the claims of other creditors, if he can do so, and such a transfer, if really made for consideration cannot be set aside under S. 53, T. P. Act: see I L R 1937 Nag 291[1] and 27 N L R 382[2] based on 43 Cal 521.[3] Such a transaction can be challenged only in insolvency proceedings. Here however there is a finding that there was an arrangement between Ramchandra and the plaintiff, in whose employment he was that Ramchandra should pay off his brother's debt to the plaintiff in preference to his own debt to Laxmibai. It therefore follows that the plaintiff was not the creditor of Ramchandra, for, two of the items were fictitious, one item was a debt due by somebody else, and the rest of the consideration was absorbed by the expenses of executing the document. The result was that Ramchandra's property was placed beyond the reach of his creditors and the transaction therefore falls within the ambit of the principle contained in S. 53, T. P. Act. In the circumstances the plaintiff clearly cannot claim to be a transferee in good faith. The Lahore High Court in 12 Lah 194[4] held that a transaction of this sort is wholly void if part of the consideration was non-existent and the object of it was to defraud the creditors and with that I respectfully agree. The transaction must therefore be set aside. It has been contended that S. 53 applies only to immovable property, and that it has no application to moveable property. In 10 Cal 616[5] the Privy Council held that :

> Whether or not Statute 13 Eliz, Ch. 5, by which all covinous conveyances, gifts and alienations of lands or goods whereby creditors might be in anywise defrauded of their just rights are declared to be void is more than declaratory of the Common law, so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the Common law for avoiding fraudulent conveyances have been given effect to by the High Courts of India and have properly guided their decisions in administering law according to equity and good conscience.

In that case the transfer was one of immovable property before the Transfer of Property Act had become law, but that principle has been applied to transfers of moveable property in 30 Mad 6,[6] which was affirmed in 37 Mad 227[7] and in 9 Rang 614.[8] No decision to the contrary has been cited, and I have no doubt that the principle contained in S. 53 applies to transfers of moveable property. The appeal therefore fails and is dismissed with costs. Counsel's fee Rs. 30.

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[1] Kasturchand v. Wazir Begam, (1937) 24 A I R Nag 1=167 I C 48=I L R 1937 Nag 291.

[2] Uttamrao v. Gangaram, (1932) 19 A I R Nag 33=136 I C 237=27 N L R 382.

[3] Musahar Sahu v. L. Hakim Lal, (1915) 2 A I R P C 115=32 I C 343=43 I A 104=43 Cal 521 (P C).

[4] Madan Gopal v. Lehri Mal-Janki Das, (1930) 17 A I R Lah 1027=130 I C 62=12 Lah 194 =31 P L R 775.

[5] Abdul Hye v. Mir Mohammad Mozaffar Hossein, (1884) 10 Cal 616=11 I A 10=4 Sar 500 (P C).

[6] Chindambaram Chettiar v. Sami Aiyar, (1907) 30 Mad 6=16 M L J 427.

V.B./R.K. *Appeal dismissed.*

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[7] Chindambaram Chettiar v. Srinivasa Sastrial, (1914) 1 A I R P C 137=23 I C 714=37 Mad 227 (P C).

[8] Ah Foon v. Hoe Lai Pat, (1932) 19 A I R Rang 13=135 I C 641=9 Rang 614.

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## A. I. R. 1938 Nagpur 251

VIVIAN BOSE J.

*Ratilal Anant Prasad Chattarpure — Plaintiff* — Applicant.

v.

*Rajaram Ganoba Sonar and another — Defendants* — Non-applicants.

Civil Revn. No. 767 of 1936, Decided on 11th October 1937, from decree of Addl. Judge, Small Cause Court, Amraoti, D/- 14th September 1936.

**C. P. Debt Conciliation Act (2 of 1933), S. 9 (3)—Order under, excluding mortgage deed from evidence in suit by creditor—Order, though effectually precludes suit upon mortgage, does not invalidate mortgage transaction—Creditor cannot fall back on original consideration.**

The effect of an order under S. 9 (3), is not to invalidate the transaction but merely to shut out certain documents from evidence. Where therefore an order is made under S. 9 (3) excluding a mortgage deed from evidence in any suit by the creditor, the order though effectually precludes a suit on mortgage does not invalidate the mortgage but keeps it alive. Hence the creditor cannot fall back upon original consideration and sue on that cause of action. [P 251 C 2; P 252 C 1]

A. R. Kulkarni and M. B. Kinkhede — *for Applicant.*

K. V. Brahma — *for Non-applicants.*

**Order. — The defendants borrowed Rs. 350 from the plaintiff-applicant on the strength of a promissory note dated 10th April 1933. On 19th April 1933, they mortgaged some of their property, also to the plaintiff, and included the amount due on the promissory note as part of the consideration. In 1935 the defendants applied to the Debt Conciliation Board, Amraoti, for the conciliation of their debts including those due to the plaintiff. The defendants were given time to produce their mortgage deed but did not do so. Consequently the Board passed an order under S. 9 (3), C. P.** Debt Conciliation Act, 1933, declaring that the document was not to be receivable in evidence. The applicant applied for review of this order and then produced the promissory note as well as the mortgage deed. But the Debt Conciliation Officer rejected the application and also passed an order stating that the promissory note was not to be receivable in evidence either. The effect of these orders is that neither of these documents can now be received in evidence. Under S. 9 (1) of the Act every creditor submitting a statement of the debts owed to him has at the same time to produce all documents on which he relies in support of his claim. The promissory note was relevant to prove the consideration for the mortgage, or to be more accurate, a part of it. Therefore it should have been produced when the statement was submitted. As it was not produced the Debt Conciliation Officer had power to act under S. 9 (3) and since he has done so the effect of his order is to exclude both the mortgage deed and the promissory note from evidence in any suit brought by the creditor against the debtor. That order cannot be challenged here.

That effectually precludes a suit upon the mortgage and also precludes a suit upon the promissory note assuming such a suit would lie. But the creditor, who is the plaintiff applicant here, states that he need not rely on either of these documents and that he has the option of falling back upon the original debt and suing upon that cause of action. The question is whether he can do so. First of all it is to be observed that the Debt Conciliation Act does not extinguish the liability in such circumstances: all it says is that these documents shall not be receivable in evidence. Therefore the matter has to be decided under the general law. It is well settled, at any rate so far as this Court is concerned, that if a plaintiff's claim upon a promissory note fails he can usually fall back upon the original consideration and sue upon that provided it is otherwise open to him to do so. Will this rule apply equally to a mortgage? In my opinion it might in certain cases where the mortgage fails as a mortgage but as I view the law it cannot so long as the mortgage is still alive. **Under S. 68, T. P. Act, the mortgagee has a right to sue for the mortgage money only in the cases specified thereunder "and in no others". One of those cases is when the mortgagor binds himself to repay the** money. But that can only be ascertained by reading the deed itself and if for any reason the deed is excluded from evidence then under S. 91, Evidence Act, no extraneous evidence can be given of its terms. None of the other conditions mentioned in that section obtain here and so, in my opinion, the mortgagee's only remedy is on his mortgage.

If the mortgage deed had been invalid or shut out from consideration only for a particular purpose and left intact for all collateral purposes, as in S. 49, Registration Act, it is possible that other considerations would apply, but as I have said the effect of an order under S. 9 (3), Debt Conciliation Act, is not to invalidate the transaction but merely to shut out certain documents from evidence. Therefore so long as the mortgage is in being as a mortgage it is clear the rights and liabilities of the parties must be worked out on the basis of the mortgage and of nothing else. I can conceive of cases where when the later transaction fails or becomes inoperative or is held not to bind the mortgagor the former is revived. That is what occurred in 39 All 178.[1] Their Lordships of the Privy Council remarked that when the mortgagor had successfully resisted a claim on the mortgage on the ground that the mortgage did not bind him he could not in a subsequent suit based on an original consideration be allowed to claim the benefit of that mortgage as a release from the prior transaction : naturally not; if the mortgage was inoperative against the mortgagor it was so for all purposes. It could not both be in being and yet not be in being so far as he is concerned. But that is not the case here. It has never been the case of the defendants that the mortgage was not valid or that it did not bind them; nor has it been so found, nor is the effect of an order under S. 9 (2) to invalidate the transaction. Another decision along those lines is to be found in 59 Mad 44,[2] where it was contended that a mortgage had been extinguished by a subsequent sale deed. It turned out on investigation that the sale deed had become inoperative so far as the shares in suit were concerned and so the plaintiff was allowed to fall back on the earlier transaction. But the learned Judges remarked at page 48 that :

> It is true that a party cannot rely on a later transaction and keep it valid for some purpose and also fall back on the earlier transaction.

I would add to this that it is not open to a party to a contract to destroy it by some unilateral act on his part. If his opponent does so and he exercises his option of avoiding it that of course is another matter and so also if the law avoids it for him or renders it inoperative, but so long as the later contract is alive and in full force it is impossible to allow the party to it to ignore it and fall back upon an earlier transaction simply because it suits him to do so. I respectfully agree with the decision in 63 Cal 194[3] on this point. The mere failure of the other side to carry out his undertaking on the second contract does not destroy it and so unless the second contract expressly or impliedly makes it a part of the bargain that this in itself will give the plaintiff a right to fall back upon an earlier transaction which the later replaces and discharges he cannot do so. The position is entirely different when the later contract ceases to exist as a contract whatever the reasons.

I am not drawing any distinction between a contract of mortgage and one on a promissory note except in so far as S. 68, T. P. Act, makes a difference. The general rule is the same in all classes of cases. In the rulings dealing with promissory notes it is to be observed that the documents sued on were ineffective or inoperative for one reason or another; that is to say that they did not at the date of suit constitute legally valid contracts. Thus in 29 N L R 131[4] the note was improperly stamped and therefore was incapable under the law of effecting the contract it purported to bring into being. In 27 N L R 327[5] the instrument was incapable of negotiation and so was ineffective to bring into being the contract upon which the plaintiff sued. In 6 N L R 125[6] the note was subsequently dishonoured by the defendant, which means that the defendant refused to treat the document as a valid contract. As I have said if a party to the contract repudiates it the other side has the option of rescinding it and in any case when the matter comes to Court the party at fault would not be allowed both to affirm and disaffirm. It is unnecessary to pursue this any further.

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[1] **Har Chandi Lal v. Sheoraj Singh, (1916) 3 A I R P C 68=39 I C 343=44 I A 60=39 All 178 (P C).**

[2] **Polayya Dora v. Anantha Patro, (1936) 23 A I R Mad 61=160 I C 757=59 Mad 44=69 M L J 903.**

[3] **Brijmohan v. Mahabeer, (1935) 63 Cal 194=166 I C 781=40 C W N 808.**

[4] **Lal Bahadur Singh v. Gulam Yasin, (1933) 20 A I R Nag 57=144 I C 745=29 N L R 131.**

[5] **Gulabgir v. Nathmal, (1932) 19 A I R Nag 23 =137 I C 33=27 N L R 327.**

[6] **Gokuldas v. Parmanand, (1910) 6 N L R 125 =8 I C 281.**

So far as this particular case is concerned another consideration also arises. It is the object of the Debt Conciliation Act to effect a settlement between a debtor and his creditors so that the debtor can start afresh and the creditors be paid rateably. It is desirable that such settlements should be effected as speedily as possible and so somewhat drastic provisions have been inserted in the Act. If a creditor was allowed to evade them by the simple process of refusing to produce his documents it would render these provisions largely nugatory. Of course the Act has to be construed according to its tenor and the fact that undesirable consequences that might ensue cannot be allowed to influence the plain meaning of unambiguous provision, but Courts are naturally reluctant to bring about such a result unless forced to do so. The decision of the lower Court is right and the application is dismissed with costs. Counsel's fee Rs. 25.

D.S./R.K. *Application dismissed.*

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## A. I. R. 1938 Nagpur 253

STONE C. J. AND PURANIK J.

*Ganeshprasad Bhadelal Baniya and another — Defendants 1 and 2* —**Appellants.**

**v.**

*Bhaiyalal Gillelal Agarwal, Plaintiff and another, Defendant 3* — **Respondents.**

**Second Appeal No. 539 of 1935, Decided on 15th September 1937, from appellate decree of Dist. Judge, Jubbulpore, D/- 3rd September 1935.**

**Transfer of Property Act (1882), S. 54 — Date on which sale takes effect is date of execution and not date of registration of instrument — Sale of property under managment of Collector under Sch. 3, Civil P. C., without written permission of Collector is nullity — Sale does not become valid merely because instrument of sale is registered on date when property has ceased to be under management of Collector.**

**In case of a sale, as in the case of gift, the date on which the transfer takes effect is the date of the instrument and not the date of the registration of the instrument. [P 253 C 2]**

Where, therefore a sale is effected of property which is under the Collector's management under Sch. 3, Civil P. C., without the written permission of the Collector, such a sale is a nullity and the fact that the property has ceased to be under the management of the Collector on the date on which the instrument of sale is registered will not render the sale valid. The nullity cannot be turned into an effective transfer simply by registration of an ineffective transfer at a date after the Collector has ceased to function : *A I R 1927 P C 42; A I R 1928 P C 86 and A I R 1918 P C 168 Foll.* [P 254 C 1]

M. R. Bobde — *for Appellants.*

E. M. Joshi — *for Respondent No. 1.*

**Judgment.** — This second appeal raises a point of law that can be shortly stated. A sale was effected on the 23rd August 1933 on which date the sale deed was executed. That sale deed was registered on 26th August 1933. On the 23rd, but not on the 26th, August the property was under the Collector's management, and accordingly, Para. 11, Sch. 3, Civil P. C. applied. The subject-matter of the sale was accordingly property which the judgment-debtor was unable to alienate without the written permission of the Collector. Admittedly, no written permission was given. The sale on 23rd August 1933 without the Collector's permission was a nullity. The learned Judge held, however, that the date of the transfer was not the date of the sale but was the date of the registration, and therefore took place on a date when no permission was required. That view was, for a long time, held by several of the High Courts in India, but it is no longer tenable since the decisions of the Privy Council in 50 Mad 193[1] and 52 Bom 313.[2] Those decisions, it is true, relate to gifts, but we see no way of distinguishing sales. Both under S. 123 and S. 54, T. P. Act the transaction, in one case of gift and in the other case of sale, is stated to be capable of being made only by a registered instrument. Nevertheless, their Lordships of the Judicial Committee have decided, bearing in mind in particular S. 47, Registration Act, that the date on which the transfer takes effect is the date of the instrument. Their Lordships express themselves at pp. 199 and 200 of 50 Mad as follows :

> They are unable to see how the provision of S. 123, Transfer of Property Act can be reconciled

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1. Kalyanasundaram Pillai v. Karuppa Mooppanar, (1927) 14 A I R P C 42=100 I C 105= 54 I A 89 = 50 Mad 193 (P C).
2. Venkatasubba Shrinivas. v. Subba Rama, (1928) 15 A I R P C 86 = 108 I .C 367 = 52 Bom 313 (P C).

with S. 47, Registration Act, except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place.

Doubtless difficulties may arise in cases of insolvency as was pointed out in A I R 1935 Lah 565.[3] As to the way to resolve those difficulties, that can be dealt with when the point arises. If the sale is not postponed until registration then, in this case, there was an attempted alienation on 23rd of August. That alienation was a nullity: 14 N L R 181.[4] That nullity cannot be turned into an effective transfer simply by registration of an ineffective transfer at a date after the Collector had ceased to function. In our opinion therefore the appeal succeeds with costs, and the trial Court's decree is restored.

R.M./R.K. *Appeal allowed.*

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[3] Lakhmi Chand v. Kesho Ram, (1935) 22 A I R Lah 565=158 I C 226 = 38 P L R 191 = 16 Lah 735 (F B).

[4] Gaurishankar Balmukund v. Chinumiya, (1918) 5 A I R P C 168=48 I C 312=14 N L R 181 =45 I A 219=46 Cal 183 (P C).

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## A. I. R. 1938 Nagpur 254

VIVIAN BOSE J.

*Kalyanji Kuwarji* — *Plaintiff* — Applicant.

v.

*Tirkaram Sheolal and others* — *Defendants* — Non-applicants.

Civil Revn. No. 229 of 1936, Decided on 31st August 1937, from order of 4th Addl. Dist. Judge, Akola, D/- 27th January 1936.

**(a) Principal and Agent—Accounts—Suit for — Suit arises only if parties are in fiduciary relationship.**

A suit for account is founded on the right of the plaintiff to receive an accounting from the other party. Such a right can only arise if the parties are in a fiduciary relationship to each other. [P 255 C 1, 2]

**(b) Contract Act (1872), S. 182 — Commission agent—How far agent within S. 182.**

Commission agents are agents within S. 182 but are not agents pure and simple. They are agents upto a point and to that extent they stand in a position of active confidence towards their principals, but beyond that they are not agents in the real sense of the term and the relationship between the parties from then on is one of debtor and creditor: *43 L T 171; (1871) L R 6 Ch 397 and 30 Bom 205, Foll.* [P 255 C 2]

**(c) Contract Act (1872), Ss. 182 to 238 — Act is not exhaustive regarding law of agency.**

The Contract Act does not draw fine distinction between different classes of agents, but the Act is not exhaustive and so far as the law relating to agency is concerned, it merely lays down general principles in wide and general terms. [P 255 C 2]

**(d) Contract Act (1872), S. 182—Definition is very wide.**

Definition of agent given in S. 182 is very wide and embraces a servant pure and simple. All the agents therefore cannot be placed in the same category. [P 255 C 2]

**(e) Contract Act (1872), S. 182 — Commission agent receiving goods as such and then selling them—He is agent up to date of sale — His position after that depends on his authority to sell in his name and pass valid title in his own right.**

Where a person receives goods from another as a commission agent and then sells them for him, he is an agent up to a certain point that is up to the date of the sale. Thereafter whether he still continues as an agent or the relationship is that of a debtor and creditor depends on whether the commission agent when he sells has authority to sell in his own name and whether he has authority in his own right to pass a valid title. If he has authority to sell and also authority to pass a valid title in his own right, he is acting as a principal *vis-a-vis* the purchasers and not merely as an agent and therefore from that point on, he is debtor of the erstwhile principal and not merely an agent. Whether this is so or not must depend on facts in each particular case. [P 256 C 1]

**(f) Evidence—Account books — Accounting no part of cause of action — Omission to produce account books—Effect of.**

Although accounting qua accounting is not a part of the cause of action in a suit, omission to produce accounts by a defendant, even though the burden were on the plaintiff may in conceivable circumstances prove fatal to the defendant: *A I R 1917 P C 6, Ref.* [P 256 C 2]

W. B. Pendharkar — *for Applicant.*

V. K. Rajwade — *for Non-applicants.*

**Order.** — The only question for determination in this revision is whether the Khamgaon Court has jurisdiction to try the present case. Both the lower Courts hold it has not. The plaintiff is a merchant who deals in the purchase and sale of grain and cotton seed. The defendants who reside and carry on business at Sonpat in the Punjab are also merchants who act as commission agents in respect of these commodities. When one of the plaintiff's agents, Hokarmal, was at Sonpat he entered into an agreement with the defendants at Sonpat on behalf of his principal for the sale of grain and cotton seed. The arrangement was this: the plaintiff was to send the defendants consignments of these goods from time to time from Khamgaon; the defendants were to keep these goods with them and await instructions from the plaintiff about the sale; then as soon as the plaintiff gave them the word they were to sell and in due course hand over the sale proceeds to the plaintiff less their commission charges: the money however was not to be paid at Khamgaon but at Delhi. These are the facts found by the Appellate Court and must of course be accepted here. They are not disputed except as regards the place of payment. As regards that the method of payment was this: The defendants were to send the plaintiff accounts from time to time of the various sales made by them. The plaintiff was then to draw hundis on one Thakurdas of Delhi and the defendants guaranteed that Thakurdas would honour these hundis. Of course the question arises whether this was payment to the plaintiff at Khamgaon or at Delhi. The plaintiff admitted that he had to bear the commission charges on the hundis and so it is clear that the nett amount which he actually received was not the full amount due from the defendants but that sum less the commission charges on the hundis. The lower Courts deduce from this that Thakurdas was acting as the plaintiff's agent for the purposes of receiving these payments and therefore held that the payment was to be at Delhi. This conclusion is eminently reasonable and cannot be questioned in revision. So far as delivery is concerned, it was clearly to be at Sonpat. The plaintiff engaged the defendants to sell these goods for him and of course the defendants could not do this until they actually received the goods; indeed according to the plaint, the contract was that the goods were not to be sold till the plaintiff gave permission; till then, they were to be stored by the defendants. Therefore we have the position here that the defendants reside at Sonpat, that the contract was made at Sonpat, that delivery was to be at Sonpat, that the sales were to be effected at or from Sonpat and that the money was to be paid at Delhi. None of these ingredients invest the Court at Khamgaon with jurisdiction. Then is there anything else which does? To determine that we must first ascertain the nature of the suit.

The defendants, as I have said, were employed by the plaintiff to sell goods for them as commission agents and so at first sight would appear to come within the definition of agent given in S. 182, Contract Act. In that event the suit would of course be by a principal against his agent, and at one time I thought it was a suit for accounts, at any rate, so far as the primary relief is concerned. If that were so, then the place where the accounts were to be rendered would be an important ingredient in the cause of action, for a suit for accounts is naturally founded on the right of the plaintiff to receive an accounting from the other party. But such a right can only arise if the parties are in a fiduciary relationship to each other. Commission agents are of course agents up to a point and to that extent they stand in a position of active confidence towards their principals, but beyond that they are not agents in the real sense of the term and the relationship between the parties from then on is one of debtor and creditor. This distinction is to be found in Blackwood Wright's Principal and Agent, page 123:

> A commission agent is not bound to keep separate accounts at his banker's for he is not a fiduciary agent, and the moneys he receives are his own; since, by custom of trade, he is only liable as debtor to his employer for the amount received, and he often makes advances in anticipation of receiving the proceeds of the sale.

The learned author then quotes a passage from the judgment of Jessel, M. R. in (1881) 43 L T 171.[1] Unfortunately the report is not available here and so I am obliged to rely upon this extract from the judgment as reproduced in Blackwood Wright's book:

> A commission agent is liable to the consignor of the goods for the amount received, and in the ordinary course of business he makes advances to the consignor, for which he charges interest and debits himself with the amount received when they are received and credits himself with interest on the other side of the account; so that the real transaction between the parties is for the consignor to treat such consignee as creditor for his advances and interest and to regard him as debtor for the amount received and interest.

Similar remarks founded on the same case are to be found in Bowstead on Agency, 8th Edn., p. 152 and also in Story on Agency, p. 305. The Contract Act, it is true, does not draw this fine distinction between different classes of agents but the Act is not exhaustive and so far as this part of the law is concerned it merely lays down general principles in wide and general terms. For instance the definition of agent given in S. 182 is wide enough to embrace a servant pure and simple, even a casual employee; a man who is engaged by me in the streets to black my boots; but it cannot for a moment be contended that they are therefore all to be placed in the same category; also in any case, I am of opinion, that, so far as the sales in this case are concerned, the defendants were not acting on behalf of the plaintiff but on behalf of themselves. The intention was that the plaintiff would look to the commission agents and the commission agents to the persons to whom they sold. No privity of contract was intended to be established between the plaintiff and the purchasers as would have been the case in a case of agency pure and simple.

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[1] Kirkham v. Peel, (1881) 43 L T 171.

The fact that a person who receives goods from another as a commission agent and then sells them for him may be an agent up to a certain point, that is up to the date of the sale, and thereafter be a debtor pure and simple was recognized by Mellish, L. J. in (1871) 6 Ch 397.[2] This principle was applied to India in the case of pakka adats by Sir Lawrence Jenkins C. J. in 30 Bom 205[3] at p. 217. Story has collected a number of similar instances in his Work on Agency, p. 200. In my opinion the same rule applies here. Of course this must not be carried too far. I am not laying down any general principle. I am confining myself strictly to the facts which arise in this case. The test to my mind is this : does the commission agent when he sells have authority to sell in his own name ? Has he authority in his own right to pass a valid title ? If he has then he is acting as a principal *vis-a-vis* the purchasers and not merely as an agent and therefore from that point on he is a debtor of his erstwhile principal and not merely an agent. Whether this is so or not must of course depend upon the facts in each particular case. It may be that these terms will be found to exist in most commission agency cases, but again there may be cases in which they are absent and in which the relation of principal and agent continues to the end. Therefore my observations must not be carried beyond the facts of this case.

So far as this case is concerned, we know that the plaintiff and the defendants are both merchants each dealing in the same commodities. We also know that commission agents in general deal with a large number of what I may call principals scattered throughout India and sometimes abroad. It can hardly be supposed that the customers who come to their shops, say in Sonpat as here, for purchasing a given quantity of cotton seed or grain look beyond them to these other persons resident elsewhere or deal with them otherwise than as principals in their own behalf. A customer in such circumstances can scarcely be expected to ask or know or even care who is the owner of each handful of grain he purchases ; in fact, it may well be that the commission agents themselves do not know once they have bought the grain from their godowns and mixed it with other stock which is being retailed in their shops ; nor would the principals care who these purchasers are. Their contracts are with the commission agents and ordinarily no privity is established between the principals and the ultimate purchasers. In general there is nothing to prevent these commission agents from purchasing the commodities themselves at the price named by their principals and then selling thereafter at a profit to themselves. This profit they would be entitled to retain. A mere agent could not do that. Looking then to the general dealing between the parties in this case, looking to the fact that these conditions are the usual conditions upon which commission agents operate and to the fact that the defendants were themselves grain and seed merchants actually running a shop, I am clear that the understanding between the parties was that the defendants were to sell the grain and cotton seed in their own right and be responsible to the plaintiff as debtors for the sale-proceeds less their agency charges.

Once that is accepted, then the relationship of principal and agent ceases and the plaintiff's right to claim an accounting as a principal against his agent goes. In that case the accounting qua accounting is no part of the cause of action. I do not say that it is relevant. I do not say that the defendants would not fail if they omitted to produce their accounts. They might in conceivable circumstances, even if the burden were on the plaintiff, though, of course, I say nothing about that here : *see* 40 Mad 402[4] at p. 408. But all that would merely be a matter of proof. It would not constitute a material part of the cause of action. It follows from this that the lower Courts have decided the case aright. The Khamgaon Court has no jurisdiction. The application is therefore dismissed with costs. Counsel's fee Rs. 30.

V.B./R.K. *Application dismissed.*

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[2] Ex parte White ; In re Nevill, Jourdain & Co., (1871) 6 Ch 397=40 L J Bk 73=24 L T 45=19 W R 488.

[3] Bhagwandas v. Kanji, (1906) 30 Bom 205=7 Bom L R 611.

[4] Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, (1917) 4 A I R P C 6=39 I C 659=44 I A 98=40 Mad 402 (P C).

### * A. I. R. 1938 Nagpur 257

STONE C. J. AND PURANIK J.

*Rinsa Ansa Teli* — Plaintiff — Appellant.

v.

*Mohanlal Madangopal Marwari* — Defendant 2 — Respondent.

Second Appeal No. 1-B of 1935, Decided on 21st October 1937, from appellate decree of Dist. Judge, Amraoti, D/- 4th October 1934.

*** Transfer of Property Act (1882), S. 55 (1) (g) and sub-s. (2)—*A* mortgaging to *R* and subsequently to *P* by way of second mortgage —*P* assigning to *G*—*R* suing *A* without impleading *P* or *G* and obtaining foreclosure decree—*R* selling to *X* property as free from incumbrances—*X* mortgaging it to *Y* on same understanding — Subsequently *G* obtaining decree in suit on his mortgage—*Y* held could recover damages from *R's* representative for breach of covenant — Measure of damages stated.**

*A* mortgaged to *R* and subsequently to *P* by way of second mortgage. *P* assigned to *G*. Later on, *R* sued *A* without impleading *P* or *G* and obtained a foreclosure decree and then sold to *X* as a property free from incumbrances. *X* mortgaged it to *Y* also as unincumbered estate. Subsequently *G* sued on his mortgage and obtained a decree. The question was whether *Y* the mortgagee of *X* was entitled to pursue the remedy which *X* had against his vendor *R* on the covenant for freedom from incumbrance :

*Held* that the question was to be decided according to the principle of S. 55 because what the Court was concerned with was the rights not of a mortgagee but of a person against not a mortgagor but a vendor. Linking up sub-s. (2) clause beginning " the benefit of the contract mentioned in this rule " with sub-section (1) (g) *R* must be deemed to have contracted with *X* that he had power to transfer and that the property was free from incumbrances. The benefit of this contract passed to *Y*, the mortgagee from *X*, and hence *Y* could recover damages for the breach of the covenant from the representative of *R* who was primarily liable to the extent of loss caused by the fact that *P's* mortgage was outstanding in the hands of *G* : *A I R 1922 P C 176, Foll.*
[P 258 C 1, 2 ; P 259 C 1, 2]

*Held further* that measure of damages was not the amount of the debt for the securing of which the property was mortgaged but the value of the security. But *Y* had only a part interest. If the value of the subject-matter exceeded the debt, *Y's* claim against *R's* representative would be limited to his debt, though had *X* sued *R's* representative, the liability would be greater. If the value of the subject-matter was less than the debt, the damage would be the value of the subject-matter. [P 259 C 2]

**M. R. Bobde, K. B. Tare and W. B. Pendharkar** — *for Appellant.*

**R. N. Padhye** — *for Respondent.*

**Judgment.** — This case raises a point of some interest. There is a somewhat complicated title to the property in suit which can be stated as follows : *A* stands for the owners of the subject-matter of a mortgage. On 29th April 1913, *A* mortgaged to one Rupram by a registered mortgage. At a later date, viz. 25th June 1913, *A* mortgaged by way of second mortgage to Pratapchand who assigned to Godadmal. At a later date, some time in 1916, Rupram sued the mortgagors *A* without impleading either Godadmal or Pratapchand, and obtained a foreclosure decree. Possession was obtained on 10th December 1917. Rupram sold to defendant 1 on 29th March 1919 and defendant 1 mortgaged to plaintiff on 27th February 1922. Rupram has died and his representative-in-interest is defendant 2. Godadmal sued defendant 2, defendant 1 and plaintiff in 1926, when it became known for the first time to defendant 2, defendant 1 and plaintiff that Godadmal had an interest in this property. Godadmal obtained a decree and the property was lost. The property was sold by Rupram to defendant 1 as a property free from incumbrances and was mortgaged by defendant 1 to plaintiff as an unincumbered estate. The second mortgagee has succeeded in establishing priority of title and his debt exhausts the security. No one disputes that on the above facts the plaintiff is entitled to a decree against defendant 1 personally. Such a decree would however be infructuous, and the question arises : Is the plaintiff also entitled to pursue the remedy which defendant 1 has against his vendor on the covenant for freedom from incumbrance ? The answer to that question turns upon three questions : (1) whether the benefit of an implied covenant is annexed and incident to, and goes with the interest of the implied covenantee ; (2) whether, if so, it can be enforced by every person in whom that interest in whole or in part is vested, and (3) whether, assuming the answers to questions (1) and (2) are yes, a mortgagee has vested in him a part of the implied covenantee's interest.

The questions find their answer in the construction of S. 55, T. P. Act. That section, it will be noted, is concerned with sales. It was accordingly argued that in considering the mortgagee's rights here against his mortgagor's vendor we are concerned with the rights of a mortgagee and should look not to S. 55, but to Ss. 65, 66 and 68. For reasons which will appear hereafter, we are of the opinion that this is not sound. We are concerned with the rights, not of a mortgagee, but of a person, against not a mortgagor but a vendor. It is a " person " against a " vendor "; not a " mortgagee " against a " mortgagor. " By S. 55 (1) (g) a vendor is bound, inter alia, (subject to a contract to the contrary, not here present)

> to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

By S. 55 (2), T. P. Act:

> The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same :
>
> Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered, or whereby he is hindered from transferring it.
>
> The benefit of the contract mentioned in this rule shall be annexed to, and shall go with the interest of the transferee as such and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time, vested.

It will be noticed that there is a reference to "this rule" in sub-s. (2), and it is not entirely clear what rule is referred to; but it would appear to refer to the implied contract mentioned in S. 55 (2) and not merely in the proviso. If it were the implied contract referred to in the proviso that is meant, then the vendor here (Rupram) would be deemed to have contracted with defendant 1 that he has done no act whereby the property is incumbered or whereby he is hindered from transferring it. In point of fact, Rupram had done no act incumbering the property. The person that had incumbered the property was not Rupram but Rupram's mortgagors *A*. It might be an interesting question whether under the old Conveyancing Act 1881, in England, the implied covenant for right to convey quiet enjoyment, freedom from incumbrance and further assurance, not being unqualified covenant amounting to an absolute warranty of title, would avail the plaintiff against Rupram's representative in interest: see (1893) 1 Ch 523[1] at pp. 531 et seq. But here the position is fixed by S. 55, T. P. Act, and it becomes a question whether one can link up sub-s. (2) clause beginning "The benefit of the contract mentioned in this rule" with sub-s. (1) (g) which does not relate to any "contract" but details one of the duties imposed on the vendor by the fact that he is a vendor and that there is no contract to the contrary.

In an endeavour to thus link up S. 55 (1) (g) with the provision annexing the implied contract to the interest of the transferee, reference was made to A I R 1922 P C 176.[2] There, their Lordships of the Judicial Committee observe as follows :

> The purchase deed contained the express declaration that the property was sold free from incumbrances and consequently by S. 55 (1) (g), sub-s. (2) (sic), T. P. Act the vendor must have been deemed (sic) to contract with the buyers that he had power to transfer the property so sold, and consequently that the property was free from burdens.

We do not understand that this conclusion turns upon the fact that there was an express covenant in that case. Whether expressed or not, the law implies such a covenant and in either case the covenant has the same weight. The "contract" that is "mentioned in this rule" must be either the contract referred to in S. 55 (2) or the contract referred to in S. 55 (2) proviso both of which contracts are implied if not expressed and the expressing of them would not alter their effect or turn what would be a qualified covenant into an unqualified covenant.

The observation in A I R 1922 P C 176[2] is not obiter. It is the fundamental proposition upon which the case turns and it is therefore binding on us. Thus, following the Privy Council, we conclude that Rupram must be deemed to have contracted with defendant 1 that he had power to transfer and that the property was free from incumbrances. Does the benefit of this contract pass to plaintiff? In view of the above decision of the Judicial Committee, we take it that this contract, which we are told must be deemed to have been made, is the contract referred to in S. 55 (2), i. e., the contract "mentioned in the rule", and it will therefore be annexed to and go with "the interest of the transferee as such". If that be so, it may be enforced by a limited class of persons. Does that class

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1. **David v. Sabin, (1893) 1 Ch 523=62 L J Ch 347=2 R 342=68 L T 237=41 W R 398.**

2. **Nathu Khan v. Burtonath, (1922) 8 A I R P C 176=66 I C 107 (P C).**

include a mortgagee from the transferee? The words "as such" will be noted. The words "in whom that interest is" are important. It is argued that this means that the class is restricted to purchasers from the purchaser-transferee and does not include persons whose interest is different from that which passes on sale. This, however, leaves out of account the words "for the whole or any part thereof." Those words are, in the argument, explained as meaning "for the whole or any part of the subject-matter of the transfer". That however is not their grammatical meaning. The words "or any part thereof" refer to "interest" not to subject-matter. The section of the Transfer of Property Act is seeking to do what S. 76 of the Law of Property Act, 1925, does in England. The form of the two Acts, however, is different and the English Act appears to be, on this point, much more clearly drafted. There can be no possible doubt the Parliament in England, when it legislated and used the words "in whom that estate or interest is, for the whole or any part thereof" meant any part of the estate or interest whether that estate or part thereof was created by a conveyance by way of sale, lease, mortgage, settlement, etc. If that estate or interest is split up part going to *A* and part going to *B*, *A* or *B* or both may enforce the implied covenant. We are accordingly of the opinion that the plaintiff can recover from defendant 2. There was an attempt made to show that the plaintiff's remedy was barred by limitation. We are of the opinion that there is nothing in this.

It remains to consider the quantum of damages. It is said that the plaintiff should exhaust his remedy first against defendant 1 and should only have a decree for the difference between what he recovers and what his debt is. It is also said that plaintiff should, immediately he knew of the existence of the outstanding mortgage interest, have paid off the mortgagees, without incurring any costs and the amount it would have cost him to pay off the mortgagee is the measure of his damage which damage should first be recovered from defendant 1 and only the deficit from defendant 2. It is further urged that the most that can be recovered is the value of the subject-matter.

As to the first point, we are of the opinion that defendant 2 is clearly liable to defendant 1 under the implied contract. Plaintiff, having a part of defendant 1's interest under his mortgage, can enforce that right. Defendant 2 and not defendant 1 is therefore primarily liable to the extent of the loss caused by the fact that Pratapchand's mortgage was outstanding in the hands of Godadmal.

As to the measure of that damage, Rupram's representative was a party to the suit brought by Godadmal. He allowed a foreclosure decree to be passed. The obligation was upon him under the provisions of S. 55 (1) (g) to pay off that mortgage. He failed to do so and as a result the whole property was taken. There has thus been a complete loss of the security. That is the measure of the loss. That is to say, the measure of loss is not the amount of the debt for the securing of which this property was mortgaged but the value of the security. But plaintiff has only a part interest. If the value of the subject-matter equals the debt, there is no difficulty. If the value of the subject-matter exceeds the debt, the plaintiff's claim against defendant 2 will be limited to his debt, though, had defendant 1 sued defendant 2, the liability would be greater. If the value of the subject-matter is less than the debt, the damage will be the value of the subject-matter. If this can be agreed, well and good; if not, there must be a remand for the purpose of ascertaining the damage in accordance with the above observations. The matter can be mentioned this day fortnight when final orders or a remand order will be passed as the case may be. No agreement on the question of value. Remanded accordingly. Two months 10 days for objections.

D.S./R.K. *Case remanded.*

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## * A. I. R. 1938 Nagpur 259

STONE C. J. AND PURANIK J.

*Madhorao Narayanrao Ghatate* — Appellant.

v.

*Harinath Bhikaji Baxi and another* — Respondents.

Second Appeals Nos. 22 and 54 of 1935, Decided on 22nd October 1937, from appellate order of Dist. Judge, Nagpur, D/- 19th November 1933.

*** Surety — Appeal by judgment-debtor against decree—Execution stayed on judgment-debtor's providing surety for due performance of any decree likely to be passed against him**

**by Appellate Court—Surety using wrong Form instead of Form 2, App. G, Sch. 1, Civil P. C. — Appeal and second appeal dismissed—Court held had power in equity to correct bond and direct decree-holder to proceed first against judgment-debtor—Costs of second appeal held could not be added to decree amount.**

A judgment-debtor appealed from a decree. Pending appeal, execution was stayed on the appellant furnishing security for the due performance of any decree or order that might be passed against him by the Appellate Court. There was in fact a second appeal. Both the appeals were dismissed. The surety for the judgment-debtor had, through mistake of some official of the Court, used the Form 3 App. G, instead of Form 2, App. G, Sch. 1, Civil P. C.:

*Held* that owing to the use of a wrong Form the document did not correctly represent the contract. Though S. 92, Evidence Act, applied to the document, the case being one of palpable error, equity sanctioned the admission of evidence to expose the error. Moreover as the error and negligence was on the part of some official of the Court in using the wrong Form, the Court could correct its officer's error without driving the persons affected to proceed under S. 31 of the Specific Relief Act.

*Held further* that on the bond as it stood the surety was under no liability at all. The bond had to be corrected before the surety became liable. The Court was therefore entitled, while correcting the bond, to direct the decree-holder to pursue his remedy first against the judgment-debtor before executing the decree against the surety. [P 261 C 1]

*Held also* that the costs of the second appeal could not be added to the decree amount to secure which the bond was given : *A I R 1919 P C 55, Expl. A I R 1935 Lah 21, Dissent.* [P 261 C 2 ; P 262 C 1]

G. J. Chati—*for Appellant.*

A. V. Khare—*for Respondent 1.*

**Judgment.** — These second appeals, (Second Appeals Nos. 22 of 1935 and 54 of 1935), the one by the surety, the other by the decree-holder, arise out of the same order. By the one (S. A. No. 54 of 1935) the surety seeks to set aside that part of the order appealed from which varied the surety bond; the decree-holder appeals (S. A. No. 22 of 1935) against that part which directed him to exhaust his remedies against the judgment-debtor before proceeding against the surety and which refused to add the costs of second appeal to the decree amount to secure which the bond was given. The facts are simple. A decree having been obtained, the judgment-debtor appealed. Pending the appeal, execution was stayed on the appellant furnishing security for the due performance of any decree or order that might be passed against him by the Appellate Court. There was in fact a second appeal. Both appeals were dismissed.

The appropriate form, in such a case, is Form 2, Appendix G, Sch. 1, Civil P. C. The actual form used and executed by the surety is Form 3, Appendix G. That form is quite inappropriate. By it the surety was obliged to pay if (a) the decree is reversed or varied (b) the decree-holder fails to (i) restore property taken in execution or (ii) act in accordance with the decree or pay anything payable thereunder. That was the bond the surety executed. It had the effect of making him a surety for the decree-holder. In point of fact, he was not asked to be surety for the decree-holder. There was no application by a decree-holder for execution. There was an application by a judgment-debtor for stay of execution. It was on the application of the judgment-debtor that security was ordered. It was in respect of that order that this surety executed this security bond. Obviously, such a bond was of no force and effect as it stood. The question then arises whether the Court has power to alter it.

It is said that this security bond can be fundamentally altered because it is not merely a contract but a "step in procedure" wherein a slip has been made which slip can be corrected under the slip section (S. 153, Civil P. C.), alternatively under the inherent power of the Court (S. 151) or under S. 152. In 52 Bom 72,[1] where the Bombay High Court had under consideration the question whether a security bond affecting an interest in immovable property requires registration, their Lordships came to the conclusion that a security bond does not require registration because it is "a step in the judicial procedure". (The headnote to that case suggests that Crump J. alone took that view. Marten C. J. however concurred at p. 83.) On the other hand in 31 Mad 330[2] a different conclusion was arrived at. In Madras, the practice was (and so far as we are aware is) to register such documents. We are not prepared to express an opinion in this case on this point which has been only touched on before us. We are not prepared in any event to re-draft this security bond unless that could be properly done on the assumption that this is a case of contract in writing where the

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1. Jayappa Lokappa v. Shivan Gouda Dyamangouda, (1928) 15 A I R Bom 42 = 107 I C 710=52 Bom 72=30 Bom L R 19.

2. Nagaruru Sambayya v. Tangatur Subbayya, (1908) 31 Mad 330=3 M L T 317.

writing does not correctly state the contract. In this case we consider that there has clearly been a mistake made, that owing to the use of a wrong form the document does not correctly represent the contract, that though, as was stated in First Appeal No. 18 of 1932, S. 92, Evidence Act applies to this document, this being a case of palpable error it falls within the observations made in Woodroffe's Evidence Act (Edn. 9) at p. 663 :

> If some plain and palpable error has crept into the written instrument equity formerly, and the Courts of Common Law now, sanction the admission of evidence to expose the error. In such cases, especially where recourse is had to equity for relief, the extrinsic evidence is not offered to contradict a valid existing agreement ; but to show that from accident or negligence the instrument in question has never been constituted the actual depository of the intention and meaning of the parties.

It is doubtless correct to say that the appropriate course to take to correct such an instrument is provided for by S. 31 of the Specific Relief Act. But where, as here, the error and negligence is on the part, it would seem, of some official of the Court in using the wrong form, we think that the Court can correct its officer's errors without driving the persons affected to expensive litigation. The question then will be : Upon what terms? The learned lower Appellate Judge has considered this matter and has decided to make the decree-holder pursue his remedy first against the judgment-debtor before executing the decree against the surety. It is not doubted that in a normal case the surety's liability is co-extensive with that of the judgment-debtor (subject of course to the terms of the bond and its pecuniary limits) : A I R 1933 Nag 287.[3] Execution can proceed against him, against the judgment-debtor or against either : *see* S. 145, Civil P. C. But it is also undoubted that here, as this bond stands, the surety is under no liability at all. The bond has to be corrected before the surety becomes liable. The correction is a remedy given by equity and the Court giving it can put the person seeking it on terms. The lower Appellate Court has put him upon terms which are not unduly onerous and which in its discretion could be imposed. The learned Judge gives a reason for doing what he did and it is a proper reason.

The above properly disposes of the whole matter from a practical point of view, but it leaves the question outstanding of the amount of the liability. The decree-holder urged that the bond secured the performance of the obligation imposed by the decree of the second Appellate Court, including the costs incurred up to that state and not merely the performance of the obligation imposed by the decree passed by the first Appellate Court, which, of course, only included the costs incurred up to that stage. In support of this view A I R 1919 P C 55[4] and A I R 1935 Lah 21[5] are relied upon. It is said that in the former case their Lordships of the Judicial Committee decided that a security bond given to secure restitution if ordered by the Court of the Judicial Commissioner could be enforced where the restitution was ordered not by that Court but by their Lordships of the Judicial Committee. Relying on this, it is said, Beckett J. in A I R 1935 Lah 21[5] held that the surety was not merely liable to the extent of the decree appealed from but to the extent of the decree in its final and enhanced form and that here that would include an increased burden for costs and would be the decree not of the first but of the second Appellate Court.

We are of the opinion that the whole argument proceeds on a misunderstanding of what their Lordships decided in A I R 1919 P C 55.[4] To understand that case a short statement of the steps there taken is necessary. The relevant steps are as follows : (1) Judgment of the Subordinate Judge decreeing possession in favour of a widow, (2) execution sought and security ordered by Subordinate Judge to be given by decree-holder to secure payment of mesne profits if judgment reversed, (3) appeal from that order dismissed, (4) security given to secure that "any order that might be passed by the Court of the Judicial Commissioner for Oudh be made binding on the surety for the said sum of Rs. 1,00,000," (5) appeal against decree to Court of Judicial Commissioner, (6) appeal dismissed, (7) appeal to Privy Council, (8) decree varied and referred back to Judicial Commissioner's Court for enquiry, (9) enquiry remitted to Subordinate Judge, (10) report of Subordinate Judge, (11)

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[3] Gokulchand v. Laxminarayan, (1933) 20 A I R Nag 287=150 I C 685.

[4] Raj Raghubar Singh v. Jai Indra, (1919) 6 A I R P C 55=55 I C 550=46 I A 228=42 All 158 =22 O C 212 (P C).

[5] Mukhat Behari Tejpal v. Khushi Ram, (1935) 22 A I R Lah 21=156 I C 903.

Judicial Commissioner's Court on that report allowed the appeal, (12) appeal to Privy Council and (13) appeal dismissed. It was urged before the Privy Council that the security bond only related to step (6) but it was decided that it related to "any order" which might be made by the Court of the Judicial Commissioner (and no other Court) and accordingly could be related to step (11). With respect, it would seem that Beckett J. in A I R 1935 Lah 21[5] misunderstood what their Lordships there said and concluded that the bond was there related not to step (11) but to step (13). A reference to A I R 1919 P C 55[4] will, we think, make clear that this is not so. It follows that Second Appeal No. 22 of 1935 must be dismissed with costs fixed at Rs. 50. Second Appeal No. 54 of 1935 is based on the view that the surety bond could not be corrected under the slip section. In substance it fails though the power to correct is founded on a somewhat different ground. No order as to costs in that appeal.

D.S./R.K. *Appeals dismissed.*

# ✲ A. I. R. 1938 Nagpur 262

VIVIAN BOSE J.

*Messrs. Dalsukh Nathmal Firm Kamptee — Defendant No. 1*—Applicant.

v.

*Motilal Balchand Parwar, Plaintiff and others, Defendants* — Non-Applicants.

Civil Revn. No. 841 of 1936, Decided on 1st November 1937, from order of Sub-Judge, Second Class, Raipur, D/- 26th November 1936.

✲ **(a) Civil P. C. (1908), S. 20 (b)—Matter to be considered when granting leave stated.**

The leave under S. 20 (b) cannot be given arbitrarily and when the defendants who reside outside jurisdiction do not appear the Court is bound to consider their position before granting leave. This obligation is in no way lessened when they do appear and object and especially when the objecting defendant seems to be the real person against whom the plaintiff wants to proceed. [P 263 C 1]

**(b) Negotiable instrument—Drawer of hundi is not surety for acceptance—Hundi not accepted—Liability of drawer is as principal debtor under implied contract of indemnity.**

The drawer of hundi is not a surety for acceptance because the drawee does not become liable until he accepts. Therefore unless and until he does that there is no debt for which he can be held responsible. It follows that there is no principal for whom the drawer can stand surety. Therefore when there is no acceptance the liability of the drawer is as principal debtor under an implied contract of indemnity. His undertaking is conditional only and his liability does not arise unless the instrument is dishonoured, either by non-acceptance or by non-payment : *19 Cal 146, Rel. on.* [P 263 C 1]

**(c) Negotiable Instrument—Rule that debtor must find his creditor does not apply.**

The ordinary rule under which the debtor must seek his creditor does not apply in the case of a negotiable instrument. [P 264 C 2]

✲ **(d) Jurisdiction — *A*, drawing at Nagpur two hundis on Bombay firm in favour of *B* of Nagpur—*B* negotiating it to another and after successive negotiations *C* of Raipur ultimately becoming holder—Hundies dishonoured—Suit by *C* at Raipur against *B* and other indorsers—Cause of action held arose at Nagpur and not at Raipur—Raipur Court held had no jurisdiction to try the suit.**

One *A* drew at Nagpur two hundis on a firm of Bombay in favour of *B* of Nagpur. *B* negotiated them in favour of another and after several successive negotiations they were ultimately negotiated in favour of *C* of Raipur. These hundis were dishonoured and the drawee refused to accept them. Thereupon *C* instituted a suit at Raipur against *B* and other indorsers:

*Held* that the only cause of action in which the defendants in the case were jointly liable was the cause of action on the principal contract, that is to say the contract in which the drawer *A* was liable as the principal debtor. The rest were all liable as sureties and their liability being co-extensive with that of the principal debtor the cause of action against them when sued along with the principal debtor was the cause of action against the principal and no other. That was the only cause of action on which they were all jointly liable and therefore the only cause of action upon which they could all be proceeded against in one suit: *57 P R 1900, Rel. on.* [P 264 C 2; P 265 C 1]

The cause of action on the principal contract under which the drawer was liable as principal debtor arose exclusively at Nagpur and no part of it arose at Raipur because firstly the hundis were drawn at Nagpur, secondly notice of dishonour under S. 35, Negotiable Instruments Act had also to be given at Nagpur where the drawer had his place of business or residence and thirdly the compensation according to S. 81, Negotiable Instruments Act was also payable at Nagpur, the place of residence of the drawer. This being so the Raipur Court had no jurisdiction to try the suit. [P 264 C 1, 2; P 265 C 1]

A. V. Khare and W. B. Pendharkar — *for Applicant.*

R. G. Rao — *for Non-Applicant No. 1.*

M. N. Jog — *for Non-Applicants Nos. 4 to 6.*

**Order.** — On 18th November 1935 Punamchand Bhikamchand of Nagpur who is the owner of the firm Bhikamchand Premchand, which figures here as defendant 7, drew two hundis each for Rs. 1000 at Nagpur on the firm of one Jivraj Agarchand of Bombay in favour of defendant 1 Dalsukh Nathmal of Nagpur. Defendant 1 Dalsukh negotiated these hundis in favour of defendant 2 Prabhoolal who resides at Raipur and he in his turn negotiated them in favour of defendant 3 Khundelal also of Raipur. Khundelal then negotiated them in favour of defendant 4, Kastoorchand, a pleader practising at Nagpur. Kastoorchand negotiated them in favour of defendant 5 Chootanlal of Bazargaon, who in his turn negotiated them to Kastoorchand Sunderlal, defendant 6, and he has negotiated them back to defendant 5 Chootanlal who in his turn negotiated them to the plaintiff who resides at Raipur. These hundis were dishonoured and the drawee refused to accept them. Therefore the plaintiff served notices on each of the prior indorsers on 24th February 1936. They not having paid, the plaintiff instituted the present suit at Raipur on the ground that two of the defendants, viz. defendants 2 and 3, live at Raipur. An objection was taken to the venue of the suit but the lower Court held that it had jurisdiction because in its opinion a part of the cause of action arose at Raipur.

This raises an interesting point about the place of payment, but before I deal with that, I will dispose of another question. Under S. 20 (b), Civil P. C. where there are a number of defendants the suit may be instituted at the place where any one of them resides or carries on business for gain provided the leave of the Court is obtained. Of course such leave cannot be given arbitrarily and even when the defendants who reside outside jurisdiction do not appear the Court is bound to consider their position before granting leave. This obligation is in no way lessened when they do appear and object and especially when, as here, the objecting defendant seems to be the real person against whom the plaintiff wants to proceed. The other defendants, I am told, have all admitted his claim so it is clear from the attitude of the plaintiff that the person against whom he really wants a decree is the only defendant who is contesting his claim. The plaintiff did not ask for the necessary leave and even when the contesting defendant, who is the applicant here, expressly raised the point in his written statement the plaintiff did not avail himself of the opportunity thus afforded him to ask for leave to amend his plaint so as to disclose a good cause of action against all the defendants, or otherwise to ask for the requisite leave. In these circumstances he cannot rely upon S. 20 (b).

Therefore what we have to see is whether any part of the cause of action as against the applicant arose at Raipur. The applicant is the payee in both the hundis and the plaintiff is a subsequent holder. Of course no liability attaches to the applicant in his capacity as payee ; he comes in because he indorsed the hundis to another holder. In that capacity he has a double liability. Under S. 37, Negotiable Instruments Act he is liable to the plaintiff as a surety for the drawer and under S. 38 he is also liable as a principal debtor. In his capacity as a surety he undertook the same liability as his principal who in this case is the drawer. It is necessary therefore to see what the liability of the drawer is. The hundis were drawn at Nagpur on behalf of defendant 7 on a Bombay firm. They are payable at sight and no place either of presentment or payment is specified in them. The drawer therefore undertook that the hundis would be accepted by the drawee within a reasonable time within business hours and on a business day (S. 61) ; provided they were presented at the place of business or the usual residence of the drawee (S. 71). Of course the drawer is not a surety for acceptance because the drawee does not become liable until he accepts. Therefore unless and until he does that there is no debt for which he can be held responsible. It follows that there is no principal for whom the drawer can stand surety. Therefore when there is no acceptance, the liability of the drawer is as principal debtor under an implied contract of indemnity (S. 124, Contract Act). His undertaking is conditional only and his liability does not arise unless the instrument is dishonoured either by non-acceptance or by non-payment : see S. 30, Negotiable Instruments Act, and 19 Cal 146[1] at p. 158.

In addition to this the drawer also undertakes that the drawee will pay at maturity provided the instrument is properly presented for payment. Here also the drawer's position as surety cannot arise unless there has been acceptance. In the present case there has been no acceptance therefore the drawer is not liable as surety and so no question about any cause of action under that head arises. Under S. 38

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[1] **Miller v. National Bank of India, (1892) 19 Cal 146.**

the drawer is also liable as principal debtor to each subsequent party provided "due notice of dishonour has been given to or received by the drawer as hereinafter provided" (S 30). These provisions are to be found in Ss. 93, 94 and 98. The only point of importance so far as the present case is concerned, where the exceptions mentioned in S. 98 have not been pleaded, is that the notice must be given "at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended" (S. 94). It is only then that the liability of the drawer arises. Up to this point then there is no difficulty. The hundis were drawn at Nagpur, that is to say the contract as between the drawer and the payee was made at Nagpur. Notice of dishonour had also to be given at Nagpur where the drawer has his place of business and also his residence. These facts constitute two of the ingredients in the cause of action against the drawer as principal debtor and so against the applicant in his capacity as surety for the drawer. Neither arose at Raipur. The only other ingredient under this head is the place of payment.

Under S. 78 payment has to be made to the holder, but, on the other hand, under S. 81 the person liable has to be "called upon by the holder to pay." He is also entitled to have the instrument shown to him before he need pay (unless it has been lost) and upon payment to have it delivered to him, or in the case of loss, to be indemnified. Therefore it is clear that the ordinary rule under which the debtor must seek his creditor does not apply in the case of a negotiable instrument. Expessing it as a formula the drawer here contracted with the payee as follows: "If the drawee does not accept and pay in due course at Bombay, I will compensate you at Nagpur where I carry on business and reside, upon your calling upon me to do so and upon your delivering up the instrument when I pay, provided the requisite proceedings on dishonour are duly taken."

It is to be observed that S. 30 uses the word 'compensate.' The drawer does not undertake to fulfil the original contract but to compensate the holder for its breach and S. 81 indicates that this compensation is payable at the place of business or residence of the drawer. It follows that the applicant's liability as surety for the drawer is the same and so also is that of every subsequent party in his capacity as surety. There is one more ingredient which has to be considered in connexion with the applicant's liability as surety for the drawer when he is sued alone, namely the place where the contract of suretyship was made. In the present case, that was at Nagpur where the applicant's indorsement was signed. The applicant is also liable as principal debtor under S. 38 in his capacity as an indorser. By indorsing the hundis he engaged that on due presentment the instrument would be accepted and paid according to its tenor and that if it was dishonoured he would compensate the holder or any subsequent indorser who was compelled to pay it provided the requisite proceedings on dishonour were duly taken. The ingredients here are much the same as before. The place where this contract was made was Nagpur, which was the place of indorsement. Notice of dishonour had to be given as before, this time under S. 35 and this again would be at Nagpur. The place of payment would also in this case be at Nagpur where the applicant has his place of business and residence.

It will be seen then that when there are several parties to a negotiable instrument, the instrument does not constitute one contract but a series of contracts which are gathered round the principal contract; also that a party to the instrument may be liable in different capacities; that is to say that the instrument may give rise to a number of different causes of action and also that there may be several distinct causes of action against any one party to it. Now under O. 2, R. 3, Civil P. C., a plaintiff may unite several causes of action against the same defendant or the same defendants jointly, but he cannot join in the same suit different causes of action against different defendants when they are not jointly liable on them. The only cause of action in which all the defendants in this case are jointly liable is the cause of action on the principal contract, that is to say the contract in which the drawer is liable as the principal debtor. The rest are all liable as sureties and their liability being co-extensive with that of the principal debtor the cause of action against them when sued along with the principal debtor is the cause of action against the principal and no other. That is the only cause of action on which they are all jointly liable and therefore the only cause of action upon which they can all be proceeded against is one suit. This rule was applied to negotiable instruments in 57 P R 1900.[2] I respectfully agree. As I have shown above the cause of action on the principal contract under which the drawer is liable as principal debtor arose exclusively at Nagpur and no part of it arose at Raipur. Therefore the lower Court had no jurisdiction to try this suit. The application for revision is allowed. The order of the lower Court is set aside and the plaint will now be returned by the lower Court for presentation to the proper Court. Costs here to be paid by the non-applicant.

D.S./R.K. *Application allowed.*

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[2] Shivji Ram v. Hem Raj, (1900) 57 P R 1900 (F B).

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## * A. I. R. 1938 Nagpur 265

POLLOCK J.

*Bhaskar Dattatraya Subnis* —
Appellant.

v.

*Nilkanth Dattatraya Subnis* —
Respondent.

Misc. Appeal No. 248 of 1936, Decided on 23rd November 1937, from order of Addl. Sub-Judge, First Class, Amraoti, D/- 5th September 1936.

*** Civil P. C. (1908), S. 47—Decree based on award—Amount paid by judgment-debtor after award but before decree cannot be given credit in execution.**

**If a defendant pays money to the plaintiff while the suit is in progress it is his duty to see that credit is given for that amount in the decree that is passed and not to stand by and allow a decree to be passed for more than is due and then come forward and say in execution proceedings that that decree is not binding on him. [P 266 C 1]**

**Thus in execution of a decree passed on an award, it is not open to the judgment-debtor to contend that he should get credit for the amount paid after award but before decree, as the judgment-debtor is not seeking the aid of the Court to determine any question relating to the execution of the decree as passed by the Court but asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as modified by the parties : *A I R 1926 Rang 140 ; 31 Cal 179 and A I R 1931 Mad 399, Rel. on ; A I R 1918 Mad 1174 (F B) and 22 Bom 463 (F B), Dissent.* [P 265 C 2]**

**M. R. Rajkarne, L. S. Sherlekar and P. P. Deo — *for Appellant.***

**E. M. Joshi — *for Respondent.***

**Judgment. — On 15th March 1935 a decree was passed against the appellant which directed inter alia that he should** pay Rs. 1500 to the respondent. That decree was passed on an award dated 5th February 1935. When the decree-holder applied in execution to recover Rs. 1500, the judgment-debtor stated that he had paid Rs. 1400 to the decree-holder on 14th February 1935, i. e. after the award but before the decree, and claimed that the decree should therefore be executed for Rs. 100 only. The lower Court held that there could be no enquiry into this under S. 47, Civil P. C., and that if it was a payment towards, or an adjustment of, the decree it should have been certified under O. 21, R. 2, and that in the absence of certification it could not be recognized by any executing Court. O. 21, R. 2 applies only where money payable under a decree is paid out of Court. As there was no decree in existence when this money was paid, I agree that O. 21, R. 2 will not apply.

It is then to be decided whether this payment is a question relating to the execution, discharge or satisfaction of the decree and therefore one falling under S. 47. In 40 Mad 233[1] a majority of the Judges held that an agreement made before a decree was passed that the decree should be executed in a certain manner could be inquired into in execution. The same view was taken in 22 Bom 463,[2] but the opposite view has been consistently taken by the Calcutta High Court, see for example 31 Cal 179,[3] and the Calcutta view has been followed in 4 Rang 118.[4] With due respect it seems to me that the view taken by Chari J., in 4 Rang 118[4] is correct and that in putting forward a claim of this kind the judgment-debtor is not seeking the aid of the Court to determine any question relating to the execution of the decree as passed by the Court but is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as modified by the parties. He concluded :

> I am clearly of opinion that a decree, which on the face of it, is enforceable to the fullest extent cannot, in execution proceedings, be challenged as being inexecutable, wholly or in part, on account of an agreement between the parties entered into prior to the decree,

and the same principle would apply to a payment made before the decree. The

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**[1] Chidambaram Chettiar v. Krishna Vathiyar, (1918) 5 A I R Mad 1174=37 I C 836=40 Mad 233=32 M L J 13 (F B).**

**[2] Laldas v. Kishordas, (1898) 22 Bom 463 (F B).**

**[3] Hassan Ali v. Gauzi Ali Mir, (1904) 31 Cal 179.**

**[4] Mulla Ramzan v. Maung Po Kaing, (1926) 13 A I R Rang 140=96 I C 773=4 Rang 118.**

facts in 54 Mad 184,[5] were very similar to the facts in the present case. There was a compromise and, in pursuance of that compromise, money was paid into Court and then there was a decree in which credit was not given for that payment. There the decision in 4 Rang 118[4] was followed and it was held that an agreement which does not relate to execution but directly attacks the decree itself cannot be pleaded in execution and that it would be most dangerous to allow a decree to be attacked in execution. With these remarks I respectfully agree. If a defendant pays money to the plaintiff while the suit is in progress it is his duty to see that credit is given for that amount in the decree that is passed and not to stand by and allow a decree to be passed for more than is due and then come forward and say in execution proceedings that that decree is not binding on him. The appeal therefore fails and is dismissed with costs. No counsel's fee as no certificate has been filed.

V.B.B./R.K. *Appeal dismissed.*

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[5] Butchiah Chetti v. Tavar Rao Naidu, (1931) 18 A I R Mad 399=129 I C 818=54 Mad 184 =60 M L J 721.

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## A. I. R. 1938 Nagpur 266

NIYOGI J.

*Sukhdeo Prasad Baldeo Prasad* — Applicant.

v.

*J. Michael, Christian* — Opposite Party.

Civil Revn. No. 315 of 1937, Decided on 20th January 1938, from decree of Sm. C. C., Nagpur, D/- 13th March 1937.

**Limitation Act (1908), Art. 52—More debts than one due — Payment made not specifically appropriated—Appropriation how to be proved stated.**

If more debts than one are due and a payment is made which is not specifically appropriated, it is a question of fact in respect of which debt the payment was made. This appropriation need not be proved by any express declaration of the debtor at the time of the payment but any expression used by him, either before or after that time, or any other circumstances from which it may be inferred that the payment was intended to be appropriated to any particular debt or debts, or was made on account of all the debts collectively will be sufficient for the purpose. If the evidence shows that the payment was made on account of all, it will prevent any of the debts being barred by statute. [P 266 C 2; P 267 C 1]

K. A. Pote and J. M. Thakar — *for Applicant.*

R. F. Rustomji — *for Opposite Party.*

**Order.** — This is an application in revision against the judgment of the Small Cause Court in Civil Suit No. 1124 of 1936 dated 13th March 1937. The question is whether the plaintiff's suit which was filed on 10th September 1936 to recover the price of the goods purchased from time to time by the defendant's father on credit was barred by limitation. The plaintiff pleaded that the defendant's father owed Rs. 74-6-0 on 19th January 1932 which represented the total debt due by him and that he paid Rs. 40 leaving balance of Rs. 34-6-0 outstanding, that thereafter he continued his purchases on credit and that on 9th December 1933 he repaid Rs. 11. The plaintiff relied on that repayment to extend limitation. The lower Court held that as under Art. 52, Lim. Act, the time began to run from the date of the sale of each article, the repayment made on 9th December 1933 could not save the claim prior to 10th September 1933 from the bar of limitation.

The dealings began in 1932 and the repayment was within three years from that date. The question is : Will it extend the limitation in respect of the claim to recover the total amount found due on 9th December 1933 or only those items which were within three years before the suit, that is to say, subsequent to 10th September 1933. To sustain the lower Court's view, the learned counsel for the defendant relies on A I R 1921 All 325,[1] A I R 1935 All 53,[2] A I R 1925 Pat 806[3] and A I R 1931 All 229.[4] Of these the last two cases do not afford any guidance. A I R 1935 All 53[2] follows A I R 1921 All 325.[1] These cases are similar to the present case and it was held there that the creditor is not entitled to credit the payment made by the debtor towards the entire balance found due on the date of payment so as to save limitation for each item. In my opinion, the principle is too broadly stated without qualification. If more debts than one are due and a payment is made which is not specifically appropriated, it is a question of fact in respect of which debt the payment was made : see Halsbury's Laws of England,

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[1] Abdul Aziz v. Munna Lal, (1921) 8 A I R All 325=63 I C 435=19 A L J 555.

[2] Puttu Lal v. Jagannath, (1935) 22 A I R All 53=155 I C 44=1935 A L J 33.

[3] Dansford v. Shaw & Co., (1925) 12 A I R Pat 806=88 I C 747.

[4] Mukat Lal v. Gulab Singh Pranmal, (1931) 18 A I R All 229=132 I C 422=1931 A L J 363.

Vol. 20, p. 637, S 807, Edn. 2. The true rule appears to be that stated at p. 423, Vol. 1 of Mitra's Law of Limitation as follows:

> This appropriation need not be proved by any express declaration of the debtor at the time of the payment but any expression used by him, either before or after that time, or any other circumstances from which it may be inferred that the payment was intended to be appropriated to any particular debt or debts, or was made on account of all the debts collectively will be sufficient for the purpose. It must be observed that if the evidence shows that the payment was made on account of all, it will prevent any of the debts being barred by statute.

This is an extract from Darby & Bosanquet, Edn. 2, p. 710.

In view of the abovementioned rule, it has to be seen whether there is any evidence or circumstance from which it can be inferred that the debtor intended the payment to be appropriated towards the entire balance outstanding against him on the date of payment. The learned counsel for the applicant contends that debtor's signature made on the endorsement evidencing the payment was not proved. The lower Court has exhibited the document as proved and it bears No. P.93. That contention therefore must fail. There is another document Ex. P-1 dated 19th January 1932 which contains several petty items making up a total of Rs. 74-6-0. The debtor paid Rs. 40 and acknowledged the balance of Rs. 34-6-0 in his own handwriting. That goes to prove that the debtor made the repayment of Rs. 40 on account of all the small items noted in that document. Unless there is proof to the contrary, it must in view of this circumstance, be presumed that the payment of Rs. 11 made on 9th December 1933 evidenced by Ex. P.93 was a payment made on account of the total balance due and not on account of any specific item. There is no evidence adduced by the defendant to displace this presumption. It must follow that the payment made on 9th December 1933 extended limitation for the total debt due on that date. The suit which was filed on 10th September 1936 was therefore amply within time. The result is that the lower Court's decree is modified by the addition of Rs. 92-4-3 The non-applicant will pay the applicant's costs in both the Courts. Pleaders fees Rs. 10.

V.B.B./R.K. *Decree modified.*

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## A. I. R. 1938 Nagpur 267

GRILLE J.

*Balchand Pratapmal Marwadi* — *Plaintiff* — Appellant.
v.
*Kachru and others* — *Defendants* — Respondents.

Second Appeal No. 142 of 1936, Decided on 28th January 1938, from appellate decree of Addl. Dist. Judge, Buldana, D/- 6th December 1935.

**Civil P. C. (1908), S. 47—Separate suit for declaration that assignment of decree is valid cannot lie.**

Whether the assignment of a decree is valid or not is essentially a question arising between the parties relating to the execution of the decree and comes within the purview of S. 47. A suit for a declaration that the assignment is valid therefore does not lie: *A I R 1925 Pat 449, Approved; Case law referred.* [P 268 C 1, 2; P 269 C 1]

A. V. Khare and W. B. Pendharkar — *for Appellant.*

V. K. Rajwade — *for Respondents.*

**Judgment.**—This second appeal arises out of a suit brought for a declaration that the assignment of a decree, which an executing Court had refused to recognize, was a valid assignment. The trial Court held that no such suit for declaration lay and this contention was upheld on appeal. This second appeal by the plaintiff is the result. One Chandu had obtained a decree against the judgment-debtor Krishna. He assigned this decree to the present appellant Balchand who filed an application in execution by virtue of the assignment made to him. The application was opposed by Krishna, the judgment-debtor, who contended that the assignment was bogus and without consideration and had been made with the express purpose of defeating his own claim as he was about to attach the particular decree in execution of his own decree which he held against Chandu. The executing Court found on the facts that there had been no consideration at all for the assignment and that the alleged transfer in favour of Balchand of Chandu's decree was a link in the whole fraud practised by the decree-holder. It declined to substitute the name of Balchand for that of Chandu and rejected the application. Balchand then filed a declaratory suit in the Court of the Second Class Subordinate Judge, Mehkar.

It is argued before me that a suit for a declaration that the assignment was valid does lie, and reliance for this proposition is placed on the judgment in 26 Mad 264,[1] where it was laid down that a suit for declaration of the validity of an assignment does lie but that the Court passing such a declaratory decree should limit itself to the declaration and should not declare that the assignee is entitled to execute the decree and that this was a matter under S. 232, Civil P. C. of 1882, now O. 21, Rule 16, within the province and discretion of the executing Court. This decision was under the Civil Procedure Code of 1882, and what is now S. 47 of the Code was S. 244 and a material difference in the two sections renders that judgment obsolete. Sub-s. (3) of S. 47 now runs :

> Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

The corresponding clause in S. 244 of the Code of 1882 ran :

> If a question arises as to who is a representative of a party for the purposes of this section the Court may either stay execution of the decree until the question has been determined by a separate suit or itself determine the question by an order under this section.

It will be seen that what was permissive under the old Code is mandatory under the present Code and the reason for the change is obvious since there is great delay and expense involved in referring the parties to a separate suit before the question of execution can proceed, and the learned Judges in 26 Mad 264,[1] *loc. cit.* had this particular provision of S. 244 in mind when they pointed out that the Court in a declaratory suit could do no more than declare an assignment to be valid. In A I R 1929 Lah 51[2] it was held, following 26 Mad, 264,[1] that a suit for a declaration lay, and it was also held that it could hardly be said that the question whether an assignment in favour of a certain person was genuine and for consideration or was intended to defeat the creditors came strictly within the purview of S. 47, Civil P. C., and it was also considered that there was a practical inconvenience of entering into an inquiry whether the assignment was valid or no. With great respect, I find myself unable to follow this decision. The very language of the judgment indicates a doubt in the mind of the Court, and whether the assignment of a decree is valid or no appears to me essentially a question arising between the parties relative to the execution of the decree and the necessity for the determination of such matters in execution proceedings is, to my mind, the basis of the alteration of the concluding portion of S. 244 of the old Code into sub-s. (3) of S. 47 of the new. In A I R 1933 Lah 473[3] it was held that an order passed by an executing Court under O. 21, R. 16 is not open to appeal in that the matter is not one falling within the purview of S. 47 (3), Civil P. C. No argument is advanced supporting the decision which is contained in these words:

> After hearing counsel I am inclined to the view that the petitioner's contention is correct and that the appeal to the learned District Judge was incompetent.

In A I R 1934 Lah 328[4] it was held that an order passed under O. 21, R. 16 is an appealable order inasmuch as it is appealable as a decree within S. 47, Civil P. C. as the transferee was a representative of the decree-holder within the meaning of that section and the order allowing his right to execute was one which decided a question relating to the execution of the decree as between the transferee and the judgment-debtor. It was also pointed out that the contention in A I R 1933 Lah 473[3] was between an original decree-holder and his own transferee to which, it was suggested, the provisions of S. 47, Civil P. C. might not be attracted. This view, with which as already indicated I am in respectful agreement, also finds support in a published decision of the Patna High Court, 4 Pat 120,[5] where Kulwant Sahay J. states:

> Lastly, it has been contended that the objection as regards non-payment of a part of the consideration money and as regards the transferee being a benamidar for some of the judgment-debtors cannot be raised in the present proceedings. I see nothing in law to prevent these matters being raised in the present proceedings. O. 21, R. 16, provides that the decree shall not be executed at the instance of the transferee without notice of the application being given to the transferor and the judgment-debtor, and the object of such notice is to enable the transferor and the judgment-debtor to raise such objections as regards the assignment as may be available to them. The question whether title passed under the assignment is clearly a question which can be taken by the assignor as well as the judgment-debtor. Reliance has been placed upon the provisions of S. 47 of the Code and

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[1] Bommanapati Veerappa v. Chintakunta Srinivasa Rau, (1903) 26 Mad 264.

[2] Ishar Das Gorakh Ram v. Salig Ram, (1929) 16 A I R Lah 51=117 I C 893.

[3] Niamat Rai v. Hotu Ram, (1933) 20 A I R Lah 473=145 I C 891.

[4] Achhru Ram v. Fazal Mohammad, (1934) 21 A I R Lah 328=154 I C 730.

[5] Sheo Prasad Singh v. P. E. Lall, (1925) 12 A I R Pat 449=86 I C 564=4 Pat 120.

it has been contended that only such questions can be allowed to be raised as may arise between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree; and it has been argued that the question raised here is not between the parties to the suit but between one of the parties and his transferee. This may be so as between the transferor and the transferee; but the transferee is clearly a representative of the decree-holder and as such the question can be raised as between him and the judgment-debtor.

I am in entire and respectful agreement with the statement of the law there enunciated. The dispute here is between a transferee of the decree-holder and the judgment-debtor and the case is fully covered by the provisions of S. 47, Civil P. C.

The ingenious argument urged on behalf of the appellant in the lower Appellate Court and repeated here that he is really bringing this suit under the provisions of O. 21, R. 63 as he was an objector objecting to the attachment of Chandu's decree by Krishna is of no avail as it is quite evident that he took no action as an objector at all but sought to execute his decree as an assignee, as the learned Additional District Judge has very properly pointed out. It also appears that the executing Court should have acted under S. 49, Civil P. C. in respect of Krishna's claim to attach Chandu's decree and set it off against Chandu's decree against him. Nothing has been said before me on this point and any remedy that the appellant Balchand may have is to be decided in execution proceedings and not here in an appeal against the dismissal of a declaratory decree. The result is that the appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

## A. I. R. 1938 Nagpur 269

POLLOCK J.

*Deorao Mukund Patil* — *Decree-holder* — Appellant.

v.

*Rambhau and others* — *Judgment-debtors*— Respondents.

Misc. Appeal No. 151 of 1936, Decided on 24th August 1937, from order of Addl. Dist. Judge, Chanda, D/- 15th February 1936.

**Civil P. C. (1908), S. 60 (1) (g) and (n) — Grant of fields rent free to grantee for his maintenance and in consideration of his rights as Deshmukh, Deshpandia and Sirmukaddam —Grant confirmed by British Government on condition of grantee's rendering loyal services — In settlement records fields recorded as vrittee and occupants as malik makbuza muafidar sarkar—Provisions (g) and (n) held did not apply—Fields held were transferable.**

The word 'pension' as used in the Civil P. C. implies periodical payments of money by Government to the pensioner and it does not apply to a person who draws rents not as a pensioner but as a limited owner of the properties which yield them. [P 270 C 1,2]

Certain fields were granted rent free to the ancestor of the judgment-debtors in consideration of his rights as Deshmukh, Deshpandia and Sirmukaddam, and these fields had since been enjoyed by the descendants of the original grantee without let or hindrance. The grant was confirmed by the British Government for the maintenance of the grantee on condition of his rendering loyal service. In each settlement the land was recorded as vrittee and the occupants as malik-makbuza muafidar sarkar:

*Held* that provisos (g) and (n) could not apply. The right of the holder in such land was not future or contingent, but present and vested, and the holder had a right to deal with it as he pleased during the period of his own life, subject of course to the right of resumption which Government had reserved to itself : *A I R 1937 Nag 202, Approved.* [P 270 C 2]

*Held further* that the malik-makbuza rights in the fields were transferable, subject of course to Government's rights in the fields to resume the concession exempting them from land revenue. The sale of these malik-makbuza fields would not be in any way contrary to public policy. [P 271 C 2; P 272 C 1]

P. P. Deo and R. G. Siras — *for Appellant.*

M. D. Khandekar — *for Respondent No. 1.*

**Order.** — In 1928 the appellant Deorao obtained a decree against Nilkant and his son Yadao. Nilkant died in 1932 and his other two sons Ramchandra and Purshottam were added as judgment-debtors in his place. In 1935 the decree-holder in execution attached two fields, survey No. 62 mauza Bambarda and survey No. 84 in mauza Amdi, in the Warora tahsil of the Chanda district. Ramchandra and Purshottam took the objection that these fields were exempt from attachment under provisos (n) and (g) to Section 60 (1) of the Civil Procedure Code and also on the ground that the present holders of these fields held them merely in trust for their heirs and had no power to dispose of them. The lower Appellate Court held that the present holders are mere trustees for their descendants, that the sale of such land is opposed to the nature of the interest affected and is also contrary to public policy, and that the lands are not saleable.

The muafi register shows that by a sanad dated 1817 Appa Sahib granted a field in every village in Warora pargana and also the village of Dahegaon rent free to the ancestor of the present judgment-debtors in consideration of his rights as Deshmukh, Deshpandia and Sir mukaddam, that these fields have since been enjoyed by the descendants of the original grantee without let or hindrance, and that at the first settlement of 1863 the Investigating Officer recommended the confirmation of this grant to the then proprietors and their heirs on condition of their rendering loyal service in their parganas. The Settlement Commissioner concurred and recommended the release in perpetuity to the then holders and their legal heirs on condition of their rendering loyal service and subject to good behaviour. The Chief Commissioner concurred. The history of the village of Dahegaon is given in the judgment of Bose J. in A I R 1937 Nag 202[1], in which one of the present judgment-debtors was a party, and it is agreed that the history of these fields is the same. I therefore quote the following extract from that judgment:

> In the year 1700 A. D. the Gond Rajah who ruled over the territories of which the village Dahegon in question formed a part granted it to one Domaji, an ancestor of the present judgment-debtor in mokasa rights. In the year 1817 the grant was renewed by the Bhonsla Raja of Nagpur, and in 1861 was continued by the British Government. On 30th April 1866 a sanad was issued to two descendants of Domaji in the following terms: 'Whereas you formerly held the office of Deshpandias in the Province of Nagpore, and enjoyed certain cash allowances and landed inams, and whereas it has seemed fit, in consideration of your family history and your present status, to arrange for your proper maintenance therefore the Viceroy and Governor-General in Council has been pleased to order that your cash allowances and landed inams, as detailed, and subject to the conditions noted at foot hereof, shall be continued to you on condition of good behaviour.' No further condition was imposed. An extract from the register of muafi grants shows that the Commissioner had recommended a condition of loyal service in addition to good behaviour. But that condition is not to be found in the sanad itself.

I will first deal with the contention that the fields are not liable to attachment by virtue of proviso (g) of S. 60 (1), Civil P. C. That proviso exempts stipends and gratuities allowed to pensioners of the Government . . . and political pensions. As Bose J. has pointed out in A I R 1937 Nag 202,[1] the Privy Council held in 59 Cal 1[2] that the word 'pension' as used in the Civil Procedure Code implies periodical payments of money by Government to the pensioner and that it does not apply to a person who draws rents not as a pensioner but as a limited owner of the properties which yield them. I agree with Bose J. that proviso (g) therefore cannot apply.

I also agree with him that proviso (n) cannot apply. Proviso (n) exempts from attachment a right to future maintenance, and for the reasons given by Bose J. the right of the holder in this land is not future or contingent, but present and vested, and the holder has a right to deal with it as he pleases during the period of his own life, subject of course to the right of resumption which Government has reserved to itself.

The main contention in this Court however was that each holder has only a life interest in the land and that the interest of the present judgment-debtors cannot be attached in execution of a decree against their father. In A I R 1937 Nag 202[1] Bose J. held that the inam was a service inam covered by R. 6 of the Berar Inam Rules. No doubt the inam would fall within that rule if the inam were in Berar, but I see no reason why the rules applicable to Berar should apply in Chanda where the land revenue system is very different. It is clear that the grant was originally made on account of past services as Deshpandias and that it was confirmed by the British Government for the maintenance of the grantee. It has, in fact, been conceded by Mr. Khandekar for the respondents in this Court that the inam is not a service inam and that any holder may alienate it for his lifetime, but he has contended that each holder has only a life interest. At the settlement of 1863 the land was recorded as vrittee and the occupants were recorded as muafidar malik makbuza. In the remarks column there was a statement "this muafi was maintained from generation to generation". In the settlement of 1897 the land was again recorded as vrittee and the occupants as malik-makbuza muafidar sarkar and there was the same entry in the remarks column about the muafi being maintained from generation to generation. Again in the settlement of 1918 there were the same entries. Now a malik-makbuza is the owner of the land and has an unrestricted right of transfer, and a person who is recorded as malik-makbuza muafidar sarkar is prima facie a person with all the rights of a malik-makbuza with the further concession that he pays no land revenue.

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1. Yadeo v. Jankidas, (1937) 24 A I R Nag 202=170 I C 78.
2. Nawab Bahadur of Murshidabad v. Karnani Industrial Bank Ltd. (1931) 18 A I R P C 160=132 I C 727=58 I A 215=59 Cal 1 (P C).

In Major Lucie Smith's report on the first settlement written in 1869 he explains the various forms of privileged tenures, and I quote the following extracts :

> 361. Lands conferred on Mookassa or Vrittee tenure were theoretically revenue-free and were granted in charity ; for the support of relatives or retainers of the sovereign ; or in reward for military, religious, or other service .... Where the grant comprises a whole village it is known as Mookassa, and where less than a whole village as Vrittee ....
>
> 364. Under the Mahratta rule all privileged holdings of whatever class were shown separately in the revenue papers, and those bearing any assessment paid the amount direct into the Government treasury however small might be the area of the plot. With the exception of Vrittees, each grant was attached on the death of the holder, and the attachment continued until orders for its removal were received from the Rajah at Nagpur.

At page 218 he stated:

> In the Khalsa pergunnahs the following classes of holders have been granted proprietary right in their plots :
>
> * * * *
>
> IV. Holders of privileged tenure plots.

It therefore appears that these plots were granted in vrittee tenure for previous services and that at the settlement of 1863 the proprietary rights were granted to the occupants. In para. 368 Major Lucie Smith proposed certain restrictions on the rights of malguzars, such as no transfer without the approval of the Deputy Commissioner and the liability to resume in case of grave misconduct, but these proposals were not accepted by Government. In Expln. (i) to S. 52, C. P. Settlement Code 1895, it is stated :

> Malik-makbuzas are to be shown in the khewat as well as malguzars. Malik-makbuzas are of three kinds, (1) ordinary malik-makbuzas assessed to revenue, (2) malik-makbuzas revenue free, and (3) malik-makbuzas revenue free as against the malguzar (muafidar-malguzar).

This clearly suggests that revenue free malik-makbuzas have the same proprietary rights as ordinary malik-makbuzas, and at p. 7 of the introduction it is stated:

> Another class of persons whose status has been recognized as that of malik-makbuza are holders of revenue-free plots of land in grant from Government, who now enjoy the right of transferring these plots by sale or mortgage, although the revenue assignment may be liable to resumption on such alienation.

In Revenue Book Circular, Vol. 2, S. 1, Serial No. 2, it is stated :

> **Grants in perpetuity or for more than one life were always made by the Government, even though no condition was expressed, with the object of maintaining the family of the grantee in a** suitable station of life. It was not intended that any holder for the time being should be able to realize the whole benefit for himself, and alienation should therefore be followed by resumption. In the case of grants subject to loyalty and good conduct, or any similar condition of a personal nature, resumption of the grant should be ordered on transfer of the land. In other cases, the grants should be allowed to continue in favour of the transferee, provided that the conditions are fulfilled. When the Deputy Commissioner, at the instance of a Civil Court, sells land held on a privileged tenure, it is desirable that the purchaser should know whether or not the land, after sale, will be liable to full revenue or not.

This appears clearly to contemplate that the holder for the time being can transfer the land, and that the only result of such a transfer will be the resumption of the concession exempting it from land revenue. In C. P. Rev. Rulings 33[3] the Financial Commissioner held that revenue officers have no power to oust a person who is in possession of a revenue-free holding as proprietor on the ground that the conditions of the muafi grant had not been observed and that in such a case the only power that they have is to direct that the revenue-free concession be resumed.

The conclusion therefore that I reach is that there is nothing to show that any restriction has been imposed in this case on the ordinary proprietary right of sale. In 22 C W N 577[4] the Privy Council held that the jagir was liable to attachment in execution of a decree and pointed out that:

> In the case of Karim Khan (the original grantee) the grant is expressed to be for his maintenance. In the case of his descendants it is not. The right inference therefore is that it was not a maintenance grant in the latter case, though it was in the former.

In this case the original grant was made for the maintenance of the grantee, but there is no express statement that it was made for the maintenance of his heirs. In 2 Luck 4[5] the proposition was laid down that where a man is proved to have hereditary rights and there is nothing to show that they are non-transferable they must be presumed to be transferable. For these reasons I hold that the malik-makbuza rights in the two fields in suit are transferable, subject of course to Government's right to resume the concession exempting them from land revenue.

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[3] Laldas v. Ganeshdas, C. P. Rev. Rulings 33.

[4] Mt. Sakina Bai v. Kaniz Fatima Begam (1917) 4 A I R P C 94=47 I C 632=22 C W N 577 (P C).

[5] Sheo Bahadur Singh v. Bishunath Saran Singh, (1927) 14 A I R Oudh 74=99 I C 876 =2 Luck 4=4 O W N 15.

Mr. Khandekar relied on certain cases which do not appear to me to be in point. In 45 Mad 620,[6] where it was held that the sale of inam land was contrary to public policy, the inam was to be held so long as certain temple services were performed and it was in the interests of the public that these services should be performed and therefore that the land should continue to be inam land. Again in A I R 1929 Nag 232[7] there were services to be rendered and it was in the interests of the public that these services should continue to be rendered. In the present case there are no services to be rendered, and I cannot see that the sale of these malik-makbuza fields would be in any way contrary to public policy.

The appeal is therefore allowed with costs, and the order of the lower Courts holding that these fields are exempt from attachment and sale in execution of a Civil Court decree is set aside. No counsel's fee as no certificate has been filed.

D.S./R.K. *Appeal allowed.*

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[6] Anjaneyalu v. Sri Venugopala Rice Mill, Ltd., (1922) 9 A I R Mad 197=70 I C 466=45 Mad 620=42 M L J 477.

[7] Thakurdas v. Dhanrao, (1929) 16 A I R Nag 232=116 I C 661.

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## A. I. R. 1938 Nagpur 272

NIYOGI J.

*Mt. Boro Bai, w/o Khubchand Mahajan* — Applicant.

v.

*Ramsunder Prayagdutt Brahmin* — Opposite Party.

Civil Revn No. 211 of 1937, Decided on 26th January 1938, from order of Dist. Judge, Jubbulpore, D/- 22nd December 1936.

**Civil P. C. (1908), O. 3, R. 4 (3); O. 9, R. 13—Suit dismissed for default—Application for restoration can be presented by pleader without fresh appointment.**

Sub-rule 3 of R. 4 of O. 3 does not impose any restraint on the generality of the meaning of the expression "all proceedings in the suit" occurring at the end of sub-r. 2 of R. 4, and cannot be regarded as exhaustive. The maxim *expressio uniusest exclusio alterius* cannot be applied in the interpretation of the term of sub-r. 3 of R. 4, as R. 1 of O. 3, authorises a pleader to make any application on behalf of the party he represents. As a suit terminates only by a decree, an application for restoration of a suit dismissed for default must be regarded as a proceeding in the suit. Consequently a pleader is entitled to present such an application without fresh appointment: *A I R 1929 Lah 96, Rel. on.* [P 272 C 2]

R. N. Padhye — *for Applicant.*

K. C. Jain — *for Opposite Party.*

**Order.**—This is a defendant's application in revision against the order by the District Judge, Jubbulpore, in Miscellaneous Civil Appeal No. 14 of 1936 passed on 22nd December 1936. Civil Suit No. 5-A of 1935 on the file of the Second Sub-Judge, Second Class, Jubbulpore, was dismissed for default of the plaintiff on 4th February 1936. His counsel applied on 5th February 1936 for its being restored to file on the plea that he had noted a wrong date in his diary and did not appear in the case due to a misunderstanding that it was not fixed for hearing on that date. The trial Court declined to restore it remarking that the application made by the plaintiff's counsel was an irregularity. The lower Appellate Court took a different view and remanded the proceeding to the original Court for enquiry into the merits. It is urged on behalf of the defendant that in view of the provisions of O. 3, R. 4 (2) and (3) it was not permissible for a pleader to apply under O. 9, R. 13, Civil Procedure Code, for restoration of a suit which was dismissed for default. Sub-r. 3 of R. 4 of O. 3, Civil Procedure Code, specifies certain proceedings wherein the appointment of a pleader shall be deemed to be in force. That sub-rule does not impose any restraint on the generality of the meaning of the expression "all proceedings in the suit" occurring at the end of sub-r. 2 of R. 4, and cannot be regarded as exhaustive. The maxim *expressio uniusest exclusio alterius* cannot be applied in the interpretation of the terms of sub-r. 3 of R. 4, as R. 1 of O. 3 authorizes a pleader to make any application on behalf of the party he represents. As a suit terminates only by a decree, an application for restoration of a suit dismissed for default must be regarded as a proceeding in the suit. Consequently, a pleader is entitled to present such an application without fresh appointment: *see* A I R 1929 Lah 96.[1] I therefore agree with the view taken by the lower Appellate Court. It is contended that the allegation made in the application was vague and evasive. That is a matter which relates to the merits, for enquiry into which the case was remitted by the lower Appellate Court. The application is dismissed with costs. Pleader's fee Rs. 10.

V.B.B./R.K. *Application dismissed.*

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[1] Abdul Aziz v. Punjab National Bank Ltd., (1929) 16 A I R Lah 96=114 I C 76=10 Lah 570=30 P L R 628.

## A. I. R. 1938 Nagpur 273

NIYOGI J.

*Madhao Mukund Nakhate—Auction-purchaser*—Applicant.

v.

*Ramchandra and others—Decree-holder and Judgment-debtors* — Opposite Party.

Civil Revn. No. 319 of 1937, Decided on 5th January 1938, from order of Addl. Sub-Judge, Second Class, Bhandara, D/- 2nd March 1937.

**(a) Res judicata — Auction sale — Executing Court suspending confirmation — Appeal by decree-holder without impleading auction-purchaser—Decision in appeal does not operate as res judicata against auction-purchaser.**

Though an order passed in execution is governed by S. 11, Civil P. C., the order would affect only the parties or their privies and not strangers who had not derived their title from the parties. [P 273 C 2]

Where an auction sale is held but the executing Court suspends its confirmation and the decree-holder subsequently appeals against such order without impleading the auction-purchaser, the decision in the appeal would not be binding on the auction-purchaser : *A I R 1925 All 236, Rel. on.* [P 274 C 1]

**(b) C. P. Debt Conciliation Act (2 of 1933), S. 21—S. 21 does not preclude executing Court from confirming execution sale held prior to application by debtor under S. 4.**

The object of the Debt Conciliation Act is the settlement or adjustment of debts owed by agriculturists and in the settlement of the debts any interest which arises in favour of a third party should not be disregarded. The word 'proceedings' occurring in S. 21, Debt Conciliation Act must therefore be understood as referring to those proceedings in which the decree-holder and the judgment-debtor alone are concerned and its meaning should not be extended to cover a case of an auction-purchaser. The proceeding relating to confirmation of sale cannot be overridden by any other provision of law unless there is an express provision controlling or impairing the effect of R. 92, of O. 21. Hence, S. 21 does not preclude the executing Court from confirming the execution sale held prior to an application made by the debtor under S. 4, Debt Conciliation Act : *A I R 1937 Nag 98, Rel. on.* [P 274 C 2; P 275 C 1]

**(c) C. P. Debt Conciliation Act (2 of 1933), S. 21—S. 21 does not apply to those who have not applied under S. 4.**

The word 'debt' used in S. 21 means a debt of that debtor who applies under S. 4. The section would therefore not apply to those who did not apply under S. 4 : *20 N L J 25, Rel. on.* [P 275 C 1]

M. R. Indurkar—*for Applicant.*

V. R. Dhoke — *for Opposite Party Nos. 5 and 7.*

**Order.**—This is an auction-purchaser's application in revision against an order passed by the Additional Sub-Judge, Second Class, Bhandara, in execution case No. 90-A of 1934 passed on 2nd March 1937. The facts are that in execution of a money decree obtained by non-applicants 1 to 4 against non-applicants 5 to 7 the right, title and interest of non-applicants 5 and 6 in a house were sold on 2nd December 1935. The execution of the decree was not sought for against non-applicant 7, Trimbak. The case was fixed for confirmation of the sale on 4th January 1936. In the meantime Trimbak, non-applicant 7, applied to the Debt Conciliation Board for settlement of the decretal debt. The executing Court, acting under the provisions of S. 21, Debt Conciliation Act, suspended confirmation of the sale. The decree-holder thereon preferred an appeal against that order staying the confirmation of the sale but that appeal was dismissed. The auction-purchaser was not impleaded in that appeal although he was the party most vitally interested.

The decree-holder applied for confirmation of the sale and impleaded the auction purchaser as a party. The auction purchaser joined with the decree-holder in the prayer that the sale should be confirmed. The lower Court dismissed that application on two grounds, (1) that the order in appeal preferred by the decree-holder debarred this application for confirmation of the sale, and (2) that S. 21, Debt Conciliation Act operated to suspend execution proceedings including confirmation of the sale.

It may be conceded that the appellate order passed against the decree-holder would preclude him from maintaining this application, but, I am unable to agree with the lower Court in the view that it also estops the auction-purchaser from asking for confirmation of the sale. Although the learned Judge of the lower Court is right in holding that orders passed in execution are governed by S. 11, Civil P. C., it overlooked the fact that the order would affect only the parties or their privies and not strangers who had not derived their title from the parties. Their Lordships of the Privy Council in 6 All 269[1] observed that the binding force of the orders passed in execution depends not on S. 13 of Act 10 of 1877, which now corresponds to S. 11 of the Code of 1908, but on the general principles of law. Now on the general principles, it cannot for a moment be contended that a decree passed against one should be held binding on a total stranger who does not derive his interest from any of the

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[1] 1. Ram Kirpal v. Rup Kuari, (1884) 6 All 269=11 I A 37=4 Sar 89=1886 A W N 286 (P C.)

parties between whom inter se there was a dispute. As a matter of fact, as far as the auction-purchaser is concerned, he is not hit by even S. 11, Civil P. C.

> In order that a decision in a suit between *A* and *B* may operate as res judicata in a subsequent suit between *A* and *C*, it is necessary to show that *C* claims under *B* by a title arising subsequently to the commencement of the first suit. Thus, a purchaser, mortgagee, lessee or donee of a property is not estopped by a decree obtained in a suit against the vendor, mortgagor, lessor or donor commenced after the date of the purchase, mortgage, lease or gift : *See* Mulla's Civil Procedure Code, pp. 65 and 66.

Applying that principle here it is obvious that the appeal having been filed subsequent to the date of the auction sale, its result will not affect the auction-purchaser unless he was made a party in the appeal. Moreover, as held in 47 All 304[2] no order which is passed behind the back of any party can bind him.

The next question is whether S. 21 of the Debt Conciliation Act operates to stay the hands of the executing Court in confirming the sale. As pointed out by Pollock J. in 19 N L J 296[3] there is nothing in S. 21 to prevent a Court from confirming sale. That section speaks of any suit or other proceeding then pending before a Civil Court. The question is whether the word "proceeding" is comprehensive enough to include a case of confirmation of sale. A sale is confirmed under R. 92 of O. 21, Civil P. C. There is therefore a conflict between S 21, Debt Conciliation Act and O. 21, R. 92, and the question would be whether the former overrides the latter. To take an analogous case, I may refer to 27 N L R 95[4] in which their Lordships of the Privy Council held that if a sale has been duly effected it is not competent to the decree-holder or the judgment-debtor to get rid of it by adjusting or otherwise satisfying the decree out of Court. In that case there was a conflict between the provisions of O. 21, R. 92 and O. 21, R. 2, and their Lordships of the Privy Council held that O. 21, R. 2, did not control R. 92 of O. 21. Their Lordships pointed out that O. 21, R. 2, which provides for certification of adjustment come to out of Court contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder and when no other interests have come into being. When once a sale has been effected a third party's interest intervenes. They further pointed out that there was nothing in that Rule, namely R. 2 of O. 21, to suggest that the third party's interest was to be disregarded. That is precisely the situation here.

The object of the Debt Conciliation Act is the settlement or adjustment of debts owed by agriculturists and the question is whether in the settlement of the debts any interest which arises in favour of a third party should be disregarded. There is nothing in S. 21 to show that such a result was intended by the Legislature. The word "proceedings" occurring in S. 21, Debt Conciliation Act must therefore be understood as referring to those proceedings in which the decree-holder and the judgment-debtor alone are concerned and its meaning should not be extended to cover a case of an auction-purchaser. That the provisions of O. 21, R. 92, are mandatory was pointed out in 24 N L R 127.[5] In a long course of judicial decisions it has been held consistently that a bona fide purchaser who is a stranger to the decree does not lose his title to the property by the subsequent reversal or modification of the decree : *see* 10 All 166,[6] 26 Cal 734,[7] 27 Cal 810,[8] 38 Cal 622,[9] 43 Bom 235,[10] 38 All 240[11] and 1 Pat L J 43;[12] and in 56 Mad 808[13] it was held that though the decree has been reversed before confirmation of the sale, a sale held in execution where the purchaser is a third party may be confirmed under O. 21, R. 92. The confirmation of sale is not affected either by

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2. Imtiaz-un-nissa v. Chuttan Lal, (1925) 12 A I R All 236=84 I C 746=47 All 304=22 A L J 1119.
3. Haji Dada Kachi – Mallik Haji Wali Mohammad v. Pannalal, (1937) 24 A I R Nag 98= 169 I C 99=19 N L J 296.
4. Nanhelal v. Umrao Singh, (1931) 18 A I R P C 83=130 I C 686=58 I A 50=27 N L R 95 (P C).
5. Shankar Lal v. Jawahar Lal, (1928) 15 A I R Nag 265=111 I C 895=24 N L R 127 (F B).
6. Zain-ul-Abdin v. Muhammad Asgher Ali, (1888) 10 All 166=15 I A 12=5 Sar 129 (P C).
7. Mukhoda v. Gopal Chunder, (1899) 26 Cal 734.
8. Set Umedmal v. Srinath, (1900) 27 Cal 810= 4 C W N 692.
9. Paresh Nath v. Hari Charan, (1911) 38 Cal 622 =10 I C 361=15 C W N 875=14 C L J 300.
10. Shivbai v. Yeshu, (1919) 6 A I R Bom 175= 48 I C 130=43 Bom 235=20 Bom L R 925.
11. Peary Lal v. Hanif-un-nissa, (1916) 3 A I R All 159=34 I C 303=38 All 240=14 A L J 302.
12. Chintaman v. Chunisahu, (1916) 3 A I R Pat 299=34 I C 747=1 Pat L J 43.
13. Sorimuthu v. Muthu Krishna, (1933) 20 A I R Mad 598=143 I C 854=56 Mad 808=65 M L J 253.

private adjustment of the decree between the decree-holder and the judgment-debtor only or even by the reversal of the decree in execution of which the judicial sale is held. That being the nature of the proceeding relating to confirmation of sale, it cannot be overridden by any other provision of law unless there is an express provision controlling or impairing the effect of R. 92 of O. 21. I therefore agree with Pollock J.'s view in 19 N L J 296[3] and hold that S. 21 does not preclude the executing Court from confirming the execution sale held prior to an application made by the debtor under S. 4, Debt Conciliation Act.

In any case I fail to see why the Debt Conciliation Act should apply to the non-applicants 5 and 6 who did not apply at all for settlement of their debt, as pointed out in 20 N L J 25.[14] The word "debt" used in S. 21 means a debt of that debtor who applies under S. 4. On this view also, Section 21 would not come into operation against non-applicants 5 and 6 whose property has been sold. The lower Court's order is set aside and it is directed that the sale will now be confirmed. The non-applicants 5, 6 and 7 will pay the applicant's costs of this application. Pleader's fee Rs. 15.

D.S./R.K. *Revision allowed.*

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[14] Premlal v. Jiwan, (1935) 20 N L J 25.

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## ✲ A. I. R. 1938 Nagpur 275

GRUER J.

*Namdeo Chimnaji Patil Marathe and another* — *Accused* — Applicants.

v.

*Emperor.*

Criminal Revn. No. 455 of 1937, Decided on 13th January 1938, from order of Dist. Magistrate, Buldana, D/- 15th October 1937.

**✲ (a) Criminal P. C. (1898), S. 514—It is sufficient if grounds of proof exist and appear in record of proceedings—Magistrate prima facie satisfied as to forfeiture of bond—Omission to record reasons is matter relating to procedure and not to jurisdiction.**

Even if the Court has not separately and formally recorded the grounds of proof it is sufficient if they exist and appear in the record of the proceedings. The jurisdiction of the Magistrate arises as soon as he is satisfied prima facie that the bond has been forfeited, and the omission to record the reasons for his being so satisfied is a matter relating to procedure and not to jurisdiction. It is not disobedience of an express provision as to a mode of trial but rather of an omission in a matter of procedure: *A I R 1932 All 446 and A I R 1927 P C 44, Rel. on.; 25 Mad 61, Disting.* [P 276 C 1]

**✲ (b) Criminal P. C. (1898), Ss. 117 (3) and 514—Person executing bond under S. 117 (3) dying—Proceedings under S. 514 against his sureties are not premature.**

Where a person executing bond under S. 117 (3) dies, proceedings against him as an accused must necessarily cease and there is no obstacle to an enquiry whether he has broken the conditions of the bond in order to take proceedings against the sureties under S. 514. [P 276 C 2]

**(c) Criminal P. C. (1898), Ss. 117 (3) and 514—Person executing bond under S. 117 (3) for certain sum—Sureties jointly and severally liable for such sum cannot be liable for more than that sum.**

Where a person executes a bond under S. 117 (3) for certain sum and the sureties each sign a bond for the same amount the sureties being jointly and severally liable, a sum more than that for which they are jointly liable cannot be recovered from them. [P 276 C 2]

R. G. Rao — *for Applicants.*

W. R. Puranik, Advocate-General — *for the Crown.*

**Order.**—One Mt. Tulsabai executed a bond for Rs. 2000 under S. 117 (3), Criminal P. C., on 28th July 1936. The two applicants Namdeo and Kisan were her two sureties and each signed a bond for a like amount. Proceedings under S. 514, Criminal P. C. have been taken against them and they have been ordered to pay a sum of Rs. 1500 each. An appeal to the District Magistrate under S. 515, Criminal P. C. was unsuccessful and this Court is now moved in revision. Four points are taken by the learned counsel for the applicants : (1) that the procedure of the first Court is illegal ; (2) that there is no definite finding that Tulsabai committed breach of peace so as to render the bonds liable to be forfeited ; (3) that the proceedings were premature, and (4) that the bonds could not be forfeited for more than a total sum of Rs. 2000. The defect in procedure pointed out is that the Magistrate failed to record the grounds of proof which by S. 514, Criminal P. C. he shall do before calling for payment of the penalty by the person bound by the bond. In answer to the objection that this defect would be curable by S. 537, Criminal P. C. it was contended that it was an omission of a mandatory provision which resulted in the Court having no jurisdiction and was a vital defect in the mode of the trial. In the first place I think that the section has been substantially complied with. The Court has not separately and formally recorded the grounds of proof but it is sufficient if they exist and appear in the record of the proceedings as was held in A I R 1925 Nag 448[1] in dealing with a similar question under S. 145, Criminal Procedure Code.

In the present case proceedings were started on a report of the Sub-Inspector, Jalgaon, dated 23rd February 1937. Further, before the case was registered, both the applicants had been called up, and in the presence of one of them the Sub-Inspector was examined. These were evidently the grounds which satisfied the Magistrate, and the record of the Sub-Inspector's statement may reasonably be taken to be the record of the grounds of proof. But, apart from this, I should hold that the jurisdiction of the Magistrate arises as soon as he is satisfied prima facie that the bond has been forfeited, and the omission to record the reasons for his being so satisfied is a matter relating to procedure and not to jurisdiction : A I R 1932 All 446[2] at pp. 447, 448. It is not disobedience of an express provision as to a mode of trial as was the case in 25 Mad 61,[3] but rather of an omission in a matter of procedure as in 5 Rang 53.[4] The trial did not actually start until the case was registered. *See also* 28 Nag L R 163,[5] 53 All 172,[6] 53 Mad 937=A I R 1930 Mad 857.[7]

The only question then is whether the omission has caused prejudice to the applicants. As they were represented by counsel and could see the grounds from a perusal of the record and from hearing the evidence I do not think that any prejudice has been caused. It was for them to bring their own evidence if they wished or to ask the Court to summon witnesses for them. The second objection is not borne out by the record. The first Court heard the evidence of the Sub-Divisional Officer and the Naib-Tahsildar, Jalgaon, and concludes that Tulsabai did raid the locked house in possession of Laxmibai and Parwatibai. The Appellate Court also records in para. 5 of its judgment a finding that the instigation came from Tulsabai.

The third point is that proceedings are premature because a criminal case arising out of these incidents is still sub judice. It does not appear from the record whether this is so or not, but assuming that it is, the record shows that Tulsabai is dead ; so proceedings against her as an accused must necessarily have ceased and there was no obstacle to an enquiry in the present case whether she had broken the conditions of the bond. It is conceded by the learned Advocate-General that the fourth point is a good one. The two sureties were jointly and severally liable and therefore more than a total sum of Rs. 2000 could not be recovered from them. Instead of paying Rs. 1500 each they will now be required to pay Rs. 1000 each. The application therefore succeeds only to that extent.

D.S./R.K. *Application partly allowed.*

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[1] Ramchandra v. Ganpat, (1925) 12 A I R Nag 448=87 I C 923=26 Cr L J 1035.

[2] Madan Mohan v. Sheoraj Kunwar, (1932) 19 A I R All 446=1932 Cr C 558=141 I C 131=34 Cr L J 156=1932 A L J 503.

[3] Subrahmania Ayyar v. King Emperor, (1902) 25 Mad 61=28 I A 257=2 Weir 271=8 Sar 160 (P C).

[4] Abdul Rahman v. Emperor, (1927) 14 A I R P C 44=100 I C 227=54 I A 96=28 Cr L J 259=5 Rang 53 (P C).

[5] Mt. Lahani v. Khusal, (1932) 19 A I R Nag 127=1932 Cr C 678=140 I C 113=33 Cr L J 938=28 N L R 163.

[6] Kalloo v. Bashiruddin, (1931) 18 A I R All 3=1931 Cr C 3=129 I C 269=32 Cr L J 372=53 All 172=1933 A L J 1504.

[7] Ramaraju v. Emperor, (1930) 17 A I R Mad 857=1930 Cr L J 1033=127 I C 654=32 Cr L J 30=53 Mad 937.

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## A. I. R. 1938 Nagpur 276

DIGBY J.

*Chaganlal Asaramji Oswal — Plaintiff* Appellant.

v.

*Mirza Yad Ali Beg and another — Defendants* — Respondents.

Second Appeal No. 141-B of 1934, Decided on 24th July 1937, from appellate decree of Second Addl. District Judge, Amraoti, D/- 14th March 1934.

**Civil P. C. (1908), S. 47—Execution—Excess property taken by decree-holder not covered by decree—Application for restoration lies to executing Court—Separate suit is not maintainable.**

No separate suit can lie for the recovery of lands taken by the decree-holder in excess of the terms of the decree; if the decree-holder has been put in possession of excess land by the officer of the Court executing the decree, it is but just and proper that the executing Court itself must undo the wrong by ordering the decree-holder to restore it back under S. 47*: A I R 1924 Nag 246 and 19 Cal 683 (P C), Rel. on ; Case law referred.*

[P 281 C 1]

N. T. Mangalmoorti — *for Appellant.*

G. V. Deshmukh—*for Respondent No. 1.*

P. N. Rudra — *for Respondent No. 2.*

**Judgment.** — The claim of the plaintiff has been dismissed by both the lower Courts on the finding that the land now in suit was sold at the auction sale and that the claim is barred by S. 47, Civil P. C. There is no difficulty in deciding that, if the property in suit was in fact sold and possession given according to the sale, no suit would now lie to contest the matter. But, in arriving at the finding that the fields in suit were sold, the learned Judge of the first Appellate Court has had to get over the contents of the sale certificate, and the sale certificate is dealt with in the following way. First of all it is said that the fields mentioned in the preliminary and the final decrees are comprehensive enough to include the fields in suit. No doubt they are, except in the case of survey No. 7 of Khojanpur which was never included in the mortgage decree at all.

The next reason given is that the application made to have the sale set aside by the defendant under Order 21, Rule 90, would have no meaning if the fields in suit had not been sold, and reference is then made to the evidence of the appellant himself regarding his protest before the Civil Court and the Collector. The appellant deposed that he protested before the Civil Court as well as before the Collector that the 'pot-hissas' in the survey number in suit did not represent the land of Chinnumia's eight annas share "directed to be sold" and that he made an application under O. 21, R. 90, Civil P. C. for setting aside the sale on the ground that the land fetched a low price and that 16 annas share in two fields had been shown instead of eight annas share as directed by the decree. But I fail to see how one can infer from this statement that what was actually sold was something different from what is mentioned in the sale certificate. Then it is said that the differences in area and sub-shares may be due to the introduction of the Record of Rights after the passing of the final decree; but in view of the fact that the sub-divisions and area are clearly specified in the sale certificate and in view of the wording of a revisional order discussed below I cannot accept such a theory.

Then it is said that the order passed by the Judicial Commissioner on 6th January 1922 clearly explains the position. The order of the Judicial Commissioner referred to, shows that when the mortgage decree was to be executed it was found that some of the fields decreed to be sold were not recorded in the name of the judgment-debtor in the Record of Rights. Accordingly, the case was referred back to the Civil Court which directed only those fields which were recorded in the judgment-debtor's name to be sold. The decree-holder gave a list of such fields. The list was "compared in Court with the decree" and forwarded to the Collector, and the proclamation of sale followed this list. If the decree-holder gave a list of what was to be sold specifying the fields, and sale was held in accordance with the list, is it conceivable that the sale certificate, which is on the face of it clear, should have departed from the list which was passed by the Court? In my judgment the failure to pay proper attention to the wording of the sale certificate and overruling its clear words is an error of law having regard to the observations made by their Lordships of the Privy Council in 44 Mad 483.[1] A sale certificate is a document of title and shows exactly what property passed by the sale, and where the specification of the property is clear and unambiguous, it is not possible to say that different property passed because different property could or should have been sold or because the mortgage was comprehensive enough to include further property or because the defendant made an application to have the sale set aside or because the defendant made some kind of complaint in the Civil Court and the Court of the Collector. Moreover in the present case the fact that the plaintiff himself gave a list of the fields and the fact that the very sub-divisions mentioned in the sale certificate are referred to in the Record of Rights strongly supports the inference which in any case should be legally drawn that the very fields and sub-divisions mentioned in the sale certificate were the fields and sub-divisions which had been put to sale. I do not consider that it is open to me to find that an eight annas share was specified in the sale and then to apply the maxim "*falsa demonstratio non nocet*".

Once the finding that the fields in suit not specified in the sale certificate were sold is set aside, as I consider it should be, the question remains in a more difficult form as to whether the suit is maintainable, and in order to apply the law, it becomes necessary to consider further the material available. The plaintiff's case is worded in the following fashion. It is said that symbolical possession was given of the fields in suit in execution and that on the date of symbolical possession the plaintiff unlawfully took possession of the fields in suit. The records have been eliminated. Of course if it was not the act of the Court or of its officers which gave possession to the defendant, the case might be a case of ordinary dispossession of those portions of land which were in possession of the defendant under his purchase taken in execution. But what the plaintiff avers is that symbolical possession was, in fact, taken of the fields in suit in execution.

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[1] Ramabhadra Naidu v. Kadiriyasami Naicker, (1922) 9 A I R P C 252=63 I C 708=48 I A 155=44 Mad 483 (P C).

The main questions thus arising for decision may be summarised as follows: (1) What is the proper construction of these averments? (2) Is the suit barred on these averments by the provisions of S. 47, Civil P. C.? As regards (1) they can only mean that by beat of drum the ownership of respondent 1 of the fields in suit was proclaimed by an officer of the Court. No party can take symbolical possession in execution by his own independent act. On the date of such proclamation respondent proceeded to enter into possession of what was so proclaimed.

The reason for this drafting of the plaint is obvious. The plaint was presented by counsel, the words "symbolical possession" were also written in brackets in English to make the matter clear. The plaintiff himself who can remember the number of a rule in O. 21 is no stranger to the law, and whatever garbled version of facts has been put forward, the law would probably be studied, and the necessity felt of somehow separating the dispossession by the plaintiff from the proceedings in execution. In his oral evidence the plaintiff omits the first stage altogether. Rightly or wrongly symbolical possession of the whole is mentioned in the plaint, so that all the physical dispossession can be made referable to an act of the respondent. Further, the symbolical possession is alleged to have been wrongly taken because the immovable property mentioned in para. 1 of the plaint of which it was given was not included in the sale certificate.

It thus appears to me that on a proper construction of the plaint, the title of plaintiff ostensibly passed to the respondent by the act of the officer of the Court in execution, and the plaintiff entered into the lands of which title had been so given to him. Nothing was left for plaintiff when his title passed, so that as against plaintiff there could be no question of bringing a suit for partition. The declared owner entered on the land. The result of the wording of the plaint is to relieve the defendant from any necessity to allege and prove that symbolical possession was given by beat of drum in execution of the decree by the officer of the Court, and to enable me to decide the case unless pleadings are amended without remand on the view of the law which I take. The following cases have been quoted in the course of the argument: 45 All 96,[2] 53 Cal 837,[3] 54 Cal 419,[4] 53 Cal 781,[5] 44 Mad 483[1] and 125 I C 765.[6]

In the Allahabad case the facts are not very clear but it was found that the auction-purchasers had taken possession of the property of the judgment-debtors outside the mortgage and an application was made under S. 47, Civil P. C. for restitution. It was held that O. 21, R. 100, had no application as it was the judgment-debtors who had been dispossessed; and apparently held that because (1) a suit by an auction-purchaser for possession against the judgment-debtor could be maintained therefore (2) a suit by the judgment-debtor against the auction-purchaser would be maintainable.

The first position is settled law, and the Full Bench decision in 10 Pat 670[7] has been followed by Macnair J. C. in 28 N L R 250[8] which is discussed in 31 N L R 217[9] at page 221, but does the converse follow? Macnair J. C. in 28 N L R 250[8] remarked that any applications under O. 21,

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[2] Munna Lal v. Collector of Shahjanpur, (1923) 10 A I R All 470=74 I C 995=45 All 96.

[3] Mohan Singh v. Panchanan Sadhukhan, (1927) 14 A I R Cal 106=99 I C 180=53 Cal 837.

[4] Umapati Mukerjee v. Sheikh Soleman, (1927) 14 A I R Cal 614=103 I C 233=54 Cal 419.

[5] Kailash Chandra Tarapdar v. Gopal Chandra Poddar, (1926) 13 A I R Cal 798=95 I C 494 =53 Cal 781=30 C W N 649=43 C L J 345 (F B).

[6] Kishen Lal v. Pearey Lal, (1930) 17 A I R All 865=125 I C 765=1931 A L J 49.

[7] Tribeni Prasad Singh v. Ramasray Prasad, (1931) 18 A I R Pat 241=133 I C 337=10 Pat 670=12 P L T 423 (F B).

[8] Chotelal v. Sarwan, (1932) 19 A I R Nag 140 =140 I C 683=28 N L R 250.

[9] Deviprasad v. Waziruddin, (1935) 22 A I R Nag 30=156 I C 995=31 N L R 217.

R. 95 did raise questions which had reference to the execution of the decree and that in 55 Cal 781,[5] the Calcutta High Court considered an application which did raise such a question. And I would refer to pp. 716 and 717 of the Patna decision where it is remarked that when a decree-holder brings a suit for possession basing it upon the title derived from the Court's sale, he does not dispute or raise any question regarding the execution or satisfaction of the decree but rather assumes and relies upon the validity of the execution, the sale and the satisfaction of the decree. "In such a case the execution terminates with the sale of property." The Bombay High Court in 54 Bom 479[10] clearly takes the view that an application made by the decree-holder auction-purchaser to get possession of property is not a proceeding in execution and that no appeal lies against the order dismissing the application, thus differing from the Calcutta High Court.

The Privy Council case in 44 Mad 483[1] was a case where the mortgage decree directed the sale of certain property "with all the pannai lands belonging to the defendants and in their enjoyment," and where the words of the sale proclamation followed the decree, and the words of the sale certificate referred to "the whole of the pannai lands belonging to and enjoyed by the sons of defendant 1, who acquired them as legal representatives of defendant 1." It was held by their Lordships that the meaning of the sale certificate was clear, and that the object of a sale certificate would be defeated if it were possible to change its plain meaning by reference to other documents. Their Lordships added that certificates of sale were documents of title which ought not to be lightly regarded or loosely construed. It was further added:

> The rights of the mortgagors, however, need not have been taken away by this fact, as they were at liberty to have taken proceedings in the suit in order to raise the contention that they now put forward under S. 47, Civil P. C. 1908, but this they have never done and it is now too late.

They also added that

> there is full opportunity for challenge of all proceedings in the execution of mortgage decrees at the time, and except in clear cases a purchaser ought not to be harassed in his possession by disputes arising years after his purchase.

One contention was that the suit should be treated as an application under S. 47 and that the other side contended that such application would now be barred and the words "now put forward under S. 47," and "now too late" refer to this contention. On the question as to whether a suit will lie I do not think the decision goes further than saying that no suit will lie if the matter can be questioned in execution. Their Lordships add "the atthakshi followed the words of the sale certificate and consequently of these lands possession was duly given." It is desirable to refer to the decision of the Madras High Court (which was reversed) of which an extract is given at page 845:

> I think the sale certificate, which presumably followed the sale proclamation, should if possible be construed so as to convey only the properties which the Court had jurisdiction to sell under the decree. I therefore come to the conclusion that the sale did not include the 226 kulis.

The 226 kulis were in possession of the mortgagee at the time of execution but were not included in the mortgage. It is thus clear that an attempt to construe the sale certificate by a reference to what was mortgaged was definitely disapproved. The decision in 53 Cal 837[3] was a case where a share in a tank was put up to sale in execution of a money decree against the legal representatives of one Rup Kumari. A suit was subsequently brought by these representatives against the auction-purchaser, who was a stranger, on the ground that on the date of the sale Rup Kumari had no interest in the tank as her life interest had come to an end with her death. It was held that the plaintiffs had an opportunity to raise the question in the execution proceedings and that once the sale had become absolute and a sale certificate had been granted to the auction-purchaser who was a stranger the latter should not be left in doubt as to whether the parties or their representatives intended in the future to attack the sale.

In the Full Bench case reported in the same volume, (53 Cal 781)[5] it was decided that an order passed on an application under O. 21, R. 95, viz. an order to put a purchaser in possession to whom a sale certificate has been granted, was an order under S. 47, Civil P. C., and appealable as such. The decree-holder was in this case the purchaser and it was held that the weight of authority was in favour of the view that where the auction-purchaser was the decree-holder any question relating to delivery of possession came under S. 47 of the Code: *vide* p. 796. This last proposition that a purchaser decree-holder was a party had already been laid down by the Judicial Committee: 19 Cal 683.[11] The Full Bench case was referred to in 28 N L R 250,[8] and not dissented from. The case reported in 125 I C 765[6] was a case where the Court sold a larger quantity of land than should have been sold owing to an excessive area being described when describing the property. The delivery of possession followed the sale and obviously there was opportunity for the judgment-debtor to raise the question in the execution proceedings.

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[10] Hiralal Mohanlal v. Ramchandra Kundanmal, (1930) 17 A I R Bom 375=125 I C 703=54 Bom 479=32 Bom L R 619.

Assuming for the sake of argument that the symbolical possession followed the warrant the question arises as to whether an order under O. 21, R. 95, need be or can be questioned in the executing Court. The order passed under R. 95 is an order of a particular kind based on the sale certificate which the Court is bound to pass and will usually be passed ex parte. No notice is necessary because the Court is bound to pass the order based on the sale certificate. But supposing the Court orders possession to be given which it is not empowered to order under O. 21, R. 95, supposing it departs from the sale certificate and orders property not mentioned in the sale certificate to be delivered, would not the act of the Court be entirely without jurisdiction and would not the person dispossessed by an order made without jurisdiction be entitled to bring a suit for recovery of the property which was taken from him in consequence of an order made without jurisdiction at all? A fortiori if the officer of the Court failed to follow the warrant, would not the act be one which could be styled illegal dispossession outside execution?

But this matter is the subject of decision from the year 1869 onwards in the Calcutta High Court. These decisions are to be found in the report published in 12 Beng L R 201[12] and the following pages. Originally Peacock C. J. took the view that an act done in execution of a decree wholly contrary to the decree would not be an act in execution at all and illustrated the case where a cow was to be delivered by the decree and a horse was delivered. In a later case of 1870 possession of properties not specified in the decree had been given by an officer of the Court and the former case was distinguished, and it was said that the question was not the thing to be delivered in execution of the decree but which was the Court which had jurisdiction to deliver the thing. Therefore however absurd the order of the Court which directed the delivery might be, still unless jurisdiction were given, no other Court would have power to alter the direction in question. So, however absurd the illustration of the cow and the horse might make out a possible order to be, still the illustration was not a guide as to which Court had proper jurisdiction. If this case is good law an argument founded on 'nullity' would be met by the proposition that no other Court has power to enter into the question. In 12 Beng L R 201[12] the Judges did not say specifically whether they agreed with the case of 1870. The decision proceeded on the assumption that it was correct, and that the test was whether an officer of the Court delivered possession. In this case, as indeed in the former case, Special Case No. 313 of 1867,[13] it was pointed out that the Court could not say whether the suit lay unless the mode of dispossession was clearly known and in *Muddun Mohun Singh's case*[12] it was pointed out that the objection to jurisdiction of the trial Court trying the suit would depend upon the facts and that the plea involving the facts was not taken by the defendant either in the first or the second Appellate Court.

In 22 Cal 483[14] and the following pages, the rule as quoted in 12 Beng L R 201[12] was referred to and the principle approved is that no suit lay where possession was given of too much by an officer of the Court:

> It seems to us that, if the Subordinate Judge had found that the defendant was put in possession of the lands in execution of the decree by the officers of the Court, the case would clearly fall within the purview of the ruling in 12 Beng L R 201.[12]

In this case too, the objection to the jurisdiction of the trial Court was not taken until the stage of appeal and was held to involve a question of fact and the case was decided also by treating the suit as an application under S. 244, Civil P. C., now S. 47. The lower Court's finding was that the defendant was in possession of the lands in execution of the decree, but the High Court relied on the fact that the executing Court held that possession of the lands decreed had been given in execution. The words "lands decreed" were interpreted as being a decision that he was put in possession in the execution case of only the lands decreed.

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[11] Prosunno Kumar Sanyal v. Kali Das Sanyal, (1892) 19 Cal 683=19 IA 166=6 Sar 209 (PC).

[12] Muddun Mohun Singh v. Kanaye Dass Chuckerbutty, (1874) 12 Beng L R 201.

[13] Ranee Surot Soondry Dabee v. Onwar Persad, Special Appeal No. 313 of 1867.

[14] Biru Mahata v. Shyma Churn Khawas, (1895) 22 Cal 483.

Their Lordships of the Privy Council in 19 Cal 683[11] emphasized in another connexion their approval of the liberality with which S. 244, Civil P. C. had been construed by the Courts in India and in 20 N L R 90[15] the learned Additional Judicial Commissioner quoted the decision in 19 Cal 683 [11] with approval, and the following remarks are pertinent to the decision of the present case :

> It has also been held in 22 Cal 483[14] that no separate suit can lie for the recovery of lands taken by the decree-holder in excess of the terms of his decree ; if the decree-holder has been put in possession of excess land by the officer of the Court executing the decree it is but just and proper that that executing Court itself must undo the wrong by ordering the decree-holder to restore it back under old S. 244, Civil P. C. or its corresponding S. 47, Civil P. C..

It is thus quite clear that the Judicial Commissioner's Court in a published ruling takes the view that the delivery of excess property not covered by the decree is a matter of which the judgment-debtor can complain to the executing Court with a view to obtaining relief and that the question of restoration of the excess must be decided by the executing Court and not by suit in another.

I would also refer to 20 N L R 93[16] where the powers of the executing Court to pass any order necessary to the ends of justice or to shorten litigation is referred to at p. 102. The trend of rulings of the Nagpur Judicial Commissioner's Court and the Nagpur High Court is really in favour of all questions relating to the delivery of possession which give rise to dispute being matters within the jurisdiction of the executing Court. The facts in 20 N L R 90[15] were different. The decree-holder attached certain moveables in execution but they did not appear in the list of moveables attached by him, and the eventual question was whether this property was with the decree-holder or with the Nazir. I agree with this clearly expressed view of Kinkhede A. J.C and consider that the view expressed by the Calcutta High Court years ago is still good law. It follows that once the plaintiff has averred that symbolical possession of all the property in suit was taken in execution, he is out of Court in the present case, for the reasons I have given.

* * * *

The result is that the appeal is dismissed as regards all the claim except half of survey No. 7/1 of mouza Khojanpur. As regards survey No. 7/1 of mouza Khojanpur the case is remitted to the Court of first instance with the following direction: on payment into the trial Court by 20th August 1937 of all costs incurred by both defendants the trial Court shall accept the appended amendment and proceed to retry the amended claim for half the field survey No. 7/1 of Khojanpur. The parties will of course be bound by the findings already delivered as to what was sold at the auction sale. If the plaintiff fails to pay all costs in the suit by the said date the amended claim will not be tried, but the case will be returned to this Court to pass a final order on the appeal regarding survey No. 7/1. As indicated, the appellant is to pay all the costs of the litigation hitherto and this is provided for in this decree dismissing the appeal except as regards survey No. 7/1 and remitting for a fresh trial the claim regarding half field survey No. 7/1. Pleaders fees as certified.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 281

VIVIAN BOSE AND PURANIK JJ.

*Daulat Shah Bapu* — Appellant.

v.

*Mt. Saraswati Bai and others* — Respondents.

First Appeal No. 81 of 1934, Decided on 16th July 1937, from order of Addl. Dist. Judge, Chanda, D/- 21st April 1934.

**(a) C. P. Land Alienation Act (2 of 1916), S. 25—Copy of decree and not decree is to be sent to Deputy Commissioner—Civil Court has no power to send decree itself for execution to Deputy Commissioner, much more simple money decree.**

**A simple money decree does not involve a permanent alienation of land and hence the Court is not empowered to send it to the Deputy Commissioner under S. 25. [P 282 C 2]**

**Besides, under S. 25 of the Act it is only the copy of a decree or order which is to be sent to the**

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[15] **Keshri Singh v. Umrao Singh, (1924) 11 A I R Nag 246=88 I C 1031=20 N L R 90.**

[16] **Ramji v. Ziblaji, (1924) 11 A I R Nag 258=80 I C 49=20 N L R 93.**

Deputy Commissioner and not the decree and that too is sent for the sole purpose of enabling the Deputy Commissioner to scrutinize it and to have it revised if it offends the provisions of the Act and not for execution. [P 282 C 2 ; P 283 C 1]

Where therefore a Civil Court sends to the Deputy Commissioner a decree with a rider that the property can be sold subject to the provisions of the Act, the procedure is wrong and must be set aside. [P 283 C 1]

**(b) C. P. Land Alienation Act (2 of 1916), S. 16—Attachment and sale are not distinct processes—Property prohibited from sale cannot be attached and attachment if any must be raised—Land mentioned in S. 16 cannot therefore be attached.**

Attachment is not in itself an independent process but is a part and parcel of the process of sale and execution. A decree may sometimes be satisfied before the process is complete but that in itself is no ground for supposing that one is not an adjunct of the other. [P 283 C 1, 2]

Where therefore a Court is for any reason prohibited from selling the property or dealing with it otherwise in lieu of sale, the attachment must be raised. The prohibition contained in S. 16 is complete and neither the Civil nor the Revenue Courts can touch the land in execution in any way. If the Court has attached such land the attachment must be raised : *A I R 1931 P C 160, Disting.; A I R 1935 Nag 133 and A I R 1937 Nag 41, Rel. on.* [P 283 C 2]

Dr. Sir H. S. Gour — *for Appellant.*

A. R. Kulkarni, B. R. Mandlekar and M. R. Bobde — *for Respondents 1 to 3 respectively.*

**Judgment.** — The respondent Saraswati Bai obtained a money decree against the appellant Daulatshah to the extent of the assets of his father Durugshah in his hands. In execution she attached the seven villages in dispute. The appellant's contention is that they are not liable to attachment and sale in execution of this decree for two reasons. Firstly, because he being a member of an aboriginal tribe is protected under the C. P. Land Alienation Act 2 of 1916, and secondly, because these villages form part of the Palasgarh Zamindari, which is both impartible and inalienable. He has lost on both points and so appeals. It is an admitted fact that the appellant is a member of an aboriginal tribe and that the C. P. Land Alienation Act 2 of 1916 applies to him. This was asserted by him in his objection petition and admitted on behalf of the respondent decree-holder by her pleader Mr. Pundalik on 6th January 1934. So the only question we have to consider in this behalf is whether the property is exempt from attachment and sale under the Act. So far as sale is concerned there can be no doubt. It is prohibited in express terms. S. 16 (1) runs :

> No land belonging to a member of an aboriginal tribe shall be sold in execution of any decree or order of any Civil or Revenue Court . . . . . . . nor shall a receiver be appointed to manage such land under S. 51, Civil P. C., 1908.

The only exceptions are contained in S. 16 (2) and S. 17. Neither applies here, so the prohibition remains without any kind of limitation or qualification. The learned Judge of the lower Court accepts this but considers he has power to refer the matter to the Deputy Commissioner under S. 25. Consequently we find the following rider added to his order :

> It is further directed that the decree be sent to the Deputy Commissioner under S. 25, C. P. Land Alienation Act. The attached villages can be sold subject to the provisions of the C. P. Land Alienation Act.

We can find no justification for this procedure. The first part of S. 25 directs every Civil Court which passes a decree or order involving the permanent alienation, mortgage or lease by a member of an aboriginal tribe of his land to send a copy of such decree or order to the Deputy Commissioner. The decree in the present case is a simple money decree and so does not involve the permanent alienation of land. Consequently the Court is not empowered to send it to the Deputy Commissioner under S. 25. Moreover, what the Court has to send in such cases is not the decree itself but a copy of the decree. The distinction is of importance. The learned Judge of the lower Court evidently thinks that what the Civil Courts have to do in such cases is to refrain from selling the property themselves and to send the decree or order to the Deputy Commissioner for execution in much the same way as they do in certain cases under Sch. 3, Civil P. C. This is entirely wrong. The Deputy Commissioner has no more power to execute such a decree under the Act than the Civil Court itself. The reason for the direction given in sub-s. (1) of S. 25 is to be found in sub-s. (2) :

> When it appears to the Deputy Commissioner that any Civil Court has, after the commencement of this Act, passed a decree or order contrary to any of the provisions thereof, the Deputy Commissioner may within two months of the date upon which he is informed of such decree or order, apply for revision of such decree or order to the Court, if any, to which an appeal would lie from such decree or order, or in any other case, to the High Court, and if the Court finds that such decree or order is contrary to any of the provisions of this Act, it shall alter it so as to make it consistent with this Act.

The copy of the decree or order is sent to the Deputy Commissioner not for execution, but for the sole purpose of enabling him to scrutinise it and to have it revised if it offends the provisions of the Act. It follows, the order of the lower Court sending the Deputy Commissioner the decree with the rider that the property can be sold (apparently by him) subject to the provisions of the Act is wrong and must be set aside. It was argued that though the decree does not involve the permanent alienation of land the order in execution attaching the property with a view to sale does; so a copy of that order should have been sent to the Deputy Commissioner. As the order stands we quite agree, but for what purpose? Not for execution but to enable the Deputy Commissioner, if so advised, to get the attachment raised by a revising authority on the ground that it was contrary to the provisions of the Act.

That brings us to the next point under this head. The learned counsel for the respondent decree-holder urged that the prohibition in S. 16 is against sale and not against attachment, and that under the Code of Civil Procedure attachment and sale are two entirely independent processes: both coercive but each distinct; both directed to the same end, namely the satisfaction of the decree-holder's claim but each accomplishing it, or endeavouring to do so by different means. He pointed out that property need not necessarily be sold after attachment: sometimes the mere fact of attachment is enough to make the judgment-debtor pay up, at others, for example, under Sch. 3, Civil P. C., the decree can be satisfied by other means. Therefore he argued that since the Act prohibits sale and not attachment, the attachment should continue and the decree-holder be left to his chances of being able to recover his money under the limited pressure exercised by this coercive process. We do not think the two processes can be separated in this way. Both are part and parcel of the procedure of execution, and S. 51, Civil P. C., states that one of the modes of execution shall be "attachment and sale" or "sale without attachment" but it does not provide for the alternative of "attachment without sale". That in itself is enough to indicate that attachment is not an independent process in itself. It is a part of the process of sale and its object is to protect the decree-holder by preventing the judgment-debtor from alienating the property before the decree-holder can bring it to sale. S. 60 leads one to the same conclusion. It enumerates the kinds of property which are liable to "attachment and sale" and makes no provision for properties which are liable to attachment but not to sale. It must, we think, follow that only saleable property can be attached.

It is true that the decree may sometimes be satisfied before the process is complete but that in itself is no ground for supposing that one is not an adjunct of the other. It is also true that in Collector's cases the property is sometimes mortgaged or leased and not sold, but that is because the Code itself provides an alternative to sale in those special cases. It does not indicate that attachment is an end in itself. If then attachment is not an end in itself, as we hold, but is an adjunct to sale, it follows that whenever the Court is for any reason prohibited from selling the property or dealing with it otherwise in lieu of sale the attachment must be raised. Any other conclusion would lead to an abuse of the processes of the Court. In the present case the prohibition is complete: not only can there be no sale but even a receiver cannot be appointed to manage the land and so the position contemplated by 59 Cal 1[1] cannot arise here. Neither the Civil nor the Revenue Courts can touch the land in execution in any way. In the circumstances we are clear that the attachment must be raised. We find, this is also the view of Niyogi J. in 31 N L R 239[2] and in I L R 1937 Nag 261.[3] The appeal is allowed. The order of the lower Court is set aside and the property in suit released from attachment. Costs in this and the lower Court will be paid by the respondents. Counsel's fee Rs. 125.

K.B./R.K. *Appeal allowed.*

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[1] Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Ltd., A I R 1931 P C 160 = 132 I C 727=59 Cal 1=58 I A 215 (P C).

[2] Ramchandra Bapu v. Sukhdeo, A I R 1935 Nag 133=156 I C 65=31 N L R 239.

[3] Balaram Misra v. Mansingh, A I R 1937 Nag 41=167 I C 807=I L R 1937 Nag 261.

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## A. I. R. 1938 Nagpur 283

GRUER J.

*Nana Sadoba and others*
Applicants.
v.
*Emperor.*

**Criminal Revision No. 467 of 1937, Decided on 4th January 1938, from order of Addl. Sess. Judge, Wardha, D/- 18th October 1937.**

**(a) Revision — High Court — High Court will not ordinarily interfere in pending case — But where procedure adopted by lower Appellate Court is exceptional and balance of convenience is in favour of deciding in revision the points raised, High Court will interfere.**

Although the High Court would not ordinarily interfere in revision in a pending case unless it is of an exceptional nature, yet, where the procedure adopted by the lower Appellate Court (in deciding certain law points by a preliminary order before proceeding to hear the appeal on merits) is somewhat exceptional and the balance of convenience would be in favour of deciding the points in revision, it would do so, more especially, when it is clear on the face of the record and recognized by the lower Appellate Court, that the procedure of the trial Court in regard to examination of the accused under S. 342, Criminal P. C. has been defective. [P 284 C 2]

**(b) Criminal Trial — Validity — Non-compliance with mandatory provisions of Criminal Procedure Code.**

Non-compliance with the mandatory provisions of the Code of Criminal Procedure does not necessarily vitiate the proceedings and the criterion is whether there has been any failure of justice: *A I R 1927 P C 44 and A I R 1932 Nag 127, Rel. on.* [P 285 C 1]

**(c) Criminal P. C. (1898), S. 342—Examination of accused contemplated by S. 342 is by Judge direct — Putting of one general question is not proper compliance with S. 342—Several accused tried together — Position of each accused must be individually considered and careful examination is necessary.**

The examination of the accused contemplated by S. 342 is one by the Judge direct, without any intervention of the counsel. The putting of one general question to the accused is not a proper compliance with S. 342. [P 285 C 1]

Where several accused are being tried for an offence of rioting and a complicated question has been put to each of the accused without reference to the particular position of each, as brought out by the evidence against him, the procedure is likely to prejudice the accused. In such a case the position of each accused must be individually considered and a careful examination is necessary: *A I R 1924 Nag 301, Ref.; A I R 1933 Mad 233, Dissent.* [P 285 C 1, 2]

**(d) Criminal P. C. (1898), Ss. 235 and 239—Accused tried for rioting, charged with having attacked excise party seeking to make raid on certain houses in village—Whole affair taking place in the village, one event succeeding another rapidly — Joint trial of accused is legal.**

The legality of a joint trial in a case of rioting depends upon whether the whole affair constituted one transaction, and with reference to that unity of time, place and purpose ought to be looked into. [P 285 C 2]

Where the rioters are charged with having attacked an excise party which came to make a raid on certain houses in a village and the whole affair takes place in the village, one incident succeeding another rapidly and the rioters are alleged to have gone from one house to another and finally to have surrounded the Excise Inspector and his companions, the joint trial of the accused is legal. [P 285 C 2; P 286 C 1]

Hidayatullah — *for Applicants.*

W. R. Puranik, Advocate-General — *for the Crown.*

**Order.** — The 15 applicants in this case have been sentenced to various terms of imprisonment for offences under Ss. 148 and 333, I. P. C. or Ss. 148 and 149 read with S. 333, I. P. C. These offences are said to have been committed in a riot which took place in the village of Zidsi in the Wardha tahsil. An excise party, about 40 strong, descended on the village about four in the morning and made a simultaneous raid on a number of houses. The inhabitants resented being turned out at that early hour of a rainy morning and offered forcible resistance. The learned Additional Sessions Judge, Wardha, before whom the case came on appeal, adopted the somewhat unusual though quite legal, course of hearing and deciding certain law points by a preliminary order before proceeding to hear the appeal on the merits. Against his order repelling the defence objections of law the present revision application has been filed. The learned Advocate-General takes a preliminary objection that the application is premature and the lower Appellate Court should be directed to decide the appeal on the merits. He quotes A I R 1930 Lah 881[1] and A I R 1931 Pat 140.[2] I quite agree with the principle set out in these cases, that in a pending case the High Court should not interfere unless it is of an exceptional nature. As I have just said the procedure adopted by the lower Appellate Court is somewhat exceptional, and I think the balance of convenience is in favour of deciding the points now, especially as it is clear on the face of the record and recognized by the Appellate Court itself that the examination of the accused in the case has been defective.

The objections urged are three-fold: first, that the charge is defective and prejudicial; second that the joint trial of all these applicants was illegal; and third, that the trial is vitiated by failure to comply properly with S. 342, Criminal P. C. Taking the last point first I remark that since the publication of the Privy Council

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1. Donlea v. Mrs. Donlea, (1930) 17 A I R Lah 881=1930 Cr C 978= 32 Cr L J 145=128 I C 542=31 P L R 809.
2. Kulo Singh v. Emperor, (1931) 18 A I R Pat 140=1931 Cr C 356=131 I C 785=32 Cr L J 782=10 Pat 596=12 P L T 69.

ruling in 5 Rang 53[3] it is now recognized that non-compliance with a mandatory provision of the Code does not necessarily vitiate the proceedings and that the criterion is whether there has been any failure of justice : *see* 28 N L R 163.[4] It is thus unnecessary on this particular point to refer to cases of the Judicial Commissioner's Court prior to that date. As learned counsel for the applicants points out, the alleged offences consist of several elements, and answers on each point ought to have been obtained from the accused. It is alleged that they formed an illegal assembly, that some of them went armed with lathis and other deadly weapons, that they resisted search, and that there was a riot in which some of them used these weapons and caused injuries.

In 25 Cr L J 417,[5] Kinkhede A. J. C. pointed out that the putting of one general question to the accused is not a proper compliance with S. 342, Criminal P. C. Here a complicated question has been put to each of the accused without reference to the particular position of each as brought out by the evidence against him. In spite of the fact that legal advisers were present I am unable to see how that procedure did not prejudice or might not have prejudiced the accused. The examination of the accused contemplated by S. 342, Criminal P. C. is one by the Judge direct, without any intervention of counsel. I find myself in disagreement with what is said in 56 Mad 231[6] at p. 245, that when the accused is represented by counsel it is often in his interest that the Judge should formally comply with the section by asking a general question and then leave the accused's counsel to offer explanations on his behalf in the way most favourable and least dangerous to him. With all due respect, that, in my opinion, is not a proper interpretation of the section or one which has found acceptance elsewhere. In the present case the accused, no doubt, were asked a supplementary question about why the witnesses took their names & they replied that they would give a written statement. After cross-examination they were asked "Is there anything further to be stated ?" and they again said that they would give a written statement. No such statement was filed. It has been held by myself in A I R 1936 Nag 147[7] and later by Grille J. in A I R 1937 Nag 67[8] that where an accused practically refuses to answer questions it would be useless for the Court to persist with them. The first answer however does not make it clear whether the written statement was to be with reference to the witnesses only or to the whole case, and after charge it would have been well if any new points had been put to the accused separately instead of the vague question "Is there anything else to be stated ?" In a case like the present the position of each accused must be individually considered, and a careful examination was necessary. The accused may well have been prejudiced, and I hold that the case should go back for a retrial from the point where the defect occurred, i. e. the accused should be re-examined and the case should continue from that point.

The defect in the charge would not in itself vitiate the trial and probably no prejudice has been caused, but it should now be corrected. There has been confusion between the real common object alleged, which was to prevent the search of the excise party, and the means adopted to carry out that object, which was the beating of Sheomangal and other officers and men. Further, the first part of the charge mentions the beating of Sheomangal only, which certainly was not the common object of each member of the assembly. The legality of a joint trial depends upon whether the whole affair constituted one transaction, and with reference to that, unity of time, place and purpose ought to be looked to. The affair took place in one village, one incident succeeding another rapidly. But it is said that the incidents were isolated and there was no common purpose. From the plan in the case, it would appear that the houses picketed are in the neighbourhood of each other. The prosecution story is that the rioters went from one house to another and finally that a whole mob of them surrounded the Excise Sub-Inspector and his companions, who had to retreat. The alarm and the shouting must have quickly spread, and presumably everybody in the village soon knew what was afoot. In these circumstances I consider that the joint trial was legal. It will still however be open to the prosecution to split up the case and try groups of accused separately if it is now thought that that would be the more convenient course. The convictions are therefore set aside, and the case is remanded for further action as indicated above.

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[3] **Abdul Rahman v. Emperor, (1927) 14 A I R P C 44=100 I C 227=28 Cr L J 259=54 I A 96=5 Rang 53 (P C).**

[4] **Mt. Lahani v. Khusal, (1932) 19 A I R Nag 127=1932 Cr C 678=140 I C 113=33 Cr L J 938=28 N L R 163.**

[5] **Udhao v. Emperor, (1924) 11 A I R Nag 301=77 I C 593=25 Cr L J 417.**

[6] **Narayana v. Emperor, (1933) 20 A I R Mad 283=1933 Cr C 289=143 I C 46=34 Cr L J 481=56 Mad 231=64 M L J 88.**

[7] **Ramesan v. Emperor, (1936) 23 A I R Nag 147=1936 Cr C 689.**

[8] **Budhulal v. Emperor, (1937) 24 A I R Nag 67=167 I C 155=38 Cr L J 354=I L R (1937) Nag 228.**

R.M./R.K. *Case remanded.*

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## A. I. R. 1938 Nagpur 286

NIYOGI J.

*Laxminarayan Nathmal Marwadi* — Applicant.

v.

*Shriram Danmal Marwadi* — Non-Applicant.

Civil Revn. No. 35 of 1937, Decided on 10th November 1937, from decree of Addl. Judge, Small Cause Court, Amraoti, D/- 5th November 1936.

**Limitation Act (1908), Arts. 7 and 56—Suit by goldsmith for recovering price of his labour in making ornaments is governed by Art. 56 and not by Art. 7.**

Article 7 applies to a case where a household servant, artisan or labourer is hired on wages per day, per week or per month and does not apply to the remuneration of a skilled person like a goldsmith. Suit by a goldsmith for recovering the price of his labour in making ornaments falls under Art. 56 and not under Art. 7 : *(1885) Bom P J 252, Rel. on*; *4 N L R 49, Disting.* [P 287 C 1]

A. R. Kulkarni — *for Applicant.*

T. L. Sheode — *for Non-applicant.*

**Order.**—This is a defendant's application to revise a judgment of the Additional Small Cause Court, Amraoti in Civil Suit No. 447 of 1936 decided on 5th November 1936. The plaintiff sued to recover the price of 4 tolas and $\frac{3}{4}$ masas of gold, which was the additional quantity of gold which he supplied to make the gold ornaments for defendant 1, and the plaintiff's wages for preparing ornaments and charges for fixing the precious stones in the ornaments. The suit was contested very strenuously by the defendant who also claimed a set off, but his defence was overruled and the plaintiff's suit was decreed. Four points are raised in revision here on behalf of the applicant: (1) that the plaintiff did not supply the additional quantity of gold, namely 4 tolas and $\frac{3}{4}$ masas, (2) that the plaintiff had retained $1\frac{1}{2}$ tola $\frac{1}{2}$ masa and $\frac{1}{2}$ gunja out of the quantity delivered to him by the defendant, (3) that the plaintiff was not entitled to withhold as batta 1 masa out of each tola of pure gold supplied by the defendant for which he substituted an alloy in making the ornaments, and (4) that the suit was barred by limitation.

As to point 1, I have myself perused the evidence on record and I find myself in agreement with the lower Court. The plaintiff put himself into the witness-box and also examined witnesses to prove that he delivered the gold ornaments weighing five tolas and odd over and above the quantity that he had received from the defendant. These ornaments were prepared out of the additional quantity which the plaintiff supplied. If it was a fact that these ornaments of five tolas and odd were delivered to defendant 1's wife, it would necessarily follow that the plaintiff supplied the extra gold required to make those ornaments. Defendant 1 in the witness-box contented himself with a mere denial of the plaintiff's averment but omitted to examine his wife who was the most important witness on this point. He however admitted that his wife used to go to the shop of the plaintiff and that she paid the jadai charges to the plaintiff. These circumstances lend corroboration to the plaintiff's word that his wife took back the ornament in question. There is apparently no reason why the plaintiff and his witnesses should be disbelieved. In any case as these witnesses have been believed by the lower Court, and I think, not unreasonably, I see no reason to interfere with the finding.

As to the second point, no evidence was led by the defendant. It has therefore no substance. As to the third point, the plaintiff adduced evidence to prove that there was an agreement whereby the plaintiff was entitled to appropriate one masa out of each tola of gold supplied by the defendant as he had to mix an alloy of one masa in a tola to make the ornaments. It is urged that this agreement was without consideration. I do not see how it can be said to be without consideration, because the goldsmith supplies as a matter of fact one masa of gold of an inferior quality in making the ornaments. As he gives some gold, though of inferior kind in place of the pure gold retained by him, the difference may not be very substantial and this item may well be considered to be a part of the remuneration given to the goldsmith for his skill in making the ornaments. There is also evidence to show that this was in accordance with the usage of trade. There is no evidence to the contrary to disprove the custom. I do not see my way to agree with the defendant's learned counsel that the custom is unreasonable. In any case as the agreement has been proved one need not go into the reasonability or otherwise of the custom.

The last point raises a question of limitation. It is urged that the case is one which falls within the purview of Art. 7, Lim. Act. The goldsmith is said to be an artisan within the meaning of that word occurring in Art. 7. "Artisan" is defined in Webster's Dictionary as a person trained to manual dexterity in some mechanic art or trade. "Artisan" in fact means a mechanic. A goldsmith can in no case be put in the category of a mechanic because his business requires skill and training involving responsibility. Art. 7 appears to me to apply to a case when a household servant, artisan or labourer is hired on wages per day, per week or per month and it could not apply to the remuneration of a skilled workman like a goldsmith. In (1885) Bom P J 252[1] it was held that suit by a goldsmith to recover the price of his labour in making ornaments falls under Art. 56 and not under Art. 7. It is urged that Art. 56 is more general than Art. 7. I cannot accede to this contention, as in my opinion Art. 7 has no applicability whatsoever to a goldsmith, whereas Article 56 is one directly applicable to a person who, situated in the position as a goldsmith is in the present case, does some work at somebody's request and no time is fixed for payment as in the case of a daily, weekly or monthly labourer. Consequently there is no question here of using one of the two Articles which are equally applicable to a case, as was the case in 4 N L R 49.[2] I hold that the case is governed by Art. 56. The suit was therefore within limitation. The result is that the application stands dismissed with costs. Pleader's fee Rs. 15.

R.M./R.K. *Application dismissed.*

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[1] Vishnu v. Gopal, (1885) Bom P J 252.

[2] Nagoba v. Madholala Kalar, (1908) 4 N L R 49.

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## A. I. R. 1938 Nagpur 287

STONE C. J.

*Mt. Hira Bai and others* — Appellants.

v.

*Indrabahadursingh and others* — Respondents.

Second Appeal No. 251-B of 1935, Decided on 24th November 1937, from appellate decree of Third Addl. District Judge, Amraoti, D/- 16th August 1935.

**Limitation Act (1908), Ss. 5 and 12 (2) — Time during which copying is stopped for want of funds should be excluded as time required to get copy of decree when extra charges are paid without delay — Delay caused by Court in finding out that wrong number is given should also be excluded.**

The time during which copying is stopped for want of funds, at least where there is no absence of bona fides and when there is no delay in supplying the extra charges when demanded, should not count but should be excluded as time required to get a copy of the decree. Time required means time properly required and if time is wasted because of the appellant's own negligence, that time does not count. But if a wrong number is given and a Court takes three weeks to find out that the wrong number is given, the error is not the cause of the delay. The error causes such delay as it is due to it : *A I R 1933 Nag 218, Rel. on.* [P 288 C 1]

W. B. Pendharkar and A. V. Khare — *for Appellants.*

M. R. Bobde — *for Respondents.*

**Judgment.** — This appeal raises a short point relating to limitation. The material facts are that an appeal was filed on 5th March 1935 against a decree passed on 20th December 1934. It was prima facie out of time but was admitted subject to objection. The objection was taken and the lower Court has held that the appeal is barred. The delay is sought to be excused under S. 12 (2), Lim. Act as including "time requisite for obtaining a copy of the decree". Application for a copy was made by a person not clerk of the pleader employed, on 22nd December 1934. On 11th January 1935, it was discovered that he had given the wrong suit number. He was told of the error on the 19th. If he had appeared when ordered, he would have been told on the 17th. The right number was given on 19th January 1935. The copying was started on 19th January 1935 but was stopped for want of funds on 28th January 1935. Funds were supplied on 7th February 1935. Copy was delivered on 9th February 1935. In my opinion the period from 22nd December 1934 to 11th January 1935 was due to delay in the office. It does not take many minutes to see whether the right or the wrong number is given. The delay from 11th January 1935 to 19th January 1935 is due to negligence in giving the wrong number and in failing to appear when ordered. The delay from 19th January 1935 to 28th January 1935 was due to delay in the office. I do not understand why it took nine days to discover that insufficient funds had been deposited for copying charges. In this case the applicant was ordered to appear on 26th January 1935 and appeared, but even then one week after he had deposited the charges, he was not told that more was required. A further five days appear to have been taken to notify the appellant that more funds were required with the result that the appellant did not know that anything was wrong until apparently 2nd February 1935. He then deposited the charges, the copying section appears to have taken another week to copy this decree, and on 9th February 1935 it was delivered. The appellant filed his appeal on 5th March 1935.

I agree with A I R 1933 Nag 218,[1] that time during which copying is stopped for want of funds, at least where there is no absence of bona fides and where there is no delay in supplying the extra charges when demanded, should not count but should be excluded as time required to get a copy of the decree. I also agree with Miscellaneous Appeal No. 104 of 1936 that time required means time properly required, and if time is wasted because of the appellant's own negligence, that time does not count. I do not however agree that it a wrong number is given and a Court takes three weeks to find out that wrong number is given, the error is the cause of the delay. The error causes such delay as it is due to it. If the office does not take up the application for a week, there would be a week's delay error or no error. Then there being an error, the office is delayed. It is delayed until after communicating with the applicant or where, as here, the applicant is ordered to appear, the correct information is given and that delay is due to the error. Here the error was not discovered until the 11th so that, error or no error, there would have been that delay. It was not communicated to the applicant because he had been ordered to appear on the 17th. He actually appeared on the 19th. The delay caused by the error can at most be put at eight days, for it was corrected on the 19th. Thus the periods 24th December 1934 to 11th January 1935 and 19th January 1935 to 9th February 1935 are not to be counted.

Thus, the following time counts : 21st December 1934, 11th January 1935 to 19th January 1935, 10th February 1935 to 5th March 1935. That equals 32 days. As of this period 11th January 1935 to 17th January 1935 was due to the fact that the slip was not communicated because the applicant had been ordered to appear on 17th January 1935 and it was left until then to tell him of his error, I am of the opinion that this is a fit case to excuse the delay under S. 5, Lim. Act, on the terms that the appellant will pay all the costs of this preliminary objection in all Courts in any event. The appeal will be now heard and disposed of according to law.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 288

GRUER J.

*Moti Shankarlal and another*
Accused — Applicants.
v.
*Keshrichand Panchangdas*
Non-applicant.

Criminal Revn. No. 469 of 1937, Decided on 7th January 1938, from order of Sub-Divisional Magistrate, Hinganghat, D/- 7th October 1937.

**Criminal P. C. (1898), S. 350—Each transfer gives accused fresh chance of exercising his right under proviso to S. 350 — Word 'predecessor' means 'predecessors' where there is more than one.**

Each transfer gives an accused a fresh opportunity of exercising his right under the proviso to S. 350. The word 'predecessor' should be taken to mean 'predecessors' where there is more than one. It cannot mean that a third Magistrate can act only on the evidence recorded by his predecessor, the second Magistrate, and not also on the evidence recorded by the first Magistrate who handled the case : *A I R 1924 Nag 227 and A I R 1926 Mad 815, Ref.; A I R 1930 Nag 59, Expl.*
[P 289 C 1]

Nisarali — *for Applicants.*

Dr. W. S. Barlinge—*for Non-applicant.*

**Order.**—This is a simple case in which the two applicants, Moti and Mishree, have been fined Rs. 20 each under S. 352, Penal Code. The purely technical point which has been ingeniously raised for them in revision is that the lower Court acted illegally in accepting the waiver made by accused's counsel, who when the case came on transfer before the Magistrate who decided it, said that he did not wish to exercise his right under S. 350, Criminal P. C., to recall the prosecution witnesses previously examined. This was the second transfer in the case. These witnesses had been examined by the first Magistrate and the second Magistrate did nothing beyond recording on one hearing before him that the accused claimed trial de novo and on the second hearing adjourning the case.

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[1] Gajpatilal v. Mauliprasad, (1933) 20 A I R Nag 218=145 I C 742.

On these facts, the contention is that once thea ccused asserted their right, they cannot be allowed to alter their decision. It is said that as soon as they decided to have the witnesses re-summoned, the effect was as if the evidence originally recorded had been obliterated and it cannot be taken into consideration later on. The third Magistrate, it is said, is by S. 350, Criminal P. C., successor only to the second Magistrate and not to the first. It was also faintly urged that Mr. Dani, counsel for the accused, had no right to act in the absence of the third accused. This third accused has been discharged, and he is not one of the applicants before me. His case therefore needs no consideration. The other two were actually present and the waiver must be deemed to have been made on their instructions.

I am of opinion that each transfer gives an accused a fresh opportunity of exercising his right under the Proviso to S. 350, Criminal P. C. The word 'predecessor' should be taken to mean 'predecessors' where there is more than one. It could not mean that a third Magistrate could act only on the evidence recorded by his predecessor, the second Magistrate, and not also on the evidence recorded by the first Magistrate who handled the case. This point has been dealt with in 47 Mad 245.[1] It was held that there was no reason why a third Magistrate should not act on evidence recorded by his predecessors. Applicants rely on A I R 1930 Nag 59[2] in which it was held by Subhedar A. J. C. that the option given to the accused under S. 350 (1), Proviso, could be exercised only once. In that case the accused attempted to exercise it a second time before the same Magistrate after the case had proceeded. That order only decides that they had no right in these circumstances to exercise a second choice. It does not say that it would have been illegal to allow them to do so. In A I R 1926 Mad 815[3] on the contrary it was held that the accused could change his mind in this matter. In A I R 1935 Mad 318[4] it was held that if the Sub-Magistrate committed an error in rehearing two prosecution witnesses whom the accused did not want him to re-hear, the action though irregular was cured by S. 537, Criminal P. C. In the present case, my view is that the accused are entitled to a second choice and they exercised it, and even if they had not been entitled in law to change their minds, the irregularity would not be a fatal one as no prejudice has been caused. There is no room for interference. The application is dismissed.

D.S./R.K. *Application dismissed.*

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[1] Govindan v. Krishnan, (1924) 11 A I R Nag 227=81 I C 54=25 Cr L J 566=47 Mad 245 =46 M L J 808.

[2] Emperor v. Sane, (1930) 17 A I R Nag 59= 1930 Cr C 147=121 I C 646=31 Cr L J 282.

[3] In re Arulay, (1926) 13 A I R Mad 815=94 I C 707=27 Cr L J 659.

[4] Veerappa v. Emperor, (1935) 22 A I R Mad 318=1935 Cr C 381=157 I C 1020=36 Cr L J 1265.

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## ✻ A. I. R. 1938 Nagpur 289

NIYOGI J.

*Shankar Bhagwanji* — Appellant.

v.

*Laxman Bhagwanji* — Respondent.

Second Appeal No. 224-B of 1935, Decided on 5th March 1937, from appellate decree of Second Addl. District Judge, Amraoti, D/- 30th July 1935.

**✻ Riparian Rights — One riparian proprietor diverting water course to his neighbour's land—Accumulation of water on neighbour's land—That neighbour in his turn, to protect his own property, also diverting that current of water—He cannot be held responsible for that act irrespective of consequences to his another neighbour.**

Where a riparian proprietor for his own purposes, viz. to rid his land of the mischief diverts the watercourse to his neighbour's land and the accumulation of water there was not made as a voluntary act by the neighbour for his own benefit but by that riparian proprietor for ridding his land of the calamity, it is the duty of that neighbour to protect himself from that threatened danger irrespective of the consequences to his another neighbour: *1 S M L C 13th Edn., 513, Foll.; (1927) A C 226 ; (1875) 10 Ex 4 ; 8 B & C 355 and A I R 1920 P C 111, Rel. on; (1883) 13 Q B D 131 and (1868) 3 H L 330, Expl.* [P 292 C 1]

E. M. Joshi — *for Appellant.*

K. V. Bramha and D. W. Kathaley — *for Respondent.*

**Judgment.** — This is plaintiff's appeal from an affirming judgment of the Second Additional District Judge, Amraoti. The plaintiff brought the suit out of which this appeal arises asking for certain reliefs of mandatory and prohibitory injunctions and also damages consequent on the loss caused to the plaintiff due to the diversion of water channel by the defendant into the plaintiff's land. The plaintiff's case was that the water flowed in a defined channel through the defendant's field No. 46 and that the defendant diverted the course of the nala from his own land to the adjoining field of the plaintiff which resulted in damage of his crop. Both the Courts below negatived this main contention raised by the plaintiff and found that the channel never flowed through the defendant's land and that he did not divert its course as alleged by the plaintiff. The defendant is held by the Courts below to have dug a trench in his land and also erected an embankment to protect his own land from the influx of water caused by the embankment which had been erected in field No. 38 which lay to the north of the plaintiff's field No. 48/1 and that the defendant was not liable to the plaintiff for whatever he did to protect his own field from flood. It is urged on behalf of the appellant that although the defendant was entitled to adopt protective measures against the flood by erecting an embankment on his own field he had no right to protect his property by transferring the mischief from his own land to that of the plaintiff. Reliance was placed on (1883) 13 Q B D 131.[1] In that case by reason of an unprecedented rain fall a quantity of water was accumulated against one of the sides of the defendants' railway enbankment, to such an extent as to endanger the embankment, when, in order to protect their embankment, the defendants cut trenches in it by which the water flowed through, and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had the trenches not been cut. In an action for damages for such injury, the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently. It was held that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable.

The situation in the present case is this. The water during the rains flowed along the boundary dividing defendant's field No. 47 from the plaintiff's field No. 48/1 and another field No. 38. Field No. 38 lies to the north of the plaintiff's field No. 48/1 and is on a higher level so that the rivulet flowed first through field No. 38 and then down to field No. 48/1 through which it passed. When it entered field No. 38 it spread over a part of it and destroyed the crops. The owner of field No. 38 in order to protect his crops erected an embankment towards the extremity of his field where the stream entered into his land. That resulted in driving water into field No. 47 at its northern end. The defendant, who is the owner of field No. 47 to protect his own field, built in his turn an embankment and also dug a trench. The result of these two embankments erected in fields Nos. 38 and 47 was to let the stream flow in its full volume and intensity along the boundary of field No. 48/1 which is on a lower level. It is in view of these facts that the rights of parties have to be determined. The case relied on by the learned counsel for the appellant no doubt lends assistance to his argument, but that case was a case in which there was a calamity caused to the defendants by reason of sudden accumulation of water in consequence of an unprecedented rainfall. The mischief already accrued to the defendants and in order to get rid of the consequential injury to their land they let off the accumulated water into the land of their neighbour. In that case it was not laid down that the defendants had no right to protect themselves from a threatened injury; what it held was that when an injury occurred to them they had no right to get rid of its consequences by shifting it on to their neighbour. The observations of Lindley L. J. at p. 140 in (1883) 13 Q B D 131[1] throw light on the principle involved in the case. They are as follows:

> It is more analogous to the Scotch case in (1828) 3 Bligh (N S) 414[2] and the case in (1875) 10 Ex. 4.[3] It seems to me established by those cases that if an extraordinary flood is seen to be coming.

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[1] Whalley v. Lanceshire and Yorkshire Railway Co., (1883) 13 Q B D 131=53 L J Q B 285=50 L T 472=32 W R 711=48 J P 500.

[2] Neil Monzies v. Earl of Breadalbane, (1828) 3 Bligh (N S) 414=4 E R 1387.

[3] Nield v. L. & N. W. Ry. Co., (1875) 10 Ex 4=44 L J Ex 15=23 W R 60.

> upon land the owner of such land may fence off and protect his land from it, and so turn it away, without being responsible for the consequences, although his neighbour may be injured by it. 8 B & C 355[4] is another step in the same direction. Of course there is a difference between protecting yourself from an injury which is not yet suffered by you, and getting rid of the consequences of an injury which has occurred to you. Then there is the squib case in 1 Sm L C 8th Edn. 466,[5] in which Gould J. says that if a man throws a squib into a coach, a passenger in the coach may throw it out and not be responsible for the consequences.

This case was explained in (1921) 1 A C 395.[6] The facts of this case resemble those in the present case. There the appellant and respondents owned lands upon opposite sides of a river as the plaintiff and the defendant do in this case. When the river was in flood and rose higher than its bank some of the flood water used to flow over the respondents' land, ultimately finding its way back to the river. The respondents erected an embankment on their own land with the object of protecting it from floods. The water flowing over the appellant's land in time of heavy flood was thereby increased. The appellant sued two respondents for damages and an injunction. It was held that the action could not be maintained. It was found in that case that there was no flood channel as such or any ancient or rightful course for the flood water of the river across the respondents' land which they either obstructed or diverted so as to transfer their misfortune to the appellant's land. Viscount Cave referred to (1741) Mor Dict Der 12779[7]: *see also* (1828) 3 Bligh (N S) 414[2] at p. 421 for the rule as to the rights of an owner of land on or near a river to protect himself from floods which was stated in these terms:

> It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his own ground by the overflow of the river; though thereby a damage should happen to his neighbour by throwing the whole overflow in time of flood upon his ground; but it was found not lawful to use any operation in the alveus

The learned Judge also referred to other decisions including the one relied on by the learned counsel for the appellant here as laying down nothing inconsistent with rule. The case in (1883) 13 Q B D 131[1] was distinguished on the ground that in that case the defendants had allowed the pool of water upon their property and having so allowed the accumulation, they subsequently took steps they did upon their property; that case cannot therefore have any bearing on facts which show that the defendants neither accumulated water on their own land nor discharged it by active steps into the plaintiff's land but were only seeking to protect themselves from a common enemy which threatened the defendant's property as much as it did the plaintiff's. The soundness of the rule that it is the duty of each riparian proprietor to protect himself from a threatened danger irrespective of the consequences to his neighbour, was conceded in (1927) A C 226.[8] While the maxim *sic utere tuo ut alienum non leedas* which is illustrated in 1 Sm L C 13th Edn. 892[9] comes into play only when a person for his own purposes brings on his land and keeps there something which is likely to do mischief if it escapes as he is responsible for bringing and keeping it in his land he must be deemed to do so at his peril and would therefore be prima facie answerable for all the damage which is the natural consequence of its escape. But that principle cannot apply to the case of a man who cannot be held responsible for bringing the dangerous thing on his own land but is brought as a consequence of *vis major* or by an act of a third party.

Now in this case the defendant himself was exposed to the danger of flood in consequence of the owner of field No. 38 having erected an embankment on his own field. The mischief having started from there found its way to the land of the defendant who had therefore to take steps to protect himself against it and in doing so he turned back the rush of water into the stream which naturally flowed into the plaintiff's land. He did not impose any extra burden on the plaintiff or expose him to any greater danger than his land was naturally subject to as the stream was already flowing along the boundary of his field which was on a lower level. All those persons whose lands were affected by the watercourse during the rains had unquestionable right to adopt such measures as would be efficient to protect their lands

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**4. Rex v. Pagham Commissioners, 8 B & C 355.**

**5. Scott v. Shepherd, 1 Sm. L. C. 8th Edn. 466.**

**6. Gerrard v. Crowe, (1920) 7 A I R P C 111=(1921) 1 A C 395=90 L J P C 42=124 L T 486=37 T L R 110.**

**7. Farquharson v. Farquharson, (1741) Mor Dict Der 12779=3 Bligh (N S) 421 (F N).**

**8. Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., (1927) A C 226=1927 N Ir 24=136 L T 417=91 J P 46=96 L J P C 25.**

**9. Fletcher v. Rylands, 1 Sm L C, 13th Edn. 892.**

from flood. The owner of the field No. 38 did so and the owner of field No. 47, the defendant, did so to protect their respective fields from what was a common danger. The plaintiff therefore cannot have any grievance against either of them. Assuming that the owner of field No. 38 was the person who started the mischief by raising an embankment on his own field still the defendant would not be liable as he took steps to save his own land from the consequences of the mischief initiated by the owner of field No. 38. His position was exactly the same as that of Willis or Ryal in 1 Sm L C, 13th Edn. 513[10] as he was acting under an imperative necessity for the security of his own property. Whatever he did was only a continuation of the mischief started by the owner of field No. 38. Consequently, it is not the defendant but the owner of field No. 38 who would be liable if at all anybody is liable.

In (1909) 1 Ch 427[11] it was held that the rule in (1868) 3 H L 330[12] does not extend to making the owner of the land liable for consequences brought about by the collecting and impounding on his land by another person of water, or any other dangerous element, not for the purposes of the owner, but for the purposes of that other person. This rule applies to the present case as it is clear that the owner of field No. 38 for his own purposes, viz. to rid his land of the mischief, diverted the watercourse to the defendant's land and the accumulation of water there was not made as a voluntary act by the defendant for his own benefit but by a third party for ridding his land of the calamity. It appears to me clear that as the defendant was not responsible for floods during rains and was himself in the unfortunate position of being exposed to danger and had to take steps to protect himself, he cannot be held liable for any injury resulting to the plaintiff who in any case would have had to put up with it although in somewhat lesser degree as the stream naturally flowed along the boundary of his field. The appeal fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

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[10] Scott v. Shepherd, 1 Sm L C, 13th Edn. 513.

[11] Whitmores (Adenbridge) Ltd. v. Stanford, (1909) 1 Ch 427=78 L J Ch 144=99 L T 924 =25 T L R 169.

[12] Rylands v. Fletcher, (1868) 3 H L 330=37 L J Ex 161=19 L T 220.

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## A. I. R. 1938 Nagpur 292

GRILLE AND VIVIAN BOSE JJ.

*Madhorao Govindrao Gadre* — Appellant.

v.

*Seth Pannalal Mohanlal Agarwal and another* — Respondents.

Second Appeal No. 189 of 1936, Decided on 31st January 1938, from appellate decree of Second Addl. District Judge, Hoshangabad, D/- 23rd December 1935.

**(a) C. P. Tenancy Act (1 of 1920), S. 6(2)—Transfer by absolute occupancy tenant without giving notice to landlord — Transfer still is valid subject only to fact that it may be avoided by landlord in manner provided by S. 6.**

Neither S. 6 nor any other section in the Act prescribes a penalty for non-compliance with the provisions of S. 6 (2). Where, therefore, an absolute occupancy tenant transfers his holding without giving written notice to the landlord as prescribed by S. 6 (2), the transferee still obtains a title good as against all the world from the moment of the transfer, subject only to the fact that it may be set aside by the landlord in the manner and to the extent provided by S. 6. [P 293 C 2; P 294 C 1]

**(b) Interpretation of Statutes—Principle.**

So long as the meaning of the Act is clear, full effect must be given to its provisions. It would be misleading to consider laws framed for entirely different purposes until the possibilities of the statute have been exhausted however similar they may at first sight appear to be. [P 294 C 1]

M. R. Bobde — *for Appellant.*

B. L. Gupta — *for Respondents.*

**Judgment.**—This appeal arises out of a suit for possession of an absolute occupancy field and of the mango trees standing in it. The trees concern defendant 2 and not 1. A decree has been passed against him and as he had not appealed, the question is not in issue here. This appeal relates to the land only. The field was originally the absolute occupancy holding of one Mt. Bhagal. She mortgaged it to the plaintiffs on 4th January 1926 and then on 7th May 1931 sold it to the plaintiffs in satisfaction of the mortgage for Rs. 860 and placed them in possession. Ex. P.1 is the sale deed. When doing so, however, she did not give the landlord, who is defendant 1 in the appeal before us, the notice contemplated by S. 6 (2), C. P. Tenancy Act of 1920. On 13th June 1931, defendant 1, whom we shall refer to for convenience as the landlord, sued the tenant Bhagal for arrears of rent for the years 1928-29, 1929-30 and 1930-31 and obtained a decree Ex. P.6 on 18th July 1931. After this, on 5th May 1932, he applied under S. 6 (4) (c) to a Revenue Officer to fix the value of the right in the holding which Bhagal had lost by reason of the sale (Ex. P-1). Ex. P-7 is the copy of the order sheet in those proceedings. During the pendency of those proceedings, the landlord put the field to sale in execution of his decree for rent against Bhagal and it was purchased by one Narayan Rao. The sale was confirmed in due course, namely on 20th June 1932, and then the landlord modified his application to the Revenue Officer by asking that the mango trees alone should be valued under S. 6 (4) (c) and not the rest of the holding. This application is Ex. D-4. In it the landlord states that Bhagal's vendees, the plaintiffs, have no more right, title or interest in the field in dispute because of the auction purchase and so all he presses is the question of the mango trees. Eventually, the whole case was dismissed in default by the Revenue Officer on 5th August 1932.

The auction-purchaser, Narayan Rao, took possession in pursuance of the sale in his favour on 10th July 1932 (Ex. D-1 and Ex. D-2), and then on 17th August 1932 the landlord again applied to the Revenue Officer under S. 6 (4) (c), this time in connexion with the auction sale to Narayan Rao. The value of the field was fixed, the money deposited and on 14th May 1933 the landlord was placed in physical possession of the property by the Revenue Officer (Ex. D-3). This had the effect of dispossessing Bhagal's transferees, the plaintiffs, and so they brought the present suit for possession of the holding. They succeeded in both the lower Courts, subject to a small payment of Rs. 37-15-6, and so defendant 1 who, as we have said, is the landlord, appeals. The main question we have to decide is whether Bhagal's sale to the plaintiffs was effective as against the landlord and whether it passed any title to the plaintiffs. It was argued that whatever the privileges of an absolute tenant might be, he is still only a tenant and so cannot foist another tenant on the landlord against his wishes except in so far as the law expressly allows this to be done. It was also argued that his status is too widely defined in 6 N L R 6[1] at p. 10 and that the description given in 3 N L R 40[2] at p. 42 and 5 N L R 103[3] is more accurate. We need not enter into that now for we are satisfied on an interpretation of S. 6 itself that a transferee from an absolute occupancy tenant obtains a title good as against all the world from the moment of the transfer, subject only to the fact that it may be set aside by the landlord in the manner and to the extent provided by S. 6.

Section 6 (2) requires an absolute occupancy tenant who intends to transfer any right in his holding to any extent or in any manner not provided for in sub-s. (1) to give his landlord a written notice of his intention and requires him to defer proceeding with the transfer for a period of one month, but neither this section nor any other section in the Act prescribes a penalty for non-compliance with these provisions. On the other hand, S. 6 (3) states definitely what is to happen in such circumstances:

> the landlord shall be entitled to purchase such right in the manner hereinafter provided.

What do the words "such right" mean? In our opinion, they refer to the right which is transferred. This is clear if we eliminate words which are not relevant at the moment from S. 6 (3) and then re-read it. It then reads as follows:

> When in pursuance of a transfer which the tenant was not entitled to make without reference to his landlord . . . . . . any person . . . . obtains possession of any right in the holding the landlord shall be entitled to purchase such right . . . .

Therefore the landlord is given the right to purchase the right transferred and the next question is from whom —from the tenant or from the transferee. The answer is to be found in the sub-sections which follow. They deal with "the manner hereinafter provided." The first step which the landlord has to take is to apply to a Revenue Officer under S. 6 (4) (c) to fix the value "of the right so lost." It is clear that up to this stage the transferee has not lost whatever rights he may have obtained and so the words must refer to the rights which the tenant has lost. But the tenant cannot lose his rights unless the transfer is effective and valid. Therefore, in our opinion, the section indicates in clear terms that the transfer is effective and valid and that the tenant loses his rights from the moment of transfer and that what the landlord purchases is the transferee's rights and not the tenant's. It was argued that the landlord's rights are rights of pre-emption and we were referred to rulings which define and describe pre-emption

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**1. Ragho v. Sadoo, (1910) 6 N L R 6=5 I C 428.**
**2. Seth Gangabishan v. Balmukund, (1907) 3 N L R 40.**
**3. Tekchand v. Tulai, (1909) 5 N L R 103=3 I C 52.**

under the Mahomedan law. However useful these rulings may have been, if the Act had not been clear, we do not think that we can refer to them usefully here. The rights and liabilities with which we are dealing are purely statutory and so long as the meaning of the Act is clear, full effect must be given to its provisions. It would be misleading to consider laws framed for entirely different purposes until the possibilities of the statute have been exhausted however similar they may at first sight appear to be. It is to be observed however in this connexion that S. 41 of the old Tenancy Act of 1898 speaks of the landlord's rights before transfer as one of pre-emption, but as regards his rights after transfer, it merely states that "any transfer made in contravention of this section shall be voidable at the instance of the landlord."

In the circumstances, the absence of any reference to pre-emption in the new Act coupled with the words "the right to purchase" and the words "the right so lost" is significant. On the whole, then, we are clear that the transfer is valid unless and until it is avoided by the landlord in the manner and to the extent provided by S. 6. In the present case, the sale to the plaintiffs has not been avoided. Though the landlord commenced the necessary proceedings to effect that purpose, he never completed them and in the end abandoned his attempt. Therefore, the plaintiffs' title was never displaced and so the sale of the holding in execution of a decree to which they were not parties at a time when they were the tenants of the holding does not bind them. Neither the tenant Bhagal nor the auction purchaser Narayan Rao had any title to convey after the plaintiffs' purchase. We need not consider here what happens when the landlord avoids a transfer under S. 6. According to A I R 1933 Nag 205[4] at p. 207, the transferee does not become the tenant in the intervening period. That is a possible point of view but we express no opinion on it. So far as this case is concerned, there has been no intervening period because the transfer was not avoided. In those circumstances, we are clear that the transferee obtains a good title and becomes the tenant from the date of transfer and not from some subsequent date. The appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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[4] Sujansingh v. Sadasheorao Damodhar Rao, (1933) 20 A I R Nag 205=142 I C 358.

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## A. I. R. 1938 Nagpur 294

NIYOGI J.

*Sudamsa Arjunsa Kshatraiya Saokar — Plaintiff* — Applicant.

v.

*Kisanrao Dawalatrao Kunbi and others, Defendants* — Opposite Party.

Civil Revn. No. 296-B of 1935, Decided on 22nd December 1937.

**(a) Promissory note — Suit on — Lady executing promissory note admitting therein that she is executing it for sum remaining due on previous promissory note executed by her — Burden shifts on executant to disprove existence of previous promissory note.**

Where a lady executing a promissory note, admits therein that she is executing it for a sum remaining due on a previous promissory note executed by her, it is not necessary for the creditor to produce evidence regarding the previous transaction. In view of the admission by the executant, the burden shifts on her or her representatives-in-interest to disprove the existence of the previous promissory note. [P 295 C 1]

**(b) Limitation Act (1908), S. 19 — Insufficiently stamped promissory note is admissible to prove fact of admission made by debtor of his existing liability and can extend period of limitation —It can also be treated as agreement chargeable with duty under Art. 5 (c), Sch. 1, Stamp Act, and is admissible in evidence on payment of requisite duty and penalty.**

A promissory note which is not properly stamped, although inadmissible in evidence as acknowledgment of debt under Art. 1, Stamp Act, by reason of S. 35 of the Stamp Act, is admissible in evidence to prove the fact that the debtor made an admission of liability to pay, apart from any intention of supplying evidence of such debt. S. 35 comes into play, only if the document is used as containing within itself any matter which would extend the creditor's right to recover money; but if the creditor derives his right not from the document itself, as would be the case if it were treated as an acknowledgment under Art. 1, but from the Limitation Act in consequence of the admission of the liability simpliciter contained in that document, S. 35 has no applicability. A document which is relevant for the application of S. 19, Lim. Act, need not be an instrument within the definition of the term in S. 2 (14), Stamp Act. The document is therefore admissible to prove the fact of admission made by the debtor of his existing liability and can extend the period of limitation under S. 19, Lim. Act : *A I R 1924 Mad 352, Rel. on.* [P 295 C 2; P 296 C 1]

*(Obiter)*—The insufficiently stamped promissory note is capable of being treated as an agreement, chargeable with duty under Art. 5 (c) of Sch. 1, Stamp Act, and becomes admissible in evidence on payment of requisite duty and penalty : *A I R 1927 All 677 and A I R 1933 All 179, Rel. on.* [P 296 C 1]

J. R. Mudholker — *for Applicant.*

R. G. Rao — *for Opposite Party (Non-applicants 2 and 5).*

**Order**. — This is a plaintiff's application in revision against the judgment of the Small Cause Court in Small Cause Suit

No. 22 of 1935 decided on 8th September 1935 whereby the plaintiff's suit was dismissed. The facts are as follows : The plaintiff owned a malguzari village in the Gwalior State which he sold to Mt. Housabai on 4th July 1927 for Rs. 9500. He received Rs. 3000 in cash and for the balance of Rs. 6500 he got a promissory note executed in his favour by Mt. Housabai, who also agreed to pay interest at 12 annas per cent. per mensem. On 18th March 1930 a sum of Rs. 822 was found due by Mt. Housabai and she executed a fresh promissory note on that date agreeing to pay interest at 12 annas per cent. per mensem as before. She repaid Rs. 218 on 13th March 1931 leaving a balance of Rs. 604. The suit is filed to recover this balance with interest amounting in all to Rs. 910 against Mt. Housabai's legal representatives. The suit proceeded ex parte against the defendants except defendant 5 who was discharged. The suit was ultimately dismissed as already stated above. According to the lower Court's finding the plaintiff failed to prove either the original transaction or the promissory note of 4th July 1927, and held that the promissory note dated 18th March 1930 being unstamped was not admissible in evidence, and further held that even on the supposition that the original transaction as well as the promissory note of 18th March 1930 were found to be proved the suit was barred by limitation. It appears to me that it was unnecessary for the plaintiff to produce evidence regarding the original transaction as the promissory note dated 4th July 1927 was admitted by Mt. Housabai in that of 18th March 1930. There she clearly says that in making account of the promissory note dated 4th July 1927 Rs. 822 were found due. In view of this admission, the burden would shift on to the shoulders of the defendants to disprove the existence of the promissory note dated 4th July 1927. They failed to give any such evidence. It must therefore be presumed that Mt. Housabai had executed the promissory note dated 4th July 1927.

The next question is whether this suit which came to be filed on 10th January 1934 was within time. Since the promissory note of 1927, Mt. Housabai executed another promissory note dated 18th March 1930 and sent a letter dated 10th January 1932 to the plaintiff wherein she acknowledged the existence of the debt due by her. In the last mentioned letter, she clearly says that she would pay the entire amount together with interest, although she at the same time requested for a fresh loan of Rs. 5000, but that does not affect the very clear admission made by her as to her liability. The only question is whether the promissory note of 18th March 1930 which bears only a stamp of one anna instead of two annas as it ought to have borne can serve as an acknowledgment under Art. 1, Stamp Act. It is indisputable that the document cannot take effect as a promissory note but the question is whether it is admissible as an acknowledgment of debt under Art. 1, Stamp Act. Reliance is placed on A I R 1927 Nag 241[1] in support of the contention that it can be so admitted, but it appears to me that in view of the specific terms of S. 35 which forbids any instrument chargeable with a duty of one anna from being admitted in evidence for any purpose as an instrument cannot be admitted. "Instrument" as defined in S. 2 (14), Stamp Act includes every document by which any right or liability is or purports to be limited, transferred, extended extinguished or recorded. If this document is intended to be used for the purpose of extending the right to recover the debt its admission in evidence is prohibited by S. 35, Stamp Act. It cannot therefore be admitted as an acknowledgment of debt under Art. 1. Stamp Act, but it appears to me that S. 35 cannot preclude the admission of that document to prove the mere fact that the debtor made an admission of liability to pay apart from any intention of supplying evidence of such debt. Section 35 would come into play only if the document were used as containing within itself any matter which would extend the creditor's right to recover the money, but if the creditor derives his right not from the document itself, as it would be if it were treated as an acknowledgment under Art. 1, Stamp Act, but from the Limitation Act in consequence of the admission of liability simpliciter contained in that document, then, in my opinion, S. 35 has no applicability. A document which is relevant for the purpose of the application of S. 19, Lim. Act need not be an instrument within the meaning of the definition of the term of S. 2 (14), Stamp Act. In 46 Mad 948[2] it was held that a document is not an acknowledgment within the terms of Art. 1, Sch. 1, Stamp Act, unless it is given with the dominant intent to supply evidence of the debt. In the absence of any such evidence, the document though unstamped was admitted in evidence. I respectfully concur with this view and hold that the document dated 18th March 1930 is admissible only so far as the proving of the fact of the admission made by Mt. Housabai of her then existing liability. S. 19, Lim. Act therefore comes to the aid of the plaintiff in extending the period of limitation.

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[1] Udaram Magniram v. Laxman Marwari, (1927) 14 A I R Nag 241=104 I C 470.

[2] Surjimull Murlidhar Chandick v. Ananta Lal Damani, (1924) 11 A I R Mad 352=74 I C 1029=46 Mad 948=45 M L J 899.

Now, since the liability arose under the promissory note of 4th July 1927, and that was kept alive by the acknowledgment of the debt contained in the document dated 18th March 1930 and that dated 10th January 1932 the plaintiff's claim must be held to be within time. There is also this consideration that the so-called promissory note dated 18th March 1930 is capable of being treated as an agreement chargeable with duty under Art. 5 (c), Sch. 1, Stamp Act, as was held in 49 All 496[3] and 54 All 761.[4] On that view, the document dated 18th March 1930 becomes admissible on payment of requisite duty and penalty. It is however unnecessary to go into this aspect of the case as in my view the document even though unstamped is admissible so as to permit the plaintiff to invoke S. 19, Lim. Act in his favour. The result is that the application succeeds and the suit is decreed with costs in both Courts. Pleader's fees Rs. 30.

R.M./R.K. *Application allowed.*

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[3] Prahlad Prasad v. Bhagwan Das, (1927) 14 A I R All 677=100 I C 593=49 All 496=25 A L J 403.

[4] Ram Prasad v. Sheo Bakhsh, (1933) 20 A I R All 179=142 I C 688=54 All 761.

## A. I. R. 1938 Nagpur 296

VIVIAN BOSE J.

*Mt. Sultan Bi — Defendant —* Applicant.

v.

*Nandlal Suganchand Marwadi and another* — Non-applicants.

Civil Revn. No. 49 of 1936, Decided on 1st November 1937, from order of Small Cause Court, Wun, D/- 26th November 1935.

**Tort—Vicarious liability—Liability of master—Defendant engaging competent persons to cut down tree and leaving the matter in their hands—Work performed negligently and portion of tree falling on plaintiff's house causing damage to it— Defendant cannot be held liable for negligence of persons employed by him.**

In general, a person is liable for the tortious acts of his servants but not for those whom he engages as independent contractors. Cutting down a tree which is three feet in diameter is not a hazardous task requiring skill nor is the work necessarily dangerous if properly performed. It is a work which even unskilled persons are able to accomplish with the exercise of a little ingenuity and care. Where therefore the defendants engage competent persons for doing the work and leaves the matter in their hands but the work is performed negligently and as a result part of tree falls on the plaintiff's house causing damage to it, the defendants cannot be held responsible for the negligence of the persons whom they have employed: *10 Cal 445, Ref.* [P 297 C 1]

Hidayatullah — *for Applicant.*

P. P. Deo — *for Non-applicants.*

**Order.** — This is a suit for damages grounded on an action for negligence. The defendants engaged certain persons to cut down a tree situate on their land. The work was done negligently and in consequence a part of the tree fell on the plaintiff's house and injured it. The plaintiff therefore sues for the damages he has sustained. The defendants admit the damage but plead that they were not responsible as the persons engaged were experts who acted as independent contractors. The lower Court finds both these facts proved but nevertheless holds the defendants responsible. The defendants or rather one of them applies here in revision. The plaintiff challenges these findings of the lower Court but as there is evidence to sustain them I am not prepared to reopen them here, especially as there is no counter-evidence and not even an attempt to contradict the statements of the witnesses in cross-examination. I will therefore deal only with the law point involved. I do not think there is much difficulty about the law. In general, a person is liable for the tortious acts of his servants but not for those whom he engages as independent contractors. There are, of course, exceptions to this rule. A man cannot for instance evade responsibility by engaging an incompetent person as an independent contractor to execute a work for which special skill is required. But then the ground of liability is his own negligence. Every man is under a duty of care not to employ an unskilled workman for a job which requires expert handling and if he does so, then, he has himself been negligent, so perhaps this is not a real exception.

However, there are other exceptions such as the doing of extra hazardous acts which involve special danger to others, though there is a difference of opinion about this, but the general rule is clear. It is to be found in 23 Halsbury's Laws of England (Hailsham's Edition) p. 710, para. 1002. It is also the Indian law: 10 Cal 445[1] at p. 461. It is not necessary for me to examine the cases cited there or indeed the cases cited in the very able argument of counsel for the applicant, because, as I say, there is no doubt about the general law. Doubts arise only when we begin to examine the exceptions to the rule. The tree in question was at a distance of 30 feet from the plaintiff's building. It was about three feet in diameter and the branch which caused the actual damage was three feet long and 1½ feet thick. There was nothing exceptionally hazardous in felling a tree of this kind nor was the work necessarily dangerous if properly performed. It is the kind of thing which even unskilled persons are able to accomplish with the exercise of a little ingenuity and care, though of course, if they attempt to do an act of this nature without the requisite skill and cause injury they will be liable. But the fact that unskilled persons can and often do accomplish such acts means that it is not an extra hazardous employment. Therefore all that the defendants were called upon to do was to engage competent persons and leave the matter in their hands and this according to the findings they did. It follows that they are not responsible for the negligence of the persons whom they employed.

I allow the revision and dismiss the plaintiff's claim. The application was filed by one of the two defendants but as the decree is joint and several and the cause of action is found to be non-existent I dismiss the suit against both the defendants. No certificate has been filed, so there will be no counsel's fee. As regards costs, since one of the defendants has not applied he will not get his costs in this Court and he will pay half the costs of the plaintiff in the lower Court. The defendant who has applied in revision will get half his costs both here and in the lower Court.

**R.M./R.K.** *Application allowed.*

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[1] Corporation of the Town of Calcutta v. Anderson, (1884) 10 Cal 445.

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## A. I. R. 1938 Nagpur 297

GRUER J.

*Syed Usman Ali Mohmood Ali*
*Accused* — Applicant.
v.
*Emperor.*

Criminal Revn. No. 468 of 1937, Decided on 11th January 1938, from order of Dist. Magistrate, Drug, D/- 4th October 1937.

**Criminal P. C. (1898), S. 147—Magistrate is not empowered under S. 147 to pass order in nature of mandatory injunction directing removal of obstruction—He can under S. 133 order removal of such obstruction from way lawfully used by public.**

A Magistrate has no power under S. 147 to make an order in the nature of a mandatory injunction directing removal of an alleged obstruction. He has however power under S. 133 to bring about the removal of such obstruction from any way lawfully used by the public : *A I R 1925 Cal 991 and A I R 1937 Cal 513, Rel. on ; A I R 1929 Pat 351, Disting.; A I R 1930 Mad 865, Dissent.* [P 298 C 1]

R. K. Rao — *for Applicant.*

**Order.** — The prosecution of the applicant, Syed Usman Ali, under S. 188, I. P. C. has been directed by Sub-divisional Magistrate, Bemetara, for disobedience of an order passed by him under S. 147 (2), Criminal P. C. The District Magistrate Drug, refused to interfere. Hence the present application to this Court. The applicant had started the construction of a wall enclosing a threshing floor on a plot of ground belonging to him. It has been found that the public has a right of user by a path over that ground and also that the structure interferes with the flow of basti water through the field. The Subdivisional Magistrate passed the following order :

> Accordingly I direct under S. 147 (2), Criminal P. C. that the right of user by the public of the path No. 8 as shown on the map Ex. C-1 should not be interfered with. This will enable the basti water to flow into fields No. 2553 and C, and this flow should not be obstructed. I add that this order is subject to any subsequent decision of a Civil Court of competent jurisdiction. For the use of Samadhi, Gamshdar should seek his remedy in Civil Court.

Thereupon the applicant left things as they were, i. e. he stopped construction of the wall but did not demolish what had already been built. When he was called upon to show cause against prosecution his pleader on 2nd November 1936 asked that the order should be made definite by laying down what walls or portions were to be removed. The Subdivisional Magistrate said he did not think that he would be able to improve upon his previous order

The learned District Magistrate recognizes that under S. 147, Criminal P. C. the demolition of the structure could not be ordered but he still thinks that since after the lapse of a reasonable time the applicant did not go to the Civil Court and did not also remove the obstruction he must be deemed to have violated the order. This reasoning appears to me somewhat inconsistent. If the Magistrate has no power to order removal then how is the applicant obliged to remove the obstruction? For the applicant it is urged that the complaint be vacated on the following grounds: first, that no definite order for removal was passed or could have been passed; second, that the applicant did nothing after the order to cause further obstruction; third, that he asked the Court to make the order definite; and fourth, that there has been no wanton disregard of orders, and if his responsibility in law is doubtful, then it is not in the interests of justice to prosecute him.

I see considerable force in these contentions. I prefer the view of the High Court of Calcutta that the Magistrate has no power under S. 147, Criminal P. C., to make an order in the nature of a mandatory injunction: A I R 1925 Cal 991[1] and A I R 1937 Cal 513.[2] A I R 1929 Pat 351[3] also recognizes that a mandatory injunction should not be passed under that section, but restrained one party from preventing the second party from closing a cutting in the bank as being a matter ancillary to the declaration of the right to the water. This case then being one of a prohibitory order is distinguishable. In A I R 1930 Mad 865,[4] no doubt, the opposite view is expressed, but with all respect I prefer to follow the Calcutta rulings. It may be noted that under S. 133, Criminal P. C. the Magistrate has power to bring about the removal of such obstruction from any way lawfully used by the public. The existence of this section would explain why mandatory action has not been prescribed under S. 147. At any rate the applicant had good ground for questioning whether the Magistrate's order enforced positive action on his part, and his neglect to take that action does not appear to me to have been due to deliberate defiance. The prosecution of the applicant is not justified and it is hereby withdrawn.

R.M./R.K. *Order accordingly.*

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## * A. I. R. 1938 Nagpur 298

POLLOCK J.

*Balkisan Hukumichand, Firm by proprietor Radhakisan Balkisan* — Applicant.

v.

*Mt. Jatnabai w/o Dhanraj Marwari*— Opposite Party.

Civil Revn. No. 191 of 1935, Decided on 2nd February 1937, from order of Sub-Judge, Second Class, Chanda, D/- 15th February 1935.

**(a) Executor — De son tort — Cannot sue to recover debts due to deceased's estate.**

An executor de son tort is not entitled to recover debts due to the estate of the deceased of which he has wrongfully taken possession. [P 299 C 1]

*** (b) Hindu Law of Inheritance (Amendment) Act (1929)—Act applies to Jains.**

It is well settled that Jains are governed by Hindu law except in so far as any custom to the contrary is established. Act 2 of 1929 should apply to Jains and the term "Hindu" should be interpreted as including Jains, more particularly in view of the wording of S. 1 (2) of the Act: *A I R 1930 Bom 517*; *A I R 1932 Lah 546 and A I R 1930 Nag 225*, *Rel. on.* [P 299 C 2; P 300 C 1]

*** (c) Hindu Law of Inheritance (Amendment) Act (1929), S. 1 (2)—S. 1 (2) applies to all persons governed by Mitakshara law — Act therefore applies to family of Jains migrated from Marwar to Chanda.**

The Preamble may be consulted to solve any ambiguity whenever the enacting part is open to doubt but where the enacting part is clear, as it is in sub-s. 2 of S. 1, then the Preamble cannot operate to restrict that meaning. S. 1 (2) must therefore be interpreted to apply to all persons governed by the Mitakshara School of Hindu law and therefore it applies to a family of Jains migrated from Marwar to Chanda and which is admittedly governed by Mitakshara law. [P 300 C 1]

V. V. Kelkar and M. R. Bobde — *for Applicant.*

Dr. Sir Harisingh Gour, M. B. Kinkhede and A. R. Kulkarni — *for Opposite Party.*

**Order.** — The suit giving rise to this application for revision was instituted by Bhivraj who alleged that there was a partnership between his father Suganchand and the defendant which was dis-

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1. **Hari Mati Dasi v. Hari Dasi Dasi, (1925) 12 A I R Cal 991=88 I C 1041=26 Cr L J 1265 =41 C L J 568=30 C W N 238.**
2. **Haradhone Mukerjee v. Brojendra Nath, (1937) 24 A I R Cal 513=171 I C 268=38 Cr L J 1071=41 C W N 900.**
3. **Ram Dhan Puri v. Barhamdeo, (1929) 16 A I R Pat 351=1929 Cr C 153=10 P L T 376.**
4. **Venkanna v. Venkata Surya Neeladri Rao, (1930) 17 A I R Mad 865=1930 Cr C 1121= 129 I C 68=32 Cr L J 215=59 M L J 430.**

solved by Suganchand's death on 29th March 1922, and sought a decree for such amount as might be found due on taking accounts of the partnership. Bhivraj died on 27th November 1933 and his sister Jatnabai has been brought on the record as his legal representative. That order is now challenged in revision. It has been contended somewhat faintly, that the right to sue does not survive in such a case. The cases in which the right to sue does not survive are stated at p. 850 of Mulla's Commentary on the Civil Procedure Code, 10th Edn. and it is clear that in the present case the right to sue does survive. The main argument has centred round whether Jatnabai as a sister can be a legal representative. Apart from the question whether she is Bhivraj's heir, the lower Court has held that she is in possession of his estate and is therefore his legal representative, as defined in S. 2 (11), Civil P. C., and so entitled to sue. It is to my mind a remarkable proposition that a person by entering into wrongful possession of the estate of a deceased person should thereby be entitled to sue for debts due to that estate. The liabilities and rights of an executor de son tort are set out in Halsbury's Laws of England, Vol. 14, pp. 180 to 182, and there is no suggestion therefore that an executor de son tort is entitled to recover debts due to the estate of which he has wrongfully taken possession. In Wharton's Law Lexicon, 13th Edn. at p. 338, it is stated that an executor de son tort is liable to all the trouble of an executorship without any of the profits or advantages and that such a one cannot bring an action himself in right of the deceased but actions may be brought against him. In Williams on Executors, 12th Edn. at p. 559, it is stated: "It is clear however that an executor de son tort cannot bring any action in right of the deceased." I therefore hold that mere intermeddling with the estate of Bhivraj would not give Jatnabai the right to maintain this action.

The question then turns on whether Jatnabai is Bhivraj's heir. It has not been suggested that there is anybody else who could be his heir. In the plaint Bhivraj described himself as an Oswal Marwari and it is admitted that the family is a family of Jains that migrated from Marwar to Chanda about 40 years ago and is governed by the Mitakshara School of Hindu law. Until Act 2 of 1929 a sister was not an heir under the Mitakshara School of law but by that Act she took her place in the list of heirs in the order there stated. It is however contended on behalf of the defendant that, as Bhivraj was a Jain, he was not a Hindu and that therefore Act 2 of 1929 — The Hindu Law of Inheritance (Amendment) Act—does not apply. It is well settled now that Jains are governed by Hindu law except in so far as any custom to the contrary is established: *see* for example 54 Bom 780,[1] 14 Lah 95[2] and 27 N L R 75.[3] They may, however, be governed by Hindu law without necessarily being Hindus. In 31 Cal 11[4] their Lordships of the Privy Council discussed the meaning of the word "Hindu" as used in S. 331, Succession Act 10 of 1865 and S. 2, Probate and Administration Act (5 of 1881). In the course of their judgment they stated at page 29:

> The framers of the earlier Acts, regulations, and charters had a less detailed acquaintance than we have now with the diversities of creed and of religious law existing in India. They were familiar with two great classes, Mahomedans and Hindus, each with its own law bound up with its own religion. They thought, no doubt, that they were sufficiently providing for the case by securing to Mahomedans the Mahomedan law, and to Hindus (or Gentus, as they were sometimes called) the Hindu law. In process of time it became more and more clearly understood that there were more forms than one of the Mahomedan law, and more forms than one of the Hindu law, and the Courts acting in the spirit which prompted the legislation, have applied the law of each school to the people whose ancestral law it was. In the same way it came to be known that there were religious bodies in India which had, at various periods and under various circumstances, developed out of, or split off from, the Hindu system, but whose members have nevertheless continued to live under Hindu law. Of these Jains and the Sikhs are conspicuous examples. Their cases had to be considered by the Courts, and in dealing with them a liberal construction was always placed upon the enactments by which Mahomedans and Hindus were secured in the enjoyment of their own laws. As to Jains the Courts in India always applied the Hindu law generally to their cases in the absence of custom varying that law. This course was approved by this Board in 5 I A 87[5] and 6 I A 15.[6]

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[1] Bhikubai v. Manilal,(1930) 17 A I R Bom 517 =128 I C 628=54 Bom 780=32 Bom L R 1217.

[2] Mt. Lado v. Banarsi Das, (1932) 19 A I R Lah 546=139 I C 721=14 Lah 95=33 P L R 801.

[3] Trimbakdas v. Nagindas, (1930) 17 A I R Nag 225=124 I C 609=27 N L R 75.

[4] Bhagwan Koer v. Bose, (1904) 31 Cal 11=30 I A 249=7 C W N 895=84 P R 1903=8 Sar 543 (P C).

[5] Sheo Singh Rai v. Dakho, (1877) 1 All 688=5 I A 87=3 Sar 807=3 Suther 529=2 C L R 193 (P C).

[6] Chotay Lall v. Chunoo Lall, (1879) 4 Cal 744 =6 I A 15=3 Sar 880=3 C L R 465 (P C).

They finally came to the conclusion that the term "Hindu" as used in the Succession Act included a Sikh, and there is no doubt that the same arguments would apply to a Jain. Therefore it appears to me probable that Act 2 of 1929 should apply to Jains and that the term "Hindu" should be interpreted as including Jains, more particularly in view of the wording of S. 1 (2) of the Act. The case may, however, be decided on a different ground. The Preamble to Act 2 of 1929 runs as follows :

> Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate etc.

Section 1 (2) provides that the Act shall apply "only to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara . . ." The plaintiff's family in this case was admittedly subject to the law of Mitakshara, and S. 1 (2) must, I think, be interpreted as applying this Act to all persons subject to the law of Mitakshara. The Preamble may be consulted to solve any ambiguity whenever the enacting part is open to doubt : see Maxwell on the Interpretation of Statutes, Edn. 7, at p. 37 ; but where the enacting part is clear, as it is in sub-s. (2) of S. 1, then I do not think that the Preamble can operate to restrict that meaning. The Act has not been as clearly drafted as it might have been, but the intention was, I think, that the Act should apply to all persons governed by the Mitakshara School of Hindu law and that therefore it applies in the present case. It therefore follows that Jatnabai is Bhivraj's heir and is entitled to prosecute the suit. The application for revision is dismissed with costs. Counsel's fee in this Court Rs. 50.

D.S./R.K. *Application dismissed.*

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## ✲ A. I. R. 1938 Nagpur 300

NIYOGI J.

*Dinkarrao Dharrao Rajurkar — Defendant* — Applicant.

v.

*Ratansi Asaram and another, Plaintiffs 1 and 2 and others, Defendants* — Opposite Party.

Civil Revn. No. 159-B of 1934, Decided on 26th November 1937, from order of Third Addl. Dist. Judge, Akola, D/- 29th March 1934.

**(a) Civil P. C. (1908), O. 21, R. 103—Judgment-debtor is proper party.**

For the purpose of success in the suit under O. 21, R. 103, it is essential for the plaintiff to establish his right not only against the decree-holder but also against the judgment-debtor for the simple reason that he has to show that his title is independent of the judgment-debtor and that it is valid as against any right the decree-holder may have acquired in consequence of his decree. In such cases the judgment-debtor would be a proper if not a necessary party, and he is almost invariably impleaded in such suits: *16 All 308, Disting.* [P 302 C 1]

**✲ (b) Civil P. C. (1908), O. 21, R. 103 — Suit under, is in substance suit for setting aside executing Court's order — Relief for possession is implicit and, if prayed for, does not necessitate levy of court-fee on ad valorem basis.**

The suit which is filed under R. 63 or R. 103 for the consequential relief in substance is not one to seek possession but reversal of the executing Court's order. The restoration of possession is implicit in the setting aside of the executing Court's order. It is therefore unnecessary and superfluous for the plaintiff to ask for possession. Hence the relief of possession if prayed for would not necessitate a levy of court-fees on ad valorem basis.: *35 Cal 202 (P C), Rel. on.* [P 302 C 2]

**✲ (c) Limitation Act (1908), S. 14 — Good faith — Circumstances being such as to justify either of two views regarding value of property — Plaintiff cannot be said to act dishonestly if he follows that which is more advantageous to him.**

'Good faith' as used in S. 14 means "exercise of due care and attention." Where the circumstances are such as would justify either view as regards the value of the property, the plaintiff cannot be regarded as having acted dishonestly and without due care and attention, because he follows the view which is more advantageous to him. [P 303 C 1]

A. V. Khare, E. M. Joshi and W. B. Pendharkar — *for Applicant.*

V. K. Rajwade — *for Opposite Party Nos. 1 and 2.*

**Order.** — This is a defendant's application to revise an interlocutory order passed by the third Additional District Judge, Akola, on 29th March 1934, in Civil Suit No. 5 of 1932. The case has been argued at great length and with considerable vehemence on both sides but the issues lie in a narrow compass. The two questions which arise for determination upon this application are (1) whether the plaintiffs ought to have stamped their plaint on an ad valorem basis for the reason that while they purported to institute a suit in terms of O. 21, R. 103, Civil P. C. they asked for possession of the property, and (2) whether the suit which had been filed in the Court of the third Additional District Judge, Akola, on 17th March 1932 was barred by limitation. This latter question involves in a subsidiary way the application of S. 14, Limitation Act.

The facts are simple. In Civil Suit No. 26 of 1909 which was a suit for partition of Hindu law estate, defendants 1 and 2 by name Dinkar and Bhimsi, were allotted to their share the site in dispute, which in that suit had been claimed unsuccessfully by Bhimsi defendant 3. In execution when defendant 1 and 2 went to take possession of the site the plaintiffs offered resistance with the result that defendants 1 and 2 had to file an application under O. 21, R. 97, Civil P. C. complaining of the resistance by the plaintiffs and for the removal of the same. On investigation, the executing Court found that the resistance offered by the plaintiffs was not justified and directed delivery of possession to defendants 1 and 2, who are in possession since.

Now this suit which professed to be filed under O. 21, Rule 103, Civil P. C. by the plaintiffs who had lost in the execution proceedings was first instituted in the Court of the Sub-Judge, First Class. It may in passing be noticed that at Akola the Court of the Sub-Judge, First Class, and that of the third Additional District Judge are consolidated and are presided over by one Judge. So, although the suit was purported to be filed in the Sub-Judge's Court, it was so filed before the same Judge, who now in his capacity as the Additional District Judge has disposed of the preliminary points; but that is an immaterial circumstance. Taking the first suit as having been filed in a separate Court, namely that of the Sub-Judge, First Class, it has to be seen whether the time during which the suit was pending in that Court could be excluded from computation of the period of limitation. In that Court on the objection of the defendants an issue was raised as to the market value of the property as well as the amount of court-fees leviable on the plaint as framed. The learned Sub-Judge found that the suit being one under O. 21, R. 103, Civil P. C. a fixed court-fee under Sch. 2, Art 17, Court-fees Act, namely Rs. 15, was sufficient. But on the other point it found that the market value of the property was Rs. 20,000, and the valuation of the suit took the case out of its jurisdiction as the Sub-Judge, First Class, and it passed a formal order returning the plaint for presentation to the proper Court. That order was passed on 17th March 1932. On the same day the plaint came to be presented in the Court of the Additional District Judge, Akola, which, as already noticed, was presided over by the same Judge. Now when the case proceeded in the second Court the defendants raised two preliminary questions as to the insufficiency of court-fees and the suit having been barred by time, with reference to the date on which it came to be presented in the Court of the Additional District Judge, namely 17th March 1932. The lower Court has considered the questions of fact and law raised by the defendants and overruled them. It is from this order that this application for revision is filed.

As to the question of court-fees, it is now a well recognized rule of law that the nature of the suit and the character of the reliefs claimed in the suit determine the amount of the court-fees leviable. The terms of the plaint leave no manner of doubt that the suit is one contemplated by O. 21, R. 103, namely as held by their Lordships of the Privy Council in 35 Cal 202,[1] it was substantially one to alter or set aside the summary order of the executing Court. Their Lordships were dealing with a case which arose under O. 21, R. 63, but the principle of the decision is, in my opinion, equally validly applicable to a suit under O. 21, R. 103. Consequently court-fee which was payable was the fixed fee of Rs. 15, as required under Art. 17, Sch. 2, Court-fees Act.

But it is contended on behalf of the defendants that that case goes out of the purview of a suit under O. 21, R. 103, Civil P. C. for two reasons : (1) that the judgment-debtor is impleaded in the suit, and (2) that the relief of possession is also asked for. In my opinion these contentions are devoid of force for the reasons which follow. There is no doubt that there is reference to Bhimsi, defendant 3 in the plaint, particularly in para. 6, but that reference was, in view of the case as laid, inevitable and as explained by the plaintiffs because of the necessary implication in the executing Court's order that their resistance was inspired by Bhimsi. It was only to show that they were not acting under the instigation or for the benefit or on account of Bhimsi that certain facts were stated by the plaintiffs in para. 6 of the plaint. They however make it clear that they do not want any relief against him, except the one that as against him as also against defendants 1 and 2 their right to present possession of the property should be adjudged in their favour. But as regards possession, the relief prayed for was not against defendant 3 but against defendant 1 and 2 only. For the purpose of success in the suit under O. 21, R. 103, it is essential for the plaintiffs to establish their right not only against the decree-holder but also against the judgment-debtor for the simple reason that they have to show that their title is independent of the judgment-debtor and that it is valid as against any right the decree-holder may have acquired in consequence of his decree. It need not be stressed that in such cases the judgment-debtor would be a proper if not a necessary party, and in practice it is observed that he is almost invariably impleaded in such suits.

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[1] Phul Kumari v. Ghanshyam Misra, (1903) 35 Cal 202=35 I A 22=7 C L J 36 = 12 C W N 169 (P C).

My attention is invited to a case reported in 16 All 308.[2] That case is manifestly distinguishable for the reason that there the distinct causes of action had been joined in the suit, namely one for setting aside the order of the executing Court, and the other for setting aside a transfer under Sec. 58, T. P. Act. In the present case, however there are no such separate and independent causes of action set up against Bhimsi, and the relief which is prayed for against him as well as against the other defendants is the one of declaration that the plaintiffs are entitled to the present possession of the property. It would thus appear that the cause of action in this case is one and common to all the defendants unlike the case cited above.

The next question is whether the relief of possession which is prayed for would necessitate a levy of court-fees on ad valorem basis. In the Privy Council case already cited, viz. 35 Cal 202,[1] the plaintiff had asked for many other reliefs such as setting aside certain decrees in that suit which was brought professedly under O. 21, R. 63, Civil P. C., but their Lordships held that that was only a verbal or formal difference inasmuch as it appeared that the reversal of the various decrees was involved in the reversal of the executing Court's order; that is precisely the position here. Going back to the executing Court one finds that the decree-holder went to the judgment-debtor, or whoever may be in possession of the property, and demanded possession with the aid of the Court officer. The plaintiffs protested and in his attempt to take possession they obstructed him. He complained to the executing Court under R. 97 and the executing Court decided on investigation that the resistance offered by the plaintiffs was not warranted by any independent right on their own account but that it was under the instigation and for the benefit of the judgment-debtor. In consequence of that finding the executing Court dispossessed the plaintiffs and delivered possession of the property to defendants 1 and 2. Now, it is this order and this order alone which is responsible for this change of possession. If that order is set aside as a result of the suit out of which this objection arises, it must necessarily follow that the executing Court will have to restore possession to the party who was deprived of his rightful possession by its wrong order. It is evident that the restoration of possession is implicit in the setting aside of the executing Court's order. It was therefore unnecessary and superfluous for the plaintiffs to have asked for possession. Their Lordships of the Privy Council observed in the case cited above that the substance of the relief has to be looked to and not the form. Here the substantive relief is that the executing Court's order should be set aside although in form it is for delivery of possession. I may in passing observe that in the suit which is filed under R. 63 or R. 103 for the consequential relief in substance is not one to seek possession but reversal of the executing Court's order. For these reasons I cannot accede to the contention raised on behalf of the applicants.

The next question is whether the plaint, when it came to be presented on 17th March 1932 in the Court of the Additional District Judge was barred by limitation. That raises the question whether the time which was spent in the Court of the Sub-Judge, First Class, from 18th August 1931 to 17th March 1932, can properly be excluded in the light of S. 14, Lim. Act, from the computation of the period of limitation prescribed for the suit in question. That involves the issue whether the instituting of the suit first in the Sub-Judge's Court was in good faith. The lower Court on a consideration of the evidence in the case concluded that the proceeding in the first Court had been prosecuted in good faith. That appears to me to be a pure question of fact which should more appropriately be left to be canvassed in an appeal that may eventually be filed from the decree in the suit in view of S. 105 (1), Civil P. C.

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[2] Moti Singh v. Kaunsilla, (1894) 16 All 308= 1894 A W N 109 (F B).

I think it would not be fair to the parties that I, sitting in revision, should express my opinion on an issue of fact which can finally be disposed of by a Bench of two Judges who would alone have the jurisdiction to hear an appeal from the decree, if any, that would be passed in the suit involving as it does a claim of Rs. 20,000. Without pronouncing my own view on this issue of fact, I may observe generally that there are circumstances in the case which would warrant any man of prudence to deduce the conclusion which the lower Court has done. All I have to see is whether the lower Court's finding is so unreasonable, improper or perverse as to require interference by this Court in revision. I do not think that the lower Court's finding is open to any such objection. 'Good faith' as used in S. 14, Lim. Act, means 'exercise of due care and attention.' Now there are circumstances on the record which must have presented themselves to the mind of the plaintiffs so as to induce an honest belief that the value of the property was Rs. 5500. The circumstances are such as would justify either view as regards the value of the property and the plaintiffs cannot be regarded as having acted dishonestly and without due care and attention, because they followed the view which was more advantageous to them, namely that the value, regard being had to the circumstances as they stood on the date of the order, was Rs. 5500 and not Rs. 20,000. The result is that the application stands dismissed with costs. Pleader's fees Rs. 50.

D.S./R.K. *Application dismissed.*

## * A. I. R. 1938 Nagpur 303

GRILLE J.

*Hafiz Ahesanali Mohamadali Musalman* — Applicant.

v.

*Emperor.*

Criminal Revn. No. 340 of 1937, Decided on 24th November 1937, from order of Sess. Judge, Nagpur, D/- 13th July 1937.

**(a) Criminal Trial—Questions asked in examination-in-chief of defence witnesses—Whether leading or not doubtful—Judge saying that he would presume the point in favour of accused—Attitude of Judge cannot be said to be perverse.**

Where a Judge has said that, as it is a matter of doubt whether the questions asked in the examination-in-chief of certain defence witnesses were leading questions or not, he would presume the point in favour of the accused, it is difficult to see how the accused can call this attitude of the Judge perverse when the interpretation has been entirely in his own favour. [P 304 C 2]

**(b) Criminal P. C. (1898), Ss. 109 and 112—Appellate Court thinking that facts set out in body of order under S. 112 bring matter within Cl. (9) instead of Cl. (b) of S. 109—It has jurisdiction to make this alteration — Magistrate recording reasons for calling person to execute bond—Entering of actual section and clause is not imperative.**

Where the Appellate Court has considered that what is set out in the body of the order under S. 112 brings the matter within the terms of Cl. (a) of S. 109 and not under Cl. (b), and it has in effect corrected what he considers either to be a misconception of the trying Magistrate or a clerical error, its order cannot be set aside. The substance of the accusation which the applicant had to meet has not been altered in any way and further there is nothing in the provisions of S. 109 or of S. 112 which makes it imperative on the part of the Magistrate, after having recited the reasons why the person named is to be called on to execute a bond, to enter the actual section and clause which he considers appropriate : *A I R 1933 Sind 8, Disting.* [P 305 C 1]

*** (c) Criminal P. C. (1898), S. 109 (a) and (b)—Person not hiding behind anything but standing still with hope that watchman would think him to be inanimate thing—This is not concealing his presence.**

A person was walking along the road, and observing the watchman on the alert, he stood still and waited until his attention should be diverted before proceeding on his way. He did not hide behind anything but stood there apparently in the hope that he might be mistaken for an inanimate object or part of a building if the watchman happened to turn his eyes on him :

*Held* that this could not be considered as concealing his presence. [P 305 C 2]

*** (d) Criminal P. C. (1898), S. 109 (a) and (b)—Cl. (b) does not necessarily refer only to those commonly known as rogues or vagabonds—Person found at midnight with housebreaking instruments—He cannot be said to have given satisfactory account of himself merely because it is said that he is respectable house-holder following honourable profession in daytime.**

The preliminary words of Cls. (a) and (b) are so different that they cannot be read together and again within Cl. (b) itself the circumstances are mentioned in the alternative, and not in a concurrent sense. The wording of Cl. (b) is such that the conditions must of necessity be read discretely and a person who cannot give a satisfactory account of himself is not necessarily a rogue and a vagabond, which might be implied by Cl. (a) or the first part of Cl. (b). When a man is called on to give a satisfactory account of himself, the implication necessarily follows that it is not a general account of himself but an account of himself in relation to the circumstances in which he is called on to give such account. The wording of S. 109 is not otherwise from that of S. 55. **A person cannot be considered to have given a satisfactory account of himself, if, being found with unmistakable burgling instruments in his possession, in the** middle of the night, he says that he is a respected house-holder, following an honourable profession in the daytime; still less can he be said to have given a satisfactory account of himself when on being accosted, he flings away a bundle of house-breaking implements and runs to his own house by a devious route, and when forced to open his door to the police, denies that he had left his house that night: *Case law discussed.* [P 307 C 1, 2]

R. M. Bhagade and Nisarali — *for Applicant.*

J. Sen, Govt. Pleader — *for the Crown.*

**Order.** — The applicant Hafiz Ahesan Ali, who is the Pesh Imam of a mosque situated in the Hump Yard quarter of Nagpur, was bound over under S. 109, Criminal P. C. The preliminary order under S. 112 of the Code ran as follows:

> Whereas from the report of the Sub-Inspector of Police Sitabuldi (Nagpur), I am informed that Hazi Ahsanali, s/o Muhammad Ali, Musalman, could not give a satisfactory account of himself (i. e. he was discovered, on 18th March 1937 at about 1 or 1-30 A. M., by Kulbirsing standing in a dark corner near the house of Fadke and when he was challenged by Kulbirsing ran away, and as he was pursued he threw in a gutter the implements of house-breaking tied up in a bundle and after some time threw away the black sheet with which he was covering himself, and entered the mosque at the Hump Yard). I require, under S. 109 (b), Criminal P. C., the said Hafiz Ahsanali Musalman to show cause why he should not be ordered to execute a bond for Rs. 100 with one surety for the like amount, for his good behaviour for one year. (*Sd.*) Adharsinha, Magistrate, First Class, Nagpur.

After evidence had been led on either side, Ahesan Ali was bound over with one surety in Rs. 100 for his good behaviour for one year under S. 118, Criminal P. C. This order was upheld in appeal by the Sessions Judge, Nagpur, except that the learned Sessions Judge considered that S. 109 (a), Criminal P. C. was applicable and not S. 109 (b). Against this appellate order Ahesan Ali has come up in revision.

On the facts of the case there can be no dispute, and the truth of the prosecution story has been amply established by the evidence, and the claim in the revision application that the lower Appellate Court has acted perversely in accepting the prosecution story and not accepting the story of the defence is of no avail whatever. Kulbir Singh, a Gurkha watchman employed by the Railway, was keeping watch and ward in the course of his duty in the middle of the night when he saw at some distance the accused standing motionless, looking at him. After some time, he flashed his torch on him and challenged him, whereupon he ran away, threw away a bundle containing house-breaking instruments, then threw away a cloak with which he was covered, was stopped by one Samiullah who let him go recognizing him as an official of the mosque, and eventually reached the mosque and closed the door. A police constable was summoned and the door was opened at the demand of the police, and Ahesan Ali was then arrested. An attempt was made to suggest that the person who was seen and who was chased was the witness Samiullah and that the black cloak and the house-breaking instruments belonged to him. These allegations have been disproved, and the suggestion that the accusation has been brought against the applicant out of communal spite has not been accepted. The facts alleged have been fully established and cannot be gainsaid in revision.

There remain however two points of law. One of them can be disposed of easily. It is the complaint that in the examination-in-chief of two of the defence witnesses the trying Magistrate disallowed certain questions as leading questions, that the learned Sessions Judge who considered that they were not leading questions was inconsistent in holding that they were not leading questions and at the same time saying that the manner and tone of a question which was apparently non-leading might make it a leading question, and that the learned Judge might reasonably have considered that the questions were leading questions. These grounds in the application for revision are followed by the amazing argument that the learned Sessions Judge has acted illegally in coming to the conclusion by stating "I would presume a favourable answer to the accused in respect of these questions", and that this shows the perverse attitude of the learned Sessions Judge. What the learned Sessions Judge has said is that, as it is a matter of doubt whether the questions were leading questions or not, he would presume the point in favour of the accused and it is difficult to see how the accused can call this attitude of the Judge perverse when the interpretation has been entirely in his own favour. This point is entirely without merit.

The next point is more cogent and deserves fuller consideration. It is that the learned Sessions Judge was not entitled to alter the section under which the security was to be taken from S. 109 (b) into S. 109 (a), and that as a matter of fact on the facts stated neither Cl. (a) nor

Cl. (b) of S. 109 applied at all, and that the order should be set aside. As to the jurisdiction of the Appellate Court to make the alteration, I have no doubt. Reliance is placed by the applicant on a case from the Judicial Commissioner's Court, Sind: A I R 1933 Sind 8.[1] This however is not in point, since what was there decided was that the Court had no power, after an order under S. 112, Criminal P. C. had been communicated to the accused, to alter the period named in that order from 12 months to three years. Here, the learned Sessions Judge has considered that what is set out in the body of the order under S. 112 brings the matter within the terms of Cl. (a) of S. 109 and not under Cl. (b), and he has in effect corrected what he considers either to be a misconception of the trying Magistrate or a clerical error. The substance of the accusation which the applicant had to meet has not been altered in any way, and further I can find nothing in the provisions of S. 109 or of S. 112 which makes it imperative on the part of the Magistrate, after having recited the reasons why the person named is to be called on to execute a bond, to enter the actual section and clause which he considers appropriate. This point must fail.

The learned Sessions Judge has said that the preliminary order under S. 109 (b) is not a proper order and that the proceedings are in fact under S. 109 (a). In this I consider the learned Sessions Judge is wrong. The very opening words of the order relate to the fact that Ahesan Ali could not give a satisfactory account of himself, that is to say, that the Magistrate clearly considered the facts to be under Cl. (b), the words in which he actually quotes. The learned Sessions Judge then says that the learned Magistrate had made himself clear as regards the facts by putting the facts at length in his preliminary order, and these the learned Sessions Judge interprets as falling within the ambit of Cl. (a) and not Cl. (b). But the Magistrate says nothing about Ahesan Ali taking precautions to conceal his presence within the local limits of the Magistrate's jurisdiction, and the learned Sessions Judge appears to stultify his own position when he states:

> **What is meant by the order under S. 112, Criminal P. C. in the present case is that the appellant could not give a satisfactory account of** his presence in the manner and under the circumstances under which he was seen by Kulbirsingh.

This can only refer to Cl. (b) and not to Cl. (a); but the learned Sessions Judge apparently considers that Cl. (b) would not apply because it is known that Ahesan Ali resides in the vicinity and has a regular means of livelihood. I am satisfied that Cl. (b) of S. 109 was the appropriate clause and that Cl. (a) had no applicability.

Ahesan Ali was not actually hiding. It appears that he was walking along the road, and observing the watchman Kulbir Singh on the alert, he stood still and waited until his attention should be diverted before proceeding on his way. He did not hide behind anything but stood there apparently in the hope that he might be mistaken for an inanimate object or part of a building if the watchman happened to turn his eyes on him. I do not think that in any circumstances this can be considered as concealing his presence, and the numerous cases that have been cited on the point whether Cl. (a) applies to a person residing in the vicinity or only to vagabonds and bad characters coming from a distance, and whether the act of concealment should be continuous or no, are beside the point. In the argument before me, all the stress was laid on the argument that Cl. (b) of S. 109 could have no application, and it was assumed that the alteration made by the Sessions Judge was correct although it was contended that he had no power to make it. It was left to the learned Government Pleader to point out that the case really did fall under Cl. (b) and then in reply it was contended that Cl. (b) did not apply either, and the learned counsel for the applicant stated that he relied on the decisions of such of the learned Judges in 50 All 909[2] who considered that in somewhat similar circumstances Cl. (a) and not Cl. (b) applied. Now in that case there was undoubtedly obvious concealment as the persons concerned were hiding in a mango grove on a dark night, with house-breaking implements in their possession, and the police having information, raided the mango grove. Clearly, then, there was a basis for the argument in that case that Cl. (a) of S. 109 rather than Clause (b) applied. In the case which I am now considering, there was no concealment whatever, merely immobility and a hope that the watchman's attention would not be attracted.

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[1] **Nim Sahibkhan v. Emperor, (1933) 20 A I R Sind 8 = 1933 Cr C 32 = 140 I C 170 = 34 Cr L J 9=27 S L R 19.**

[2] **Emperor v. Phuchai, (1929) 16 A I R All 33= 113 I C 417=30 Cr L J 145=50 All 909=26 A L J 1257 (F B).**

The point, then, that remains for consideration is whether Ahesan Ali can be said to have been a person who was unable to give a satisfactory account of himself although his residence and his profession were known. In 50 All 909,[2] which was heard by a Full Bench consisting of five Judges, every possible permutation and combination of the applicability of the two clauses was found; one Judge held that Cl. (a) and not Cl. (b) applied, another that Cl. (b) applied and not Cl. (a), one held that neither was applicable, another that both were applicable, and the fifth Judge held that Cl. (a) was applicable and possibly (b) although a decision on the latter point was not necessary. With the greatest respect, the opinion held by Boys J. appears to me entirely convincing, and the same line of argument has been followed in the Patna High Court by Mohammad Noor J. in A I R 1935 Pat 69.[3] This opinion overruled opinions which appear to have been previously held in the Allahabad High Court and referred to with approval in the Calcutta High Court that, so long as a person gives his name and address and establishes that he is a person who is known and respected in the ordinary pursuits of his life, he must be held to have given a satisfactory account of himself, and that Cl. (b) will not apply; and even in those cases none of the judgments cited took the view that a person otherwise respectable can be said to have given a satisfactory account of himself if he is found with house-breaking instruments in his possession. There were cases where persons not in possession of house-breaking implements were held to be not amenable to S. 109, but were cases considered under Cl. (a) which was held not to apply, and the applicability of Cl. (b) was denied in those cases. In 17 A L J 432[4] the three applicants were found at night in the company of two other persons and were arrested as the police had had information that men of bad character were about to commit a raid on the town; a burglar's jemmy was found on the ground near by. The judgment there proceeds:

> The present applicants clearly do not come within Cl. (a) as it was not alleged that they were taking precautions to conceal their presence with a view to committing an offence. They could only have come in under Cl. (b) as persons who could not give a satisfactory account of themselves. But as the District Magistrate's judgment on appeal shows the account they gave of themselves was correct and the police of Delhi have reported that these three present applicants are persons who are well-to-do and of good character. In these circumstances I do not think S. 109 can apply to them and that the order passed has been passed more on suspicion than on any good basis of fact.

It will be seen, as Boys J. remarks in commenting on this case, that whether Cl. (b) applied or not was purely a question of fact in that case, and he also notes that in 8 A L J 1097[5] Chamier J. did no more than refuse to apply Cl. (b) to a case where the Magistrate seemed to think that Cl. (b) justified calling on a person to account satisfactorily for his leisure time. Clearly, such an attitude on the part of the trying Magistrate would be nothing short of oppression, and the mere fact that a man who is well-known is found wandering in an unfrequented place at night without any apparent purpose would not be sufficient to attract Cl. (b); he might be suffering from insomnia or he might, as Mohammad Noor J. has indicated in A I R 1935 Pat 69,[3] be an apparently respectable person returning from the house of his mistress late at night and who wished to avoid being seen by any acquaintances. But this principle cannot be extended to giving complete immunity to any person, however well-known and respected, who is found late at night in circumstances giving rise to the very gravest suspicion that he is about to commit an offence. On this supposition a man might find an intruder in his garden or against the wall of his house with house-breaking instruments, and the intruder giving his correct name and address and establishing the fact that he is a respectable prosperous stone mason or shoemaker by day would be held blameless under this section. Moreover, he might be found in a similar predicament on more than one occasion and would yet have to be held to give a satisfactory account of himself. I am unable to accept the proposition that the whole of the section has reference to what are commonly known as rogues and vagabonds only and that it can have no application to such a man as, for instance, the notorious English criminal

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[3] Emperor v. Bishi Sahara, (1935) 22 A I R Pat 69=1935 Cr C 139=155 I C 729=36 Cr L J 846=15 P L T 836.

[4] Ghulam Jilani v. Emperor, (1919) 6 A I R All 260=51 I C 161=20 Cr L J 401=17 A L J 432.

[5] Sharif Ahmad v. Emperor, (1911) 8 A L J 1097 =12 I C 304.

Charles Peace who by day time was a respected suburban householder whose hobbies consisted of playing the violin and the enjoyment of good tobacco and by night was a burglar of quite unusual skill. With the greatest respect, I am unable to subscribe to the dictum in 57 Cal 949,[6] which has been strongly urged before me, that:

> It is reasonable . . . that Cls. (a) and (b) should be found together, treating a man who has no ostensible means of subsistence and cannot give a satisfactory account of himself, as a person of the same kind, as a person trying to escape notice and to inhabit the locality without his presence in the locality becoming known, and doing this for the purpose of committing an offence.

I would consider in the first place that the preliminary words of Cls. (a) and (b) are so different that they cannot be read together, the first implying concealment within the local limits, and the second the mere existence within such limits, and again within Cl. (b) itself the circumstances are mentioned in the alternative, namely, "that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself," and not, as the learned Judges of the Calcutta High Court imply, in a concurrent sense. Similarly, in 49 All 240[7] the learned Judges quote with approval the dictum of Tudball J. as being particularly valuable:

> The persons contemplated in the section are persons taking precautions to conceal their presence within the local limits of such Magistrate's jurisdiction, or persons who have no ostensible means of subsistence and who cannot give a satisfactory account of themselves.

Here again, I would point out with the greatest respect that, although the learned Judges say that Tudball J. was quoting the *ipsissima verba* of the section, the word "and" has been substituted for the word "or" as in 57 Cal 949.[6] It appears to me that the wording of Cl. (b) is such that the conditions must of necessity be read discretely and that a person who cannot give a satisfactory account of himself is not necessarily a rogue and a vagabond, which might be implied by Cl. (a) or the first part of Cl. (b).

When a man is called on to give a satisfactory account of himself, the implication necessarily follows that it is not a general account of himself but an account of himself in relation to the circumstances in which he is called on to give such account. Under S. 55, Criminal P. C., an officer in charge of a police station is empowered to arrest or cause to be arrested inter alia anyone who cannot give a satisfactory account of himself, and the satisfactory account which is to be given cannot, at the moment when an arrest is impending, be considered to have reference to anything except the circumstances in which he is about to be apprehended. The wording of S. 109 is not otherwise, and I am unable to apprehend that a person can be considered to have given a satisfactory account of himself if, being found with unmistakable burgling instruments in his possession, in the middle of the night, he says that he is a respected house-holder, following an honourable profession in the day time still less can he be said to have given a satisfactory account of himself when, on being accosted, he flings away a bundle of house-breaking implements and runs to his own house by a devious route, and, when forced to open his door to the police, denies that he had left his house that night. Another point to which Boys and Mohammad Noor JJ. have also referred is the existence of a provision for arrest not only under S. 55 (b) but also under S. 54 (1), *secondly*, which would be entirely nugatory were there no provision for subsequent action in respect of these arrests. If the argument that a person found with house-breaking instruments on him at night is to be held capable of giving a satisfactory account of himself by giving his correct address and his correct name is to prevail, then there is no such provision, since being found in possession without lawful excuse of an implement of house-breaking or being unable to give a satisfactory account of oneself are not offences under the Penal Code.

**I am satisfied that the preliminary order under S. 112, Criminal P. C. was correctly framed by the learned Magistrate and that the circumstances in which the applicant Ahesan Ali was found, warrant his being bound over under S. 118. The decision of the trial Magistrate is correct in fact and in law, and the application is dismissed.**

D.S./R.K. *Application dismissed.*

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[6] Gangachandra De v. Emperor, (1929) 16 A I R Cal 775=1929 Cr C 519=123 I C 747=31 Cr L J 569=57 Cal 949=34 C W N 194.

[7] Emperor v. Bhairon, (1927) 14 A I R All 50=97 I C 428=27 Cr L J 1116=49 All 240=25 A L J 94.

## A. I. R. 1938 Nagpur 308

POLLOCK J.

*Mt. Gomti, w/o Jiwanlal Lodhi* — Appellant.

v.

*Society Ghat Pindarai No. 134 (Central Co-operative Bank) through Surpanch and another* — Respondents.

Second Appeal No. 600 of 1935, Decided on 1st February 1938, from appellate decree of Addl. Dist. Judge, Hoshangabad, D/- 15th October 1935.

**Execution — Validity — Failure to bring legal representative of the judgment-debtor on the record does not necessarily render proceedings nullity.**

The failure to bring a legal representative of the judgment-debtor on record does not necessarily make the proceedings in execution a nullity, more so when the legal representative is aware of the proceedings and raises no objection : *A I R 1924 Mad 130*; *25 Bom 337*; *A I R 1919 Cal 411*, *and 115 I C 520*, *Rel. on.* [P 308 C 2]

D. N. Choudhary — *for Appellant.*

Abdul Razak — *for Respondent 2.*

**Judgment.**—In 1925 Jivanlal borrowed Rs. 350 from the Ghat Pindarai Co-operative Society of which he was a member, and as security mortgaged his absolute occupancy fields in that village including field No. 223, area 9 acres. The Central Bank, Narsingpur, obtained an award against the Ghat Pindarai Co-operative Society and in execution this field was sold for Rs. 1325 in June 1930. It was purchased by defendant 2 who was placed in possession in August 1930. Jivanlal had died in 1926 leaving two widows, Mt. Gomti the plaintiff, and Mt. Lalti who alone was made a member of the Co-operative Society in Jivanlal's place. The fields were originally recorded jointly in the names of Jivanlal and Ghuransingh, and after Jivanlal's death in the names of Gomti, Lalti and Ghuransingh till there was a partition at the end of 1928. The award was dated 27th January 1929. It was shown as an award in the case of *Narsingpur Co-operative Bank Liquidator v. Members of the Ghat Pindarai Society*, and then follow the names of 11 members including Lalti and Ghuransingh. Survey No. 223 was attached on 24th February 1930 and sold on 11th June 1930. Between the attachment and sale, Lalti remarried in March or April 1930. No notice was issued to Gomti. On 18th June 1930 Gomti put in an application asking that she should be given half the sale proceeds that remained after satisfying the plaintiff's claim. Out of the sale proceeds of Rs. 1325, Rs. 531 went to satisfy the mortgage debt, Rs. 385 was returned to Ghuransingh, and Rs. 309 was deposited with the Ghat Pindarai Co-operative Society to cover bad and doubtful debts.

The first point taken in this appeal is that in an award against the Ghat Pindarai Society, the Central Bank Narsingpur was not entitled to proceed against the property of the individual members of that Society and that all that it could sell in execution was the Co-operative Society's rights as a mortgagee. In support of this contention, I have been referred to the decisions in 11 Pat 174[1] and A I R 1934 Mad 181.[2] That position may be correct, but the award shows that it was an award against the members of the Ghat Pindarai Society including Lalti and there is no doubt that the field itself was sold and not merely the mortgagee's rights therein. Assuming that Lalti ceased to represent the estate of Jivanlal after her re-marriage, I do not think that the failure to bring Gomti on the record would amount to more than an irregularity. Lalti remarried only just before the sale and Gomti was obviously aware of the proceedings from her application which she put in a week after the sale. The failure to bring the legal representative of the judgment-debtor on the record does not necessarily make the proceedings a nullity. See for example 47 Mad 63[3] following the principle laid down by the Privy Council in 25 Bom 337,[4] 23 C W N 608[5] and 32 C W N 418.[6] From her application of 18th June 1930 it is clear that Gomti was aware of the sale of the field to which she raised no objection and also that she had no objection to the mortgage being paid off out of the sale proceeds. In my opinion therefore the mortgage was extinguished and it is not open now to Gomti to sue for redemption. The appeal fails and is dismissed with costs. Counsel's fee Rs. 20.

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[1] Harihar Prasad v. Bansi Missir, (1931) 18 A I R Pat 321=134 I C 421=11 Pat 174=12 P L T 619 (FB).

[2] South Kanara Central Co-operative Bank v. Chikumudunur Co-operative Society, (1934) 21 A I R Mad 181=150 I C 172 = 66 M L J 474.

[3] Doraswami v. Chindambaram Pillai, (1924) 11 A I R Mad 130=75 I C 46=47 Mad 63 = 45 M L J 413.

[4] Malkarjun v. Narhari, (1901) 25 Bom 337=27 I A 216=7 Sar 739=2 Bom L R 927 (P C).

[5] Jagadish Bhattacharjee v. Bama Sundari Dasya, (1919) 6 A I R Cal 411=51 I C 972 = 29 C L J 411=23 C W N 608.

[6] Tarangini Debi v. Raj Krishna Mondal, (1928) 115 I C 520=32 C W N 418.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 309

GRILLE J.

*Poonamchand Sheoratan Maheshri — Defendant 6* — Appellant.

v.

*Mt. Fulabai w/o Bheoraj Maheshri— Plaintiff* — Respondent.

Second Appeal No. 496 of 1935, Decided on 2nd December 1937, from appellate decree of District Judge, Chhindwara, D/- 8th July 1935.

**(a) Civil P. C. (1908), Sch. 3, Para. 11 — Object of — Fully substantiated and certain permission from Collector is necessary—Written record of facts proving that permission was given fulfils requirements—Formal permission is unnecessary.**

The object of Para. 11, Sch. 3 is that there shall be a fully substantiated and certain permission on the part of the Collector, which is to be given in such a manner that the fact of its having been given is indisputable. The essence of the paragraph is that there shall be a written permission as opposed to an oral permission, which would be susceptible of evidence of varying degrees of credibility in order to establish the necessary proof. What is required is certainty, and where there is a written record of facts which cannot be disputed, an unmistakable inference drawn from this written record that permission was given, fulfils the requirements of the paragraph and a formal permission is then unnecessary. [P 310 C 2]

**(b) Execution — Attachment — Execution of warrant of attachment whether judicial act *(Quære).***

Whether the execution of a warrant of attachment by a process-server can be considered a judicial act which may be considered as taking place at the earliest period of the day on which it takes place : *9 N L R 155, Ref.* [P 312 C 1]

M. R. Bobde and A. V. Wazalwar — *for Appellant.*

R. N. Padhye — *for Respondent.*

**Judgment.**—The plaintiff Mt. Fulabai brought a suit for an amount due under a mortgage dated 15th September 1920. The executants, who are defendants 1 to 5, did not dispute the mortgage and the execution thereof. The properties concerned were two houses and a field at mauza Mogra. The suit was contested by defendant 6, one Poonamchand, who alleged that he was in possession of the houses and the field, as the son and heir of Sheoratan who had purchased them at an auction sale. The trial Court held that the mortgage was inoperative as against defendant 6, Poonamchand, although it had been duly executed by the mortgagors, on three grounds ; in respect of the houses, because at the date of the mortgage an attachment on the houses was in force and the mortgage in question was subject to all the claims enforceable under that attachment ; in respect of the field because by virtue of Para. 11 of Sch. 3, Civil P. C. no written permission had been taken from the Collector at the time of the mortgage when the field was admittedly being dealt with by the Collector in execution proceedings ; and lastly because the money which had been advanced in respect of the mortgage was held to be not the plaintiff's own property but that of her adopted son. The plaintiff preferred an appeal in respect of these three points in the Court of the District Judge, Chhindwara, who disallowed the appeal in respect of the houses, affirming the decree of the trial Court in that respect. The learned Judge however allowed the appeal in respect of the field and also in respect of the argument as to the origin of the money which was advanced on the mortgage. The decision of the appellate Judge on the latter point has not been challenged before me, and it is unnecessary therefore to say anything more about it. So far as the matter concerning the permission of the Collector for the mortgaging of the field is concerned, the Appellate Court held that the documentary evidence on the record was sufficient to warrant the conclusion that the Collector had given his permission and that the mortgage accordingly was a valid one. This is the point which is now challenged by defendant 6, Poonamchand, in second appeal.

Paragraph 11 (1) of Sch. 3, Civil P. C., runs as follows :

> So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by Paras. 1 to 10 the judgment-debtor or his representative-in-interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

What happened in the Collector's Court is as follows. The decree-holder's representation had been received, and a sale had been recommended, and the sale had been sanctioned by the Deputy Commissioner and a proclamation of sale had issued. On 10th August 1920 the order-sheet ran :

> None present. Proclamation duly published. Sale to be held before the Tahsildar Sausar on 10th September 1920 and report to be submitted on 14th September 1920.

Now on 11th September 1920 an application was put in by the judgment-debtor to the effect that the sale had been held on 10th September 1920 and that the property had been knocked down for the very low price of Rs. 1200. The applicants stated that they wanted to mortgage the property with Mt. Fulabai, the present plaintiff, for Rs. 2000, and they stated that, if they were granted time up to 20th September and allowed to mortgage the said land, they would pay the plaintiff's full claim. The application ends with the words :

> The applicants therefore pray that they be allowed to mortgage the above-mentioned land and the case be stayed up to 20th September 1920.

On 14th September, which was the next date for consideration of the sale, the order sheet runs as follows :

> Decree-holder by agent Deokishan. Judgment-debtor in person. Sale was held and decree-holder is the highest bidder. His bid is of Rs. 1200 but as this is not sufficient, decree-holder's agent raises the bid to Rs. 1726-6-0, i. e. the full decretal amount. This bid is a fair one and is accepted. Judgment-debtor says that he wants only four days' time to pay the decretal amount. Judgment-debtor's request is granted and time is given till 20th September 1920 on which date the decree-holder should file the receipt in full satisfaction of the bid and the decretal amount and costs.

The next item on the order-sheet is undated, but presumably the date should be 20th September 1920 as there is evidence from registers that the case was struck off on that date as being fully satisfied, the judgment-debtor having deposited the full decretal amount of this case and other Collector's cases in full. The sale in favour of the decree-holder was not confirmed and was set aside. The learned District Judge reversing the decision of the trial Court held that on these facts it was impossible to come to any other conclusion than that the Collector had acceded to the request for permission to mortgage the property and that the property had been mortgaged in accordance with that permission and the decree had been satisfied out of the money which had been received as the result of the mortgaging of the fields. It has been contended before me that, as Para. 11 of Sch. 3 refers to a written permission, there must be a formal permission in writing and signed by the Collector before the property could legally be mortgaged, and that any implied permission cannot be considered as it is an impossibility for an implied permission to be in writing. I do not think that this is an absolute impossibility. But the fact remains that the permission which has been implied in this case is an inference to be drawn from various facts all of which have been set down in writing. There is no ambiguity as to the facts from which the inference has been drawn by the learned District Judge. If there were any question of oral statements, there might be some doubt, but the facts in this case are incontrovertible.

It appears to me that the object of Para. 11 of Sch. 3 is that there shall be a fully substantiated and certain permission on the part of the Collector, which is to be given in such a manner that the fact of its having been given is indisputable. The essence of the paragraph appears to me that there shall be a written permission as opposed to a oral permission, which would be susceptible of evidence of varying degrees of credibility, in order to establish the necessary proof. What is required is certainty, and where we have a written record of facts which cannot be disputed it appears to me that an unmistakable inference drawn from this written record that permission was given, fulfils the requirements of the paragraph and that a formal permission is then unnecessary. It would appear to me intolerable if a Collector, having acceded to a request to mortgage property in which he was considering the question of sale, and having put down by way of order-sheets sufficient testimony from which his consent could unmistakably be deduced, should, if requested to record a formal order saying "I grant permission" decline to do so because he considered that what was already written was sufficient, and thereby wreck the claim of the mortgagee. I am not for a moment suggesting that this is what occurred in this case, but it is a situation that might possibly occur. It could not be obviated by an endorsement made on the application to mortgage directly it was received; this would not be sufficient; as the mortgaging of the property would be useless unless the amount raised and paid was sufficient to satisfy the debt and to warrant the release of the property from attachment. I can conceive many cases in which the actual writing of the order, which could not be done until the case had been disposed of, would be postponed and lost sight of altogether.

No authority has been cited before me on the question whether the words 'written permission' are to be construed absolutely literally, and the learned counsel for the appellant has based the whole of his argument on the contention that an entirely wrong inference has been drawn from the facts on the record, and he contends that so far from warranting the inference that permission was given, the only deducible inference is that permission was denied. With this contention I am entirely unable to agree. The learned counsel for the appellant argues that the first part of the order sheet of 14th September 1920, by the fact that the decree-holder's bid was raised, shows that the application dated three days before was before the Court and that it did not give permission for the mortgage. From the second part of the order-sheet, which to the ordinary mind would presuppose that it had been written in consequence of the granting of the application, the learned counsel deduces that, as in the first part permission to mortgage had been denied, but permission was given to the judgment-debtor to raise the necessary sum to satisfy the decree in any other way which he chose, and that he did succeed in raising the sum by some means strange but unspecified without having recourse to mortgaging the property, permission for which had been denied him by the Court. It may be convenient to note here that the date of the mortgage is 15th September 1920, that is to say one day after this order in the order-sheet was recorded. This contention appears to me little short of fantastic. The date 20th September 1920 which appears in the judgment-debtor's prayer of 11th September and is repeated in the order-sheet as the time up to which extension is given, does not, so the learned counsel for the appellant says, as one would imagine it would to the ordinary mind, imply that the request had been granted, but is a pure coincidence.

It is also contended that it is incompatible with the four days which the judgment-debtor asks for according to the order-sheet, since four days would take him to the 18th only. I fail to see how the judgment-debtor who had asked for permission up to the 20th in respect of raising money by a mortgage, should be held to have limited himself to a lesser period, when according to the appellant he was to raise the money by means unspecified, which would certainly be much more uncertain. I fail to see how the fact that the decree-holder's bid was raised can be interpreted as a denial of the permission to raise money by mortgage. It is perfectly compatible with it; there is a complaint in the application that the bid is extremely low, and the decree-holder offered to raise the bid. It seems to me in the highest degree improbable that he would have done this unless he was sure that he would get the money, that is, by the assurance that the property would be mortgaged and the money raised, and it is perfectly compatible with the well-known good offices of the revenue authorities in Collector's cases to obtain for the judgment-debtor, whose property is to be sold or mortgaged, as easy terms as possible. Not only, in my opinion, is the conclusion which has been reached in the lower Appellate Court a reasonable conclusion from the facts, but it appears to me to be the only possible conclusion which could be reached. What has been asked for in the prayer has been granted, the price has been raised, an extension has been given until the date asked for, the mortgage was made on the succeeding day, and the amount was paid in full on the 17th and the case was struck off on the 20th. Any more satisfactory evidence on which to base the conclusion that permission had been given, it is difficult to imagine.

The other point taken in connexion with the question of the field is that the mortgage was invalid as there was existing at the time a previous attachment of the field. This attachment is said to have been made earlier on the same day on which the mortgage was executed, in execution of a decree of the present appellant's father. Now there is on the record a warrant of attachment dated 15th September 1920, the same date on which the mortgage was executed in respect of this field. It has been argued before me that, as the attachment was a judicial act, it must be presumed to have taken place earlier in the day than the mortgage, and therefore to prevail over it, and reliance is placed on 9 N L R 155.[1] The authority of this case is largely negative. The principle was contended for, there, and all that this case decided was, that the point did not really arise as the filing of a plaint was not a judicial proceeding which could be considered as taking place at the earliest period of the day on which it was filed. I am also in considerable doubt whether the execution of a warrant of attachment by a process-server could also be considered a judicial act, in respect of which such presumption could be made. But apart from this I am in entire agreement with the finding of the lower Appellate Court that the attachment was after the mortgage and not before it. A letter has been produced in order to establish the fact that the attachment was prior to the mortgage. There appears to have been no reason whatever why the letter should have been written, or indeed why such a pointless letter should have been preserved for so many years, and I entirely agree with the lower Appellate Court in considering that this letter is a deliberate piece of manufactured evidence in order to support the proposition that the attachment was earlier than the mortgage. As the present appellant is seeking to defeat the mortgage, and one of the reasons alleged on his behalf is that at the time of the mortgage he himself or rather his father had a prior attachment on the mortgaged property, the burden lay on him to establish it. He has failed to do so and has attempted to do so by very dubious evidence.

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[1] Rafiuddin v. Brijmohan, (1913) 9 N L R 155 =21 I C 602.

I find therefore, agreeing with the lower Appellate Court, that it has not been established that the attachment urged in respect of this field was prior to the mortgage which was executed on the same day. As the attachment has not been proved to be a prior attachment, all legal argument based on the assumption that it was, fails. The appeal appears to me to be based on such slender foundation that I have not considered it necessary to call on the learned counsel who has appeared for the respondent to argue. The appeal fails and is dismissed with costs.

V.B.B./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 312

STONE C. J. AND VIVIAN BOSE J.

*Suleman Latif Hasam Kachi and another*—Appellants.

v.

*Laxman and others*—Respondents.

Misc. Appeal No. 212 of 1936, Decided on 2nd February 1938.

**(a) Provincial Insolvency Act (1920), Ss. 37, 53, 54—Adjudication of insolvent annulled—Proceedings under S. 53 or S. 54 cannot be started or continued.**

Once an adjudication is annulled, the receiver, or a creditor or the Insolvency Court cannot either institute or continue proceedings under S. 53 or S. 54. Where therefore the creditors of an insolvent apply for an annulment of a transfer made by the insolvent during his insolvency and the adjudication of the insolvent is annulled without any opposition from the creditors during the pendency of the application, the creditors are not entitled to pursue the application and obtain an annulment of the transfer after the annulment of the adjudication. No question of validating the proceedings under S. 37, arises and the property transferred, having ceased to be the property of the debtor, the Court has no power to deal with it under S. 37 : *A I R 1933 Rang 223 (F B), Foll.; A I R 1930 Mad 278, Not foll.; A I R 1933 Pat 84 ; A I R 1934 Lah 452 and A I R 1933 Cal 386, Disting.* [P 313 C 1, 2]

**(b) Provincial Insolvency Act (1920), Ss. 35, 53, 54 — Whether annulment proceedings should be kept pending so long as proceedings under Sections 53 and 54 are outstanding — *(Quære.)***

It is a matter for consideration whether in all ordinary cases, annulment proceedings shall not be kept pending so long as proceedings under Ss. 53 and 54 are outstanding. The better view seems to be that it can be under S. 27 (2). [P 313 C 2 ; P 314 C 1]

W. H. Dhabe—*for Appellants.*

P. P. Deo—*for Respondents 3 and 4.*

**Order.**—This is an appeal filed by two creditors of respondents 1 and 2, Laxman and Harba. They, that is to say, Laxman and Harba were declared insolvents on 5th July 1932 on their own petition. As no receiver was appointed the creditors (appellants) were allowed to apply on 11th October 1933 for the annulment of a transfer made by the insolvents in favour of respondents 3 and 4. While these proceedings were pending the insolvents applied for their discharge and on 17th April 1934 the adjudication was annulled because the insolvents had taken no steps to have notices of their application issued to the creditors and because they (insolvents) remained absent. The appellants represented by their counsel were however present on that day and neither they nor any of the other creditors opposed the application. The order sheet states "none of the creditors oppose". No vesting order was made under S. 37, probably because, as the lower Court remarks, none of the creditors asked for such an order. The question now arises whether the creditors (appellants) can pursue their application of 11th October 1933 for annulment of the transfer. On this point there is a difference of opinion.

The Madras High Court has held in 52 Mad 648[1] that the creditors, or rather the Official Receiver, can continue such an application. This view was endorsed in a later Full Bench decision of the same Court though the remarks on this point were obiter. The Rangoon High Court on the other hand took a contrary view in 11 Rang 287.[2] We prefer the Rangoon view.

The rights to avoid a transfer and to obtain its annulment against the receiver in insolvency under Ss. 53 and 54 Provincial Insolvency Act are special rights conferred for the benefit of the general body of creditors. They are not meant for the benefit of the insolvent and cannot be exercised by him, for, as between him and his transferee the transactions hold good. They are powers which are peculiar to insolvency proceedings and can only be exercised by an insolvency Court or a receiver acting on its behalf. But this presupposes an insolvency. If there is none, it is clear these powers cannot be exercised. Also, if there was once an Insolvency and the order of adjudication is later annulled, then the effect is that the insolvency ceases to exist and is deemed never to have existed for most purposes. Therefore, except in so far as the Act otherwise directs, all the special powers with which an Insolvency Court is invested must also disappear. It is to be observed that Ss. 53 and 54 speak of an annulment "by the Court", meaning of course the Insolvency Court. Therefore if that Court becomes functus officio it is clear that the annulment cannot be made.

It was argued that these proceedings are expressly validated by S. 37 which states that "all acts therefore done by the Court or receiver should be valid", but we cannot read this clause to mean that. It is one thing to validate all proceedings up to the point of annulment and quite another to say that everything shall continue as before thereafter. There would be no point in requiring a special order for annulment if that were so. The use of the word 'debtor' and the fact that the property can be vested "in such person as the Court may appoint" (not the receiver any longer but the appointee) places that beyond doubt. It was also argued that the Court has power to vest the property of the debtor in such person as the Court may appoint and that this power can be exercised even after the order of annulment has been made. Therefore, counsel argued, if that is done, then the person so appointed is invested with power to recover the debtor's property from the hands of those who have wrongfully obtained possession of it. We were consequently invited to make the necessary orders now. Again we cannot agree. The transfer which the creditors are seeking to annul is valid in law as between the debtor and his transferee. He could not claim a return of the property unless and until he avoided the transfer in some way known to law. Therefore, so long as the transfer stands, it is not the debtor's property and the Court has consequently no power to deal with it under S. 37. As the Rangoon Full Bench points out:

> It is only because under the special provisions of the Insolvency Act jurisdiction is given to the Court to declare a transfer void against the receiver as representing the general body of creditors, that the Court has any jurisdiction to set aside a transfer which, as between the debtor as transferor and transferee, is valid in law and not open to challenge.

Moreover, as the Rangoon Full Bench also observe:

> It is only upon an application presented in that behalf by the receiver in insolvency in the interest of the general body of creditors, or by a creditor under S. 54-A, that the Court can declare such a transfer to be void under S. 53 or S. 54 of the Act.

That in our opinion clearly excludes an appointee under S. 37. We need not go into this further as the Madras view has been fully analysed in the Rangoon case and it would be idle for us to cover the same ground. As regards the other cases cited, namely 12 Pat 163,[3] 15 Lah 694[4] and 60 Cal 259,[5] none of them is, in our opinion, in point. They do not hold that the receiver or a creditor or the Insolvency Court can either institute or continue proceedings under S. 53 or S. 54, once the adjudication has been annulled. We may add that it is a matter for consideration whether in all ordinary cases annulment proceedings shall not be kept pending so long as proceedings under S. 53 or S. 54 are outstanding. Although there is a difference of opinion as to whether this can be done, the better view seems to be that it can under S. 27 (2). Of course no such considerations arise here because the creditors did not oppose the making of the order although given an opportunity to do so. As the point is not actually before us, we refrain from deciding it but indicate that it is a matter for consideration in all normal cases. The appeal is dismissed with costs. Counsel's fee Rs. 30.

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[1] **Jethaji Peraji Firm v. Krishnayya, (1930) 17 A I R Mad 278=122 I C 851=52 Mad 648 = 57 M L J 116.**

[2] **Jaing Bir Singh v. R. K. Banerjee, (1933) 20 A I R Rang 228 = 145 I C 820 = 11 Rang 287 (F B).**

[3] **Chouthmal Bhagirath v. Jokhiram, (1933) 20 A I R Pat 84=141 I C 836=12 Pat 163 = 13 P L T 775.**

[4] **Mohammad Chiragh v. Fatta, (1934) 21 A I R Lah 452 = 148 I C 209 = 15 Lah 694 = 36 P L R 525.**

[5] **In re Keshablal Dhar, (1933) 20 A I R Cal 886=144 I C 214=60 Cal 259.**

R.M./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Nagpur 314

GRILLE J.

*Govindrao Balwantrao Kale, Plaintiff* —Appellant.

v.

*Ruma Atmaram Kunbi, Defendant* — Respondent.

Second Appeal No. 398 of 1935, Decided on 30th November 1937, from appellate decree of Dist. Judge, Chhindwara, D/- 3rd April 1935.

**(a) Lease — Terms of tenancy providing that tenant should pay half produce and fixed sum varying from year to year — Terms amount to lease and not to cultivating partnership.**

Where the terms of the tenancy are that the tenant is to pay half the produce and a fixed sum which varied apparently from year to year but which is entered in jamabandis as certain amount, the terms of cultivation amount to a lease and not to cultivating partnership : *A I R 1932 Nag 138, Foll.* [P 315 C 2]

*** (b) Guardians and Wards Act (1890), S. 29 (b) — Certified manager cannot create occupancy tenancy without permission of Court.**

When a certified manager creates an occupancy tenancy, whether deliberately or inadvertently, by giving a lease without the previous permission of the Court the landlord is not bound by it. It is not in any way an intolerable restraint on efficient management to provide that the creation of a permanent tenancy should not be made without the Court's permission. It is not a matter of any difficulty for a manager to approach the Court and obtain the necessary permission. The question whether the act opposed is a prudent one or not is immaterial. [P 316 C 1]

M. R. Bobde and M. D. Khandekar — *for Appellant.*

R. N. Padhye — *for Respondent.*

**Judgment.** — One Mt. Shantabai was a one anna cosharer in mauza Mahdi in the Sausar tahsil of the Chhindwara District. She was a minor and was a ward of the Court of the District Judge, Chhindwara. She died in 1930 while still a minor, leaving an infant son who died shortly afterwards. Her husband Govindrao, the father of the infant child, succeeded to the property. He was a major, but within a few months his estate was brought under the Court of Wards at Benares in the United Provinces. He is the plaintiff and brings the suit out of which this appeal arises with the consent of the Court of Wards. The claim is for the possession of a field, and mesne profits, which during the lifetime of Shantabai had been left out by Mr. Laxmiprasad, who was the manager appointed by the Court of the District Judge, Chhindwara, to manage the estate. The field concerned was the khudkasht of Shantabai, apparently held in severalty, and the plaintiff's contention was that, as Shantabai obviously was unable to cultivate herself and a manager had been placed in charge, the manager, acting as a manager would in all prudence, had let the field on batai in successive years to the defendant, beginning from 1926, and that since Shantabai's death the defendant in spite of requests has refused to vacate the field.

The defendant, on the other hand, contended that he was an occupancy tenant of the field inasmuch as he was cultivating not as a licensee on a partnership basis with the manager of Shantabai's estate, but that the field had been leased to him and consequently he had become an occupancy tenant and could not be removed. To this the plaintiff replied that owing to the restrictions placed on the powers of a guardian appointed by a District Court by S. 29, Guardians and Wards Act, any lease which had the effect of being a lease in perpetuity was prohibited. The trial Court found that S. 29, Guardians and Wards Act operated as a bar to the power of the guardian to create the lease in question and that the plaintiff was entitled to possession. On the question whether the defendant was entitled to be reimbursed before giving up possession on account of improvements made, the Judge considered that he was so entitled, but that the value of the improvements cancelled out with the mesne profits which the plaintiff was entitled to claim and that consequently the plaintiff was entitled to possession without restriction.

On appeal in the Court of the District Judge, Chhindwara, the learned District Judge agreed with the trial Court so far as the claim regarding money due by either side was concerned, but the Judge held that the plaintiff was not entitled to possession of the field as in his view the creation of a lease which amounted to an occupancy tenancy was a normal prudent act on the part of the manager and that S. 29, Guardians and Wards Act was not intended to have any application to such cases. The pertinent portion of the appellate judgment runs as follows :

> In my opinion however the view of the counsel for the appellant is correct. The certified guardian of a minor's property has in general the powers of a karta of a joint Hindu family, but they are curtailed in one direction by S. 29, Guardians and Wards Act, which forbids certain transfers unless with the permission of the Court. The object of S. 29 is evidently to prevent permanent alienation of the property or leases of the property for a long term which would have the effect of taking out of the estate *(sic)*. I do not think there is any intention to interfere with the ordinary management by way of accepting surrenders or creating tenants. It would be an intolerable restraint on efficient management for every creation of tenancy to be subject to control of the Court. If the manager abuses his power by creating tenants to the prejudice of the minor's estate, the minor would have another remedy against him, just as he has a remedy for any other kind of mismanagement. Accepting surrenders which means accrual to the homefarm and leasing out portions thereof so as to create occupancy tenants is an ordinary matter of management and I do not think the intention of S. 29 was to interfere with it. I therefore hold that the tenancy once created will be good as against the plaintiff.

Against this decision the plaintiff has appealed. There is no appeal on any other point. S. 29, Guardians and Wards Act runs as follows :

> **Where a person other than a Collector, or than a gurdian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court,—(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of his ward, or (b) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.**

**Now, although the defendant has stated in the witness-box that it was agreed that he would be a perpetual tenant, it is clear on a review of the whole case that there was no intention on the part of the manager to create him an occupancy tenant as such and this is admitted by the learned counsel for the defendant-respondent. The field had not always been leased out by the certified manager to the same tenant, although the present defendant was the tenant from 1925 onwards. In the year 1927-28 there had been an attempt to lease the field to another person, but this** appears to have fallen through and the defendant continued to be the tenant as he had been in the previous year. The terms of the tenancy were that the defendant was to pay half the produce and a fixed sum which varied apparently from year to year but which was entered in the jamabandis as Rs. 69. An attempt was made by the plaintiff to show that this condition, varying as it did from year to year, did not amount to a tenancy but was merely cultivation in agreement with the proprietor of the khudkasht field. This of course cannot be so and it is admitted that the terms of cultivation amounted to a lease, and this follows the decision in the Judicial Commissioner's Court in 28 N L R 198.[1] It was not a cultivating partnership but a lease. Now, the leasing out of any khudkasht property by the proprietor amounts to the creation of an occupancy tenancy therein. The circumstances in this case show that the creation was, if it had been by an authorised person, inevitable, although the intention may have been, and in this case seems to have been, to avoid the creation of a tenancy. There was thus no deliberate evasion of the provisions of S. 29, Guardians and Wards Act by the manager.

The question then arises whether the lease thus inadvertently created offends against Cl. (b) of the section. Although the lease was granted year by year, the very first year the lease was granted it became in fact one in perpetuity, and although this may have been contrary to the intention of the lessor, it did nevertheless amount to a lease of the property for a term exceeding five years which the certified guardian was forbidden to do without the previous permission of the Court. The learned counsel for the respondent, in claiming that he was not bound by the supposition that he had entered into a contract with a person who was not authorised to make the contract but was an occupancy tenant by virtue of the Tenancy Act, is, in my opinion, begging the question. **The tenancy, although it is an occupancy tenancy by virtue of the Tenancy Act, had its origin in a contract of lease for one year, and even if the contract had been for a lease in perpetuity, i. e. the creation of an occupancy tenancy in the ordinary course of village management by** the manager, the defendant would be in no better position.

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[1] **Sobhagsingh v. Khushal, (1932) 19 A I R Nag 138 = 140 I C 708 = 28 N L R 198.**

In A I R 1923 Nag 139,[2] Batten J. C. held that, although ordinarily, the thekedar of a village had power to create tenants, nevertheless, if there was a condition in the theka that the thekedar should not create tenants and did so, those tenants could not claim the benefit of statute, and that the actual landlord was not bound to accept persons whose tenancies were so created as tenants. Similarly, when a certified manager creates a tenancy, whether deliberately, or inadvertently, by giving a lease without the previous permission of the Court, the landlord is not bound by it.

I cannot agree with the learned District Judge that the ordinary prudent management of a village is exempted from the provisions of S. 29, Guardians and Wards Act. It might be desirable to mortgage or charge a village share or to exchange shares or villages constituting an estate; such action by a manager without the previous permission of the Court is forbidden, however prudent or desirable such mortgage, charge or exchange may be. No difficulties are placed in the way of the manager if he wishes to do any of these acts; all that is necessary for him to do is to obtain the permission of the Court; and I do not see that it is in any way an intolerable restraint on efficient management to provide that the creation of a permanent tenancy should not be made without the Court's permission. It is not a matter of any difficulty for a manager to approach the Court and obtain the necessary permission. The question whether the act opposed is a prudent one or not is immaterial. Under S. 29, Guardians and Wards Act the manager would be entitled certainly to accept surrenders from tenants, but he is not, as the learned District Judge appears to assume, as a corollary entitled to create occupancy tenants. The result is that the appeal succeeds, the decree of the District Court is set aside and that of the trial Court restored. The plaintiff will obtain his costs in the trial Court as directed in that Court and will obtain his costs in this Court and that of the District Judge.

D.S./R.K. *Appeal succeeds.*

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[2] Mulloo v. Seth Kundanlal, (1923) 10 A I R Nag 139 = 71 I C 863.

## ✲ A. I. R. 1938 Nagpur 316

GRUER J.

*Namdeo Atmaram Teli*
*Accused* — Applicant.
v.
*Emperor.*

Criminal Revn. No. 413 of 1937, Decided on 23rd November 1937, from order of Sess. Judge, Nagpur, D/- 27th September 1937.

**(a) Criminal P. C. (1898), S. 517—House in possession of complainant broken into and house-hold articles belonging to complainant removed—Court relying on sworn evidence of complainant and ordering all property seized from accused to be restored to complainant—Order held logical.**

An accused broke into the house in the possession of the complainant and removed house-hold articles of the complainant. The Court relying on the complainant's sworn statement thought that all the property seized belonged to the complainant and hence ordered it to be delivered to the complainant. It added that even if by inadvertence some of the accused's articles had been included he would be able to get them back on proving his title to them:

*Held* that the Court's order delivering all the seized property to the complainant was logical as the house was in her possession before it was broken into and the prima facie inference was that the contents also belonged to her. [P 317 C 1, 2]

**✲ (b) Criminal P. C. (1898), S. 522—One month's time limit does not apply to Court of Appeal.**

One month is the time limit fixed for the trial Court in sub-section (1), but there is nothing in sub-s. (3) to show that this limitation applies to a Court of Appeal. If it did, the result would be that sub-s. (3) would be of little or no practical use, as a case will not usually reach the Appellate Court before the expiry of the month. The Court of Appeal therefore can pass such order at any time, however long, after conviction: *A I R 1925 Pat 689 and A I R 1933 Pat 617, Rel. on.* [P 317 C 2]

R. W. Fuley and R. G. Rao — *for Applicant.*

J. M. Thakkar and S. G. Gadgil — *for Complainant.*

**Order.** — The applicant was sentenced under S. 455, I. P. C., for breaking into the house of his paternal aunt, Mt. Sita Bai and removing household articles of the complainant. In appeal the section was changed to 453, and the sentence of four months' rigorous imprisonment and fine of Rs. 100 was maintained. It is first of all pointed out on behalf of the applicant that certain witnesses, Dayaram (P. W. 4), Bholanath (P. W. 5) and Surajbali (P. W. 7), have not been relied on by the Appellate Court, and it is therefore urged that the evidence of Rukhmabai, who was alone at the house at the time, should be discarded. All that need be said is that the Appellate Judge was perfectly entitled to rely on the evidence of this witness, and this Court should not interfere with his appreciation of her statement. It is said that she could not have seen the door of the house being opened as she was inside. That argument arises from a misapprehension. She was lying in the verandah and clearly it was the lock of the house itself that was broken and not the lock of the compound. The next argument is that the examination of the accused did not amount to one under S. 342, Criminal P. C., and that this is a mistake which could not be rectified. S. 342 says that the Court shall question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. From the order-sheet it appears that the accused was examined on 23rd September 1936 and again on 29th May 1937. The recording of the prosecution evidence was completed by 11th September 1936 and therefore this examination was at the proper stage—before charge was framed. The supplementary examination was also in order, as questions can be put to the accused at any time. I can see no force in the above argument.

It is said that the question about the mortgage deed (Ex. P.8) was insufficient. Accused was asked, "Did you execute the mortgage deed, Ex. P-8?" and he replied, "Yes, I did execute." It is said that he should have been asked to explain how he came to execute it. That might certainly have been done, but I have no reason for thinking that the significance of the deed was not present to the mind of the accused and his counsel. He could have put forward any explanation he wanted, and even now he has not been prejudiced. These are all the grounds pressed in argument. The lower Courts have rightly concluded from the facts that the conduct of the applicant was ruthless and devoid of all good faith. The sentence imposed was well deserved. It is also contended in this application that the order of the Appellate Court to return all the seized property to the complainant is illegal. The first Court ordered the delivery to her of only the safe and the articles in it, it being doubtful as to whether the other articles seized were proved to belong to the complainant. The Appellate Court takes up the position that there is evidence on record that all the property belongs to the widow; that even if by inadvertence some of the applicant's articles have been included he will be able to get them back on proving his title to them; and that he has only himself to thank for the result. That, I think, is a perfectly logical order. It was open to the Judge to accept Sitabai's sworn statement, and as the house was in her possession before it was broken into, the prima facie inference is that the contents also belonged to her.

It is said that the order is illegal as, it being held that there was no attempt at theft, the property is not the subject-matter of any offence. That, however, is only one alternate condition under the section. The property was produced before the Court and was in its custody, and therefore S. 517, Criminal P. C. applied. The Court of Appeal had power to alter the order and make further orders under S. 520, Criminal P. C. Complainant has now applied in this Court under S. 522, Criminal P. C., for an order that the house be delivered into her possession. The only objection argued by the applicant s learned counsel against this is that this Court cannot pass such an order as more than one month has elapsed since the date of conviction. One month is the time limit fixed for the trial Court in sub-s. (1), but there is nothing in sub-s. (3) to show that this limitation applies to a Court of Appeal. If it did, the result would be that sub-s. (3) would be of little or no practical use, as a case will not usually reach the Appellate Court before the expiry of the month. It was held in 4 Pat 438[1] that the Court of Appeal can pass such order at any time, however long, after conviction: *see also* 12 Pat 787.[2] I agree that it is desirable that the widow should not be driven into civil litigation in order to recover possession. It is therefore ordered that she be restored to possession of the house described in para. 3 of the application dated 16th November 1937. The application for revision is rejected.

D.S./R.K. *Application rejected.*

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[1] **Rameshwar Singh v. Emperor, (1925) 12 A I R Pat 689=91 I C 809=27 Cr L J 137=4 Pat 438=7 P L T 285.**

[2] **Fida Husain v. Sarfaraz Hussain, (1933) 20 A I R Pat 617=1933 Cr C 1366=34 Cr L J 940=12 Pat 787=14 P L T 696.**

## A. I. R. 1938 Nagpur 318

GRILLE AND DIGBY JJ.

*Minai w/o Hudkia* — Appellant.

v.

*Emperor.*

Criminal Appeal No. 212 of 1937, Decided on 13th October 1937, from order of Sessions Judge, Chhindwara, D/- 3rd September 1937.

**Penal Code (1860), S. 302 — Accused with intention of getting rid of her husband administering fatal dose of dhatura in his food—She is guilty of murder in absence of explanation creating doubt in mind of Court.**

Once it is established that a woman with a motive to get rid of her husband has administered in his food a fatal dose of dhatura, the conclusion to be drawn is that she has committed murder unless her explanation is such as to create some doubt in the mind of the Court. The intention to cause bodily injury is clear and knowledge of the results of the poison can safely be imputed : *A I R 1923 All 608 ; 31 All 148 and A I R 1926 Bom 518, Rel. on ; 31 All 290 ; 39 Cal 855 and A I R 1924 Pat 635, Disting.* [P 318 C 2 ; P 319 C 1]

If one deliberately administers a common poison, the effects of which are well known, it is no defence to say that one failed to grade the exact dose correctly so as to cause some injury short of death. The question whether a person knows, what he is administering and knows what its effects will be, is of course a question of fact in the particular case. [P 319 C 2]

K. K. Thakur — *for Appellant.*

J. Sen, Government Pleader — *for the Crown.*

**Judgment.** — The appellant Mt. Minai administered dhatura poison in her husband's food causing his death. She has been convicted of murder by the learned Sessions Judge, Chhindwara, and sentenced to death. The question for determination in this appeal is whether Mt. Minai who administered the fatal dose knew what she was doing, or whether her explanation raises a doubt as to her guilt. Her case is that she was given a powder by her paramour, that she did not know that it was dhatura, and that she administered it in order to make her husband oblivious to her relations with Gunga. The first ground of appeal in which it is contended that she did not administer dhatura is not argued, and indeed, could not be argued successfully in the face of the following facts. Minai lived with her husband Hudkia and her father Chamaria. Chamaria went away to Dongaria and returned on Sunday the 6th of June, to find his son-in-law desparately ill, unconscious, with open eyes and twitching hands. Minai the appellant, told her father that Hudkia had had fever for four days. This was a false account of illness, for Maharaji (P. W. 8) tells us that on the Saturday (the day before) Hudkia was in good health and had been doing work, which required physical strength. Moreover, it was not till Chamaria had returned next day that Maharaji came to know of Hudkia's illness, when Chamaria asked him to come and look at Hudkia who was lying on the ground in a serious condition. This witness lives next door to Hudkia. Again Jaikisan (P. W. 5), the employer of Hudkia, tells us that on the Saturday Hudkia was at work and was not ill in any way. Pitam, who is Jaikisan's brother, also tells us that on Saturday Hudkia was all right and that in the afternoon of Sunday he learnt of Hudkia's sudden death. An examination of Hudkia's viscera disclosed the presence of dhatura.

The symptoms noted by Chamaria correspond with dhatura poisoning and there is no doubt that Hudkia died of dhatura poisoning. Between Saturday, when he was well, and Sunday, when he died, there had been nobody but his wife at home to prepare his food. There are dhatura plants in the bari adjoining his house. Minai is admittedly on terms of criminal intimacy with one Gunga, and there is direct evidence on this point. Hagria tells us that Gunga used to visit her house though his evidence does not carry the matter very far ; Raya (P. W. 9) actually saw Minai in Gunga's arms and in the act of adultery, and although the accused Minai and Gunga were not outcasted because Raya kept quiet, it is clear that this relationship (admitted by the appellant) did exist and would constitute a motive for poisoning her husband. Once it is established that a woman with a motive to get rid of her husband has administered in his food a fatal dose of dhatura, the conclusion to be drawn is that she has committed murder unless her explanation is such as to create some doubt in the mind of the Court. We have very carefully considered and weighed the explanation adduced; and without relying on the fact that Minai pointed out to the police three plants of dhatura in her bari, which is hardly distinguishable from a confession by means of gesture, or on the evidence of Raya (P. W. 9) that she stated some while before that it would be a good thing if her husband were dead, we remain wholly unconvinced by her explanation and consider it to be false. We do not believe that she was unaware of what she was administering. Her conduct in lying to her father, her failure to disclose the illness of Hudkia to neighbours, and the fact that poison was administered when her father was away are circumstances which tell strongly against her. We reject her explanation that she was unaware that she was administering dhatura. With regard to the use of dhatura reliance is placed by the learned advocate for the appellant on the dictum at p. 643 of Lyon's Medical Jurisprudence for India, Edn. 9. There it is said:

> In the East dhatura is not used with homicidal or suicidal intent; it is almost invariably employed with the object of producing stupefaction to facilitate theft.

With the utmost respect to the learned author, we consider that such a general proposition is by no means in accordance with judicial experience in the Central Provinces, and certainly cases are not wanting in which the administration of dhatura has caused death, and the person who has administered it has been convicted of murder. Our experience is that dhatura is a common poison frequently used to cause death, and we also consider that the effects of dhatura, plants of which are often to be found in villages, are well known to the villagers. It may be conceded that dhatura is sometimes administered in fairly large doses with the intention of stupefying the victim, but we have no doubt that if a person consciously administers dhatura and administers a fatal dose that person is guilty of murder, for the intention to cause bodily injury is clear, and knowledge of the results of the poison can safely be imputed. We would refer to the decision in 45 All 557[1] where it is laid down that a person who recklessly administers dhatura to another is guilty, if death ensues, of the offence of murder. We also cite 31 All 148[2] where a person administered dhatura in order to rob the victim and as the dose proved fatal was convicted of murder. We also refer to 28 Bom L R 1003.[3] This was a case where dhatura was administered for the purpose of facilitating robbery and three of the victims died. The acquittal of the accused was set aside by the High Court. The head notes run as follows :

> **Per Fawcett J.: Having regard to the extent to which dhatura poisoning does take place in India,** both in the case of men and cattle, there is very adequate ground for attributing, at any rate, to ordinary Indian villagers a knowledge of the dangerous results that may occur from administering dhatura.
>
> Per Madgavkar J.: In the case of adult persons deliberately administering dhatura or some such poison or deleterious substance and in quantities such as to kill three persons within a few hours on the spot, the burden is heavily on the accused to show why the ordinary presumption from an act so imminently dangerous and so probably fatal should not be drawn.

The appellant relies on 31 All 290.[4] That was a case in which it was held on facts that the accused did not know what she was administering and a case where the Judge believed the evidence which supported the case of the accused. The case reported in 39 Cal 855[5] and followed by the Patna High Court in A I R 1924 Pat 635[6] is relied on by the appellant. So far as any question of law relevant to the present case is concerned these cases only establish that where a guilty intention is not proved the accused must have the benefit of the doubt, but it must be conceded to the appellant that the explanations of the appellant were somewhat readily accepted as possible in both those cases. In the Calcutta case however, the evidence rested almost entirely on the accused's own statement, which it was held must be accepted as a whole and there was also direct evidence to show that the drug which she administered was obtained through the agency of her paramour. In the present case there is no evidence of this nature to corroborate Minai's statement. In the Patna case it also seems clear that the poison had been obtained from a third person and the explanation was accepted that the appellant administered the poison because she thought it would cause her husband to leave her.

Thus the law is clear. If one deliberately administers a common poison the effects of which are well known, it is no defence to say that one failed to grade the exact dose correctly so as to cause some injury short of death. The question whether a person knows what he is administering and knows what its effects will be is of course a question of fact in the particular case. Where it is proved that one person has

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**1. Emperor v. Nanhu, (1923) 10 A I R All 608 = 75 I C 361=24 Cr L J 937=45 All 557.**

**2. Emperor v. Gulali, (1909) 31 All 148 = 1 I C 765 = 9 Cr L J 383 = 6 A L J 129.**

**3. Emperor v. Shetya Timma Wadar, (1926) 10 A I R Bom 518 = 97 I C 654 = 27 Cr L J 1134 = 28 Bom L R 1003.**

**4. Emperor v. Jamna, (1909) 31 All 290=2 I C 214=9 Cr L J 522=6 A L J 203.**

**5. Pika Bewa v. Emperor, (1912) 39 Cal 855=14 I C 195=15 C L J 512=16 C W N 1055=13 Cr L J 195.**

**6. Phulmani Mundain v. Emperor, (1924) 11 A I R Pat 635=77 I C 801=25 Cr L J 449.**

administered poison to another causing his death by mixing it with his food the question is whether his explanation raises a reasonable doubt as to his guilt. In the present case we are satisfied that dhatura was administered in a fatal dose to Minai's husband and in view of the circumstances we reject entirely her story that she did not know what she was administering. We have no doubt that she is guilty of the murder of her husband and that the reason for this murder was that she wished to be free to continue her relations with her paramour. In these circumstances we consider that the learned Sessions Judge has rightly imposed the death sentence which we accordingly confirm. The appeal is dismissed and the reference accepted.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 320

POLLOCK J.

*Deosthan Narsingji Maharaj and Dharmashala* — Appellant.

v.

*V. D. Bhake and another* — Respondents.

Misc. Appeal No. 311 of 1936, Decided on 3rd January 1938, from order of First Addl. District Judge, Wardha, D/- 28th October 1936.

**Provincial Insolvency Act (1920), Ss. 68, 4 — Receiver holding sale of property under instructions of Court — Sale is not act of receiver and S. 68 does not apply — Application to set aside sale is within time although presented 21 days after sale.**

Section 68 is intended to apply to provide an appeal to the Court against an act of the receiver and not an appeal to the Court against acts of the Court done through receiver. [P 321 C 1]

Where a receiver considers that certain property of which the insolvent is the trustee should be sold, and merely invites bids under the instructions of the Court, and refers the bids received to the Court which accepts the highest bid, the sale, if a sale be held to have taken place, is not the act of the receiver and S. 68 does not apply to such a case. An application to set aside such sale does not therefore fall under S. 68. It falls under S. 4 and is not barred by time although filed after 21 days after the date of the sale: *A I R 1932 All 408, Rel. on.* [P 320 C 2; P 321 C 1]

M. Adhikari — *for Appellant.*

Abdul Razak — *for Respondents.*

**Order.** — On a petition by one of his creditors Gowardhan was adjudged insolvent on 16th March 1932. Mr. Bhake was appointed ad interim receiver on 8th January 1932, and on 24th March 1932 he was appointed receiver on the same conditions as before. One of those conditions was:

> The receiver shall not dispose of any property or money coming into his hands without the express permission of the Court . . . No sale of immovable property would be knocked down by the receiver but he shall ascertain the highest bid on the spot and reserve final acceptance of the confirmation by this Court.

Certain property was sold by the receiver, but his report of 30th January 1932 shows that he regarded some of the property in possession of the insolvent as belonging to a deosthan, of which the insolvent was a trustee, and not to the insolvent himself. On 24th April 1933 the Insolvency Court ordered the receiver to sell this property. On 23rd May 1933, the receiver held an auction, and on 21st June 1933 the Insolvency Court accepted the highest bid or, as it put it, confirmed the sale. Subsequently the receiver recommended that this sale should be set aside because the land sold was malik makbuza land which ought to have been sold by the Collector. It has apparently not yet been decided whether this sale should be set aside, but the purchase money has been refunded. On 4th January 1934 the deosthan, which claims to be the owner of the property sold, applied to have the sale set aside. That application has been dismissed in both the lower Courts on the ground that it fell within S. 68, Provincial Insolvency Act and ought to have been filed within 21 days of the sale by the receiver. Now it may be that a receiver has a statutory authority under S. 59 of the Act to sell all or any part of the property of the insolvent, which in fact vests in the receiver; and that the Court has no power to limit the receiver's authority to do such acts. On that point I express no opinion. It is, however, clear from the facts stated above that the receiver considered that the property should not be sold, and that he merely invited bids under the instructions of the Court and referred these bids to the Court which accepted the highest bid. In such circumstances it seems to me that the sale, if a sale has been held, was not the action of the receiver and that S. 68 of the Act would not apply. The facts in A I R 1932 All 408[1] were very similar and there the Court remarked:

> The actual attachment was a mere ministerial act done in pursuance of the order of the Court

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[1] Nathu Ram v. Madan Gopal, (1932) 19 A I R All 408=136 I C 791=1932 A L J 391.

The objector was not challenging the act of the receiver, who had no voice in the matter, but the order of attachment passed by the Court ex parte. It seems to us that it was not an act or decision of the receiver within the meaning of S. 68. On the other hand, it was a claim put forward by a stranger to the insolvency proceedings setting up his own independent title and it fell within the scope of S. 4, Provincial Insolvency Act.

Section 68 is intended, in my opinion, to provide an appeal to the Court against the acts of the receiver and not an appeal to the Court against the acts of the Court done through the receiver. I therefore hold that S. 68 does not apply and that the application falls under S. 4. It follows therefore that the application is not barred by limitation. The appeal is accordingly allowed and the case is remanded to the trial Court for a decision on the merits. The costs will abide the event. Counsel's fee Rs. 25.

R.M./R.K. *Case remanded.*

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## * A. I. R. 1938 Nagpur 321

POLLOCK J.

*Mt. Rahibai w/o Pandit Mannulal Shukla* — Appellant.

v.

*Ratanlal Hiralal Marathi* — Respondent.

Misc. Appeals Nos. 286 and 287 and Civil Revn. No. 833 of 1936, Decided on 25th October 1937, from order of Addl. Dist. Judge, Raipur, D/- 5th September 1936.

*** (a) Married Women's Property Act (1874), S. 6—No mention in policy itself that it is for benefit of wife and children—Statement in proposal form that object of policy was for "family provision" — Such statement is not sufficient to bring policy within S. 6.**

Where there is no mention in the policy itself that it was for the benefit of the wife and children but there is a statement in the proposal form that the object of the policy was for "family provision," such statement is not sufficient to bring the policy within the ambit of S. 6. Most married men taking out insurance policies on their lives payable only at death do so with the intention of making provision for their family, but it does not follow that they intend to divest themselves of all interest in the policy and to create an irrevocable trust in favour of the wife or children : *A I R 1936 Mad 635, Rel. on.* [P 322 C 1]

**(b) Civil P. C. (1908), O. 38, R. 6—Applicability.**

Order 38, R. 6 might apply to an objection by the defendant but not to an objection by a third person. [P 322 C 2]

A. R. Kulkarni — ***for Appellant.***

V. V. Kelkar and M. R. Bobde — ***for Respondent.***

**Judgment.**—This order will dispose also of Miscellaneous Appeal No. 287 of 1936 and Civil Revision No. 833 of 1936. Two creditors brought suits against the sons of Mannulal Shukla as the legal representatives of their father for the recovery of debts incurred by their father during his lifetime. In each suit the plaintiff attached before judgment money due under an insurance policy taken out by Shukla. His sons and widow objected to this attachment. In one suit, which was a regular suit, the objections were allowed, but on appeal the Additional District Judge held that the money was attachable. In the other case, which was a small cause court case, the objections were disallowed. The sons and the widow therefore preferred the above appeals and application for revision. The point to be decided is whether the insurance money forms part of the assets of the deceased Shukla or whether the policy was taken out for the benefit of the wife and children, so that Sec. 6, Married Women's Property Act, applies and a trust arose in favour of Shukla's wife and children so that the money would not form part of his estate. S. 6 runs as follows :

> A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall inure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

In the policy itself there is no statement of any sort that it was intended for the benefit of his wife or children, but it is stated in the policy that the proposal and declaration of insurance shall be the basis of the assurance, and in the proposal form where there is a question "what is the object of the proposed assurance?", Shukla wrote "family provision". There is a note under that question :

> If for family provision, it is desirable to assign the policy after issue to a member of the family to facilitate immediate settlement of the claim.

There was no such assignment and the policy was expressed to be payable to his assigns or his proving executors or administrators or other legal representatives. In A I R 1937 Mad 571[1] it was stated that if a declaration is part of the contract of insurance, it will be part of the policy and

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[1] **Bengal Insurance and Real Property Co. Ltd. v. Velayammal, (1937) 24 A I R Mad 571= 170 I C 279=I L R (1937) Mad 990.**

a statement in the declaration is sufficient to comply with the provisions of Sec. 6. I must confess to some doubt whether a statement in the proposal form can be said to be a statement expressed on the face of the policy, and the Judicial Commissioner's Court of Sind dissented from the view of the Madras High Court in A I R 1937 Sind 181.[2] Even however assuming that the statement in the proposal form can be said to be a statement expressed on the face of the policy, I do not think that this statement is sufficient to bring the policy within the ambit of S. 6. Most married men taking out insurance policies on their lives payable only at death, as this was, do so with the intention of making provision for their family, but it does not follow that they intend to divest themselves of all interest in the policy and to create an irrevocable trust in favour of the wife or children. The words used, " family provision", are very vague, and there is no indication that Shukla intended that his wife and children should get the whole interest in the policy. In A I R 1936 Mad 635[3] the facts were very similar; there was no mention in the policy itself that the policy was for the benefit of the wife and children but there was a statement in the proposal form that the object of the policy was "for the maintenance of the family". Venkatasubba Rao J. held that a statement of this sort did not bring the policy within S. 6, and with that view I respectfully agree. I therefore hold that no trust had been created and the money therefore forms part of the estate of the deceased.

Objections to the attachment before judgment were made (1) by the sons and (2) by the wife. The wife was not a party to the suit, and the sons were objecting not as legal representatives of Shukla, in which capacity they were being sued, but as claimants to the insurance money on their own account. Under O. 38, R. 8, it would therefore follow that the objections to the attachment should be investigated in the manner provided in R. 58 and the following Rules in O. 21. No appeal therefore lay against the order of the trial Court allowing the objections and the Additional District Judge therefore had no jurisdiction to reverse the trial Court's decision. It has been conceded in this Court that S. 47 Civil P. C., does not apply, but it has been urged that an appeal would lie under O. 38, R. 6. That Rule might apply to an objection by the defendant but not to an objection by a third person. No second appeal however would lie against the decision of the Additional District Judge. I have been asked to treat these two appeals, if necessary, as applications for revision. They are inadequately stamped as applications for revision and, as the decision of the Additional District Judge was correct, I do not propose to interfere in revision. The decision of the Small Cause Court that the money formed part of the estate of the deceased Shukla was correct. The appeals and the application for revision are therefore dismissed with costs. Counsel's fee in the three cases Rs. 50.

D.S./R.K. *Appeals and application dismissed.*

# A. I. R. 1938 Nagpur 322

POLLOCK J.

*Sonba Keshao Sonar — Defendant —* Appellant.

v.

*Sardar Bahadur Jouquim Nasciments Rodrigues and others — Plaintiffs —* Respondents.

Second Appeal No. 216B of 1935, Decided on 22nd November 1937, from appellate decree of District Judge, Amraoti, D/- 17th June 1935.

**(a) Civil P. C. (1908), S. 2 (2) — Decree — — Order dismissing appeal as time-barred is decree.**

An order dismissing an appeal on the ground that it was barred by limitation is a decree and so appealable : *7 All 42; 9 Bom 452; 12 Cal 30 and 27 Mad 21, Foll. ; 4 N L R 168 and A I R 1932 Cal 482, Disting.* [P 323 C 1]

**(b) Civil P. C. (1908), S. 149 — Substantial court-fee paid in time — Discretion to grant extension is matter for the Court — No question whether there was sufficient cause for failure.**

Where the appellant has paid a substantial court-fee and is unable at the time to pay the balance, the Court has discretion to allow him further time. It is not a question whether there was sufficient cause for the failure to pay the entire court-fee within the proper time but whether the Court acted unreasonably in allowing an extension of time. In such circumstances the Court has discretion to grant an extension of time, and whether that discretion should be exercised or not is a matter for the Court. [P 323 C 2]

T. L. Sheode, W. W. Bhole and R. G. Rau — *for Appellant.*

J. R. Mudholkar — *for Respondent 1.*

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[2] Shamdas v. Mt. Savitribai, (1937) 24 A I R Sind 181=170 I C 225=31 S L R 98.

[3] Krishna Murthy v. Anjayya, (1936) 23 A I R Mad 635=164 I C 465=71 M L J 39.

**Judgment.** — The defendant against whom a decree had been passed in the trial Court appealed to the Court of the District Judge. The appeal required a stamp of Rs. 120, but the defendant stamped his appeal with a stamp of Rs. 60 only and asked for further time for payment of the balance of Rs. 60 pleading that owing to poverty he had been unable to realize the entire amount required. The appeal was presented on the last day of limitation, 9th January 1934, and time was granted for payment of the balance of the stamp until 2nd February and again until 10th February. On the last date the balance of Rs. 60 was paid. The appeal eventually came up for hearing before another District Judge who held that the plaintiff-respondent was not bound by the order made behind his back, granting time to the defendant-appellant for payment of the balance of the stamp and that there was no sufficient reason for allowing the defendant-appellant an extension of time. He accordingly dismissed the appeal as barred by limitation. Against that decision the defendant has preferred this second appeal.

A preliminary objection has been taken that no such appeal lies on the ground that the order dismissing the appeal was not a decree within the definition of S. 2, Civil P. C. I have been referred to the decisions in 4 N L R 168[1] and 59 Cal 388.[2] In the first case the full court-fee was never paid, and the memorandum of appeal was rejected; and in the second case the memorandum of appeal was rejected and a new memorandum was presented. In the present case the memorandum of appeal was not rejected, but the appeal was dismissed on the ground that it was barred by limitation. That order appears to me to be clearly a decree within the definition of S. 2, Civil P. C., just as much as if the appeal had been dismissed on a finding that it was barred by limitation for any other reason. In support of this view I may cite the decisions in 7 All 42,[3] 9 Bom 452,[4] 12 Cal 30[5] and 27 Mad 21.[6]

The cases on which the learned District Judge has relied are mainly cases under S. 5, Lim. Act. Under S. 5, Lim. Act, an appellant who has presented his appeal after the period of limitation has expired has to show that he was prevented by sufficient cause from presenting it within the period allowed, and there are decisions that inability to raise the necessary money required for the appeal is not a sufficient cause. Under S. 149, Civil P. C., however, a Court has discretion to allow the whole or part of the fee payable to be paid at a later date, and upon such payment the defective document is retrospectively validated. In 61 Cal 663,[7] where the court-fee payable was Rs. 975 and the appeal was filed with a court-fee of Rs. 2 only, the Court observed that it could hardly be said that discretion should be exercised in a case where the ground urged is that of mere inability to pay the requisite court-fees on the day the memorandum of appeal was presented, but the Court did eventually exercise its discretion in the appellant's favour and allowed him a fortnight for payment of the deficit amount. That was apparently an ex parte order, and there is no indication that it was made subject to objection by the respondent.

Assuming that the respondent has a right to object to an order under S. 149, Civil P. C., made behind his back, it becomes necessary to examine the question whether the learned District Judge was justified in granting an extension of time. He did not state his reasons for allowing time, but it may be clearly inferred that he granted an extension of time for the reasons given in the application, i. e. inability of the appellant to pay the entire court-fee required. The appellant certainly had no right to claim that the Court's discretion should be exercised in his favour; but, where the appellant has paid a substantial court-fee and is unable at the time to pay the balance, I do not think that it can be said that the Court has no discretion to allow him further time. It is not a question whether there was sufficient cause for the failure to pay the entire court-fee within the proper time but whether the Court acted unreasonably in allowing an extension of time. In such circumstances the Court has discretion to grant an extension of time, and whether that discretion should be exercised or not is a matter for the Court. It therefore follows that the memorandum of appeal was retrospectively validated and was presented within time. The appeal is therefore allowed, and the case is remanded to the lower Appellate Court for a decision on the merits. The appellant will be allowed his costs in this Court and counsel's fee of Rs. 20.

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[1] Ghasiram v. Jhingwa, (1908) 4 N L R 168.

[2] Gnanadasundari Shaha v. Madhabchandra Mala, (1932) 19 A I R Cal 482=138 I C 643 =59 Cal 388.

[3] Gulab Rai v. Mangli Lal, (1884) 7 All 42= 1884 A W N 223.

[4] Raghunath Gopal v. Nilu Nathaji, (1885) 9 Bom 452.

[5] Gunga Das Dey v. Ramjoy Dey, (1886) 12 Cal 30.

[6] Saminatha Ayyar v. Venkatasubba Ayyar, (1904) 27 Mad 21=13 M L J 300.

[7] Khatumannessa Bibi v. Durjyodhan Ray Chaudhuri, (1934) 21 A I R Cal 659=153 I C 201=61 Cal 663=38 C W N 650.

V.B.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Nagpur 324

VIVIAN BOSE J.

*Firm Haji Isa Haji Noor and others*—*Plaintiffs*—Applicants.

v.

*Saru Bai w/o Ragho Appa and another* — *Defendants* — Non-applicants.

Civil Revn. No. 811 of 1936, Decided on 21st October 1937, from order of Small Cause Court, Arvi, D/- 22nd September 1936.

**(a) Mahomedan Law—Applicability of alien law to Mahomedans can only be by reason of custom.**

Mahomedans can only be governed by an alien law by reason of custom, and the question in each case is whether the custom has been established. [P 324 C 2]

**(b) Partnership— Agreement of partnership need not be express—It may be evidenced by course of conduct or admission of parties.**

An agreement of partnership need not be express. It can arise out of a mutual understanding evidenced by a consistent course of conduct, and indeed, by the express admission of the parties concerned. [P 325 C 1]

**(c) Partnership — Association of men for business—Legitimate inference is they intend to make profit and share in it—Person actually conducting business acts on behalf of all.**

When more than one business, man associate together for the purpose of carrying on a business, it is legitimate to infer that they are not doing it for philanthropic purposes but intend to make a profit out of it; also that they all intend to share in the benefit of the proceeds. The person who actually conducts the business acts on behalf of all his associates, that is to say, on behalf of all who are joint proprietors with him. He does not act for his own separate and exclusive benefit. His intention is obviously to further the business as a whole for the benefit of all who own the concern. [P 325 C 1, 2]

D. T. Mangalmoorti and N. T. Mangalmoorti — *for Applicants.*

Dr. W. S. Barlinge—*for Non-applicants.*

**Order.**—The only question in this revision is whether S. 69, Partnership Act applies. Plaintiff 2 is the father of the first and of one Haji Isa who is now dead. The plaint recites that these three formed a joint family and that though Mahomedans, the Hindu law relating to joint families applies to them. The plaint also recites that the family owned a grocery shop called Haji Isa Haji Nur Mohammad and that plaintiffs 1 and 2 are now its sole proprietors. The plaintiffs' case is that the defendants owed them money for goods purchased and so they are suing for their dues. The lower Court holds that the plaintiffs formed a partnership concern and being unregistered are debarred from suing because of S. 69, Partnership Act, and what I have to decide now is whether that is correct. In the first place it can be accepted that the Hindu law of joint families does not apply in its entirety. Whatever may be the historical back ground in these cases, the fact remains that Mahomedans can only be governed by an alien law by reason of custom, and what we have to see in each case is whether the custom has been established.

According to the Bombay view the rules of survivorship and those which give the sons a right by birth in the joint family property do not apply though some of the incidents of the Hindu law do: 47 Bom 369.[1] The Madras High Court has taken a different view in 70 I C 715.[2] Which of these is right in the abstract need not detain us here because the plaintiffs' own evidence, namely of P. Ws. 4 and 5, disclosed that the incidents mentioned in 47 Bom 369[1] apply to these families. That is to say that the sons have no interest so long as the father is alive and that they cannot claim a partition against his wishes. In view of the Bombay decision which upholds a custom of this kind, no further evidence was required and since it comes from the plaintiffs' own witnesses I see no reason why their testimony should not be accepted. Therefore I accept the position that the sons obtained no interest by birth or by virtue of the status as sons in their father's business. How then did they get it?

As I have said the plaint clearly recites that both the plaintiffs own the business and this is reiterated in their pleadings dated 5th August 1936 where the plaintiffs admit that they form a partnership though

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1. Haji Oosman v. Haroon Saleh Mahomed, (1923) 10 A I R Bom 148=68 I C 862=47 Bom 369=24 Bom L R 978.
2. Siddick Haji Aboo Bucker v. Ebrahim Haji Aboo Bucker, (1921) 8 A I R Mad 571=70 I C 715.

they qualify this by stating that it arose by status and not by agreement. I have no intention of tying them down to technical terms which they perhaps used inadvertently, but whether they own the shop and have rights in it as proprietors is not a mere technicality but a matter of substance. It is impossible to believe that grown up business men belonging to an essentially business community do not know whether they actually own the business or are there in a purely ministerial capacity or on sufferance. I am quite willing to believe that they may be using the word 'partnership' in a loose sense but I cannot believe that they do not understand the significance of the following statement : "I am the owner of the shop. Formerly there were three owners, myself, Haji Isa and Haji Nurmohammad." P. W. 1 also admits that the plaintiffs have a third brother who is still alive and who is "in Desh." He does not regard him as one of the owners of the shop. How then did these two sons alone come to be part owners with their father in a business started by him 31 or 32 years ago? The answer is obvious : by agreement. In the absence of status there is no other way. Such an agreement need not be express. It can arise out of a mutual understanding evidenced by a consistent course of conduct and indeed, as here, by the express admission of the parties concerned. In any case it is clear that the relationship between the father and his two sons did not arise out of status.

It was argued that if the Hindu law of joint families does not apply in its entirety, then the plaintiffs were mistaken in thinking that the sons were part owners with their father and therefore they are not owners at all. I can hardly accept this in view of the plaintiffs' own evidence which shows distinctly that in these families the sons have no right during the lifetime of their father though the father admits that they are co-owners with him. As I have said, their rights accordingly arise by mutual agreement. When three business men associate together for the purpose of carrying on a business, it is legitimate to infer that they are not doing it for philanthropic purposes but intend to make a profit out of it ; also that they all intend to share in the benefit of the proceeds. In any case that is the normal and usual course of human conduct. Another thing is also usual. The persons or person who actually conducts the business acts on behalf of all his associates, that is to say, on behalf of all who are joint proprietors with him. He does not act for his own separate and exclusive benefit. His intention is obviously to further the business as a whole for the benefit of all who own the concern. That, as I say, is the normal and usual course of business and it is all that is necessary to constitute a partnership within the meaning of Ss. 4, 5 and 6, Partnership Act.

Whether all these ingredients were present in this particular case or not is a matter which is peculiarly within the knowledge of the plaintiffs and so from the presumption which it is legitimate to draw from these circumstances the burden falls on the plaintiffs under S. 106, Evidence Act. In this case they pleaded that their associations arose from status and not from agreement, but they have not adduced a single word in support of this in their evidence. On the contrary not only do their witnesses prove that sons have neither interest nor status in their father's property during his lifetime but we find the father deliberately selecting two of his sons to be joint owners of this concern with him and ignoring the third. In the circumstances the lower Court cannot be regarded as having acted otherwise than in accordance with the law in holding that the suit is barred under S. 69, Partnership Act. The application is dismissed with costs. No certificate has been filed so there will be no counsel's fee.

V.B.B./R.K. *Application dismissed.*

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## A. I. R. 1938 Nagpur 325

GRUER J.

*Jamna Prasad Ramcharan Pathak*
Applicant.
v.
*Emperor.*

Criminal Revn. No. 470 of 1937, Decided on 24th November 1937, from order of Extra Addl. Sess. Judge, Jubbulpore, D/- 23rd September 1937.

**Criminal P. C. (1898), S. 539-B—Inspection note—Failure to make is not fatal.**

The omission to make an inspection note is not a fatal defect : *A I R 1924 Cal 1035, Dissent.* [P 326 C 1]

Dr. Sir Hari Singh Gour —
*for Applicant.*

**Order.** — This trial is said to be vitiated by three illegalities : (1) that the petitioner was charged under a non-existent S. 506 (b), I. P. C. ; (2) that no memo of inspection was made by the Magistrate as required by S. 539-B, Criminal P. C.; (3) that inadmissible evidence was received in the form of a confession to a police officer. S. "506 (b)" seems to be merely a clerical error copied from the complaint without verification. In any case the accused was acquitted of this charge, and the mistake does not affect the rest of the trial. On the second ground, reliance is placed on the Privy Council case in 25 Mad 61.[1] That case was explained in a later Privy Council ruling, 5 Rang 53.[2] Their Lordships therein pointed out that in the former case the procedure adopted was one which the Code positively prohibited, and that it was possible that it might have worked actual injustice to the accused. In 5 Rang 53[2] there was, as here, an omission to comply with a mandatory provision of the Code. There it was S. 360 which says that the evidence shall be read over to the witness. It was no doubt held in a Calcutta case, 52 Cal 148,[3] that the omission to make an inspection note was illegal and not merely irregular, but this decision has been dissented from in numerous cases, which will be found collected at page 1473 of Mitra's Criminal Procedure Code, Edition 9, under S. 539-B. Following them I hold that the omission is not a fatal one. The local inspection has not much bearing on the case at all, and the omission to record the note can have had no practical effect on the decision.

With regard to the improper admission of evidence the learned Sessions Judge had acted correctly under S. 167, Evidence Act and come to the conclusion that the rest of the evidence is sufficient to justify conviction. It appears then that the irregularities are not fatal and that no interference is called for. The sentence of Rs. 100 is justified in view of the dangerous nature of the injury caused, which has left a permanent mark on the complainant's eyebrow. The application is rejected.

B.D./R.K. *Application dismissed.*

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[1] Subrahmania Iyer v. King-Emperor, (1902) 25 Mad 61=26 I A 257=8 Sar 160=2 Weir 271 (P C).

[2] Abdul Rahman v. Emperor, (1927) 14 A I R P C 44=100 I C 227=54 I A 96=28 Cr L J 259=5 Rang 53 (P C).

[3] Hridoy Govinda Sur v. Emperor, (1924) 11 A I R Cal 1035=82 I C 765=25 Cr L J 1375 =52 Cal 148=40 C L J 149.

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## * A. I. R. 1938 Nagpur 326

STONE C. J. AND DIGBY J.

*Mt. Champabai w/o Seth Gopikisan* — Appellant.

v.

*Shree Daulatram Sharma and others*— Respondents.

Second Appeal No. 528 of 1935, Decided on 15th September 1937, from appellate order of Dist. Judge, Raipur, D/- 9th September 1935.

*** Civil P. C. (1908), Ss. 151 and 144—Appeal — All orders passed under inherent jurisdiction are not appealable — Orders however passed in order to expand remedy granted by procedural section of Civil Procedure Code are appealable—Orders for restitution after setting aside order of confirmation of sale — Order though analogous to S. 144, is under S. 151 — Appeal lies against such order.**

Simply because an order is passed under the inherent powers it does not necessarily become appealable. If however the inherent powers are used to expand a remedy in order to do justice to cover a case not within the exact words of but within the purpose of a procedural section, the Court is in effect using its inherent powers to act as if the orders were made under the section in question. In such a case, even justice demands that one side should be given a remedy and other side should, as a matter of justice, be allowed the right to appeal that would have existed had a particular section really applied instead of its being applied by means of a fiction: *A I R 1928 Nag 173; A I R 1936 Nag 8; A I R 1914 Cal 692 and A I R 1927 Cal 285, Rel. on*; *Case law referred.* [P 328 C 1]

Therefore an order for restitution passed after setting aside an order of confirmation of sale in execution proceedings is in fact not an order under S. 144 but an order under S. 151, and by analogy is appealable. [P 328 C 1]

M. R. Bobde — *for Appellant.*

**Judgment.** — The appellant's husband purchased at execution sales the village property of Brijlal, judgment-debtor, on 15th November 1930. On 15th December 1930, Brijlal applied under O. 21, R. 89, Civil P. C. to set aside the two sales, tendering 5 per cent. of the purchase price and filing a receipt given by the decree-holder for satisfaction of the decree. The executing Court and the Appellate Court of the District Judge held that there was no proper compliance with O. 21, R. 89, and refused to set aside the sales. The Judicial Commissioner's Court held in revision, *vide* 31 N L R 67,[1] that the orders of the Courts below dismissing the application must be set aside and as a necessary consequence set aside the sales to the appellant's husband which had been confirmed by the executing Court. The appellant's husband obtained possession of mouza Pisid, but the sale of the share in mouza Kasdol was pre-empted by one Budhram and the sale confirmed in his favour. After the revisional order of the Judicial Commissioner's Court, the sons of Brijlal, who are respondents in this appeal, applied to the executing Court for restoration of mouza Pisid by the appellant for the costs awarded by the order of the revisional Court, and for Rs. 61,181-3.0 mesne profits of Pisid village. This application was combined with an application against Budhramprasad and his brothers in respect of village Kasdol. The executing Court ordered the latter application to be separated, and also came to the following conclusions : (1) That restitution of the village from the auction-purchaser could be ordered by the exercise of inherent powers. (2) That the judgment-debtor must first deposit the purchase money which had been taken away by other creditors before a lengthy inquiry was conducted into the claim for mesne profits. (3) That the matter of mesne profits would be more conveniently conducted in a suit, and (4) that as regards Kasdol the separated application should be amended so as not to include a claim for mesne profits.

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[1] Brijlal v. Manohar Prasad, (1934) 21 A I R Nag 21=150 I C 611=31 N L R 67.

The matter went in appeal to the District Judge. That Court held inter alia (1) that restitution could be claimed; (2) that the order was appealable; (3) that the question of mesne profits should be inquired into both in respect of Pisid and in respect of Kasdol. The case was therefore remanded with directions similar to those approved in 2 Pat 10.[2] These directions were :

> If they (mesne profits) are more than the sale price, then possession should be delivered to the judgment-debtor immediately and the auction-purchasers should be made to pay the difference. If the mesne profits are found to be less than the purchase price, then the restoration of possession of the property must not be made until the judgment-debtor deposits the difference.

The appeal is made from this decision. It is not disputed before us that an order for restitution could be made by the executing Court in exercise of its inherent powers, but it is contended that the trial Court's order was unappealable, and that mesne profits were wrongly directed to be ascertained by the first Appellate Court. As regards the merits of the order of the first Appellate Court, and the power to order restitution, a reference to the case of 2 Pat 10,[2] which was a sequel to 41 Cal 590,[3] is sufficient to show that there is no force in this part of the argument. In the former case (i. e. 41 Cal 590[3]) the Subordinate Judge had issued a certain sale certificate. The High Court held that no appeal lay and declined to interfere in revision. Their Lordships of the Privy Council describing the High Court's order affirming the grant of the sale certificate as a "judgment and decree" interfered in appeal without referring to the argument that no appeal had lain to the Calcutta High Court. The sale was set aside. In the subsequent case the position was that the Subordinate Judge had ordered restitution and that an appeal had been made to the High Court. An appeal was then made to the Privy Council which affirmed the decision of the High Court containing directions similar to those given in the present case. It was never however suggested that S. 144, Civil P. C., was inapplicable, or that no appeal had lain in the latter case to the Calcutta High Court. This was a case where an order had been reversed, namely the grant of a certain sale certificate, and restitution ordered. Their Lordships also referred to the duty of the Court to order restitution under its inherent powers in the following words :

> It is the duty of the Court under S. 144, Civil P. C. to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.

The power of the executing Court to order restitution is thus clear, but in view of the fact that the order confirming the sale in the present case does not fall within the definition of a decree given in S. 2 (2), Civil P. C. and indeed is expressly excluded from the definition for the reason that it is appealable as an order under O. 43, R. 1 (j), the restitution is not covered by the exact wording of S. 144, which uses the words "where and in so far as a decree is varied or reversed." Assuming that the word 'decree' in S. 144, Civil P. C. should not be construed as including an appealable order of this kind (though a contrary view is indicated in 20 N L R 93[4] at p. 99), the restitution is given by the Court as if S. 144 applied, this fiction being imported in the exercise of its inherent power and in performance of its inherent duty.

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[2] **Jai Berham v. Kedarnath, (1922) 9 A I R P C 269=69 I C 278=2 Pat 10=49 I A 351 (P C).**

[3] **Thakur Barhmha v. Jiban Ram Marwari, (1913) 41 Cal 590=21 I C 936=41 I A 38=19 C L J 161=18 C W N 313 (P C).**

[4] **Ramji v. Ziblaji, (1924) 11 A I R Nag 258=80 I C 49=20 N L R 93.**

Is such an order appealable or not? It may readily be conceded that because an order is passed under the inherent powers it does not necessarily become appealable: 24 N L R 55[5] and 31 N L R Sup 72.[6] If however the inherent powers are used to expand a remedy in order to do justice to cover a case not within the exact words of, but within the purpose of a procedural section, the Court is in effect using its inherent powers to act as if the order were made under the section in question, in this case S. 144. In such a case even justice demanded that one side should be given a remedy, restitution, as if S. 144 applied so the other side should, as a matter of justice, be allowed the right to appeal that would have existed, had S. 144 really applied instead of its being applied by means of a fiction. Some such reason seems to be involved in those cases where orders for restitution passed under the inherent powers have been held appealable. This is not a case where one is purporting to act under S. 144. It is a case where under the powers conferred by S. 151 the Court is giving a relief as if S. 144 applied though it does not apply. It is clear that two views can be taken upon the subject. We prefer the above view which is consonant with the conclusions arrived at by the Calcutta High Court in A I R 1914 Cal 692[7] and A I R 1927 Cal 285.[8]

In A I R 1914 Cal 692[7] *loc. cit.* a second appeal was entertained but the report does not show if the executing Court had purported to act under S. 144 or not. The first Appellate Court's decision was set aside on merits, not on the ground that no appeal lay. The case was one where the order would rightly be passed under S. 151. In A I R 1927 Cal 285[8] *loc. cit.*, an order for restitution passed under S. 151 was held appealable. The reason given was that the exercise of jurisdiction was the exercise by analogy of the jurisdiction under S. 144. On the other hand in A I R 1931 Cal 779[9] such an order was held appealable on the ground that the matter fell under S. 47 Civil P. C. as to which an opposite view was taken in two Patna cases. In A I R 1917 Pat 495[10] it was held that the auction-purchaser was not the representative of any party to the suit. This was a case where a sale set aside by the executing Court was confirmed in appeal, and the auction-purchaser was consequently ordered by the executing Court to restore the purchase money which he had withdrawn. In A I R 1930 Pat 280,[11] a case where restitution had followed on the setting aside of a sale, the first case was relied on and it was said that the matter could not be treated as a matter relating to the execution of the decree without somewhat stretching the expression. In 18 N L R 24[12] it appears that the right of appeal was not questioned. We therefore dismiss the appeal with costs.

B.D./R.K. *Appeal dismissed.*

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[5] Narayan Das Bhagwanji & Co. v. Kalyanji, Mawaji & Co., (1928) 15 A I R Nag 173=107 I C 525=24 N L R 55.

[6] Tatyarao v. Shrikrishna, (1936) 23 A I R Nag 8=160 I C 202=31 N L R Sup 72.

[7] Amirannessa v. Karimannessa, (1914) 1 A I R Cal 692=22 I C 839=18 C W N 1299.

[8] Gnanda Sundari v. Chandra Kumar, (1927) 14 A I R Cal 285=100 I C 735=31 C W N 290.

[9] Sasikanta v. Jalil, (1931) 18 A I R Cal 779 = 135 I C 1185=53 C L J 49=35 C W N 105.

[10] Sukhdeo v. Rito Singh, (1917) 4 A I R Pat 495=39 I C 763=2 Pat L J 361.

[11] Ramratan v. Banarsilal, (1930) 17 A I R Pat 280=122 I C 589=9 Pat 685=11 P L T 156.

[12] Shrikisan v. Sundarbai, (1922) 9 A I R Nag 82 =64 I C 732=18 N L R 24.

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## A. I. R. 1938 Nagpur 328

POLLOCK AND GRUER JJ.

*In re Surajpalsingh Indrapalsingh* — Appellant.

Criminal Appeal No. 234 of 1937, Decided on 25th February 1938, from order of Sess. Judge, Jubbulpore, D/. 2nd September 1937.

**(a) Criminal Trial—Evidence — Evidence of one accomplice cannot be used to corroborate evidence of another even in India.**

The evidence of one accomplice cannot be used as independent evidence to corroborate the evidence of another accomplice. The rule is to be applied in India, though there is no specific provision on the point in the Evidence Act. It may be that conviction would be difficult to secure in some cases, and that a case would be equally weak, whether one accomplice or a dozen were examined in it. But a plurality of accomplices has to be considered independently, and the Court might while not losing sight of S. 114 (b), Evidence Act, still be able to rely under S. 133 of the Act on the uncorroborated testimony of one or more out of a number either on the same or on different points: *A I R 1936 P C 242, Rel. on; A I R 1936 Nag 103, Expl.* [P 331 C 2; P 332 C 1]

**(b) Criminal Trial — Conspiracy to commit offence—Offence committed—No illegality in trying for conspiracy to commit offence.**

Where an offence has been committed in pursuance of a conspiracy to commit that offence, it is not illegal to try accused on a charge of conspiracy to commit an offence: *A I R 1932 Bom 406; A I R 1934 Mad 88; A I R 1922 Cal 107; A I R 1933 Oudh 86 and A I R 1936 Cal 573, Foll.; A I R 1938 Mad 130, Dissent.* [P 333 C 1]

**(c) Criminal P. C. (1898), S. 285-A—'And is so tried'—Meaning of.**

The expression 'and is so tried' in S. 285-A means 'if he is in fact so tried' or 'if he is eventually so tried'. [P 333 C 2]

C. B. Parakh and Y. V. Jakatdar — *for Appellant.*

W. R. Puranik, Advocate-General — *for the Crown.*

**Judgment.**—The accused, Zincke, Sequeira and Surajpal Singh, employees of the G. I. P. Railway now under suspension, were tried before the Sessions Judge, Jubbulpore, with a jury on charges of conspiracy and cheating. At all material times, Surajpal Singh was time-keeper on the Barkhera section with his headquarters at Barkhera; Sequeira was Sub P. W. I. with his headquarters at Hoshangabad except for ten days in September when he was officiating as P. W. I. at Barkhera until he was relieved by Zincke and Zincke was P. W. I. at Barkhera from 28th September 1933 onwards. These accused are alleged to have entered into a conspiracy to defraud the railway by entering false names in the muster rolls of the gangs working on the line and taking the pay of these non-existent coolies for themselves. The first charge was that the three accused in or about September 1933 at Barkhera entered into an agreement to cheat the Chief Accounts Officer of the G. I. P. Ry., by preparing false muster rolls and pay sheets in which the names of coolies who had not worked were falsely shown and thereby fraudulently or dishonestly inducing the said officer to deliver the money shown against these names through the pay clerk, and that in pursuance of this agreement they caused pay sheets to be prepared for the months ending 8th May and 8th June 1934, in which the names of coolies who had not worked were falsely shown and for whom payments were made by the pay clerk, and that thereby they committed an offence punishable under S. 120-B read with S. 420, I. P. C. The second charge was that the three accused cheated the Chief Accounts Officer by fraudulently or dishonestly inducing him to deliver between Barkhera and Itarsi through his pay clerk on 24th May 1934 Rs. 386-12-0 as the pay of coolies who were falsely shown as having worked in the month ending 8th May, and that they thereby committed an offence punishable under S. 420 read with S. 34, I. P. C. The third charge was that the three accused cheated the Chief Accounts Officer by fraudulently or dishonestly inducing him to deliver through his pay clerk between Barkhera and Itarsi on 21st June 1934, Rs. 834-15-0, as the pay of coolies who were falsely shown as having worked in the month ending 8th June and that they thereby committed an offence punishable under S. 420 read with S. 34, I. P. C.

The case, which is a very complicated one, was tried with great care and thoroughness by the learned Sessions Judge and was very exhaustively summed up by him to the jury. There was some slight confusion in the charge about whether the evidence of one accomplice can corroborate the evidence of another, but we do not think that there was any misdirection to the jury. Under the first charge the jury returned a unanimous verdict of guilty against Zincke and Surajpal Singh and a verdict of guilty by a majority of three to two against Sequeira. Under the two charges of cheating there was a verdict of not guilty by a majority of four to one in favour of Zincke, a unanimous verdict of not guilty in favour of Sequeira, and a unanimous verdict of guilty against Surajpal Singh. The learned Sessions Judge accepted the jury's verdict. The three accused have now appealed against their convictions, and the Provincial Government have appealed against the acquittal of Zincke and Sequeira on the charges of cheating. The method employed by the accused to defraud the railway is said to have been as follows: False names were entered in the muster rolls of temporary gangs working on the line. These muster rolls are sent into the P. W. I's office at the end of the month, i. e. on the 8th day of each month when the working month ends, and pay sheets are prepared from them and sent to Jhansi where they are checked and a consolidated statement is prepared. The consolidated statement is sent to the Chief Accounts Officer at Bombay who draws cheques in favour of the various pay clerks for the amount which they have to distribute in wages. On or about the 20th of each month, the pay clerk sets out with these wages and the pay sheets, accompanied by the P. W. I., the time-keeper, and a guard for the cash. As they reach each gang the gang is lined up under its mate. The name of each coolie is then called out, he comes forward, his left thumb impression is taken by the time-keeper against his name on the pay sheet, he is given his pay, and his thumb impression is attested by the P. W. I. It was necessary for the accused in order to defraud the railway to obtain thumb impressions against the names of the non-existent coolies, and the case for the prosecution is based largely on evidence that the thumb impressions against the names of many coolies on the pay sheets are the thumb impressions of persons who did not work as coolies. (Their Lordships after examining the evidence proceeded.) In our opinion the only possible conclusion that can be drawn from these facts is that false names were entered in the muster rolls and pay sheets, that false thumb impressions were made against these names, and that the railway was thereby defrauded of the money that it thought was being paid to these coolies. The payments for the month ending 8th September 1933 were made on 23rd September before Zincke had joined. In that month we find the impressions of Surajpal Singh and Sequeira in the pay sheets and the initials of Sequeira. The money was admittedly distributed by the pay clerk in their presence. It has been urged that there is nothing to show that the pay clerk who was then doing the work was dishonest or a party to any conspiracy to defraud the railway. That is a question that we have not to decide in this case. Whether the pay clerk could or could not have been deceived, we think it is obvious that Sequeira and Surajpal Singh must have acted together so as to defraud the railway.

Similarly in the next two months, October and November, we find the impressions of Surajpal Singh, Sequeira and Zincke on the pay sheets, with each entry initialled by Zincke. Here again the inference is obvious. These three must have acted in concert to defraud the railway, and so it goes on. In support of the prosecution's allegation that a large number of coolies were entered in the pay sheets though they never worked as coolies, a certain number of persons bearing these names have been examined as witnesses and have said that they never worked and were never paid as coolies of temporary gangs or that they never worked but were paid and refunded their pay to the mates. Many of the thumb impressions are too blurred to be recognizable, and the difference in the clearness of the impressions is so marked at times that this by itself raises a strong presumption that the people responsible for taking these thumb impressions were anxious that they should not be identifiable. Many of the coolies have proved untraceable. The learned counsel for the defence argues that when a coolie of the same name has been produced it is a mere coincidence, and no doubt there are a certain number of coolies bearing the same name; and that when the coolie is untraceable it merely means that he has left that part and cannot be found; that also may be true of a certain number of coolies. It is however striking that so large a number of coolies bearing the same names as those on the pay sheets have been produced and say that they did not work in those gangs, and that so many are untraceable. It is also remarkable that on several occasions extra coolies were apparently taken on by Zincke on the day after the Resident Engineer had checked the number of coolies working in the gang and that the thumb marks of these extra coolies are too blurred to be identified.

The fraud came to light through a statement made by D'Cunha (P. W. 2) to Vandarhide (P. W. 62). D'Cunha joined the G. I. P. Railway in October 1928 and became a pay clerk in 1932. He was posted to the Barkhera section at the end of April 1934. He paid the gangs on 24th May for the month ending 8th May and on 21st June for the month ending 8th June. After he had returned from making payments along the line from Bhopal to Itarsi he asked Vandarhide (P. W. 62), who was the Divisional Pay Clerk, if he could get him a transfer. According to Vandarhide, D'Cunha was nervous and dejected and said that he had received Rs. 30 as illegal gratification from Zincke for overlooking certain irregularities in the pay sheets. Vandarhide says that he wrote a confidential letter to the Chief Cashier and Treasurer, Bombay, Mr. Kelly. The letter has been destroyed, but according to Vandarhide he wrote that D'Cunha was eager for a transfer and that he thought that there was something fishy about it and that Mr. Kelly should see into things for himself. Mr. Kelly (P. W. 9) saw Vandarhide at Jhansi on 21st June and asked him for details, and Vandarhide told him that D'Cunha was very much upset after his return to headquarters and wanted a transfer and had admitted receiving Rs. 30 from Zincke. Mr. Kelly saw D'Cunha at Bhopal on 22nd June and D'Cunha admitted receiving Rs. 30 from Zincke. This started the investigation which resulted in the present prosecution. We see no reason to doubt the statements made by Mr. Kelly and Vandarhide that D'Cunha told them that he had received Rs. 30 from Zincke though it may be that D'Cunha did not use the words "illegal gratification" and that Vandarhide merely inferred that D'Cunha tried for some time to conceal as far as possible the part he had played, and it was not until the police took his finger impressions that he realized that the part he had played was bound to come out because, as we have already pointed out, he had put a finger impression on one of the pay sheets.

In his evidence in Court D'Cunha told the following story. He met Zincke and Sequeira for the first time on 5th May 1934 when in the course of conversation he admitted to Zincke that he was badly off and Zincke promised to help him financially. D'Cunha's pay was then Rs. 85 p. m., and he apparently found it insufficient for his needs. On 24th May he started making payments from Obaidulla Gunj, accompanied by Zincke and Surajpal Singh. They paid each gang as they came to it, all the gangs between Obaidulla Gunj and Barkhera being permanent gangs, in which no bogus names were entered. While they were on the way Zincke told him that they were making money by showing bogus names on the pay sheets of the temporary gangs. At Barkhera D'Cunha took the pay sheets to Surajpal Singh's house and Surajpal Singh began putting finger impressions on the pay sheets of the temporary gangs. When D'Cunha objected, Surajpal Singh laughed and said, "You are a boy, you do not know". D'Cunha told Zincke what was going on and Zincke also laughed and said, "You are a fool, this is the way how money is made. You need not be afraid. The impressions are bad." After that Zincke also put finger impressions on the pay sheets and then caught hold of D'Cunha's hand and put his finger impressions on too, saying "We are going to make you a bold man". D'Cunha then returned to his carriage, accompanied by Zincke and Surajpal Singh who demanded Rs. 360 from him, which was the total amount of the wages shown against the bogus coolies. D'Cunha unlocked his box and paid Rs. 360 to Zincke in the presence of Surajpal Singh. Zincke told him that this was to be divided into six shares, one each for themselves, one for Sequeira, and two for clerks at Bhopal and Jhansi. They, then, went on down the line towards Itarsi making payments as they went, and on the way Zincke gave D'Cunha his share of the Rs. 360, but D'Cunha later found that he had been given Rs. 30 only. They met Sequeira on the way between Barkhera and Itarsi, and Zincke gave Sequeira his share.

On his return to Jhansi D'Cunha says that he felt very unhappy about what had happened and made up his mind to tell Vandarhide about it, so he told him that there were serious irregularities in payments on Barkhera section and that he had been paid Rs. 30 by Zincke not to disclose these irregularities. He asked Vandarhide to get him a transfer to some other section, and Vandarhide replied that he would do his best. Again on 21st June D'Cunha went out to make payments accompanied by Zincke, Sequeira and Surajpal Singh. On this occasion Zincke told him that he had more bogus names on the pay sheets than before, and when D'Cunha protested, laughed at him. Sequeira was not on their trolly but on a second trolly following behind. Much the same procedure was gone through as on the previous occasion, but the amount handed over this time to Zincke by D'Cunha was Rs. 550. One temporary gang, No. 7, which contained 27 names, was entirely bogus.

D'Cunha is of course an accomplice, and it is a recognized rule that it is ordinarily unsafe to convict on the evidence of an accomplice unless it is corroborated by independent evidence as against each of the accused. The question whether the evidence of one accomplice can be corroborated by the evidence of another accomplice was considered in 31 N L R Sup 215,[1] but the point was not definitely decided. In view of the decision of the Privy Council in A I R 1936 P C 242,[2] we think it must now be taken as settled that the evidence of one accomplice cannot be used as independent evidence to corroborate the evidence of another accomplice. That case

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**1. James Dowdall v. Emperor, (1936) 23 A I R Nag 103=1936 Cr C 605 = 162 I C 430=37 Cr L J 607=31 N L R Sup 215.**

**2. Mahadeo v. The King, (1936) 23 A I R P C 242=163 I C 681=1936 Cr C 757=37 Cr L J 914 (P C).**

came from Fiji and it has been suggested that the ruling might not apply to India. The law applied was the English Common law, and in the absence of a specific provision on the point in the Evidence Act, we think that the ruling must necessarily apply to India also. It may be said that if this be the law, conviction would be made very difficult to secure in some cases in this country and that in effect a case would be equally weak whether one accomplice or a dozen were examined in it. Some solution for that state of affairs is to be found in S. 133, Evidence Act. A plurality of accomplices might be useful in this way. They have to be considered independently and the Court might, while not losing sight of Sec. 114 (b), Evidence Act, still be able to rely on the uncorroborated testimony of one or more out of a number either on the same or on different points. We must point out to Courts however that the Privy Council case has to be followed and the 31 N L R Sup 215[1] is not to be interpreted as deciding the point in the contrary fashion. Under S. 114 (b), Evidence Act, a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, and the ordinary rule is to presume that accomplices are unworthy of credit unless corroborated in material particulars. It is however open to a Court to depart from that rule if it thinks that there are special circumstances in the case making it safe to do so and in such cases S. 133, Evidence Act makes it clear that a conviction is not illegal merely because it is based upon the uncorroborated testimony of an accomplice or of accomplices. This point was, we think, correctly appreciated by the learned Sessions Judge, though there is some slight confusion in the charge to the jury.

We see no reason to doubt that the evidence of D'Cunha is substantially true, though he may have tried to minimise the part that he took himself and he may have made mistakes in matters of detail. (Their Lordships after examining the evidence proceeded.) We have therefore no hesitation in accepting the evidence of D'Cunha as substantially true and in holding it proved that a large number of bogus coolies were entered on the pay sheets and their pay retained by the accused for themselves. We also accept D'Cunha's story that gang No. 7 in June consisted entirely of bogus coolies, and it is noteworthy that this gang was never checked by the Resident Engineer when he went down the line checking the other gangs. He could hardly have overlooked a gang of 27 coolies.

It has been argued that there is no evidence that Sequeira took any part in the frauds after the first two months but he and Zincke checked every gang under them two or three times every month and marked these bogus coolies present, in particular they each checked gang No. 7 three times in the month ending 8th June. There is a mass of evidence consisting of the depositions of mates and coolies to show that various coolies whose names are entered in the pay sheets never worked as coolies and never drew any pay, and that various coolies who never worked were produced at the time of payment and paid, and that the finger prints against some names are the finger prints of different persons. We see no reason to suppose that all this evidence is false, but we think it unnecessary to discuss it as the case against the accused is complete without it.

It has been also argued that the offence of cheating was completed when the Chief Accounts Officer at Bombay drew a cheque in favour of the pay clerk, at Jhansi. The pay clerk was the agent of the Chief Accounts Officer and in our opinion the offence of the accused was completed when the pay clerk as the agent of the Chief Accounts Officer handed over the pay on the line. It makes no difference that the pay clerk was not personally deceived when he did so. There is no substance in the ground that under S. 10, Evidence Act, there was no reasonable ground to believe that the accused had conspired and that therefore anything done by one of them was not relevant as against the others. We have shown that a conspiracy between Sequeira and Surajpal Singh must be inferred from their joint conduct when they made the payments in the month ending 8th September 1933 and that it must be inferred that Zincke joined this conspiracy from the conduct of all three when they made the payments in the month ending 8th October 1933; and from the conduct of all three it is again clear that that conspiracy continued throughout up to the payments made for the month ending 8th June 1934. The three accused were therefore rightly convicted of conspiracy and Surajpal Singh was rightly convicted of the two charges of cheating. Once it is found that all three accused entered into a conspiracy to cheat the railway and that the railway was cheated in the months of May and June we find it quite impossible to understand how the jury could have held that Zincke and Surajpal Singh took no part in the cheating that occurred in those two months. The appeals of the Provincial Government against these acquittals must therefore be allowed, but as the Provincial Government has not asked that the sentences should be enhanced the point is not of importance.

It remains to deal with certain objections that have been taken to the validity of the trial. In A I R 1938 Mad 130[3] the Court expressed the opinion that where an offence has been committed in pursuance of a conspiracy to commit that offence the accused ought to be tried for the substantive offence and not for conspiracy. There is however no doubt that it is legal to try accused persons on a charge of conspiracy to commit an offence even if the substantive offence has been carried out : *see* 56 Bom 304,[4] 57 Mad 545,[5] 49 Cal 573,[6] 8 Luck 286[7] and A I R 1936 Cal 753.[8] In the committing Magistrate's Court, Zincke claimed under S. 443, Criminal P. C., that he was a European British subject and entitled to be tried as such, and his right to be so tried was conceded by the Crown. The case originally came before the Sessions Judge at Hoshangabad, and when the three accused first appeared on 28th August 1936 before him Zincke again put forward his claim to be tried as a European British subject and the other two accused stated that they did not claim an Indian majority in the jury but wished to be tried jointly with Zincke. The learned Sessions Judge should have started proceedings in accordance with S. 271, Criminal P. C., by reading out the charges and asking the accused whether they pleaded guilty or claimed to be tried. Instead of that he at once decided not to proceed with the case as it was impossible to obtain sufficient European jurors in Hoshangabad and referred the case for the order of this Court, though the question of empannelling a jury did not arise until the accused claimed to be tried. This Court ordered that the case should be tried by the Sessions Judge, Jubbulpore. On 2nd April before the Sessions Judge, Jubbulpore, Surajpal Singh claimed to be tried separately but Sequeira again stated that he wished to be tried jointly with Zincke. The learned Sessions Judge held that Surajpal Singh had already made his choice and must adhere to that choice. An application in revision to this Court was rejected and that order is now final. It would, no doubt, have been open to Surajpal Singh not to apply in revision against that order but to take the matter up in appeal, but he did not adopt that course and he cannot now contest the validity of this Court's order rejecting his claim for a separate trial. In any case we think that the decision was clearly correct. Under S. 285-A, Criminal P. C., it was legal to try Surajpal Singh and Zincke jointly, but there is this provision :

> If he (Zincke) requires to be tried in accordance with the provisions of S. 275 and is so tried, and if the other person accused (Surajpal Singh) requires to be tried separately, such other person shall be tried separately.

The argument is that owing to the failure of the learned Sessions Judge, Hoshangabad, to start the trial there was no trial in progress when Surajpal Singh made his choice and that under S. 275, Criminal P. C., he had a right to defer making a choice until the first juror was called. In our opinion the words 'and is so tried' mean "if he is in fact so tried" or "if he is eventually so tried", for unless Zincke was in fact tried in accordance with the provisions of S. 275, Surajpal Singh's ground for claiming a separate trial would disappear. When Surajpal Singh was asked he did not require to be tried separately, and therefore the joint trial was legal.

It has also been contended that the jury was illegally constituted. After objections had been taken to several jurors the learned Sessions Judge summoned all the remaining jurors in the list except those connected with the railway or police department, to whom the accused apparently objected. Eventually on the day when the trial was due to start only two European jurors out of all those summoned were available. One

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[3] In re Venkataramiah, (1938) 25 A I R Mad 130=173 I C 26=39 Cr L J 266=(1937) 2 M L J 862.

[4] Emperor v. Ramrao Mangesh, (1932) 19 A I R Bom 406=1932 Cr C 572=138 I C 708=33 Cr L J 666=56 Bom 304=34 Bom L R 598.

[5] Venkata Hanumantha Rao In re, (1934) 21 A I R Mad 88=1934 Cr C 118=148 I C 281=57 Mad 545=66 M L J 198.

[6] Abdul Salim v. Emperor, (1922) 9 A I R Cal 107=69 I C 145=23 Cr L J 657=26 C W N 680=49 Cal 573=35 C L J 279.

[7] Kunwar Sen v. Emperor, (1933) 20 A I R Oudh 86=1933 Cr C 168=141 I C 192=34 Cr L J 124=8 Luck 286=9 O W N 1136.

[8] Rash Behari Shaw v. Emperor, (1936) 23 A I R Cal 753=1936 Cr C 1048=163 I C 657=41 C W N 225=38 Cr L J 245.

Hutchins, who happened to be in the Court verandah, was called in and included in the jury. An objection was taken, presumably on behalf of Zincke, that he was not a European British subject, but the learned Sessions Judge after examining Hutchins came to the conclusion that he was a European British subject. The objection that he was not, was an objection under S. 278, Criminal P. C., either under Cl. (b) or Cl. (h), and the decision of the learned Sessions Judge on the point was final under S. 279 (1). The procedure for empannelling a jury in such cases seems to be this. Where five jurors are required, the Court shall summon not less than ten under S. 326 (1), Criminal P. C., if more than 5 attend, 5 jurors shall be chosen by lot from those attending under S. 276; if 5 only attend, those 5 shall form the jury (unless an objection is taken to any one of them) as there is no reason why the drawing of lot should be insisted upon when only the required number is present: *see* 54 Cal 1026.[9] If less than the requisite number is present, then the deficiency may be made up by choosing jurors from such other persons as may be present in Court under Proviso 2 to S. 276. The name of each juror is then called out under S. 277, and the accused is asked if he objects to be tried by such juror. The objections are then decided under Sec. 278, and under S. 279 (1) the decision is final. If an objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in the manner provided by S. 276 or, if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors or whom the Court considers a proper person to serve on the jury. It will be seen from the order sheet of 12th April 1937 that the deficiency of one juror arose because a number of them had been objected to. Hutchins was therefore properly selected by the Court under S. 279 (2) and the jury was properly constituted.

The learned counsel for the accused has not suggested that the sentences imposed are excessive and the learned Government advocate has not suggested that they are inadequate. The appeals of the three accused are therefore dismissed and their convictions and sentences are upheld. The appeals of the Provincial Government are allowed and Zincke and Sequeira will also be convicted on the second and third charges of cheating under S. 420, I. P. C., each of them is sentenced to 9 months' rigorous imprisonment for each offence of cheating, the sentences to run concurrently with the sentences imposed for the offence of conspiracy. This judgment will also govern Criminal Appeals Nos. 235, 236, 277 and 278 of 1937.

V.B.B./R.K. *Appeals dismissed.*

## A. I. R. 1938 Nagpur 334

GRUER J.

*Satwarao Nagorao Hatkar* — Applicant.

v.

*Kanbarao Bhagorao Hatkar* — Non-applicant.

Criminal Revn. No. 392 of 1937, Decided on 12th November 1937, from order of Addl. Sess. Judge, Amraoti, D/- 3rd August 1937.

**Criminal P. C. (1898), S. 494—Withdrawal of case — Reasons though not necessary are desirable—Prosecution having to incur expenses is not sufficient reason for withdrawing case when case is strong.**

Section 494 does not prescribe that reasons in writing must be given, but it is obviously desirable that reasons should be given in order to enable the High Court to judge whether the withdrawal has been rightly made: *A I R 1921 Cal 259 and A I R 1929 Cal 319, Rel. on.* [P 335 C 1]

The reason that prosecution would involve a lot of expenditure is not sufficient for withdrawing a case when the case itself is not weak. [P 335 C 2]

R. N. Padhye — *for Applicant.*

B. T. Amlekar — *for Non.applicant.*

**Order.**—The Additional District Judge, Yeotmal, as the result of a civil suit tried by him directed the prosecution of the non-applicant, Kanbarao, for forgery. The Prosecuting Inspector was ordered to conduct the case and before any evidence was recorded he referred it to the District Magistrate suggesting that it should be withdrawn. The District Magistrate after consulting the Public Prosecutor evidently concurred. In the order sheet dated 10th May 1937, the learned Sub-Divisional Magistrate writes:

> The case is taken up today on receipt of D.S.P.'s application for withdrawal of the case at the instance of the D. M. For the reasons given in the application I allow the withdrawal. The accused is therefore discharged under S. 494 (a).

The only application which I can see on the record is one undated, by the Prosecuting Inspector at page 11 of the record. The grounds given are:

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[9] Rahamat Sheikh v. Emperor, (1927) 14 A I R Cal 593=102 I C 903=28 Cr L J 615=54 Cal 1026=31 C W N 711.

> It is apprehended that there would be unnecessary expense to call handwriting experts on both sides. Each of the experts would at least be coming twice before the finish of the case.
>
> It is doubtful whether the expert will satisfactorily prove the signature as forged, as they would be giving contradictory opinions and also there is no real data to accept which of the opinions is true, as there are no inherent circumstances in the case justifying one view.

Ordinarily this Court will not interfere with the discretion given to the prosecution by S. 494, Criminal P. C., but it undoubtedly has power to do so, and will do so, in special circumstances where the withdrawal appears to be manifestly improper. I do not lay stress on the fact that the Magistrate has given no separate reasons for his order. He has evidently read and agreed with the reasons given by the Prosecuting Inspector. S. 494, Criminal P. C., itself does not prescribe that reasons in writing must be given, but it is obviously desirable that reasons should be given in order to enable the High Court to judge whether the withdrawal has been rightly made: 48 Cal 1105[1] and 56 Cal 1023.[2] I also do not think that there was anything wrong in the Prosecuting Inspector consulting his superior officers before putting in his application.

The present case however is a special one as the prosecution has been launched by an experienced Civil Judge after a full trial on the merits. The accused had an opportunity to appeal against the order for prosecution, but apparently did not do so. It seems to me that it would be allowing an undesirable precedent if such a prosecution were to be, unless for very cogent reasons, cut short by the prosecuting authorities. The learned Additional District Judge must have considered the question of the probability of a conviction, and his opinion was entitled to respect. The reasons given in the application for withdrawal do not appeal to me. It was held in 60 Cal 233[3] that an opinion that the prosecution case is a weak one was not sufficient to justify the Public Prosecutor in applying for its withdrawal and the Judge in consenting thereto. I see no prima facie reason for thinking that the present case is weak, and the argument about the expense is not sound. Government has got to face, and does face the spending of considerable sums in maintaining justice. Such an application at the instance of a private person is in order: 56 Cal 1023[2] at page 1031. It is my experience that forgery cases are unduly prevalent in Berar, and it is in the public interest that offenders should be brought to book in spite of the difficulties and expense necessarily involved in such trials. If the case is thought to be beyond the capacity of the Prosecuting Inspector, then the services of the Public Prosecutor should be secured. I allow the application, set aside the order of discharge, and direct that the case be proceeded with.

B.D./R.K. *Application allowed.*

## * A. I. R. 1938 Nagpur 335

### FULL BENCH

STONE C. J., VIVIAN BOSE AND DIGBY JJ.

*Asaram and others*—Appellants.

v.

*Ludheshwar and others*—Respondents.

Second Appeal No. 420 of 1933, Decided on 25th October 1937, from Appellate decree of Addl. Dist. Judge, Bhandara, D/- 7th August 1933.

**(a) Hindu Law—Alienation—Illegal transfer by adult members — Minor members attacking transfer — Collusion between adult and minor members—Careful scrutiny is necessary** (Per *Stone C. J. and Vivian Bose J.*).

A case which bears all the signs of collusion between the adult members of the family who are accused of being parties to the illegal transfer of family property and the minor members who appear as innocent plaintiffs not in *pari delicto* either with the vendor or the purchaser and attacking the transfer, calls for careful scrutiny: *A I R 1934 P C 55, Rel. on.* [P 338 C 1]

**(b) C. P. Tenancy Act (1 of 1920), S. 49 — Object of—Protection of land working classes from being landless—Alienation of sir ineffective if requisite permission is not obtained — Safeguards should be maintained effectively — Collusive actions to defraud alienees for consideration should also be checked — Transfer of sir is not illegal but arrangement to evade provisions of Act is illegal.**

**Per *Stone C. J.* — It is the policy of the law to prevent the land-working classes being driven into the state of landless proletariates so far as may be, and accordingly it is provided by S. 49, C. P. Tenancy Act that alienation of *sir* land, that is home farm land in cultivation, shall be ineffective unless the sanction of appropriate official has first been**

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1. Rajani Kanta Shaha v. Idris Thakur, (1921) 8 A I R Cal 259=64 I C 280=22 Cr L J 760=48 Cal 1105=34 C L J 51=25 C W N 615.
2. Raman v. Emperor, (1929) 16 A I R Cal 319=121 I C 678=31 Cr L J 315=56 Cal 1023=33 C W N 468.
3. Giribala Dasee v. Mader Gazi, (1932) 19 A I R Cal 699=1932 Cr C 654=142 I C 891=34 Cr L J 483=60 Cal 233=56 C L J 79=36 C W N 928.

obtained. It is of the utmost importance that this safeguard should be maintained in full force and effect. It is likewise desirable that collusive actions having as their real object to defraud alienees who have given consideration should fail. [P 338 C 1, 2]

Per *Vivian Bose J.* — The anxiety of the Legislature to protect this class is so great that S. 49 (2) of the Act prohibits registration of any document which does not reserve "the right of occupancy specified in sub-s. (1)". The object of this prohibition is clearly to bring to the notice of the parties exactly what their bargain amounts to under the law and if they have understood the position aright to enable them to amend their document so as to make their meaning clear beyond all possibility of doubt, and if not, then to let them realize that they have entered into a transaction one of whose objects is prohibited by law. The illegal part of the transaction is not the sale of the *sir* but the arrangement or device which attempts to evade the provisions of the Act. [P 343 C 1, 2]

Per *Digby J.*—Where a surrender and a sale deed of proprietary right are both executed on the same date and it has been arranged to make the surrender before the sale deed is executed, the surrender deed is the execution of "device which is void and illegal" : *Case law discussed.*

[P 353 C 1]

**(c) Limitation—Cause of action and not relief determines limitation** (Per *Stone C. J.*).

In considering whether a particular remedy is barred one looks not at the relief given but at the cause of action, that is, at the necessary allegations which have to be made and found before the relief sought can be given. [P 339 C 1]

**(d) C. P. Tenancy Act (1 of 1920), S. 49—Surrender — Surrender found illegal — Surrenderee holds land burdened with obligation in nature of trust for benefit of surrenderor—Suit to set aside surrender — Parties can be put in their proper position** (Per *Stone C. J., and Vivian Bose J.*).

Where a person sells his proprietary rights in a village and then surrenders his holding of *sir* lands in which he has acquired occupancy rights, and the surrender was illegal, the surrenderee holds the surrendered land for the benefit of surrenderor — a cestui que trust — because surrenderee is supposed to hold the lands burdened with an obligation in the nature of trust. In a suit to set aside the surrender Court can not only declare the surrenderee as a sort of trustee but can place the parties in the position they ought to be : *A I R 1916 P C 59 and (1907) 1 Ch 300*, *Rel. on.*

[P 339 C 1, 2]

**(e) Pleadings—Illegality not pleaded — Court can take notice but should be slow in drawing inferences of illegality** (Per *Stone C. J., and Vivian Bose J.*).

A Court can, and must, take notice of an illegality which emerges in the course of a case although not pleaded. But a Court should be very slow to do so and should not go out of its way to assume facts or draw inferences from facts capable of another construction to tend to the conclusion that there has been illegality of so grave a nature neither pleaded nor raised by the issues. It should be still more hesitant if the suit appears collusive. [P 341 C 1, 2]

**(f) Evidence—Contract reduced to writing — Oral evidence of change of terms of contract not admissible—Parties however can show that writing was not real contract.**

Per *Vivian Bose J.* — All that S. 92, Evidence Act excludes is oral evidence to contradict, vary, add to or subtract from the terms of a contract which has been reduced to writing. It does not preclude a party from showing that the writing was not really the contract between the parties but was only a fictitious or colourable device which cloaked something else. Benami transactions afford a common illustration of this rule. In any case it is always permissible to look to the surrounding circumstances to see in what manner the language of a document was related to existing facts : *A I R 1924 P C 226 and A I R 1916 P C 59, Rel. on.* [P 342 C 1]

Per *Digby J.* — Though the contract is apparently valid in form or matter, extrinsic evidence is always admissible in variance of or in addition to the contract to show that the transaction is illegal and therefore void, even in the case of a covenant or contract under seal. [P 353 C 1]

**(g) Pleading — Mofussil pleadings should not be strictly construed—Point taken in substance properly understood and tried—Court must not throw out good claim only on that point** (Per *Vivian Bose J.*).

Pleadings in the mofussil are not to be construed too strictly and while one cannot allow unlimited license, if a point has been taken in substance and has been properly understood and properly tried, then an Appellate Court would not be warranted in throwing out an otherwise good claim on that ground alone : *A I R 1934 P C 130; A I R 1915 P C 89 and A I R 1916 Nag 84, Rel. on.*

[P 342 C 2]

**(h) Contract—Two separate objects and separate considerations — One object legal while other illegal — Court must give effect to lawful and reject unlawful** (Per *Vivian Bose J.*).

Where a transaction consists of two separate considerations for two severable objects consisting of legal and illegal parts in which the lawful is separable from unlawful, it is always possible to give effect to the lawful and reject the unlawful; in fact that is what the Courts are bound to do unless the whole transaction is prohibited by statute or unless it involves serious moral turpitude or is otherwise against public policy : *A I R 1931 Nag 6 and A I R 1925 Nag 302, Rel. on.*

[P 343 C 2]

✲ **(i) Restitution — Contract being illegal — Goods delivered in pursuance cannot be recovered — Exception to general rule — Contracts made illegal by statute for protecting particular class of persons — In such contracts restitution can be ordered—Basis for general rule of refusing restitution** (Per *Vivian Bose J.*).

When a contract is void for illegality as opposed to being merely nugatory, money paid or goods delivered in pursuance of it cannot ordinarily be recovered unless it is still executory because of the maxim *ex turpi causa non oritar actio* : in fact the test of illegality is the applicability of maxim. But there are several exceptions to this rule, one of which is where the contract is made illegal by statute with the object of protecting a particular class of persons in which case restitution can be ordered : *(1890) 24 Q B D 742 ; (1893) 2 Ch 154; (1907) 1 Ch 300 and A I R 1916 Cal 136, Rel. on; A I R 1925 Nag 302, Dissent.*

[P 344 C 1]

The refusal to direct restitution is not founded on any section of the Contract Act but is because of the matters like public policy, *ex turpi causa*, *in pari delicto* and the like. [P 344 C 2]

✲ **(j) Contract Act (1872), S. 65 — Applicability to contracts void ab initio and void subsequently.**

Per *Vivian Bose J.* — S. 65 applies to agreements which have been void from their inception as well as to contracts which became void subsequent to their making: *A I R 1927 Nag 116, held no longer good law in view of A I R 1922 P C 403.* [P 344 C 2]

Per *Digby J.* — S. 65, Contract Act, does apply to agreements which are void by reason of illegality: *Case law referred.* [P 355 C 2]

**(k) Contract—Statute making contract void—Suit to set aside—Equities can be worked out—Question of limitation and court-fee does not arise** (Per *Vivian Bose J.*).

When the contract is void because prohibited by statute the Court has power to work out the equities and place the parties upon terms. No question of limitation arises, that is to say, in connexion with the Court's powers to place the parties upon terms if the suit is otherwise good, nor does any question of court-fees : *A I R 1923 P C 189, Ref.* [P 344 C 2]

**(l) Trust—Trustee or person holding position of quasi trustee cannot set up adverse title until discharged of office of trusteeship** (Per *Vivian Bose J.*).

No person who has accepted the position of trustee or of quasi trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself : *34 Mad 257, Applied.* [P 346 C 1]

**(m) Contract—Instruments voidable and void — Difference between explained — Claim for restitution—Art. 91, Lim. Act does not apply—Addition of ancillary relief will not change position—Transaction embodied in two instruments— Claim for restitution with reference to separable legal part — Article 142, Lim. Act applies** (Per *Vivian Bose J.*).

There is a wide difference between an instrument which is voidable and one which is void from the beginning. In the former the right under the contract continues until it is avoided and therefore restoration of property handed over in pursuance of it cannot be claimed until the instrument is avoided either by the act of parties or through the Court. In the latter no legal contract ever came into being and so the rights of the parties are determined independently of the deed. There is no need to avoid or cancel that which never existed in the eye of the law and so the substantial relief claimed would not be governed by Art. 91, nor can the mere addition of an ancillary relief for cancellation which need never have been claimed make any difference: *35 Cal 551; A I R 1914 Nag 75; A I R 1928 All 267; 16 Mad 311; 6 I A 110 (P C); 25 All 1 (P C) and 25 Bom 337 (P C), Rel. on.* [P 346 C 2]

These observations apply equally whether the transaction is embodied in one instrument or two. If the legal parts can be separated from the illegal, then the relief of restitution in respect of the bad is not governed by Art. 91. If they cannot, even then Art. 91 would not apply, for the only difference is that the whole would be bad and so void ab initio instead of only a part, nor can the fact that the other side can elect in such a case to make restitution in respect of the bad and keep the good without altering the consideration make any difference. It is Art. 142 that applies to such a case: *A I R 1931 P C 196, Disting.* [P 346 C 2; P 347 C 1]

✲ **(n) C. P. Tenancy Act (1 of 1920), S. 49 —Surrender—Suit to set aside illegal surrender —Surrenderee holding as quasi trustee—Limitation for suit not governed by Tenancy Act—Art. 142, Limitation Act applies.**

(Per *Stone C. J. and Vivian Bose J.*).—In a suit to set aside surrender which was found to be illegal on account of its being part of a transaction which was against the provisions of S. 49, it is not Sch. 2, Art. 1, Tenancy Act that applies to determine limitation but it is Limitation Act that governs such suit. As the surrenderee holds land as a quasi trustee, he cannot set up a title adverse to the cestui que trust and hence it is Art. 142 and not Art. 144, that will govern the suit : *35 Cal 551 (P C) and A I R 1931 P C 196, Discussed.* [P 346 C 1 ; P 348 C 1]

(Per *Digby J.* contra).—Such a case is a clear case of exclusion from possession and it is Art. 1 of Sch 2, C. P. Tenancy Act that will govern limitation and not any Article of the Limitation Act: *35 Cal 551 (P C), Explained; A I R 1931 P C 196, Disting.* [P 357 C 2]

**(o) C. P. Tenancy Act (1 of 1920), Sch. 2, Art. 1 — Intention — Securing freedom from dispute — Attaining quick finality in revenue record** (Per *Digby J.*).

The intention of the C. P. Tenancy Act is evidently to secure freedom from the disputes regarding tenancy land, and set some short time limit to claims stirred up in villages, and to attain quick finality in the revenue records. [P 358 C 1]

**(p) C. P. Tenancy Act (1 of 1920), Ss. 12, 89 —'Transfer' in S. 12 does not include surrender** (Per *Stone C. J.*).

'Transfer' in S. 12 does not include the 'surrender' referred to in S. 89. [P 339 C 2 ; P 340 C 1]

Dr. Sir Hari Singh Gour, M. B. Kinkhede and A. R. Kulkarni — *for Appellants.*

M. R. Bobde — *for Respondents 1 to 4.*

**Stone C. J.**—This appeal raises a point of some importance under the Central Provinces Tenancy Act. Other questions also arise. The relevant facts can be shortly stated. There are five plaintiffs and three defendants. Plaintiff 1 is the next friend of plaintiffs 2 to 5. Plaintiffs 2 and 3 are the minor sons and plaintiff 1 is a major son of defendant 2; plaintiffs 4 and 5 are the minor sons of defendant 3. Plaintiffs and defendants 2 and 3 form a joint Hindu family. That family was indebted and had numerous decrees against them in favour of defendant 1. Those decrees were satisfied by the transaction impugned in this action, and as further consideration defendant 1 expended money in obtaining a lease of land in favour of the minors. The action is to set aside the resulting transfer and surrender on the ground of illegality without in any way restoring to defendant 1 his rights under the decree or his money. The illegality is said, in argument, to consist in a manœuvre whereby defendants 2 and 3 agreed with defendant 1 to evade the law by alienating *sir* land without obtaining the requisite sanction. The mode whereby this was to be achieved was to sell the family share (a four annas' share) in a village wherein the family had *sir* rights excepting the *sir* rights and then, the vendors being thus, it is said, put in the position of occupancy tenants, to surrender the occupancy tenancy. The whole, it is said, was one transaction, agreement, sale deed, and surrender deed all being approximately of the same date and the transfers of exactly the same date, namely 14th April 1923.

It will be observed that this is a suit brought by sons impugning the acts of their fathers, as it is now said in argument, on the ground of illegality. The fathers have not gone into the box to give the Court the benefit of their evidence; the transaction attacked had as one result the release of the family from a load of debt and the gain by the family of a valuable lease in another village. The result, if the suit succeeds, will be that the family will gain all these advantages and still retain their property as before. It is the sort of case which bears all the signs of collusion between the adult members of the family who are accused of being parties to the illegality and the minor members who appear as innocent plaintiffs not *in pari delicto* either with the vendors or the purchaser. Such a case calls for careful scrutiny: *see* 56 All 123[1] at pp. 130 and 131. On the other hand it is the policy of the law to prevent the land-working classes being driven into the state of landless proletariat so far as may be, and accordingly it is provided by S. 49, Central Provinces Tenancy Act that alienations of *sir* land, that is home farm land in cultivation, shall be ineffective unless the sanction of the appropriate official has first been obtained. As this section is the one under consideration, it is desirable to reproduce it in extenso. It runs as follows:

> (1) Notwithstanding any contract to the contrary, and, save where sanction has been given in accordance with the provisions of this Act, a proprietor, who temporarily or permanently loses, whether under a decree or order of a Civil Court or a transfer or otherwise, his right to occupy any portion of his sir land as a proprietor, shall, at the date of such loss, become an occupancy tenant of such sir land, and any tenancy right granted by him in such sir land for a period exceeding five years, without the sanction of a Revenue Officer, shall thereupon lapse.
>
> (2) Notwithstanding anything contained in the Registration Act, 1908, no officer empowered to register documents thereunder shall admit to registration any document which purports to transfer the rights of a proprietor in his sir land, without reservation of the right of occupancy specified in sub-s. (1), or to grant tenancy rights in sir land for a period exceeding five years, or to be an agreement for such transfer or grant, unless sanction to such transfer or grant has been endorsed on the document in such manner and by such authority as may be prescribed by rules made under S. 109.
>
> (3) Nothing in this section shall affect rights under any document duly registered before 21st October 1898, and on any transfer being made, decreed, or ordered in pursuance of such document, the rights of the transferee to occupy and cultivate such sir land shall accrue.
>
> (4) Nothing in this section shall apply to land in the Sambalpur territory recorded as bhogra in the Record of Rights of the current settlement.
>
> (5) Nothing in this section shall apply to a lease, for a term not exceeding the term of settlement, of a village of any estate to which the Commissioner may declare this sub-section applicable.
>
> (6) Nothing in this section shall affect any loss of possession of any sir land in the course of a partition.

I regard it of the utmost importance that this safeguard should be maintained in full force and effect. I regard it as desirable that collusive actions having as their real object to defraud alienees who have given consideration should fail. The difficulty lies in achieving both ends in this case. Before coming to the main point it is desirable to put on one side the question raised as to limitation. It is said that here Sch. 2, Art. 1, Tenancy Act, applies. That provides as follows:

> For possession of a holding by a person claiming to be a tenant from which he has been dispossessed or excluded from possession by any person — "Two years" from the date of dispossession or exclusion.

Though plaintiffs 2 to 5 are minors, that does not extend the time, it is said, because of S. 104, Tenancy Act, which provides as follows:

> (1) The suits and applications specified in Sch. 2 annexed to this Act shall be instituted and made within the time prescribed in that Schedule for them respectively; and every such suit instituted

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[1] Jagannath v. Shri Nath, (1934) 21 A I R P C 55=147 IC 903=56 All 123=61 IA 150 (PC).

and application made after the period of limitation so prescribed shall be dismissed.

(2) Any suit which would be barred under sub-s. (1) may be instituted within one year next after the commencement of this Act, or within the period of limitation previously in force, whichever period expires first.

(3) If the payment of any rent has been suspended under S. 65, the period of suspension shall be excluded in the computation of the period of limitation prescribed for a suit for the recovery of such rent.

(4) Subject to the provisions of sub-s. (1), the provisions of the Limitation Act, 1908 with the exception of Ss. 6, 7, 19 and 20 thereof shall apply to suits and applications under this Act.

That excludes S. 6, Lim. Act which is the section extending the time in case of persons under a legal disability. But it is said, that is a section which ought very strictly to be construed and one which relates only to "suits and applications under this Act." It is added that this is not a suit under the Tenancy Act but is a suit seeking to set aside two alienations, (1) a sale deed and (2) a surrender on the ground that they are illegal and "contrary to law." On the other hand, S. 29, Lim. Act has to be borne in mind. In considering whether a particular remedy is barred, one looks not at the relief given but at the cause of action, that is at the necessary allegations which have to be made and found before the relief sought can be given. In very many cases each falling under a different Article in the Schedule to the Limitation Act, the same remedy is obtained, e.g. a decree for a sum of money. All the attacks expressly pleaded failed, but in the course of the case an infraction of S. 49, Tenancy Act emerged. Whether pleaded or not the Court has to take notice of that illegality. The result is that defendant 1 has to be declared a quasi trustee. Are we to stop there leaving the parties to start a new litigation on that basis, or can we settle the matter once and for all in this litigation? I think that we can dispose of the matter fairly in this suit. **Illegality being established, even though not pleaded, it follows that the surrenderees have to be placed in the position of quasi trustees. The position being reached, the Court must declare that the surrender being illegal, the persons in possession under it hold as quasi trustees, that such quasi trust should be determined and that defendants do relinquish possession on terms that are equitable and that have the effect of restoring as nearly as may be the status quo.**

**Though that result is similar in effect to that which a tenant would obtain if he** sued a landlord who had wrongly dispossessed him in that in both cases the plaintiff gets possession, the two causes of action are entirely different. The decree which results in the plaintiff getting possession is not directed against the defendant as a person dispossessing but as a person in the position of a trustee holding for his cestui que trust which trust is being determined. I have deliberately put the matter as broadly as possible. How different such a cause of action is from the kind envisaged by Sch. 1, Central Provinces Tenancy Act is apparent from a perusal of S. 84, Trusts Act. That section justifies the Court's treating the surrenderees in this case as burdened with an obligation in the nature of a trust (S. 80). The surrenderees have therefore in the eye of the law ever since the illegal surrender, been holding this property for the benefit of the surrenderors as quasi trustees. But the Court does not stop at declaring them quasi trustees. It can and should make all necessary orders that will place the parties in the position they ought to be in, viz. the plaintiffs' families through their respective managers will be in possession as occupancy tenants.

The next question is as to the maintainability of the suit. This branch of the argument rests upon Ss. 12, 13, 49 and 105 of the Tenancy Act. It is said that S. 12 states the powers of transfers, S. 49 imposes restrictions upon transfer, Sec. 13 gives the remedy if the provisions imposing restrictions are violated and this remedy is by S. 105, one which lies before a Revenue Officer and not before a Civil Court whose jurisdiction is excluded. This argument proceeds on the assumption that a surrender under S. 89 of the Tenancy Act is a transfer within S. 12, for, it is only the surrender that falls within the powers conferred by S. 12 or the provisions of S. 13 both sections being concerned with transfer by an "occupancy tenant." Here the alienations were two (1) a sale deed by proprietors, and (2) a surrender by occupancy tenants. **The sale transfer does not come under S. 12, for that limits the power of an occupancy tenant. It does not confer rights; it restricts rights of transfer. These restrictions are imposed where the transferor is an occupancy tenant. It does not apply where the transferor is a proprietor.**

**It makes it impossible to give any fair construction to S. 89 if one holds that "transfer" in S. 12 includes the "surrender"**

referred to in S. 89. It is not of course sufficient, in order to take a case out of S. 12, to call the transaction a surrender, if in point of fact it is a transfer, and this we understand to be the ratio decidendi of 31 N L R Sup 96.[2] There the transaction resulted in the tenancy right being alienated to a co-sharer who was not the lambardar. The alienation was called a surrender but in fact it was a transfer; the tenant did not surrender to the person standing in the position of his landlord, but transferred to a co-sharer. In the present case the tenants purported to surrender to their landlord and the transaction must be treated as a surrender under the provisions of S. 89, not as a transfer under the provisions of S. 12. It follows that S. 13 does not apply and the jurisdiction of a Civil Court is not ousted. That leaves the main question outstanding. It should be noted that there is here an appeal and a cross-appeal. The lower Appellate Court has held that the sale is valid and binding and that the surrender is not. The only fragment of the cross-appeal pressed is that found in paras. 13 and 14 of the cross-objections. It is said not only the surrender but also the sale should have been set aside, both being part of one transaction. It is to be observed that the ground on which it is said, in the cross-objections, that the sale should be set aside is that the sale was a void, not an illegal, transaction: *see* page 164 of the Paper Book. If the issues are referred to, it will be found that the only issue which raises the question whether the sale deed is binding is Issue (9); the only issues which challenge the surrender are Issues (10) as read with (11). Issue (9) challenges the sale on the ground of lack of consideration, the decrees paid off being, it is said, in respect of suits in which the minors were not parties and in respect of debts not binding on the minors. These are points not now in dispute. Issue (10) raises the questions:

> (a) Whether the lands described in para. 10 of the plaint were sir and khudkasht at the time when defendants 2 and 3 executed and registered a surrender deed in respect of it? (b) Whether they executed the surrender deed before or after the sale deed of the same date?

It is now important to note how the rest of the issue is framed. It will make for clearness to express the sense. Alternative attacks are made according as it is found that it was (a) before or (b) after. If "before," then the issue is raised: "Is the transfer by surrender of *sir* and khudkasht land valid and approved by the Tenancy Act?" If "after", then the issue is: "Is the plaintiff's claim within two years from the time defendant 1 entered into possession of these lands in pursuance of the surrender deed?" Issue 11 raises a question whether defendants 2 and 3 had not become occupancy tenants under an earlier alienation. That earlier alienation has been held to be nominal and of no effect and that conclusion is not contested. It does not carry the matter any further though it shows the kind of persons defendants 2 and 3 are. The materiality of that issue is to be found in the fact that it was clearly perceived that there is a vast difference between purporting to surrender before you have become a tenant and surrendering after you have become a tenant. What the plaintiffs were here saying was that the surrender was before the sale and so 39 All 173[3] applies. The answer that was being made to that was: even before the sale by defendants 2 and 3 to defendant 1, defendants 2 and 3 were occupancy tenants because they had sold to a third party before. No, say defendants 2 and 3, through the mouths of their children, that was a feigned transaction; it had no effect therefore, we were not, before the sale, occupancy tenants, and therefore, as we say the surrender was before the sale, the surrender is void. The only allegation of illegality (apart from allegations that the mortgages which resulted in decrees which were satisfied by the transfers were illegal) touching the sale transaction is to be found in para. 9 of the plaint in the following terms:

> The debt mentioned in this sale deed was not genuine. Due to the said same, this sale deed being against the law is illegal.

As regards the surrender, referred to in the plaint as a rajinama, the allegation of illegality is contained in para. 10. The substance of that allegation is that the surrender was registered before the sale deed was registered and therefore was contrary to the Tenancy Act. This allegation was evidently founded on the view, now decided by their Lordships of the Privy Council to be wrong, that a transfer dates from registration. Thus the allegation raised in substance the same point as the issue, namely that the surrender being before the sale, it was by persons not tenants and therefore inoperative. The prayer is simply for possession ; there is no claim for a declaration that the transfer or surrender was illegal or void; there is no prayer that they or either of them should be delivered up to be cancelled; there is no allegation that they sprang out of an illegal scheme to circumvent the Tenancy Act. Possession is not sought on the ground that defendant 1 is a quasi trustee or that the quasi trust should be determined. This result however follows as a matter of law from facts that have been proved by evidence admissible under the allegations and issues in the case. It is to be noted that the subject-matter of the surrender is said to be *sir* and khudkast land and from the order dated 28th January 1929 this khudkast, after surrender, is stated to have "ripened into *sir* land". Nothing was made of this in argument before us. In the written statement para. 8 (a), it is stated that the subject-matter of the surrender was neither *sir* nor khudkasht land but was occupancy land and accordingly the surrender was not illegal. In the plaintiffs' reply (which, as so often happens, is not a reply so much as a re-statement of old and a statement of new allegations) the attack on the sale deed is restricted to an attack upon the consideration given for the transfer (*see* paras. 9 and 10) and upon the allegation that if there was consideration "it was not for the benefit of the minors or for legal necessity". There is no further attack on the surrender.

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[2] Kanhaiya Kunbi v. Sitaram Kunbi, (1936) 23 A I R Nag 18=159 I C 862=31 N L R Sup 96.

[3] Moti Chand v. Ikram-Ullah Khan, (1916) 3 A I R P C 59=39 I C 454=39 All 173=44 I A 54 (P C).

In a suit of this kind and one bearing the marks of collusion, and consequently one in which the allegations and the evidence tendered by the plaintiffs have to be scrutinized somewhat closely, it has been found that there is some illegality which vitiates the surrender. If the judgment appealed from is upheld, it follows that the plaintiffs (as originally constituted) get back the subject-matter of the surrender, and the transferee is left without the land and without his debts which have long since been time-barred. That is not a satisfactory result. The question is : Does the law compel not merely the avoidance but the avoidance for an illegality of a nature which prevents any order of restitution of the whole or the part ? A Court can and must take notice of an illegality which emerges in the course of a case although not pleaded. But a Court should be very slow to do so and should not go out of its way to assume facts or draw inferences from facts capable of another construction to tend to the conclusion that there has been illegality of so grave a nature neither pleaded nor raised by the issues. It should be still more hesitant if the suit appears collusive. In this case, pursuant to 39 All 173,[3] I find it impossible to uphold the surrender. There have here emerged facts indistinguishable from those present in 39 All 173,[3] from which the Court must infer that the transaction falls within the mischief struck at by S. 49, C. P. Tenancy Act. The result will not be to make the whole transaction void or illegal. Applying S. 49 has the result of making the surrender inoperative making the surrenderees quasi trustees, and making it just and equitable now to direct that the quasi trust shall determine, the family be restored to possession on the terms that they repay to defendant 1 the amount they have gained.

This is a case of illegality created by a statute for the protection of a particular class to which the plaintiffs belong. In such a case the member of the class when relying on the statute can be put upon terms to give up all benefit obtained under the impugned transaction: *see* (1907) 1 Ch 300.[4] The effect of applying the appropriate remedy is to restore these families to the position they would have been in, so far as possible, had there been no surrender. That can best be done if defendants 2 and 3 are transposed as plaintiffs. They are transposed accordingly. The remedy must be given on terms, viz. that the plaintiffs (i. e. the plaintiffs who sued together with the transposed plaintiffs) must return what they got under the surrender. The surrender is declared void and defendant 1 is declared a quasi trustee of the subject-matter. The quasi trust is determined and it is directed that the surrenderors be placed in possession of the *sir* land on the following payment being made by the plaintiffs. There shall be paid to defendant 1 the sum of Rs. 7267-3-10. Neither interest nor damages are fairly due in the circumstances. The plaintiffs' claim, so far as the subject-matter of the sale deed is concerned, is dismissed ; so far as the subject-matter of the surrender is concerned, subject to the payment of the sum of

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[4] **Lodge v. National Union Investment Co. Ltd. (1907) 1 Ch 300=76 L J Ch 187=96 L T 301 =23 T L R 187.**

Rs. 7267-3-10, possession in occupancy right is decreed. Each side will bear its own costs throughout including appeal and cross-objections.

**Bose J.**—I have had the advantage of reading the judgment of my learned brother Digby J. I regret I am unable to accept his conclusions and so am writing a separate judgment. I agree that the two deeds of sale and surrender must be regarded as colourable and that when one looks behind them to the real transaction which the parties intended to effect we find that they tried (1) to effect a sale of the entire rights which the transferor possessed in the property transferred, that is to say, of both the proprietary rights as well as the ex-proprietary tenancy rights in the *sir*, or to use colloquial language, the cultivating rights in the *sir*, and (2) that they deliberately separated the considerations for these two different objects. It was argued that the Court is powerless to look behind a transaction which has been reduced to writing and determine its real nature. It was said that S. 92, Evidence Act, bars the way and a number of Privy Council decisions were cited which are supposed to support this proposition. 53 Bom 230[5] is typical of that group. It is enough to say that their Lordships of the Privy Council decided otherwise in 39 All 173,[3] a case which I find it impossible to distinguish from the present. All that S. 92 excludes is oral evidence to contradict, vary, add to or subtract from the terms of a contract which has been reduced to writing. It does not preclude a party from showing that the writing was not really the contract between the parties but was only a fictitious or colourable device which cloaked something else. Benami transactions which have been upheld by the Judicial Committee on numerous occasions afford a common illustration of this rule. In any case it is always permissible to look to the surrounding circumstances to see in what manner the language of a document was related to existing facts: 47 Mad 729[6] at p. 738. When we do that, we find that before the sale there was already an agreement to surrender the occupancy rights soon after the sale had been effected, which is exactly what 39 All 173[3] strikes at. The documents themselves afford intrinsic indication of this. The sale deed, which it is said, was executed first, speaks of the sale having been effected "after getting the mortgage rights in mauza Dongargaon relinquished." This village was not sold nor had the amount of the decree obtained against it anything to do with the sale consideration. It related exclusively to the deed of surrender. The only possible explanation then is that the deeds were colourable and that the real transaction was what I have stated above.

Of course whether the writing was the real agreement between the parties or was only colourable is naturally a question of fact which must be decided afresh each time it arises. In the case before us there is a concurrent finding by two Courts that the two documents here are colourable and that the real transaction between the parties was what I have just described: at least that is the substance of the decisions though the learned Judges have not used quite the same language. I am not impressed with the objection that this matter was not pleaded. The plaintiffs did say that the two transactions offended against the provisions of the Tenancy Act and so were illegal. It is true that they advanced other grounds as well but none of them are covered by the provisions of the Tenancy Act. On the facts alleged this is the only ground on which the matter could fall within the purview of that Act. It was so understood by both the lower Courts and I have no doubt was similarly interpreted by the parties themselves. It is significant that this objection to the sufficiency of the plea is not to be found in the voluminous grounds of appeal which have been filed here. It has repeatedly been held that pleadings in the mofussil are not to be construed too strictly and while I am not prepared to allow unlimited license, if a point has been taken in substance and has been properly understood and properly tried, then I do not think an Appellate Court would be warranted in throwing out an otherwise good claim on that ground alone: *see* 9 Luck 178[7] at p. 184, 20 C W N 297[8] at p. 303 and 12 N L R 90[9] at p. 93.

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[5] Bomanj Ardeshir v. Secretary of State, (1929) 16 A I R P C 34=114 I C 1=53 Bom 230=56 I A 51 (P C).

[6] Narasingerji v. Parthasaradhi Rayanim Garu, (1924) 11 A I R P C 226=82 I C 293=47 Mad 729=51 I A 305 (P C).

[7] Someshwar Dutt v. Tirbhawan Dutt, (1934) 21 A I R P C 130=149 I C 480=61 I A 224=9 Luck 178 (P C).

[8] Haji Umer Abdul Rahiman v. Gustadji Muncherji Cooper, (1915) 2 A I R P C 89=34 I C 268=20 C W N 297 (P C).

[9] Vishwanath v. Shankerlal, (1916) 3 A I R Nag 84=34 I C 704=12 N L R 90.

I am satisfied that no injustice is being done to the contesting defendant here because the lower Courts have virtually accepted his own version of the incident. When examined as D. W. 9 he stated in examination-in-chief that the agreements to sell and surrender had both been entered into before the actual documents were executed and that though the original intention was to execute them on separate days they eventually decided to carry them through on one day. This is not just a stray sentence in the deposition finding a place there because of a slip of the tongue, for the witness spoke about it at length in his examination-in-chief and when cross-examined about it adhered to that story. The facts given by him bring the transaction within the four corners of 39 All 173.[3] In any case I agree with my learned brother that Courts are bound to take notice of any illegality to which their attention is drawn whether it was pleaded or not. Accepting then that the two deeds were colourable and that the real transaction between the parties was as I have stated above, what was its legal effect ? S. 49 (1), Tenancy Act enacts that :

> Notwithstanding any contract to the contrary . . . . a proprietor who . . . . loses . . . . under . . . a transfer . . . . . . his right to occupy any portion of his sir land as a proprietor shall at the date of such loss become an occupancy tenant of such sir land.

This clearly means that there is no prohibition on transfer ; it is perfectly lawful, but the effect of it is that the proprietor becomes an occupancy tenant of the *sir* at the date of the transfer and that this cannot be prevented by any contract to the contrary. Their Lordships of the Privy Council go further and state that "the policy of the Act is not to be defeated by any ingenious devices, arrangements or agreements" and that "all such devices, arrangements and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void." The anxiety of the Legislature to protect this class is so great that S. 49 (2) of the Act prohibits registration of any document which does not reserve "the right of occupancy specified in sub-s. (1)." The object of this prohibition is clearly to bring to the notice of the parties exactly what their bargain amounts to under the law and if they have understood the position aright to enable them to amend their document so as to make their meaning clear beyond all possibility of doubt, and if not, then to let them realize that they have entered into a transaction one of whose objects is prohibited by law. Their Lordships of the Privy Council make it clear that the illegal part of the transaction is not the sale of the *sir* but the arrangement or device which attempts to evade the provisions of the Act : in their case the relinquishment or surrender, which happens to be the case here as well. What then is the effect of that? As I have said the Act nowhere prohibits a transfer as such; all it says is that the proprietor becomes at that moment an occupancy tenant of the *sir* despite any contract to the contrary. Therefore it clearly contemplates cases in which such a transfer can be upheld in spite of a contract to the contrary. Exactly when this can be done and when not, is determinable not under the Act but under the general law of the land. S. 24, Contract Act states that:

> If any part of a single consideration for one or more objects or any one or any part of any one of several considerations for a single object is unlawful the agreement is void.

Therefore if this transaction had consisted of a single consideration for the two objects contemplated, namely the sale of the proprietary rights (as distinguished from the occupancy rights) together with the occupancy rights (which we usually somewhat inaccurately call cultivating rights in these Provinces), then the whole would have fallen to the ground under this section unless the transferee had been content to accept the proprietary rights alone for the entire consideration and forgo the occupancy rights. But since the transaction consists of two separate considerations for two severable objects we are left with a contract consisting of legal and illegal parts in which the lawful is separable from the unlawful. In such a case it is always possible to give effect to the lawful and reject the unlawful; in fact that is what the Courts are bound to do unless the whole transaction is prohibited by statute or unless it involves serious moral turpitude or is otherwise against public policy. *See* Ss. 57 and 58, Contract Act. This rule was applied and in my opinion rightly, to this very class of cases in 27 N L R 113[10] at p. 115 and 22 N L R 136[11] at p. 141. As I have said the whole transaction in this case is not prohibited by statute; on the contrary the part of it relating to the transfer of the proprietary rights is expressly allowed. Therefore under this rule since the considerations are separable that portion can, in my opinion, be enforced and it is only the surrender which is of no effect and that brings me to the next question: can the parties be placed upon terms? Can a refund of that portion of the consideration which was apportioned to the surrender be ordered ? As I view the law it can. There is no doubt that when a contract is void for illegality as opposed to being merely nugatory, money paid or goods delivered in pursuance of it cannot ordinarily be recovered unless it is still executory because of the maxim *ex turpi causa non oritur actio*; in fact the test of illegality is the applicability of the maxim. But there are several exceptions to this rule one of which is where the contract is made illegal by statute with the object of protecting a particular class of persons to which the plaintiff belongs. *See* 7 Halsbury's Laws of England, 175-176 and (1890) 24 Q B D 742[12] and (1893) 2 Ch 154.[13]

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[10] **Dharamchand v. Jhamsa, (1931) 18 A I R Nag 6=130 I C 91=27 N L R 113.**

[11] **Bhagwant v. Anandrao, (1925) 12 A I R Nag 302=86 I C 515=22 N L R 136.**

A little reflection will show that this must be so, for otherwise, the maxims *ex turpi causa non oritur actio* and *in pari delicto* would put the plaintiffs out of Court and thus perpetuate the very mischief which these Acts are designed to avoid, namely to save certain classes of persons from the consequences of their own folly. In all such cases the Courts have power to place the plaintiff upon terms. *See* 1 Smith's Leading Cases, Edn. 13, p. 442. This was done in (1907) 1 Ch 300,[4] and restitution was allowed by the House of Lords in a case where persons had deposited money in an ultra vires banking concern (ultra vires because it had been prohibited by statute) on general equitable grounds for which there was no direct authority, even though the depositors knew and the bank knew that their actions were legally invalid. These principles were applied in India in 43 Cal 790.[14] I am therefore of opinion that the plaintiffs can be placed upon terms and respectfully dissent from the view in 22 N L R 136.[11]

It was argued that no such order can be passed because S. 65, Contract Act relates only to void and not illegal agreements. This overlooks S. 23 which states that all agreements of which the object is unlawful are void, and among the unlawful objects enumerated are those forbidden by law and those whose nature is such that if permitted would defeat the provisions of any law. The refusal to direct restitution is not founded on any section of the Contract Act but is because of the matters with which I have dealt: public policy, *ex turpi causa*, *in pari delicto* and the like. If they do not apply then this section at any rate is not a bar. To this extent I agree with my learned brother. I may also observe in passing that 23 N L R 8[15] upon which the learned trial Judge relies is no longer good law in so far as it holds that S. 65 is applicable when there is not and could not have been any contract at all, because of the Privy Council decision in 45 All 179.[16] Their Lordships point out that S. 65 applies to agreements which have been void from their inception as well as to contracts which became void subsequent to their making. As regards the objection about limitation in respect of this question, it was urged that the defendants should really have made a counter claim under S. 65 and that the limitation for this would run from the date of the void agreement: 50 Cal 929.[17] If the transferee having lost his property had been suing for a refund of consideration, then assuming that such a suit would lie (and about that I say nothing), I have no doubt that this would be so. But so long as the transferee is in possession I am unable to see how a right to counterclaim can arise. In my opinion the power rests in the Court and is discretionary with it. When the contract is void for the reasons which obtain here the Court has power to work out the equities and place the parties upon terms. No question of limitation arises, that is to say, in connexion with the Court's powers to place the parties upon terms if the plaintiffs' suit is otherwise good, nor does any question of court-fees.

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[12] Kearley v. Thomson, (1890) 24 Q B D 742=59 L J Q B 288=63 L T 150=38 W R 614=54 J P 804.

[13] Barclay v. Pearson, (1893) 2 Ch 154=62 L J Ch 636=3 R 388=68 L T 709=42 W R 74.

[14] Mathura Mohan Saha v. Ram Kumar Saha and Chittagong District Board, (1916) 3 A I R Cal 136=35 I C 305=43 Cal 790=23 C L J 26=20 C W N 370.

[15] Janardhan v. Vishwanath, (1927) 14 A I R Nag 116=98 I C 650=23 N L R 8.

[16] Harnath Kunwar v. Indar Bahadur Singh, (1922) 9 A I R P C 403=71 I C 629=45 All 179=50 I A 69=26 O C 223 (P C).

[17] Annada Mohan Roy v. Gour Mohan Mullick, (1923) 10 A I R P C 189=74 I C 499=50 Cal 929=50 I A 239 (P C).

Before passing on to the next point I will dispose of another objection in connexion with this matter. It was urged that the lower Courts have both found that there was a single consideration for the two deeds, and that though it has been divided into two parts the division was purely arbitrary and nominal and was not intended to represent a real apportionment of consideration. In my opinion the findings are exactly the opposite. Both the Courts hold that though the two deeds represent one transaction they are separable, being for distinct considerations, and they apply the law laid down in 22 N L R 136,[11] to those facts. The first Court says so distinctly in para. 20 of its judgment and the lower Appellate Court distinguishes A I R 1928 Nag 232[18] at page 236 on this very ground in para. 19, and follows the reported ruling which I have just cited. It then concludes "I therefore agree with the lower Court that the whole transaction should not be set aside." It is true there are earlier passages in both judgments which if read by themselves might suggest a contrary conclusion, but, on reading the judgments as a whole, I agree with my learned brother that the lower Court's findings are as above. In any case neither side has pleaded this and not only does the plaintiffs' evidence not disclose it but defendant 1's evidence which though disbelieved stands unrebutted shows exactly the opposite. He swears that the agreements were not only quite distinct but were separated by an interval of several days. As I say he has been disbelieved about this. The lower Courts consider that there was no separation in point of time, but it was nevertheless open to them to conclude on this evidence coupled with the documents and other circumstances that though there was only one set of negotiations, they concluded in the manner indicated above.

I now turn to the question of limitation as against the plaintiffs' right of suit. It was argued on behalf of the defendants that the plaintiffs became occupancy tenants the moment the transfer was effected and so their right to recover possession is barred by Article 1 to Sch. 2, Tenancy Act. Authority for this is to be found in 21 All 204,[19] although a different view was taken in 8 All 256.[20] Of course if the special law of limitation prescribed in the Tenancy Act applies then there can be no doubt that this remedy is barred, but in my opinion it does not. Article 1, Sch. 2 is confined to persons who seek possession of a holding from which they have been "dispossessed or excluded from possession." It was suggested that this cannot apply when the tenant voluntarily surrenders the land as here, but as at present advised I am not prepared to go as far as that. I prefer to base my decision on another ground and leave this question open. In my opinion there is a quasi trust in such cases under S. 84, Trusts Act by virtue of which the transferee holds the property for the benefit of the transferor, and if he does that, then as I view the law there is neither dispossession nor exclusion from possession in the sense in which those words are used in the schedule. Under S. 95, Trusts Act he holds as if he were a trustee for the transferor and under S. 14 he is prohibited from setting up any adverse interest. I cannot regard this as constituting either dispossession or exclusion from possession within the meaning of Sch. 2, Tenancy Act and I respectfully differ from my learned brother.

It is true that S. 84 appears at first sight to differentiate between an illegal purpose and one whose effect would be to defeat the provisions of any law, but in my opinion the latter clause, which appears as the last clause in the section, is designed to cover the exceptions to the rules about illegality which I have pointed out above. It is to be observed that the clauses are disjunctive. Therefore in my opinion this case is not covered by the schedule to the Tenancy Act. But it was argued that wrong-doers are expressly excluded from the definition of trustee for the purposes of limitation and reference was made to S. 2 (11), Lim. Act. The obvious answer is that the defendants are not trustees, they only hold as if they were trustees, and also that S. 2, Lim. Act does not apply to suits under the Tenancy Act, which, of course, includes the suits referred to in the schedule, because S. 104 (4) expressly excludes it, and once this special bar is removed then a suit against a wrong-doer would be governed by the 12 years' rule, but I prefer to found on a broader basis. The word wrong-doer has not been defined but it can certainly not mean a person who has entered into possession as a trustee and who has committed a breach of trust, for otherwise much of the usefulness of S. 10 would disappear and Art. 98 would be rendered meaningless; also such an interpretation would be contrary to the decision of the Judicial Committee in 34 Mad 257[21] at p. 265 where their Lordships say:

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[18] **Khushal v. Labhan Rao, (1928) 15 A I R Nag 232=110 I C 351.**

[19] **Dalip Rai v. Deoki Rai, (1899) 21 All 204=1899 A W N 36.**

[20] **Harjas v. Radha Kishen, (1886) 8 All 256.**

> To such a contention advanced under such circumstances it would be a sufficient answer to say that no person who has accepted the position of trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself.

In my opinion these remarks apply with even greater force when the law makes him a qausi trustee whether he will or no and states that he must hold the property for the benefit of the persons in whom the real interest lies, and that he must hold it so far as may be as if he were a trustee. I cannot see that there is any difficulty in so holding. As I see it, the definition refers to a person who enters into possession of property without any semblance of right and thereafter endeavours to resist a suit for possession against a trespasser whom he has dispossessed. In such circumstances the possessory title of the prior trespasser is deemed superior to that of the later wrong-doer and the latter cannot be allowed to set up a *jus tertii*, cannot be heard to say that he is a trustee on behalf of the rightful owner. It is the type of case I had occasion to deal with recently in Second Appeal No. 279-B of 1935.[22] I am clear then that the special law of limitation prescribed in Article 1 to Sch. 2, C. P. Tenancy Act does not apply and so we are thrown back on the Limitation Act.

We have next to determine which Article of that Act applies. It was suggested that the suit is really under S. 38, Specific Relief Act for cancellation of an instrument. I do not think it is. It has certainly not been framed as such and even if it had been, the addition of a relief to that effect could not have altered its real character so far as the relief for possession is concerned. One has to look beyond the mere verbiage of the plaint to the real relief claimed, that is to say to the real relief which according to the law the plaintiff is bound to seek before he can succeed: 23 N L R 73,[23] I L R 1937 Nag 254[24] at p. 258 and 57 All 278[25] at p. 285. There is in my opinion a wide difference between an instrument which is voidable and one which is void from the beginning. In the former the right under the contract continues until it is avoided and therefore restoration of property handed over in pursuance of it cannot be claimed until the instrument is avoided either by the act of parties or through the Court. In the latter no legal contract ever came into being and so the rights of the parties are determined independently of the deed. There is no need to avoid or cancel that which never existed in the eye of the law and so the substantial relief claimed would not be governed by Art. 91; 35 Cal 551[26] at pp. 559-560 and 10 N L R 133[27] at p. 136; nor can the mere addition of an ancillary relief for cancellation which need never have been claimed make any difference: 50 All 510,[28] 16 Mad 311[29] at p. 314: *see* also 6 C L R 12[30] at p. 15, 25 All 1[31] at p. 16 and 25 Bom 337[32] at p. 350.

I think these observations apply equally whether the transaction is embodied in one instrument or two. If the legal parts can be separated from the illegal then the relief of restitution in respect of the bad is not governed by Art. 91. If they cannot, even then Art. 91 would not apply, for the only difference is that the whole would be bad and so void ab initio instead of only a part. Nor can the fact that the other side can elect in such a case to make restitution in respect of the bad and keep the good without altering the consideration make any difference. That is a privilege which the promisee can always claim except when the maxims *ex turpi causa* and *in pari delicto* apply without reservation. The general principle is to be found in S. 63, Contract Act. It relates, of course, to a time when the contract, or at any rate, a part of it, is still executory, but it means that in these circumstances performance will be compelled with that variation. How much more then must the rule apply when the contract though illegal, has been wholly performed on both sides, provided, of course, that no injury results to the promisor; and in order to prevent that the Courts have ample power to place the parties upon terms, such for instance, as compelling the promisor to account for mesne profits. But all this is a matter of defence and the defence to an action cannot modify or alter the substance of the plaintiffs' right of suit though it may sometimes help to explain it: I L R 1937 Nag 254[24] at p. 259.

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[21] Srinivasa Moorthy v. Venkata Varada Aiyangar, (1911) 34 Mad 257=11 I C 447 = 38 I A 129=(1911) 2 MWN 375=21 MLJ 669 (P C).

[22] Pannalal v. Bhaiyalal, *Reported in* (1937) 24 A I R Nag 281=173 I C 680.

[23] Bhagwan Appa v. Shivappa, (1927) 14 A I R Nag 248=101 I C 770=23 N L R 73.

[24] Shankersa v. Punamchand, (1937) 24 A I R Nag 129=171 I C 271=I L R 1937 Nag 254.

[25] Bindhyachal Chand v. Ram Gharib Chand, (1934) 21 A I R All 993=152 I C 1=1934 A L J 973=57 All 278 (F B).

[26] Petherpermal Chetty v. Muniandy Chetty, (1908) 35 Cal 551=35 I A 98=12 C W N 562 =7 C L J 528 (P C).

[27] Husen v. Rajaram, (1914) 1 A I R Nag 75=26 I C 813=10 N L R 133.

[28] Muhammad Nazir v. Mt. Zalaikha Bibi, (1928) 15 A I R All 267=109 I C 54=50 All 510=26 A L J 289.

[29] Sundaram v. Sithammal, (1893) 16 Mad 311= 3 M L J 144.

[30] Raj Bahadoor Sing v. Achumbit Lall, (1881) 6 I A 110=6 C L R 12=4 Sar 15 (P C).

[31] Rampal Singh v. Balbhaddar Singh, (1903) 25 All 1=29 I A 203=8 Sar 340 (P C).

[32] Malkarjun v. Narhari, (1901) 25 Bom 337=27 I A 216=2 Bom L R 927=7 Sar 739 (P C).

In my opinion Art. 142, Limitation Act applies to such a case. I confess that at first upon a somewhat cursory reading of 10 Pat 851,[33] I thought that Art. 120 would apply but I am obliged to my learned brother Digby J. for saving me from error. I now find that at p. 868 their Lordships observe that if the title had resided in the plaintiff and he had been the owner of the property claimed, the 12 years' rule would have applied, but inasmuch as he was not the owner the claim fell within Art. 120. The question then is whether Art. 142 applies or Art. 144. I am clear that Art. 144 does not. In 10 Pat 851,[33] their Lordships state at p. 863 that it applies only when the person sued in holding adversely to the plaintiff and without title, and at page 868 they say:

> This would, in their Lordships' opinion, depend upon whether he could rightfully assert that he was the owner of the properties and that the appellant's possession was that of a trespasser.

As I have said S. 95, Trusts Act states that a person governed by S. 84 must perform so far as may be the same duties as a trustee and that he is subject so far as may be to the same liabilities and disabilities (with two exceptions) "as if he were a trustee". One of the disabilities of trustees is that they cannot set up an adverse title (S. 14). There is no difficulty in applying such a provision here; therefore as I see it Art. 144 cannot apply. I do not feel the difficulty which my learned brother experiences about S. 14, Trusts Act. The fact that a trustee or a quasi trustee may never set up an adverse title does not mean that he cannot in a suitable case set up the bar of limitation; all that it means is that he cannot use Art. 144. The two are not the same. But of course the defendants here are not trustees. S. 4, Trusts Act, expressly prohibits a trust in such cases. They are subject to the same disabilities, but they cannot claim the same rights and privileges nor will the title reside in them; that has been with the plaintiffs all along. What then is the difference between Article 1 to Schdule 2, Tenancy Act, and Art. 142. Lim. Act? In my opinion it is this. Art. 142 speaks of a person who, while in possession has been dispossessed, or while in possession has "discontinued the possession". In my opinion there has been no dispossession here but a discontinuance from possession. Art. 1 to Sch. 2 has no corresponding clause. It speaks of dispossession and 'exclusion from possession'. I cannot regard a person who is compelled by law to hold property for the benefit of another in the same way as a trustee, and who is not permitted to set up an adverse right as excluding the other from possession. An agent for example or a cosharer cannot be regarded in that light unless and until he openly sets up an adverse right to the knowledge of the owner whom he seeks to exclude. But if the law says he may not in any circumstances set up such a right then it follows he can in no circumstances exclude the rightful owner from possession.

But the Privy Council decision in 35 Cal 551[26] raises a real difficulty. The position there was much the same in that the case there formed one of the exceptions to the rule *in pari delicto.* An illegal transfer was made with object of defrauding creditors but as the purpose of the fraud was not effected their Lordships held that the plaintiff could recover possession and they applied Art. 144. If it had not been for their later ruling, of course, I would have had to follow it but as in my opinion 10 Pat 851[33] holds that Art. 144 does not apply I find myself in a difficulty, especially as their Lordships did not refer to their earlier ruling in the later one. However there is this to be noticed. In 35 Cal 551[26] the question of S. 84, Trusts Act was not raised nor was a possible conflict between Arts. 142 and 144 considered, probably because it was unnecessary to do so. The cause of action accrued on 11th June 1895 and the suit was instituted on 24th July 1901. The only question under the head of limitation raised at the bar was whether Art. 91 applied or Art. 144. Their Lordships held that Art. 91 could not apply because as the sale was an illegal transaction it was void from the beginning and so it was not necessary for the plaintiff to ask for cancellation before seeking possession. Once that was clear it became immaterial whether Art. 142 applied or Art. 144. As I say the questions which we find discussed in the later ruling were not raised and their Lordships disposed of the matter in a single sentence without discussion by saying :

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[33] **Chhatra Kumari v. Mohan Bikram, (1931) 18 A I R P C 196=10 Pat 851=58 I A 279 (P C).**

> The 144th and not the 91st Article in the second schedule to the Act is therefore that which applies to the case, and the suit has consequently been instituted in time.

In 10 Pat 851[33] however their Lordships are emphatic that Art. 144 cannot apply unless the defendant is in a position to set up an adverse title and has done so. The Legislature is equally emphatic that a person falling within the purview of S. 84, Trusts Act cannot set up an adverse interest. It follows that Art. 144 cannot apply. In the circumstances I feel that we have no option but to apply Art. 142. I have dealt with this at length because it is important to decide whether the deed of surrender requires cancellation before the relief of possession can be granted. If it does then Art. 91 applies and the limitation is three years. As I have said I consider that the Privy Council have set this controversy at rest. The question is also important because of its indirect bearing on the construction of Art. 1 to Sch. 2, Tenancy Act. If Art. 144 applies, or rather would apply apart from the special law in the Tenancy Act, then according to 10 Pat 851,[33] it must mean that the defendant is in a position to set up an adverse title and that he has done so. Once that is accepted then in my view it would be impossible to escape the conclusion that the plaintiffs have been excluded from possession which in its turn would mean that the special local law of limitation must apply. If Art. 142 applies then the suit is well within time. The cause of action accrued on 14th April 1923 which is the date of the surrender and the suit was filed on 25th October 1928 which is well within 12 years.

I turn now to a difficulty of another sort. The actual transferors were not the plaintiffs but their fathers. Who then became the occupancy tenants under S. 49? In my opinion it would be the whole family. The findings are that the family was joint and that this was a part of its property. The debts for the satisfaction of which the sale was made were all for legal necessity and so bound the entire family. In the circumstances the benefits which accrued by reason of S. 49 from the sale must be taken to have enured for the family as a whole. It is the family who should have sued. In the circumstances I feel the ends of justice will best be met by transposing defendants 2 and 3 to the category of plaintiffs under O. 41, R. 33, Civil P. C., read with O. 1, R. 10 and passing a decree in favour of the entire family. Our power to do so is undoubted : *see* 59 Cal 80[34] at page 91 and 44 Cal 759[35] at page 769. The only question is whether we should exercise it in this case. No question of limitation arises because the twelve years required by Art. 142 have not yet elapsed and since the sons would be entitled to a decree for possession of the whole, in any case that seems to be the most reasonable course to pursue : *see* 25 N L R 28[36] and 9 N L R 18.[37]

That brings me to the last point: upon what terms should possession be granted. As I have said the Courts have ample powers to place the plaintiffs upon terms. The consideration for the surrender consisted of Rs. 7267-3-10 made up as follows:

> Rs. 950 due to Government on account of taccavi loan and interest.
>
> Rs. 2425-5-4 due on foreclosure decree obtained by the transferee against 1 anna 8 pies share of Mauza Dongargaon.
>
> Rs. 2192-0-6 due on three decrees also apparently in the transferee's favour.
>
> Rs. 300 paid in cash to meet the expenses of the sale deed Ex. P-1.
>
> Rs. 1400 paid in cash to enable the minors to obtain leases of certain lands in this village.

There can be no doubt that the plaintiffs have received the benefit of this consideration in full. So far as the first and third items are concerned, the plaintiffs were exonerated from liabilities which would otherwise have been enforced against them.

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[34] Bhupendranarayan Singha v. Rajeswarprosad Bhakat, (1931) 18 A I R P C 162=132 I C 610=59 Cal 80=58 I A 228 (P C).

[35] Tricomdas Coovarjee Bhoja v. Gopinath Jiu Thakur, (1916) 3 A I R P C 182=39 I C 156 =44 Cal 759=44 I A 65 (P C).

[36] Kamtaprasad v. Madhorao, (1929) 16 A I R Nag 60=116 I C 648=25 N L R 28.

[37] Mohanlal v. Tekchand, (1913) 9 N L R 18= 18 I C 826.

It is true the exproprietary rights in the fields covered by the surrender could not have been touched but there was other property and notably this share in Mauza Dongargaon which was evidently not mortgaged for anything like its full value. Then so far as the foreclosure decree is concerned the whole share would have been lost but for this or some similar arrangement, and as regards the Rs. 1400 in cash the plaintiffs are actually in possession of property which they would not have obtained without it. The sale deed Ex. P-1 has already been upheld so the Rs. 300 for meeting its expenses had to come from somewhere. The transferee would here have consented to all this if he had known that he was eventually to lose the property without compensation and it would be inequitable to allow the plaintiffs to retain all these benefits and get the property as well. Though the consequences of the rule *in pari delicto* do not apply there can be no question that both parties are equally in fault (the plaintiffs must of course stand in their fathers' shoes for these purposes) and so it would be inequitable to assist the plaintiffs without restoring the other side so far as may be to the status quo.

The only other material consideration is the question of mesne profits. Normally the transferee would have to account for these but as against this is the interest due on the moneys he paid or could have recovered. I think it right that the one should be set off against the other as was done by their Lordships of the Privy Council in 48 All 443[38] at p. 455. I observe in passing that three of the fields surrendered were khudkasht and not *sir*. If the deed had been confined to them then of course none of these difficulties would have arisen. But as there was a single consideration in this deed for the surrender of the *sir* and these three khudkasht fields it is impossible to separate them from the others and so the transaction has to be set aside as a whole. This was not challenged but I think it right to refer to the matter in passing to show that this fact has not been overlooked. The only equitable solution is that occupancy rights should be given in respect of the lot, as indeed was assumed during the course of the arguments. In the result I agree with the decree proposed by my Lord the Chief Justice.

**Digby J.**—This appeal arises out of a suit brought by the sons of Prayagnath and Shivnath of whom the eldest is 20 years of age and the others minors. The defendants are Bairagisao and the fathers of the plaintiffs. On 14th April 1923 the two fathers and those of the plaintiffs who were then born through their fathers sold to the defendant-appellant Bairagisao a four annas share in mauza Suplipar reserving cultivating rights in *sir* land. On the same day the *sir* lands were surrendered. The consideration for the sale was Rs. 7367-5-11½ (sic). The transferee undertook liability to pay various amounts due to R. B. Indrarajsingh, and in addition there was a foreclosure decree in respect of the four-annas share of mauza Suplipar in favour of the transferee. The transferee also had a foreclosure decree in respect of a one-anna eight pies share of Dongargaon, and the sale deed contains a provision that after the mortgage rights in respect of mauza Dongargaon are relinquished and after getting some occupancy land leased out for the benefit of the minors, the debts due to Indrarajsingh should be paid. In the surrender deed of even date the consideration of Rs. 7267-3-10 is composed of money decrees due to the defendant-appellant and a sum of Rs. 1400 for taking on lease land situated at mauza Dongargaon in the name of the minors, and it is stated that all rights in the foreclosure decree in the one-anna eight pies share of mauza Dongargaon have been relinquished and that the defendant-appellant has agreed to take occupancy land at mauza Dongargaon in the name of the minors. It is then said that the four-annas malguzari share of mauza Suplipar has been sold for the balance amount. Thus in each document the consideration is first stated and then reference is made to the relinquishment of the mortgage of Dongargaon and the lease of occupancy land to be obtained by the transferee for the minors. In the second document the cost of obtaining the lease forms part of the consideration itself.

It has been found that the plaintiffs then alive had a vested interest by birth in two annas eight pies out of the four annas proprietary share of mauza Suplipar, whereas one anna four pies belonged to their fathers alone. To this two annas eight pie share it appears that all the sir belonged (*vide* 1 D. 66). The suit was a suit to recover possession of all the land transferred. The trial Court held that the sale and surrender were part of the same transaction and on the authority of 22 N L R 136,[11] a Bench decision, the surrender of the land except three fields which turned out to be khudkasht was held to be void as being in contravention of the provisions of the Tenancy Act. The trial Court on the same authority upheld the sale as valid. It dismissed the suit so far as it was brought for the possession of the surrendered *sir* land on the ground of limitation applying Article 1 of Sch. 2, C. P. Tenancy Act. The first Appellate Court supported the decision of the trial Court, except that it held that the suit was in time as regards the recovery of the tenancy lands and directed that the defendant should place the plaintiffs in possession of the *sir* lands surrendered.

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[38] **Ram Charan Lonia v. Bhagwan Das, (1926) 13 A I R P C 68=95 I C 898=48 All 443=53 I A 142 (P C).**

The defendant Bairagisao has appealed from the decision of the first Appellate Court contending that the suit should have been dismissed. The plaintiffs-respondents have filed a cross-objection in which they contend that the whole transfer both of proprietary rights in the village and of cultivating rights in *sir* should have been adjudged void and possession of the whole decreed to the plaintiffs. The questions for determination in this case are as follows: (1) Whether the surrender deed dated 14th April 1923 is (a) void or (b) also illegal. (2) Whether the sale of the proprietary share is (a) void or (b) void and illegal. (3) Whether if the sale stands but the surrender does not, the suit is within time. (4) Whether the defendant can and should receive refund of consideration in this suit if possession is decreed. The plaintiffs' prayer is simply a prayer for possession of the entire property. In the plaint they attacked the sale on various grounds which have been found to have no substance. The first was that the debts which formed the consideration were immoral and illegal. The second was that they were not joined as parties in some previous litigation. The third was that the sale took place during the management of the Collector in execution without written permission. The fourth was that neither transaction was for legal necessity.

As regards the surrender it was stated that it was registered before the registration of the sale deed, and that according to the Tenancy Act "these proceedings and the surrender" were illegal and against the law. The pleading in reply to this was that at the time of the surrender the lands were the occupancy lands of defendants 2 and 3, and that after the sale of the village defendants 2 and 3 became occupancy tenants of the land described in para. 10 of the plaint, and that the plaintiffs could not sue for possession of them, and if they did their suit was out of time. In reply the plaintiffs said that as the surrender was registered previous to the sale the land could not become occupancy even by reason of the sale dated 14th April 1923, and that the surrender was therefore a fraud, void and inoperative. Although the position is now clear that at the time of the transactions the *sir* land was proprietary land of the transferors, the *sir* fields were, as a matter of fact, at the time recorded as occupancy fields because there had been a fictitious transfer of the proprietary share in favour of a third party, and it would appear that the pleading that they were occupancy tenants at the time of the surrender made by the defendants covered this point. The only issues framed as regards the invalidity of the surrender deed were as follows:

> Issue 9 (b): Whether they executed the surrender deed before or after the sale deed of the same date. If before, is the transfer by surrender of *sir* and khudkasht land valid and approved by the Tenancy Act? If after, is the plaintiffs' claim within two years from the time defendant 1 entered into possession of these lands in pursuance of the surrender deed?
>
> Issue 13: Could plaintiff be permitted to set aside the whole sale deed and surrender deed or only to the extent of their specific shares only and they should be held good as far as defendants 2 and 3 are concerned?
>
> Issue 18: Is rajinama dated 14th April 1923 a fraudulent transaction as alleged?

The plaintiffs' oral evidence was mainly concentrated on the immoral habits of the fathers, but the defendants led evidence regarding the transactions which are now in suit. As a result of the consideration of their evidence the trial Court came to the conclusion that their story of separate negotiations prior to the execution of the documents was false and that the two transactions were arranged in advance as one contract and not as two separate contracts. The first Appellate Court interpreted the pleading of the plaintiffs which I have quoted as meaning that the sale of the village share and surrender of occupancy rights were in fact a single transaction and in contravention of the provisions of the Tenancy Act. The first Appellate Court in para. 18 of its judgment held that there was a single set of negotiations in which it was agreed that the whole village would be transferred by the method of sale and surrender for one consideration.

Now it is strenuously urged by the learned advocate for the appellant that neither the trial nor the Appellate Court had any right to go into any fact in this connexion at all except the question whether the surrender or the sale deed was first registered. It is urged that there is no pleading on which any finding could be based that the transaction or transactions were designed to escape the provisions of S. 49, C. P. Tenancy Act. It appears to me that the pleading "according to the Tenancy Act these proceedings and the rajinama are illegal and against the law" coupled with the insistence by the defendant on the position of the transferors as occupancy tenants at the time of the surrender indicates that the defendant-appellant was not being taken by surprise over the matter. The reference to the "illegality according to the Tenancy Act" raises the question as to whether the surrender of the occupancy land was illegal as being part and parcel of the sale. These cases are cropping up in the Courts with some frequency. They are dealt with in various rulings. Some years before the suit was filed the decision in 22 N L R 136[11] had been published and a surrender executed on the same date as a sale deed would naturally be thought to be part of the same transaction unless the Court was satisfied that it was not. The evidence of the defendants given in order to show that two separate negotiations took place prior to the execution of either deed is obviously designed to avoid such presumption being drawn against them. That is why the trial Court and the Appellate Court both regard the evidence adduced by the appellants as evidence given by way of explanation of an awkward fact.

In these circumstances I do not think that it would be in any way improper for this Court to take notice of the fact which has fallen from the defendant's own mouth that prior to execution of the documents there had been an executory agreement that both should be executed. When we see that the sale of proprietary rights and the surrender of *sir* are made on the same day there is the strongest suspicion that both transactions have been arranged in advance. It would indeed be curious if the parties to the sale proceeded after the sale to start negotiations regarding the surrender of the new occupancy right just received and managed to bring their negotiations to an end and to execute the second document on the same day as the sale deed. Moreover, in this case the documents themselves afford internal evidence that the executory contract preceded the execution of either. It is therefore not surprising that the defendants gave evidence to show that the executed contracts were the result of separate executory contracts. My conclusion therefore is that the form of the pleadings will not prevent the Court from arriving at the conclusion that the surrender was void or illegal because it was intended to contravene the provisions of the Tenancy Act.

There have been a considerable number of cases either in the Allahabad High Court or in the Judicial Commissioner's Court regarding such sales of proprietary rights followed by a surrender of *sir* land in pursuance of previous executory contracts, and the basis of all these decisions is the decision of the Privy Council in 39 All 173[3] upholding the decision in 33 All 695.[39] That was a case in which the provisions of the Agra Tenancy Act which are similar on all material points in this connexion with the provisions of the C. P. Tenancy Act were involved. In a sale deed by which a proprietary share was transferred the defendants agreed to surrender the occupancy rights in *sir*. It was held that the agreement was a device to evade the provisions of the Agra Tenancy Act, and that all such devices were void and illegal. The suit to enforce the agreement therefore failed. S. 49, Central Provinces Tenancy Act is as follows :

> (1) Notwithstanding any contract to the contrary, and, save where sanction has been given in accordance with the provisions of this Act, a proprietor, who temporarily or permanently loses, whether under a decree or order of a Civil Court or a transfer or otherwise, his right to occupy any portion of his sir land as a proprietor, shall at the date of such loss, become an occupancy tenant of such sir land, and any tenancy right granted by him in such sir land for a period exceeding five years, without the sanction of a Revenue Officer, shall thereupon lapse.
>
> (2) Notwithstanding anything contained in the Registration Act, 1908, no officer empowered to register documents thereunder shall admit to registration any document which purports to transfer the rights of a proprietor in his sir land, without reservation of the right of occupancy specified in sub-s. (1), or to grant tenancy rights in sir land for a period exceeding five years, or to be an agreement for such transfer or grant, unless sanction to such transfer or grant has been endorsed on the document in such manner and by such authority as may be prescribed by rules made under S. 109.

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[39] **Ikramullah Khan v. Moti Chand, (1911) 33 All 695=11 I C 17=8 A L J 826.**

> (3) Nothing in this section shall affect rights under any document duly registered before 21st October 1898, and on any transfer being made, decreed, or ordered in pursuance of such document, the rights of the transferee to occupy and cultivate such sir land shall accrue.
>
> (4) Nothing in this section shall apply to land in the Sambalpur territory recorded as bhogra in the Record of Rights of the current settlement.
>
> (5) Nothing in this section shall apply to a lease, for a term not exceeding the term of settlement, of a village of any estate to which the Commissioner may declare this sub-section applicable.
>
> (6) Nothing in this section shall affect any loss of possession of any sir land in the course of a partition.

Apart from cases where sanction has been obtained, sub-s. (1) provides that when the proprietor temporarily or permanently loses his right to occupy any portion of his sir land as proprietor he shall at the date of such loss become an occupancy tenant of such *sir* land. Sub-s. (2) prohibits registration of a document which purports to transfer the rights of a proprietor in sir land without reservation of the rights of occupancy specified in the previous subsection. The result is that if the proprietor wishes to transfer his cultivating rights in *sir* the only method by which he can apparently do it is first, to execute a sale deed and then to execute a surrender deed. If the sale covers the whole, it will be ineffective and therefore the form of sale and surrender has to be adopted in order to secure valid registration and ostensible effectiveness. If this is arranged beforehand the result is that the provision by which a proprietor who loses the right to occupy the land as a proprietor becomes an occupancy tenant is really defeated and by a curious paradox the very drafting of sub-s. (1) is utilized to defeat its object. The intention is to avoid the operation of law, to avoid being an occupancy tenant by the simple process of becoming an occupancy tenant in name for a period which may not exceed the time necessary to make one's signature on a document. It is this kind of device which has been characterized by their Lordships of the Privy Council as a void and illegal device. In this case the device which there was in the executory stage is carried out by execution. Consequent on this decision we have a course of rulings which have been reported. There is the decision in 40 All 449[40] where it was said :

> If a covenant to relinquish the sir lands is part of the transaction of sale or of mortgage, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If the Court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant, with full knowledge of that fact and of the rights preserved to him by the statute, deliberately chooses, as a separate transaction, to relinquish his exproprietary tenancy into the hands of the new proprietor or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequence of his own act.

Then there is the case in 54 I C 794[41] where the above words were quoted with approval. In that case there was "admittedly a design to evade the requirements of the Act." In 22 N L R 136[11] the further material portion of the headnote which quotes the above passage is as follows :

> The mere fact that nine months intervened between the sale deed and the relinquishment of the occupancy land does not become legal if it is manifest that the arrangement by which the occupancy rights were to be surrendered dates back to the date of the sale.
>
> Where the legal and illegal objects or the legal and illegal transactions cannot be separated, the whole transaction is void under S. 24, Contract Act, but it is otherwise when the legal and illegal portions can be separated.

In 27 N L R 113[10] occurs the following passage :

> It is admitted before me that the sale and surrender formed a single transaction. In view of the decision in 22 N L R 136[11] this could not well be disputed.

In 30 N L R 306[42] at p. 310 appears the following passage :

> In any case however I would hold that the surrender would be void as laid down in *Bhagwant* v. *Anandrao*[11] as being part and parcel of the transaction of the sale deed. As noted above the sale deed was executed on 22nd April, and on 22nd Ahiman executed the deed of surrender with regard to the occupancy rights in all the sir sold by the sale deed. There can be no doubt that the surrender was a clear evasion of S. 45, Tenancy Act then in force and as such is void.

In A I R 1928 Nag 232[18] a surrender was made three days after the sale deed. The following passage occurs :

> The real nature of this transaction is, of course, that without the sanction of the revenue officer the village was sold without reservation of the right to occupy the sir land. The sale and the surrender taken by itself was perfectly valid, but the two things combined in one transaction do certainly constitute a void agreement under S. 23, Contract Act.

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[40] Mir Dad Khan v. Rangan Khan, (1918) 5 A I R All 86=44 I C 988=40 All 449=16 A L J 329.

[41] Bhure v. Sheogopal, (1920) 7 A I R Nag 157= 54 I C 794.

[42] Mt. Dhela v. Mt. Ahiman, (1934) 21 A I R Nag 153=149 I C 992=30 N L R 306.

There appears to me to be no doubt that where a surrender and a sale deed are both executed on the same date and it has been arranged to make the surrender before the sale deed is executed, the surrender deed is the execution of a "device which is void and illegal". It is argued by the learned advocate for the appellant that oral evidence is not admissible to show that two executed documents were the result of previous negotiations and a previous illegal agreement. In reply to this I would quote from Leake on Contracts, Edn. 4, page 551:

> Though the contract is apparently valid in form or matter, extrinsic evidence is always admissible in variance of or in addition to the contract to show that the transaction is illegal and therefore void, even in the case of a covenant or contract under seal.

This passage is quoted in 27 All 266.[43] Moreover, it is the evidence which has fallen from the mouth of the defendant which fully justifies the conclusion of illegality. I therefore would hold that the surrender must be regarded as an attempted sale concealed in the guise of a surrender made by a proprietor with the intention of preventing the operation of S. 49, Tenancy Act, and that it was a void and illegal device. Although there are certain remarks in 52 All 338[44] which in distinguishing between the executed and executory contract support the appellant's argument, I am unable to come to the conclusion that when the executory agreement is illegal the executed surrender is not illegal.

The next question is whether the sale of the proprietary share expressed to be sold in the sale deed is also void by reason of illegality. It is urged by the learned advocate for the appellant that it is perfectly valid, while the respondents through their learned advocate rest themselves on the findings of fact of the lower Appellate Court that there was one executory contract for transfer of the whole village, to be carried out by two documents, one of which (the sale) was contractually interdependent with the other (the surrender), and was not intended to be made at all, unless the surrender were made as well. Further it is argued forcibly that if the surrender deed is considered void because it is part of the sale, how can there possibly be two transactions and not one only? I regard the surrender as void and illegal because it is the execution of an executory agreement which appears to me a device indistinguishable from the devices stigmatized as void and illegal by their Lordships of the Privy Council. But it does not follow that the sale evidenced by the sale deed is itself an illegal device. The finding of the lower Appellate Court, as I understand it, is that there was in reality one single executory agreement, as the whole transaction was really arranged at one sitting, and not by two separate negotiations, one for the sale and the other for the surrender. But in this matter I consider that the argument of the learned advocate for the appellant is sound. There is not a word in the pleadings to suggest what would be a material question of fact, namely whether there was one consideration for the whole sale, instead of two considerations one for each part of it, or to suggest that the sale of one part was contractually interdependent with the transfer of the other part in the sense that the sale alone would never have taken place. No doubt there is something in the documents to suggest interdependence, but while Courts may take notice of illegality even when it is not pleaded, it is more especially in cases where the plaintiff is trying to enforce an illegal agreement that the Court takes notice of it to defeat the improper claim. I would quote the remarks of Lindley L. J. in (1892) 2 Q B D 724,[45] which are quoted in 27 All 266[43]:

> No Court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not.

Again I quote the further passage from Leake on Contracts:

> The facts showing illegality either by statute or Common law must be pleaded but when the illegality appears from the plaintiff's own evidence it is the duty of the Court to take judicial notice of the fact.

In the present case it was never alleged by the plaintiffs that they wished to avoid the sale itself on the ground of illegality; the expression in connexion with the surrender as regards "these proceedings" cannot I think be taken as a plea that something which is in no way forbidden by the

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[43] Alice Mary Hill v. William Clarke, (1905) 27 All 266=1 A L J 632.

[44] Dip Narain Singh v. Nageshwar Prasad, (1930) 17 A I R All 1=122 I C 872=52 All 338=1930 A L J 45 (F B).

[45] Scott v. Brown, (1892) 2 Q B D 724=61 L J Q B 738=4 R 42=67 L T 762=41 W R 116 =57 J P 213.

Tenancy Act at all, a sale of a proprietary share, was to be considered illegal. There was no plea regarding a single consideration or interdependence of the executory agreement to sell with the agreement to surrender. In 27 N L R 113,[10] this very matter was considered and I quote again the following passage :

> It is admitted before me that the sale and surrender formed a single transaction. But it is urged that the legal and illegal positions can be separated and only the part which relates to surrender of the occupancy rights is void.

It was then held that :

> In the absence of a pleading that the money paid for the share did not represent what was paid for the share the sums mentioned in the consideration for the sale of the proprietary share must be deemed to be the consideration for the share.

On this ground the sale was held valid and the surrender void. I think therefore that it would be beyond the scope of the pleadings in the case to conclude that the transactions were inseparable. And relying on this reported ruling I hold that the sale in so far as it conveyed the proprietary right in the village is valid. This decision might be justified on another ground namely that the matter had passed from the sphere of contract to the sphere of conveyance, by a sale deed which conveys title. The Allahabad High Court in a Full Bench ruling refuses to apply S. 24, Contract Act, to executed conveyances: 52 All 338.[44] The following passage occurs at p. 343:

> In cases of inherent illegality it is sometimes impossible to say whether the legal or illegal portion of the consideration affected the mind of the promisor most. But if we take the case of a contract only partly beyond the competence of the promisor there is no good ground why the promisee who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make.

Mukherji J. at p. 352 quotes the following remarks with approval from 38 All 232,[46] a case where property capable of transfer had been conveyed with property incapable of transfer, and it was sought to set aside the whole sale:

> It thus appears that a contract for sale is one thing and a deed of transfer another and it does not necessarily follow that because the contract was unenforceable the transfer is void.

The title to the transferable property was held to be good; and again:

> In the present case we are not concerned with the validity or invalidity of the original contract . . . the transaction has long since passed the stage of contract.

I do not go as far as this, and indeed if the latter proposition were carried to a logical conclusion, it might be said that the surrender and sale deed were equally valid, as indeed the learned advocate for the appellant contends. I think that it is sufficient on this part of the case to say that while the surrender has been proved to be an illegal device, and the executed document is outward and visible evidence thereof strengthened by the evidence of the defendant, there is on the pleadings no justification for entering into the question as to whether the antecedent executory contract as regards the sale of the proprietary share is tainted with illegality. The sale was prima facie legal, the consideration for the sale was legal, the sale would presumably have no illegal purpose, the law presumes in favour of legality, the fact that it is contemporaneous with the surrender is insufficient to vitiate it, and there is no pleading that the consideration therefore was part of a larger consideration for one transaction, which included the transfer of sir. The simultaneous execution of the surrender deed bears strongly on the point that it was intended to defeat the law as regards occupancy right, the simultaneous execution of the sale deed carries with it no such implications of illegality as regards a sale which is prima facie a perfectly legal transaction, unlike a surrender of even date. The next question is regarding the refund of the consideration. S. 41, Specific Relief Act, cannot be invoked, for this is not a suit for specific relief; and the surrender need not be first set aside (*vide* 35 Cal 551[26]). S. 65, Contract Act, is then relied on. This section is as follows:

> When an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it or make compensation for it to the person from whom he received it.

Under S. 23 of the same Act "every agreement of which the object or consideration is unlawful is void." The section lays down a legal right and does not deal with the procedure for enforcing it. It may be noticed that the date of discovery of voidness is the date of the agreement, except in unusual circumstances, 50 Cal 929,[17] that a right to money or compensation is not extinguished by efflux of limitation, that the limitation for a suit is governed by Art. 62 of the Limitation Schedule for money had and received, though if an existing consideration can legally be said to have failed afterwards,

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[46] Bajrangi Lal v. Ghura Rai, (1916) 3 A I R All 346=32 I C 913=38 All 232 = 14 A L J 270.

Art. 97 will apply: *cf.* 5 Rang 283.[47] The Contract Act passed in 1872 "defines and amends certain parts of the law relating to contracts" and I find it hard to place any other construction on Ss. 65 and 23 than that it amended the law relating to the remedies available in respect of agreements void by reason of illegality, and that the rule "the loss will remain where it lies" no longer applied.

On the applicability of S. 65 to illegal agreements, the authorities against its application are far less convincing than might at first sight appear, and I have not succeeded in finding any reported case, which in the light of the law as now established that a void agreement is discovered to be void on the date when it is made and that S. 65 applies to agreements void ab initio, disposes of the simple and convincing reasoning of Batchelor J. at pages 416 and 417 of 33 Bom 411.[48] This reasoning is not referred to (perhaps as it is obiter) in 42 All 449,[49] which is based on an earlier Bombay case, 11 Bom L R 335;[50] but the case is relied on by the Madras High Court for a contrary proposition in 41 Mad 197.[51] In this Madras case the old Bombay case is also referred to in support of the contrary proposition and two previous Madras cases, 37 Mad 393[52] and 32 Mad 185.[53] But in those two cases S. 65 was not discussed. It may be noted that in the Madras case Bakewell J. rests himself partly on the meaning of "discovered to be void" in the sense in which that phrase was then understood, while in 43 Cal 115,[54] the reasoning to be found at pages 122 and 123 clearly is that an agreement void ab initio is not an agreement subsequently found to be void or a contract made void by supervening circumstances. It is settled by the Privy Council that the section presupposes a competency in the parties to contract, and hence it does not apply to an agreement with a minor: 30 Cal 539[55] at p. 548. As regards this aspect the section has been discussed in connexion with a municipal agreement in 58 Mad 65.[56] On perusing such authorities as I have been able to find, I incline to the view that the matter is much more open than might be thought, for the reason that S. 65 is now held by the Privy Council to apply to agreements void ab initio and for the reason that the date of the discovery is also held by the Privy Council to be the date of the agreement, and although Courts have constantly applied the English law of illegality to attempts to recover money paid on illegal agreements, I do not think that the reasoning by which S. 65 has been considered inapplicable is sound. I therefore hold that S. 65, Contract Act does apply to agreements which are void by reason of illegality.

Now in cases of void agreements where S. 65 is applicable both parties are allowed (in a suit to enforce the supposed contract or for refund arising therefrom) the relief which can be given to them in view of the rights and duties created and imposed by the section. Obviously where *A* comes to Court asking for compensation or refund from *B*, he gives to *B* in the same suit the compensation or refund due to *B*. Again if *A* sues to enforce the apparent contract which is really a void agreement, he may receive and give compensation in the same action. But if an action for possession of land is to be regarded as based on title, there is room for doubt whether S. 65, Contract Act would require the Court to condition the relief, which is not sought or given to the plaintiff under S. 65, Contract Act with the enforcement of a right arising in favour of the defendant under that section. It might be said that the plaintiff sued for possession in view of his title, and that the defendant should sue or counterclaim for refund. Of course the moment that the plaintiff asks or sues for any equitable relief which is in the discretion of the Court, he, seeking equity, must do equity, and the relief may be conditioned. It seems to me that when in 1882 the

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[47] **Ma Hnit v. Fatima Bibi, (1927) 14 A I R P C 99 = 101 I C 414 = 5 Rang 283 = 54 I A 145 (P C).**

[48] **Gulabchand Paramchand v. Fulbai, (1909) 33 Bom 411=3 I C 743=11 Bom L R 649.**

[49] **Chhanga Mal v. Sheo Prasad, (1920) 7 A I R All 167 = 55 I C 965 = 42 All 449=18 A L J 513.**

[50] **P. R. & Co. v. Bhagwandas, (1910) 34 Bom 192 =2 I C 475=11 Bom L R 335.**

[51] **Srinivasa Ayyar v. Sesha Ayyar, (1918) 5 A I R Mad 444=41 I C 783=41 Mad 197=34 M L J 282.**

[52] **Deva Rayan Chetty v. Muthu Raman Chetty, (1914) 1 A I R Mad 551=18 I C 515=37 Mad 393=24 M L J 810.**

[53] **Venkata Kristnayya v. Lakshmi Narayana, (1909) 32 Mad 185=3 I C 554=18 M L J 403.**

[54] **Ledu Coachman v. Hiralal Bose, (1916) 3 A I R Cal 266 = 29 I C 625 = 43 Cal 115 = 21 C L J 587=19 C W N 919.**

[55] **Mohri Bibee v. Dharmodas Ghose, (1903) 30 Cal 539 = 30 I A 114 = 7 C W N 441 = 8 Sar 374 (P C).**

[56] **Arunachala Nadar v. Srivilliputtur, Municipal Council, (1934) 21 A I R Mad 480=151 I C 46 =58 Mad 65=67 M L J 38.**

Transfer of Property Act and the Trusts Act were passed, and the law of illegality, applied since the days of the Suddar Adalat to transfer for illegal object, received inferential recognition, the rights of the transferee were left to be dealt with under their own head. Cases where the transferor would be sued before he had recovered the property would be extremely rare. If the transferee sued the transferor, the action would be brought on a right arising out of S. 65, Contract Act and the property be restored as a matter of course, no title in respect of what could not be transferred (S. 6, T. P. Act) standing in the way of restoration. But if the transferor sued, the action was of a different kind, based on his title, and while he was restricted by the law of illegality from obtaining relief except where there was time for repentance, or he was not *in pari delicto*, or the object of the law would be defeated by refusing him relief, the guilty transferee could be left to seek such steps for refund as he might be advised to take. On the construction adopted of Art. 97 in the Rangoon case,[47] he might, I consider, after being compelled to restore the property sue for the consideration.

The action as framed on the title of proprietors wholly fails when the sale deed of the proprietary share is upheld as valid and there comes into existence if the surrender is void as being an illegal device the special right of tenant conferred by S. 49, C. P. Tenancy Act, and it seems to me that in so far as the Court is to give relief to the plaintiffs based on a tenancy brought into existence by the very law which it has been sought to defeat, the true position is that the relief arises out of a title brought into existence by the Legislature under a special Act.

The case in (1907) 1 Ch 300[4] clearly settles that where an equitable relief is sought, then the plaintiff relying on an exception to the rule *potior est conditio possidentis* must refund the benefit he has received. And in the same case the view is also clearly expressed, though the matter is not decided except hypothetically, that even in an action for legal as opposed to equitable relief the same rule should be enforced.

The reasoning at p. 311 is that in such a case the plaintiff relies on the illegality, for his claim would otherwise be defeated by the conveyance. It is however also possible to say as has indeed been said, though in a case where the merits were very different, that the defendant in this suit has been relying on a fraud and seeking to make a title to the lands through and by means of it: 35 Cal 551[26] at pp. 551 & 559. In that case the plaintiffs were seeking to put everyone as far as possible in the position occupied prior to execution. It was a case of benami sale to cheat creditors, and no doubt no question of consideration was involved. Here the plaintiffs have been trying, no doubt with their fathers behind them, to recover everything without paying anything. In my judgment in this case the scale is turned by the consideration that the tenant right is a special right brought into operation by a local law, and I feel that to condition the relief to be granted on that basis would in the majority of cases render that law nugatory. The devices would continue, prompted by the necessities of the cultivating class and the desire of the creditor to obtain valuable land, and the devices would be successful if they could not be interfered with by the Courts except on condition of refund of the consideration. The consideration may as in the present case be largely composed of debts, for payment of which the tenant right cannot be seized or sold. In this case the plaintiffs escape the maxim *in utr iusque delicto potior est conditio possidentis* on the grounds that the provision sought to be evaded was made for their benefit, and that to apply the maxim would be to defeat an express provision of law.

They are not *in pari delicto*. (*cf.* the dictum of Mansfield L. C. J., quoted in 2 Ch 154[13]). I consider that the fact that the claim as presented is a monstrous claim and that the sons are no doubt set up by their fathers as being of less relevance than that the object and intention of the law should be given full effect, and I therefore consider that this claim so far as the tenancy land is concerned should be regarded as a legal claim based on title not to be conditioned by terms, while as regards S. 65, Contract Act the appellant should be left to seek any relief he can get arising out of the rights thereby conferred. In 54 I C 794[41] and in the Bench case quoted, 22 N L R 136,[11] refund was refused; it was given in A I R 1928 Nag 232,[18] but I base my view on somewhat different grounds than those on which it was refused in the first two cases above quoted. I would also remark that minors are not in control of the family funds, that there are legal difficulties regarding the transfer of the tenancy lands which they received, and emphasize that their fathers had no right in Hindu law to make an attempted illegal transfer of their lands.

It remains to consider the question of limitation. I have referred to the 'claim' for the tenancy lands. The plaintiffs have claimed as proprietors, but their case as proprietors wholly fails as they cease to be proprietors, on the date when the sale held to be valid took place, and the illegal surrender (discovered on the same day to be void because the intention was to sell the whole village) does not affect their legal position. Their remedy which I consider should be unconditioned is to recover in the capacity of tenants by operation of law possession from the landlord. Where the proprietary right has been conveyed by an incompetent transfer, the limitation is governed by Art. 144 of the Limitation Schedule: 35 Cal 551.[26] Their Lordships do not enter into any question whether an adverse title can be asserted in view of S. 14, Trusts Act read with S. 84 and S. 95, and it seems that the Indian Trusts Act was not in force in Burma except in Rangoon itself, and was not applicable in that case. This was a case of a benami transfer with illegal purpose. In the present case if the tenants who became tenants on the date of the sale can be said to have been dispossessed or excluded from possession by the defendant, and if they can be said to be claiming possession of the holding from which they have been so dispossessed or excluded, the provisions of the Sch. 2 to the C. P. Tenancy Act would, in virtue of S. 104 (1) of that Act, apply.

The case in 10 Pat 851[33] is of a somewhat different nature. This was a case where a trust was alleged to have come into existence under an oral contract and there was no ownership in the plaintiff. It was held that a suit to enforce the trust which was not express fell under Art. 120 of the Limitation Schedule and their Lordships said that Article 144 was only applicable to possessory suits by the owner of the property claimed against a person holding adversely to him without title.

In the present case, although there is a purported executed surrender in the name of the defendant, it cannot be said that title passed to the defendant, the more especially when an illegal surrender is wholly beyond the competence of a Hindu father purporting to act for his minor son. The question is whether in view of the provisions of Ss. 84, 95 and 14, Trusts Act, the plaintiffs who have been excluded in point of fact can be said to have been excluded in point of law. The matter is by no means free from difficulty, but on the whole I regard the question of exclusion as a question of fact which will not be affected by the provision in the Trusts Act in virtue of which Section 14, Trusts Act should apply "so far as may be" to an obligation in the nature of a trust. If the Article applicable were Art. 144 and S. 14 were to be applied it might be said that limitation could never run at all. S. 10, Limitation Act has, in course of judicial decisions which need not be enumerated, been held inapplicable to trusts which are not express and does not apply here. In my judgment, this is clear case of exclusion from the holding, and as the land is tenancy land of which possession is claimed, and the plaintiffs have studiously refrained from claiming any equitable relief and thus inviting the discretion of the Court, I would hold that this Article should be applied.

It is desirable to observe that the Bench decision of the Judicial Commissioner's Court was not decided under the present Tenancy Act, and that the term 'ejectment' used in the former Act then in force, is a very different term in reference to landlord and tenant than 'dispossession' or 'exclusion.' It was argued that S. 6, Limitation Act applied to this case, on the ground that S. 104 (4) only applies to suits under the Tenancy Act and not to suits mentioned in Sch. 2 not brought under some section of the Tenancy Act. If this were so then S. 29, Limitation Act would itself preclude the application of S. 6. It thus seems clear that minority will not save limitation in this case. It is argued that the tenancy still subsists as the tenancy has not been abandoned, within the meaning of S. 35, Tenancy Act, but this argument seems to me merely an attempt to apply S. 35, Tenancy Act without regard to the law of limitation laid down by the Act itself. It is argued that the tenant right is not extinguished by limitation, S. 28, Limitation Act not being applicable, but that also is not the question here. It is argued that Art. 1 of Sch. 2 does not apply to part of a holding, and that the defendant is a co-sharer in the holding and that the Article does not apply against co-sharers. It would however be wrong in this case to apply the principles of co-ownership, and moreover the plaintiffs availing themselves of their position of members of a joint Hindu family, are seeking to recover and indeed would be entitled if they succeeded to be put in possession of the whole. The intention of the C. P. Tenancy Act is evidently to secure freedom from the disputes regarding tenancy land, and set some short time limit to claims stirred up in villages, and to attain quick finality in the revenue records.

I would therefore restore the decision of the trial Court, allowing the appeal and dismissing the cross-objection with costs.

B.D./R.K. *Order accordingly.*

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## * * A. I. R. 1938 Nagpur 358

VIVIAN BOSE J.

*Bhaiya Saheb Dajibabhau Kunbi* — *Defendant* — Applicant.

v.

*Pandit Ramnath Rampratap* — *Plaintiff* — Non-applicant.

Civil Revn. No. 480 of 1937, Decided on 26th October 1937, from order of Sub-Judge, First Class, Bhandara, D/- 18th June 1937.

**(a) Revision—Interference by High Court—High Court will not ordinarily interfere in purely interlocutory matters of procedure—It may however do so when matter is of general importance and no objection is taken by opposite party—Such interference must not be regarded as precedent.**

The High Court would not ordinarily exercise its revisional jurisdiction in a purely interlocutory matter, namely about the admission of a certain piece of evidence. It may however do so when the question is one of general importance and no objection is taken by the opposite party as to the competency of the Court to entertain the petition. But such case must not be regarded as a precedent for interference in purely interlocutory matters of procedure which do not affect jurisdiction, and do not inflict irreparable injury : *A I R 1936 Nag 25, Ref.* [P 359 C 2]

*** * (b) Evidence — Documents of State — Admission in evidence—Privilege when can be claimed—When State is party to litigation and when it is not—Difference between—Rules to be followed by Court explained.**

When the State is a party, it is interested in the litigation and is bound by ordinary procedure and so before documents otherwise relevant can be excluded, the Court must be satisfied that the mind of a responsible officer of Government has been brought to bear upon the question whether it is expedient in the public interest to give or to withhold the information asked for ; and also that he has made his decision solemnly and with a due sense of responsibility and not merely in order to avoid an inconvenient disclosure which may tell against his own side in the litigation or as a matter of mere departmental routine. When however the State is not a party, the position is different. It is no longer interested. It is no longer bound by the rules of procedure which govern the parties to a suit and so it would then ordinarily be enough for the Court to accept the unsworn statement of the head of the department, or when S. 124, Evidence Act, applies, of the public officer concerned. As to which of these two courses should be adopted in any particular case is a matter which is purely discretionary with the Court. But the Court is to decide whether a document is one of State or not. (Rules applicable in India when the State is not a party stated) : *(1931) A C 704, Rel. on.* [P 361 C 1, 2]

*** (c) Evidence — Admission of documents—Police during investigation making copies of account books of certain person—Such copies called into evidence by another in litigation with that person—Police claiming privilege of State document — Copies held were not State documents.**

Police during an investigation seized account books of a certain person and made copies of it in their diary. In another suit that person denied that he kept accounts and hence other party called for the copies of the account books made by the police to be produced in evidence. Police refused to produce the copies claiming the privilege of "State document" :

*Held* where account books were not State documents, copies of them could not assume this important shape simply because they were written in the course of a police investigation. Neither the police nor any other person can evade the normal rules of disclosure by the simple expedient of entering matter for which no privilege can be claimed into an otherwise privileged document : *32 Mad 62 ; A I R 1929 Rang 87 and A I R 1936 Nag 249, Rel. on.* [P 362 C 2]

Y. V. Jakatdar — *for Applicant.*

D. N. Choudhuri — *for Non-applicant.*

J. Sen, Govt. Pleader — *for Deputy Commissioner, Bhandara.*

**Order.**—The question here is an interesting and important one relating to privilege in connexion with documents of State. The plaintiff sues the defendant on a promissory note dated 19th March 1933. The defence is that it was executed for an illegal consideration and so is void. The defendant's case is that he was being prosecuted for a criminal offence and had called a certain witness in his defence and in order to induce the man to depose in his favour had executed this note as a bribe. At least the defence comes to that, although the word 'bribe' is not actually used. His learned counsel explained here that it would have been too crude to execute a note in favour of the witness directly especially as he was a Government official, so the plaintiff's name was inserted, but the plaintiff was a mere benamidar for the other person who was the real payee. The defendant denies that he received any consideration cash and also states that the plaintiff was not in a position to advance the money. In order to establish this he called upon the plaintiff to produce his accounts. The plaintiff replied that he had none relating to the period in suit. About the time that this money is said to have been advanced a police investigation was proceeding in connexion with another offence — a cheating case — entirely unconnected with the one for which the defendant was being prosecuted. During the course of the investigation the police had inspected the plaintiff's account-books and made copies of them. In order to disprove the plaintiff's story that he had no account-books relating to that period and in order to establish his own case that the plaintiff did not lend him any money and that the plaintiff was not in a position to advance the loan in suit the defendant called upon the police to produce these copies which they had made.

The Circle Inspector of Police, Faiz Husain, who had investigated the cheating case was called as a witness and in his deposition as D. W. 6 he admitted that he had inspected the plaintiff's accounts and admitted that his Sub-Inspector had made copies of the relevant entries which he says he checked. It is these copies which the defendant wants. A number of summonses were issued in this connexion, one being to the Station House Officer, who is said to be in possession of these copies. He was called upon to produce: (1) The reports made by Baktawarmal from July to October 1934; (2) the case diary; (3) the report of the Station House Officer, Gondia, and (4) the copy of the account-book of the plaintiff Pandit Ramnath. This summons was returned with the following endorsement:

> Returned . . . . . . with the intimation that according to the Police Manual, para. 694 a copy of the F. I. Report only could be given to the defendant. The other papers if required by the defendant he should apply to the I. G. of Police.

No attempt was made to approach the Inspector-General of Police for permission but further summonses were issued to various police officers at Gondia. At one stage the District Superintendent of Police complained that the information given in the summons was vague and confusing and that it would require a great deal of unnecessary search to unearth a complaint so vaguely described and so he asked for further particulars. No notice was taken of this request and instead the Circle Inspector, Faiz Husain was summoned to produce the documents. On this the following reply was received from the Inspector-General's office: "As the documents are privileged I regret they cannot be produced." It is signed—"Sheo Shankar Prasad, Superintendent for I. G. of Police, C. P." On receipt of this letter the lower Court held that as the Inspector General of Police had written to say that the documents are privileged Faiz Husain need not be summoned again and that the defendant would have to close his case. It is this order which the defendant seeks to revise.

In this Court the defendant's learned counsel confined himself to the copies of the plaintiff's account-books made by the police and said that he would give up his right to have the other documents, for which he had asked, produced. But so far as the copies of the accounts are concerned he argued that by no conceivable stretch of imagination can they be regarded as documents of State or as being in any other way privileged. I desire to make this clear at the outset. I am being asked to exercise revisional jurisdiction under S. 115, Civil P. C. in a purely interlocutory matter about the admission of a certain piece of evidence. I am clear that in the ordinary way I would have no jurisdiction to do so, but as Niyogi, A. J. C. interfered in a similar matter in A I R 1936 Nag 25[1] and in view of its general importance, I thought it right to hear both sides as well as the Crown. All three appeared and have thrashed the matter out at length. No objection has been taken to my competency to entertain the petition and so it is evident that everybody concerned wants the question to be settled at this stage in the case. In civil matters jurisdiction can be conferred by consent and so for that reason and because the point has been so fully argued I now proceed to decide the question, but make it plain that this must not be regarded as a precedent for interference in purely interlocutory matters of procedure which do not affect jurisdiction and which do not inflict irreparable injury.

The Evidence Act is anything but clear on this point. S. 123 prohibits anybody from giving evidence derived from unpublished official records relating to any affairs of State except with the permission of the officer at the head of the department concerned, and he is entitled to give or to withhold such permission as he thinks fit. This raises the following difficulties at once. First of all the section does not refer directly to documentary evidence. The prohibition is in respect of a living person whose lips are sealed by this section. Of course a document is not evidence in itself except in certain circumstances. It has to be proved by a witness before it can be admitted and it may be that the prohibition is effective to prevent its proof and therefore its production in evidence, but even so the prohibition obtains only in respect of an unpublished official record relating to any affair of State. Who is to decide whether the document in question is of that nature? S. 123 does not assist us there. The clause relating to the head of the department concerned does not in my opinion give that official the right to determine whether the document is an unpublished official record relating to affairs of State. It merely gives him the right to give or to withhold permission in his absolute discretion when the document is of that kind. But the question is still at large as to who is to decide about the nature of the document.

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[1] Ibrahim Sheriff v. Secy. of State, (1936) 23 A I R Nag 25=161 I C 668.

Section 124 is also not easy to construe. It states that no public officer shall be compelled to disclose a communication made to him in official confidence when he considers that the public interests would suffer by the disclosure. It is doubtful whether this can be taken to cover a copy made of a man's account-book in the course of a police investigation and in any case it raises the same difficulty as before. Who is to decide whether the matter in question was a communication made to the public officer in official confidence, the public officer or the Court? The difficulty is doubly felt when we find, as here, that the public officer in question has deposed freely about the contents of the document or at any rate about parts of it. It would, in my opinion, be dangerous to hold that a witness may speak freely about the contents of a document and then evade the wholesome rule which states that a document must be read and construed as a whole by claiming official privilege under S. 124; and yet that is the inevitable result if the witness is to be the sole judge. Then comes S. 162 which deals with the exact situation we are now considering, namely when a witness is summoned to produce a document. Para. 1 states that the document must be produced "notwithstanding any objection which there may be to its production or to its admissibility."

Then comes para. 2 :

> The Court, if it sees fit, may inspect the document, unless it refers to matters of State or take other evidence to enable it to determine on its admissibility.

It is clear from this that the Court may not inspect the document if it refers to matters of State, but it is not clear how the Court is to determine whether the document falls within that category or not. An examination of these three sections reveals that two points of view are possible. The first is that the head of the department concerned takes the necessary objection and that his decision is final. He is entitled to decide both whether the document is a document of State as well as whether the evidence derived from it should be given or not. This is the view in 48 Cal 304[2] at page 318. The opposite point of view is to be found in 44 All 360[3] at p. 365 and there is thus much to be said in its favour. It would be meaningless to compel a witness to produce a document in Court if his decision or that of the head of the department was intended to be final. Also the position of the last clause in para. 2 of S. 162 appears to indicate that the Court is entitled to take other evidence to determine whether the document is admissible or not. If that had not been the intention then the paragraph would have run thus : "The Court, if it sees fit, may inspect the document or take other evidence to determine on its admissibility, unless it refers to matters of State."

The only point of inserting the clause "unless it refers to matters of State" in the middle of the paragraph immediately after the words "may inspect the document" seems to be to indicate that the Court may not inspect a document in respect of which such a privilege is claimed until it has had an opportunity of determining its admissibility and for that purpose it may, if it thinks fit, take other evidence. The words "take other evidence" must mean evidence other than that of the document produced and the word "its" must refer to the document produced. Therefore since this clause is not qualified by any other words in that paragraph, it would appear to mean that the Court may take other evi-

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2. Irwin v. Reid, (1921) 8 A I R Cal 282=63 I C 467=48 Cal 304=25 C W N 150.
3. Collector of Jaunpur v. Jamna Prasad, (1922) 9 A I R All 37=66 I C 171=44 All 360 = 20 A L J 140.

dence to determine the admissibility of a document in respect of which this particular kind of privilege is claimed and that would be consistent with the rule which compels its actual production in Court. However since the Act itself is not clear on the point it is legitimate to refer to the English law on which the Act is based.

As regards that, one thing is clear at the outset. There is a wide difference between cases in which the State itself is a party and those in which it is not. In the former event the State is bound by the ordinary rules of procedure which bind any other person who sues or is sued in a Civil Court. If the State chooses to engage in commercial activities or render itself civilly liable in other ways, it cannot evade its obligations and liabilities by claiming privilege in respect of documents relating to matters in controversy in the suit except to the extent explained by the Privy Council in (1931) A C 704.[4] The manner in which such privilege is claimed is also different. The State when a party is bound by all the usual rules about the discovery and production of documents. If it claims privilege in respect of any particular document it must claim it upon affidavit in the usual way; also in such a case the Court may rightly insist upon the sworn statement of the head of the department concerned or even of a responsible minister. When the State is a party it is interested in the litigation and so, before documents otherwise relevant can be excluded the Court must be satisfied that the mind of a responsible officer of Government has been brought to bear upon the question whether it is expedient in the public interest to give or to withhold the information asked for; and also that he has made his decision solemnly and with a due sense of responsibility and not merely in order to avoid an inconvenient disclosure which may tell against his own side in the litigation or as a matter of mere departmental routine.

When however the State is not a party the position is different. It is no longer interested. It is no longer bound by the rules of procedure which govern the parties to a suit and so it would then ordinarily be enough for the Court to accept the unsworn statement of the head of the department, or when S. 124, Evidence Act, applies, of the public officer concerned. These two aspects are considered at pages 717 and 718 of the Privy Council ruling just cited. As to which of these two courses should be adopted in any particular case is a matter which is purely discretionary with the Court. But this still leaves the main difficulty unsolved. Who is to decide whether a document is one of State or not? From the observations made by their Lordships in the above case it seems that the decision lies with the Court. Of course that was a case in which the State was a party and it is true there is a wide difference but the observations of their Lordships on this point seem to be of general application. Their Lordships came to the conclusion after an examination of the authorities that :

> The Court has in these cases always had in reserve the power to enquire into the nature of the document for which protection is sought and to require some indication of the nature of the injury to the State which would follow its production.

They state that :

> The existence of such a power is in no way out of harmony with the reason for the privilege provided that its exercise be carefully guarded so as not to occasion to the State the mischief which the privilege where it exists is designed to guard against.

They also state that :

> The existence of the power .... is confirmed not only by judicial pronouncement, but by widespread practice, and may it not be added, by the reason of the thing?

They add that the Court is entitled in any particular case to prescribe the manner in which the claim of privilege is to be made if it is to be allowed. Some of the cases of which their Lordships approved, as for example, (1900) 1 Ch 347[5] and (1888) 21 Q B D 509[6] were not cases in which the State was a party. On reading this case law in conjunction with the provisions of the Evidence Act, I am of opinion that the following rules apply in India when the State is not a party :

(1) That all documents called for must actually be produced in Court, provided of course they are in the possession and power of the person who is summoned to produce them.

(2) That in the case of State documents the privilege should ordinarily be claimed by the witness who is summoned to produce them, though the Court may and

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[4] **Robinson v. State of South Australia (No. 2), (1931) A C 704=100 L J P C 183=145 L T 408=75 S J 458=47 T L R 454.**

[5] **In re Joseph Hargreaves Ltd., (1900) 1 Ch 347 =69 L J Ch 183=82 L T 132=7 Manson 354=48 W R 241=4 Tax Cas 173=16 T L R 155.**

[6] **Hennessy v. Wright, (1888) 21 Q B D 509=57 L J Q B 530=59 L T 323=53 J P 52.**

should raise the objection of its own motion if it is satisfied either from the nature of the document called for or otherwise, as for example from a letter written by a responsible public officer in response to the summons to produce, that it is an unpublished official record relating to an affair of State or a communication made to a public officer in official confidence.

(3) That when objection is taken the Court is precluded from inspecting the document but is entitled, if it thinks fit, (that is to say it is not bound) to examine other evidence to determine its nature and character though not its contents.

(4) Ordinarily it will be enough if the head of the department concerned certifies not necessarily in a sworn statement, but in a letter or other document produced and proved by the witness concerned or in some other way (e. g. under S. 57, Evidence Act where the signatures of certain public officers need not be proved) that the document is an unpublished official record relating to an affair of State or a communication made to a public officer in official confidence.

(5) But the Court is not bound to accept that as final and may require further evidence to satisfy itself that the document in question is really of that nature bearing in mind however the observation of the Judicial Committee in (1931) A C 704[4] at page 725 that:

> The Judge in giving his decision . . . will be careful to safeguard the interests of the State, and will not in any case of doubt resolve the doubt against the State without further inquiry from the Minister,

or here the head of the department.

(6) If after all this the Court decides that the document is not privileged it must be tendered in evidence, although in view of the possible disastrous public consequences which may flow from disclosure it would be right and proper to allow the State a reasonable time for taking such steps as it thinks fit to have the matter set right.

(7) On the other hand if the Court considers that the document is a State document of the nature described above, then it cannot be admitted in evidence unless the party who seeks its production produces the permission of the head of the department or the public officer concerned. The burden is on the party calling for the document and the decision of the head of the department or the public officer concerned to give or to withhold consent is in that event final.

Applying these rules to the present case the first question which I have to determine is whether the documents called for are unpublished official records relating to an affair of State or are communications made to a public officer in official confidence. As I have said four sets of documents were called for. The first three are undoubtedly privileged. It does not require a witness to describe their nature and so, as I have said, the Court can and indeed must of its own motion refuse to allow their production unless the defendant who called for them produces the necessary permission. This has been recognized here and counsel has very rightly confined himself to the fourth set, namely the copies of the account books.

The Circle Inspector, Faiz Hussain tells us as D. W. 6 that his Sub-Inspector made copies of certain entries in the plaintiff's accounts at the plaintiff's shop. The plaintiff's account books are certainly not State documents and so prima facie it is impossible to see how copies of them can assume this important shape simply because they were written by a Sub-Inspector in the course of a police investigation. In 32 Mad 62[7] at p. 65 it was held that the returns made to an Income-tax Officer are not documents of State. The position is much the same here. D. W. 6, Faiz Hussain tells us that these copies were made at the plaintiff's shop, so they were probably not copied into the case diary direct, but even if they were, it would make no difference. The case diary as such is of course privileged but not necessarily every entry in it. Neither the police nor any other person can evade the normal rules of disclosure by the simple expedient of entering matter for which no privilege can be claimed into an otherwise privileged document: *see* 6 Rang 672[8] at p. 673 and I L R 1937 Nag 178[9] at p. 179. The correct procedure in such a case is to seal up the rest of the document so that it cannot be inspected and to disclose only those portions which are not privileged: *see* Mulla's Civil Procedure Code, 10th Edn., p. 622, and 20 Cal 587.[10]

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[7] Venkatachella Chettiar v. Sampathu Chettiar, (1909) 32 Mad 62=1 I C 705=19 M L J 263.

[8] Mohamed Bholat v. Emperor, (1929) 16 A I R Rang 87=115 I C 899=30 Cr L J 538=6 Rang 672.

[9] Emperor v. Viswanath, (1936) 23 A I R Nag 249=1936 Cr C 1040=170 I C 638=38 Cr L J 936=I L R 1937 Nag 178.

[10] Jadub Loll Shaw v. Kanai Loll Shaw, (1893) 20 Cal 587.

Also it is not necessary that the document should be left on record so to afford an unauthorized person an opportunity of tampering with it or seeing it. The witness who produces it can furnish copies of the entries concerned in the same way as copies of entries in account books dealt with. As their Lordships observed in *Robinson's case*[4]:

> The privilege is a narrow one most sparingly to be exercised . . . . . . the principle of the rule is concern for the public interest and the rule will accordingly be applied no further than the attainment of that object requires.

One of the earlier summonses was returned with the remark that only a copy of the first information report could be supplied and my attention was drawn during the argument to S. 162, Civil P. C. But that section excludes the statements mentioned in it only during the inquiry or trial in respect of any offence under investigation at the time when the statement was made. It does not apply to every proceeding whether civil or criminal. Of course it may be that the matter is privileged on other grounds but not because of this section. As regards the objection that the summons was vague in that the documents were not described with sufficient particularity to enable them to be recognized, it might have been a valid objection if it had not been for the fact that the Circle Inspector, Faiz Hussain, seems to have had no difficulty in remembering the incident and the case referred to. He actually consulted his own notes about the proceedings in the course of his evidence and gave exact particulars as to sums and dates. In the circumstances it is difficult to resist the conclusion that the excuse was not a genuine one and that the police were either playing for time or making a routine excuse, although why they should want to do that is not easy to understand. I allow the revision. A fresh summons will now issue for the production of the copies of the plaintiff's accounts which D. W. 6 states that his Sub-Inspector made in the course of the investigation about which he speaks. Prima facie these copies whether entered in the case diary direct or made on separate sheets of paper are not privileged documents. But as this matter has not really been determined it will be open to the witness or the head of the department concerned (but not the defendant, for the privilege is not his) to satisfy the lower Court that the documents really are unpublished official records relating to an affair of State or that they are communications made to a public officer in official confidence for reasons which have not appeared hitherto and which have not been dealt with by me. If they succeed in that then the documents cannot be used in evidence unless the defendant produces the sanction of the Inspector-General of Police. If not, the documents must be disclosed. In view of the fact that the objection throughout has been by or on behalf of the Crown and not by the parties concerned and since my jurisdiction to act in this matter has really been conferred by consent I will make no order as to costs.

B.D./R.K. *Application allowed.*

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## A. I. R. 1938 Nagpur 363

NIYOGI J.

*Kachru Chindhu Mahar* —
*Decree-holder* — Applicant.
v.
*Laxman Sitaram and others* —
Non-applicants.

Civil Revn. No. 204 of 1937, Decided on 28th January 1938, from order of Small Cause Court Judge, Bhandara, D/- 16th January 1937.

**Civil P. C. (1908), S. 47 — Decree against father's assets in hands of minors — Decree adjusted by giving dhan to decree-holder and execution case struck off—Subsequent application against order striking off execution on ground that dhan was personal property of minors—Application comes under S. 47—Executing Court can re-open execution proceedings and can restore dhan.**

The wording of S. 47 is comprehensive enough to include a case where an objection is made to the order regarding satisfaction of the decree and striking off the execution proceedings. An application made after the decree is satisfied is as much an application under S. 47 as it is when made before it. [P. 364 C 2]

Where a decree against father's assets in the hands of the minors is adjusted, by giving dhan in full satisfaction and the execution case is struck off, the decree having been fully satisfied and subsequently an application is made for the restoration of the dhan on the ground that it was grown on the occupancy fields belonging to the minors, and that it did not constitute the assets of their father against which the decree had been passed, the application must be treated as having been made under S. 47 and the executing Court has jurisdiction to re-open the execution proceedings after they had been struck off as fully satisfying the decree. Moreover on the principle that the Court has power to correct its own mistake the executing Court can be regarded as having the power to restore the parties to *status quo ante* : *A I R 1933 All 429*; *A I R 1934 Pat 202*; *A I R*

*1935 Cal 645 and A I R 1936 Lah 725, Rel. on; A I R 1929 Pat 559 and A I R 1929 Lah 121, Disting.* [P 364 C 2]

T. J. P. Chetty — *for Applicant.*

R. Kaushalendra Rao — *for Non-applicants.*

**Order.**—This is a decree-holder's application in revision against an order passed in execution proceedings by the junior Small Cause Court Judge in Case No. 1614 of 1934 on 16th January 1937. The applicant obtained a decree against their father's assets in the hands of the minor non-applicants, and in execution received by way of adjustment 9 khandis of paddy in full satisfaction, from their guardian mother Mt. Yemi. Thereon one Mangaru who is their maternal uncle applied to the Court on 7th January 1936 for the restoration of the dhan on the ground that it was grown on the occupancy fields belonging to the minors and that it did not [constitute the assets of their father against which the decree had been passed. That application was dismissed as Mangaru, not being a duly appointed guardian, was incompetent to make it ; and at the request of the decree-holder the execution case was struck off, the decree having been fully satisfied. Subsequently Mangaru made a fresh application complaining that Mt. Yemi acted adversely to the minors' interest in having adjusted the decree by delivering 9 khandis of dhan belonging to the minors without the sanction of the Court. He sought for her removal and his own appointment as guardian ad litem. On inquiry the lower Court was satisfied about the truth of the allegations made in that application and passed an order removing Mt. Yemi from guardianship and appointing Mangaru in her place, and on the merits of the application found that the 9 khandis of dhan belonged personally to the minors and could not be considered to be the assets of their father. It consequently directed the decree-holder to restore the dhan to the minors. It is against this order that the application in revision is directed.

It is vehemently argued that the executing Court had no jurisdiction to re-open the execution proceedings after they had been struck off as fully satisfying the decree. This argument seeks to put a very restricted interpretation on the scope and terms of S. 47 which is not justified as will be presently shown. S. 47 speaks of only questions arising between the parties to the suit in which a decree was passed relating to the execution, discharge and satisfaction of the decree. The wording is comprehensive enough to include a case where an objection is made to the order regarding satisfaction of the decree and striking off the execution proceedings. An application made after the decree is satisfied is as much an application under S. 47 as it is when made before it. S. 47 is intended to obviate a fresh suit between the parties to a decree on matters affecting the execution, discharge and satisfaction of the decree. The question therefore is whether the application made by Mangaru was not one relating to execution, discharge or satisfaction of the decree. There can be only one answer and that must be in the affirmative. If so, the application must be treated as having been made under S. 47, Civil P. C. There is one other important aspect which must be borne in mind. It is that the executing Court exceeded its jurisdiction and was acting ultra vires in executing the decree against property belonging to the minors when the decree was passed against their father's assets in their hands. The first order dated 22nd February 1936 which struck off the execution on the ground that the decree was fully satisfied was therefore a nullity. On the principle that the Court has power to correct its own mistake the executing Court could be regarded as having the power to restore the parties to *status quo ante*. It therefore appears to me that the lower Court was perfectly right in directing the decree-holder to return the dhan that he had illegally obtained from the minor's quondam guardian. I am fortified in this view by the cases reported in A I R 1933 All 429,[1] A I R 1934 Pat 202,[2] A I R 1935 Cal 645[3] and A I R 1936 Lah 725.[4] The learned counsel for the applicant invites my attention to A I R 1929 Pat 559[5] and A I R 1929 Lah 121.[6] In both these cases the question was whether a sale in execution could be challenged by the judgment-debtor after it had been confirmed and the auction-purchaser had been put

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1. Madholal v. Duli Chand, (1933) 20 A I R All 429=144 I C 468=1933 A L J 738.
2. Sheodahin v. Ramjanam, (1934) 21 A I R Pat 202=148 I C 519.
3. Basiruddin Sarkar v. Elahi Bux Pramanik, (1935) 22 A I R Cal 645=158 I C 585.
4. Bur Singh v. Anjuman Dehi Sohal, (1936) 23 A I R Lah 725=161 I C 21.
5. Dukhu Mandal v. Gopinath, (1929) 16 A I R Pat 559=119 I C 881.
6. Kartarsingh v. Zorawar Singh, (1929) 16 A I R Lah 121=113 I C 778.

in possession. It was held that the question was not one relating to execution, discharge or satisfaction of the decree, and consequently the application was not treated as one under S. 47, Civil P. C. These cases are therefore distinguishable and cannot afford any guidance in the present case. The application is dismissed with costs. Pleader's fees Rs. 10.

D.S./R.K. *Application dismissed.*

## A. I. R. 1938 Nagpur 365

GRILLE J.

*Emperor*

v.

*Mohamad Khan and others*
Non-Applicants—Accused.

Criminal Revn. No. 63 of 1937, Decided on 8th November 1937, from reference by Addl. Sess. Judge, Yeotmal.

**(a) Forest Act (1927), S. 55—Grazier committing cattle trespass—Owner of cattle, though not criminally, is civilly liable.**

The object of the Legislature in enacting S. 55 was to make the owner liable to a certain extent for the acts of his servant, civilly, not criminally. Hence in the case of cattle trespassing in Government forest unless duly licensed, the master cannot be criminally liable for the acts of his grazier in taking his cattle into such forest unless he permits the cattle so to graze by some overt acts or by some negligent omission : *A I R 1915 Nag 2, Rel. on.* [P 365 C 2]

**(b) Forest Act (1927), S. 55 — Confiscation may be in respect of property not owned by offender.**

The word used in S. 55 is 'confiscation' and not 'forfeiture.' Hence it cannot be argued that confiscation can only be in respect of the property of the person convicted of the offence. [P 366 C 1]

**(c) Forest Act (1927), S. 55 — Owners of cattle entrusting large number of cattle in vicinity of closed forest to a youth—Youth committing cattle trespass—Confiscation of cattle is just.**

Entrusting by the owners of a large number of cattle in the vicinity of a closed forest to a youth and two children might be held to amount to such negligence as to suggest connivance at a breach of the law and in case of cattle trespass by such youth an order of confiscation of cattle is just. [P 366 C 2]

J. Sen, Govt. Pleader — *for the Crown.*

Ahmad Raza Khan — *for Non-Applicants (Accused).*

**Order.**—Three graziers were convicted under S. 26 (d), Forest Act and sentenced to a fine of Rs. 5 each. At the same time 81 cattle were seized, and the trying Magistrate passed orders of confiscation under S. 55 (2), Forest Act in respect of 30 she-buffaloes. The convicted graziers appealed, as did the owners of the cattle. The appeal of the graziers was rejected and the orders in respect of the confiscation of the cattle were modified by eliminating the women, the poorer owners and such as had but few buffaloes, so that in the end orders of confiscation were passed in respect of 16 she-buffaloes only. The owners of these buffaloes applied to the Additional Sessions Judge, Yeotmal, who has made a reference to this Court with the recommendation that the orders of confiscation be set aside. A rule was issued and the Crown has appeared to oppose the rule which is supported by Mr. Ahmad Raza Khan. The recommendation of the learned Additional Sessions Judge is comprised in the following sentence :

> The result of the passing of an order of confiscation under S. 55, Forest Act is to make an owner liable for the wrong of his servant even when he could not be convicted for a substantive offence under S. 26 (d), Forest Act.

He therefore considered that the order should be set aside. It appears to me that the object of the Legislature in enacting S. 55 was to make the owner liable to a certain extent for the acts of his servant civilly, not criminally. It is well established that the owner cannot be made criminally liable for the acts of his servant except in certain cases by statute. It is also equally well established that he is civilly liable for wrongs done by his servant. In the case of cattle trespassing in Government forest unless duly licensed, there is a long consensus of decisions in these Provinces, of which the leading case is 11 N L R 76,[1] that the master cannot be criminally liable for the acts of his grazier in taking his cattle into such forest unless he permits the cattle so to graze by some overt acts or by some negligent omission. Cases of cattle trespass into Government reserve forest are numerous, and in a great majority of cases it is impossible to bring the offence home to the master, although connivance at the acts of the grazier is almost a certainty.

Almost all forest offences are committed by servants; grazing offences by the graziers of large cattle owners or graziers hired by a community of small owners, and thefts of timber by forest contractors or by malguzars, are ordinarily committed not by the contractors or malguzars with their own hands but by their servants; and it is because the servants are caught and masters escape that the salutary provision has been introduced that not only all produce in respect of which the offence is committed may be seized and confiscated but also tools, boats, carts or cattle used in the commission of any such offence. These tools, boats, carts or cattle will ordinarily belong to the master and not to the servant, and although it is the servant and not the master who is convicted of the crime, it is on the master, if the appeal which he has the right to make under S. 59, Forest Act, fails, on whom some punishment rightly falls. While tools, boats, carts and cattle may be instrumental in cases of theft of forest produce, it cannot be disputed that cattle are also instrumental in the theft of grass which they eat and in the damage to gross and young trees which they cause in grazing; and an offence under S. 26 (d) is as much an offence as the illicit removal of timber, and cattle used in committing such an offence are as much liable to confiscation as cattle drawing a cart containing illicitly felled timber.

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[1] Saiyyad Rahim v. Emperor, (1915) 2 A I R Nag 2=29 I C 825=11 N L R 76=16 Cr L J 465.

It has been argued that a confiscation can only be in respect of the property of the person convicted of the offence, since sub-s. (2) of S. 55 reads: "Such confiscation may be in addition to any other punishment prescribed for such offence", and therefore that the confiscation is itself a punishment. If this argument were correct, there would be no reason for the existence of S. 59 or at least of the provision contained therein that any person claiming to be interested in the property so seized may make an appeal against the order of confiscation. Cases not infrequently arise of persons making an appeal under this section in respect of the confiscation of the bullocks which they have lent to others in all innocence and these bullocks being used in the commission of a forest offence. I have already stated that I believe it to be the intention of the Legislature that masters should not in every case be able to evade punishment in some form, although their criminal liability for forest offences is excluded. The word used is "confiscation" and not, as in the Penal Code, "forfeiture". Forfeiture can only relate to the property owned by the person concerned, but property may be confiscated from the possession of anyone, whether he is the owner thereof or no. The owner of property confiscated, be he an offender under the Forest Act or no, has a right to appeal against the order of confiscation, and it is in the discretion of the Court to which the appeal is made whether the order of confiscation shall or shall not be set aside.

That the order of confiscation in this case was just and that the discretion of the appellate Magistrate has not been wrongly exercised is to my mind apparent. A herd of 81 cattle was entrusted to one youth and two children. The owners of the cattle at first agreed to a composition which under S. 68 (1) (a), Forest Act was offered to them by the forest authorities, but subsequently resiled. There is no doubt that there was a reasonable suspicion against the owners that they themselves had committed an offence, as entrusting such a large number of cattle in the vicinity of a closed forest to a youth and two children might be held to amount to such negligence as to suggest connivance at a breach of the law. Allegations against the forest authorities of driving the cattle themselves into prohibited areas and of beating the graziers had been made and have been found to be false. The result is that the reference is not accepted and the rule is discharged.

D.S./R.K. *Rule discharged.*

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## ✲ A. I. R. 1938 Nagpur 366

STONE C. J. AND PURANIK J.

*Gowardhandas Surajmal Marwadi — Decree-holder* — Appellant.

*Mohanlal Surajmal Marwadi — Judgment-debtor* — Respondent.

First Appeal No. 88-B of 1935, Decided on 26th October 1937, from order of Sub-Judge, First Class, Akola, D/- 29th June 1935.

**✲ Civil P. C. (1908), S. 60 (1) (c) — Cases in which person is agriculturist stated—Owner of land letting it reserving either money or produce is not agriculturist:** *16 N L R 89=A I R 1920 Nag 45 = 55 I C 481 and A I R 1927 Nag 374 = 102 I C 712, Overruled.*

In determining whether a person is an agriculturist the following factors should be noted:

(1) Whether a person is an agriculturist or not is not a question turning on source of income but on nature of occupation. (2) A person may have many occupations. If one of them is agriculture and for that purpose a house or building is occupied, protection can be claimed. (3) A person who owns and and lets it reserving either money or produce is not an agriculturist but a landlord. (4)

A person who cultivates the land as a labourer, though neither a landowner nor a tenant, is an agriculturist. (5) If a man cultivates the land with his own hands or by means of labourers whose activities he directs, he is an agriculturist whether he operates on a large or a small scale. If he has no connexion with the land except that he owns it and people work for him, he may or may not be an agriculturist according to circumstances: *Case law discussed.* [P 369 C 2]

Hence an owner of land is not an agriculturist, if he lets out on batai (reserving share of produce instead of money rent): *16 N L R 89 = A I R 1920 Nag 45 = 55 I C 481 and A I R 1927 Nag 374 = 102 I C 712*, **Overruled.** [P 369 C 2; P 370 C 1]

Hidayatullah and P. V. Dixit — *for Appellant.*

R. N. Padhye — *for Respondent.*

**Judgment.**—This is an appeal by the decree-holder against an order passed on an objection made by the judgment-debtor objecting that a certain house should not be taken in execution as it was a house occupied by him as an agriculturist and accordingly was protected by Sec. 60 (1), Proviso (c). One question arises in the result, viz., is the objector an agriculturist ? The other questions, viz. (2) has the house, to be protected, to be occupied by the agriculturist as such ? and (3) if so, was it so occupied ? do not arise, for the answer to the first question is in the negative. The general trend of opinion as expressed by the Judicial Commissioner's Court is in favour of the view that whether or not a person is an agriculturist depends upon whether he receives a substantial portion of his income from agriculture. Thus, in 26 N L R 295[1] Macnair A. J. C. decided that the term "agriculturist" includes all persons who gain a substantial portion of their livelihood by agriculture. He also decided that proviso (c) to sub-s. (1), S. 60, Civil P. C., refers only to those houses which are occupied for the purposes of agriculture. He laid stress on S. 60 (1), proviso (b) and posed the case of an agriculturist who was also an artisan. If a man has to gain his whole living from agriculture to be an agriculturist then by parity of reasoning he would have to gain his whole living from handicraft to be an artisan, which is absurd.

This apparent absurdity however overlooks the fact that whether a man follows this or that art, mystery of occupation does not depend upon the source of his livelihood but the nature of his employment which in some cases, may be very arduous and yet not bring in any money. An example is to hand in the life of Cezanne, another in the life of Fantin Latour. These starving geniuses were artists. Their slender resources were derived from house property. No one would deny that they were artists simply because their works, now each worth a fortune, would not sell. No one would class them as land owners because their few francs were derived from the rent of some small property. They were artists because they devoted their time and thought to art. They would still have been classed as artists if they had been bad instead of good at painting pictures. So an artisan is a person who follows some mystery or craft. In that case the trial Judge found that the person in question was a timber-merchant, factory owner, and agriculturist and therefore not an agriculturist within the meaning of S. 60 because agriculture was not his sole means of livelihood. The facts on which it was decided that he was an agriculturist do not appear. On appeal it was remitted for consideration whether the appellant derived a substantial part of his livelihood from agriculture. The actual decision we agree with. A man may be an agriculturist if he is engaged in cultivating fields though he has other employments or other sources of income. In 15 N L R 83[2] the person claiming protection was clearly a farmer, that is an agriculturist. All that case decided (and we respectfully agree with the decision) was that if buildings are occupied by a farmer when he is farming a big farm they do not cease to be occupied by him as an agriculturist, simply because his farm shrinks to more modest proportions, if the various parts are in actual use for agricultural purposes. He need not crowd all his produce, implements and cattle into a few barns in order to clear other barns, hitherto used for the farm purposes, and thus render them attachable.

In 16 N L R 89,[3] Kotval A. J. C. held that an agriculturist who transfers his land by mortgage or lease so as to be unable to cultivate it himself does not cease to be an agriculturist. It is a little difficult to follow the judgment, but assuming that a farmer does not cease to be a farmer simply because he has no farm yet it would appear difficult for a person so situate to be occupying a house for the purpose of an occupation, farming, which he is not carrying on. We are not in agreement with this decision, which we overrule. In A I R 1927 Nag 374[4] it was indicated by Hallifax A. J. C., that S. 60 (1), proviso (c) must be read as though it ended "...... belonging to an agriculturist and occupied by the agriculturist as such." With this we respectfully agree. He then held that a widow who has been left land which she does not cultivate but lets out is an agriculturist and occupies her house as such because

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[1] **Sadhuram v. Chapsi, (1931) 18 A I R Nag 8= 130 I C 81=26 N L R 295.**

[2] **Bhaiyalal v. Ballabhadas, (1919) 6 A I R Nag 54=51 I C 129=15 N L R 83.**

[3] **Amolaksao v. Eknath, (1920) 7 A I R Nag 45=55 I C 481=16 N L R 89.**

> it is necessary for her to live in that house to look after the subletting of the holding, that is, for the purposes of agriculture.

We do not agree with this and overrule it. In 29 N L R 106[5] the learned Judicial Commissioner following 15 Nag L R 83[2] held that an agriculturist who is employed solely in cultivating land is not to be regarded as not occupying buildings for the purposes of agriculture simply because they are more numerous than are necessary. It is a little difficult to ascertain the ratio decidendi, but it would seem that it turns on the fact that all the buildings were being used by an agriculturist as such and though he could have crowded his implements, etc. into some only of the buildings the principle enunciated in 15 Nag L R 83[2] applied. If this is so, we respectfully agree. In A I R 1935 Nag 59,[6] Gruer A. J. C. (as he then was) decided that the house or building must be proved by the judgment-debtor to be occupied or required for agricultural purposes. He had not to consider what constitutes an agriculturist. The above appear to exhaust the Nagpur decisions which are all of single Judges. In Madras the matter was considered by a Bench in 49 Mad 227.[7] It is quite obvious that Waller J. regarded occupation, not income, as the test. We do not know where Devadoss J. got his etymological meaning from, but we would prefer to follow Webster and define an agriculturist as one engaged or skilled in agriculture or a husbandman or (according to the Oxford Dictionary) a farmer (not being a stock or dairy farmer): In short, one who is engaged in or skilled in cultivating fields. Such a person may do the work through others. But he must either engage himself in such work or direct others in the doing of it.

That case supports the view (for which 7 Bom 530[8] is relied upon) that the house or building must be occupied by the agriculturist as such. We respectfully agree with the view expressed by Waller J., in that case. We are not able to agree with the restriction of the term 'agriculturist' to small holders and manual cultivators. A farmer in a large way of business is, in our view, no less an agriculturist than a peasant proprietor. A zamindar who owns land and lives by rent is not an agriculturist not because his lands are wide but because he is a man who owns, as distinct from a man who cultivates, land. One does not cultivate land if one lets lands. The mere fact of letting precludes the lessor from having any say in the mode of cultivation. He can, but rarely in India does, make provision in the lease for certain things to be done, but after the lease is executed he has no right whatever to interfere. In A I R 1916 Cal 891[9] it was indicated that by 'agriculturist' is meant "the common agriculturist such as lives in (this country), that is, the raiyat who tills the field."

There the persons claiming protection were engaged in the jute business and as middlemen and "had a small cultivation in land." Apparently the learned Judges relied on 12 Bom 363[10] which was also relied on in 49 Mad 227[7] at p. 229, where it was observed that this protection was designed for agriculturists in the strictest sense. The Calcutta case (which is very scantily reported) appears to have gone on the view that the person must be a raiyat to be protected. With this we are unable to agree. In 41 Bom 475[11] it was held that a person who has become a mere labourer is, being a person engaged in cultivating the soil, an agriculturist though he owns no land and is not a tenant. We respectfully agree. Such a person is engaged in agriculture.

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[4] **Atma Ram v. Radha Bai, (1927) 14 A I R Nag 374=102 I C 712.**

[5] **Daulat Shah v. Premchand, (1933) 20 A I R Nag 80=141 I C 824=29 N L R 106.**

[6] **Shrikumar M. G. Ganpat v. Mt. Kashibai, (1935) 22 A I R Nag 59.**

[7] **Muthuvenkatarama Reddiar v. Official Receiver, South Arcot, (1926) 13 A I R Mad 350=92 I C 398=49 Mad 227=50 M L J 90.**

[8] **Radhakisan Hakumji v. Balvant Ramji, (1883) 7 Bom 530.**

[9] **Ashmatulla Sircar v. Pan Mahmud Chowdhury, (1916) 3 A I R Cal 891=35 I C 343=20 C W N 874.**

[10] **Jivan Bhaga v. Hira Bhaiji, (1888) 12 Bom 363.**

[11] **Devara Hegde v. Vaikunt Subaya, (1917) 4 A I R Bom 253 = 39 I C 639 = 19 Bom L R 281=41 Bom 475.**

There are a group of cases from Allahabad, viz. A I R 1935 All 292,[12] A I R 1928 All 211[13] and A I R 1927 All 214.[14] The last case, which decides that "occupation" is a wider word than "residence" does not touch this case. A I R 1928 All 211[13] doubted 35 All 307[15] where it was decided that if *A* is a zamindar letting lands and a farmer cultivating lands, the question whether he was an agriculturist depends upon whether he got most from his letting or his cultivating. With respect, we share this doubt. In the case put *A* would be an agriculturist, in our opinion, but whether a house occupied by him was protected or not would depend on whether he was occupying it as agriculturist or as zamindar or otherwise. In A I R 1935 All 292[12] the facts were that the person claiming protection was employed as a steward. He had some land which was cultivated by hired labourers. It does not appear from the report whether the steward directed the labourers' activities or not. It was held he was not an agriculturist.

The various cases from Lahore are referred to in A I R 1936 Lah 737,[16] A I R 1928 Lah 132[17] and A I R 1930 Lah 1034.[18] In the first named, Coldstream J. held that an agriculturist is a professed cultivator of land, a farmer or husbandman. He further held that the term does not exclude a large land-owner or a person who does not depend solely or mainly on cultivation but that a person who does not himself till land and earn his living thereby, wholly or partly, is not an agriculturist. Broadly speaking, we are in accord with this. We would however respectfully vary it by making employment and not income the sole test and by adding that the tilling may be done by employed persons so long as the person claiming protection directs their activities, i. e. is a farmer. That case[16] also decided, and with this also we respectfully agree, that a landowner having khudkast (home farm) land is not a cultivator if he lets those lands to tenants and cultivates nothing himself. In A I R 1928 Lah 132[17] it was held that a person who owns lands and lets it out on the batai system is not an agriculturist. Again we agree, for it seems to us that the only difference between that and letting on the usual lease is that in the former case the rent is paid in produce and in the latter case in money. If that produce is stored in a shed, that does not cause the shed to be used for agricultural purposes. The land would get on the same if instead of storing his produce the land-owner sold it as market and banked the proceeds. In A I R 1930 Lah 1034,[18] a Bench decision, it was observed as follows:

> It is settled law that in order to claim exemption from attachment or sale under S. 60 (1) (c), Civil P. C., it is not sufficient merely to show that the house or the site in question belonged to an agriculturist, but it must be established further that it was being used or occupied 'bona fide for purposes of agriculture': *see* 7 Bom 530,[8] 12 Bom 363,[10] 47 P R 1897[19] and 65 P R 1909.[20] It is also beyond dispute that the onus to prove this essential fact lies on the debtor: 28 Bom 125,[21] 35 All 307,[15] A I R 1927 Lah 810.[22]

Our conclusions from the above cases and a consideration of the words used in S. 60 and generally may be stated as follows: 1. Whether a person is an agriculturist or not is not a question turning on source of income but on nature of occupation. 2. A person may have many occupations. If one of them is agriculture and for that purpose a house or building is occupied, protection can be claimed. 3. A person who owns land and lets it reserving either money or produce is not an agriculturist but a landlord. 4. A person who cultivates the land as a labourer, though neither a landowner nor a tenant, is an agriculturist. 5. If a man cultivates the land with his own hands or by means of labourers whose activities he directs he is an agriculturist whether he operates on a large or a small scale. If he has no connexion with the land except that he owns it and people work for him, he may or may not be an agriculturist according to circumstances. Applying the above to this case, it is clear that the judgment-debtor was not an agriculturist. He owns land which he let out on batai (reserving share of produce instead of money rent). He did not cultivate any lands. The appeal is accordingly allowed with costs.

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[12] Habibul v. Shiam, (1935) 22 A I R All 292=158 I C 511 = 1935 A L J 306.

[13] Girwar Dayal v. Narain Singh, (1928) 15 A I R All 211=116 I C 20.

[14] Baladin v. Lakhan Singh, (1927) 14 A I R All 214=99 I C 376.

[15] Jamna Prasad v. Raghunath Prasad, (1913) 35 All 307=19 I C 125=11 A L J 437.

[16] Gurbaksh v. Lal Chand-Darshan Lal, (1936) 23 A I R Lah 737 = 164 I C 690 = 38 P L R 833.

[17] Abdulla v. Anjuman Dehi, (1928) 15 A I R Lah 132=106 I C 45.

[18] Mirza v. Jhanda Ram, (1930) 17 A I R Lah 1034=130 I C 419=12 Lah 367 = 31 P L R 842.

[19] Bawa Gurbakhsh Singh v. Ghulam Qadir, (1897) 47 P R 1897.

[20] Attar Singh v. Bhagwan Das, (1909) 65 P R 1909=2 I C 983=104 P W R 1909.

[21] Pandurang Balaji v. Krishnaji Govind, (1904) 28 Bom 125=6 Bom L R 799.

[22] Bute Shah v. Guranditta, (1927) 14 A I R Lah 810=100 I C 104.

D.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Nagpur 370

VIVIAN BOSE J.

*Firm of J. E. Billimoria and Sons, Nagpur — Defendant* — Applicant.

v.

*Gopinath Sunderlal Bhargao — Plaintiff* — Non-Applicant.

Civil Revn. No. 712 of 1936, Decided on 12th November 1937, from order of Small Cause Court, Nagpur, D/- 2nd September 1936.

**(a) Decree—Ex parte—Setting aside — Sufficient cause—Party engaging counsel to appear on his behalf when case would be called—Counsel not undertaking any other work on day of hearing but ready to appear when called —Accommodation in Court being insufficient, counsel leaving his clerk in Court and himself waiting in bar room with instructions to clerk to call him when case was called — Clerk remaining absent when case was called—Ex parte decree passed—Held sufficient cause for non-appearance.**

In setting aside an ex parte decree attention must in the first instance be concentrated on the conduct of the party and not merely on that of the counsel. If a party cannot be present himself when his case is called on for hearing, he must of course make adequate provision for his proper representation by some agency. If he employs counsel for this purpose he must ensure that the person he employs undertakes to be present when the case is called, or that there is somebody else there to represent him. This means that he must pay counsel adequately or employ others who will be there to assist him. If he does that, then he has done all that the law can reasonably expect of him. If in spite of that, counsel does not appear, the litigant cannot be held responsible. This does not mean that everything is to be assumed in favour of a litigant who is prima facie in default. If he wants to have the ex parte proceedings set aside, he must show sufficient cause and that means he must show that counsel undertook to represent him at all necessary hearings for the fees agreed upon or paid, and also that there was no qualifying clause in the agreement. He need not show an express undertaking by counsel to be present either personally or through some other authorized person at all hearings; that is necessarily implied in the contract, but he must bring the responsibility definitely home to counsel if he wants to succeed and on that ground. [P 371 C 1, 2]

A party engaged a counsel to appear for him when the case would be called. On previous hearings the counsel had appeared regularly and on the day of hearing in question he undertook no other work in any other Court but was ready to appear as soon as the case was called up. The accommodation in the Court being inadequate he remained waiting in the bar room and left his clerk in the Court with instructions to call him as soon as the case was called up. The clerk had been with the counsel for several years and no previous instance of his negligence had been suggested. When the case was called up, the clerk remained absent and a decree ex parte was passed:

*Held* that neither the party nor his counsel were to be blamed for the negligence of the clerk and there was sufficient cause for non-appearance and hence the ex parte decree should be set aside. [P 372 C 1, 2; P 373 C 1]

**(b) Legal Practitioner—Duty of—Care and due diligence should be exercised in choosing clerks—Close personal check should be kept on their actions.**

There is a duty cast upon members of a monopolist profession, like the legal profession, to exercise care and due diligence in the persons whom they employ, and if they choose to employ a person known by them to be irresponsible without taking adequate steps to keep a close personal check upon his actions, then they are themselves at fault and will become liable to be called to account. [P 373 C 1]

**(c) Decree — Ex parte — Setting aside — In determining whether there was sufficient cause Judge concentrating on negligence of counsel instead of on conduct of party—Interference in revision is called for.**

It is true that whether there was sufficient cause for non-appearance is a question of fact and the High Court cannot interfere in such matter in revision in the absence of perversity or something of the like nature. But where the Judge has concentrated his attention on the negligence of counsel instead of on the conduct of the party, interference is called for. [P 373 C 1]

**(d) Costs—Neither plaintiff nor defendant to blame — Party employing offending agency should pay costs.**

In proceedings to set aside an ex parte decree, it was found that neither the plaintiff nor the defendant was to blame. The ex parte decree was passed on account of the negligence of the clerk of the defendant's counsel who also was not to blame:

*Held* that the defendant who had employed the offending agency, i. e. the clerk, should pay the costs. [P 373 C 1]

R. N. Padhye and P. P. Deo — *for Applicant*.

B. T. Amlekar — *for Non-applicant.*

**Order.** — On 1st November 1935 the defendant and his counsel were both absent when the case was called at 1-30 P. M. though they had been present at every hearing up till then; so the lower Court proceeded ex parte and after examining the plaintiff and two of his witnesses passed an ex parte decree. Mr. P. P. Deo the defendant's counsel appeared a few minutes later and in fact conducted the very next case in that Court but was told that judgment had already been delivered ex parte in this. The defendant applied to have this order set aside but the lower Court has rejected the application on the ground that no sufficient cause was shown. The defendant applies here in revision to have that order revised. The facts are these. As I have said, the defendant had conducted the case with due diligence up to that date. The claim was a contested one and there had been a number of previous hearings, about ten, ranging from 11th August 1933 to 25th July 1935, the hearing before the one in question. On 1st November 1935 the defendant was ill suffering from an attack of malarial fever. He admits frankly that he was not seriously ill and could have come to Court if he had made an effort to do so, but as he had already engaged a pleader to represent him and as he had already made special arrangements with the pleader's clerk to be present when the case was called he very naturally did not go in person. His attitude was a natural one which cannot reasonably be criticized. The law does not require any abnormal or impossible standard of care in these cases and this is all that can reasonably be expected of a careful and diligent man when his personal attendance is not necessary, as in this case it was not.

The question then is whether the defendant is responsible for the negligence of his counsel, assuming for the moment that counsel was negligent. I do not deny that cases may arise when he is, but I do not think it is either possible or desirable to lay down any hard and fast rule. Speaking generally, I do not think a party ought to be penalized in this drastic fashion unless there has been remissness on his part. Apart from the general undesirability of having litigation terminate in this unsatisfactory manner, it must be remembered that the provisions of the Code speak throughout of the absence of the party himself and not of that of his counsel and that therefore attention must in the first instance be concentrated on the conduct of the party and not merely on that of the counsel: *see* O. 9, Rules 6, 8 and 13 and O. 41, R. 17. What then is the duty of a litigant in this respect? If he cannot be present himself when his case is called on for hearing, he must of course make adequate provision for his proper representation by some agency. If he employs counsel for this purpose he must ensure that the person he employs undertakes to be present when the case is called or that there is somebody else there to represent him. This means that he must pay counsel adequately or employ others who will be there to assist him. If he does that then he has done all that the law can reasonably expect of him. If in spite of that counsel does not appear, I hardly think the litigant can be held responsible. After all, he is not allowed to employ anybody he chooses. He is forced to confine himself to a special class of persons whom the Courts and the State hold out to the general public as specially honest, competent, reliable and responsible, and who for that reason have been given an exclusive monopoly to practise in Courts of justice. If the person so selected behaves in an irresponsible manner the remedy is for those responsible for placing him in this privileged position to punish him and to ensure as far as may be that the public at large are not left to the mercy of his irresponsibility or incompetency a second time. It is manifestly unjust in these circumstances to blame the litigant.

I do not mean by this that everything is to be assumed in favour of a litigant who is prima facie in default. If he wants to have the ex parte proceedings set aside he must show sufficient cause and that means that he must show that counsel undertook to represent him at all necessary hearings for the fees agreed upon or paid, and also that there was no qualifying clause in the agreement. Again, I do not mean that he must show an express undertaking by counsel to be present either personally or through some other authorized person at all hearings; that is necessarily implied in the contract, but he must bring the responsibility definitely home to counsel if he wants to succeed and on that ground. The Court cannot be left to guess whether the litigant was to blame or his counsel and as to where the litigant wants the responsibility to be placed. The cause shown, that is to say, the allegations made, must be definite and precise, blaming a particular person and such allegations must be fully proved. The Court must be apprised in the most certain terms exactly where the responsibility is supposed to lie. Applying these principles to this case, was Mr. P. P. Deo to blame or was the defendant at fault for what in its ultimate analysis means a refusal to pay proper fees? Was counsel forced to tell his client when the bargain was struck, "Well if that is all you are prepared to pay me, then please remember that I cannot undertake to give up other work for the sake of your case and you must therefore take the risk of my not being able to appear at all hearings and you must undertake the responsibility of adequate representation when I am not there." Of course the pleader must tell his client this definitely otherwise the client is entitled to assume that he has undertaken to appear without reservation at all necessary hearings. But, on the other hand, the client must be equally definite in bringing the responsibility home to the pleader and telling the Court that this is the ground upon which he wishes to proceed if he wants to urge that as sufficient cause.

The question then has to turn on the facts in each particular case. What are they here? We find that Mr. Deo had regularly appeared at every previous hearing—as I have said there were ten of them —and that on the day in question he was actually waiting in the bar room for this case to be called. He had not undertaken other work in another Court, he had not gone off elsewhere for some other purpose, but was ready and willing to appear and fulfil his undertaking to his client the moment he was called upon to do so. The only legitimate inference in these circumstances is that the defendant did all that was required of him. Had Mr. Deo been engaged in another case the matter would have been different. The defendant would then have had to bring responsibility definitely home to his pleader and show that the pleader had not appeared in his case in breach of the undertaking express or implied properly to represent his client at all hearings. There is no such breach here and the circumstances as I have said indicate that the defendant had done all that the law required of him.

I have next to consider the conduct of Mr. Deo for, as I have said, it is essential in all such cases that the responsibility for non-appearance should be definitely brought home to some definite person so that suitable action can be taken when necessary and so that the Court can be satisfied that the responsibility does not rest on the shoulders of the party himself. Was Mr. Deo justified in waiting in the Bar room instead of waiting in Court? That must depend entirely upon the prevalent practice. In this particular Court accommodation is limited and the seating arrangements for counsel on the waiting list are manifestly inadequate. In the circumstances it would be unreasonable to expect counsel literally to stand in a crowded Court room in the hope that his case might be taken up some time in the course of the day. I am informed that cases are not called in any particular order—and I have no doubt that it is the most convenient way to proceed in that Court; I am not criticising the practice in any way—but it does mean that the Bar cannot anticipate when any particular case is likely to be taken up, and so the prevalent practice in which counsel come from the Bar room when called either by their clients or their clerks or some other responsible person is the only one that in those particular circumstances can be said to be reasonably feasible. If counsel followed it here, as he did, then he cannot be blamed unless the arrangements he made for being called were inadequate.

Here again I do not see what else Mr. Deo could have done. He says he left his clerk in the Court with definite instructions to call him when the case was called and the defendant says that he also had specially employed this clerk for that purpose. That means of course that this man had been specially paid and the excuse he has given for not remaining at his post is manifestly inadequate. It was not just a temporary absence for a few minutes because no less than three witnesses were examined, one of them at length and the judgment written in the interval. Is counsel then to be blamed for the negligence of his clerk and the client in turn to bear the brunt of it all? Again that must depend upon circumstances. The lower Court thinks that he must, and here again I have no intention of casting the slightest doubt upon those decisions which lay down this broad rule. But as I say every case must depend upon its own facts. In some matters, such as for instance the drafting of plaint or memoranda of appeal, or calculating the period of limitation, there is a definite duty cast upon counsel to do these things himself and he cannot delegate it to another. If he does, then he cannot escape the consequences of his own negligence. Then again if the client leaves things to the last minute and does not give counsel adequate opportunity to study the law and facts at his leisure then the client is also to blame. In such cases it is obviously the duty of a litigant to place the brief in the hands of counsel at the earliest reasonable opportunity and then only can he hope as a general rule to escape the consequences of counsel's negligence. But none of these rules apply when no duty is cast upon counsel personally to wait in Court till his case happens to be called. But I make it clear again that I am not laying down any universal rule. The prevalent practice and therefore the duty may, and indeed does vary from Court to Court, and that is an important feature.

So far as the clerk is concerned, he has been with Mr. Deo for 6 years and no previous instance of negligence has been suggested. Therefore Mr. Deo is clearly not to blame. But of course the clerk is, and if anything of the kind happens again then naturally his employer cannot hope to escape responsibility as easily as this. There is a duty cast upon members of a monopolist profession to exercise care and due diligence in the persons whom they employ and if they choose to employ a person known by them to be irresponsible, without taking adequate steps to keep a close personal check upon his actions, then they are themselves at fault and will become liable to be called to account. I have dealt with this at length because it was argued, and quite rightly, that whether there was sufficient cause or not is a question of fact and that I cannot interfere in such matters in revision in the absence of perversity or something of the like nature. It is perfectly true that this question is ordinarily one of fact but in this particular case the learned Judge has concentrated his attention on the negligence of counsel and that as I have explained is not what has to be ascertained. Interference is therefore called for. I allow the application and set aside the ex parte decree, holding that sufficient cause has been shown within the meaning of O. 9, R. 14. The proceedings will now be re-opened and will continue from the stage at which they were on 1st November 1935. The next question is to determine the terms on which this should be allowed. I have already found that the defendant was not to blame but neither was the plaintiff, therefore one of two innocent parties has to suffer whatever is done. It is only fair in such circumstances that the party who employed the offending agency, in this case Mr. Deo's clerk, should be the one to bear the brunt of the consequences. The defendant will therefore pay the entire costs in the 1st Court whatever the result of the suit. But as regards this revision I allow him his costs because the plaintiff opposed the application. No certificate has been filed by the applicant so there will be no order as to counsel's fee.

D.S./R.K. *Application allowed.*

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## A. I. R. 1938 Nagpur 373

NIYOGI J.

*Tikaram Jugan Malguzar* —
Decree-holder — Applicant.
v.
*Ganpat Sahai Harprakashlal* —
Judgment-debtor — Non-applicant.

Civil Revn. No. 377 of 1936, Decided on 6th December 1937, from order of Junior Judge, Small Cause Court, Chhindwara, D/- 14th April 1936.

**(a) C. P. Debt Conciliation Act (2 of 1933), S. 4—Debtor must be agriculturist, i. e. person earning livelihood mainly by agriculture.**

To acquire the character of a debtor within the meaning of that term used in the Debt Conciliation Act, it is not merely necessary that a person should have tenancy or proprietary land but also that agriculture should be the main source of his maintenance. [P 374 C 1]

**(b) C. P. Debt Conciliation Act (2 of 1933), S. 16 — Application under S. 4 by person not agriculturist — Civil Court has jurisdiction to enquire whether Debt Conciliation Board has jurisdiction to entertain such application — Failure of party to raise question of jurisdiction before Debt Conciliation Board does not estop him from raising same before Civil Court.**

The Civil Court has power to enquire into the question whether a special tribunal created for a special purpose has acted within the limits strictly defined by the enactment which created it : *167 I C 843, Rel. on.* [P 374 C 2]

Hence the Civil Court, sitting in execution, has power to enquire into the question whether the Debt Conciliation Board had jurisdiction to hear an application purporting to have been made under S. 4 of the Act by a person who was not an agriculturist. As the Debt Conciliation Board in such case has inherently no jurisdiction, no amount of consent or acquiescence on the part of any party to or in its jurisdiction would validate its decisions which are in their nature void ab initio, and hence the failure of a party to raise the plea of jurisdiction before the Debt Conciliation Board cannot deprive the Civil Court of its inherent jurisdiction to try the issue which has been raised: *38 Cal 639, Rel. on ; A I R 1935 Nag 33 ; A I R 1926 Nag 77 and A I R 1933 Pat 104, Explained and Disting.* [P 375 C 1, 2]

**(c) C. P. Debt Conciliation Act (2 of 1933), S. 7-A—S. 7-A has no retrospective effect.**

Section 7-A inserted by Act 15 of 1936 has no retrospective operation : *20 N L J 203 and A I R 1937 Nag 259, Rel. on.* [P 374 C 2]

**M. D. Khandekar and A. V. Wazalwar**— *for Applicant.*

**V. R. Dhoke** — *for Non-applicant.*

**Order.** — This is an application in revision against an order passed in execution case No. 1044 of 1932 on 14th April 1936. This case raised the question whether the Civil Court, sitting in execution, has power to enquire into the question whether the Debt Conciliation Board had jurisdiction to hear an application purporting to have been made under S. 4, Debt Conciliation Act by a person who was not an agriculturist. The facts are that the applicant had obtained a decree against the non-applicant in Civil Suit No. 1044 of 1932 and he sued for execution of the decree on 20th July 1935. The judgment-debtor produced an order which had been passed by the Debt Conciliation Board, Seoni, discharging the decree-holder's debt in consequence of his default in submitting his statement within time prescribed by law and pleaded that that order debarred the decree-holder from executing the decree. The decree-holder to escape from this defence raised the plea that the judgment-debtor was neither a malguzar nor a tenant in the Seoni Sub-division and that the Board had no jurisdiction to entertain the judgment-debtor's application under S. 4. The lower Court on enquiry came to the conclusion that the judgment-debtor was not an agriculturist although he had become a tenant in the Seoni Sub-division by acquiring about 5 acres of tenancy land with a view to qualify himself for applying under S. 4, Debt Conciliation Act to settle his debts. The lower Court however held that the Civil Court had jurisdiction in view of S. 16, Debt Conciliation Act to deal with the execution of the decree and that it could not enquire into the question whether or not the Debt Conciliation Board had jurisdiction, for the reason that the decree-holder had omitted to raise the plea before the Board.

There appears to be but little room for doubt that the judgment-debtor is not an agriculturist, that is to say, a person who earns his livelihood mainly by agriculture which is the qualification for a debtor to be entitled to apply under S. 4, Debt Conciliation Act. Much capital was made of his possessing 5 acres of tenancy land in the Seoni Sub-division, but that is not sufficient for him to acquire the character of a debtor within the meaning of that term used in the Debt Conciliation Act. It is not merely necessary that a person should have tenancy or proprietary land but also that it should be the main source of his maintenance. On the judgment-debtor's admissions made in the witness-box he was earning his livelihood as a pleader's clerk for many years and as a private servant of one Kasar at the time when he was deposing in Court. It is established beyond doubt that he acquired 5 acres of tenancy land in Seoni Sub-division only to enable himself to apply for settlement of his debts. Had this fact been inquired into by the Debt Conciliation Board, I have no doubt that the Board would have thrown out his application as being untenable. The question is whether this Court can give effect to the order of discharge passed by the Debt Conciliation Board, when obviously it had no jurisdiction to attempt to effect any settlement of the debt. I am of opinion that the Civil Court has power to enquire into the question whether a special tribunal created for a special purpose has acted within the limits strictly defined by the enactment which created it. The powers of the Civil Court are comprehensive enough to extend to all matters of civil nature except those that are expressly excluded by the statute. On the other hand, a special tribunal, like the Debt Conciliation Board, which has been created by the Legislature for the specific purpose of relieving the agriculturists, has its jurisdiction strictly limited by the express terms of the enactment. Consequently any subject that falls outside the limits defined in the law which has created the special tribunal would not be cognizable by it. Special tribunals while exercising their powers under the statute of their creation must be vigilant to see that they do not exceed their jurisdiction and thus encroach on the province of the Civil Court's jurisdiction. The only authority that is competent to decide whether a special tribunal has acted strictly within its limits of authority or not would be the Civil Court. That was the view I had expressed in 19 N L J 16.[1] Since then the Legislature has inserted S. 7-A, Central Provinces Debt Conciliation Act, but this Court in 20 N L J 203[2] and A I R 1937 Nag 259[3] has held that S. 7-A has no retrospective operation. In the present case the order discharging the decree-holder's debts was passed before the amended enactment S. 7-A was introduced in the Central Provinces Debt Conciliation Act. S. 7-A therefore does not debar the decree-holder

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1. Bapu Sakharam v. Shrinandanlal, (1935) 167 I C 843=19 N L J 16.
2. Thakur Lachmansingh v. Durgaprasad, (1937) 20 N L J 203.
3. Shivdin Kaluram v. Ramratan Udaram, (1937) 24 A I R Nag 259=170 I C 905.

from questioning the jurisdiction of the Debt Conciliation Board in the Civil Court.

It is however contended on behalf of the judgment-debtor that the decree-holder by his failure to raise the plea of jurisdiction before the Debt Conciliation Board submitted to its jurisdiction and consequently he is estopped from raising the plea in the Civil Court. Reliance is placed on 31 N L R 212,[4] 22 N L R 82[5] and 12 Pat 117.[6] These cases refer to the jurisdiction of the Civil Court which has plenary power in respect of matters of civil nature and they do not deal with a case of a special tribunal. They therefore have no bearing on the issue which is under consideration here. In deciding whether a special tribunal like the Debt Conciliation Board has power to deal with any particular application one has to see whether its act was one which fell within the limits of its jurisdiction or was in the nature of a mere irregularity. If inherently it had no jurisdiction, no amount of consent or acquiescence on the part of any party to or in its jurisdiction would validate its decisions which are in their nature void ab initio. Of course if the tribunal has jurisdiction but it has been exercised with material irregularity the question is different.

It is therefore necessary now to see whether or not the Debt Conciliation Board had inherent jurisdiction in the matter. The Central Provinces Debt Conciliation Act of 1933 was enacted to make provision for the setting up of Debt Conciliation Boards to give relief to agriculturist debtors. It is emphasized in the Preamble that it was because the Legislature thought it was expedient to relieve the agriculturists from indebtedness by amicable settlement between them and their creditors, that the Act came to be passed. Now if the object of the Act is to relieve the agriculturists only, the Debt Conciliation Board which has been set up by the Act to attain that object, must confine its activities only to cases where the debtors are agriculturists as the definition of the word "debtor" itself makes clear in S. 2 (f) of that Act. If a person who applies for amicable settlement of his debts is not a debtor, that is a person who earns his livelihood mainly by agriculture, then it is patent that the Act itself would not apply to him and the Debt Conciliation Board, the creation of that enactment, could have no power to afford him any relief. If that is so, the judgment-debtor in the present case, who was not an agriculturist, as rightly found by the Court below, could not possibly have any footing before the Debt Conciliation Board and that Board could not possibly give him any relief. The Board therefore was entirely devoid of jurisdiction in the matter. The omission of the decree-holder to protest against the Board's exercising jurisdiction in the matter cannot confer a power on the Board which it did not derive from the Act which created it. It is a well-recognized principle of law that mere consent of the parties to the litigation cannot confer jurisdiction on a Court : *see* 38 Cal 639.[7] I fail to see how the situation could be different if the decree-holder had raised the plea of jurisdiction before the Debt Conciliation Board. Even in that case, the Civil Court would not have been precluded from enquiring into the question as to the jurisdiction of the Board. It consequently appears to me immaterial whether the decree-holder did or did not raise the plea of jurisdiction before the Debt Conciliation Board, as in either case the Civil Court cannot have been deprived of its inherent jurisdiction to try the issue which has been raised.

I may notice in passing that this is a glaring instance of the abuse of the enactment which was designed to bring relief to the agriculturists. Here is a man who never grew a blade of grass until he was faced with the difficulty of having to satisfy his judgment-debt. It occurred to his ingenuity to resort to the Conciliation Board by acquiring a superficial qualification of an agriculturist and for that purpose he purchased 5 acres of land a few months before he applied under S. 4 before the Debt Conciliation Board for settlement of his debt. An Act which lends itself to fraud so easily as this case illustrates should be very strictly construed and vigilantly applied by the special authority which owes its origin to that enactment. It appears therefore necessary to convey a caution to the Debt Conciliation Boards that they should first satisfy themselves about the bona fides of every application that is made for settlement of debts. For the foregoing reasons I hold that the order of the Debt Conciliation Board discharging the decree-holder's debt was ultra vires and inoperative. I set aside the lower Court's order and direct that the execution proceedings do continue. The non-applicant will pay the costs of the applicant in both the Courts. Pleader's fee Rs. 25.

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[4] **Vithal v. Chunnilal, (1935) 22 A I R Nag 33 =157 I C 242=31 N L R 212.**

[5] **Mt. Janki Sethani v. Laxmi Narayan, (1926) 13 A I R Nag 77=89 I C 129=22 N L R 82.**

[6] **Girwar Narayan Mahton v. Kamla Prasad, (1933) 20 A I R Pat 104=142 I C 118=12 Pat 117=13 P L T 737.**

[7] **Bailakhshmi Dasee v. Katyayani Dasee, (1911) 38 Cal 639=12 I C 464.**

D.S./R.K. *Revision allowed.*

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## A. I. R. 1938 Nagpur 376

NIYOGI J.

*Chintaman Ramjipant Gharpure* — Judgment-debtor — Applicant.

v.

*Govind Vithal Kane* — Decree-holder — Non-applicant.

Civil Revn. No. 234 of 1937, Decided on 14th December 1937, from order of Sub-Judge, First Class, Nagpur, D/- 27th January 1937.

**Civil P. C. (1908), O. 21, R. 63—Objection to attachmeut dismissed with costs — Suit by objector under O. 21, R. 63 decreed in his favour—Decree-holder is not entitled to enforce order as to costs passed in his favour.**

The suit under O. 21, Rule 63 is substantially one to set aside a summary decision or order of any Civil Court : *35 Cal 202 (P C), Rel. on.* [P 377 C 1]

Where an objection under O. 21, R. 58 made by a person to attachment is dismissed with costs, that is to say, he is made liable to pay the costs of the decree-holder and the objector brings a suit under O. 21, R. 63 and obtains a decree in his favour, the decree-holder is not entitled to enforce the order as to costs because the order must be deemed to have been set aside by the decree in objector's favour under O. 21, R. 63 : *A I R 1928 Rang 248, Disting.* [P 376 C 2 ; P 377 C 1]

V. R. Gharpure — *for Applicant.*

S. T. Bhave — *for Non-applicant.*

**Order.**—This is an application in revision against an order passed by the Subordinate Judge, First Class, Nagpur, in Miscellaneous Judicial Case No. 77 of 1934. In this case the non-applicant decree-holder had attached some property considering it as being that of his judgment-debtor. An objection to the attachment was made by the applicant under O. 21, R. 58. His objection was dismissed with costs, that is to say, he was made liable to pay the costs of the decree-holder. Thereon the objector, namely the applicant, filed a suit under O. 21, R. 63, Civil P. C., for reversal of the order passed in execution proceedings and for establishing the right which he claimed to the property. That suit resulted in a decree passed in his favour, whereby it was declared that the fields which had been attached were not liable to attachment and sale in execution of the decree-holder's decree; and as to the costs it was ordered that each party should bear his respective costs.

The decree-holder non-applicant initiated proceedings in the executing Court to recover the costs that had been allowed to him by the previous order in execution whereby the applicant's objection had been dismissed. The question is whether in view of the result of the suit under O. 21, R. 63, Civil P. C., the decree-holder is entitled to enforce the order as to costs passed in execution proceedings. The lower Court has answered the question in favour of the decree-holder. I do not see my way to concur in the view taken by the lower Court. The learned Judge of that Court relied on 6 Rang 408[1] in support of its view, but that case is distinguishable from the present one. There the objection to the attachment was dismissed, and the objector's costs, which amounted to Rs. 54-6-0, were not awarded. The objector in a suit under O. 21, R. 63, Civil P. C., asked for a decree in respect of costs amounting to Rs. 54-6-0 in addition to a declaration of his right that he claimed to the property. The contention there was that inasmuch as the executing Court did not award the costs in favour of the objector he could not in a suit under O. 21, R. 63, Civil P. C., get any relief in respect of them : it was held that it was open to an objector suing under O. 21, R. 63, to ask for any relief in regard to costs which had been disallowed in miscellaneous proceedings. In the present case the objector does not want that any costs should be allowed to him; all that he wants is that the decree-holder should not be permitted to sue out execution for the costs which had been allowed to him in the order that has now, as a result of the decree passed in the suit filed under O. 21, R. 63, been reversed. Therefore the question assumes this aspect, namely whether the Court which decided the suit under O. 21, R. 63, Civil P. C., could, while passing the order directing each party to bear his respective costs, have ever intended to keep alive the order in miscellaneous proceedings relating to costs. It must be borne in mind that a suit under O. 21, R. 63, Civil P. C., is substantially one to set aside a summary decision or order of any Civil Court, that is to say an order such as was passed in the present case, as was pointed out by their Lordships of the Privy Council in 35 Cal 202[2] at page 206.

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[1] **V. E. R. M. Firm v. Maung Po Kyone, (1928) 15 A I R Rang 248=112 I C 285=6 Rang 408.**

Now if that order has been expressly set aside by the decree which has been passed in the suit, one fails to see how it could still be enforced in execution so far as the costs are concerned. The order must be deemed to have been set aside wholly and not in part. Moreover, there is another aspect of the question. It is that of interpretation of a decree passed in a civil suit under O. 21, R. 63. It says each party shall bear its respective costs. In construing decrees one must have regard to the nature of the suit and the previous proceedings which led to the suit. Taking these circumstances into consideration there appears to be but little doubt that the decree in the civil suit relating to costs superseded the order in miscellaneous proceedings. If it is supposed that the decree did not affect the order passed in miscellaneous proceedings as to costs, then one is led to the anomalous result that, while the property which was attached was held not liable to attachment and sale and the objector succeeded in his objection he would, nevertheless, be saddled with the costs of a proceeding which the decree-holder had no right to initiate. A construction which leads to such an anomalous result ought to be avoided. The result is that the lower Court's order is set aside with costs in both Courts. Counsel's fee Rs. 10.

D.S./R.K. *Order set aside.*

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[2] Phul Kumari v. Ghanshyam Misra, (1908) 35 Cal 202=35 I A 22=7 C L J 36=12 C W N 169 (P C).

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## * A. I. R. 1938 Nagpur 377

STONE C. J. AND PURANIK J.

***Messrs Mulji Sickka & Co.*** — **Appellants.**

**v.**

***Nurmohammad Abdul Gani and another*** — **Respondents.**

**First Appeal No. 10 of 1935, Decided on 29th October 1937, from decree of Addl. Dist. Judge, Bilaspur, D/- 14th December 1934.**

**(a) Practice — Parties — Respondent transposed as appellant — Transposed appellant allowing appealing time to pass—It is inequitable to treat him as one against whom final decree has been passed on ground that transposition was wrong.**

Where a respondent has been transposed as an appellant before the time for appeal has expired, it is inequitable to treat him, after he has allowed the time to appeal to pass, as a person against whom final decree has been passed, on the ground that it would have been preferable had the transposed appellant appealed instead of being transposed. [P 378 C 2]

**(b) Lease—Registration — Lease not naming villages affected though such area could be ascertained with certainty — List of such area added subsequently before registration — Addendum signed only by lessee — Registration held proper, though accuracy of list could be contested by lessor.**

A registered lease, the terms of which regarding area, could be ascertained with certainty, did not name actually the villages affected. A list of those villages signed only by the lessee was appended to the lease on being required by the Registering Officer, who was of the view that the area was not sufficiently delimited :

*Held* that the lease was properly registered, though the addendum was not signed by both the parties. No doubt the inclusion of the list would not preclude the lessor from contesting its accuracy. [P 380 C 2]

**(c) Registration Act (1908), S. 2 (9)—'Crop' might include leaves.**

The word 'crop' in S. 2 (9) might include leaves of a tree : *A I R 1925 All 411, Rel. on.* [P 381 C 1]

*** (d) Registration Act (1908), Ss. 2 (6), 17 (1) (b)—Right to collect and remove leaves for certain period is a license and grant amounting to profits a prendre—Grant is of immovable property and requires registration.**

A right to collect and remove leaves from the trees for a certain period is a license coupled with a grant amounting to profits *a prendre* and not lease. Such grants are of "immovable property" within the definition of S. 2 (6) as relating to "benefits to arise out of land" and so require registration under S. 17 (1) (b): *Case law referred.* [P 379 C 1; P 382 C 1]

**(e) Transfer of Property Act (1882), S. 53-A —Whether S. 53-A applies to leases *(Quære)*.**

Whether S. 53-A applies to leases : *A I R 1937 Pat 36; A I R 1937 Cal 467; A I R 1936 Lah 5; A I R 1937 Nag 74 and A I R 1937 All 10, Ref.* [P 383 C 1]

**(f) Transfer of Property Act (1882), S. 53-A—Notice—Grant of registered licence to *C* to collect Tendu leaves, during existence of unregistered licence in favour of *B* — Held on facts *C* had notice of *B's* licence and *B* was not tortfeasor or trespasser.**

*A* granted to *C* a registered licence to collect and remove Tendu leaves while there was unregistered licence in existence in favour of *B*, a bidi merchant. *C* and *B* worked together for many years, this relationship lasting beyond the commencement of the unregistered lease. *C* was present in the district over which the licences were granted for some time. Some disputes arose over collections in the neighbouring lands resulting in suit being filed against *C* by *B*. *B* had done many open and widespread acts under his unregistered lease in the last collecting season. In a suit brought by *C* on his registered licence for damages for collecting leaves ever after his lease, the question arose whether *C* had notice :

*Held* that *C* had notice. S. 53-A operated to prevent *A* from stopping or interfering with *B's* collecting leaves. *B* was entitled to do acts under the terms of unregistered licence. In so doing *B* was not trespasser or tort-feasor. [P 383 C 1, 2]

**(g) Transfer of Property Act (1882), S. 111 — Registered lease granted before expiry of unregistered lease — Registered lease while determining unregistered lease does not render acts done under unregistered lease unlawful.**

Though the effect of granting a registered lease would be to determine the unregistered 'lease' unexpired at such date, it does not cause it to disappear as though it had never been rendering acts done under it in the past and before the grant of the registered 'lease' unlawful, as though done by a trespasser. [P 384 C 1]

**(h) Easement — Licence — *A* granting to *B* exclusive licence to collect leaves from 1st January 1936 to 31st December 1936—*A* granting on 1st June 1936 to *C* same licence from 1st June 1936 to 31st May 1937—On 1st July 1936 *A* granting to *B* same licence from 1st July 1936 to 30th June 1937 — Held no licence from 1st June 1936 to 31st December 1936 could be granted — But licence to commence from 1st January 1937 to 31st May 1937 could be granted to *C*—*B* could repudiate or affirm and sue for compensation for loss of half of his grant — Similarly *B* could be granted licence after expiration of *C's* licence but not before—*C* too could then approbate or reprobate.**

*A* granted to *B* exclusive licence to gather and remove leaves for one year from 1st January 1936 to 31st December 1936 inclusive. On 1st June 1936 *A* granted to *C* in respect of the same area exclusive licence to gather and remove the same leaves for one year from 1st June 1936 to 31st May 1937. On 1st July 1936 *A* granted to *B* same licence over same area for the period of 1st July 1936 to 30th June 1937 :

*Held* that after the first grant, *A* was divested of the power to make any such grant to *C* for the period of 1st June 1936 to 31st December 1936. But *A* could make a grant to *C* in 1936 to commence on 1st January 1937. He had the power to make such a grant. *B*, seeing that he had only got half of what he thought he was getting, could, of course, repudiate the grant or he could affirm and take under it for the period 1st January 1937 to 31st May 1937 claiming from *A* compensation for the loss of half of what was granted to him. *A* having divested himself of his grant to *C* of any power to grant an exclusive licence to anybody until after 31st May 1937, could grant a licence on 1st July 1936 to *B* but not for any period before 31st May 1937. Then *C* could approbate or reprobate. [P 385 C 1]

M. R. Bobde — *for Appellant 1.*

Sir H. S. Gour and D. N. Chaudhuri — *for Respondent 1.*

M. B. Kinkhede and G. R. Deo — *for Respondent 2.*

**Judgment.**—To this appeal by defendant 1 firm, a preliminary point arising out of the order passed by Pollock A. J. C. (as he then was) dated 29th March 1935 transposing defendant 2 who was then a respondent to be appellant, is raised. The transposition was made because the grounds of appeal were the same and the time for appealing had not expired. It is now said the case against defendant 1 firm and defendant 2 stands on entirely different grounds which involve different questions on appeal, that the order of Pollock A. J. C. being interlocutory can be reviewed at this stage, and it should be held that that order was wrong. It is urged that defendant 2 was not properly transposed and that therefore he is concluded by the judgment of the lower Court, against which he has not appealed. We are of opinion that although, as the facts now appear, it would have been preferable had defendant 2 appealed instead of being transposed, yet having been transposed and accordingly having let the time for appealing pass, it would be inequitable now to treat him as a person against whom a final decree has been passed. We think it unfortunate that he has got before the Court as an appellant by transposition rather than by appealing because on the argument there are wide differences between his position and that of defendant 1 firm. These differences however are greatly reduced as a consequence of the pleadings (which raise quite a different case from that argued before us) and any difficulty that is caused by the fact that defendant 2 is before us by transposition can be avoided by keeping defendant 2 to his representation, on the strength of which he was transposed, that his grounds of appeal are the same as those taken by defendant 1 firm. As their Lordships of the Privy Council observed in 23 All 137[1] at p. 142, "as matters turn out the misjoinder in appeal will not cause any embarrassment."

It is very necessary in this case, the arguments in which have ranged over a wide area, to bear in mind what the nature of the relief sought is. That can best be expressed after certain facts are stated. Bidies or beedies are small and very cheap cheroots. Some years ago it was found that the leaves of the tendu tree could be made into bidies. Hitherto these leaves were of no value whatever and so far as we know were never used other than as fuel or manure. Tendu trees are found in considerable number in the forests in zamin (estate) of defendant 2 who is a zamindar (estate-holder). Defendant 1 firm is carrying on business as a bidi merchant. The plaintiff was at one time associated with defendant 1 firm and later admittedly acted as a commission agent for the sale of the firm's goods. Later he severed connexion or his connexion was severed. Defendant 1 firm got their supply of leaves partly from the zamin of defendant 2. Their right to take these leaves was founded on various so-called leaves [which we shall refer to as "lease" (in inverted commas) to avoid confusion between this judgment and the previous judgment and the record and at the same time to note that they are not leases]. We are however of the opinion that these "leases" are not leases at all but, for reasons which appear hereafter, are exclusive licences coupled with a grant amounting to profits *a prendre*. These "leases" commenced with an unregistered document, Ex. D-15 dated 21st March 1925. The period covered was 1st April 1926 to 31st March 1931. Before that period had expired Ex. D-1 was given. That was dated 1st December 1929 and covered the period 19th March 1931 to 18th March 1936. That was followed by Ex. D-16 dated 15th March 1930 and covered the period 1st April 1931 to 31st March 1936. All the above were unregistered. It was in the early part of 1931 (we are told that plaintiff and defendant 1 firm became enemies over some dispute about the leaves in the neighbouring zamin of Korba) that plaintiff for the first time got a document from the zamindar. That "lease" is dated 24th April 1931 and was registered on 9th June 1931. That document is the foundation of the plaintiff's claim.

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[1] Hodges v. Delhi and London Bank Ltd., (1901) 23 All 137=27 I A 168=7 Sar 767 (P C).

On 28th April 1931, i. e. during the term created by Ex. D-16, defendant 1 firm got a "lease" Ex. D-3 for 10 years, for the period 1st April 1931 to 31st March 1941. That document was duly registered. Passing by for the present the disputes that arose about the registration of plaintiff's "lease" and assuming that everything was in order, the position will be seen to be as follows: Defendant 1 firm had, for many years, during most of which plaintiff was associated with defendant 1 firm in business connected with these leaves, been gathering leaves from defendant 2's trees under exclusive licence of the nature of a profit *a prendre*. Those licences were not registered at the time when plaintiff got an exclusive licence from defendant 2 who four days later gave an exclusive licence over the same area to defendant 1 firm. At the time of the grant to plaintiff, defendant 1 firm was entitled as against defendant 2 to gather leaves under an unregistered licence under which defendant 1 firm had acted and under which the firm had paid substantial sums. If S. 53-A, T. P. Act, applies, he was accordingly entitled to act under that licence against defendant 2 or against any person (including the plaintiff) "claiming under" defendant 2. Those are the broad facts which have to be borne in mind in considering the relief sought in this suit. The pleadings and so-called pleadings amount to 44 typewritten pages in the record. The relief sought is to be found in para. 14 of the plaint which is as follows :

> (1) That it be declared that the plaintiff is the sole lessee for collection and removal of tendu leaves within the villages of Zamindari Chhuri, with the exception of inferior proprietary villages therein for a period from 24th April 1931 to 23rd April 1939 and that defendant 1 acquired no rights as against him (i. e. the plaintiff). (2) That the defendant be enjoined by a permanent injunction not to interfere in any way with the plaintiff's right of collection and removal of tendu leaves within the said area during the said period of the lease ; (3) that the defendants be ordered to restore to the plaintiff all the leaves collected and removed by defendant 1 or to pay Rs. 28,000 (or such sum as may be found due) as the price thereof or in the alternative as damages; (4) that any other relief that the plaintiff may be found entitled to be granted to him ; (5) that the costs of the suit be awarded to the plaintiff.

In the so-called reply paras. 12 and 13 it is alleged as follows:

> 12. That with regard to para. 11, it would be enough to say that the reliefs claimed are sufficient for the purpose of the suit ; it is a mistake to say that the amount of Rs. 28,000 claimed is in the nature of damages for breach of contract but it is a claim for recovery of the prices of leaves wrongly and unjustifiably appropriated by defendant 1 which really belongs to the plaintiffs ; 13. that with reference to para. 12, the plaintiff has again to reiterate that his claim is not for damages against defendant 2 for breach of contract but for helping and encouraging defendant 1 to appropriate plaintiffs' property.

From this it is clear that plaintiff is not suing defendant 2 for damages, but on an alleged cause of action that defendant 2 has helped and encouraged defendant 1 firm to commit a tort. The nature of this tort is not very clear but seems to be conversion. (It will be noted however that the "price" and not the "leaves" is alleged to belong to the plaintiff). If conversion, it does not arise until demand and no demand is pleaded. Overlooking that and assuming that there is some cause of action against defendant 1 firm unspecified, defendant 2 is joined apparently as being a joint tortfeasor clearly and expressly; he is not being sued in contract. This is alleged by plaintiff in answer to defendant 1 firm's written statement para. 13 (adopted by defendant 2 in para. 1 of his written statement). In defendant 1 firm's written statement, para. 13, it is alleged that "the joinder of causes of action of distinct and different nature is bad in law". An issue is taken on this plea of misjoinder: *see* Issue 2 (b). This issue is dealt with in para. 10 of the judgment where it is stated:

> Plaintiff alleges that both the defendants are joint tort-feasors. They combined in depriving the plaintiff of his right to exclusive collection of tendu leaves....

It will be seen if that paragraph in the judgment is referred to, that mention is made of an agreement come to in a criminal case (Exs. P-4 and P-9). Ex. P-4 is to the effect that defendant 1 firm agrees to pay to plaintiff "the costs of the leaves so collected" in case a Civil Court decides that defendant 1 firm has no right to take the leaves. Ex. P-9 is to the effect that the plaintiff will pay a sum there mentioned if the Civil Court decides he has no right to collect leaves. Neither statement imposes any obligation on defendant 2 to pay anything. Defendant 2 presumably was not concerned in those criminal proceedings. No application for amendment has been made and we are not prepared to amend suo motu though it would seem to be clear that in a suit properly framed defendant 2 is liable either to one side or the other seeing that he has given two exclusive licenses over the same area for periods which overlap with the result that neither plaintiff nor defendant 1 firm has got what he or they paid for. With these preliminary remarks we proceed to discuss the numerous points of law which have been debated before us. The first question is: Was the plaintiff's lease duly registered or is the registration of no effect as being made by a Registrar who had no jurisdiction to register? There is no dispute that plaintiff's "lease" was in fact registered. The difficulty is as follows: In Ex. P-1 the "lease" in question is referred to. It will be seen that it ends with the words "dated 24th April 1931". Then follow signatures of defendant 2 and plaintiff, then those of the attesting witnesses. There follows a statement, signed by plaintiff alone, that the villages affected were not named in the "lease" and there is appended a list of those villages, that is signed by plaintiff and dated 5th June 1931. That addendum was required by the registering officer before he would register as, in his view, the area was not sufficiently delimited. It is said that this was an addition to the terms of the "lease" not signed by both parties and therefore the Registrar had no power to register it and in registering was acting without authority. In our opinion the terms of the "lease" as to area were certain, for on a true construction it related to all the villages in zamin chhuri except the villages under inferior proprietary rights. Which those were could be ascertained with certainty. Therefore the maxim applies *id certum est quod certum reddi potest.* We are accordingly not prepared to hold that the "lease" was not properly registered by an officer acting within his powers. The inclusion of the list would not of course preclude defendant 2 contesting its accuracy. There has been no suggestion that it is inaccurate.

The next attack on that "lease" is that it could be at any moment cancelled if the plaintiff failed to perform his part which included the payment of Rs. 7000. It is said that amount was not paid. We are of the opinion that the plaintiff made every reasonable effort to pay and the fact that defendant 2 has not got that money is his own fault in not accepting it when tendered. We are accordingly of the opinion that the plaintiff's "lease" was properly registered and could not be cancelled by defendant 2. That "lease" preceded by four days the registered "lease" given to defendant 1 firm by defendant 2 but it was given at a time when an unregistered "lease" was in existence and under which defendant 1 firm was operating. The next question that arises is: "Did these documents require registration?" It is urged that these "leases" do not require registration as the subject-matter falls within the definition of moveable property contained in S. 2 (9), Registration Act, which is as follows:

> "Moveable property" includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immoveable property.

On the other hand it is said that the subject-matter is "immovable property" within the definition contained in the General Clauses Act, S. 3 (25) which is as follows:

> "Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth,

that it is also within the definition of "immovable property" contained in the Registration Act, Sec. 2 (6) which is as follows :

> "Immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops nor grass

and is not excluded by the words in S. 3, T. P. Act, viz. "immovable property" does not include standing timber, growing crops, or grass. In A I R 1937 Nag 116[2] Pollock J. had to consider whether an agreement giving a right to collect bidi leaves for three years in consideration of the payment of Rs. 100 per annum was an agreement which, being reduced to writing, required registration. He held that it did not as the right to collect bidi leaves (we assume the leaves of the tendu tree are in question) is a right relating to moveable property within the meaning of S. 2 (9), Registration Act. He relied on 47 All 738[3] and distinguished 5 C P L R 6.[4] 47 All 738[3] was concerned with a grant of the right to take for three years the fruit of mango trees and the question there was whether what was there granted was a growing crop of fruit. It was said that in the case of a tree's fruit, if the tree is growing at the time of the agreement for the collection of its fruit, the fact that, at the time of the agreement the fruit is not in existence does not take the subject-matter out of the words "growing crops," i. e. "growing crop" includes the future fruit of a growing tree. We doubt whether on a true construction of S. 2 (9), Registration Act the word "growing" can be related to "fruit" or that "crop" includes "fruit," but as Pollock J. observes, the definition is not exhaustive. The word "crop" derives from an old English word meaning the top of a plant and might include, we think, leaves. Indeed one would naturally speak of a tobacco crop though whether one would normally speak of a tea crop we doubt. Assuming however that the leaves of a tree can be described as a crop (which according to English legal usage would have a more restricted meaning: *see* 5 C P L R 6[4]) then a transfer of a growing crop, i. e. a crop growing at the time of the transfer might be a transfer of moveable property within the definition of "moveable property" contained in the Registration Act.

Pollock J.'s view was that as the tree was growing at that time, the leaves were, or might be, growing and therefore there was nothing to show that the agreement in question was concerned with a crop not growing at the time. We prefer in this case however to view the matter somewhat differently. These "leases" are not "leases" of leaves or crops. That is, the subject-matter is not the sale or transfer of leaves or crops. The subject-matter is the transfer of a right. We have therefore to consider not what leaves or crops are, but what the right is. To show the difference we observe that when a lease is granted of a house, there is no doubt that the house is immovable property and there is no doubt that the right granted is not immovable property. A lease of immovable property is, by definition, a transfer of a right to enjoy such property : *see* S. 105, T. P. Act. A lease accordingly is provided for not by S. 17 (1) (b), Registration Act but by S. 17 (1) (d). If the lease were creating any right to or in immovable property, it would fall within S. 17 (1) (b). It creates no such right but a right to enjoy immovable property.

The so-called "lease" here in question is a license and a grant. As a license it is within the meaning of S. 52, Easements Act and it does not amount to an interest in property. But to it is added a grant, viz. a grant permitting the grantee over a period of years to sever from the land certain things which are attached to the earth. A tree is attached to the earth and with it all its parts. It is, in the eye of the law, as much land (though, if standing timber, it is not immovable property and accordingly can be transferred as though severed) as rock imbedded in the soil, or soil itself. The fact that grass is excluded from the term "immovable property" shows how strictly the law regards anything affixed to the land as land. Were it not for this exception, a transfer of the growing grass in a field would have to be like a conveyance of the field. Consequently if the grant is of a right to sever what is part of the land from the land, whether what is severed is a tree or a mineral, what is being dealt with is a right to or in immovable property. Are the leaves of a tendu tree excepted because they fall within the expression "growing crops"? This does not arise for our present purpose for what was transferred was not a crop but a right to pick leaves.

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[2] Ahmed Khanjamath Khan v. Mahomed Khan, (1937) 24 A I R Nag 116=169 I C 834.

[3] Raja Devi v. Muhammad Yaqub, (1925) 12 A I R All 411 = 88 I C 109=47 All 738=23 A L J 430.

[4] Raja Bije Bahadur v. Ganoolal, (1892) 5 C P L R 6.

Here the grant amounted to a profit *a prendre*. A profit *a prendre* is a right to take something off the land of another person: per Lindley L. J. in (1892) 1 Ch 475.[5] It is an interest in land and, in England must, under the Statute of Frauds, be in writing: *see* Law of Property Act, 1925, S. 53. If *in gross*, as here, it can be created for a term or in perpetuity and is a tenement: *see* Laws of England (Hailsham edition) Vol. 11, p. 386, and cases cited infra. The owner of a profit can bring trespass, unlike the owner of an easement whose remedies are abatement or nuisance. The "something" which may be taken off the land can be very various and does not necessarily form part of the land. Thus the right to gather acorns and beech-mast, [(1878) 7 Ch D 562[6]] the right to shoot pheasants [(1901) 2 Ch 598[7]] are examples of profits. The right to shoot pheasants is an interest in land not because pheasants are land, but because, being wild animals, while upon the land they are deemed to be owned by the owner of that land who, as such may give the right to come and take them. We are accordingly of the opinion that these "leases" amounted to grants of immovable property within the definition contained in the General Clauses Act, S. 3 (25) and S. 2 (6), Registration Act, as relating to "benefits to arise out of land" and as not being excluded by S. 3, T. P. Act or S. 2 (9), Registration Act. These grants accordingly fall within S. 17 (1) (b), Registration Act, and require registration.

We come to that conclusion independently of authority. The same conclusion was also reached in 20 Mad 58.[8] That case however rather turns on the fact that it amounted to a sale of inter alia growing timber. It is however useful in this connexion as containing at p. 64 an observation by Subramania Ayyar J. showing why such a grant is not a lease. The fact that there the instrument was not called a lease and that here all are called "leases" of course makes no difference. In the light of the above it is not necessary to consider more fully the incidents of such a grant according to the English law. We content ourselves with a reference to Peacock's "Law relating to Easements in British India," Edn. 3, pp. 656 *et seq.* and the cases there cited, especially (1840) 7 M & W 63,[9] (1819) 2 B & Ald 724,[10] (1839) 5 Bing N C 694,[11] (1861) 4 L T 424[12] and (1882) 9 Q B D 315.[13] As was pointed out in (1892) 1 Ch 475[5] such a grant in England would amount to an incorporeal hereditament lying in grant. We agree with the learned author of the work above cited that 16 Mad 280[14] is open to criticism if it is to be taken as laying down that the sort of grant there made is a mere license. We concur in the view expressed by him that the agreement there come to, amounted to a license coupled with a grant amount to a profit *a prendre*. In England it would create an incorporeal hereditament and in India it would, we think, transfer "a benefit to arise out of land" and so relate to immovable property. The right to take elephants (the Madras case[8]) is at least as much a benefit to arise out of land as a right to shoot partridges. The right to collect leaves is still more clearly a right relating to "a benefit to arise out of land."

We have spent some time over this point because much of the argument addressed to us is founded on the major premise that we are here concerned with leases and that therefore the Sections of the Transfer of Property Act relating to leases apply. We are of the opinion that these "leases" were not leases and the Sections relating to leases have no application: *see* Mulla's Transfer of Property Act, Edn. 2, pages 581, 582 and 38 Mad 883[15] (a decision which, in so far as it decided that the license did not require registration, turns on the definition of moveable property in the Transfer of Property Act). The next point raises the much debated question whether S. 53-A is applicable. Here the suit was instituted after the 1st April 1930. To such a suit, according to the recent Bench decision of this High Court, I L R (1936) Nag 115[16] (where the cases were reviewed), S. 53-A applies unless the plaintiff had no notice of either the "lease" to defendant 1 firm or of the part performance thereof. Before we examine the question of notice, it is desirable to put on one side the question raised whether S. 53-A relates to leases at all. In view of the fact that we are not dealing with leases but with licenses coupled with a grant it is not necessary to fully consider this point, but we observe that in a very considerable number of cases, S. 53-A has been applied to leases and we feel we should not examine this novel point in a case in which it does not arise. For cases where S. 53-A has been applied to leases, *see* 15 Pat 786,[17] A I R 1937 Cal 467,[18] A I R 1936 Lah 5,[19] (where this point was considered expressly) AIR 1937 All 10=I L R 1937 All 312,[20] and I L R (1936) Nag 115.[16]

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[5] Duke of Sutherland v. Heathcote, (1892) 1 Ch 475=61 L J Ch 248=66 L T 210.

[6] Chilton v. Corporation of London, (1878) 7 Ch D 562=47 L J Ch 433 = 38 L T 498=26 W R 627.

[7] Lowe v. Adams, (1901) 2 Ch 598 = 70 L J Ch 783=85 L T 195=50 W R 37=17 T L R 763.

[8] Seeni Chettiar v. Santhanathan Chettiar, (1897) 20 Mad 58=6 M L J 281 (F B).

[9] Wickham v. Hawker, (1840) 7 M & W 63=151 E R 679=10 L J Ex 153=56 R R 623.

[10] Doe v. Wood, (1819) 2 B & Ald 724=106 E R 529=21 R R 469.

[11] Muskett v. Hill, (1839) 5 Bing N C 694 = 7 Scott 855=9 L J C P 201=50 R R 832.

[12] Newby v. Harrison, (1861) 4 L T 424=9 W R 849 affirming (1861) 1 J & H 393 = 128 R R 437=4 L T 397=9 W R 849.

[13] Webber v. Lee, (1882) 9 Q B D 315 = 51 L J Q B 485 = 47 L T 215 = 30 W R 866 = 47 J P 4.

[14] Ramakrishna v. Unni Check, (1893) 16 Mad 280=3 M L J 27.

[15] Natesa v. Tangavelu, (1914) 1 A I R Mad 362 =23 I C 102=38 Mad 883.

A considerable time was devoted to this question of notice. We are of the opinion that the plaintiff had notice. This conclusion is reached having regard (1) to the history of the enterprise conducted by defendant 1 firm, (2) to the business relations of defendant 1 firm and the plaintiff (which lasted beyond the commencement of the third unregistered "lease," that is, the "lease" in respect of which there was the relevant part performance), (3) to the presence of the plaintiff in the district for some time, (4) to the disputes arising over collections in the neighbouring zamin resulting in a suit being filed against the plaintiff by defendant 1 firm, (5) to the widespread and open acts done by defendant 1 firm (there is some evidence that they spent Rs. 20,000 collecting in 1930-31. Even regarding that as grossly exaggerated, it is clear that defendant 1 firm employed very many people in forests extending over very many villages for the whole of the collecting season 1930).

Thus, in our opinion, S. 53-A would operate to prevent defendant 2 stopping or interfering with defendant 1 firm's collecting leaves. In other words defendant 1 firm was entitled to do what they did under the terms of the unregistered "lease." In so doing they were not trespassers or tortfeasors. The "lease" in question (Ex. 1-D 16) gave the right to pluck and remove leaves in return for the payment of Rs. 1100 per annum. It contains a Cl. (1) (6) "after the expiry of this lease I have a right to give a fresh lease to this lessee or to any other lessee." There are many other terms and some in respect of restricted sites on which buildings might be put might be regarded as creating a true lease of such sites though this is doubtful as the sites are not demarcated. We are not however concerned with sites but with the main part which is dealing with the plucking and removing of leaves. There is no suggestion that defendant 1 firm did anything they were not entitled to do under the terms of the "lease;" defendant 2 has no grievance, no claim, against defendant 1 firm. But it is said that as regards all the leaves collected after the plaintiff's "lease" was granted, viz. 24th April 1931 (it was registered about six weeks later), the leaves, as collected by defendant 1 firm, became the property of plaintiff. If this be so, then defendant 1 firm, it is said, have converted the property of plaintiff and are liable in damages; defendant 2 has aided and abetted and is therefore a joint tortfeasor and is also liable in damages and the damage is the market value of the leaves without any allowance for cost of collection.

That is how the case is framed according to the pleadings. According to the argument the obvious difficulty in the way of such a case is glozed over by treating the plaintiff as entitled to damages because he has a 'lease' which has priority over defendant 1 firm's registered 'lease'. That defendant 1 firm's registered 'lease', it is said, eliminates the previous unregistered 'lease' because the grant of the registered 'lease', during an unexpired portion of the term created by the unregistered 'lease', operated to effect a surrender of the unregistered

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[16] Hari Prasad v. Hanumant Rao, (1937) 24 A I R Nag 74=170 I C 554=I L R (1936) Nag 115.

[17] J. G. Wakefield v. Sayeeda Khatun, (1937) 24 A I R Pat 86=166 I C 797=15 Pat 786=17 P L T 968.

[18] Ashutosh v. Nalinakshya, (1937) 24 A I R Cal 467=170 I C 267=64 C L J 558.

[19] Benarsi Das v. Ali Muhammad, (1936) 23 A I R Lah 5=157 I C 889=37 P L R 658.

[20] Shyam Sundar Lal v. Din Shah, (1937) 24 A I R All 10=166 I C 812=I L R (1937) All 312=1936 A L J 1328.

'lease' which thereupon ceased to exist and is, according to the argument, as though it had never been. If that be so, the parties are situate as follows: Plaintiff has a 'lease' dated 24th April 1931; defendant 1 firm has a 'lease' dated 28th April 1931, and no other lease, and are to be treated as though they never had any unregistered 'leases', those 'leases' having disappeared by a series of surrenders culminating in the surrender effected by the grant of the registered 'lease' on 28th April 1931. If that be so, then, it is said, defendant 1 firm are mere trespassers on land let to plaintiff. If they, in that unhappy state, collect leaves, they collect them for the plaintiff and they become plaintiff's leaves. If they are retained, there is conversion. As to the quantum of damages, reliance is also placed on the agreement come to in the criminal case and already adverted to.

We are not impressed by this analysis. S. 111, T. P. Act has in our opinion no application to these 'leases' for they are not leases. Even if that Section applies, though the effect of granting the registered lease would be to determine the unregistered 'lease', it does not cause it to disappear as though it had never been, rendering acts done under it in the past and before the grant of the registered 'lease' unlawful as though done by a trespasser. Further, even if the above remarkable result could be imagined to flow from the application of S. 111, it would not turn defendant 1 firm into the agent of plaintiff when collecting leaves so as to make the leaves belong to plaintiff. A remedy would, however, be at hand in that plaintiff could sue for damages for interference with his rights under his licence and grant, and we proceed to discuss the position to see whether on the facts here present such a cause of action here exists. If it does, we should not construe these pleadings too strictly. They are mofussil pleadings in a suit of some complexity. Our view being that S. 53-A, T. P. Act applies, clearly defendant 2 could not enforce against defendant 1 firm "any right in respect of the property of which the transferee has taken or continued in possession. . . . . ." He could not have obtained an injunction restraining defendant 1 firm from collecting and taking away tendu leaves. Neither could "any person claiming under him." Defendant 1 firm when operating under that unregistered lease were not tort-feasors or trespassers. They were exercising rights they had paid for. That is the position that existed up to the end of the unregistered 'lease'. What is the position thereafter?

The position is not easy. To understand the difficulty certain dates are necessary. At the date of the grant to plaintiff (28th April 1931) defendant 1 firm had an unregistered licence under which they had operated and in respect of which they had paid substantial sums. That 'lease' expired on 31st March 1936. On 28th April 1931 a registered 'lease' was given to defendant 1 firm for the period 1st April 1931 to 31st March 1941. The unregistered 'lease' contained a term which we have mentioned above. The plaintiff's 'lease' was for the period 24th April 1931 to 23rd April 1939. Though, in our opinion, it was a breach of contract (with defendant 1 firm) on the part of the zamindar to grant plaintiff a 'lease' before the expiry of defendant 1 firm's 'lease', viz. 31st March 1936, the effect of granting it was to confer on plaintiff a right in the nature of an exclusive licence coupled with a grant which entitled plaintiff to enter on the expiry of the term imposed by the unregistered lease, viz. 31st March 1936, unless that unregistered lease was brought to an end before, by the grant on 28th April 1931 of the registered 'lease'. Either that registered 'lease' was effective or not. If it was effective it determined the unregistered 'lease' quite apart from S. 111, T. P. Act which, for the reasons given, we do not think has any application. But if it was effective, it also entitled defendant 1 firm to operate under it for the term of that licence, i. e. until 1941. If it was not effective, it was not effective to destroy defendant 1 firm's rights: A I R 1925 Nag 26[21] and A I R 1937 Nag 104.[22]

We are of the opinion that defendant 2 having granted an exclusive licence to plaintiff on 24th April 1931, he had divested himself of all power to grant an effective exclusive licence to defendant 1 firm on 28th April 1931 for any period covered by the grant of 24th April 1931 but that the grant of the exclusive license on 28th April 1931 is effective to give to defendant 1 firm the right to pluck and remove leaves after the termination of the plaintiff's license, i. e. after 23rd April 1939. By parity of reasoning defendant 2 had no power to give an exclusive license on 24th April 1931 to plaintiff for the period covered by defendant 1 firm's unregistered license but the effect of making that grant was to give plaintiff exclusive rights after the termination of that unregistered "lease," i. e. 31st March 1936 to 23rd April 1939 plaintiff has the exclusive right to pluck leaves, defendant 1 firm has the exclusive right up to 31st March 1936 and from 23rd April 1939 to 31st March 1941. That appears to us to be the result of this extraordinary series of overlapping grants. Needless to say this results in neither plaintiff nor defendant 1 firm getting what they paid for. The consequence will be that the zamindar will be liable in a properly constituted suit for damages. What the measure of damages will be can be left to be decided in such a suit. It does not arise here. We have not overlooked the fact that these licenses are given during the pendency of an existing license. Broadly our position can be made clear by the following illustration. *A* grants to *B* exclusive license to gather and remove leaves for one year from 1st January 1936 to 31st December 1936 inclusive. On 1st June 1936 *A* grants to *C* in respect of the same area exclusive license to gather and remove the same leaves for one year from 1st June 1936 to 31st May 1937. On 1st July 1936 *A* grants to *B* same license over same area for the period 1st July 1936 to 30th June 1937. In our view after the first grant, *A* is divested of the power to make any such grant to *C* for the period 1st June 1936 to 31st December 1936. But *A* can make a grant to *C* in 1936 to commence on 1st January 1937. He has the power to make such a grant. *B*, seeing that he has only got half of what he thought he was getting, could, of course, repudiate the grant or he could affirm and take under it for the period 1st January 1937 to 31st May 1937 claiming from *A* compensation for the loss of half of what was granted to him. *A* having divested himself of his grant to *C* of any power to grant an exclusive licence to anybody until after 31st May 1937, could grant a license on 1st July 1936 to *B* but not for any period before 31st May 1937. It would be inoperative until after 31st May 1937. Then *C* could approbate or reprobate, etc. In this present case we treat plaintiff as approbating. His remedy against defendant 2 is for damages or compensation, we do not decide which, the matter not being before us.

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[21] Ganpat v. Mahadeo, (1925) 12 A I R Nag 26 =85 I C 264.

[22] Gharati Hiracharan v. Kehar Mansaram, (1937) 24 A I R Nag 104=170 I C 120=I L R (1937) Nag 353.

Obviously, on the above view, defendant 1 firm at all material times was justified in plucking and removing leaves but defendant 1 firm will collect leaves or remove them hereafter at their peril after 31st March 1936 until 23rd April 1939 after which date they may resume. The period for which the claim is made in respect of leaves collected falls within the period up to 31st March 1936 and accordingly fails. In view however of the agreement come to whereby the plaintiff undertook (Ex. P.9) to pay Rs. 10,000 to Rs. 12,000 if the civil suit "is decided against me," we think it right to observe that this suit has not been decided wholly against plaintiff and that plaintiff though we have held that defendant 1 firm was entitled during the period in question to the exclusive right to collect, was, as a reasonable man, justified in thinking that he was exclusively entitled to collect and should not accordingly be liable for having collected except to the extent of what he had thereby gained all allowances being made for the cost of his collection. The question of that liability does not of course arise in this action but we consider it right to make these observations as this dispute is one which might, with advantage to all parties, be amicably settled. The plaintiff is entitled to the injunction he seeks as from this date to 23rd April 1939 but not otherwise. He is also entitled to a declaration that he has and had the exclusive right to pluck and remove tendu leaves from the area in question from 31st March 1936 to 23rd April 1939. He has no other right. There will be a decree accordingly. Defendant 2 will bear his own costs and will pay half the costs of defendant 1 firm and all the costs of the plaintiff, he being responsible for all this trouble. Defendant 1 firm will bear half their own costs. The order as to costs will apply throughout.

V.B.B./R.K. *Order accordingly.*

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**✻ A. I. R. 1938 Nagpur 385**

GRILLE J.

*Kisan Isaramjee Mali and others — Defendants 1 to 3*—Appellants.

v.

***Mt. Jaiwanti, w/o Kisan Kunbi, Plaintiff and others, Defendants 4 and 5***—**Respondents.**

**Second Appeal 215 of 1936, Decided on 23rd March 1938.**

**☆(a) Registration—Sub-Registrar's opinion as to executant's age at the time of presentation of document for registration cannot be accepted as evidence of age.**

Under S. 34, Registration Act, an enquiry as to whether any of the parties concerned in the registration is a major or not is not one of the duties imposed on the Registrar. The opinion of the Sub-Registrar as to the executant's age when the document was presented for registration cannot be accepted as evidence of his age at all, much less conclusive evidence : *33 Cal 537 (P C), Expl.* [P 387 C 1]

**(b) Second Appeal—Misapplication of law of evidence is open to correction in second appeal.**

Where certain convincing evidence has been set aside in the lower Appellate Court on a ground that can have no legal basis whatever, such a glaring misapplication of law of evidence is open to correction in second appeal. [P 388 C 1]

V. V. Kelkar and M. R. Bobde — *for Appellants.*

D. T. Mangalmurti — *for Respondents.*

**Judgment.**—This second appeal arises out of a suit brought by the plaintiff, Mt. Jaiwanti to pre-empt a portion of a field, which defendants 4 and 5 had sold to defendants 1, 2 and 3, by virtue of the fact that she was a co-occupier of the same field. She claimed to pre-empt for Rs. 400, alleging that the sale price of Rs. 700 was inflated. The plot sold had been offered to her for Rs. 700, but she refused to pay this amount. The defence was that the price was not inflated and also that the plaintiff was not entitled to sue because she was in fact the co-owner of the part of the field which was recorded in her name, as her title depended on a gift deed by Mt. Punji, defendant 5, and that when the gift deed was made on 24th June 1932, Mt. Punji was in fact a minor and incapable of conveying anything by a deed of gift. The trial Court found that the price was inflated and that Rs. 400 was a fair price, but it dismissed the plaintiff's suit as it found on the evidence that Mt. Punji was actually a minor, being four months short of majority at the time when the gift deed was executed. In an appeal by the plaintiff, the Additional District Judge upheld the finding that Rs. 400 was a fair price for the field, and reversing the decision of the trial Court in respect of the plaintiff's right to sue, held that Mt. Punji was a major when she executed the gift deed in favour of Mt. Jaiwanti, and consequently decreed the plaintiff's claim to pre-empt. This second appeal has been filed by the original defendants 1, 2 and 3, the purchasers Kisan, Sonaji, and Shanker, and the only point which has been raised before me is the validity of the decision that Mt. Punji was a major on 24th June 1932. It is apparently conceded that if the trial Court's decision is correct and she was a minor on that date, the ostensible deed of gift is void and the plaintiff has no right of suit.

At first sight the appeal appears to be an appeal on a question of fact, and indeed this is the contention advanced by the learned counsel on behalf of the respondents after he had dealt with the appreciation of the evidence in the case. The real point however is whether the lower Appellate Court was justified in holding that the endorsement on the deed of gift by the Sub-Registrar at the time of registration to the effect that Mt. Punji was 20 years of age was sufficient to dislodge the evidence on which reliance was placed in the trial Court and with which the learned Additional District Judge himself stated he would have been loath to interfere but for the Sub-Registrar's endorsement, and for paramountcy of this endorsement over any other evidence. He relied on a decision of their Lordships of the Privy Council in 33 Cal 537.[1] The learned appellate Judge seems to have been somewhat undecided as to his appreciation of the evidence which the defendants afforded in support of the contention of Punji's minority at the material time. He states at one place that the statement of the age of Punji made by the Sub-Registrar in his endorsement is an act done by him in an official capacity and would carry more weight than the oral evidence of the defendants' witnesses which is indefinite and unconvincing. Later on however he says :

> The learned Judge of the lower Court has mainly decided Issue 2 from oral evidence adduced by the parties, and had it not been for the fact that the Sub-Registrar made a statement about the age of Punji in his endorsement on the deed of gift, Ex. P-3, I would have hesitated to interfere with the learned Judge's finding on that issue. I therefore consider that the Sub-Registrar's endorsement is much more reliable than the oral testimony of the defendants' witnesses whose knowledge of Punji's age in October 1917 is imaginary only....

Now, if the learned appellate Judge considered, as he apparently did, that the oral testimony of the defendants' witnesses as to Punji's age was unreliable, there is no reason whatever why he should not have discarded it entirely apart from the question whether he considered the Sub-Registrar's opinion as to the girl's age binding on him or no; and his statement that he does not consider their evidence reliable conflicts with his remark that he would have hesitated to interfere with the finding of the trial Court but for the Sub-Registrar's endorsement. It is to my mind perfectly clear that the opinion of the Sub-Registrar as to the girl's age when the document was presented for registration cannot be accepted as evidence of her age at all, much less conclusive evidence as the learned Additional District Judge seems to think. The decision in 33 Cal 537[1] is no authority at all for the proposition that has been advanced. The point at issue there was whether a will had been executed as far back as 1867. Those who contended for the execution of the will pointed out that will had been presented for registration and that the testator himself had offered the will for registration and had been identified by two witnesses. This was denied by the opponents who had produced evidence for the purpose of showing that the testator was incapable of attending the place of registration as he was too ill and that he had died immediately after the time when he was said to have executed the will. Their Lordships of the Privy Council held that it must be presumed that everything that the Registrar did had been done duly and in order, and that, unless very strong evidence to the contrary was produced to show that fraud had been perpetrated, it must be assumed that when the Registrar had certified that the testator of the will had appeared before him and had been properly identified and had presented the will for registration, this must have been done.

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[1] Gangamoyi Debi v. Troiluckhya Nath Chowdhary, (1906) 33 Cal 537=33 I A 60=10 C W N 522=3 C L J 349 (P C).

It is quite impossible to apply this principle in the manner in which the lower Appellate Court has sought to apply it. Under S. 34, Registration Act, an enquiry as to whether any of the parties concerned in the registration is a major or not is not one of the duties imposed on the Registrar. Under S. 35 of the Act it is laid down that he shall refuse registration if any person by whom the document purports to be executed appears to him to be a minor. It is clear, then, that all that can be deduced from the Privy Council decision on the presumption that everything that was done was done in order, is that Mt. Punji did not appear to the Sub-Registrar to be a minor. It is nowhere laid down in the Registration Act that the Registrar was bound to enquire whether she was a minor or not, although he could have done so had he chosen to do so by virtue of sub-s. (2) of S. 35. No evidence has been adduced whether he did or did not do so, and when a girl is 17 years and eight months of age and it is not claimed by anyone that she is any younger, it would not be surprising that the Sub-Registrar, when a deed of gift is being presented, should presume that she was more than 18 years of age and register the document without any enquiry as to her majority. But that the opinion of a layman or the Registrar of a document should be taken as absolutely conclusive of the age of an adolescent girl is quite opposed to all the laws of evidence.

The learned appellate Judge, possibly feeling the weakness of his argument in using the Sub-Registrar's opinion to counterbalance the very strong evidence before him, has stated that the defendants who testified to Punji's age in 1917 were testifying from imaginary knowledge only because there was nothing to show that they were acquainted with Punji's age in October 1917 when they gave evidence in succession proceedings on the death of Punji's mother, which it is not disputed occurred in the year 1916. In argument before me capital is made out of the fact that all the defendant's witnesses in the present suit preface their evidence by stating that they did not know whether Punji was born before or after her father's death. This, in relation to a matter which occurred some 20 years ago, is understandable and, in my opinion, a proof of the honesty of the witnesses who have all deposed that they gave evidence in 1917 in the succession proceedings and that what they deposed to there was the truth. What they then stated was that the child was 2½ or 3 years old. There could have been no motive whatever in misrepresenting the child's age then, and also there is little room for inaccuracy in gauging the age of a child at that period of its existence. Were the age of Punji as given by the Sub-Registrar correct, Punji would have been between 5 and 6 years old in 1917, an age easily distinguishable from 2½ to 3 years. In 1917 these witnesses were deposing in respect of a child they had known and seen, and it is altogether inaccurate to state, as the learned appellate Judge has stated, that there is no foundation for the fact that they were acquainted with Punji's age in October 1917. This is the only point in the oral evidence on which the lower Appellate

Court has commented and the general stigma that the evidence of the defendants' witnesses is indefinite and unconvincing merely shows the disinclination to discuss the evidence which, from the Judge's remarks that he would have been disinclined to interfere with it, would appear to be in his mind really evidence of very considerable strength. I have perused the evidence, and there can be, in my opinion, no doubt as to the strength and the reliability of it. The will executed in favour of Punji's father in February 1914 shows him to have been alive at the time and completely negatives the plaintiff's case that he had died in the previous year and that the child, if posthumous, must have been born in 1913. Equally cogent appears to me evidence that the child was born in 1914 after the big floods of that year, which could have occurred at no other time than in the rains. Another witness refers the birth of Punji to the time of the birth of a child of his own. The learned counsel for the respondent has argued that after all the husband, who is one of the plaintiff's witnesses, should be the best judge of his wife's age. As this husband states that he was married either in 1920 or 1921 and also gives two possible years for his own age and two possible years for his wife's age, I fail to understand the learned counsel's argument. It is then contended that, although the defence witnesses say that the child was posthumous and that her mother was pregnant when its father died, no one says how far advanced in pregnancy she was. The reply to this is that there was no cross-examination on the subject and also no witness states that the woman was seen to be pregnant at the time of her husband's death; the pregnancy is assumed on account of the posthumous birth.

I am satisfied that the evidence as to the minority of Punji fully establishes the fact that she was a minor at the time the deed of gift was executed. Her husband has joined in the gift, but he too having derived his title from the wife would have no power to execute it. This convincing evidence has been set aside in the lower Appellate Court on a ground that can have no legal basis whatever. Such a glaring misapplication of the law of evidence is open to correction in second appeal. The result is that the appeal succeeds and the plaintiff's claim is dismissed. In view of the evidence regarding the value of the land in the Courts below I direct that in those Courts each party shall bear its own costs. Costs of the appeal in this Court, which is on the point of Punji's majority alone, will be paid entirely by the defendant-respondents.

D.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Nagpur 388

STONE C. J. AND VIVIAN BOSE J.

*Lachhmansingh Chandansingh* — Appellant.

v.

*Mahendralal Choudhari and others* — Respondents.

Second Appeal No. 279 of 1934, Decided on 8th February 1938, from appellate decree of Dist. Judge, Jubbulpore, D/- 19th March 1934.

**(a) Pleadings — Amendment of — New case when introduced being time-barred, amendment should not be allowed.**

As an ordinary case an amendment should not be allowed where to allow it would be to bring on the record a new case which, at the date of the application to amend, was time-barred: *(1887) 19 Q B D 394, Rel. on.* [P 389 C 2]

**(b) Pleadings—Amendment of—When costs should be awarded—Amendment sought at late stage—Guiding principles explained.**

Amendments should always be made with great readiness In most cases up to issue stage no special burden as to costs is called for and thereafter justice is met by leave being granted conditionally on the payment of costs thrown away. But where one seeks an amendment asked for at a late stage, which introduces a new cause of action one should ask oneself: where would the applicant be if he were to bring a fresh suit at the time he seeks this amendment? If you find that he is out of time and he has not got the power to bring that fresh suit without finding himself opposed by the defence of limitation, very exceptional circumstances have to be present to justify a Court letting him do in one litigation when he cannot do it in another. [P 390 C 2]

M. B. Kinkhede and A. R. Kulkarni — *for Appellant.*

N. T. Mangalmurti, Abdul Razak and G. R. Deo — *for Respondents 1 and 2, 5 to 7 and 8 and 9.*

**Judgment.**—This appeal raises an interesting point relating to the amendment of pleadings. The appellant is defendant 6 who is the grandson of the man with whom the plaintiffs had business dealings. Defendant 6 is taking up the position as to the correctness of which we say nothing that he is not liable if the suit transactions are post-partition and that he may be liable if the suit transactions are pre-partition. The suit, as it was originally framed, was founded upon Ex. P-1 which is dated 7th March 1929 and takes the form of an acknowledgment of liability. In point of fact, defendant 6 has been urging (and it is so found in the judgment of the trial Court) that before that date there was a partition so that the transaction of 7th March 1929 is post-partition. That position obviously had been adverted to or at least adumbrated in argument, and accordingly we find that in this case after all the witnesses had been in the box and all the documents had been put in and the matter stood reserved for argument, on 25th February 1933 an application was put in to permit the plaintiffs to amend their plaint by adding allegations which in point of fact founded their claim not upon the agreement or the receipt of 7th March 1929 but upon an agreement dated 9th October 1927, Ex. P-7, which is in the following words:

> I have executed a receipt for Rs. 6700. This day on 9th October 1927 that is, on making account of Rs. 5433 due on receipt dated 17th October 1927, Rs. 6648-10-0 including interest thereon, are found due (by me) and took Rs. 51-6-0 in cash this day, total Rs. 6700. I have therefore executed a receipt therefor. I will pay interest thereon at the rate of ten annas per cent. per mensem and will satisfy the same within two years.

It is now necessary to mention some dates in relation to limitation. It will be seen that Ex. P-7 founds a cause of action on 9th October 1929, that is, two years from 9th October 1927 which was the starting point for the liability to repay that amount, and accordingly that cause of action would be time-barred on 9th October 1932. On the other hand the first agreement is time-barred on 7th March 1932. The suit was brought on 7th March 1932 that is the last day of limitation. The application to amend, as already stated, was dated 25th February 1933. The amendment was allowed on 17th March 1933, and the pleadings were amended on 3rd April 1933. Nobody doubts but that the critical date for limitation purposes is either the date of the plaint that is amended or the date of the application to amend. It has been urged before us that bearing in mind the fact that this is a second appeal and the terms of S. 100, Civil P. C., this being a discretionary matter, it should not be interfered with. We are however of the opinion that the learned Judge who allowed the amendment proceeded on a wrong view of the law so that he could not have applied his mind to the question whether he should or should not in his discretion allow this amendment because he quite clearly was much impressed by the view that whether you looked at the original cause of action or whether you looked at the new cause of action, both were in time and they were both within time because, in his view, when you are considering amending you should regard the new cause of action as in time if it was in time when the original suit was brought. In our opinion that is not so. The leading case on this subject is (1887) 19 Q B D 394,[1] which has been followed in India in a very considerable number of cases referred to in Sir Dinshaw Mulla's Civil Procedure Code (Edn. 10) p. 547 from which it is clear that as an ordinary case an amendment should not be allowed where to allow it would be to bring on the record a new case which, at the date of the application to amend, was time-barred. As Lord Esher, M. R., observed in that case:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

Here it has been urged that this is one of those exceptional cases and 11 M I A 468[2] has been particularly relied on together with another Privy Council decision reported in 48 Cal 110[3] and by way of additional weight the following decisions of High Courts in India have also been referred to on this point by the respondent: 33 Bom 644,[4] 33 All 616,[5] 36 Mad 378,[6] 50 Cal 878[7] at p. 891, A I R 1929 Bom 51[8] and A I R 1931 Bom 218.[9] If 48 Cal 110[3] is referred to, it will be seen that it is a case where it was clear that what was being litigated was the plaintiff's right to pre-emption and what the plaintiff was seeking was pre-emption. What he actually claimed was a declaration that he had a right to pre-empt and the amendment was one that followed on the declaration and was ancillary thereto. To have refused amendment in such a case would have been to make idle litigation the purpose of which was apparent to every one. As their Lordships observed at p. 116 "their cause of action was one and the same whether they sued for possession or not." In 11 M I A 468,[2] their Lordships allowed an amendment which at first sight looks as though they were permitting an entirely fresh cause of action to be litigated at a very late stage. If however that case is carefully regarded, specially their Lordships' observations at pp. 473 and 474, it will be seen that it was another case where their Lordships were putting right a mere blunder and that all the facts were already present and the litigants perfectly well knew what the subject-matter in contest was. They observe at p. 473 as follows :

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[1] Weldon v. Neal, (1887) 19 Q B D 394=56 L J Q B 621=35 W R 820.

[2] Mohammad Zahoor Ali Khan v. Mt. Thakooranee Rutta Koer, (1866-67) 11 M I A 468=9 W R 9=2 Suther 107=2 Sar 320 (P C).

[3] Charan Das v. Amir Khan, (1921) 8 A I R P C 50=57 I C 606=48 Cal 110=47 I A 255 (PC).

[4] Kisendas Rupchand v. Rachappa Vithoba, (1909) 33 Bom 644=4 I C 726=11 Bom L R 1042.

[5] Muhammad Sadiq v. Abdul Majid, (1911) 33 All 616=10 I C 476=8 A L J 636.

[6] Sevugan Chetty v. Krishna Aiyangar, (1913) 36 Mad 378=13 I C 268=22 M L J 139.

[7] Satchidananda Dutt v. Nritya Nath Mitter, (1924) 11 A I R Cal 517=79 I C 287=50 Cal 878=27 C W N 1007.

[8] Bhogilal v. Jethalal, (1929) 16 A I R Bom 51=114 I C 262=30 Bom L R 1588.

[9] Gurulingappa v. Sabu Ramappa, (1931) 18 A I R Bom 218=131 I C 886=33 Bom L R 141.

> Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberty of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings.

The cases, in which amendments out of time have been allowed, have all been exceptional cases of little slips which created a difficulty in the plaintiff's way and could be removed by an amendment that would not cause the other side in any way to be taken by surprise. To show how far this case is outside 11 M I A 468[2] it is only necessary to look at p. 3 of the paper book, para. 7 of the plaint in which the plaintiffs say after reciting the various documents which they filed with the plaint:

> there is no other paper either in the possession of the plaintiffs or other persons to be produced in evidence of the claim.

That means that the plaintiffs were taking up the position that this document (Ex. P-7), which is the document on which they are now relying, was irrelevant to the claim which was originally pleaded. Nevertheless it has been urged by counsel for the respondents that in truth and in fact the amendment made no important difference; all the way through the plaintiffs were suing on an account; all the way through it was well known to the other side what account was; all the way through they had before them the account books and this is merely an amendment that is necessary to get over a technical defect. We are unable to take that point of view. This amendment is not only out of time but is made at a very late stage after the case was over—apart from argument—and therefore falls within the decision in 36 Cal 780.[10] It is also, in our opinion, an amendment that introduces a new case, a new cause of action, a new contract, a contract made at a different time having a different period of limitation and having different legal consequences and therefore falls within 48 Cal 832,[11] another Privy Council decision.

Amendments should always be made, in our opinion, with great readiness. In most cases up to issue stage no special burden as to costs is called for and thereafter justice is met by leave being granted conditionally on the payment of costs thrown away. But where one sees an amendment asked for at so late a stage, which introduces a new cause of action one should ask oneself : Where would the applicant be if he were to bring a fresh suit at the time he seeks this amendment ? If you find that he is out of time and he has not got the power to bring that fresh suit without finding himself opposed by the defence of limitation, very exceptional circumstances have to be present to justify a Court letting him do in one litigation when he cannot do it in another. This case, in our opinion, possesses all the features which entitle a Court to refuse an amendment, including the feature that a Court should not be astute to impose on grandsons liability for their grandfather's debts. The amendment being swept away, the case is sent back to the trial Court for a new judgment on the evidence as it stood when evidence was closed, adding to the issues already drafted issues raising the question whether defendant 6 is bound by the oral agreement pleaded in para. 1 of the plaint before amendment and further whether defendant 6—bearing in mind the fact that that is an agreement come to after the partition alleged — is bound by such oral agreement should it appear that the partition alleged is found for. All the costs incurred after the appli-

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10. Rup Narain v. Gopal Devi, (1909) 36 Cal 780 =3 I C 382=36 I A 103=93 P R 1909 (P C).
11. Ma Shwe Mya v. Maung Mo Hnaung, (1922) 9 A I R P C 249=63 I C 914=48 Cal 832= 48 I A 214 (P C).

cation to amend up to and including the costs of this appeal defendant 6 is entitled to receive in any event, that is to say, whether his defence succeeds or not. The costs in the trial Court hitherto or hereafter incurred will be costs in the cause.

B.D./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 391

STONE C. J. AND VIVIAN BOSE J.

*Tulsiram Khirchand Parwar* — Appellant.

v.

*Chunnilal Panchamsao Parwar and others*—Respondents.

Second Appeal No. 290 of 1934, Decided on 15th February 1938, from appellate decree of Dist. Judge, Bhandara, D/. 23rd February 1934.

**(a) Pleadings—Allegations of fraud, etc. — Pleadings and issues should be specific.**

Pleadings and issues on the averment of fraud, undue influence, coercion, etc. should be very specific based on definite allegations, because fraud, coercion, etc. are all separate categories in law : *A I R 1915 P C 7 and 15 Cal 533 (P C), Rel. on.* [P 392 C 1]

**(b) Contract—Undue influence—Position of domination and use of such position should be first established—Both should be proved by party alleging undue influence—Mere physical infirmity is not mental infirmity.**

The first thing which has to be established in a case of undue influence is (and the burden is on the person asserting it), that the relation subsisting between the parties was such that one of them was in a position to dominate the will of the other. It is only when that has been established that the second question arises, namely whether he used that position in order to obtain an unfair advantage over the other. One of the ways in which the first point can be established is by showing that the mental capacity of the person whose will is said to have been dominated was temporarily or permanently affected by reason of age, illness, or mental or bodily distress. But the burden is still on the party asserting undue influence. Mere physical infirmity does not necessarily carry with it mental incapacity : *A I R 1924 P C 60, Rel. on ; A I R 1933 Rang 90 ; A I R 1930 Cal 590 and A I R 1925 Nag 211, Ref.* [P 392 C 2 ; P 393 C 1]

**(c) Custom—Evidence of—Decided cases are good evidence to establish custom.**

The value as evidence of judicial decisions recognizing custom has been recognized and it is the most satisfactory evidence that a party can produce. Of course such decisions do not operate as res judicata unless they bind the parties otherwise, and the evidence created by them is capable of rebuttal, but their relevancy as evidence is undoubted : *10 All 585 ; 27 Cal 379 ; A I R 1930 Nag 225 and A I R 1918 P C 81, Rel. on.* [P 394 C 1]

**(d) Hindu Law—Jains—Widow takes absolute estate.**

The widow takes an absolute estate among Jains in general and not merely in some particular sub-sects : *A I R 1930 Nag 225 and A I R 1925 Nag 174, Rel. on.* [P 394 C 2]

D. T. Mangalmoorti — *for Appellant.*

R. N. Padhye — *for Respondent 1.*

**Judgment.** — One Gopalsao who owned the house now in dispute, died leaving a widow Bayabai and the plaintiff Tulsiram who is the son of a predeceased daughter. Bayabai died on 23rd March 1929 and so, according to plaintiff, he succeeded. He used to let out the house to tenants and they used to pay him rent, but in August 1931 they refused to pay him any more rent and said that the defendant Panchamsao was the owner and that they would pay the rent to him. The plaintiff therefore sues for a declaration and in the alternative, in the event of it being found that he was out of possession, for possession. The defendant Panchamsao claims through Bayabai. It is admitted by both sides that Bayabai executed a sale deed in favour of the defendant on 25th February 1929. The defendant's case is that Bayabai was a Digambari Jain and that among them a widow obtains an absolute estate and not merely the limited estate which she obtains under the ordinary Hindu law. This, he said, was the law applicable to all Digambari Jains, and in the alternative he pleaded that "the Jains of this part have been following that custom". The plaintiff's case as regards the custom is that the widow of a Digambari Jain is in the same position as any other Hindu widow and gets only a life-estate. As regards the sale deed he made the following plea :

> It is denied that the deceased Bayabai sold the house to the defendant for Rupees 3000 on 25th February 1929. She was a very old and feeble woman and lived with the defendant till her death. She was under the influence of the defendant and the sale deed dated 25th February 1929 has been fraudulently obtained from her without any consideration. The defendant does not get any title by the sale deed.

On these pleadings a composite issue was framed in these terms:

> Whether Bayabai sold the house in suit to the defendant on 25th February 1929 for a consideration of Rs. 3000 ? Was it a genuine transaction or was it a fraudulent transaction and was it effected under circumstances of undue influence ?

There can be little doubt that the pleadings and the issue are both irregular, to put it at its mildest. Their Lordships of the Privy Council have condemned this sort of pleading in the strongest terms in 39 Bom 441[1] at p. 467 and since the slovenly manner in which cases of this kind are pleaded and conducted in this province has in no way changed for the better since those observations were made, we venture to reproduce their Lordships' remarks at length:

> Under the contract law of India, as well as by ordinary principles, coercion, undue influence, fraud and misrepresentation are all separate and separable categories in law. It is true that they may overlap or may be combined. But in the present case it is impossible to discover what ground or grounds are really taken up. There is a well-known rule of pleading expressed in the frequently quoted language of Lord Selborne, [see (1880) 5 A C 685[2] at p. 697] that 'With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.'
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> The law of India is in no way different from this, and it has been decided over and over again, e. g. in 15 Cal 533=15 I A 119.[3] It is, in their Lordships' opinion, much to be regretted that the rule is not more strictly observed, and their Lordships are of opinion that in the present case much confusion and contention have been caused, together with much expenses to the parties in consequence of its neglect. No definite issue upon any one of the well-known categories of attack was settled for trial, the only issue on the subject being — whether plaintiff 4 is a validly adopted son of Baba Maharaj. From time to time, in the course of this case, it is clear that specific pleadings in Indian procedure have been abandoned altogether. In short, several of the careful prescriptions of the law and of the Legislature, all of which were intended to bring litigation within definite compass and to make articulate and clear the points of difference between the parties, have been lost sight of.

We find ourselves in a similar difficulty in this case. It is difficult to understand exactly what the ground of attack was, but the fault, we observe, does not lie wholly on one side. It was open to the defendant to attack these pleas on the ground of vagueness and to ask for further and better particulars of the averments made. Since he did not do so and has himself led evidence on this confused issue, we can only conclude that the parties knew what they were really fighting about and did not find themselves as embarrassed as we find ourselves here. Therefore in the language of their Lordships in the case just cited, we are "unwilling, confused though the charges be, to dismiss this part of the case on such ground." Whatever else these pleadings may have meant, the parties at any rate appear to have understood them as containing an averment of undue influence and, as we have shown, that is one of the points brought out in issue 3 even though it has been coupled there, as it was in the pleadings, with allegations of fraud. The only particulars given in the pleadings are that Bayabai "was a very old and feeble woman and lived with the defendant till her death" and that there was no consideration. The first Court found in the plaintiff's favour, but the lower Appellate Court held that undue influence has not been proved.

It is not denied that questions of undue influence are ordinarily one of fact, but it was urged that in this case the burden was wrongly placed and we were referred to S. 16, Contract Act and to A I R 1933 Rang 90,[4] A I R 1930 Cal 590[5] and A I R 1925 Nag 211.[6] It was argued that under S. 16 (2) (b) it must be assumed that the defendant was in a position to dominate Bayabai's will because of her age and that since there was no consideration, the bargain is, on the face of it, unconscionable, and that therefore the burden lies on the plaintiff and not on the defendant as the lower Appellate Court holds. S. 16 has been analysed by their Lordships of the Privy Council in 3 Pat 279.[7] As they point out the first thing which has to be established (and the burden is on the person asserting it), that the relation subsisting between the parties was such that one of them was in a position to dominate the will of the other. It is only when that has been established that the second question arises, namely whether he used that position in order to obtain an unfair advantage over the other. One of the ways in which the first point can be established is by showing that the mental capacity of the person whose will is said to have been dominated was temporarily or permanently

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1. Bal Gangadhar Tilak v. Shrinivas Pandit, (1915) 2 A I R P C 7=29 I C 639=39 Bom 441 =42 I A 135 (P C).
2. Wallingford v. Mutual Society, (1880) 5 A C 685=50 L J Q B 49=43 L T 258=29 W R 81.
3. Gunga Narain Gupta v. Tiluckram Chowdhary, (1888) 15 Cal 533=15 I A 119=5 Sar 168 (P C).
4. Maung Aung Bwin v. Maung Than Gyaung, (1933) 20 A I R Rang 90=144 I C 673.
5. Ramesh Chandra v. Charu Chandra, (1930) 17 A I R Cal 590=129 I C 622=34 C W N 445.
6. Ghasi v. Gangabisan, (1925) 12 A I R Nag 211=83 I C 239.
7. Raghunath Prasad v. Sarju Prasad, (1924) 11 A I R P C 60=82 I C 817=3 Pat 279=51 I A 101 (P C).

affected by reason of age, illness, or mental or bodily distress. But the burden is still on the party asserting undue influence. In the present case the lower Appellate Court holds that that burden has not been discharged. It is to be observed that even the pleadings do not allege that Bayabai's mental capacity had been affected by reason of her age. The allegations stop short of that and merely state that she was an old and feeble woman. But that is not enough, for mere physical infirmity does not necessarily carry with it mental incapacity. The only evidence on the point is contained in a few short sentences of one witness, the plaintiff himself, and this is all he says :

> She was nearly 100 years old and had got paralysis for two or three years before her death. I had come to see her about a month before her death and at that time I had found her in Panchamsao's house. At that time I had asked her if she had done any transaction with respect to the property and she said that she had all the property with her. I asked her if she wanted any money and she said that she did not want any. . . . I stopped in Katangi at that time for about 3 days. She died about 3 weeks after I went back.

The defendant's evidence as D. W. 1 on which the learned counsel for the plaintiff-appellant has also relied, is to this effect :

> Bayabai was my cousin being my uncle's daughter. . . . Before the sale she had borrowed Rs. 1000 from me in small sums for her maintenance and this was deducted by me out of the consideration of the sale. Then Bayabai told me that she wished to pay Rs. 1200 to the Jain temple and asked me to pay that amount. Accordingly I paid Rs. 1200 to Chudamansao of Gondia who is Panch of the Jain temple and this was on the day following the registration of the sale deed. The remaining Rs. 800 remained with me for meeting expenses of her illness and her obsequies. She died on 24th March 1929. I attended during her illness and performed her obsequies. . . . . Bayabai died in my house. I had brought her to my house a month and half before her death. She had to be bodily carried from her house. She had been ailing for about 2 years before her death. She had not got paralysis. She executed the sale deed after she had been brought by me to stay in my house. She was about 80 or 90 years of age when she died. For about three years before her death, she had been borrowing money from me. . . . Chudamansao was present when the negotiations of sale took place. I had called Chudamansao from Gondia in order to induce Bayabai to sell the house to me. I had come to know of her intention to sell the house and Murlidhar was also offering to purchase the house. But she had not accepted the offer. Then she proposed to make a gift to the temple and she told me that I might buy the house and pay myself the loans advanced to her and also pay the amount she had promised to the temple.

The defendant's second witness is Chudamansao. He says :

> Panchamsao had paid Rs. 1200 before the Sub-Registrar and that was the amount which I had received. Bayabai said that she had borrowed Rs. 1000 from Panchamsao and that he should keep Rs. 800 more with him for performing her obsequies. Bayabai had been seen by me about two months before her death. At that time she was ailing. She was very old, may be 90 years of age. She had not lost her eyesight.

D. W. 7 Jairamsingh is the country physician who is said to have attended Bayabai. He says :

> I knew Bayabai. She was under my treatment for 3 years before her death and she died about 3½ years ago. She was in her proper senses till about a month before her death and then her powers began to fail. She was not attacked with paralysis at any time.

That is all the evidence that there is on the point. There is not a word in it to suggest mental incapacity. We do not say that there is nothing in it to suggest that the defendant was not in a position to dominate the old lady's will, but for the moment we are considering S. 16 (2) (b) on which the learned counsel for the plaintiff-appellant relies. What we find is that the special presumption which arises once mental incapacity is established, cannot be applied here, and once that is accepted, it follows that the burden of proving that the defendant was in a position to dominate Bayabai's will, remains with the plaintiff and that therefore the learned Judge of the lower Appellate Court has committed no error of law in placing it upon him. The next question then is to consider whether the plaintiff, the burden being on him, has established that the defendant was in a position to dominate Bayabai's will apart from the special assistance afforded by S. 16 (2) (b). This is of course a question of fact and though the first Court found in the plaintiff's favour, the lower Appellate Court has found against him and we find it difficult to see how we can interfere. There is material on which the learned trial Judge's conclusions can be based, but the matter is not so overwhelmingly obvious as to justify interference with the judgment of the lower Appellate Court in second appeal, especially as the plaintiff has chosen to leave his allegations in such a vague and unsatisfactory state. Also there is evidence the other way. The fact that Chudamansao had to be brought in to persuade Bayabai to sell the property to the defendant rather than to another, suggests that the defendant was not in the dominating position which the plaintiff would have us believe. We are consequently powerless to interfere.

The next question is about consideration. This again is a question of fact and though the evidence is weak it is impossible to hold that there is none. So here again we are not in a position to interfere. A number of rulings were cited, such as 43 All 525[8] and 34 All 455[9] which deal with pardanashin women and it was argued that the same principles which were applied there, should be applied here. But this opens up an entirely new field which again was not pleaded. The underlying idea in that type of cases is that the Court must be fully satisfied that the lady in question really understood the nature of the deed she was executing with all its implications. There is nothing to suggest that Bayabai did not understand the nature of the transaction : in fact the very plea of undue influence implies that she did, and, as the lower Appellate Court holds on the evidence that she did, the matter is not open to question here. That brings us to the question of custom. What the defendant pleaded was that among Digambari Jains a widow obtains an absolute estate in her husband's property. The oral evidence in the case is consistent with such a custom, but standing by itself it is not enough to establish it. The matter has however been considered in a number of decided cases and the custom upheld. The value as evidence of judicial decisions recognizing custom has repeatedly been recognized, and in fact the Allahabad High Court says it is the most satisfactory evidence that a party can produce. *See* 10 All 585[10] and also 27 Cal 379[11] and 27 N L R 75[12] at p. 92. Of course, such decisions do not operate as res judicata unless they bind the parties otherwise, and the evidence created by them is capable of rebuttal, but their relevancy as evidence is undoubted. In fact their Lordships of the Privy Council state in 41 Mad 778[13] at p. 785 that a point may be reached when a custom which has repeatedly been recognized can be regarded as part of the law :

> When a custom or usage whether in regard to a tenure or a contract or a family right is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case.

The custom in question here was elaborately investigated in 27 N L R 75[12] and all the case law on the point up to that date was carefully analysed as well as a large body of evidence. It is true, that was a case of Swetambari Jains, but the learned Judicial Commissioners came to the conclusion that the custom set up by the defendants before them had been clearly established. That custom was that the widow takes an absolute estate among Jains in general and not merely in some particular sub-sects. The evidence produced in that case was impressive. The leaders of the Digambari and the Swetambari sects respectively were both called. Both were graduates in law who had made a special study of the customs prevailing in their respective communities, and one of them was a practising solicitor in Bombay. The learned Judicial Commissioners considered them to be "absolutely disinterested." They both stated that this custom applied among all the various sub-sects of Jains. 78 I C 461,[14] where the custom was also upheld, was a case of Parwar Jains which both sides have admitted before us is the same as the Digambari sect. There is therefore ample material on which the findings of the Courts below can be based and on this point both the Courts are agreed. In fact the outstanding feature of this case is that there is no evidence in rebuttal of this custom. We are therefore constrained to hold that the custom pleaded has been proved. The appeal fails and is dismissed with costs.

B.D./R.K. *Appeal dismissed.*

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[8] Kamawati v. Digbijai Singh, (1922) 9 A I R P C 14=64 I C 559=43 All 525=48 I A 381 (P C).

[9] Sajjad Hussain v. Wazir Ali Khan, (1912) 34 All 455=16 I C 197=15 O C 271=39 I A 156 (P C).

[10] Gurdayal Mal v. Jhandu Mal, (1888) 10 All 585=1888 A W N 242.

[11] Harnabh Pershad v. Mandil Dass, (1900) 27 Cal 379.

[12] Trimbakdas v. Mathabai, (1930) 17 A I R Nag 225=124 I C 609=27 N L R 75.

[13] Rama Rao v. Raja of Pittapur, (1918) 5 A I R P C 81=47 I C 354=41 Mad 778=45 I A 148 (P C).

[14] Mt. Sano v. Puran Singh, (1925) 12 A I R Nag 174=78 I C 461.

## * A. I. R. 1938 Nagpur 394

NIYOGI AND GRUER JJ.

*Sheoprasad Ramjas Agarwal and others* — Applicants.

v.

*Emperor.*

Criminal Revn. No. 530 of 1937, Decided on 23rd May 1938, from order of Sess. Judge, Raipur, D/- 14th December 1937.

*** Criminal Trial—Order of discharge—Setting aside of—Misapprehension of evidence is**

**good ground — Misappreciation of evidence unless it is flagrant though legal ground is not proper ground – No practical difference in application of this principle between Ss. 436 and 437, Criminal P. C.**

It is both legal and proper for a Sessions Judge or a District Magistrate to set aside an order of discharge on the ground of misapprehension of evidence. It is, strictly speaking, legal for a Sessions Judge or a District Magistrate to do so on the ground of misappreciation of evidence, but it is not proper to do so unless he is clearly of opinion that the misappreciation is so flagrant that in effect the order is perverse or manifestly unreasonable or foolish or prima facie incorrect. Where exactly to draw the line is a matter for the exercise of common sense. In the application of these principles there is no practical difference between S. 436 and S. 437, Criminal P. C., *Case law discussed.* [P 397 C 2, P 398 C 1]

S. W. A. Rizvi and R. K. Rao — *for Applicants.*

W. R. Puranik — *for the Crown.*

## Order of Reference

**Gruer J.**—This is a revision application against an order of the Sessions Judge, Raipur, passed under S. 436, Criminal P. C., directing further inquiry into the case of the four applicants, Sheoprasad, Dhoorji, Nur Mohammad and Mt. Punia, who had been challaned under Ss. 363, 366 and 376, I. P. C., but were discharged by the Magistrate after hearing all the prosecution evidence and examining them. Sheoprasad is a Marwari business man of some position, about 50 years old, residing at Dhamtari. Dhoorji is a servant in his business and Nur Mohammad is his motor-driver. Mt. Punia, aged about 20, is a Gondin labourer, and the complainant (P. W. 1), whose age is probably 16 or 17, is a married girl, who was an acquaintance of Punia.

The case brought against these accused is that on 21st June 1937, Punia enticed the complainant to accompany her to a village called Surid not far from Dhamtari. While they were going along, they were, it seems by pre-arrangement, overtaken by a motor car in which the other accused were seated. The complainant was forcibly dragged into it and driven along for some miles, when she was taken out by Sheoprasad and led to a spot some distance from the road where she was raped by him. The girls were then taken back in the car and set down near the place where they had been picked up. Sheoprasad denied his presence altogether, and the others said that the girls were merely taken for a pleasure drive at their own request. Patras (P. W. 3) supports complainant's story that she was carried away unwillingly and implicates Sheoprasad, while Sher Singh (P. W. 4) also made a statement that he saw three men in the car. The complainant's story however was not believed by the trial Court. The Sessions Judge has set aside the order of discharge on two grounds : first, that the proceedings of the lower Court in this case are vitiated by several irregularities leading to the admission of illegal and inadmissible evidence resulting in wrong inferences; secondly, that the prosecution evidence has not been properly appreciated by the lower Court.

It is contended for the applicants that the irregularities are either non-existent or of little importance, and that the appreciation of evidence is not a ground for setting aside an order of discharge. Reliance is placed on 21 N L R 88,[1] for this latter proposition and also on a number of other cases including 18 N L J 90,[2] 49 All 879,[3] 59 I C 193,[4] 31 Mad 133[5] and 57 Bom 430.[6] This last case has been dissented from in a Full Bench ruling, 59 Bom 125.[7] This however was a case under S. 437, Criminal P. C., although the same consideration may apply. 32 Mad 214[8] dissented from 31 Mad 133[5]; *see also* 32 Mad 220.[9] In 21 N L R 88,[1] 31 Mad 133[5] was referred to with approval. S. 436 itself contains no restrictions on the power to order further inquiry, and it is possible that the reported ruling requires reconsideration. In view of the conflict of rulings the question is of some importance. I frame it as follows :

"Is it open for a Sessions Judge or a District Magistrate to set aside an order of discharge under S. 436, Criminal P. C., on

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1. Sheocharan v. Emperor, (1926) 16 A I R Nag 117=90 I C 385=26 Cr L J 1537=21 N L R 88.
2. Nathu v. Emperor, (1935) 18 N L J 90 = 159 I C 238=37 Cr L J 89.
3. Emperor v. Alam, (1927) 14 A I R All 804 = 102 I C 777 = 28 Cr L J 601=49 All 879=25 A L J 703.
4. Bindeshri Dube v. Emperor, (1920) 7 A I R All 266=59 I C 193=22 Cr L J 49=18 A L J 1135.
5. Lakshminarasappa v. M. Venkatappa, (1908) 31 Mad 133=18 M L J 57=7 Cr L J 267.
6. Parashram Bhika v. Emperor, (1933) 20 A I R Bom 158 = 1933 Cr C 470 = 143 I C 289=34 Cr L J 564=57 Bom 430=35 Bom L R 245.
7. Ramchandra Babaji v. Emperor, (1935) 22 A I R Bom 137 = 1935 Cr C 288 = 155 I C 101 = 36 Cr L J 643=59 Bom 125=37 Bom L R 16 (F B).
8. Venkata Subba Reddi v. Ayyalu Reddi, (1909) 32 Mad 214=3 I C 488=10 Cr L J 299.
9. Narayanswamy Naidu v. Emperor, (1909) 32 Mad 220=1 I C 228=19 M L J 157.

the ground of misappreciation or misapprehension of evidence, and is there any difference in this respect between S. 436 and S. 437, Criminal P. C.?"

I refer the case to my Lord the Chief Justice for constituting a Divisional Bench to dispose of this matter.

## OPINION

**Gruer J.**—The question referred to us is as follows :

> Is it open for a Sessions Judge or a District Magistrate to set aside an order of discharge under S. 436, Criminal P. C. on the ground of misappreciation or misapprehension of evidence, and is there any difference in this respect between S. 436 and S. 437, Criminal P. C.?

In deciding it we have had the advantage of careful arguments by the learned Advocate-General and by learned counsel for the applicants in revision. At the outset I think that the two words 'misappreciation' and 'misapprehension' ought to be distinguished. According to the Oxford Dictionary, 'to appreciate' is to form an estimate of worth, quality, or amount, and 'appreciation' is the action of estimating or deliberate judgment. 'Misappreciation' is the failure to appreciate rightly, and so applied to evidence would be the forming of a wrong estimate of its worth or quality. 'To misapprehend' on the other hand, is to misunderstand—apprehension being the action of grasping with the intellect. Thus it appears that 'misapprehension' implies a positive and demonstrable mistake or misunderstanding whereas misappreciation of evidence is more subjective and by no means so capable of logical demonstration. S. 436, Criminal P. C., must be read along with S. 435 which precedes it. S. 435 shows that the Sessions Judge or District Magistrate has to satisfy himself as to the correctness, legality or propriety of the order, etc. S. 436 says that on examining any record under S. 435 or otherwise he may direct further enquiry into the case of any person accused of an offence who has been discharged. This implies that he would do so if he found that the order was either incorrect, illegal or improper, but there is no provision in this Section laying down the principles by which he should arrive at that finding. So far as the Section itself goes it is legal for the Sessions Judge or the District Magistrate to come to the conclusion that an order of discharge is incorrect or improper because the lower Court has misappreciated or misapprehended the evidence, and in this sense the first part of the question would have to be answered in the affirmative.

A procedure however which is not illegal may yet be improper or undesirable, and the question must be further examined from that point of view. Various tests have been laid down by the different High Courts for the guidance of District Magistrates or Sessions Judges in the exercise of the wide discretion given them by the Section. A large number of such rulings have been cited before us, and the great majority of them enjoin that an order of discharge should not be set aside unless it can be said to be perverse or manifestly unreasonable, or foolish, or prima facie incorrect, or if evidence has been overlooked or misinterpreted. It also seems to be a generally accepted principle that where two views are possible from the evidence, the revising Court should not order further enquiry simply because it does not agree with the view taken by the trial Court. From these rulings it would follow that misapprehension of evidence is a good practical reason for setting aside an order of discharge but mere misappreciation is not, when the revising Court means by that term simply that its appreciation differs from that of the lower Court, but where the misappreciation amounts to perversity or prima facie error or manifest unreasonableness, then it would justify interference. It may be said that this standard is defective as the revising Court may be tempted to characterize misappreciation of evidence as perverse simply because it does not square with its own view. But Courts are surely trained to look to both sides of a question, and there is the safeguard that an order under S. 436 is itself open to revision by the High Court. Cases cited to us on behalf of the applicants in revision include 21 N L R 88,[1] 18 N L J 90,[2] A I R 1929 Nag 360[10] and A I R 1930 Nag 108.[11] From Allahabad, we have 9 All 52,[12] 44 All 691,[13] 49 All 879,[3] while A I R 1934 All 944[14] at page 946 upheld the doctrine of the Allahabad High Court that an order of discharge should be set aside very sparingly and only when it can be said either to be perverse or prima facie incorrect.

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[10] Bhaulal v. Kallu, (1929) 16 A I R Nag 360=1929 Cr C 673=121 I C 671=31 Cr L J 279.

[11] Bageshwar v. Emperor, (1930) 17 A I R Nag 108=1930 Cr C 316=122 I C 434=31 Cr L J 417.

[12] Queen-Empress v. Chotu, (1886) 9 All 52=1886 A W N 281 (F B).

[13] Emperor v. Udai Raj Singh, (1922) 9 A I R All 429=71 I C 528=24 Cr L J 176=44 All 691.

[14] Nazir Ahmad v. Emperor, (1934) 21 A I R All 944=1934 Cr C 1256=152 I C 884=36 Cr L J 202.

From the Lahore High Court we have A I R 1933 Lah 561,[15] where the previous cases are reviewed, and 11 I C 132.[16] For the views of the Calcutta High Court, 38 C L J 206[17] and A I R 1929 Cal 755,[18] may be referred to. The learned Advocate-General relies on 32 Mad 214[8] and 32 Mad 220[9] and also on 59 Bom 125.[7] He says that as 32 Mad 214[8] has dissented from 31 Mad 133,[5] which was relied on in 21 N L R 88,[1] therefore this Nagpur decision should be reconsidered. In 32 Mad 214[8] the learned Judges seem to be viewing the question from the restricted point of view of legality or jurisdiction. Thus Munro J. concludes that the Sessions Judge had power to set aside the order of discharge, and Pinhey J. says that he had jurisdiction to make the order. In 32 Mad 220[9] also, the reasoning is that misappreciation of evidence is a ground for interference under Ss. 436 and 437 because there is nothing in the Sections themselves to suggest otherwise. I have accepted this point of view above with the proviso that it must be qualified in practice. If the Legislature had not intended that discretion under S. 436, Criminal P. C., should be cautiously exercised, it would have provided an appeal from an order of discharge so as to allow findings of fact to be freely interfered with.

59 Bom 125[7] was a case under S. 437, Criminal P. C., but it was held that the jurisdiction of the Sessions Judge was substantially the same in revision under these two Sections. It was also held that under S. 437, the Sessions Judge in a proper case may set aside an order of discharge on the ground that he disagreed with the appreciation of evidence by the Magistrate. To my mind the only appreciable difference in the attitude of a Magistrate holding an enquiry as committing Magistrate and one holding an enquiry as a preliminary to a trial before himself is that he might be justified in committing a case which if he were trying it himself might appear to him to be not strong enough to warrant him to charge the accused. The reason for this opinion is that when a case is committed it is heard in full by a new tribunal so that the committing Magistrate has only to consider whether there is evidence to be weighed, whereas when the disposal of the case lies with himself he has himself to weigh the evidence and to consider whether a prima facie case warranting a charge has been made out. The distinction however is somewhat tenuous, and I do not think it is sufficient in degree to justify any practical difference in the standards according to which in these two cases an order of discharge should be upheld or upset.

I agree with the following conditions set out in 21 N L R 88[1] which would justify a District Magistrate to direct further enquiry, viz. that the order of discharge is perverse or prima facie incorrect or foolish, or that the Magistrate has not dealt with the evidence. I consider that the last condition—that the Magistrate has not recorded sound reasons for the discharge—is too vague to be of real help. It would be better to say, as mentioned above, that the order is manifestly unreasonable. What are "sound" reasons is difficult to determine, and the discharge might be quite proper although the reasons given by the Magistrate for his action might not be very sound. Apart from this I should accept the rule of practice laid down in this case in 21 N L R 88[1] which is in accordance with previous and subsequent cases of this same Court. In 4 N L R 166[19] at page 167 it was pointed out that the settled practice of the Court, unless it is shown to be illegal, is the law of the Court. In 18 N L J 90[2] the ruling in 21 N L R 88[1] was not questioned, but the point before the Court was simply whether the finding of the lower Court on the evidence was perverse or not. It appears then that there is no fundamental difference amongst the various authorities. The apparent difference arises because most of them lay down practical rules for the working of the Sections while some of them confine themselves to the immediate implications of the Sections themselves.

**My answer to the reference would be as follows: (i) It is both legal and proper for a Sessions Judge or a District Magistrate to set aside an order of discharge on the**

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**[15] Diwan Singh v. Emperor, (1933) 20 A I R Lah 561=1933 Cr C 819=144 I C 331=34 Cr L J 785=34 P L R 719.**

**[16] Emperor v. Kiru, (1911) 10 P R 1911 Cr=11 I C 132 = 24 P W R 1911 Cr = 205 P L R 1911.**

**[17] Abdul Rashid v. Momtaz Sheikh, (1924) 11 A I R Cal 229=76 I C 431=38 C L J 206=25 Cr L J 191.**

**[18] Sulav Chandra Das v. Prafulla Kumar Roy, (1929) 16 A I R Cal 755=1929 Cr C 457=128 I C 246=31 Cr L J 475=50 C L J 284.**

**[19] Atmaram v. Krishna, (1908) 4 N L R 166.**

ground of misapprehension of evidence. (ii). It is, strictly speaking, legal for a Sessions Judge or a District Magistrate to do so on the ground of misappreciation of evidence, but it is not proper to do so unless he is clearly of opinion that the misappreciation is so flagrant that in effect the order is perverse or manifestly unreasonable or foolish or prima facie incorrect. Where exactly to draw the line is a matter for the exercise of common sense. (iii) In the application of these principles there is no practical difference between S. 436 and S. 437, Criminal Procedure Code.

**Niyogi J.**—I agree and I wish to add what follows. In view of the fact that S. 435, Criminal P. C., confers revisional and not appellate jurisdiction, there must be some restriction as to the manner in which the power in revision as opposed to that in appeal is to be used. The revision jurisdiction is essentially one of general superintendence and it is therefore supervisory. In appeal, the opinion of the Appellate Court prevails because it is of a superior Court; it is not quite so in revision. The object of S. 435, Criminal P. C., is to prevent miscarriage of justice and it gives power to the High Court, Sessions Judge or District Magistrate

> for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed or as to the regularity of any proceedings of such inferior Court.

The Section does not contemplate mere difference of opinion between the revisional authority and the inferior Courts but something more : the finding, sentence, order or procedure of the inferior Court must be intrinsically erroneous or defective. The material words must therefore be construed in an objective sense, i. e. the error or defect must be capable of being demonstrated. Such defect or error may arise from mere perversity, misconception of law or fact, illegality or material irregularity in procedure or undue harshness or leniency. There is obvious difference between 'misapprehension' and 'misappreciation'. Misapprehension is misconception, i. e. to regard a thing as something different from what it is. Misappreciation is putting a wrong value on a thing. While the former is capable of objective demonstration the latter is not, because appreciation is mostly if not wholly, a subjective process. S. 435, Criminal P. C., clearly covers a case of misapprehension of evidence but does not cover a case of bare misappreciation of evidence. If however a District Magistrate sets aside an order of discharge on the sole ground of misappreciation of evidence, his action cannot be treated as illegal. He has power to send for the record, examine it and set aside the order of discharge. The legality of an order does not depend on the correctness of the reason given and therefore wrong reason cannot impair the legality of the order but only its propriety.

I do not see any substantial difference between S. 436 and S. 437, Criminal P. C., so far as the question under consideration is concerned. Both have a common background in S. 435, Criminal P. C. It is true that the Magistrate contemplated in S. 437 is one who is competent to try the case and the one contemplated in S. 437 is not. It is this difference which accounts for the difference in the nature of the orders to be passed under those Sections. This however is not a factor which can influence the interpretation of the material words in S. 435, Criminal Procedure Code.

B.D./R.K. *Reference answered.*

## A. I. R. 1938 Nagpur 398

NIYOGI J.

*Ramdulare* — Plaintiff.

v.

*Municipal Committee, Akola* — Defendant.

Civil Revn. No. 398 of 1937, Decided on 15th January 1938, from reference made by Judge, Small Cause Court, Akola, D/- 29th June 1937.

**Provincial Small Cause Courts Act (1887), Sch. 2, Art. 19 – Main relief along with nature of suit should be looked into—Claim for refund of tax by Municipality and for declaring its action as illegal—Declaration held was subsidiary relief—Suit held triable by Small Cause Court.**

If it appears from the nature of the suit as evidenced by the prayer that the main relief asked for is one for a declaration, then Art. 19, Sch. 2, Provincial Small Cause Courts Act would come into operation and preclude the suit from being tried by the Small Cause Court. [P 399 C 2]

Where a person claimed refund of tax recovered by Municipal Committee with a declaration that the action of the Committee was illegal :

*Held* that the declaration was a subsidiary matter and that the suit was triable by Small Cause Court : *A I R 1932 Mad 226 and A I R 1923 Mad 689, Rel. on ; A I R 1937 Pat 25, Not foll.; A I R 1929 Oudh 90 and 20 Bom 675, Disting.* [P 399 C 2]

**Order.** — This proceeding arises on a reference made by the Judge, Small Cause Court, Akola. Pandit Ramdulare filed a suit in the Court of the Second Class Subordinate Judge, Akola, against the Municipal Committee, Akola, on the allegation that the Municipal Committee's action in compelling him to pay license fees of Rs. 10 was ultra vires and illegal. His prayer was as follows :

> A decree for Rs. 10 be passed against the defendant, in plaintiff's favour, for refund of the sum realized from him by the defendant as said above, declaring that the action of the defendant in doing that being ultra vires and illegal.

The Subordinate Judge returned the plaint for presentation to the proper Court holding that it was triable by the Court of Small Causes. That finding was maintained in Miscellaneous Civil Appeal No. 16 of 1937 by the Third Additional District Judge, Akola, and the suit was re-presented in the Court of Small Causes, Akola. As the party concerned acquiesced in the decision on the point of jurisdiction, I see in reality no ground for making this reference. But since it has been made and certain authorities have been mentioned in the reference, I am on perusal of them of opinion that the Small Cause Court has jurisdiction to try the suit. 4 Luck 235[1] is not *ad rem.* In 20 Bom 675[2] the suit was for a declaration of illegality of Surat Municipal tax and for damages on account of alleged illegal entry into the plaintiff's house. As the suit was treated as being one mainly for a declaration it was rightly held not to come within the cognizance of the Small Cause Court in view of Art. 19, Sch. 2, Small Cause Courts Act. A I R 1937 Pat 25[3] does not contain any discussion and cannot therefore be accepted as a safe guide. In 46 Mad 808[4] it was held that the suit, which was one for declaration coupled with a claim for consequential damages was a suit of a Small Cause nature. The case, reported in A I R 1932 Mad 226,[5] is in point. In that suit, which was for recovery of a certain amount of money alleged to have been unlawfully collected by the Taluk Board from the plaintiff by way of profession tax, it was held that the suit was one of small cause nature on the ground that a money decree in such a suit does not become a declaratory decree because the order of the Taluk Board has to be cleared away by way of declaration or because the judgment is prefaced by some sort of declaration.

The question is really one of construction of the plaint filed in the suit. If it appears from the nature of the suit as evidenced by the prayer that the main relief asked for is one for a declaration, then Art. 19, Sch. 2, to the Provincial Small Cause Courts Act would come into operation and preclude the suit from being tried by the Small Cause Court. In this case the plaintiff asserts in the plaint that the recovery of the license fees from him was illegal. That raises an issue upon the decision of which would depend his right for refund of the money recovered from him. The declaration that is asked for is only a subsidiary matter and not the main relief. In fact even if the relief of declaration is struck out from the plaint the plaintiff will not lose his right to get a decree for refund of the amount which was illegally recovered from him, if his plea succeeds. That appears to be the test which ought to be applied in such a case as this. In my opinion the Small Cause Court has jurisdiction to try the suit.

B.D./R.K. *Reference answered.*

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## A. I. R. 1938 Nagpur 399

NIYOGI J.

*Abaji Ganesh Sayankar* — Applicant.

v.

*Damodar and others* — Non-applicants.

Civil Revn. No. 581 of 1937, Decided on 23rd February 1938, from order of District Judge, Wardha, D/- 23rd July 1937.

**Guardians and Wards Act (1890), Ss. 4 (2) and 41 (3)—Guardian includes de facto guardian — On his removal or discharge Court can direct him to deliver minor's property.**

The definition of guardian is wide enough to include not only a natural guardian but even de facto guardian : *A I R 1934 Bom 311, Rel. on.* [P 400 C 1]

On his removal or discharge the Court has power under S. 41 (3) to require him to deliver the infant's property : *A I R 1919 Mad 189, Approved ; A I R 1934 Mad 902, Explained ; A I R 1929 All 597 and A I R 1925 All 277, Disting.* [P 400 C 2]

P. P. Deo — *for Applicant.*

**M. R. Indurkar** — *for Non-applicant.*

**Order.—This is an application in revision against an order passed on 23rd July 1937 by the District Judge, Wardha, in Guardian Case No. 1 of 1936. The lower**

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[1] **Ram Het Shukul v. Ram Ratan, (1929) 16 A I R Oudh 90=118 I C 736=4 Luck 235=5 O W N 1138.**

[2] **Motabhai v. Surat City Municipality, (1896) 20 Bom 675.**

[3] **Chakradharpur Municipality v. Murlidhar, (1937) 24 A I R Pat 25=166 I C 748.**

[4] **President of the District Board, South Kanara v. Gopalakrishna Bhatta, (1923) 10 A I R Mad 689=74 I C 223=46 Mad 808 = 45 M L J 125.**

[5] **Raman Chetti v. Taluk Board of Sivaganga, (1932) 19 A I R Mad 226=139 I C 620.**

Court's order is impeached on the ground that it had no jurisdiction to compel the applicant to deposit the value of the gold and silver ornaments and cash belonging to the minors. Reliance is placed on 51 All 899[1] and 47 All 313.[2] They have no application as in this case the applicant was a party to the proceedings for the appointment of a guardian. The applicant himself admitted that the minors' property remained with him as the custodian on behalf of the minors. He actually deposited Rs. 947-2.0 as the balance found due on accounts between him and the minors. In fact no question of jurisdiction so far arises in the case, as the applicant himself appeared through his counsel and consented to deposit the price of ornaments instead of the ornaments themselves at certain specified rates. It is true that he did not consent to deposit the sum of Rs. 1286; but when the applicant himself filed the accounts through his counsel and deposited Rs. 947-2-0 and made a request that he might be allowed to deposit the price of ornaments, the plea comes with a bad grace from him that the Court had no jurisdiction to pass an operative order based upon his consent. In fact the lower Court simply accepted the applicant's proposal and the applicant cannot be heard to complain here against his own conduct.

Much vehement argument is addressed here to show that, notwithstanding the applicant's consent, the lower Court had intrinsically no jurisdiction to pass an order such as it did. The ground is that the applicant was not amenable to the jurisdiction of the District Judge exercising his powers under the Guardians and Wards Act. That the applicant was a de facto guardian of the minors cannot be and is not denied. S. 4 (2), Guardians and Wards Act, defines "guardian" as a person having the care of the person of a minor or of his property or of both his person and property. The definition is wide enough as held in A I R 1934 Bom 311,[3] to include not only a natural guardian but even a de facto guardian. Under S. 41 (3), Guardians and Wards Act, the Court can compel a guardian who has been discharged to deliver any property in his possession or control belonging to the ward and also to render any accounts in his possession relating to the past or present property of the ward.

Under S. 45 (1) (c) of that Act, if such a person fails to deliver any property or accounts in compliance with a requisition under S. 41 (3) of the Act, he is liable to penalty as provided in that Section. In 36 M L J 189[4] it was held that a de facto guardian is a guardian within the meaning of S. 4 (2), Guardians and Wards Act and that on his removal or discharge the Court has power under S. 41 (3) to require him to deliver the infant's property to the guardian appointed under the Act. It is urged that this case was dissented from by the Madras High Court in a subsequent case reported in 47 M L J 655.[5] On a perusal of the case, it is clear that their Lordships in deciding the latter case distinguished the former case on the ground that the person who was in possession of two jewels claimed by the natural guardian had long ceased to be a de facto guardian. Their Lordships therefore simply distinguished the previous case but did not dissent from it. I am in respectful agreement with the view taken in 36 M L J 189[4] and I feel no doubt that the lower Court, both under the law and in view of the special circumstances of the case noted already, had jurisdiction to call upon the applicant to deposit the minors' property or its equivalent in Court.

It however appears to me that, since the applicant has submitted what purports to be a complete account, it would be hard on him to be called upon to deposit such a large amount as Rs. 4700 (approximately). The object of the order under consideration is obviously to protect the minors' property. That object can well be served by directing the applicant to furnish solvent security for payment of the amount in Court, if a scrutiny of the accounts filed by him shows that the applicant is liable to do so. The lower Court will, while proceeding with the case, take into consideration the observations made above, in passing any fresh order. This application is dismissed with costs. Pleader's fees Rs. 10.

D.S./R.K. *Application dismissed.*

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[1] Chandrika Rai v. Srikant Rai, (1929) 16 A I R All 597=117 I C 98=51 All 899=1929 A L J 798.

[2] Harbans Singh v. Rajinder Kuar, (1925) 12 A I R All 277=85 I C 1047=47 All 313=23 A L J 28.

[3] Noshirwan v. Sharoshbanu, (1934) 21 A I R Bom 311=151 I C 1037=58 Bom 724=36 Bom L R 668.

[4] Sitha Bai v. Radha Bai, (1919) 6 A I R Mad 189=51 I C 236=36 M L J 189.

[5] Kuppammal v. Muniappa Chetti, (1924) 11 A I R Mad 902=82 I C 488=47 M L J 655.

# * A. I. R. 1938 Nagpur 401

STONE C. J. AND PURANIK J.

*Mt. Sitabai, w/o Ratiram Powar — Plaintiff*—Appellant.

v.

*Hari and others — Defendants* — Respondents.

Second Appeal No. 540-A of 1934, Decided on 29th October 1937, from appellate decree of Addl. Dist. Judge, Bhandara, D/- 11th September 1934.

**(a) Res judicata — Debts incurred by widow of deceased—Creditor obtaining decree and attaching deceased's property — Suit by reversioner claiming release of property from attachment on ground that debt being without legal necessity was not binding on his reversionary interest and because he was owner in pursuance of gift by widow—Issue as to legal necessity raised and decided against plaintiff—Property sold — Subsequent suit by him that sale is not binding on his reversionary interest is barred by res judicata.**

If it is possible to treat the entire cause of action upon which the later suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied on, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit : *A I R 1935 Cal 792, Rel. on.* [P 405 C 1]

A widow of a deceased incurred some debts and the creditor obtained a decree and attached deceased's property. A suit was instituted by reversioner claiming release of the property from attachment on the ground firstly because the debts being without legal necessity were not binding on his reversionary interest and secondly because he had become owner of the property in pursuance of a gift in his favour by the widow. Thus the suit was a composite suit by the plaintiff claiming release in both capacities, one as reversioner and another as donee. The issue as to legal necessity was decided against the plaintiff and the suit was dismissed. The property was sold. Subsequently the plaintiff brought a suit for declaration that the sale was not binding on his reversionary interest as the debts were without legal necessity :

*Held* that the suit was barred by res judicata. [P 404 C 2 ; P 405 C 1]

**(b) Hindu law — Widow — Debts by widow without legal necessity — Creditor obtaining decree and attaching property — Reversioner may sue for declaration that these acts do not bind his reversionary interest.**

A reversioner is entitled to challenge the unauthorized acts of the widow. To incur a debt without legal necessity for the same is an unauthorized act of the widow and if a creditor sues for such a debt and obtains a decree and attaches the property in the hands of the widow, a cautious reversioner may sue for a declaration that these acts do not bind the reversionary interest. A reversioner cannot sue for a mere declaration that he is a reversioner, but when a cloud is cast on his title and when he apprehends danger to his interest, there is no reason why he should not seek a declaration that a particular act of the widow is unauthorized so far as the reversionary interest is concerned : *A I R 1916 Nag 100, Rel. on.* [P 405 C 1, 2]

* **(c) Res judicata—Point not properly raised by plaint — Parties choosing to join issue upon it — Decision on it is res judicata.**

Where a point is not properly raised by the plaint but both parties have without protest chosen to join issue upon that point, the decision on that point would operate as res judicata between the parties : *A I R 1932 P C 50 and A I R 1924 P C 144, Foll.; A I R 1931 P C 114 and A I R 1932 P C 161, Disting.* [P 405 C 2]

* **(d) Civil P. C. (1908), S. 11—Causes of action may be different in both suits.**

Section 11 does not require that the causes of action in both the suits should be the same for the application of the rule of res judicata. The causes of action may be different or the subject-matter may be different, but if the issue involved in both the cases is the same and if it was directly and substantially in issue in the former case between the same parties or between parties under whom they or any of them claim, litigating under the same title, the decision of such an issue in the former case will operate as res judicata provided the other conditions laid down in S. 11 are satisfied. [P 406 C 1]

R. N. Padhye—*for Appellant.*

M. R. Bobde and V. V. Kelkar — *for Respondents 1 to 4.*

**Judgment.**—The malik makbuza fields in dispute are situate at mauza Mundepar and belonged to one Jangli. He died in 1915 leaving behind him two widows, Mt. Turja and Mt. Wadja. Mt. Turja had a daughter Rama who was married to one Ganpat Powar. Mt. Rama however predeceased Jangli. Plaintiff is the daughter of Jangli from Wadja. Mt. Turja executed a sale deed in favour of her son-in-law Ganpat Powar on 18th April 1921 and plaintiff got it declared as not binding on her by a decree obtained by her in Civil Suit No. 234 of 1927. Mt. Turja is alleged to have incurred some debt under a bond dated 11th October 1927 (Ex. D.2) from another Ganpat. This Ganpat instituted a suit for recovery of the debt due and obtained a decree in Civil Suit No. 1738 of 1928. In execution of this decree he attached the fields in dispute on 18th May 1929. On 25th May 1929, Turja and Wadja executed a gift deed in favour of the plaintiff in respect of the fields attached. The plaintiff being armed with the gift deed in her favour, instituted Civil Suit No. 100 of 1929 claiming release of the fields gifted to her on the ground that she was the next reversioner to the estate of the deceased Jangli after his widows, but the latter relinquished the estate in her favour with the result that she became the owner thereof. She also stated that the debt incurred by Turja for which the creditor had obtained a decree was not incurred, but if proved to be incurred, there was no legal necessity, and the same was not binding on the estate of Jangli of which the plaintiff had become the owner by virtue of the gift deed executed in her favour by the widows of Jangli. Plaintiff having raised the issue of want of legal necessity for the debt for satisfaction of which the decree-holder had attached the property and wanted to sell it, the Court investigated it and came to the conclusion that the debt was incurred for legal necessity and was binding on the estate of Jangli and the property in suit could be attached for satisfaction of the same. The Court further held that the gift deed having been executed after the attachment was void as against the same. As a result of the findings arrived at, the Court dismissed the plaintiff's suit. The property was thereafter sold and purchased by one Sonu on 14th November 1929.

Plaintiff thereafter instituted the present suit for a declaration that the sale was not binding on her reversionary interest, as the debt in satisfaction of which the property was attached and sold was not incurred for legal necessity. The decree-holder who attached the property and brought it to sale and the widow who had incurred the debt and the legal representatives of the auction-purchaser were joined as defendants in the case. The main defence on behalf of the contesting defendants was that it was decided in Civil Suit No. 100 of 1929 that the debt incurred by Mt. Turja from Ganpat was for legal necessity and binding on the estate of Jangli and that in view of that decision plaintiff could not maintain the present suit for the same declaration. On behalf of the plaintiff it was contended that the decision in the previous suit was not res judicata as the decision on the point was not necessary for the proper adjudication of the previous suit and the plaintiff is now litigating under a different title. The trial Court decreed the claim. The lower Appellate Court came to the conclusion that the decision in the previous suit operated as res judicata and the plaintiff's suit for a declaration that the debt was not incurred for legal necessity and consequently the auction-sale is not binding on her is not tenable. Plaintiff's suit having thus been dismissed, she has preferred this second appeal. The only point urged before us is one of res judicata. The appellant contends that the decision in the former suit ought not to operate as res judicata for the following reasons: (1) though the present plaintiff had instituted the former suit against the decree-holder who had attached the property and the widow who had incurred the debt, and though the question of legal necessity was raised and the fact that the plaintiff was the next reversioner mentioned, the said suit was instituted on the basis of a gift deed executed in her favour by the widows and was for a declaration claiming release of the property from attachment on the basis of the gift deed. In fact the former suit was instituted by the plaintiff as owner and not in her capacity as reversioner, while the present suit is by plaintiff as a reversioner for a declaration that the sale held for satisfaction of the debt which was also challenged in the former litigation, is not binding for want of legal necessity. The plaintiff in the present suit is not thus litigating under the same title as in the former suit; (2) the issue regarding legal necessity though raised and decided against the plaintiff in the former suit was not necessary to be decided in the former suit and the mere fact that the Court decided it, will not make it operate as res judicata in the present case. It could not be said to be directly and substantially in issue in the former litigation; (3) there is no identity of causes of action. The cause of action in the former suit was quite distinct from the cause of action in the present suit. There was no alienation when the former suit was instituted.

In order to understand the contentions of the appellant properly, we must look to the pleadings in the former litigation and the decision therein. The decision in the former case is filed in this case as Ex. D-1, but the pleadings are not on record. We are however informed that the record of the former litigation was before the lower Courts and the same is also placed before us for perusal. The proper procedure however for the parties was to place the pleadings of the former litigation as exhibits in this case to complete the record of this case and to enable the Courts to appreciate the dispute properly but as this was not insisted upon in the lower Courts, we use the record of the previous litigation for the purpose of deciding the point of res judicata urged before us. The plaint in the former litigation is an important document and we think it necessary to re-produce the material portions thereof for the proper decision of the contentions raised before us.

In the Court of the First Sub-Judge, Second Class at Gondia.

*Civil Suit No. 100 of 1929.*

1. Mt. Sitabai, w/o Ratiram Patil Powar, aged 20 years, by occupation a Malguzar, resident of Sitapar, Pargana Tiroda, Tahsil Gondia, District Bhandara—Plaintiff.

v.

1. Ganpat s/o (not known), by caste a Brahmin, aged 35 years, by occupation a Malguzar, resident of Lawesur Pargana, Tahsil and District Bhandara. 2. Mt. Turjabai w/o Jangli Patil, Powar, aged 50 years, by occupation a cultivator, resident of Mundipar, Pargana Tiroda, Tahsil Gondia — Defendants.

*(Claim for declaration, value Rs. 2700.)*

The plaintiff begs to submit as below :

1. The plaintiff and defendants reside within the local limits of the jurisdiction of this Court and the subject-matter of the suit is situate within the jurisdiction of this Court. Hence the suit is filed in this Court.

2. Defendant 1 obtained a money decree for Rs. 437-8-0 against defendant 2 on 25th February 1929 in Case No. 1738 of 1928 in the Court of the Judge of Small Causes at Bhandara. Defendant 1, in execution of the said decree has (attached) the plaintiff's father's ancestral property situate at Mauza Mundipar, Pargana Tiroda, Tahsil Gondia, consisting of malik makbuza lands mentioned herein below :

* * * *

3. The attached land forms part of the ancestral property of the plaintiff's father Jangli, s/o Tanba Powar. Two widows of the plaintiff's father Jangli, viz. Mt. Turja and Mt. Balja, are alive. Defendant 2 is the step-mother of the plaintiff. The plaintiff is the only issue of her father and she is the sole heir of her father Jangli.

4. The plaintiff has filed a Suit No. 234 of 1927 in the Court of the First Sub-Judge, Second Class, at Gondia, against defendant 2 and plaintiff's real mother Mt. Balja, wives of Jangli Powar for an injunction restraining (them) from disposing the ancestral property of the plaintiff's father Jangli. The same is pending and is fixed for 25th September 1929 for evidence.

5. During the pendency of the above Suit No. 234 of 1927, defendant 2 and plaintiff's mother Mt. Balja relinquished their rights and executed a registered gift deed in favour of the plaintiff in respect of the following lands and put the plaintiff in immediate possession thereof.

* * * *

And a house—one kotha having a tiled roof together with doors, door-panels, etc.

* * * *

6. The plaintiff does not know whether defendant 2 borrowed the debt from defendant 1. Defendant 2 had no legal necessity for incurring the debt. At the time of his death, the plaintiff's father Jangli had much wealth with him and was not at all indebted. Defendant 2 alone cannot incur the debt, and even though if it is proved that she borrowed a debt from defendant 1, it was not incurred for the benefit of the estate and was not applied for that purpose. The land attached in defendant 1's decree is not therefore liable to attachment and sale. The plaintiff therefore sues for a declaration to this effect.

7. The cause of action accrued on 24th May 1929.

* * * *

8. The value of the claim for purposes of jurisdiction and court-fee is Rs. 2700.

9. * * * *

10. Prayer :

Plaintiff prays as follows: (a) It be declared that the malik makbuza lands described in para. 2, above, attached by defendant 1 in execution of the decree in Case No. 1738 of 1928 are not liable to attachment and sale. (b) Defendants be directed to pay costs of the suit to the plaintiff. Any other relief deemed proper by the Court be granted and a decree be passed as above.

The defence in the case was that the debt incurred by Turja was incurred for legal necessity and is binding on the estate of Jangli. The mere fact that plaintiff has taken a gift deed from the widows does not relieve Jangli's estate from the liability to pay the debt incurred by the senior widow for legal necessity. Jangli's estate was thus rightly attached and cannot be released on the basis of the gift deed. It was further pointed out that the gift deed was executed after the attachment and in the alternative it was pleaded that in any event even if legal necessity is not proved, the creditor was entitled to attach the life-interest of the widow in the property and it having been attached before the gift deed, the gift is not operative against the attachment. It will thus be seen that the plaintiff in the former litigation claimed release of the property from attachment on two grounds, viz. (1) that the debt in dispute was not for legal necessity and as such not binding on the estate of Jangli to which the plaintiff was the only reversioner and (2) that the plaintiff having obtained the property by gift was the owner thereof. What the plaintiff sought in the former case was a declaration that the attachment of Jangli's estate for the debt incurred by Mt. Turja which was not binding on the estate was void and the property was liable to be released from attachment. Ex. D.1, the judgment in the former case, shows that the Court which tried the case decided the issue of legal necessity of the debt in these words:

> It was borrowed for agricultural purposes and to pay off debts and to fight out litigations. She had an authority to borrow. There does not seem to be any express authority from a junior widow but a long course of consistent conduct and no voice of protest from the junior widow establishes it. The debts are binding upon Jangli's estate.

After finding that the gift deed was duly executed and attested and after holding that it was executed after the attachment, the Court ends the judgment by saying she (the plaintiff) must pay all true debts existing in the form of decree or otherwise on the date of the gift-deed. She is not bound by the debts that Turja might incur after the gift deed. This debt is therefore binding on the plaintiff if she takes the whole estate. As a result of the findings arrived at the plaintiff's suit was dismissed with costs.

The first contention urged by the appellant is that the plaintiff in the present suit is not litigating under the same title under which she litigated the former suit. The former suit was filed by her as owner of the property claiming a release from attachment, while the present suit is filed by her as a reversioner claiming that the alienation is not binding on her. We have reproduced the plaint in the former case in particular para. 6 above to show in what capacity the plaintiff was litigating the former suit. The plaintiff in the former suit mentioned that she was the only next reversioner and that the debt, if proved to be incurred by Mt. Turja, was not binding on the estate of Jangli for want of legal necessity. The property of Jangli was attached for satisfaction of this debt and the plaintiff apprehending that her reversionary interest will be affected by the attachment, claimed release of the property on the ground that the debt is of a nature which is not binding on her as a reversioner. No doubt by the time the suit was instituted she had armed herself with a gift deed from the widows which will efface the widow's life-interest in the property also. The plaintiff's claim to be the owner of the property thus consisted of her reversionary interest plus the life-estate of the widows which she obtained by the gift deed and it is this ownership on the basis of which she claimed the release of the property from attachment. Had the plaintiff laid claim only to the life-interest of the widows by virtue of the gift deed and had she intended the release of that interest only, it was not necessary for her to allege that the debt was not for legal necessity and binding on the estate of Jangli to which she laid claim as reversioner.

It is argued that the mere fact that a widow borrows a debt or the mere fact that property is attached by a creditor of the widow, does not give the reversioner a cause of action for suit and 13 Lah 524[1] is relied on. In a recent Bombay case reported in 60 Bom 311,[2] which we had an occasion to follow in another case, their Lordships of the Bombay High Court have clearly pointed out that an alienation for want of legal necessity and a debt for want of legal necessity stand on the same footing. If the debt is incurred by the widow for legal necessity, the estate is bound to pay it and the reversioners cannot escape the liability. It is quite clear to us that the plaintiff in the former suit claimed release of the property and wanted a declaration that the estate of Jangli was not liable for the debt. Her claim for this declaration failed as it was found that the debt was for legal necessity. Her suit claiming the release of the life-interest of the widow failed as the Court came to the conclusion that the gift deed was executed after the attachment and even if it had been before the attachment but after the incurring of the debt, she took the gift subject to the liability of the donor. We are of the opinion that it was a composite suit by the plaintiff claiming release in both capacities and that it failed entirely. It is the plaintiff in the former case who began the litigation with allegations of want of legal necessity for the debt. An express issue was raised and the Court with a view to decide what relief should be granted to the plaintiff, investigated into it and found it against the plaintiff. Having lost that suit, plaintiff is agitating the same question in the present litigation by putting on a garb of a mere reversioner as distinct from ownership in the former litigation. Her reversionary character as plaintiff was fully stated by the plaintiff in the former suit in para. 6 and it is on that ground that she claimed release of the property of Jangli from an attachment for a debt which was not binding on that estate.

The plaintiff cannot be allowed to urge that her present suit is in a different capacity. The mere fact that to her capacity as reversioner in which she litigated in the former suit, she added another capacity as a donee under the gift deed so far as the life-estate of the widow was concerned, does not change the nature of the suit. Not only her suit as a donee failed but her suit claiming the release of the property on the ground that the debt was not binding on Jangli's estate also failed. In A I R 1935 Cal 792[3] at p. 797 it is laid down that if it is possible to treat the entire cause of action upon which the later suit is founded as divisible, and if in the earlier suit one of the component parts of the cause of action was relied on, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit. Applying the principle of this rule to the present case, the same result can be arrived at and the rule of res judicata applies.

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[1] Natha v. Ganesha Singh, (1932) 19 A I R Lah 179=136 I C 265=13 Lah 524=33 P L R 46.

[2] Dhondu Yeshwant v. Mishrilal Surajmal, (1936) 23 A I R Bom 59=160 I C 1046 = 60 Bom 311=38 Bom L R 6 (F B).

It is next argued that a mere incurring of a debt by a widow or passing of a decree against the widow, or attachment of the property held by the widow representing the estate, does not give the reversioner a cause of action to sue for a declaration that the reversionary interest is not bound by any of such acts and the mere fact that the plaintiff in the former suit referred to her reversionary character or alleged that the debt was not for legal necessity did not mean that she was suing as a reversioner in the former case, and that the issue about legal necessity did not directly and substantially arise in the case. We have explained that the plaintiff's ownership of the property as claimed in the former suit was a combination of reversionary interest plus the life-estate which she obtained by the gift deed. The debt incurred by the widow, the decree obtained by the creditor against the widow and the subsequent attachment had cast a cloud on that title and plaintiff claimed a declaration of her rights and sought removal of the cloud. Mulla in his Hindu Law, Edn. 8, p. 219, para. 202, states that a reversioner is entitled to challenge the unauthorized acts of the widow. To incur a debt without a legal necessity for the same is an unauthorized act of the widow and if a creditor sues for such a debt and obtains a decree and attaches the property in the hands of the widow, a cautious reversioner may sue for a declaration that these acts do not bind the reversionary interest. A reversioner cannot sue for a mere declaration that he is a reversioner, but when a cloud is cast on his title and when he apprehends danger to his interest there is no reason why he should not seek a declaration that a particular act of the widow is unauthorized so far as the reversionary interest is concerned : 13 N L R 187.[4] Moreover, whether such a suit is tenable or not plaintiff did sue for such a declaration and raised an issue and the Court deciding the case did not think that the said issue did not arise in the case or that the plaintiff had no cause of action on that basis. In A I R 1932 P C 50[5] their Lordships of the Privy Council stated that where a point is not properly raised by the plaint but both parties have without protest chosen to join issue upon that point, the decision on that point would operate as res judicata between the parties. To the same effect we find observations of their Lordships in 51 Cal 631[6] at pages 641 and 642. 53 All 103[7] and 10 Rang 322[8] relied on by the appellant have no bearing on the facts of the present case. These cases deal with the question of res judicata as between co-defendants and the test laid down is that if there be a contest as between co-defendants on any point and if it be necessary to decide that point in order to grant the plaintiff a relief in that case, the matter is res judicata and not otherwise. The majority decision in 9 Luck 291[9] does not support the appellant. Several other cases were referred to at the Bar on both sides on the point "directly and substantially in issue" but it appears to us that no useful purpose will be served by reviewing them in this case as each case seems to have been decided on its own facts. We are bound by the view expressed by their Lordships of the Privy Council in A I R 1932 P C 50[5] and 51 Cal 631[6] at p. 642, and we are of the opinion that in view of the pleadings in the former case, the issue on the point of the binding nature of the debt on the ground of legal necessity directly and substantially arose in the case and was decided against the plaintiff, the

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[3] **Sekendar Ali Mridha v. Sadaruddin Bhuniya, (1935) 22 A I R Cal 792=159 I C 1008=40 C W N 174.**

[4] **Mt. Parwati v. Govind Prasad, (1916) 3 A I R Nag 100=42 I C 737=13 N L R 187.**

[5] **Krishna Chendra v. Challa Ramanna, (1932) 19 A I R P C 50=136 I C 412 (P C).**

[6] **Midnapore Zamindary Co. Ltd. v. Naresh Narayan Roy, (1924) 11 A I R P C 144=80 I C 827=51 Cal 631=51 I A 293 (P C).**

[7] **Munni Bibi v. Tirloki Nath, (1931) 18 A I R P C 114=132 I C 598=53 All 103=58 I A 158 (P C).**

[8] **Maung Sein Done v. Ma Pan Nyun, (1932) 19 A I R P C 161=137 I C 328=10 Rang 322=59 I A 247 (P C).**

[9] **Mt. Moola v. Bithal Das, (1934) 21 A I R Oudh 50=147 I C 984=9 Luck 291=11 O W N 53.**

Court trying it treated it as an essential issue in the case and based its decision on it. It operates as res judicata in the present case.

The third contention of the appellant is that the causes of action for the two suits are different. When the former suit was instituted there was no alienation while the present suit is based on the cause of action afforded by the alienation. S. 11, Civil P. C., does not require that the causes of action in both the suits should be the same for the application of the rule of res judicata. The causes of action may be different or the subject-matter may be different, but if the issue involved in both the cases is the same and if it was directly and substantially in issue in the former case between the same parties or between parties under whom they or any of them claim, litigating under the same title, the decision of such an issue in the former case will operate as res judicata provided the other conditions laid down in S. 11 are satisfied. This contention of the appellant fails. Moreover, we are not satisfied that the cause of action is not the same. It is pointed out by the respondent that the sale took place on 14th November 1929 during the pendency of the former suit which was decided on 17th February 1930. The debt and the decree which were challenged as not binding in the former suit are the same and even the sale of the property had taken place in execution of the decree, when it was declared that the debt was such as was binding on the estate of Jangli. The cause of action is thus the same or at any rate had already accrued to the plaintiff before the decision of the former suit. Knowing that the debt for which the property was sold was held to be binding on her, the plaintiff could not be allowed to institute a fresh suit and challenge the same debt which is the foundation of the sale. All the contentions raised by the appellant before us thus fail and the result is that the appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Nagpur 406

POLLOCK AND GRUER JJ.

*Provincial Government, C. P. & Berar* — Appellant.

v.

*Seth Chapsi Dhanji Oswal Bhate and another — Accused* — Respondents.

Criminal Appeal No. 309 of 1937, Decided on 7th March 1938.

*** Factories Act (1934), Ss. 42, 81 and 71 (1)—S. 81 is intended for protection of inspecting staff and not for the protection of manager or agent—But manager or agent can show that offence was committed without his knowledge — Working for 15 minutes beyond prescribed time held could not be ignored.**

Section 81 was inserted in the Act primarily, if not entirely, for the benefit of the inspecting staff. The manager or occupier who allows workmen to work beyond the prescribed hour is not acting or intending to act under the Act. Hence it is sufficient in a prosecution under the Factories Act to prove that the accused has infringed the Act or rules under the Act and it is not necessary to show that the accused intended to infringe the Act or the rules. Though S. 81 does not apply, it is open to the occupier or manager to show under S. 71 (1) that he has used due diligence to enforce the execution of the Act and that the offence was committed by some other person without his knowledge, consent or connivance. [P 407 C 1, 2]

Working for 15 minutes beyond the prescribed time was held to be not a trifling difference which could be ignored and therefore it was held to be an offence under S. 42 : *A I R 1934 Bom 43, Rel. on; A I R 1934 Cal 730 and English cases referred.* [P 407 C 2]

W. R. Puranik, Advocate-General — *for Appellant.*

M. K. Chande — *for Accused.*

**Judgment.** — This is an appeal by the Provincial Government against an acquittal under the Factories Act 25 of 1934. At 6-5 P. M. on 18th April 1937, Mr. Sen, the Inspector of Factories, visited the Sir Sarup Chand Hukum Chand Ginning Factory, Khamgaon, and found that factory at work. In accordance with S. 39 (1) of the Act, there was a notice posted up showing the periods of work as 7 A. M. to 12 noon and 1 P. M. to 6 P. M. The work stopped that day at 6-15 P. M. The clock in the engine room was 15 minutes slow but the clock in the office-room was correct. S. 42 of the Act provides that no adult worker shall be allowed to work otherwise than in accordance with the notice of the periods for work for adults displayed under sub-s. (1) of S. 39, and the two accused who are the managers and agents were therefore prosecuted under S. 60 (b) (i) read with S. 42 of the Act. They were convicted in the trial Court but acquitted on appeal. Mr. Sen's evidence shows that the office clock was correct by the Post Office time. The time observed by the Post Office is Indian standard time, and the hours stated in the notice for the periods of work must be interpreted as referring to Indian standard time. It therefore follows that the factory worked for 15 minutes after the hour when it should have closed in accordance with the notice for the periods of work. The workers who worked for these 15 minutes were undoubtedly allowed to work, and therefore under S. 60 (b) (i) the manager and occupier are liable.

The main defence is that the accused acted in good faith, honestly believing the engine-room clock to be correct, and that they are protected by S. 81 of the Act. S. 81 runs as follows:

> No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act,

and a similar Section is to be found in other Acts, e. g. the Central Provinces Excise Act and the Lunacy Act. It appears to us that this Section was inserted in the Act primarily, if not entirely, for the benefit of the inspecting staff. The manager or occupier who allows workmen to work beyond the prescribed hour is not, in our opinion, acting or intending to act under the Act. In 58 Bom 137[1] Divatia J. remarked that the manager seemed to have believed in good faith that he had the power to extend the time, but the manager was convicted and no reference was made to S. 81 of the Act (then S. 58). The decision in A I R 1934 Cal 730,[2] so far as we understand it, seems to be based on the assumption that acting in good faith is always a defence to a criminal charge, which it is not, but there was no discussion there of S. 58 (now S. 81).

Under the English law mens rea is not an essential element in a limited class of offences consisting for the most part of statutory offences of a minor and only quasi-criminal character: *see* Halsbury's Laws of England, Edn. 2, Vol. 9 page 11. Examples of such offences are: (1) possessing for sale unsound meat, though without knowing it to be unsound: (1910) 2 K B 471;[3] (2) selling an adulterated article of food, though without knowing it to be adulterated: (1888) 20 Q B D 771;[4] (3) selling intoxicating liquor to a drunken person, though without noticing that he was drunk: (1884) 13 Q B D 207.[5] In such cases it will seldom be possible for the prosecution to prove that the accused had such knowledge, and the Legislature has accordingly dispensed with the necessity for such evidence. As Ismay, Judicial Commissioner, put it in (1897) 10 C P L R 11 Cr[6] at p. 12:

> Where an offence has been committed in ignorance or misapprehension of the law, and the statute prohibiting the act does not expressly make malice or wilfulness or other intent an essential element of the offence, the absence of mens rea does not control the language of the statute.

It therefore appears to us sufficient in a prosecution under the Factories Act to prove that the accused has infringed the Act or rules under the Act and that it is not necessary to show that the accused intended to infringe the Act or the rules. Though S. 81 does not apply, it is open to the occupier or manager to show under S. 71 (1) that he has used due diligence to enforce the execution of the Act and that the offence was committed by some other person without his knowledge, consent or connivance. That plea has not been put forward in the present case, and we do not think that it is unreasonable to expect persons in charge of a factory to see that the time observed in the factory is the correct time. We do not know if the factory really started at 1.15 P. M. and not at 1 P. M.; but if it did, then the workers, who would know no time except the local time, must have arrived a quarter of an hour early and have been kept hanging about the factory instead of enjoying their hour of rest. A trifling difference in time would no doubt be ignored but a quarter of an hour is not a trifling difference. We therefore hold that an offence has been committed. The appeal is allowed and the convictions in the lower Court will be restored. We think that a fine of Rs. 25 for each accused is sufficient and we pass orders accordingly; in default of payment, one month's simple imprisonment.

K.S./R.K. *Appeal allowed.*

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1. Emperor v. Nanubhai Maneckial, (1934) 11 A I R Bom 43=1934 Cr C 205=147 I C 1154 =36 Bom L R 1167=58 Bom 137.
2. Superintendent and Legal Remembrancer, Bengal v. H. E. Watson, (1934) 11 A I R Cal 730 = 1934 Cr C 1104 = 152 I C 566 = 38 C W N 1008.
3. Hobbs v. Corporation of Winchester, (1910) 2 K B 471=79 L J K B 1123 = 102 L T 841= 74 J P 413=8 L G R 1072=26 T L R 557.
4. Betts v. Armstead, (1888) 20 Q B D 771 = 57 L J M C 100=58 L T 811=36 W R 720=52 J P 471=16 Cox C C 418.
5. Cundy v. Lecoco, (1884) 13 Q B D 207 = 53 L J M C 125=51 L T 265=32 W R 769=48 J P 599.
6. Local Government v. * * *, (1897) 10 C P L R 11 Cr.

## * A. I. R. 1938 Nagpur 408

POLLOCK AND DIGBY JJ.

*Mrs. A. T. Marten* — Appellant.

v.

*R. K. Dutt, Manager, Bengali Stores, and others* — Respondents.

Misc. Appeal No. 228 of 1936, Decided on 20th October 1937, from order of Dist. Judge, Raipur, D/- 22nd August 1936.

*** Provincial Insolvency Act (1920), S. 28 (4) and (5) — Provident fund as soon as it reaches hands of undischarged insolvent depositor vests in Insolvency Court.**

The insertion of the word 'forthwith' in S. 28 (1) has been to sweep away the Court's attempt to postpone the vesting: *4 Rang 125, Foll.* [P 408 C 2]

As soon as the amount of provident fund reaches the hands of an undischarged insolvent depositor, it ceases to be a compulsory deposit that is not liable to attachment, and it becomes the absolute property of the depositor insolvent and therefore vests in the Insolvency Court : *A I R 1935 Bom 396 and A I R 1927 P C 108, Rel. on; A I R 1929 Pat 97 and A I R 1920 Bom 58, Dissent.; Case law referred.* [P 409 C 1]

Abdul Razak — *for Appellant.*

P. N. Rudra — *for Respondents.*

**Judgment.** — Marten, a guard on the Bengal Nagpur Railway, who had been adjudged insolvent on his own petition was discharged from railway service and thereafter received from the railway company a cheque for Rs. 3000, representing the amount due to him from his provident fund. He endorsed this cheque to his wife who deposited the amount partly in the Imperial Bank and partly in the Post Office Savings Bank. The Insolvency Court attached these deposits at the instance of Marten's creditors, and the lower Courts have held that the deposits are liable to be attached. Against that decision Mrs. Marten has appealed. No order of discharge had been passed in the insolvency proceedings when Marten received the cheque for Rs. 3000 and therefore under S. 28 (4), Provincial Insolvency Act, it would appear that this money forthwith vested in the Insolvency Court. Mrs. Marten based her claim partly on the fact that she had been nominated by Marten as the person entitled to receive the deposit in the event of his death, but it has been conceded in this Court that Marten was the only person who was entitled to receive the money after his discharge from the railway service and that Mrs. Marten could have no claim against either him or the railway company. The appellant has relied mainly on the decision in 44 Bom 673[1] which was based largely on (1890) 25 Q B D 262.[2] All that was decided in the latter case was that under the English Bankruptcy Act then in force, until the trustee intervened all transactions by the bankrupt with a person dealing with him bona fide and for value in respect of property acquired after the bankruptcy, whether with or without knowledge of the bankruptcy, were valid against the trustee. The decision in 44 Bom 673[1] went further and has been dissented from in 59 Bom 517[3], 1 Luck 313,[4] A I R 1928 Mad 784[5] and A I R 1931 Mad 797.[6]

Under the Act in force when (1890) 25 Q B D 262[2] was decided, the provision that the after acquired property of the insolvent should vest in the receiver was not worded in quite the same way as in Sec. 28 (4), Provincial Insolvency Act, and we agree with the decision in 4 Rang 125[7] that the effect of the insertion of the word "forthwith" in S. 28 (4) of the present Act has been to sweep away the Court's attempt to postpone the vesting. A contrary view was taken in 8 Pat 478[8] with which we respectfully disagree, and we are fortified in this conclusion by the remarks of Sir Dinshaw Mulla at page 368 of his Law of Insolvency that the decisions in 44 Bom 673[1] and 8 Pat 478[8] are erroneous. In any case the principle laid down in (1890) 25 Q B D 262[2] falls far short of the proposition which the appellant seeks to establish in this case.

Section 28 (5), Provincial Insolvency Act provides that property of the insolvent which is exempted by the Code of Civil

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1. Nagindas Bhukhandas v. Ghelabhai Gulabdas, (1920) 7 A I R Bom 58=56 I C 449=44 Bom 673=22 Bom L R 322.
2. Cohen v. Mitchell, (1890) 25 Q B D 262=59 L J Q B 409=63 L T 206=38 W R 551=7 Morrell 207.
3. Walchand Molaji v. Charles A. Williams, (1935) 22 A I R Bom 396=159 I C 144=59 Bom 517=37 Bom L R 494.
4. Gauri Shankar v. R. J. Decruze, (1927) 14 A I R Oudh 22=92 I C 673=1 Luck 313=29 O C 278=3 O W N 378.
5. Official Assignee of Madras v. Ranganayaki Ammal, (1928) 15 A I R Mad 784=112 I C 235=55 M L J 38.
6. Ranganayaki Ammal v. Official Assignee of Madras, (1931) 18 A I R Mad 797=134 I C 179=61 M L J 354.
7. Ma Phaw v. Maung Ba Thaw, (1926) 13 A I R Rang 179=97 I C 221=4 Rang 125.
8. Jagdish Narain Singh v. Mt. Ramsakal Kuer, (1929) 16 A I R Pat 97=114 I C 465=8 Pat 478=9 P L T 969.

Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution shall not vest in the Court. Cl. (k) of the Proviso to S. 60 (1), Civil P. C., states that all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment are exempt from attachment or sale. The Provident Funds Act now in force is Act 19 of 1925, and a "compulsory deposit" is defined in S. 2 (a) as a subscription to, or deposit in, a provident fund which under the rules of the fund is not, until the happening of some specified contingency, repayable on demand otherwise than for certain purposes and any interest or increment which has accrued under the rules of the fund and also any such subscription, deposit, contribution, interest or increment remaining to the credit of the subscriber or depositor after the happening of any such contingency. As was pointed out in 59 Bom 517[3] at page 522 it is clear that on the happening of the contingency provided for in the rules, the amount becomes payable to the subscriber even during his life-time; and that being so, it is difficult to see on what principle it can be said that the sum which is paid to the subscriber is not his property and still continues to retain its character of a compulsory deposit for all time. Their Lordships of the Privy Council in 54 Cal 595[9] pointed out that the provisions of S. 16 (4), Provincial Insolvency Act of 1907 are perfectly clear and that the moment the inheritance devolved on the insolvent who was still undischarged, it vested in the receiver already appointed. We therefore hold that as soon as the deposit reached the depositor it ceased to be a compulsory deposit that was not liable to attachment, in support of which we may cite the decision in 40 C W N 1406,[10] and that it became the absolute property of the depositor insolvent and therefore vested in the Insolvency Court. The appeal fails and is dismissed with costs. Counsel's fee Rs. 20.

V.B.B./R.K. *Appeal dismissed.*

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[9] Kala Chand Banerjee v. Jagannath Marwari, (1927) 14 A I R P C 108=101 I C 442=54 Cal 595=54 I A 190 (P C).

[10] Rukmini Kumar v. Assam Bengal Loan Co. Ltd., (1936) 40 C W N 1406.

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## * A. I. R. 1938 Nagpur 409

### FULL BENCH

STONE C. J., GRILLE AND VIVIAN BOSE JJ.

*Sitabai w/o Prithwigir Gosai — Defendant* — Appellant.

v.

*Ramchandra Raghunath Abhyankar — Plaintiff* — Respondent.

First Appeal No. 55 of 1937, Decided on 17th December 1937, from decree of Addl. District Judge, Yeotmal, D/- 20th January 1937.

*** Court-fees Act (1870), Sch. 2, Art. 17 (vi) and Sch. 1, Art. 1 — Appeal from final decree for sale in mortgage suit — Amount due under decree not challenged — Memorandum of appeal claiming reliefs that prayer made before final decree for extension of time should have been allowed and that payment should be allowed to be made in instalments — Court-fee for such relief is payable under Schedule 2, Article 17 (vi).**

In consideration of the court-fee payable on an appeal, one has to consider the relief sought by the appellant. It does not serve as a guide to consider whether the effect of the appeal would be to set aside the trial Court's decree : *A I R 1937 Nag 295, Rel. on.* [P 411 C 1]

Where in a memorandum of appeal from a final decree for sale in a mortgage suit, when the amount due under the decree is not challenged and the only relief claimed is that a prayer which had been made before the passing of the final decree for extension of time should have been allowed, and in similar circumstances where a relief only asks for instalments and does not question the amount due under the decree, both the reliefs are incapable of valuation and the court-fee is leviable under Art. 17 (vi) of Sch. 2. Court-fees under this Article would be leviable twice over when both the reliefs mentioned above are claimed in the same appeal, once for each relief : *7 N L R 41 and A I R 1931 Nag 1 (F B), Considered.* [P 409 C 2; P 410 C 1 ; P 411 C 1]

V. K. Rajwade — *for Appellant.*

S. Y. Deshmukh — *for Respondent.*

### OPINION

This reference raises the following questions for consideration :

(1) Is the court-fee on a memorandum of appeal from a final decree for sale in a mortgage suit when the amount due under the decree is not challenged and the only relief claimed is that a prayer which had been made before the passing of the final decree for extension of time should have been allowed, leviable ad valorem, as the Full Bench in A I R 1931 Nag 1[1] decided, or is it leviable under Art. 17 (vi) to Sch. 2 as was decided in 7 N L R 41[2]?

(2) In similar circumstances is the court-fee on a relief which only asks for instalments and does

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[1] Singai Raghubar Prasad v. Chhogmal, (1931) 18 A I R Nag 1=130 I C 98 (F B).

[2] Dadnoo v. Somnath, (1911) 7 N L R 41=10 I C 786.

not question the amount due under the decree leviable ad valorem or under Article 17 (vi)?

(3) Assuming that Article 17 (vi) applies, would court-fees under this Article be leviable twice over when both the reliefs mentioned above are claimed in the same appeal, once for each relief, or would one payment of Rs. 15 be enough?

The matter comes before us in the following way: The matter being one of court-fee was raised before the Taxing Officer who found himself in a difficulty owing to a conflict of decisions between a Division Bench of the Judicial Commissioner's Court which is reported in the official reports (7 N L R 41[2]) and the decision of a Full Bench of the Judicial Commissioner's Court which was not reported in the official reports but in an unauthorized report, A I R 1931 Nag 1.[1] He accordingly referred the matter to the Taxing Judge who has in turn felt a difficulty owing to those two cases, and to avoid that difficulty in future has referred it to a Full Bench.

In 7 N L R 41[2] it was held that:

> An appeal against a decree absolute for redemption, foreclosure or sale on the ground that the mortgagor should not, or should have been, allowed further time, in which to pay the mortgage-debt, requires a ten-rupee stamp under Cl. (vi), Article 17 of Schedule 2.

The first question that was debated there was whether the appeal was from an order or from a decree. It was held that it was from a decree and accordingly the appeal could not be filed on a Rs. 2 stamp. The next question was as to whether the relief sought in appeal could be valued. It was urged that its value was that of the subject-matter of the suit. It was held that that was not the value of the relief, for the liability to pay the amount decreed was not in issue and was not disputed. On the other hand the correctness of that decision was doubted by the referring Judge in A I R 1931 Nag 1[1] who appears to have attached considerable weight to a Full Bench decision of the Allahabad High Court: 35 All 476.[3] If that Full Bench decision of the Allahabad High Court be referred to, it will be seen that there the appeal was a challenge to the trial Court's decree in toto, and the only question that was being considered was whether the so-called order absolute was an order or was a decree, and the decision was that it was a decree. Accordingly it was held that the memorandum of appeal from the decree required to be stamped as such and not like an appeal from an order. As the appeal in that case put in issue the whole matter, it had to be stamped ad valorem according to the value of the subject-matter. The opinions of the learned Judges who decided A I R 1931 Nag 1[1] are not founded on precisely the same reasons, but the general sense is reflected in the argument addressed to us by the learned counsel for the respondent and can be expressed as follows:

The court-fee payable by an appellant falls either under Sch. 1, Article 1, if the subject-matter of the appeal is capable of valuation, or under Sch. 2, Art. 17 (vi), if the subject-matter of the appeal is incapable of valuation. Here what is being sought by the appellant are two reliefs: (1) further time, and (2) payment by instalments. Either of these involves a retracing of one's steps back to the position of the preliminary decree. Therefore it is said that the relief claimed is really not the giving of time or an instalment decree, but the setting aside of a final decree in toto. If a final decree be set aside in toto, the subject-matter of the appeal which results in such relief must have as its value the value of the subject-matter of the decree, and therefore the appeal is capable of valuation, the value being the value of that subject-matter. The difficulty in the way of looking at the matter in that way is seen when one considers what the position is where there is a mortgage decree for Rs. 10,000 and an appeal challenging not the whole of the Rs. 10,000 but Rs. 5000. Such an appeal, whether it succeeds or whether it fails, would be valued for court-fee purposes at Rs. 5000, not Rs. 10,000. Clearly in such a case, as indeed in all cases of appeal from decrees, the trial Court's decree is replaced by the Appellate Court's decree and therefore can be said to be set aside, even though it is upheld by the appeal being dismissed. In the latter case, the appellate decree adopts the decree appealed from but it is the decree of the Appellate Court which is the effective decree; it replaces the trial Court's decree.

In the case put, if the appeal be successful and probably even if the appeal be dismissed, a fresh time for payment would, as a matter of practice, be given. Thus, it does not serve as a guide to consider whether the effect of the appeal would be to set aside the trial Court's decree. That inevitably follows in every case and yet it is a common place that every appeal is not valued for court-fee purposes at the value of the subject-matter of the decree. In our opinion, as was indicated by a Full Bench in First Appeal No. 47 of 1936[4] in consideration of the court-fee payable on an appeal, one has to consider the relief sought by the appellant. Here the relief sought is two-fold : (1) the granting of time, (2) the granting of payment by instalments. As to the former, we are clear that it is incapable of valuation and therefore falls within Sch. 2, Art. 17 (vi). As to the latter, though we at one time were inclined to think that it would be capable of valuation, we have, on consideration, been unable to find a satisfactory basis on which to value it and accordingly have come to the conclusion that it also is incapable of valuation. Thus the questions put are answered as follows : As to (1), the relief being incapable of valuation, Sch. 2, Art. 17 (vi) applies. As to (2), the relief being incapable of valuation, Sch. 2, Art. 17 (vi) applies. As to (3), each separate relief carries separate court-fee and therefore in the cases put there will be a payment of Rs. 15 in respect of each item.

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[3] Bairangi Lal v. Mahabir Kunwar, (1913) 35 All 476=21 I C 498=11 A L J 801 (F B).

D.S./R.K. *Answer accordingly.*

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[4] Ram Sahay v. S. S. Kanhaiya Lal, *Reported in* (1937) 24 A I R Nag 295=I L R (1937) Nag 49 (F B).

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## A. I. R. 1938 Nagpur 411

NIYOGI J.

*Shankar Vithal Ganorkar* —
*Decree-holder*—Applicant.
v.
*Ramchandra Janrao Kokardekar* —
*Judgment-debtor*—Non-Applicant.

Civil Revision No. 151 of 1937, Decided on 1st December 1937, from order of Addl. District Judge, Daryapur, D/- 25th January 1937.

**(a) Specific Performance — Agreement for sale — Vendor making certain representations as to his title—Conveyance which follows must be in conformity with agreement—Agreement should stand or fall as whole — Decree-holder holding decree for specific performance of agreement of sale seeking to execute it — Both parties presenting draft agreement — Court should accept that draft which is more in conformity with agreement.**

Where parties enter into an agreement for sale and certain representations are made by the vendor as to his title, the conveyance which follows must be in conformity with the terms of the agreement. Although the conveyance may come to be executed later, still in equity it will take retrospective effect from the date of the agreement and the Courts are bound to put the parties in the same situation in which they were on the date of the agreement. Where a person agrees to sell certain property representing that he is the full and absolute owner thereof, whatever disputes he may raise later on as regards his title, would not deprive the agreement of its validity. The agreement would either stand or fall as a whole. If it stands, then the conveyance must be in conformity with the agreement. [P 412 C 1, 2]

Where therefore a decree-holder in whose favour a decree for specific performance of an agreement for sale is passed, presents a draft agreement to the Court to be executed by the judgment-debtor and the draft which is presented by him is in conformity with the agreement, the Court should accept it in preference to the draft presented by the judgment-debtor which is at variance with it. [P 412 C 2]

**(b) Civil P. C. (1908), S. 115—Suit for specific performance of contract of sale—Lower Courts failing to give effect to decrees which are in terms of agreement between parties — High Court can rectify error under S. 115.**

Where the lower Courts fail to give effect to the decrees passed by them in a suit for specific performance of a contract of sale, which are in terms of the agreement between the parties, they exercise their jurisdiction illegally or at any rate with material irregularity and the High Court has power under S. 115 to rectify the error. [P 412 C 2]

W. W. Bhole — *for Applicant.*

W. B. Pendharkar—*for Non-applicant.*

**Order.**—This is a decree-holder's application to revise an order passed in Miscellaneous Civil Appeal No. 8 of 1936 by the Additional District Judge, Daryapur. The dispute is now as to the terms of a conveyance which the judgment-debtor is bound by the decree in Civil Suit No. 75-A of 1934 to execute. It may be necessary to narrate the facts which are as follows : The judgment-debtor entered into an agreement with the decree-holder on 5th February 1934 in respect of a house for Rs. 130. In the agreement he distinctly represented that he was the owner of the house. Subsequent to this agreement the judgment-debtor intimated to the decree-holder that he had only a partial interest in the house in which his brothers also had interest. As disputes arose, the decree-holder had to file a suit claiming the relief of specific performance or in the alternative damages. In that suit there was a clear finding by the Court of the first instance that the house was a self-acquired property of the judgment-debtor. The finding was not reversed in appeal, Civil Appeal No. 31-A of 1934, by the Additional District Judge who thought that the issue was not material. The learned Judge however confirmed the decree of the trial Court which directed the defendant to execute a sale deed in favour of the plaintiff for Rs. 130

and also put him in possession. On appeal the Appellate Court directed that

> the judgment-debtor will sell his own right, title and interest whether full, according to appellant, or fractional according to judgment-debtor. No one will be allowed to resist on behalf of judgment-debtor or on judgment-debtor's account.

These words however were not included in the decree and the first Court's decree remained unvaried. It is rather unfortunate that the difficulty which has arisen now in execution was not anticipated by the Courts. It was transparent that in view of the dispute raised by the defendant, the vendee could not possibly get an absolute and exclusive title to the property because the vendor himself had been protesting that it was the joint family property. Much of his difficulty could have been solved had the lower Appellate Court pronounced its finding on the question whether the property was self-acquired property or joint family property. The lower Appellate Court's direction that only the right, title and interest of the vendor would be conveyed leaves the real issue unanswered. However, its directions were not embodied in the decree and consequently they are not effective so far as the execution of the decree is concerned. It appears to me that the right course for the lower Appellate Court, when it heard the appeal from the decree, was to have refused to grant specific performance but only awarded damages; but inasmuch as that Court chose to affirm the original Court's decree, it must, in execution proceedings, follow that the decree which is sought to be executed is in terms in which it was drawn up.

When parties enter into an agreement for sale and certain representations are made by the vendor as to his title, the conveyance which follows must be in conformity with the terms of the agreement. Although the conveyance may come to be executed later, still in equity, it will take retrospective effect from the date of the agreement. That shows that the conveyance must be in terms of the agreement. Now if that is so, the Courts are bound to put the parties in the same situation in which they were on the date of the agreement. The agreement shows that the vendor was a full and absolute owner of the property which he professed to transfer. Whatever disputes he raised later on would not deprive the agreement of its validity. The agreement would either stand or fall as a whole. If it stands, then the conveyance must be in conformity with its terms. In this case the passing of the decree for specific performance itself is evidence that the parties were bound by their original agreement. If that is the effect of the decree, as it ought to be, then the recitals of the representation must reflect the spirit of the agreement.

On this view the lower Appellate Court ought to have accepted the draft presented by the decree-holder which was in conformity with the agreement and not the one presented by the judgment-debtor which was at variance with it. Under Sec. 55 (2), T. P. Act, it is presumed that the seller contracts with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. The decree-holder would be deprived of this statutory advantage if the conveyance were to contain an express covenant to the contrary. To do so would be running counter to the spirit of the agreement and the decree and the law governing such transactions. It is easy to envisage the very favourable position which the vendor would come to occupy in case a dispute is raised by his brothers; while the vendor would be getting the full price of the entire property of the vendee, the vendee, in case of eviction by paramount owners, will not be entitled to any compensation. The acceptance of the draft proposed by the judgment-debtor would lead to this inequity which ought to be avoided. It is urged that this Court is not competent to go into this question in revision. I cannot accept the contention in view of the fact that the Courts below have obviously exercised their jurisdiction illegally or at any rate with material irregularity in not giving effect to the decrees which were in terms of the agreement between the parties. This Court has therefore power under Sec. 115 to rectify the error. The lower Appellate Court's order is set aside and it is directed that the decree-holder's draft be accepted. The application thus succeeds with costs in all the Courts. Pleader's fee Rs. 15.

R.M./R.K. *Application allowed.*

## * A. I. R. 1938 Nagpur 413

NIYOGI J.

*Babu Rao Ramchandra Rao and others*
*Plaintiffs* — Applicants.
v.
*Babu Manaklal Nehrmal* — *Defendant*
— Non-Applicant.

Civil Revn. No. 840 of 1936, Decided on 11th January 1938, from order of Small Cause Court, Narsinghpur, D/- 22nd October 1936.

*** Surety — Discharge — Surety guaranteeing payment of part of debt—Application by principal debtor to Debt Conciliation Board for settlement of debts — Creditor excluding debt guaranteed by surety from his statement of debts — Surety's remedy against principal debtor is impaired and surety is discharged.**

The position of the surety is two-fold : on the one hand he is liable to pay the debt, on the other hand when he pays the debt, he stands in the shoes of the creditor and he is entitled to enforce against the principal debtor all the remedies which were available to the creditor. If the liability of the surety is so co-extensive with that of the principal debtor, his right is not less co-extensive with that of the creditor after he satisfied his debt. To enable the surety to enforce his right against the principal debtor, there are two essential conditions: (i) that the debt itself must subsist, (ii) that his remedy against the principal must remain unimpaired. Consequently the creditor will be entitled to compel the surety to perform his promise only if the debt subsists and the surety's remedy is unimpaired. [P 413 C 2; P 414 C 1]

Where the principal debtor has applied to the Debt Conciliation Board for settlement of his debts, and before the Board the creditor excludes from his statement of debts the debt guaranteed by the surety declaring that he would recover it from the surety, the debt due by the principal debtor does not exist so as to entitle the creditor to enforce his remedy against surety. Granting for the nonce that it subsists, it cannot be overlooked that under S. 15 (3), C. P. Debt Conciliation Act, the surety's remedy is very substantially impaired and hence the surety is discharged. [P 415 C 1]

D. N. Chaudhuri — *for Applicants.*

R. G. Rao and T. J. Kedar — *for Non-Applicant.*

**Order.**— This is a plaintiff's application in revision against the judgment of the Small Cause Court in Suit No. 197 of 1936 decided on 22nd October 1936. The material facts are that on 3rd August 1932 the defendant had guaranteed to pay Rs. 400 out of a loan of Rs. 1100 borrowed by one Rajmal from the plaintiff. The defendant paid Rs. 220 and left the balance of Rs. 180 outstanding. Rajmal applied to the Debt Conciliation Board for settlement of his debts. Before the Board, the plaintiff excluded from his statement of debts this debt of Rs. 400 declaring that he would recover it from the surety (defendant). The plaintiff filed the suit out of which this revision application arises to recover Rs. 219-13-9 including interest and cost of notice. The lower Court in an able judgment held that the defendant's right as a surety to have recourse to his remedy against the principal debtor was impaired by the plaintiff's act of withholding the debt in suit from the statement of his debts submitted to the Debt Conciliation Board and that the legal consequence under Sec. 15 (3), Debt Conciliation Act, was that the defendant was discharged from liability in view of S. 134, Contract Act. The lower Court's judgment is contested here on the grounds that in the first instance the liability of the surety is co-extensive with that of the principal debtor, that the plaintiff had before the Debt Conciliation Board expressly reserved his remedy against the Board, and that nothing provided in the Debt Conciliation Act can be construed to impair the plaintiff's right to recover the debt from the surety. Reliance is placed on 28 N L R 325,[1] A I R 1933 Nag 287,[2] 16 Pat 27,[3] 38 M L J 131[4] and 56 Mad 625.[5]

I find no difficulty in assenting to the first two grounds but the third one requires serious consideration. It may be easily conceded that an express release of the principal debtor coupled with a reservation of the creditor's right to proceed against the surety does not discharge the principal debtor. In such a case the debt is not destroyed and the remedy of the surety against the principal debtor is not impaired. The position of the surety is two-fold: on the one hand he is liable to pay the debt, on the other hand, when he pays the debt, he stands in the shoes of the creditor and he is entitled to enforce against the principal debtor all the remedies which were available to the creditor. If the liability of the surety is so co-extensive with that of the principal debtor, his right is not less co-extensive with that of the creditor after he satisfies his debt. To enable the surety to enforce his right against the principal debtor, there are two essential conditions: (i) that the debt itself must subsist, (ii) that his remedy against the principal must remain unimpaired. Consequently the creditor will be entitled to compel the surety to perform his promise only if the debt subsists and the surety's remedy is unimpaired. It is at this stage that we have to turn to the relevant provisions of the C. P. Debt Conciliation Act. S. 8 (2) of that Act runs as follows:

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[1] Nandlal v. Surajmal, (1932) 19 A I R Nag 62 =138 I C 879=28 N L R 325.

[2] Gokulchand v. Laxminarayan, (1933) 20 A I R Nag 287=150 I C 685.

[3] Bagha Co-operative Society v. Debi Mangal Prasad Sinha, (1937) 24 A I R Pat 410 = 170 I C 130=16 Pat 27=18 P L T 309.

[4] Murugappa Mudaliar v. Munisami Mudali, (1920) 7 A I R Mad 216 = 54 I C 758 = 38 M L J 131.

[5] Annadanna Jadaya v. Konammal, (1933) 20 A I R Mad 309=141 I C 852=56 Mad 625 = 64 M L J 386.

> Every debt of which a statement is not submitted to the Board in compliance with the provisions of sub-s. (1) shall be deemed for all purposes and all occasions to have been duly discharged.

The material portion of sub-s. (1) is this:

> If . . . . it is in the opinion of the Board desirable to attempt to effect a settlement between him and his creditors, a notice shall be issued and served or published in the manner prescribed, calling upon every creditor of the debtor to submit a statement of debts owed to such creditor by the debtor.

Section 15 (3) runs as follows:

> Where, after the registration of an agreement under sub-s. (2) of S. 12, any unsecured creditor sues for the recovery of a debt, other than a debt incurred subsequent to such agreement, in respect of which a certificate has been granted under sub-s. (1) or any creditor sues for the recovery of a debt incurred after the date of such registration, any decree passed in such suit shall, notwithstanding anything contained in the Civil Procedure Code 1908 (5 of 1908), not be executed until all amounts recorded as payable under such agreement have been paid or such agreement ceased to subsist.

In view of S. 8 (2), Debt Conciliation Act, is it open to the creditor to contend that the debt still subsists? It is argued for the plaintiff that the Debt Conciliation Act itself has no application. The learned counsel for the plaintiff says: I have two debtors, the principal debtor and the surety. I choose to forgo my claim against the former but how does it affect my right to recover my debt from the surety? That is indeed a valid and effective argument if there had been two independent debts. Is that the case here? Manifestly not, because the liability of the surety, though distinct, postulates the existence of the liability of the principal debtor. As pointed out in 49 Mad 156[6] at pp. 172, 185, a contract of suretyship requires the concurrence of three persons, viz. the principal debtor, the creditor and the surety. To express in terms of S. 126, Contract Act, the surety enters into a contract of guarantee to perform the promise or discharge the liability of a third person in case of his default. The surety undertakes his obligation at the request, express or implied, of the principal debtor. It is because the surety pays the principal debtor's debt that he is entitled to enforce the debt against the principal debtor after he discharges it. When the creditor seeks to enforce the debt against the surety, the latter is legitimately entitled to ask: "Is the principal debtor himself liable to you? If not, he has committed no default and you cannot compel me to discharge an obligation which has no existence. If, on the other hand, I pay you, how can I recover it from the principal debtor whose liability the debt itself having vanished, has ceased." When the surety seeks his remedy against the principal debtor, he does it in respect of the same debt as the one owed by the principal debtor to the creditor. It is clear that the debt must exist although the creditor may choose to enforce his remedy against the surety only to the exclusion of the principal debtor. Therefore the real issue is whether the debt due by the principal debtor exists at all to entitle him to enforce his remedy against the surety, and that issue must be determined in the light of S. 8 (2), Debt Conciliation Act. It says that every debt of which a statement is not submitted to the Board in compliance with the provisions of sub-s. (1) shall be deemed "for all purposes and all occasions" to have been discharged. It is true that in the present case the plaintiff as creditor declared this debt in his statement but that declaration was not made for settlement of the debt but to intimate that it should not be settled. A creditor cannot say to the Board "I have this debt to recover but I do not wish it to be settled" and maintain nevertheless that the debt subsists in the face of S. 8 (2) of the Act. The words "for all purposes and all occasions" cannot be overlooked and they, confronting the creditor, make it impossible for him to say that the debt exists for the purpose of its being enforced against the surety.

The case of a surety of an insolvent who has obtained an order of discharge is no doubt similar but it does not render any assistance here. The surety's liability in that case is not discharged because of special provisions of S. 44 (3), Provincial Insolvency Act. That enactment cannot guide the interpretation of the Debt Conciliation Act. Although the object of both these enactments is to relieve debtors, they differ fundamentally in this, that while the Provincial Insolvency Act does not interfere with the contract, the Debt Conciliation Act does. The special authority, viz. the Debt Conciliation Board has been created to scrutinize the contracts of debtors and effect equitable settlement of the debts irrespective of the terms of the contracts. The settlement will be of no effect unless all the debts owed by a debtor are covered by it. It is therefore essential that every debt due by the debtor should be brought to the notice of the Board. The Insolvency Act exempts the debtor from personal liability and restricts the creditor's remedy to his property whereas the Debt Conciliation Act protects both the person and the property of the debtor from the attacks of the creditor and cripples him by demolishing his fortifications of contract, although this result is attained by his concurrence induced by indirect compulsion.

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[6] Periyamianna Marakkayar & Sons v. Banians & Co., (1926) 13 A I R Mad 544 = 95 I C 154 =49 Mad 156.

From the foregoing discussion it follows that the original debt cannot be regarded as subsisting. Granting for the nonce that it subsists, it cannot be overlooked that under S. 15 (3), Debt Conciliation Act, the surety's remedy is very substantially impaired. The plaintiff, by lifting the burden of the debt off the shoulders of the principal debtor and laying it on those of the surety, seeks virtually to shift his own disability entailed by the Debt Conciliation Act on to the surety in an aggravated form. The result is that the application is dismissed, with costs. Pleader's fee Rs. 15.

D.S./R.K. *Application dismissed.*

## A. I. R. 1938 Nagpur 415

GRILLE J.

*Secretary of State — Defendant —* Appellant.

v.

*Nagorao Tanko Deshmukh — Plaintiff* — Respondent.

Second Appeal No. 402 of 1935, Decided on 21st December 1937, from appellate decree of First Addl. Dist. Judge, Nagpur, D/- 18th April 1935.

**(a) Civil P. C. (1908), S. 80 — Object of notice under S. 80 is to give Government sufficient warning of case to be instituted against it—Object of notice achieved—No violation of spirit and intention of S. 80—Notice should be treated as valid.**

The object of giving two months' notice to the Government, which is prescribed in S. 80, is to give Government sufficient warning of a case which is about to be brought against it, so that Government may, if it so wishes, compromise the case, or afford restitution if it considers that the restitution is due, without recourse being had to a Court of law in which Government might be mulcted in costs. It is necessary to import a little commonsense into notices under S. 80. The Court should look at the wording of the notice and interpret it in the light of commonsense. It is not necessary for the plaintiff to state in his notice the full details of his claim. When the object of the notice is plain and is achieved, and there has not been any violation of the spirit and intention of S. 80, the notice should be treated as valid notice: *(1844) 13 M & W 361 and A I R 1933 Mad 105, Rel. on; A I R 1927 P C 176, Explained.* [P 417 C 1, 2; P 418 C 1]

**(b) Easement—Right to—Nature of claim.**

The claim in respect of an easement is not incompatible with a claim of ownership. [P 417 C 2]

**(c) Civil P. C. (1908), S. 80—Right of plaintiff to have his claim decided—Nature of.**

An alternative and a lesser claim which is not mentioned in the notice under S. 80 cannot derogate from the plaintiff's right to have the suit tried on the issue which is claimed in the notice. [P 417 C 2]

**(d) Highway—Closing of—Path used as public path from time immemorial—Its dedication to public as public highway can be presumed from long user.**

Where it is found that a path has been used as a public path from time immemorial, its dedication to the public as a public highway can be presumed from the long user which has been established; when there is evidence of long enjoyment in a particular way, it is the habit and duty of the Court so far as it lawfully can, to clothe the fact with right: *A I R 1929 Bom 94; A I R 1918 Nag 166 and A I R 1934 Pat 11, Rel. on.* [P 419 C 1]

**(e) Forest Act (1927), S. 25—S. 25 presupposes existence of public rights of way—Power given to deal with them are exceptional — Alternatives provided by S. 25 cannot be clogged with any restriction.**

Section 25 presupposes the existence of public rights of way before a forest is reserved and also presupposes that such public rights of ways are recognized; and the powers given to deal with them are exceptional powers hedged with the proviso that suitable alternatives be provided in the case of the special power to close them being used. The alternatives referred to cannot however be clogged with any restriction such as the imposition of a transit fee for cattle. [P 419 C 2]

J. Sen, Govt. Pleader and R. G. Rao — *for Appellant.*

R. N. Padhye — *for Respondent.*

**Judgment.**—The plaintiff-respondent in this appeal is the malguzar of mouza Katlabodi, a village some three miles to the north of Bazargaon, a market village which is situated on the main Nagpur-Amraoti road. He is also the malguzar of a small uninhabited village called Mandla to the south of Katlabodi. Between these two villages there is an area of Government reserved forest and the plaintiff states that he was in the habit of taking his cattle to and fro between these two villages by a road which had been in existence from time immemorial without let or hindrance, but that in the year 1928 the forest authorities for the first time demanded a transit fee of Re. 1 on each head of cattle before allowing him to traverse the forest from village to village. There was a similar allegation in respect of a right of way from the village of Katlabodi to an outlying field through the extreme corner of the forest area. This point however has been dropped during the litigation, either presumably because the plaintiff considered he could not establish that this particular path was a public road or because a very slight detour would enable him to avoid the reserved forest altogether. The plaintiff objected strongly to the restriction on the passage of his cattle which had been placed on it by the forest authorities and served a notice on the Collector; this is Ex. D-1 dated 17th July 1928. The forest authorities offered him an alternative route by the side of the cart track referred to (i. e. that in which the passage of the plaintiff's cattle had been stopped) provided the plaintiff himself would fence it. The Forest Department offered to provide the necessary thorns for the fencing. Nothing came of this offer which was not accepted, and the forest authorities stated that, in the circumstances, they awaited the threatened action. This was in January 1929, and the suit was brought in 1930. The suit was resisted by the Secretary of State on the ground that the notice of 1928 was not a valid notice and that the path by which the plaintiff claimed to take his cattle was not a public highway and that the plaintiff and every other member of the public who had been using the path had been using the path as licensees of the Forest Department on sufferance. It was contended that, when the forest was reserved in the year 1879, any rights which may have existed were extinguished by the preliminary inquiry before reservation which was made according to law, that no objection was taken at the time and that the area which had been declared Government forest was found to be free of any rights. Objection was also taken to the fact that a right of easement of necessity had been claimed in the alternative. The trial Court found that the suit was maintainable and the notice valid, but that the route in question was not a public highway, that there had been no dedication at any time, that there could be no grant of a right of way after the passing of the Forest Act of 1878 without a writing to that effect and that no easement could be acquired either. The plaintiff's suit was consequently dismissed.

This decision was reversed in appeal by the Additional District Judge, Nagpur, who upheld the finding in the plaintiff's favour in the trial Court which was attacked in appeal as to the validity of the notice, and held that there was ample evidence of continued and uninterrupted user of the path within the memory of the oldest living witness, who was 80 years old, and that from this continued user a dedication could be inferred, that the dedication was prior to the reservation of the land as forest in 1879, and that the rights which could be determined by the Forest Settlement Officer at the time of reservation did not include a determination as to rights of way which would exclude the public from public highways. He found however, although the findings were immaterial in view of his decision, that there could be no dedication subsequent to the year 1879 and that there could be no right of easement. A second appeal has now been preferred by the Secretary of State. The learned Government Pleader, in opening his case, has stated that the point at issue is one of considerable importance to the Forest Department and that Government was extremely anxious to have a decision on the matter. In view of the fact that Government has strenuously opposed, in the Courts below as well as in the present appeal before me, the proposition that the suit is maintainable at all, this statement must be taken to be rather in the nature of a forensic flourish than as a real expression of Government's desire. The tenacity with which the contention has been put forward throughout that the notice given was not a valid notice under S. 80, Civil P. C., would rather appear to indicate that Government was not desirous of having the matter discussed at all. The appeal then falls into two parts: the first, whether the suit is maintainable in view of the nature of the notice, and the second, whether the plaintiff is entitled to the declaration and the injunction that he sought and which is awarded him in appeal. The notice to the Collector runs as follows:

> I own the villages of Katlabodi and Mandla in the Katol tahsil, which are separated by the strip of Government forest. I have my malguzari jungle in both these villages. My cattle are generally kept at Katlabodi and these cattle and also those of my tenants have to pass by the public way running through the Government forest, while going to graze in the forest of Mandla, which is uninhabited. So also the cattle of the tenants of Mandla residing at Katlabodi have to take their agricultural cattle by this very public road. Further, my agricultural cattle have to pass through a corner of the Government forest by the public road, while going to my field called Kamatha. The cattle used to be taken by these public roads since more than 50 years last. This year the forest officers have asked me to take out a licence to take my cattle by the said public road. I have never paid any such fees up to this time, and I submit I have a right to take my cattle by these public roads, without any obstruction and without payment of any license fee from Katlabodi to Mandla, from Katlabodi to my field called Kamatha. I strongly protest against the order of the forest officer (Ranger's No. 1172/956 dated 5th July 1928) and request you to order free passage to the cattle by these public roads or to take notice that if such order is not made within two months of the receipt of this letter by you, I shall take such legal steps to obtain the required redress of my grievance as I may be advised.

This notice satisfies the conditions of S. 80, Civil P. C., by stating the name, description and place of residence of the plaintiff; but it is argued that it does not state the cause of action nor the relief claimed. There can be no doubt that the cause of action is definitely stated, and the only difficulty lies in the relief claimed. The plaintiff certainly does not say that he claims a declaration of his right or an injunction; but, as both the Courts below have held, there can be no doubt whatever as to the nature of the relief which he would claim in the civil action which he gave notice he would bring. There can also be no doubt whatever that the defendant-appellant knew perfectly well the nature of the suit that would be brought. The plaintiff claimed to have been taking his cattle along a public road and that the forest authorities asked him to take out a license for taking his cattle on the public road, and he submitted that he had a right to take them by the road without obstruction and without payment of any license fee. The relief could not be other than a claim for a declaration and an injunction, although it is true that damages might have been included. Now the object of giving a notice of two months to Government which is prescribed in Sec. 80, Civil P. C., is to give Government sufficient warning of a case which is about to be brought against it, so that Government may, if it so wishes, compromise the case, or afford restitution if it considers that restitution is due, without recourse being had to a Court of law in which Government might be mulcted in costs. Government was aware of the case which it had to meet and offered a limited form of redress (vide Ex. P-2), which the plaintiff refused to accept. The defendant then replied: "In these circumstances I cannot but inform you that we are awaiting the threatened action." The object therefore of the notice had been achieved, the notice had been admitted, the possibilities of a compromise had been discussed and had failed, and the defendant, Secretary of State, awaited the action which he was prepared to defend.

A further objection is the allegation that the suit is based on claims other than those advanced in the notice, in that the plaint discloses that the plaintiff claims only a private right and that it was not until a later stage in the pleadings that it was urged that the plaintiff was claiming a declaration that the road was a public way. This contention is in my opinion an idle one. The plaint refers to the use of the road from time immemorial, and, although the words "a public way" are not used in the plaint, they are used in the notice, which was accepted and which preceded the plaint, and the point was made definite later in the course of the pleadings, mainly on account of the defendant's argumentative resistance to the form of the plaint. It is then contended that plaint is bad in that two reliefs were claimed. But it has been correctly pointed out in the Courts below that the claim in respect of an easement is not incompatible with a claim of ownership, and an alternative and lesser claim which is not mentioned in the notice cannot derogate from the plaintiff's right to have the suit tried on the issue which is claimed in the notice. If the stand is taken that the easement is not mentioned in the notice, it can be treated as a surplusage in the pleadings and disregarded. I would note that there is no reference in the plaint to a claim on the ground of an easement acquired, and that this too was included subsequently as the result of the vigour with which the plaintiff's original case was met. The claim in respect of an easement has been very correctly dismissed in the Courts below and is not pressed on behalf of the respondent before me.

Finally it is contended that, by the Privy

Council decision in 51 Bom 725,[1] the conditions laid down in S. 80, Civil P. C., must be meticulously followed and no deviation from them should be allowed. The point at issue in that case was whether the plaintiff was entitled to bring a suit within two months of the service of the notice in circumstances which the plaintiff then considered to be sufficiently exceptional to warrant an infraction of the law as there laid down. It was held that he was not entitled to do so. I do not consider that this decision is a warrant for the proposition that in this case the plaintiff was bound to state in his notice in full detail how he claimed that the road which he had been using was a public way on which his right of user had been infringed. As was stated by Pollock C. B. in (1844) 13 M & W 361[2] cited in A I R 1933 Mad 105,[3] it is necessary to import a little common sense into notices of this kind, and the object of the notice was plain and that object was achieved, and I am in respectful agreement with Pandalai J. that the language of their Lordships of the Privy Council in 51 Bom 725[1] does not preclude the Court from looking at the wording of a notice and interpreting it in the light of commonsense. There has not been in this case any violation to the spirit and the intention of S. 80 as there had been in the numerous cases which have been cited on behalf of the appellant before me to establish the proposition that the notice was an invalid one. Therefore, agreeing with the Courts below, I hold that the notice was valid and was accepted as such before the suit was brought.

I now turn to the question whether the road was a public way and whether the defendant had any right to restrain the plaintiff from using it by levying a transit fee on the cattle. No doubt the forest authorities are entitled to preserve their forests, not only from the depredations caused by illicit grazing, but also from damage caused by cattle passing through the forest on their lawful occasions of transit from one village to another. Similarly, when paths through forests are paths constructed or permitted to be constructed by the Forest Department, persons using such paths are licensees and must submit to such restrictions as the Forest Department chooses to impose. But it is claimed here that this road in question, which is used not only by cattle but by carts, has been in existence from before the reservation of the forest in the year 1879. This has been denied by the defendant who has claimed that there is no permanent road or track and that all that exists are forest paths which shift from time to time at the disposition of the forest authorities. The evidence on the record is heavily against any such position and in favour of an existing road from Katlabodi to Bazargaon going south and passing through the uninhabited village of Mandla. The officer who was holding the post of Divisional Forest Officer when the evidence was recorded, implies that there were three paths none of which was a public way which could be stopped by the Forest Department at any time. Ex. P-2 however which is a document written by the predecessor of the officer in question after the notice had been served on the Collector, admits the existence of the cart track to which the plaintiff refers, and indeed offers him an alternative route just by the side of the cart track. The existence then of a cart track as opposed to temporary paths for the passage of cattle is admitted.

The only other witness for the defendant on the point was a witness of the name of Mahomed Sher Khan (D. W. 2), who is engaged in litigation with the plaintiff, and under pressure admits that the path in suit is one which is used for taking carts and states that the path is not a public one and that everyone using it has to apply to the forest authorities for permission so to do, although it is the only path leading from Mandla to Katlabodi. His evidence clearly carries very much less weight than that of the plaintiff's witnesses. That the road existed before the forest was reserved is apparent from the maps of the 30 years settlement (1859) of the villages of Katlabodi and Mandla, where in each case a road is marked going due south through the fields of the respective villages and given a separate khasra number, indicating that the roads through the villages were public roads; and the Survey of India map (Ex. P-9) also indicates the existence of a track from Katlabodi due south to Bazargaon. The indication and nature of the roads on this map have been entirely misinterpreted in the trial Court when the learned Judge seems to think that only a road indicated as a main road is a public way. The Appellate Court has a more proper appreciation of the matter when it says that the map is of no use at all in determining whether the path in dispute is a public path or no, although it is somewhat astray in holding that it is a working plan map prepared for the use of forest officers. The map is an authoritative survey map prepared by the Government of India in the Survey Department, and the reference to it by the forest officer in the witness box as a season map of 1913-14 does not indicate that it is a map prepared for the Forest Department but has reference only to the season in which the actual survey by the Government of India was made.

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[1] Bhagchand Dagadusa v. Secy. of State, (1927) 14 A I R P C 176=104 I C 257=51 Bom 725 =54 I A 338 (P C).

[2] Jones v. Nicholls, (1844) 13 M & W 361=1 New Sess Cas 524=2 D & L 425=14 L J Ex 42=8 Jur 989=153 E R 149.

[3] Ramaswami v. Secy. of State, (1933) 20 A I R Mad 105=140 I C 458.

As it has been found that the path has been used as a public path from time immemorial, its dedication to the public as a public highway can be presumed from the long user which has been established: 53 Bom 187[4] and 14 N L R 78.[5] Also, as stated by Wort Ag. C. J. in A I R 1934 Pat 11,[6] where there is evidence of long enjoyment in a particular way, it is the habit and duty of the Court, so far as it lawfully can, to clothe the fact with right. There remains the contention that, whatever rights existed before the reservation of the forest in the year 1879, those rights were extinguished when the forest was reserved, and the learned counsel for the appellant has taken me through, what he contends are the relevant Sections of the Forest Act of 1878. By S. 4 of that Act, whenever it is proposed to constitute any land a reserved forest, the Local Government may publish a notification in the local Official Gazette and appoint a Forest Settlement Officer to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest produce; by S. 5 no rights are to accrue between the publication of such notification of the intention to reserve such land and the date of a notification declaring a forest to be reserved; by S. 6, after a proclamation by a Forest Settlement Officer, persons claiming rights are to be heard and claims inquired into by virtue of S. 7; and by S. 9, when no claim has been made, any right shall be extinguished. The learned counsel for the respondent however has pointed out that by virtue of S. 10 of the Act of 1878, a Forest Settlement Officer is precluded from considering a case of a right of way, and also contends that the wording of S. 4 (c), "to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person," emphasizes that his inquiry must of necessity be limited to questions of private rights, and not to questions of public rights in which the community as a whole is interested. In my opinion the question is really concluded by S. 24 of the Act of 1878, which runs:

> The Forest officer may from time to time, with the previous sanction of the Local Government or of any officer duly authorized in that behalf, stop any public or private way or water-course in a reserved forest; provided that a substitute for the way or water-course so stopped, which the Local Government deems to be reasonably convenient already exists, or has been provided or constructed by the Forest officer in lieu thereof.

This presupposes the existence of public rights of way before a forest is reserved and also presupposes that such public rights of way are recognized; and the powers given to deal with them are exceptional powers, hedged with the proviso that suitable alternatives be provided in the case of the special power to close them being used. This Section has been repeated in S. 25 of the current Forest Act, but it has not been suggested that the proposal made by the Forest Officer in answer to the notice was in accordance with this Section. The defendant would be at liberty to act under S. 25 if he chooses to do so, and the plaintiff would then have no cause for complaint, but such substitution could not be clogged with any restriction such as the imposition of a transit fee for cattle. It appears then that there existed prior to the year 1879, at which time the maps of the 30 years settlement were prepared, a public way running from Katlabodi to Bazargaon and that, when the forest was reserved, Government had no right to abolish it. All the evidence on the record goes to show that the way has been used continuously without any objection on the part of the Forest Department until 1928. Persons may be licensees in respect of their user of paths which the forest authorities themselves have made, but they cannot be licensees in respect of a public way.

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[4] Ardeshir Jivanji Mistri v. Aimai Kuvarji, (1929) 16 A I R Bom 94 = 117 I C 518 = 53 Bom 187=31 Bom L R 97.

[5] Laxman v. Tukia, (1918) 5 A I R Nag 166 = 44 I C 868 = 14 N L R 78.

[6] Radha Kishun v. Sunder Mal, (1934) 21 A I R Pat 11 = 148 I C 215.

The result is that the appeal fails and is dismissed with costs. It is regrettable that Government should have permitted the plaintiff to involve it in litigation which has extended over seven years at considerable cost when the matter could have been rectified, on the admission of Government's own witnesses, at a cost of Rs. 16 or less. A laudable attempt to protect the forests cannot be allowed to degenerate into an unauthorized levy on the transit of cattle using a public way. Counsel's fee in this Court will be Rs. 100.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 420

GRILLE J.

*Adkoo Umrao Kalar* — Applicant.

v.

*Emperor.*

Criminal Revision Nos. 313 and 314 of 1937, Decided on 26th October 1937, from order of Addl. Sess. Judge, Saugor, D/- 12th June 1937.

**Criminal P. C. (1898), S. 499—Provisions of S. 499 do not override inherent powers of High Court in matter of granting bail—Order of High Court directing production of accused in High Court on particular date and subsequently in the Court of District Magistrate, to hear judgment reserved, is valid—Sureties failing to produce accused before District Magistrate as directed —There is a forfeiture.**

The provisions of S. 499 are not exhaustive and do not override the inherent powers of the High Court in the matter of bail. There are no restrictions on the High Court in the matter of imposing conditions on which it grants bail, and there is no irregularity in the High Court directing that the sureties shall be responsible for the production of an accused person on bail in the High Court and for his subsequent production in the Court of the District Magistrate of the District where he was tried to hear the reserved judgment in his appeal. A bond which directs the appearance of the accused not only in the High Court but in such Court in which the High Court might direct him to appear is therefore valid; and there is a forfeiture of the bond, if the sureties, although aware of the terms set out in the bond on which they undertake to furnish security for the due appearance of the accused, fail to produce the accused before the Court according to the directions of the High Court : *A I R 1936 Nag 243, Commented upon ; 30 Cal 107 and A I R 1925 Rang 153, Disting.* [P 421 C 1, 2 ; P 422 C 1]

W. B. Pendharkar — *for Applicant.*

J. Sen, Govt. Pleader — *for the Crown.*

**Order.** — This order will also cover Criminal Revision No. 314 of 1937. One Durgaprasad was convicted under Ss. 193, 467 and 471, I. P. C., and sentenced to five years' rigorous imprisonment. Pending the hearing of the appeal in this Court, he was released on bail by the orders of this Court with three sureties of Rs. 1000 each. The directions of this Court in respect of the bail bond were that he was to appear in this Court on 7th October 1936, and thereafter continue so to attend until otherwise directed by this Court or as may be directed by this Court in that behalf. The bail bond was issued in accordance with these directions, and the sureties bound themselves accordingly and made themselves liable severally in respect of Rs. 1000 each for the appearance of Durgaprasad. Durgaprasad appeared in this Court on the due date and on dates to which the hearings were adjourned and, after the final hearing, was directed to appear before the District Magistrate, Saugor, on 15th February 1937 to hear the decision of his appeal in the reserved judgment. He failed to appear, and proceedings were then taken in the Court which had granted him bail against the sureties for the forfeiture of the sums to which they had made themselves liable. The contention in the Courts below was that they should be given time in which to produce the defaulter Durgaprasad, that they were only witnesses to the bond executed by Durgaprasad himself and that they were too poor to pay the sum of Rs. 1000 each. These contentions were overruled and failed equally before the District Magistrate to whom they went in appeal. The Additional Sessions Judge, Saugor, declined to refer the case to this Court in a full and considered order, and applications in revision have now been preferred by two of the sureties, Adku and Kuarpal. No application has been made by the third surety Amansingh.

The fact that the two applicants did stand surety for the appearance of Durgaprasad is now beyond question, and the fact that they made applications and that their solvency was enquired into and established to the satisfaction of the Court is patent on the record. Also, if their contention that they have not the means to pay Rs. 1000 each which has been declared forfeited is correct, they are liable to criminal proceedings in view of their declarations by reason of which the Magistrate accepted them as sureties. The only point for consideration before me is whether the form of the bond directing the appearance of Durgaprasad, not only in this Court but in any subsequent Court in which this

Court might direct him to appear is valid, and whether there has been no forfeiture in that the bail bond could go no further than direct the appearance of the accused in the High Court alone. The cases in 30 Cal 107[1] and 2 Rang 581[2] are of no application, since they refer to cases where a bail bond directed the appearance in one Court and the lower Court proposed to forfeit the security of the sureties on account of the non-appearance in a Court other than that mentioned in the bail bond. Reliance however is placed on a recent judgment of this Court, namely I L R (1937) Nag 137.[3] The passage relied on runs:

> It was argued by the learned Government Advocate that the undertaking was to produce him 'till decision'. If that is so, it was beyond the power of the Court to insert such a condition in the bond, for S. 499 is exhaustive of the conditions which can be imposed on sureties.

This has been unwarrantedly expanded in the head-note as:

> Section 499, Criminal P. C., is exhaustive of the conditions which can be imposed on sureties and it is beyond the power of the Court to insert a condition in a surety bond requiring the surety to produce the accused 'till decision' without specifying in which Court or even 'till decision in whatever Court he may be called upon to appear'.

Now the learned Judge who is responsible for this decision was dealing with a case in which a person was being prosecuted in the Court of the Subdivisional Magistrate of Janjgir and Katghora which are sub-divisions of the Bilaspur District. The Magistrate sits at Bilaspur, and the undertaking in the bond was that the accused undertakes to attend in "the Court at Bilaspur till the decision of the case," and the surety whose security was sought to forfeit undertook to produce the accused in "the Court at Bilaspur till decision." There are many Courts at Bilaspur, and the learned Judge held that it was impossible to enforce a vague and slovenly bond of this character in which no Court is defined and in which no date is given. The passage which I have quoted and on which reliance is placed is really obiter so far as the decision of the case was concerned and cannot, in my opinion, be taken as a statement of the law that the provisions of S. 499 are exhaustive and override the inherent powers of the High Court in matters of bail. In I L R (1937) Nag 137[3] the bail was granted by a subordinate Court; in the case before me, bail was granted on the directions of the High Court, and I am unaware of any restrictions on the High Court in the matter of imposing conditions on which it grants bail. It is open for instance to the High Court in granting bail, where an accused person has been convicted of making a seditious speech, to impose the condition that the accused should abstain from addressing any public meeting or publishing any matter until the decision of the appeal, and I do not consider that there is any irregularity in the High Court directing that the sureties shall be responsible for the production of an accused person on bail in the High Court and for his subsequent production in the Court of the District Magistrate of the district where he was tried to hear the reserved judgment in his appeal.

A little consideration will show that this practice, which has been the invariable practice in this Court, is for the benefit of the accused person. If this Court were entitled to do nothing more than to direct the release of the applicant on bail so far as his attendance in the High Court is concerned, the accused would find himself in grave difficulties in the case of judgment being reserved after the hearing of the appeal. The High Court would not release him on bail without sureties, and he would have to bring potential sureties with him. Their solvency could not be verified here, and the result would be that, unable to furnish bail which he had been able to furnish in his own district, the accused would have to surrender and remain in jail until the appellate judgment is delivered. It is in order to obviate these inconveniences which would amount to injustice to an accused person that this Court directs the granting of bail in the trial Court with the provision that the accused shall appear in this Court on a fixed date and on subsequent dates and shall also appear subsequently according as the High Court directs. The accused is thereby enabled to furnish securities which enure until judgment is pronounced. The decisions in the cases which have been cited before me rest on the sure foundation that a surety's bond cannot be forfeited because he has failed to produce the accused in a Court in which he did not undertake to produce him. In the case before me the sureties were well aware of the terms on which they had undertaken to furnish security for the due appearance of the accused, as the terms were set out in the bond which they signed, and they knew that they were responsible for his appearance not only in the High Court but in such Court as the High Court might direct him to attend, in order to surrender to his bail. The present applications must therefore be dismissed.

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[1] Shamsuddin Sirkar v. Emperor, (1903) 30 Cal 107=6 C W N 885.

[2] Maung Nge v. Emperor, (1925) 12 A I R Rang 153=84 I C 933=26 Cr L J 389=2 Rang 581.

[3] Emperor v. Chintaram, (1936) 23 A I R Nag 243=1936 Cr C 1037=165 I C 825=38 Cr L J 100=I L R (1937) Nag 137.

There is no force in the contention that the sureties made themselves jointly responsible for the sum of Rs. 1000 only. The bond states very clearly that they were each severally and individually responsible for that sum. None of the Courts below has considered that there should be any reduction in the amount to be forfeited, and in view of the deliberately false denial of responsibility, I do not consider that the case is one in which any reduction should be made. The applications are dismissed in their entirety.

R.M./R.K. *Applications dismissed.*

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## A. I. R. 1938 Nagpur 422

STONE C. J. AND VIVIAN BOSE J.

*Atmaram Soma Patil*—Appellant.

v.

*Accountant-General, C. P., through the Examiner, Local Fund Accounts and others*—Respondents.

First Appeal No. 116 of 1935, Decided on 16th December 1937, from decree of Dist. Judge, Nagpur, D/- 21st September 1935.

**C. P. Local Fund Audit Act (9 of 1933), S. 10—Examiner must be satisfied that loss has been caused by gross misconduct or negligence before ordering surcharge — Court must consider evidence case by case and not take lot of cases together.**

Before a notice can be served under S. 10 (1) the Examiner, in cases which fall under Cls. (b) and (c) of S. 8, must be satisfied that the loss has been caused by gross negligence or misconduct and it is necessary for the surcharging officer to state whether he is proceeding because of gross negligence or because of the misconduct of the member. If he proceeds on the basis of gross negligence or misconduct and surcharges, the member can apply to a Judge, and the Judge must consider whether in point of fact there was gross negligence or misconduct. In order to arrive at a conclusion of that nature, he must consider the evidence case by case and not take a lot of cases all together, decide one, and say that all are the same. Such a mode would be very inconvenient if there were any difference whatever in the evidence led in one case or another. [P 423 C 1, 2]

Y. V. Jakatdar—*for Appellant.*
J. Sen—*for Respondents 1 and 2.*
W. Dutta—*for Respondent 4.*

**Judgment.** — This appeal is brought under the provisions of S. 14, Local Fund Audit Act. That Act has, since the hearing of this case by the learned District Judge, been amended in many particulars, but those amendments do not affect the present point. The learned Judge has dealt with the matter in a somewhat inconvenient way because having before him several applications to set aside orders of surcharge made by the Local Fund Auditor, he has dealt with one of those applications (that is, the one made by the Chairman of the Local Board) at length and then has passed to this present application and has said in effect that there is no difference in fact between the two and therefore his decision on the one must control the decision on this one. The application under consideration arises in the following way: The applicant, a member of the Local Board, had been recently elected. The vouchers that are prepared for the signature of members who receive any money, we are informed, are in a language not known to the member. According to his story, he was informed by the accountant that the voucher that was being placed before him for his signature related to his travelling expenses. In point of fact, again according to his story and according to the accountant's evidence in another matter which, it is not disputed, we can take into consideration in this appeal, the sum in question had been paid to a former Chairman fraudulently and was shown as moneys expended on roads. In truth and in fact, according to the applicant's story, the money had not been expended on roads; it had been pocketted by the former Chairman; the accountant was a party to the misappropriation and was endeavouring to cover up the defalcation by getting the newly elected member's signature on this voucher representing that it was for the member's travelling expenses which amounted to a few rupees. The newly elected Chairman was saying much the same thing as was another member, and the learned Judge seems to have thought that, having dealt with one case, that disposed of all the cases so long as there was no material difference in the facts excepting that the one was the Chairman and the other was a member.

It is a little inconvenient to deal with the matter in that way because it is not apparent, when an appeal is brought by only one and when the evidence of the accountant is quite different in the case of the one who appeals and the others who do not appeal, to what extent the learned Judge has stressed the points special to the case under appeal or whether he has ignored them altogether. However that may be, and we only mention it in order to avoid this kind of inconvenience in future —in our opinion, this matter goes off on a short point. The Central Provinces Local Fund Audit Act provides by S. 8 as to what shall be included by the Examiner in his Audit Report, and two of the things which must be included in the Audit Report are: (S. 8-b) "the amount of any deficiency or loss which appears to have been caused by the gross negligence or misconduct of any person," and (c) "the amount of any sum which ought to have been but is not brought into account by any person." Those together with two other sub-sections which are not material here, state what should appear in the Audit Report. But it is S. 10 which empowers the Examiner to surcharge. S. 10 provides as follows:

> (1) On the preparation and delivery of copies of the report under S. 7, the Examiner may serve a notice on the person whom he considers to have made or authorized the illegal payment or to be accountable for the deficiency, loss or omission, referred to in Cls. (b) and (c) of S. 8, when caused by gross negligence or misconduct, requiring him to show cause within three months why the payment or amount should not be charged against him.

That entitles the Examiner to serve a notice calling upon the person in question to show cause why the payment or amount should not be charged against him. If he shows cause, it is considered and then the Examiner can surcharge him if he finds that the person charged has not explained his position and when he surcharges him, the person, charged has, under S. 14, the right to apply to the District Judge. It will be noticed that before a notice can be served under Sec. 10 (1) the Examiner, in cases which fall under Cls. (b) and (c) of S. 8, must be satisfied that the loss has been caused by gross negligence or misconduct.

Here he has nowhere so found and he places the obligation to make good the loss by finding, according to the reasons which he gives in Ex. P-2, inter alia "(iii) Acknowledgments of the amount in question signed by you exist" and "therefore your contention that you did not receive a pie of it cannot be accepted." That of course is not a finding of either gross negligence or misconduct. If there is a defalcating clerk who is minded to commit a fraud on a new member by getting him under false representations as to the contents of a receipt printed in a language that the new member does not understand, to sign a voucher and the new member signs believing in the integrity of an employee of the Board (the accountant), that may or may not show misconduct or gross negligence on the part of the member. Whether it does or does not will depend on circumstances, but if he is to be surcharged on that ground, it is necessary for the surcharging officer to state whether he is proceeding because of gross negligence or because of the misconduct of the member. If he proceeds on the basis of gross negligence or misconduct and surcharges, the member can apply to a Judge, and the Judge must consider whether in point of fact there was gross negligence or misconduct. In order to arrive at a conclusion of that nature, he must consider the evidence case by case and not take a lot of cases all together, decide one, and say that all are the same. As we have observed, such a mode would be very inconvenient if there were any difference whatever in the evidence led in one case or another.

In our opinion therefore, this appeal succeeds, and it is not even necessary to send the matter back to the learned Judge for a finding because there never having been a surcharge on the basis of gross negligence or misconduct, the surcharge is unjustified. The appeal is allowed with costs.

K.S./R.K. *Appeal allowed.*

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## ✻ A. I. R. 1938 Nagpur 423

STONE C. J. AND NIYOGI J.

*Mt. Draupadi, w/o Ramaji Mali and others* — Appellants.

v.

*Vikram Krishna Mali and another* — Respondents.

Second Appeal No. 177-B of 1933, Decided on 28th January 1938, from appellate decree of First Addl. District Judge, Akola, D/- 25th August 1933.

**✻(a) Hindu Law—Adoption—Bombay School —After death of last male-holder his widow in possession of entire family property — Adoption by widow of predeceased co-parcener is valid — After death of adopted son widow of last male-holder adopting son — This adoption also is valid and divests property vested in widow of predeceased co-parcener after remarriage of widow of her adopted son.**

The vesting of the property on the death of the last holder in some one other than the adopting widow, be it another co-parcener of the joint family or an outsider claiming by reverter or by inheritance cannot be in itself the test of the continuance or extinction of the power of adoption. Similarly, it is the right of the adopted son and not the existence of the co-parcenary that is the true criterion for determining the judicial effect of the adoption. A person in whom the property is vested after the death of the sole surviving member of a joint family takes it subject to defeasance in the event of an adoption by the widow of a predeceased member of the quondam joint family. The defeasibility of the vesting of such an estate is implicit in the very fiction that a widow is the surviving half of the husband. The husband becomes fully alive, for juridical purposes, in the form of the adopted son on the well-recognized Vedic Doctrine : " The father is born as the son. " Consequently the adopted son must get such interest as his father would have got had he been alive at the date of adoption. [P 426 C 2; P 430 C 1]

Where therefore after the death of the last male holder his widow is in possession of the entire joint property and the widow of a predeceased co-parcener adopts a son, the adoption is valid and divests the widow of the last male holder. If after the death of this adopted son the widow of the last male holder adopts a son, that adoption is also valid because she has no less power to adopt a son to her husband than the widow of the predeceased co-parcener had to adopt a son to her own husband. Neither her consent to adoption by widow of predeceased co-parcener nor death of son adopted by widow of predeceased co-parcener would destroy her inherent power to adopt. The estate vested in the widow of the predeceased co-parcener after the remarriage of the widow of her adopted son would be subject to defeasance by last male holder's widow's exercise of her power to adopt : *A I R 1933 P C 155 and A I R 1935 P C 95*, *Rel. on; A I R 1929 Nag 98 (F B) and 14 Bom 463, held overruled by A I R 1933 P C 155; Case law reviewed.* [P 430 C 2]

**(b) Privy Council — Principle enunciated must be followed by Indian Courts even if inconvenient to do so.**

It is not open to the Courts of India to question any principle enunciated by the Board, which must therefore be followed irrespective of the inconvenient and embarrassing results which may attend the application of that principle : *A I R 1925 P C 272*, *Rel. on.* [P 427 C 1]

**(c) Hindu Law — Co-parcenary explained.**

' Co-parcenary ' as popularly understood only expresses the rights and obligations growing out of the status of an undivided family which is the creature of Hindu law. Joint family consists of males and females who constitute a sort of corporation some of the members of which are co-parceners, that is, persons who on partition would be entitled to demand a share while others are only entitled to maintenance. The male members of a joint family are entitled to claim partition and the female members are only entitled to maintenance, although an exception ought to be made in favour of the mother who is entitled to a share on partition between her sons or her husband and her sons. Their rights spring from their being Gotraja Sapinda tracing their descent from a common ancestor or connected by lawful wedlock with the male members of the family. It is apparent that joint family may consist of surviving female members only : *9 M I A 195 (P C)*, *Rel. on.* [P 428 C 2; P 429 C 1]

**(d) Hindu Law — Adoption — Adopted son can challenge alienations by limited owner prior to adoption.**

The rights of an adopted son accrue on the date of adoption; nevertheless he is entitled to challenge alienations made by a limited owner prior to his adoption : *A I R 1918 Mad 469*, *Rel. on.* [P 430 C 2]

**(e) Adverse Possession—Joint family — One member's possession is not adverse to another member.**

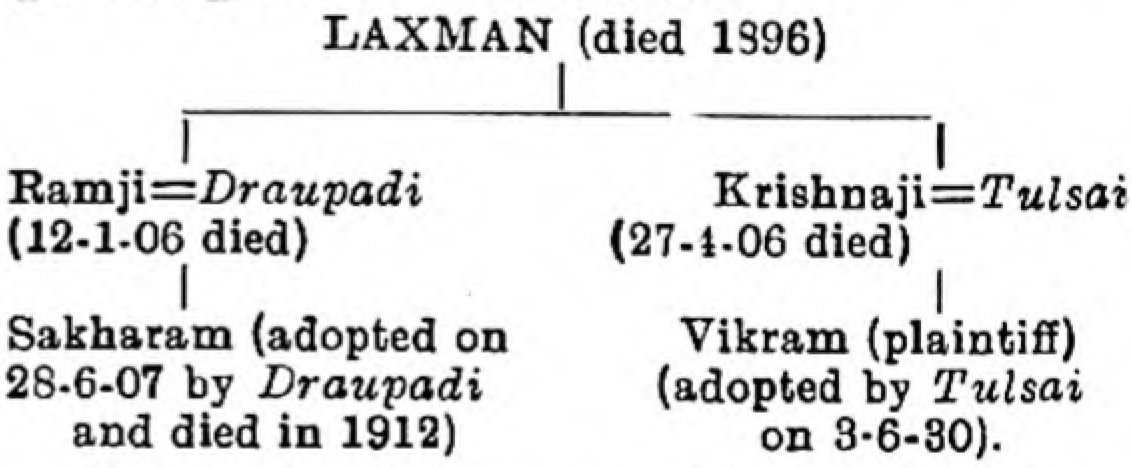
Where after the death of the last male holder his widow is in possession of family property and the widow of a predeceased co-parcener adopts a son, his adoption is valid and his possession cannot be regarded as that of a trespasser but that of a member of a joint family. As such it cannot be regarded as being adverse to the last male holder's widow who is a female member of the family. Even if regarded as adverse, it cannot destroy the right of her adopted son who claims as her husband's son. [P 431 C 1]

M. R. Bobde and B. V. Pradhan — *for Appellants.*

Dr. D. W. Kathalay — *for Appellant 2.*

M. B. Kinkhede and N. B. Chandurkar — *for Respondent 1.*

**Judgment.**—This is a defendants' second appeal against the concurring judgment of the First Additional District Judge, Akola, in Civil Appeal No. 201 of 1932, decided on 28th August 1933. One Laxman died in or about 1896 leaving him surviving two sons Ramji and Krishnaji. For a clear apprehension of the main issue in the case, it is desirable to describe the relationship of the principal parties in the form of a genealogical table as below :


LAXMAN (died 1896)
Ramji=*Draupadi*
(12-1-06 died)
Krishnaji=*Tulsai*
(27-4-06 died)
Sakharam (adopted on 28-6-07 by *Draupadi* and died in 1912)
Vikram (plaintiff) (adopted by *Tulsai* on 3-6-30).

The parties are governed by the Bombay school of Hindu law. Ramji died on 12th January 1906 survived by his widow Mt. Draupadi and brother Krishnaji. After Krishnaji's death on 27th April 1906, the only members of the joint family who were left were the widows, Mt. Tulsai and Draupadi. Tulsai being the widow of the last surviving member was in possession of the entire joint family property. Mt. Draupadi adopted Sakharam on 28th June 1907 with the alleged consent of Mt. Tulsai.

Sakharam died in 1912 and Mt. Tulsai adopted in 1930 Vikram, who has filed this suit against Mt. Draupadi and her daughter Mt. Bani and her transferees of portions of the joint family property. Mt. Draupadi resisted the suit on the ground that she had, pursuant to the authority of her husband, adopted Sakharam and that consequent on his death in 1912, she became the sole owner of his property; that Tulsai consented to Sakharam's adoption; and that her own power of adoption was exhausted, with the result that she was incompetent to adopt Vikram; and the plaintiff's claim, if any, was barred by adverse possession on the part of Draupadi as well as by her omission to set aside Sakharam's adoption within six years under Art. 118, Limitation Act, and lastly that the plaintiff was bound by family arrangement concluded between Mt. Draupadi and Mt. Tulsai by a written farkatnama dated 27th July 1920, whereby Mt. Tulsai had relinquished her interest in favour of Mt. Draupadi. The transferees contended that the properties which they had acquired by transfer from Mt. Draupadi were Sakharam's self-acquired property to which the plaintiff, even if his adoption was valid, had no claim. Both the Courts below concurred in holding that Sakharam's adoption was invalid and that Mt. Tulsai was alone competent to adopt a son as she was the widow of the last male holder Krishnaji; and negatived the pleas that Ramji had authorized Mt. Draupadi to adopt and that Mt. Tulsai had consented to Sakharam's adoption. The suit was held to be barred neither by adverse possession nor by failure to sue to set aside Sakharam's adoption. The so-called relinquishment by Tulsai was found to be fraudulent and ineffective. The property which was in possession of the transferees was found to be not the self-acquired property of Sakharam but a part of the joint family estate.

The lower Appellate Court, in holding Sakharam's adoption as invalid, followed a Bench decision of the late Court of the Judicial Commissioner, C. P., reported in 25 N L R 144,[1] 55 Bom 699[2] and 57 Bom 157.[3] The principle applied to the case was that the vesting of the estate in Tulsai, the widow of the last male holder, deprived Draupadi, who was the widow of a predeceased member of the joint family, of her power to adopt. The Full Bench case of the late Court of the Judicial Commissioner, Nagpur, was declared in 31 N L R Sup 180,[4] by a Full Bench of that Court to have been impliedly overrlued by the Privy Council decision in 12 Pat 642.[5] In 59 Bom 360,[6] the Board followed the view taken in that case. In the face of the pronouncements of the Privy Council in these two cases which are of paramount authority in India, it is manifestly impossible to affirm the lower Appellate Court's finding that Sakharam's adoption was invalid, but our attention has been drawn to a very important Full Bench decision of the Bombay High Court which has a direct bearing on the point under consideration. That is I L R (1937) Bom 508.[7] In that case the learned Judges regarded the question from the point of view whether the effect of the two above mentioned Privy Council decisions was to overrule the dictum of Telang J. in 14 Bom 463[8] to the effect that an adoption by a widow under her husband's authority divests an estate vested in any member of the undivided family of which the husband was himself a member, but that it does not divest the estate of one on whom the property has devolved by inheritance from a lineal heir of the husband. The majority of the learned Judges including the learned Chief Justice held that if there was any implication in that case that the adoption was invalid, that case should be deemed to have been overruled to that extent by the two Privy Council decisions. Rangnekar J. in a separate judgment propounded the view that the authority of that case was not impaired to any extent by the Privy Council decisions; while the majority were of opinion that when an adoption by a widow of a predeceased coparcener takes place after the termination of the coparcenary, that adoption though valid for ceremonial purposes has not the effect of divesting the property which devolved on the heir of the last surviving coparcener (other than the widow) or those claiming through him or her. Rangnekar J. was definitely of opinion that such adoption itself was invalid both for spiritual and secular purposes. With due respect, it may be observed that either view discards the ancient texts (Yathaiva Atma, Thatha Putrah Katham Anyodhanam haret—Manu 9.130, Pindam Dadyat haret dhanam — 9.136, Gotrarikhtanugo Pindo — 9.142 : *See* Kalluk Bhatta's Commentary Yaschartha haret Pindadayi—Vishnu 15.40, *See* Dattakamimansa Chap. 6—S. 51) which sustain the principle laid down by the Privy Council.

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[1] Uttamrao v. Daulat, (1929) 16 A I R Nag 98 =116 I C 499=25 N L R 144 (F B).

[2] Sangangouda v. Hanmantgouda, (1932) 19 A I R Bom 8=136 I C 500=55 Bom 699=33 Bom L R 1225.

[3] Bhimabai v. Gurunathgouda Khandappagouda, (1933) 20 A I R P C 1=141 I C 9=57 Bom 157=60 I A 25 (P C).

[4] Ramchandra v. Mt. Yamunabai, (1936) 23 A I R Nag 65=162 I C 571=31 N L R Sup 180 (F B).

[5] Amrendra Mansingh v. Sanatan Singh, (1933) 20 A I R P C 155=143 I C 441=12 Pat 642 =60 I A 242 (P C).

[6] Vijaysingji v. Shivsangji, (1935) 22 A I R P C 95=155 I C 493=59 Bom 360=62 I A 161 (P C).

[7] Balu Sakharam v. Lahoo Sambhaji, (1937) 24 A I R Bom 279=170 I C 393=I L R (1937) Bom 508=39 Bom L R 382 (F B).

[8] Chandra v. Gojarabai, (1890) 14 Bom 463.

The question is a complex one but the answer is unmistakably traceable in the two Privy Council decisions. It will therefore be desirable to set forth the material facts in 12 Pat 642[5] which is the leading case. In that case the plaintiff Banamali claimed an impartible zamindari by inheritance upon the death of Raja Bibhudendra who died unmarried. The Raja's mother Rani Indumati adopted a son by name Amrendra after his death. Banamali who was descended from a remote common ancestor claimed the zamindari on the basis that it was a separate property. According to the custom obtaining in the family the females were excluded from inheritance. Banamali's contention was that when once the estate had vested in him as the heir of the last male holder Rani Indumati's power of adoption was at an end. He succeeded in the original Court as well as in the High Court but failed in the Privy Council. Before the Board, the respondent's argument was that when once the estate had vested in an heir of that last male holder other than the adoptive widow, the widow's power of adoption was extinguished. Their Lordships of the Privy Council described that argument as one which approached the question from that point of view of rights in the property. On the other hand, the appellant contended that the power to adopt was not dependent in any way on the vesting or divesting of property. Their Lordships of the Privy Council referred to certain ancient authoritative texts and judicial decisions bearing on the issue and deduced the conclusion that the foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestor to provide for the continuance of the line and the solemnization of the necessary rites, and referring to 1 Mad 69[9] at p. 82 observed that the doctrine of devolution of property was a secondary consideration, and conveyed an admonition that great caution should be observed in shutting the door on any authorized adoption by the widow of a sonless man. After a critical and exhaustive consideration of what were seemingly divergent currents of rulings, their Lordships enunciated the proposition that the true principle must be found upon the religious side of the Hindu doctrine. It must be particularly observed that their Lordships deduced from 43 Bom 778,[10] 1 Mad 69[9] and 1 Mad 174[11] the conclusion that the vesting of the property on the death of the last holder in some one other than the adopting widow, be it another coparcener of the joint family or an outsider claiming by reverter or by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption, and further pointed out that if in 43 Bom 778[10] the actual reverter of the property to the head of the family did not bring the power to an end it would be impossible to hold in the case that was under consideration that the passing by inheritance to a distant relation could have that effect any more than the passing by survivorship would in a joint family. Applying that principle, it was decided that Rani Indumati's power of adoption under her husband's authority was not exhausted at the death of Bibhudendra (her son). In 59 Bom 360[6] the Board followed the view laid down in 12 Pat 642[5] and reversed the decision in 56 Bom 619[12] on these observations:

> The learned Judges proceeded upon the principle that a widow cannot adopt a son to her deceased husband if by so doing she would defeat an estate other than her own. This view cannot now be regarded as a correct exposition of the law.

In the penultimate paragraph of that judgment there is an observation which is important and noteworthy: "It is clear that in his presence the plaintiff cannot inherit the estate." The pronoun "his" refers to the adopted son. The pronouncements made by their Lordships of the Privy Council upon the principle which should determine the validity of adoption by a Hindu widow are thus clear and unambiguous. It must be borne in mind that, as their Lordships of the Privy Council pointed out in 47 All 883[13] at p. 900, it is not open to the Courts of India to question any principle enunciated by the Board, which must therefore be followed irrespective of the inconvenient and embarrassing results which may attend the application of that principle. Next it is necessary to turn to 14 Bom 463[8] and analyze it to discover the principle which was applied to the particular facts of that case and to see how far that principle received the approval of the Privy Council. The facts were that Krishnaji and his two sons, Bhau and Nana, were members of an undivided family. Bhau died first leaving a widow. Then Krishnaji died. On his death Nana succeeded to the family property. Nana died survived by his widow Gojarabai who came into possession of the property. Thereafter Bhau's widow adopted Chandra as son to her husband, Bhau, and he proceeded against Gojarabai to recover the property. Telang J. on a review of authorities evolved the rule:

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[9] Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishore Patta Deo, (1876-78) 1 Mad 69=3 I A 154=25 W R 291=3 Sar 583 (P C).

[10] Pratapsingh Shivsingh v. Agarsinghji Raisinghji, (1918) 5 A I R P C 192=50 I C 457 =43 Bom 778=46 I A 97 (P C).

[11] Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmini, (1876-78) 1 Mad 174=4 I A 1=26 W R 21=3 Sar 669 (P C).

[12] Bai Kesharba v. Shivsangji, (1932) 19 A I R Bom 654=142 I C 253=56 Bom 619=34 Bom L R 1332.

> An adoption by a widow under her husband's authority has the effect of divesting an estate of any member of an undivided family of which the husband was himself a member, but it does not divest the estate of one on whom the estate devolved from a lineal heir of the husband.

In the light of that rule the learned Judge viewed the case as follows:

> When the inheritance devolved from Nana upon his widow Gojarabai, it devolved, not by succession, as in an undivided family, but strictly by inheritance, as if Nana had been a separated householder. Strictly speaking, according to the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption,

and on that view he concluded that Chandra's adoption was invalid. The rule enunciated by Telang J., who was a distinguished Judge and Sanskrit scholar, was followed in a long series of decisions of the Bombay High Court including 20 Bom 250[14] and 23 Bom 327[15] with reference to which Ranade J. made an observation in 25 Bom 306[16] at page 312:

> The whole current of the recent decisions has been to base this limitation on the widow's power of adoption solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others.

In 12 Pat 642[5] at p. 653, this observation was disapproved and at p. 658, 37 Bom 598,[17] which deduced its ratio decidendi from 14 Bom 463,[8] 23 Bom 327[15] and 25 Bom 306[16] was pronounced to be no longer authoritative. It is also pertinent to notice here that in 56 Bom 619[12] at page 653, Patkar J. had declined to discuss the reasoning in A I R 1932 Mad 227[18] because he doubted the decision in 14 Bom 463[8] and 20 Bom 250,[14] but the decision in 56 Bom 619[12] was itself reversed in 59 Bom 360.[6]

It may be useful to examine in some detail the course of reasoning pursued in 14 Bom 463.[8] At the outset, Telang J. declares on the authority of West and Bulher that the principle that a widow cannot adopt so as to defeat a vested interest is not to be found in that form in the Hindu authorities. Then the learned Judge refers to 1 Mad 69[9] as an authority for the proposition that an adoption under the husband's direction may divest the estate vested in an undivided coparcener of the husband. He then turns to 10 M I A 279[19] as an authority for the opposite view, and points out that it was explained in 1 Mad 174,[11] remarking that this judgment was delivered by Sir J. Colville who was also the mouthpiece of the Judicial Committee in 1 Mad 69[9] decided only a few months before. Finding that on the one hand the later judgment did not contain any reference, notwithstanding allusion to it in the counsel's argument, to the former case and that on the other hand 10 M I A 279[19] was again explained and followed in 8 Cal 302[20] and the principle deduced from it was again applied in 10 Mad 205[21] and 17 Cal 122,[22] the learned Judge concluded that the Judicial Committee did not consider the decision in 1 Mad 69,[9] as being inconsistent with the other cases mentioned above and deduced the rule of his decision. While concluding the judgment the learned Judge observes that there was no direct authority in support of his view, either of text-books or decided cases, but that there was general tendency of the Courts from the Privy Council downwards, in favour of limiting the exercise of the power of adoption by women after the death of their husbands.

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[13] Mata Prasad v. Nageshar Sahai, (1925) 12 A I R P C 272=91 I C 370=28 O C 352=47 All 883=52 I A 398 (P C).

[14] Shri Dharnidhar v. Chinto, (1896) 20 Bom 250.

[15] Pavapa v. Appanna, (1899) 23 Bom 327.

[16] Venkappa Bapu v. Jivaji Krishna, (1901) 25 Bom 306=2 Bom L R 1101.

[17] Bhimabai v. Tayappa Murarrao, (1913) 37 Bom 598=21 I C 107=15 Bom L R 783.

[18] Panyam v. Rama Lakshmamma, (1932) 19 A I R Mad 227=138 I C 170=55 Mad 581=62 M L J 187.

[19] Mt. Bhooban Moyee Debia v. Ramkishore Acharji Chowdhary, (1863-66) 10 M I A 279 =3 W R 15=1 Suther 574=2 Sar 111 (P C).

[20] Padma Kumari Debi v. The Court of Wards, (1882) 8 Cal 302=8 I A 229=4 Sar 285 (P C).

Now the identical cases, from which Telang J. deduced the rule he did, have been explained, and the rule based on the principles of Hindu law governing adoptions by widows in Bombay has been enunciated in clear and positive terms by the Judicial Committee in 12 Pat 642[5] at pp. 651-53. The effect of this decision is to sweep away the cobwebs of case law in India which strangled the real principle of the Hindu law.

It is true that in 57 Bom 157[3] at p. 173, their Lordships of the Privy Council referred to the reason for decision contained in 14 Bom 463,[8] but it will not do to overlook that the controversial aspect of that case was there not material for consideration and the Board was not invited to pronounce its opinion on it. Mere reference to that case without affirmance of the correctness of the principle which is now in controversy cannot be regarded as reflecting the Board's view in favour of that principle. In view of the foregoing discussion, it will be evident that the effect in 12 Pat 642[5] and 59 Bom 360[6] is to denude 14 Bom 463[8] of its authority. The case reported in 60 Bom 102[23] contains a tacit admission of this position. In I L R 1937 Bom 508[7] an attempt is made to distinguish 12 Pat 642[5] and 59 Bom 360[6] on the ground that a coparcenary was in existence at the time of the adoption, although it was conceded that the coparcenary was of a peculiar nature. That argument loses its force in view of 41 Mad 778[24] at p. 783, where it was pointed out by their Lordships of the Privy Council that in an impartible zamindari there is no coparcenary. Further it was pointed out that inconvenient and embarrassing results are likely to follow from the application of the principle enunciated in 12 Pat 642.[5] The answer, in the words of Telang J., in 14 Bom 463[8] is: "the possibility of such difficulties arising is not to prevent the rule of law from being enforced," at p. 472. They are however no more so than in the case of an ordinary widow's estate and at all events they must be tolerated to maintain the true principle of the Hindu law. Such practical difficulties which may arise in exceptional cases cannot justify the destruction of the widow's paramount right to adopt. Hard cases should not make bad law. Any limit to the widow's power of adoption that may be laid down to avoid practical difficulties would in its nature be arbitrary. It is therefore advisable to leave it to the Legislature to amend the law. In the meantime the limit indicated in 12 Pat 642[5] may be regarded as the only limit.

The rule propounded in 12 Pat 642[5] appears to be startling only because it runs counter to and unsettles the effect of a uniform course of decisions in Bombay but there is nothing in it which is repugnant to the spirit of the Hindu law. It must be observed that attaching undue importance to "coparcenary" may be misleading since that concept itself was unknown to the original Hindu law. In 43 All 228[25] at p. 243, their Lordships of the Privy Council observed that it would be better if the words 'coparcenary' and 'coparceners' had not been used and conveyed a caution against fastening the attention too much on the word 'coparcenary.' 'Coparcenary,' as popularly understood, only expresses the rights and obligations growing out of the status of an undivided family which is the creature of Hindu law: *see* 9 M I A 195[26] at p. 237. Joint family, as pointed out by Mayne at p. 344, Edn. 9, consists of males and females who constitute a sort of corporation some of the members of which are coparceners, that is persons who on partition would be entitled to demand a share, while others are only entitled to maintenance. The male members of a joint family are entitled to claim partition and the female members are only entitled to maintenance, although an exception ought to be made in favour of the mother who is entitled to a share on partition between her sons or her husband and her sons. Their rights spring from their being Gotraja sapindas tracing their descent from a common ancestor or connected by lawful wedlock with the male members of the family. It is apparent that joint family may consist of surviving female members only.

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[21] Thayammal v. Venkatarama, (1887) 10 Mad 205=14 I A 67=5 Sar 10 (P C).

[22] Tarachurn Chatterjee v. Suresh Chandra Mukerjee, (1890) 17 Cal 122 = 16 I A 166=5 Sar 379 (P C).

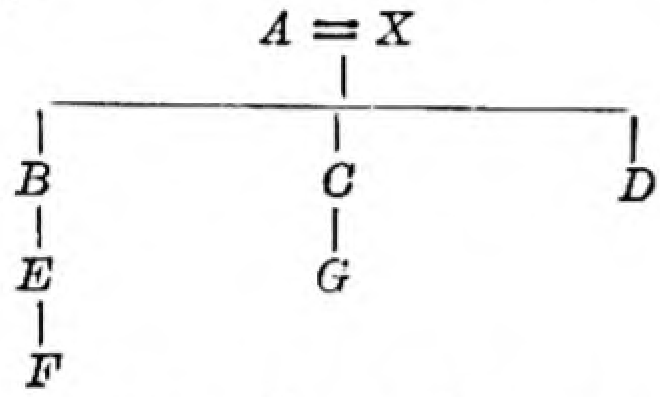
[23] Umabai v. Nani, (1936) 23 A I R Bom 135 = 162 I C 133=60 Bom 102=38 Bom L R 100.

[24] Ram Rao v. Rajah of Pittapur, (1918) 5 A I R P C 81 = 47 I C 354 = 41 Mad 778 = 45 I A 148 (P C).

[25] Baijnath Prasad Singh v. Tej Bali Singh, (1921) 8 A I R P C 62 = 60 I C 534 = 43 All 228=48 I A 195 (P C).

[26] Charlotte Abraham v. Francis Abraham, (1861-63) 9 M I A 195 = 1 W R 1=1 Suther 501=2 Sar 10 (P C).

Now, attention may be directed to the law of property which may be elucidated with reference to the following illustrative pedigree:



*A* is the propositus who acquires property. On his death his property devolves on his sons *B*, *C* and *D*, as ancestral joint (or corparcenary) property to the exclusion of *A's* widow. When *B* begets a son *E* and *C* adopts one *G*, both *E* and *G* will acquire interest in that property by their birth. It will be apparent that there is a difference between the rights of *A's* widow and those of *B*, *C*, *D* and others (male members). The law expounded in the Mitakshara uses the word "Daya" as signifying the wealth which becomes the property of another, solely by reason of relation to the other. It is of two sorts: unobstructed (apratibandha), i. e. not liable to obstruction, or liable to obstruction (sapratibandha). The wealth of the father or the grandfather becomes the property of his sons or his grandsons, in right of their being sons or grandsons; and that is inheritance not liable to obstruction. But property devolves on parents (or uncle) brothers and the rest upon the demise of the owner if there be no male issue: and thus the actual existence of a son and the survival of the owner are impediment to succession; and on their ceasing, the property devolves (on the successor) in right of being uncle or mother. This is inheritance subject to obstruction (Colebrooke's Mitakshara, Chap. I, Ss. 1, 3). It is now to be seen what is the nature of the rights of the male members of the family designated as coparceners. As Mayne points out at p. 344. Edn. 9, they have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with their debts and at their pleasure to enforce its partition. Even the father has no independent power in the disposal of this (coparcenary) property because

> they who are born, and they who are yet unbegotten, and they who are still in the womb require the means of support, no gift or sale should be made: Colebrooke's Mitakshra, Chap. I, S. III-27.

To revert to the illustrative pedigree, if all male persons die excepting *D* and the widows of *B* and *C*, it is conceded by Telang J. in 14 Bom 463[8] that the widows' adoptions, if made during *D's* lifetime, confer on the adopted sons all the rights of the coparceners but denies them those rights, if their adoptions took place after *D's* death. The difference in the results of adoptions made before and after *D's* death is made to turn on the existence or non-existence of the coparcenary. But the question may reasonably arise: Is there a joint family or coparcenary when *D* alone is surviving? Coparcenary denotes ownership of at least two persons; and so, to call a sole owner a coparcener and his property which is admittedly held in severalty, coparcenary property is a manifest contradiction in terms. The contradiction disappears when it is borne in mind that the sole coparcener holds a species of property which is intended for the support of those "who are born, who are yet unbegotten, who are still in the womb" and consequently he holds it on behalf of his natural born son, yet unbegotten, as well as any son who would be adopted by *A's* or *B's* widow. Why are these afterborn or after-adopted (if such expression may be used) sons able to divest the estate which had already lapsed to *D* by survivorship? Obviously because the property is ancestral and required for their support. It must not be overlooked that these sons derive their right not from their relationship to *D* but to the propositus, the common ancestor who acquired the estate or its nucleus. If that is the peculiarity of this ancestral (coparcenary) property how will its nature be altered by *D's* death? That it is not altered is evident from the fact that the widows of *A* and *B* still continue to have the right of maintenance in respect of that property—a right which is capable of being enforced by declaration of a charge on it. That will not be the result had the property been *D's* self-acquired property. It must consequently be held that on *D's* death, *D's* widow who is apparently the sole owner, stands in precisely the same position as *D* did with respect to the ancestral property. It must follow that the result of the adoption made after *D's* death must be the same as if it had been made before his death. The result will not be different even if after *D's* widow's death, the property devolves on *D's* daughter, or other heir. When the adoption takes place after *D's* death, there arises a conflict between the rights of the adopted son and the person in whom the property remains vested at the moment. That conflict must be resolved in favour of the adopted son because the former's heritage is not liable to obstruction whereas the latter's is. His right being superior must override that of the rival. This situation reveals the significance of remark, "It is clear that in his presence, the plaintiff cannot inherit the estate" occurring in the penultimate paragraph at p. 365 of 59 Bom 360.[6] The word 'plaintiff' refers to the person in whom the property vested before the adoption.

There is nothing new or startling in the above-mentioned proposition which but involves the application of the Mitakshara rule. It is in accordance with this rule that when a widow of a deceased coparcener adopts a son to her husband, he acquires his father's interest notwithstanding that it lapsed to the survivors, and an adoption by a widow of a deceased owner results in divesting the widow's estate. It is clear that a person in whom the property is vested after the death of the sole surviving member of a joint family takes it subject to defeasance in the event of an adoption by the widow of a predeceased member of the quondam joint family. The defeasibility of the vesting of such an estate is implicit in the very fiction that a widow is the surviving half of the husband. The husband becomes fully alive, for juridical purposes, in the form of the adopted son on the well-recognized Vedic Doctrine, "The father is born as the son". Consequently, the adopted son must get such interest as his father would have got had he been alive at the date of adoption. To conclude, it is the right of the adopted son and not the existence of the coparcenary that is the true criterion for determining the judicial effect of the adoption. Turning now to the present case, it must be held that Sakharam's adoption was valid so as to divest Tulsai and vest the property in Sakharam. On the view we have taken of Sakharam's adoption, it is unnecessary to consider the effect of the consent alleged to have been given by Tulsai to the adoption.

The next important question is whether Vikram's adoption by Tulsai in 1930 was valid; unquestionably it would be, in view of the principle discussed above. Tulsai had no less power to adopt a son to her husband than Draupadi had to adopt a son to her own husband. She could have exercised it during the life-time of Sakharam and her adopted son would have been entitled to his appropriate share in the joint family property. Neither her consent to Sakharam's adoption nor Sakharam's death would destroy her inherent power to adopt. After Sakharam's death the estate vested in his widow on whose remarriage it vested in his mother, but it was manifestly subject to defeasance by Tulsai's exercise of her power of adoption. Vikram as Krishnaji's son had obviously a superior right to the ownership of the estate to that of Sakharam's personal heirs. It must follow that Vikram after his adoption was entitled to possession of the property. The next important question is whether the transfers in favour of the appellants Shankar and Trimbak are binding on the plaintiff. Shankar is interested in field Survey No. 84 and a house. This property was purchased on 14th May 1910 by Sakharam. The Courts below are agreed in finding that this was not the self-acquired property of Sakharam as it was not proved that Sakharam had purchased it otherwise than from the income of the property which came to him as an adopted son. It must therefore be treated as an accretion to the original estate. This property was sold by Draupadi, Bani and Tulsai to Chahadu on 28th July 1920. Neither Bani nor Tulsai had any right to sell it, and Draupadi had only a widow's right in it and her alienation would be binding on Vikram only if it had been justified by legal necessity. The rights of an adopted son accrue on the date of adoption; nevertheless he is entitled to challenge alienations made by a limited owner prior to his adoption : *see* 41 Mad 75[27] and Mayne's Hindu Law, Edn. 9, at page 271. The appellant Trimbak's case stands on no better footing. Trimbak admits that Survey No. 9 in which he is interested came into possession of Sakharam in the wake of his adoption. That was sold by Draupadi and

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27. Vaidyanatha Sastri v. Savithri Ammal, (1918) 5 A I R Mad 469=42 I C 245=41 Mad 75 = 33 M L J 387 (F B).

Bani to Chahadu on 2nd April 1924. The sale is not proved to have been justified by legal necessity.

It is urged that Mt. Tulsai's right to the property was already extinguished in consequence of adverse possession on the part of Sakharam from the date of his adoption in 1907 and that her adoption in 1930 could not create any right in Vikram. As Sakharam's adoption was valid, his possession could not be that of a trespasser but that of a member of a joint family. As such it could not be regarded as being adverse to Tulsai who was a female member of that family. Granting that his possession became at any time adverse, it was from 1920, when Tulsai executed the farkatnama in favour of Draupadi as held by the Courts below. The suit is however within time as computed from that date. It must be also observed that adverse possession, if any, against Tulsai could not destroy the right of Vikram who claims as Krishnaji's son. Much capital is made of the farkatnama as having extinguished Tulsai's rights. The appellants are concluded by the lower Appellate Court's finding of fact that it was a fraudulent document and that it was not binding on Tulsai. The result is that the appeal stands dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 431

STONE C. J. AND VIVIAN BOSE J.

*Gangaram Choturam Mistri* — Appellant.

v.

*Chapsi Kuwarjee Bhate and others* — Respondents.

First Appeal No. 28-B of 1934, Decided on 8th November 1937, from decree of Sub-Judge, First Class, Khamgaon, D/- 28th February 1934.

**(a) Hindu Law—Joint family — Suit against member of joint family for declaration that certain property belonging to joint family is liable to attachment and sale in execution of decree—Whether decree is binding only upon defendant sued or upon joint family is question of fact—Where defendant is sued in representative as well as personal capacity decree is binding upon joint family and can be executed against joint family property—It is better to join members of joint family in such suit to avoid further disputes — High Court would withhold costs for failure to do so.**

It is a question of fact to a large extent whether a decree passed in a suit against a member of joint Hindu family for declaration that a certain share in property belonging to a joint Hindu family is liable to attachment and sale in execution of a decree, is binding only upon the defendant sued or upon the family. Which conclusion is arrived at depends upon whether it is a fair inference, that though sued alone, he is sued in his representative as well as in his personal capacity or whether he is sued only in personal capacity. In the former case the decree will be binding upon those whom he represents as well as upon himself and can be executed against the joint family property; in the latter case it will be binding upon him only. In matter of such kind it is very much the better course to join the members of the family and avoid further disputes. The High Court is entitled to withhold costs from litigants who necessitate a number of actions instead of one in order to fairly clear the position as to whether the family is being sued or a member of the family is being sued. Where the members of the joint family were not impleaded in such a suit and consequently were not in a position to contest matters which might have to be contested before the joint family property could be taken in execution, it is right and proper that they should have an opportunity of litigating the question as to whether the debt was one binding on the family. [P 432 C 1, 2]

**(b) Hindu Law—Debt — Debt borrowed for carrying on joint family business is binding on joint family.**

Debt borrowed for carrying on a joint family business is binding on the joint family, being for the benefit of the family. [P 433 C 1]

V. K. Rajwade — *for Appellant.*

K. V. Brahma — *for Respondent 1.*

**Judgment.**—This is an appeal by defendant 5 against the respondent-plaintiff in a matter in which the plaintiff prayed for a declaration that the 2/3rd share in certain immovable property is liable to attachment and sale in execution of the decree obtained by the plaintiff in Suit No. 15 of 1926. The appellant Gangaram is the son of Choturam and the brother of Sriram, (the father of defendants 1 and 2) and of defendants 3, 4 and 6 (Sadhuram). The plaintiff in this matter sued in 1926 Sadhuram on a promissory note and in that action he alleged as follows:

> The timber shop named Shriam Choturam and a ginning factory known as the Sadhuram Ginning Factory belong to the joint family of the defendant Sadhuram Choturam and his brothers Shriram, Girdhari, Asaram, Mangal and Gangaram, and the defendant Sadhuram Choturam is the karta of the joint family. He has borrowed the amount of the pronote as the karta of the joint family and for the joint family business. The present suit is therefore brought against the defendant as the karta of the joint family.

The suit resulted in an instalment decree and after the first two instalments were paid by Sadhuram, some instalments fell into arrears, and it became necessary to borrow some Rs. 6000 in order to pay off the instalments in arrears. Rs. 6000 was accordingly borrowed from a money-lender in Bombay on a promissory note. That creditor in turn started to press Sadhuram for payment and thereupon, in order to avoid another suit, two friends of the family were induced to pay off the creditor Rs. 6000 in return for a mortgage. That mortgage was effected by a deed (Ex. P-2) which all the brothers were executants of and in which we find the following recital:

> You have taken the havala for directly paying on our behalf, the amount of Rs. 6000 towards the amount of principal and interest up to this day, found due to Narayandas Bija Wallabhdas Daga, residents of Bombay, managing proprietors of the Shop Bhai Narayandasji Radhakisanji, Bombay, on the promissory note dated 7th December 1926 executed by Sadaramji out of us, on account of the loan, taken by him for the benefit of the joint, undivided Hindu family, and thus we have received the consideration in full.

Subsequently, further instalments fell due, and it became necessary to execute the decree obtained in the suit of 1926. In the course of execution proceedings the decree-holder in that suit sought to take in execution part of the property which the defendants to this suit say belongs to the joint Hindu family and as such cannot be reached in execution of a decree obtained against Sadhuramji personally. That objection was taken in execution proceedings, and was successful. Hence this suit. A number of reasons have been advanced by the appellant before us for holding that the learned trial Judge was wrong in the conclusion he arrived at that this debt is binding on the joint family property. The first is that there was no joint family, and the second, that there was no joint family property; the third, that Sadhuram was not the manager. As to those three questions, we think that there is abundant evidence, aided by presumptions, to support the conclusion of the learned trial Judge.

The next point is one of greater difficulty and may be stated as follows: In this case the suit was against Sadhuram. The decree that was obtained is not on the record, but it is said that it should be assumed, as Sadhuram was the defendant, the decree must be against Sadhuram and nobody else. Thus, according to the appellant, we are concerned with a personal decree obtained on a promissory note made by one member of a family, and such a decree cannot possibly be binding on the other members. As to that, in our opinion, for reasons which have been stated in First Appeal No. 39 of 1934,* it is a question of fact to a large extent whether a decree passed in a suit so framed is binding only upon the named defendant or is binding upon the family. Which conclusion is arrived at depends on whether it is a fair inference that though sued alone he is sued in his representative as well as in his personal capacity or whether he is sued only in his personal capacity. In the former case the decree will be binding upon those he represents as well as upon himself; in the latter case it will be binding upon him only. We think it right to issue warning that in matters of this kind it is very much the better course to take to join the members of the family and avoid the sort of disputes which have arisen in this case. We shall consider ourselves free in future to withhold costs from litigants who necessitate a number of actions instead of one in order to fairly clear the position as to whether the family is being sued or a member of the family is being sued. In this case, owing to the way the litigation in 1926 was launched we have had that litigation, we have had an objection in execution, and we have had this suit—all to dispose of a matter which could have been disposed of in one action. We are however of the opinion that as this has been the common practice in the past, it will not be fair to penalize the respondent in any way as to costs; but we issue the warning for the future.

Bearing in mind the form of the plaint, this is a case which, in our opinion, was expressly and clearly being brought against Sadhuram not in his personal but in his representative capacity, and we are accordingly of opinion that the decree could be executed against the joint family property. But as the members of the joint family were not joined in that earlier suit and consequently were not in a position to contest matters which might have to be contested before the joint family property could be taken in execution, it is right and proper that they should have an opportunity (such as they have had as a consequence of the objection taken in execution and in this suit) of litigating the question as to whether this was a debt binding on the family. That leads to the fifth point that has been taken before us, viz. that the decretal debt was not binding on the family. That in our opinion depends upon this: Was the money borrowed for the benefit of the family? We think it established in evidence that the money was borrowed for the purpose of carrying on a timber business. We think it established in evidence that the timber business was being carried on by these brothers jointly, that they were living together, messing together, showing all the outward signs of being members of a joint family. There is nothing whatever to show that the earnings from this business were going to one or more of them as distinct from all, and we think that it is a fair inference that the business was a joint family business whether or not it was one created out of an ancestral nucleus. The money therefore borrowed for it was borrowed for the benefit of a family business and hence for the family. That, in our opinion, is the general purport of the oral evidence. But it seems to us that that part of Ex. P-2 which we have already quoted makes much more probable the inference that this money was borrowed for the family. We can see no reason whatever why these adults who were executing a mortgage should have stated that the loan was taken by Sadhuramji for the benefit of the joint family unless in point of fact it was being taken by him for the benefit of the joint family. At any rate, taken in conjunction with the oral evidence and bearing in mind the fact that we are an Appellate Court, and the trial Court has come to the conclusion that the money was borrowed for the benefit of the joint family and that the loan was binding on the joint family, we should do very wrong if we came to the conclusion that that finding was such as must be reversed. On the contrary, we agree with it. It follows that the appeal fails and must be dismissed with costs.

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* *Reported in* (1938) 25 A I R Nag 225.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 433

GRUER J.

*Qamarali Syed Ali and others* — Applicants.

v.

*Mt. Tulsi, w/o Syed Abbas Musalman* — Non-Applicant.

**Criminal Revn. No. 66 of 1938, Decided on 5th April 1938, from order of Addl. Sessions Judge, Nagpur, D/- 24th January 1938.**

**(a) Criminal P. C. (1898), S. 202 — 1st part of Section does not apply to transfer — 2nd part includes transfer made under S. 192, but not made under S. 528.**

**The first part of S. 202 applies only to cases in which the Magistrate has taken cognizance himself** and does not include a case which is transferred. The transfer under S. 192 comes within the ambit of 2nd part of S. 202 but not transfer under S. 528, because where the language is clear it is not for a Court to probe into the mind of the legislator or to indulge in surmises such that the case of a transfer under S. 528 was overlooked when the Section was amended. [P 434 C 1, 2]

**(b) Criminal P. C. (1898), S. 202 — First Court taking evidence for complainant and issuing process — Second Court cannot direct preliminary inquiry under S. 202.**

A reference under S. 202 cannot be made after evidence has been taken for the complainant and process issued. The Magistrate cannot go back beyond the stage reached by his predecessor. A necessary preliminary to an inquiry under S. 202 is postponement of issue of process. Where that was not done by the first Court, which in fact procured the attendance of the accused, the stage for holding inquiry under S. 202 has therefore passed and cannot be revived subsequently : *9 Mad 282, Rel. on.* [P 434 C 2]

P. K. Salve — *for Applicants.*

**Order.**—The Additional Sessions Judge, Nagpur, acting under S. 436, Criminal P. C., has set aside the dismissal of a complaint under S. 203, Criminal P. C., and remanded the case for further inquiry. The case, which is a complaint one under S. 323 and other Sections of the Penal Code, was started in the Court of an Honorary Magistrate, First Class, Digras; on 6th September 1937, it was transferred to the Tahsildar and Magistrate, First Class, Katol, by the Additional District Magistrate, Nagpur. The first Magistrate had examined the complainant and had summoned the accused persons, who were present in his Court on 12th June 1937. The second Magistrate re-examined the complainant, and then directed a preliminary inquiry. The accused had not appeared in his Court and no process was issued against them. The question is whether in these circumstances it was open to the second Court to order inquiry under Sec. 202, Criminal P. C. The transfer was not made under S. 192, Criminal P. C., as the Additional District Magistrate did not himself take cognizance of the case: he in fact acted under S. 528, Criminal P. C. Now S. 202 can be applied by a Magistrate in two cases: first, on receipt of a complaint of an offence of which he authorized to take cognizance; and second, on receipt of a complaint of an offence which has been transferred to him under S. 192, Criminal P. C. For the present applicants, it is urged that the first clause is very wide, and when the case came to the second Magistrate on transfer he received it as a complaint of an offence of which he was authorized to take cognizance. It is urged that if the Section were otherwise interpreted, it would preclude the possibility of preliminary inquiry when a case was transferred by the High Court under S. 526, Criminal P. C., even before any action at all had been taken in the first Court. It is also said that in any case, there will be no prejudice to the complainant if a preliminary inquiry were ordered in such cases also. But, in the present case, the preliminary inquiry has been followed by dismissal, whereas under the procedure now ordered the complainant might possibly succeed: the complainant therefore might be prejudiced if the action of the second Court although illegal were still upheld.

The Additional Sessions Judge takes the view that 1st part of S. 202, Criminal P. C., cannot apply to a transfer, and 2nd part deals only with a transfer under S. 192 and therefore excludes the case of a transfer under S. 528, Criminal P. C. It is to be noted that all this part of the Section was amended in 1923 as the result apparently of the rulings to the effect that a Magistrate to whom a case had been transferred for disposal had no jurisdiction to direct an inquiry or investigation under this Section: 22 I C 422[1] and A I R 1920 Pat 563.[2] If 1st part of S. 202 were to include all cases of transfer then 2nd part would be redundant. Clearly, 1st part applies only to cases in which the Magistrate has taken cognizance himself. Although it is not proper to rely on Select Committees' Reports for interpretation of a statute, I may just note that the Select Committee of 1916 said that the words "transferred to him under S. 192" were inserted to cover cases which have been transferred to a Magistrate under S. 192 as well as cases of which he has taken cognizance himself.

Section 192 is specially mentioned. We must conclude that the other kind of transfer under S. 528 does not come within the ambit of S. 202. This is on the principle of *expressio unius est exclusio alterius.* It may be urged that there is no apparent reason for distinguishing between two kinds of transfers and allowing preliminary inquiry in the case of one only. But where the language is clear it is not for a Court to probe into the mind of the legislator or to indulge in surmises such that the case of a transfer under S. 528 was overlooked when the Section was amended. As the Section stands, I think that the interpretation of the Additional Sessions Judge is correct. As was held in 9 Mad 282[3] a reference under S. 202, Criminal P. C., cannot be made after evidence has been taken for the complainant and process issued. The Magistrate cannot go back beyond the stage reached by his predecessor. A necessary preliminary to an inquiry under S. 202 is postponement of issue of process. That was not done by the first Court, which in fact procured the attendance of the accused. The stage for holding inquiry under S. 202 had therefore passed and could not be revived subsequently. I therefore uphold the order of the Additional Sessions Judge and dismiss this application for revision.

D.S./R.K. *Application dismissed.*

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[1] Mohamad Imamuddin v. Debendra Nath, (1915) 2 A I R Cal 20=22 I C 422=15 Cr L J 70=18 C W N 95.

[2] Ram Barai v. Ram Pratap, (1920) 7 A I R Pat 563=57 I C 162=21 Cr L J 594=5 P L J 47.

[3] Sadagopachariar v. Ragavacharyar, (1886) 9 Mad 282=2 Weir 243.

## A. I. R. 1938 Nagpur 434

VIVIAN BOSE AND PURANIK JJ.

*Narayan Sakharam Patil — Plaintiff* — Appellant.

v.

*Co-operative Central Bank, Malkapur, and others — Defendants —* Respondents.

First Appeal No. 12-B and Second Appeal No. 184-B of 1934, Decided on 21st October 1937, from decree of Sub-Judge, First Class, Khamgaon, D/- 31st January 1934.

**(a) Hindu Law—Joint family — Execution — No objection by father — Son not party to decree can challenge it only to the extent necessary to protect his interest — Test is whether decree was obtained against father in representative capacity or personally.**

Where an award executable as a decree is being enforced against the father of a joint Hindu family who raises no objection whatever, the son who was not a party to the award can challenge it at the execution stage of the proceedings but only to the extent necessary to protect his own interests. He cannot be allowed to fight his father's battles though he may use the same weapons which his father used or might have used. The test is: was the decree obtained against the father personally or in a representative capacity: *Case law referred* [P 435 C 2, P 436 C 1]

**(b) Co-operative Societies Act (1912), S. 43 (1)—Rules framed under, R. 5—Award against member personally for debt against society cannot be passed.**

The bye-laws of a statutory corporation cannot travel beyond the powers vested in it by the Act. [P 437 C 1]

A Co-operative Society being a statutory corporation is a legal person and its debts are distinct from the liability of its members which members can only be reached by creditors of the corporation in winding up proceedings. Hence it is legally not possible for the Registrar to make an award against the members personally for a debt of the Society: *20 N L J 6; A I R 1931 Pat 321; A I R 1933 Bom 191; A I R 1934 Mad 181 and A I R 1925 Cal 203, Rel. on.* [P 436 C 2]

**(c) Hindu Law — Partition — Mere lists of property do not form instrument of partition—Test to determine whether they so amount stated.**

Mere lists of property do not form an instrument of partition and so would not require registration, but what the Court has to consider is whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relation contemplated : *A I R 1932 P C 55 and A I R 1923 P C 50, Rel. on.* [P 438 C 1]

**(d) Hindu Law—Partition—Ordinarily negotiations are carried on orally—But parties may agree that such oral concluded contract will not be binding till reduced to writing.**

Ordinarily, in case of transaction of partition negotiations are carried on orally and finality is also reached orally. But, if the parties intend that the oral contract so concluded should not be binding until embodied in a document, or even at some subsequent stage agree to substitute a written instrument for the oral agreement, then the ultimate contract is deemed to be contained in that instrument alone and no oral evidence of its terms can be given thereafter: *A I R 1937 Nag 289, Rel. on.* [P 438 C 2]

**(e) Deed — Construction — Oral evidence to determine intention of parties is not admissible if document is unambiguous.**

Oral evidence to determine the intention of the parties is certainly not admissible if the document is unambiguous; but if there is doubt then it is permissible: *A I R 1923 P C 50, Foll.* [P 439 C 1]

D. T. Mangalmoorti, N. T. Mangalmoorti and E. M. Joshi — *for Appellant.*

K. V. Brahma and B. R. Mandlekar — *for Respondent 1.*

**Judgment.**—This judgment will govern Second Appeal No. 184-B of 1934 as well as this case. The main point involved is the same in both cases. We will deal with First Appeal No. 12-B of 1934 first. Defendant 1 is the Co-operative Central Bank of Malkapur. It obtained an award against defendant 2, which is the Jawala Bazar Co-operative Society, from the Registrar of the Co-operative Societies under the rules framed in accordance with S. 43 (1), Co-operative Societies Act (Act 2 of 1912), in respect of a debt which the Jawala Bazar Co-operative Society owed the Central Bank. Defendant 3 is a member of the Jawala Bazar Society and a portion of his property has been attached in execution of this award which under R. 32 is executable in the same manner as a decree. Defendant 3 did not resist but the plaintiff, who is his son, objected claiming the property as his own and he also set up the usual pleas about the father's illegal and immoral actions. His objection was overruled and so he filed the usual declaratory suit out of which this appeal arises.

So far as the facts are concerned, we need not say much because in the view we take, it is unnecessary to go into them. We will content ourselves with stating that we agree with the conclusions of the learned Judge of the lower Court who found all these pleas about illegality and immorality, etc., against the plaintiff. We are left then with this problem. There is an award executable as a decree which is being enforced against the father of a joint Hindu family; the father raises no objection whatever; can the son who was not a party to the award challenge it at the execution stage of the proceedings? We think he can, but only to the extent necessary to protect his own interests. He cannot be allowed to fight his father's battles though he may use the same weapons which his father used or might have used. The position is peculiar. Ordinarily, an objector's interests are not bound up with those of the judgment-debtor and so he cannot challenge the decree in execution. All he can do is to prove that the property attached is his property and not the judgment-debtor's. But in a joint Hindu family the interests of the judgment-debtors and the objectors are often largely interlocked. The interests of all members of a joint Hindu family are usually co-extensive, though some of them may have greater powers than others. Of course, when the judgment-debtor represented, or can be assumed to have represented, the family, or the sons, as the case may be, and the decree or award was against him in that capacity, all would be bound, but when those conditions do not obtain, the others are not bound and they can fight the decree or award in exactly the same way as they could have done if they had been joined in the first instance, because the ground of their liability is the assumption that the father represented them and that therefore they were impliedly parties to the suit: apart from that their interests in the property, which is what the decree-holder wants to proceed against here, would clearly not be liable. They can only be reached through the father. Therefore the sons can show that the decree ought never to have been passed at all, not even against the father, if it is necessary for them to do so, as it is here. They cannot nullify its effects as against him; the decree will stand so far as he is concerned and his interests will be bound but that will not fetter the sons' rights to protect themselves in every way open to them.

The test is always the same though it can be posed in various ways: was the decree obtained against the father personally or in a representative capacity? The question was considered by their Lordships of the Privy Council in 51 Bom 450[1] at p. 453, which was a case of a father's decree and also in 36 All 383[2] at p. 387, a case of a manager. In the latter case, their Lordships of the Privy Council stated that the principle applies even to foreclosure actions. The matter was considered by one of us (Bose J.) in 31 N L R 352[3] and it was pointed out that even when the decree does not purport on the face of it to be against a manager in his representative capacity, that can be proved by extraneous circumstances and evidence. Execution proceedings against the family property have been successfully resisted on this score in Madras, Allahabad and Lahore in the following among other cases: 8 Mad 208,[4] 10 Mad 316,[5] 12 All 209,[6] 16 All 449[7] and 3 Lah 288.[8] The two Allahabad decisions are cases in which sons resisted execution in respect of the decrees passed against their fathers: *See also* 14 Pat 732[9] at p. 758. We are therefore clear that sons can resist in suitable circumstances, and if they can do that, then, they must be allowed to urge in their defence every ground which would have been available to them if they had been joined as parties in the first instance.

That brings us to the next question: could the fathers have resisted either at the execution stage or when the award was made? The award is in these terms:

> On 1st July 1930 the sum due from the Jawala Bazar Co-operative Society to the Bank was Rs. 36,383-13-9 . . . . I therefore in this my award order that the Jawala Bazar Co-operative Society consisting of the following members or past members all of whom are jointly and severally liable for the debts of the Society pay at once to the Malkapur Central Bank, etc.

Then follows a list of members and we find that the plaintiff's father, defendant 3, is among them. On the face of it, this is an award against the Jawala Bazar Co-operative Society alone and not against its members, but we are asked by the Central Bank to construe it as an award against the members as well. A Division Bench of this Court construing a similar award refused to do that in 20 N L J 6[10] and we have grave doubts whether we can do so either. Even if the language can be regarded as ambiguous and so construed in this sense, not that we think it can, but even if it can when read along with the various rules and circulars to be found in the Co-operative Manual, then the question arises whether it was legally possible for the Registrar to make an award against the members personally for a debt of the Society. We are clear that it was not.

As was pointed out in the decision we have just cited:

> A Co-operative Society being a statutory corporation is a legal person and its debts are distinct from the liability of its members which members can only be reached by creditors of the corporation in winding up proceedings.

This is also the sense in which the Act we are now considering, viz. the Co-operative Societies Act of 1912, and the rules framed under it, have been interpreted by other High Courts. There is for instance a Full Bench decision by five Judges of the Patna High Court in which the matter has been elaborately discussed, 11 Pat 174.[11] Similar conclusions have been reached in 57 Bom 319,[12] A I R 1925 Cal 203[13] and

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1. Lingangowda v. Basangowda, (1927) 14 A I R P C 56=101 I C 44=51 Bom 450=54 I A 122 (P C).
2. Sheo Shankar Ram v. Mt. Jaddo Kunwar, (1914) 1 A I R P C 136=24 I C 504 = 36 All 383=41 I A 216 (P C).
3. Madhodas v. Gangabai, (1935) 22 A I R Nag 14=154 I C 333=31 N L R 352.
4. Viraragavamma v. Samudrala, (1885) 8 Mad 208.
5. Guruvappa v. Thimma, (1887) 10 Mad 316.
6. Ramdayal v. Durga Singh, (1890) 12 All 209=1890 A W N 38.
7. Lachmi Narain v. Kunji Lal, (1894) 16 All 449=1894 A W N 169.
8. Mela Mal v. Gouri, (1922) 9 A I R Lah 200=66 I C 485=3 Lah 288.
9. Atul Krishna Roy v. Lala Nandanji, (1935) 22 A I R Pat 275=157 I C 53=14 Pat 732=16 P L T 393 (F B).

10 Shreelal v. Central Co-operative Bank of Piparia, (1936) 20 N L J 6.
11. Harihar Prasad v. Bansi Missir, (1931) 18 A I R Pat 321=134 I C 421=11 Pat 174=12 P L T 619 (F B).
12. Shamji Rakhama v. Mahadev Sadashiv, (1933) 20 A I R Bom 191=147 I C 1233=57 Bom 319=35 Bom L R 282.
13. Kudratulla v. Upendra, (1925) 12 A I R Cal 203=84 I C 999=40 C L J 254.

A I R 1934 Mad 181.[14] But it was contended that the Co-operative Societies in these Provinces differ from those in other parts of India because of bye-law 5 which it was said does not obtain elsewhere. But all that that bye-law says is this: "The members of this association are jointly and severally liable for all liabilities of the association." It says nothing which the Act itself does not say except to make it clear that the liabilities are unlimited. S. 4 contemplates societies with either limited or unlimited liability, so it is necessary to state either in the bye-laws or in the rules which of these two alternatives is being adopted, and that is all that bye-law 5 does. In the Patna case a similar provision was embodied in the rules, R. 13; here we find it in the bye-law, that is the only difference. In any case the bye-laws of a statutory corporation cannot travel beyond the powers vested in it by the Act. It is evident from the rulings we have just cited that a body corporate whose members can be made liable for its debts can only be created by statute; not even the Crown which can create corporations of another nature has that prerogative. Therefore either the statute must itself define this extraordinary liability or at the very least give the corporation the right to do so in its bye-laws. In no event can the liability of a member for the debts and engagements of such a corporation travel beyond the limits allowed by the statute.

That the statute now in question, namely the Co-operative Societies Act of 1912 does not itself give the creditors the right to proceed against a member personally is clear from the decisions on which we have relied. Such members can only be reached in liquidation. In the Patna case the Full Bench held that it was impossible to say that the rule with which they were dealing, (R. 13 in their case), which provides that the members are liable jointly and severally for the debts of the society, entitled the creditors to sue for execution against an individual member. We find it equally impossible to construe bye-law 5 in this sense. We have dealt with this somewhat fully without however covering the same ground as the cases we have quoted, partly because the matter was argued before us at length, but mainly out of deference to the authors of the various Government Circulars which endeavour to interpret the Act. We were referred to Ch. 11, Para. 1 (2) and 6 of Part. 2 of the Co-operative Manual issued by the Local Government, pp. 171-173 and told that the idea in these Provinces is that it is neither desirable nor necessary to kill a society by sending it into liquidation for the recovery of money which can easily be obtained by direct execution against the members personally.

We are by no means sure that these circulars mean this, but if they do, then we are of opinion that they go too far. As we have said neither the Act nor the rules confer any such powers; on the contrary the fact that it was felt necessary expressly to confer these powers on Government by S. 44 (2) indicates that they do not exist apart from the Act. It shows in addition that the intention of the Legislature was to confine these privileges to Government. Also a good part of Ss. 36-39 would then be otiose, for, there is no point in prescribing an elaborate procedure with numerous safeguards which a creditor must follow before he can send a society into liquidation if he is allowed to get all that he wants by the simple process of execution. It would all be pointless if the assets of a member could be reached by a creditor direct. We are thus clear on all hands, firstly, that the award in question was not against defendant 3 personally and secondly, that a member's liability, to make good the debts of a society does not arise till liquidation and that therefore thirdly no award in favour of a creditor for a debt of the Society can either be made or enforced against a member personally. It follows that there is no award which can be enforced against defendant 3 and much less against his son, the plaintiff. But we make it clear again that the son cannot fight his father's battle and that he is allowed to set up and establish these pleas in this case only in order to protect his own interests. He cannot obtain a declaration that the entire property is not liable to attachment and sale but only that his half share in it is not so liable. We repeat that we are not concerned here with the father.

In addition to these pleas the plaintiff also claimed that the property in dispute was his own separate property because of a partition effected between his father and himself on 30th June 1930. The debt in suit, so far as the father is concerned, did not crystallize as a debt till the date of the award which was on 8th October 1930. Till then there was only an inchoate liability. Of course in the view we take, there was no liability even then, but because the father has not contested the execution proceedings it has to be assumed as against him that a personal liability not binding on the sons was brought into existence on that date. But even so, the liability would be post partition and therefore the property assigned to the sons' share before this liability accrued would not be attachable. The lower Court shut out oral evidence of partition, that is to say of a division of the property, because it considered that the two receipts filed amounted to documents of partition and since they were unregistered they could not be used to prove a division of the property by metes and bounds and so it held that no oral evidence could be admitted either.

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[14] South Kanara Central Co-operative Bank, Ltd. v. Chikumudunur Co-operative Society, Ltd., (1934) 21 A I R Mad 181=150 I C 172=66 M L J 474.

It can be accepted at once that mere lists of property do not form an instrument of partition and so would not require registration, but what we have to determine here is whether these documents are mere lists or in themselves purport to "create, declare, assign, limit or extinguish .... any right, title or interest" in the property which is admittedly over Rs. 100 in value. The question is whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relation contemplated: 11 Pat 272[15] at p. 279 and 50 Cal 338[16] at page 345. Ex. P-13 which is one of these documents calls itself a receipt and recites :

> As of late you and I have not been pulling on smoothly, our joint estate having been privately partitioned through the mediation of panchas and with our consent, the share of each has been put in our respective possession, and we have become separate from each other. According to the said partition, the following moveable, immovable and other properties have been allotted to our respective shares.

So far there is no doubt that the document recites a past event. But it must be remembered that in every case in which a transaction is ultimately reduced to writing, negotiations have to be carried on ahead of time and that ultimately finality is reached, before the writing is commenced. There is ordinarily at that stage a complete contract, unless the intention of the parties is that it is not to be binding until formally embodied in a written instrument of title, and unless of course, writing or registration is required by law. Ordinarily, these negotiations are carried on orally and finality is also reached orally. But if the parties intend that the oral contract so concluded should not be binding until embodied in a document, or even at some subsequent stage agree to substitute a written instrument for the oral agreement, then the ultimate contract is deemed to be contained in that instrument alone and no oral evidence of its terms can be given thereafter. This has been dealt with by one of us (Bose J.) at length in Second Appeal No. 251 of 1935.[17] Therefore these recitals though relevant are not conclusive in themselves. Ex. P-13 after setting out in the utmost detail every item of property moveable and immovable allotted to one side then continues :

> I have received all the aforesaid moveable property in my possession. The said moveable and immovable property according to the list, has been allotted to me. I have also received possession of papers, etc. in this connexion. The following moveable and immovable property has been allotted to your share.

The words 'according to the list' are important. They cannot refer to the document itself, for, apart from the context making that unlikely, the document calls itself a receipt and not a list. The words therefore must have reference to a previous list. If so, then, what was the point in copying out that list again, amplifying it, signing it and attesting it with all the formality of an instrument of title ? Unless the document was intended to embody the actual will of the parties and be the sole repository of their intention, all this elaborate procedure would be pointless. The document then concludes :

> As all the debts incurred by me have been incurred personally for me, I have undertaken liability to pay all. I am fully responsible for all those debts, or the moveable and immovable property allotted to your share is not at all liable for all these debts. I have taken more land and site, and all the amounts to be received from others in my share and have undertaken liability for all the debts. You are therefore not responsible for any debts. Be it known.

The document is then signed and witnessed by no less than four persons. The other document is a counter-part and executed by the other side. We have not the slightest doubt that they were not just casual lists but were intended by the parties to embody, and do in fact embody, the actual and legally effective transaction of partition. This we find from a perusal of the document itself. It is perhaps a moot point whether oral evidence is admissible to determine the intention of the parties. It is certainly not admissible if the document is unambiguous, but if there is doubt, then it is permissible and that is what their Lordships of the Privy Council did in similar circumstances in 50 Cal 338[16] at p. 345. When we turn to the oral evidence, we find that those who were immediately concerned with the document referred to it as "the partition deed." P. W. 1, the scribe, refers to it in those terms and so does P. W. 7, who not only attested the document but was one of the panchas called to effect the partition. In the circumstances, there can be no doubt whatever as to what the documents were meant to be. We therefore uphold the finding of the lower Court.

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[15] Bageshwari Charan Singh v. Jagarnath Kuari, (1932) 19 A I R P C 55=136 I C 798=11 Pat 272=59 I A 130 (P C).

[16] Subramanian v. Lutchman, (1923) 10 A I R P C 50=71 I C 650=50 Cal 338=1 Rang 66 =50 I A 77 (P C).

[17] Imamali Abdul Kadar v. Rani Priyawati Devi, *reported in* (1937) 24 A I R Nag 289=171 I C 553=I L R (1938) Nag 31.

The effect of that is that the plaintiff is not able to prove that the property was divided by metes and bounds and that the property now under attachment fell to their share. That is enough for the present purpose. It is immaterial whether the documents can be used to prove a severance of status, for we have already held that the sons' interests are not bound. The decree of the lower Court is reversed and in its place a decree will now be drawn up declaring that the plaintiff's share in the plaint property is not liable to attachment in execution of the award No. 207/30 obtained by defendant 1 against defendant 3 and directing his share be released from attachment. As the plaintiff succeeds he will receive his costs from defendant 1 in both Courts. Defendants 2 and 3 will bear their own costs throughout. We desire to add that the pious obligation rule cannot obtain here because the father's liability which is sought to be enforced was created by the award itself and so cannot be regarded as an antecedent debt.

Turning next to Second Appeal No. 184-B of 1935, the facts are a little different but it can be decided along the same lines. The proceedings here are in execution and we are at the objection stage of the case. The decree-holder is the Central Bank of Akola and the judgment-debtor the Co-operative Society of Goregaon Khurd No. 2. The award which is couched in exactly the same terms as before was obtained on 15th January 1926 and in the list of members was one Namdeo who died on 16th November 1929. On 17th December 1930, the registration of the Society was cancelled and a liquidator was appointed. Execution is now sought against respondents 1 and 2 Purushottam and Krishna, who are the sons of Namdeo, under S. 50, Civil P. C. Their property has been attached. The liquidator has also been joined and is respondent 3 before us. In this case the Bank has lost, though it had succeeded in the first Court. The Bank is therefore the appellant here.

The ground on which its execution application was dismissed by the lower Appellate Court is that of limitation. S. 24 of the Act was applied and it was held that the application having been made more than a year after the death of Namdeo it was barred by time. It is not necessary for us to go into that question because for the reasons already given, we are of opinion that the award was not against Namdeo and could not have been executed against him personally: still less can it be executed against his legal representatives. The fact of liquidation cannot make any difference for, under S. 42, the liquidator is the only person competent to collect the assets of the Society from its members and distribute them rateably among the creditors. This appeal is therefore dismissed. The appellant will pay respondents 1 and 2 their costs. Respondent 3, who is the liquidator and whose interests we are told are the same as the appellants, will bear his own costs as also will the appellant.

V.B.B./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 439

NIYOGI J.

*Gajadhar Ramchandra Jatia and another — Defendants* — Applicants.

v.

*Rambhau Vishwanath Gharpure — Plaintiff* — Non-applicant.

Civil Revn. No. 36 of 1937, Decided on 21st December 1937, from decree of Court of Small Causes, Wardha, D/- 13th October 1936.

**Transfer of Property Act (1882), S. 108 (c) —Lessee of theatre sub-letting it to another person — Original lessor preventing sub-lessee from using theatre before expiry of sub-lease — Sub-lessee required to pay extra amount to secure fresh lease from lessor — Sub-lessee is entitled to sue lessee for damages and recover amount so paid, over and above other damages.**

Section 108 (c), T. P. Act, secures to the lessee the benefit of an unqualified covenant for quiet title. Where the lessee of a theatre grants a lease of the theatre to another person for a certain period but before the expiry of the period, the original lessor, the proprietor of the theatre who has previously served the lessee with a notice determining the lease, intervenes and prevents the sub-lessee from using the theatre and the latter is compelled to take a fresh lease from the proprietor on payment of an additional sum, there is a breach of covenant for quiet enjoyment, which entitles the sub-lessee to bring a suit for damages against the original lessee. The sub-lessee is entitled to recover from the lessee surplus amount which he was required to pay to secure a fresh lease from the proprietor over and above other damages : *A I R 1923 Cal 41, Rel. on.* [P 440 C 2 ; P 441 C 1]

N. K. Banerji — *for Applicants.*

W. B. Pendharkar—*for Non-Applicant.*

**Order.**—This is an application for revision of the judgment of the Small Cause Court, Wardha, in Civil Suit No. 582 of 1936. The applicants, who were defendants in the lower Court, were lessees of a theatre. On 26th August 1935, the proprietor of the theatre served a notice on the applicants determining their lease with effect from 10th September 1935 on account of default in payment of rent. On 5th September 1935, the applicants had granted a lease of the theatre to the non-applicant (plaintiff) for a period of 15 days, i. e. from 7th September 1935 to 21st September 1935 whereby they were to receive Rs. 24 as rent for the use of the theatre for 3 days between the 7th and 10th September and Rs. 56 for the remaining days. The non-applicant performed three plays without any hitch, but on the 11th September the proprietor intervened and prevented him from using the theatre with the result that he had to take a fresh lease from him for the period ending 21st September 1935 for Rs. 101. Consequently, the non-applicant sued the applicants for damages due to the disturbance of his possession by the proprietor and claimed reimbursement for the loss of his income and the surplus payment by him of Rs. 45 (Rs. 101—56) to the proprietor. The lower Court decreed the plaintiff's claim to the extent of Rs. 56-9-0 which includes the aforesaid sum of Rs. 45. The point for determination is whether the plaintiff could lawfully compel the defendants to compensate him for the extra amount of Rs. 45 which he had to pay to obtain a fresh lease from the proprietor and thus secure quiet enjoyment of the subject-matter of the lease. That raises the question as to the scope of the covenant for quiet enjoyment which is implied in every lease. S. 108 (c), T. P. Act, says:

> The lessor shall be deemed to contract with the lessee that he may hold the property during the time limited by the lease without interruption.

It is evident that every lease implies a covenant for quiet enjoyment which is designed to protect the lessee from interruptions not only by the lessor or his heirs and successors and assigns but also by persons claiming by title paramount. This provision in the Transfer of Property Act secures to the lessee the benefit of an unqualified covenant for quiet enjoyment. In England, where the covenant for quiet enjoyment is in the majority of cases an express covenant it may be either restricted, i. e. that the lessee shall peaceably hold and enjoy the demised premises during the term without interruption by the lessor or persons claiming through or under him, or absolute, in which case it extends also to interruption by persons claiming by title paramount : *see* Halsbury's Laws of England, Edn. 2, Vol. 20, pp. 238-39. This rule has been adopted in India as pointed out in 50 Cal 68.[1] There appears to be but little doubt that in the present case there was a breach of the implied covenant for quiet enjoyment when the plaintiff's possession was interrupted by the proprietor of the theatre in assertion of his paramount title.

The next question is what is the measure of damages ? The lower Court, in assessing damages, took into consideration the loss of earnings on the night of the 11th September as well as the payment of Rs. 45 to the paramount owner for securing a fresh lease. It is contended that the sub-lessor cannot be held liable to pay that sum on the ground that it was not the direct consequence of breach of the covenant for quiet enjoyment. I cannot assent to this contention. The sub-lessee, in consequence of his eviction by the paramount owner, lost the term of his sub-lease. To get it back, he had to pay Rs. 45 over and above what he had to pay to the sub-lessors. The sub-lessors had, under their covenant, bound themselves to indemnify the sub-lessees against disturbance of their possession by the paramount owner, as already shown and they were compelled to pay the aforesaid sum to the latter in order to avoid the loss inflicted on them by the sub-lessors' breach of their covenant. The direct and immediate consequence of the breach of the covenant was that the sub-lessees were obliged to pay the sum of Rs. 45 in order to put themselves in the position they would have been in had there been no breach of the covenant. Mayne on Damages at page 205 (Edn. 9) enunciates the law in this behalf on the authority of some English cases that where an action is brought against the occupier by a person with superior title and the former compromises by paying money, he is entitled in an action upon the covenant for title to recover the whole sum so paid. The present case clearly falls within the principles of the law so enunciated. The lower Court was therefore right in including Rs. 45 in assessing damages awarded by it. The application is dismissed with costs. Pleader's fees Rs. 10.

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[1] Naorang Singh v. A. J. Meik, (1923) 10 A I R Cal 41=70 I C 161=50 Cal 68 = 36 C L J 28 =27 C W N 71.

R.M./R.K. *Application dismissed.*

## * A. I. R. 1938 Nagpur 441

NIYOGI J.

*Mt. Sundera Bai w/o Shaligram — Plaintiff*—Applicant.

v.

*Pandharinath Ganesh — Defendant*— Non-applicant.

Civil Revn. No. 134 of 1937, Decided on 22nd December 1937, from decree of the Addl. Dist. Judge, Wardha, D/- 27th November 1936.

*** Contract — Damages — Contract of sale— Person agreeing to sell not disclosing existence of mortgage on property agreed to be sold — Even if mortgage was registered, one party agreeing to purchase cannot be saddled with constructive knowledge of mortgage and in case of breach of contract he is not liable in damages.**

The case of a vendee stands on a different footing from that of a person who is only bound by contract of sale. In view of the duty cast on the seller to disclose any material defect in the seller's title thereto, it may be reasonable to assume that the vendee after completion of a sale in his favour acquires full and correct knowledge as to the seller's title, but that cannot be said when the sale is in course of negotiation. [P 441 C 2; P 442 C 1]

Where therefore in a contract of sale the party agreeing to sell does not disclose the existence of mortgage on the property, even if the mortgage was a registered one the party agreeing to purchase cannot be saddled with constructive knowledge of the mortgage. In the absence of such knowledge, he must be presumed to have bargained for purchase of the property free from the encumbrance. Hence in case of breach of contract the party agreeing to sell has hardly any ground to claim damages from the defendant as if the latter had committed a breach of contract : *A I R 1928 Bom 427, Disting.* [P 442 C 1]

S. P. Kotwal and W. B. Pendharkar — *for Applicant.*

V. V. Kelkar — *for Non-applicant.*

**Order.**—This is a plaintiff's application in revision against the judgment and decree in Civil Appeal No. 36-B of 1936 decided by the First Additional District Judge, Wardha, on 27th November 1936. Under an agreement of sale dated 15th June 1932 for Rs. 3100, the defendant agreed to purchase some fields from the plaintiffs. On 8th May 1933 the defendant received a notice from the plaintiff inviting him to implement the contract. On 25th May 1933 the defendant replied expressing his willingness to pay the price and accept the sale deed but the contract for sale could not be carried out on account of a dispute regarding an incumbrance on the property which the plaintiff ought to have disclosed but did not. The plaintiff thereon sold the fields to the mortgagee for Rs. 3100 and sued to recover Rs. 500 which the defendant had agreed to pay in case of default on his part. Both the Courts below held that the plaintiff had concealed from the defendant the fact of the existence of an incumbrance to the extent of Rs. 3100 and dismissed the plaintiff's suit. The question which arises in this Court is whether the defendant is liable to be saddled with constructive knowledge of the incumbrance for the reason that the mortgage deed was a registered document. It is urged that inasmuch as Expln. 1 of S. 3, Transfer of Property Act, fastens knowledge of a registered instrument as from the date of registration on any person acquiring property comprised in the registered instrument, the defendant was precluded from contending that he had no notice thereof although in truth and in fact he had none : reliance is placed on 52 Bom 883.[1] That was a suit for rescission of a transfer and for a refund of the consideration. It was thus a case of the completed sale and not one of contract of sale. The case of a vendee stands on a different footing from that of a person who is only bound by contract of sale. Under S. 55 (1) the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is and the buyer is not aware and which the buyer could not with ordinary care discover. Under S. 55 (1) (g) the seller is similarly bound to discharge all incumbrances on the property existing on the date of sale except where the property is sold subject to incumbrances. In view of the duty cast on the seller to disclose any material defect in the seller's title thereto, it may be reasonable to assume that the vendee after completion of sale in his favour acquires full and correct knowledge as to the seller's title, but that cannot be said when the sale is in course of negotiation. Even on the assumption that the defendant had knowledge of the previous incumbrance, still there would arise the question whether or not the property which was contracted to be sold was intended to be sold free from incumbrances. On this vital question the parties had not come to any agreement as is clear from the fact that the contract of sale which is reduced to writing does not contain any reference to it. It is pertinent to notice that that document refers to two other charges but is silent as to the mortgage. If the defendant was made aware of the existence of the incumbrance, he would have been free to decide whether to purchase the property with or without the incumbrance. In the absence of such knowledge the defendant must be presumed to have bargained for purchase of the property free from the incumbrance. It appears to me clear that the plaintiff would not have been able to maintain his suit for specific performance successfully as he was himself guilty of a breach of an essential condition imposed on him by law. In these circumstances he has hardly any ground to claim damages from the defendant as if the latter had committed a breach of the contract. The application is dismissed with costs. Pleader's fees Rs. 25.

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[1] **Harilal Dalsukhram v. Mulchand, (1928) 15 A I R Bom 427=113 I C 27=52 Bom 883= 30 Bom L R 1149.**

D.S./R.K. *Application dismissed.*

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## * A. I. R. 1938 Nagpur 442

NIYOGI J.

*Jagannath Bijraj Marwadi and another* — Applicants.

v.

*Khwaja Fasiuddin and others* — Non-applicants.

Civil Revn. Nos. 119 and 106 of 1937, Decided on 21st January 1938, from order of the Addl. District Judge, Khamgaon, D/- 4th December 1936.

* **(a) Civil P. C. (1908), O. 21, Rule 100 — Objector in his application under O. 21, Rule 100 contending firstly that he was in actual possession despite formal delivery to decree-holder — He alternately praying that if legal effect of formal delivery to decree-holder be dispossession he (objector) should be given possession—Application is competent.**

When a party is in doubt as to his legal right to apply under O. 21, R. 100, Civil P. C., he can well invite the Court to pronounce its opinion and his competency to apply would depend upon the nature of the Court's opinion. When a party comes to Court with an alternative case, the Court cannot nonsuit him by refusing to consider his alternative case which gives him in reality a right of action. [P 443 C 2]

Where therefore an objector in his application under O. 21, R. 100 contends in the first instance that he was in actual possession of the property despite the formal transfer to the decree-holder and in the alternative prays that if it was found that he was dispossessed, the possession should be restored to him, the application is competent : *A I R 1933 Cal 144 and A I R 1923 Cal 601, Disting.* [P 443 C 1, 2]

**(b) Civil P. C. (1908), O. 21, Rule 100 — Co-owners entitled to joint possession can apply under O. 21, R. 100.**

Co-owners entitled to joint possession only, can invoke the provisions of O. 21, R. 100 and claim restoration of possession: *17 Bom 718, Dissented; A I R 1923 Nag 52 and A I R 1931 Cal 385, Rel. on.* [P 443 C 2 ; P 444 C 1]

**(c) Civil P. C. (1908), O. 21, R. 100—Decree for possession of fields against judgment-debtor entitled only to certain share in fields — Judgment-debtor's co-owners on application under O. 21, Rule 100 are not entitled to possession of entire set of fields but only to the extent of their share.**

Where a decree has been passed for delivery of possession of fields against judgment-debtor having only certain share in the fields, the judgment-debtor's co-owners on application under Order 21, R. 100 are not entitled to possession of entire set of fields but only to the extent of their share in the fields because the judgment-debtor is not their tenant but co-owner : *25 Bom 478 and 33 Cal 487, Disting.* [P 444 C 1, 2]

M. R. Bobde and J. R. Mudholkar — *for Applicants.*

M. B. Kinkhede and Abdul Razak — *for Non-applicants.*

**Order.** — This revision application and Civil Revision Application No. 106 of 1937 are directed against the order of the Additional District Judge, Khamgaon, in Miscellaneous Judicial Case No. 24 of 1930, dated 4th December 1936. These applications have been argued at inordinate length but the point for decision is simple. Stripped of all inessentials, the case is as follows : Jagannath and Murlidhar, who are applicants in Civil Revision No. 119 of 1937, obtained a final decree for foreclosure against Fayazuddin in Civil Suit No. 24 of 1930 and took possession of eight fields (comprised in final decree) on 23rd December 1935. The non-applicants in Civil

Revision No. 119 of 1937 filed an application under O. 21, R. 100, Civil P. C., on 22nd January 1936 complaining of their dispossession. They are admittedly co-owners of extensive properties including the eight fields, along with Fayazuddin, the mortgagor, and they had obtained a decree for partition in Civil Suit No. 38 of 1909. That decree remains unexecuted until to-day; but their title as co-owners to these fields cannot be and is not disputed. It is common ground, as found by the lower Court, that Fayazuddin had only 7/72 share and the applicants and some others had 65/72 share in the fields as in other property. Consequently Fayazuddin's mortgage affected only his share of 7/72 in the fields.

It appears that until 1932 Fayazuddin was in actual physical possession of all these fields but since then the appellants came into possession of them. Their possession is stigmatized by the applicants in Civil Revision No. 119 of 1937 as being collusive and nominal on behalf of Fayazuddin. On 23rd December 1935 the non-applicants (objectors) were in constructive possession of these fields through their lessees who, on 25th December 1935, attorned to the applicant. The non-applicants (objectors) in their application under O. 21, R. 100, Civil P. C., contended in the first instance that they were in actual possession of the fields despite the formal transfer to the decree-holders (applicants) on 23rd December 1935 and in the alternative prayed that if it was found that they were dispossessed, the possession should be restored to them. They succeeded in the lower Court in being restored to joint possession to the extent of 65/72 share only and the decree-holders were permitted to retain possession of 7/72 share. Both parties feel aggrieved by this order and they have filed these two revision applications.

On behalf of the decree-holders it is argued here that in view of the contention of the objectors that their possession persisted in spite of the formal delivery of possession by the process-server on 23rd December 1935, their application under O. 21, R. 100, Civil P. C., was incompetent. Reliance is placed on A I R 1933 Cal 144[1] and 50 Cal 311.[2] They are manifestly distinguishable, inasmuch as in these cases there was no alternative prayer as in the present case. In A I R 1933 Cal 144[1] the objectors were found to be in actual possession despite the formal delivery of possession. 50 Cal 311[2] was in no way different. In the present case the question was whether the legal effect of the procedure followed by the process-server was to deprive the objectors of their possession. The objectors did not plead inconsistent facts as argued here but they stated the bare facts and invited the Court to determine the legal result of the delivery of possession effected by the Court's officer. The lower Court found that the decree-holder obtained a symbolical possession, the legal effect whereof was to dispossess the objectors. When a party is in doubt as to his legal right to apply under O. 21, R. 100, Civil P. C., he can well invite the Court to pronounce its opinion and his competency to apply would depend upon the nature of the Court's opinion. When a party comes to Court with an alternative case, the Court cannot non-suit him by refusing to consider his alternative case which gives him in reality a right of action. The decree-holder's contention must therefore fail.

It is next contended that although Fayazuddin, the malguzar, was only a partial owner, he was in sole possession and that therefore the decree-holders were entitled to be put in possession to the exclusion of the co-owners of their mortgagor. There is no room for the contention in view of the fact that the objectors were solely in possession since 1932, i. e. for 3 years before the delivery of possession to the decree-holders. It is said that their possession was collusive as being on behalf of the mortgagor. There is no substance in the contention since the objectors were co-owners and as such they had an independent right to be in possession on their own account as well as on behalf of their co-owner, the mortgagor. Some strength for the contention is sought to be derived from 14 N L R 101[3] and 18 Cal 10[4] but they can have no application in the absence of any pleading and proof that the mortgagor acquired the right to exclusive possession by an agreement with his co-owners or by usage. The question now is whether objectors, who were co-owners, entitled to joint possession only, can invoke the provisions of O. 21, R. 100, Civil P. C., and claim restoration of possession at all. It was no doubt held in 17 Bom 718[5] that a person in joint possession is not in possession on his own account but that view was not followed in 18 N L R 206[6] and 58 Cal 55.[7] The view taken in 17 Bom 718[5] would render O. 21, R. 100 otiose so far as co-owners are concerned and I therefore find it difficult to agree with it. I hold that the objectors' application under O. 21, R. 100, Civil P. C., was competent.

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[1] Gostha Behari v. Indra Chandra, (1933) 20 A I R Cal 144=142 I C 152.

[2] Atarmoyi Dasi v. Ramananda Sen, (1923) 10 A I R Cal 601=84 I C 876=50 Cal 311.

[3] Jagannath v. Ramprasad, (1917) 4 A I R Nag 45=46 I C 272=14 N L R 101.

[4] Watson and Co. v. Ramchund Dutt, (1891) 18 Cal 10=17 I A 110=5 Sar 535 (P C).

Lastly it is urged that the objectors do not own the entire share of 65/72 and that they are not entitled to possession of those co-owners who have not applied. They were in possession of the non-applying co-owners as well, and the judgment-debtor had no interest in 65/72 share. The decree-holder is not therefore entitled to retain possession of any share beyond what was transferred to him by his decree. That disposes of Civil Revision No. 119 of 1937. Turning to the counter-application in revision, the contention is that the objectors ought to have been restored to possession of the entire set of fields. Reliance is placed on 25 Bom 478[8] and 33 Cal 487[9] in support of the contention. The first mentioned case lays down that a landlord who is in constructive possession through his tenants is entitled to apply under S. 335, Civil P. C., 1882=O. 21, R. 97, Civil P. C., 1908. In 33 Cal 487[9] the possession was not restored to the landlord (objector) because the judgment-debtor was his tenant on whom his decree was binding, and further it was held he was not entitled to actual possession when he had been deprived of his constructive possession only. That case is not an authority in the present case where the judgment-debtor Fayazuddin was not the tenant of the objectors but their co-owner. As the result of the decree passed in Civil Suit No. 24 of 1930, Fayazuddin's share passed to the decree-holders but not those of their judgment-debtor's (Fayazuddin's) co-owners. The objectors have no title to 7/72 share, and their possession of that share was on behalf of Fayazuddin. They are therefore not entitled to possession of that 7/72 share. The lower Court's order is correct and must be upheld. Both the revision applications are dismissed with costs. Pleader's fees in each case Rs. 50.

D.S./R.K. *Applications dismissed.*

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## ✻ A. I. R. 1938 Nagpur 444

GRUER J.

*Sahebrao Awadhut Maratha*
Appellant.
v.
*Emperor.*

Criminal Appeals Nos. 43, 52, 53 and 54 of 1938, Decided on 5th April 1938, from order of Addl. Sess. Judge, Buldana, D/- 19th January 1938.

**(a) Penal Code (1860), S. 120-B—S. 120-B applies to conspiracy to fabricate false evidence.**

As there is no express provision made in the Code for the punishment of conspiracy to fabricate false evidence, S. 120-B applies to such offence. [P 445 C 1]

✻ **(b) Penal Code (1860), S. 28 — Accused counterfeiting some coins and introducing them into another's house with sole intention that he (other person) should be thought as counterfeiter – Accused cannot be said to counterfeit.**

The deception meant in S. 28 is with regard to the nature of the coins. It is deception through the resemblance of the true coin with the false and it means that someone must be led to believe that the false coin is a true one. [P 445 C 1, 2]

Where the accused counterfeited some coins and introduced them into another's house with the sole object that he should be thought to be the counterfeiter and be prosecuted accordingly, the accused cannot be said to counterfeit the coins: *A I R 1937 Mad 711, Rel. on.* [P 445 C 2]

R. G. Rao — *for Appellant.*

W. R. Puranik, Advocate-General — *for the Crown.*

**Judgment.**— This order disposes also of Criminal Appeals Nos. 52, 53 and 54 of 1938. The four appellants and two others were charged with two offences, first, conspiracy under S. 120-B read with Section 195/232, I. P. C., and second, abetment of counterfeiting Queen's coins under Section 232/109, I. P. C. They were tried by jury, and the present appellants were convicted on both charges. Kashiram has been sentenced to five years' rigorous imprisonment and a fine of Rs. 100 on the first count and to a concurrent sentence of three years' rigorous imprisonment on the second. The other appellants, Tulsiram, Sahebrao and Sukhdeo get three years and Rs. 50 fine on the first count and concurrent sentences of one year each on the second. The written grounds of appeal, which are mostly out of place in a jury trial, are not pressed in argument. The appeals have been urged before me on two grounds only: first, that the charge under the first count is unsustainable as S. 120-B applies only where no express provision for the offence is made in the Code. The charge is one of entering into conspiracy to fabricate false evidence: Sec. 120-B read with S. 195, I. P. C. S. 120-B provides for punishment of criminal conspiracy. In some cases, where special provision is made such as in S. 121-A, this Section (120-B) would not be applicable, but in the present case it is, as there is no express provision made in the Code for the punishment of conspiracy to fabricate false evidence. It was unnecessary to mention Ss. 232 and 235, part 2, in this charge, and they may be considered superfluous. The accused have not been charged with criminal conspiracy in respect of the same offence which they are charged with abetting. In the first case the offence is the fabrication of false evidence, and in the second the counterfeiting of Queen's coins. Therefore the criticizm that S. 120-B and S. 109 are mutually exclusive is beside the point.

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[5] Cooverji Hirji v. Dewsay Bhoja, (1893) 17 Bom 718.

[6] Miss A. K. Singh v. Ramprasad, (1923) 10 A I R Nag 52=68 I C 174=18 N L R 206.

[7] Indubhushan Das v. Haricharan Mandal, (1931) 18 A I R Cal 385=132 I C 631=58 Cal 55.

[8] Nancharam v. Fakirchand, (1901) 25 Bom 478=3 Bom L R 58.

[9] Brajbala Devi v. Gurudas Mundle, (1906) 33 Cal 487=3 C L J 293.

The second objection appears to be well founded. It is alleged and proved that the accused counterfeited these coins and introduced them into Govinda's house with the sole object that Govinda should be thought to be the counterfeiter and be prosecuted accordingly. The plot however failed, as the police, who on information received searched the house and found these coins, came to the conclusion during investigation that they had been planted there by enemies of Govinda. The question is, whether in these circumstances the accused have counterfeited these coins. According to the definition in S. 28, I. P. C.:

> A person is said to 'counterfeit' who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

What is meant by the phrase 'to practise deception'? No doubt, the accused intended to practise some deception: they wanted to make the police believe that Govinda had manufactured these coins, but if the definition is carefully examined, it will be seen that the deception meant is with regard to the nature of the coins. It is deception through the resemblance of the true coin with the false and it means that someone must be led to believe that the false coin is a true one. That was not the intention of these accused. In fact, they did not wish the police or anyone to be deceived about the real nature of the coins at all. Therefore they did not counterfeit these coins. The case in A I R 1937 Mad 711[1] is precisely in point, and I agree with the reasoning therein. As the learned Sessions Judge misdirected the jury on this point, their verdict of guilty under the second count must be quashed. As the sentences however are concurrent, this will not afford any relief to the prisoners in the punishment awarded to them. The appeals are otherwise dismissed.

D.S./R.K. *Appeals dismissed.*

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[1] Velayudham v. Emperor, (1937) 24 A I R Mad 711=171 I C 951=(1937) 2 M L J 232 =I L R (1938) Mad 80=39 Cr L J 51.

## A. I. R. 1938 Nagpur 445

NIYOGI AND GRUER JJ.

*Provincial Government* — Appellant.

v.

*Shankar Gopal* — *Accused* — Respondent.

Criminal Appeal No. 87 of 1938, Decided on 21st May 1938, from order of the Addl. Sess. Judge, Buldana, D/- 1st February 1938.

**(a) Criminal Trial—Charge—If no prejudice has resulted to accused, error in charge cannot affect legality of trial.**

In a case of criminal misappropriation the charge was erroneous in respect of the date as well as the place of payment but there was nothing in the case to show that the accused was misled by the error. The correct date was mentioned to him in his examination under S. 364, Criminal P. C., and he did not raise any dispute as to the place where payment had been made:

*Held* that no prejudice having resulted to the accused, the error in the charge was immaterial and could not affect the legality of the trial. [P 446 C 2]

**(b) Penal Code (1860), S. 409 — Patwari receiving Rs. 5 in excess of land revenue actually due and retaining excess to himself — Onus is on him to prove that he refunded excess to rightful owner.**

A patwari received from an occupant of some fields Rs. 39 as land revenue. The actual amount payable as land revenue was only Rs. 34 and not Rs. 39. He credited only Rs. 34 and retained Rs. 5 with himself without the knowledge of the patel. He was tried on a charge of criminal misappropriation punishable under S. 409, I. P. C., and he pleaded at the trial that he had refunded the sum of Rs. 5 but did not specify the name of the person to whom it had been paid :

*Held* that all these facts considered together would lead to the natural inference that he wanted to make a wrongful gain for himself and cause wrongful loss to the rightful owner. The onus therefore shifted on to his shoulders to prove (1) that he received Rs. 5 in excess by mistake, and (2) that he paid it back to the rightful owner : *A I R 1934 Cal 532*; *A I R 1932 Oudh 145 and A I R 1936 Pat 350, Rel. on* ; *A I R 1934 Sind 22* ; *AIR 1936 Nag 160 and A I R 1928 Lah 382, Expl.*
[P 447 C 1, 2]

W. R. Puranik — *for Appellant.*

Dr. W. S. Barlinge — *for Respondent.*

**Judgment.**—This is an appeal by the Local Government under S. 417, Criminal P. C. The accused Shankar was a patwari residing at mouza Bhadola, District Buldana, Berar. He received on 31st March 1935, from one Hiralal, agent of Tulsiram, who was an occupant of some fields, Rupees 39-5-3 as land revenue. On 2nd April 1935 he credited Rs. 34-5-3 in the kird (i. e. ledger). The actual amount payable as land revenue was only Rs. 34-5-3 and not Rupees 39-5-3 as is evident from the irsal patti (P-12) which the accused himself had prepared, as required by law, on 18th March 1935. As he had received the amount in the absence of the patel, he was under law bound to hand over the entire amount to the patel or to credit it in the kird, but he, credited only Rs. 34-5-3 and retained Rs. 5 with himself without the knowledge of the patel. He was tried on a charge of criminal misappropriation punishable under S. 409, I. P. C., and he pleaded at the trial that he had refunded the sum of Rs. 5 but did not specify the name of the person to whom it had been paid. He examined two witnesses in defence to prove the alleged refund. The trying Magistrate disbelieved the defence witnesses and convicted the appellant and sentenced him to rigorous imprisonment for nine months in addition to a fine of Rs. 25. On appeal the learned Additional Sessions Judge, Buldana, was of the opinion that the burden lay on the prosecution to prove that the sum of Rs. 5 was not refunded by the accused and that it was not necessary for the accused to prove "to the hilt" his plea raised in defence.

The case raises the fundamental question whether the prosecution in the circumstances of the case was bound to prove that the accused did not refund the amount. If the onus lay on the prosecution, it must fail; if, on the contrary, it lay on the accused, he was bound to prove judicially that he had returned the sum to the person legally entitled to it. It was incumbent on the prosecution to prove that the accused committed criminal breach of trust in respect of that amount, that is to say, that he dishonestly misappropriated or converted it to his own use. It is clear from Expln. 1 to S. 403, I. P. C., that dishonest misappropriation for a time is a misappropriation within the meaning of that Section. If, from proved facts and circumstances, it appears that the accused retained the amount with the intention of causing wrongful loss to the rightful owner and wrongful gain to himself, the dishonest misappropriation must be regarded as proved. The facts alleged by the prosecution are : (1) that the accused collected Rs. 5 in excess with the knowledge or in circumstances in which he was bound to know that the sum was not legally due and recoverable, (2) that the accused, who collected the sum of Rs. 39-5-3 for the patel, was bound under the law to deliver the entire amount to him but he not only failed to do it but did not even inform him that he had retained the excess amount of Rs. 5, and (3) that under the law he was bound to credit the whole amount of Rs. 39-5-3 promptly in the kird and could not retain any part of it with himself.

There appears to be but little doubt that the money was received by the accused at his own house in Bhadola. That comes out very clearly in the cross-examination of Hiralal (P. W. 4), the man who had paid it. The charge is indeed erroneous in respect of the date as well as the place of payment but there is nothing in the case to show that the accused was misled by the error. The correct date was mentioned to him in his examination under S. 364, Criminal P. C., and he did not raise any dispute as to the place where it had been paid. No prejudice having resulted to the accused, the error in the charge is immaterial and cannot affect the legality of the trial. On the evidence it must be found that the accused received the amount at his own house. If so, there is hardly any scope for any mistake as to the actual amount due, as he could have consulted his papers. That he did so is clear from the fact that the receipt (Ex. P-4) contains the specific numbers of the fields in respect of which the payment was made. In the circumstances the inference is natural that the accused received the amount with the knowledge that he was getting Rs. 5 in excess. Under para. 23 of the Schedule of Patwari's duties annexed to the Rules made under the Berar Patels and Patwaris Law, 1886, the accused was bound to account for all the sums he received for Government in the absence of the patel and to make it over to the patel as soon as possible. Notwithstanding this clear rule, he neither credited Rs. 5 to Government nor made it over to the patel. When he retained the money with himself in the circumstances, the presumption under S. 114, Evidence Act, would be that it continued to remain with him. All these facts considered together lead to the natural inference that he wanted to make a wrongful gain for himself and cause wrongful loss to the rightful owner. In A I R 1934 Cal 532[1] it was held that when retention of money for a sufficiently long period is proved, the inference of temporary misappropriation is reasonable. In 6 Luck 435[2] it was held that the prosecution has only to prove that the accused has received the money, has acknowledged the receipt and has failed to show it in his master's accounts. This has been fully proved in the present case. In 15 Pat 108[3] the failure to account for the money proved to have been received was considered sufficient to justify the inference of misappropriation. In this case, there is the additional circumstance of the admitted retention of the money for such a long period as a month and a quarter.

The learned counsel for the accused invites our attention to the case reported in A I R 1934 Sind 22,[4] but in that case the accused had pleaded that he had paid Rs. 350 to one Vishindas and the latter admitted having received it. There is a reference to an unreported Bombay case as well as to A I R 1928 Lah 382.[5] In the unreported case it was observed that where the accused admitted having received the money alleged to have been misappropriated by him but defended himself by saying that he made it over to the proper person, the onus did not lie on him to prove payment but on the prosecution to prove non-payment. In A I R 1928 Lah 382[5] it was laid down that the onus lies on the prosecution to prove that the accused did not apply the money received by him for the purpose for which it was given. These cases ostensibly support the accused but in view of the facts of this case they go directly against him. In this case it is clear from the receipt, Ex. P-4, that he had received the whole amount as land revenue for Government. Hiralal rightly or wrongly paid it for that purpose and the accused knew that it was so. He failed to credit the whole amount although he had received it for that purpose.

The inference is inevitable that the accused dishonestly retained the money for his own use. The onus therefore shifted on to his shoulders to prove (1) that he received Rs. 5 in excess by mistake, and (2) that he paid it back to Tulsiram or his agent Hiralal. There is no evidence to disprove the fact that he had received the amount at his own house where he had all the necessary papers. The story of the return of the money does not stand scrutiny. The accused did not question Hiralal whether he or his master had not got back the amount. When he was examined under S. 364, Criminal P. C., he stated in vague terms "the excess amount was refunded after 1 or 1¼ month." He does not specify the name of the individual to whom it was paid. He examined two witnesses Gulabrao (D. W. 1) and Daulat (D. W. 2). The former witness only says that some three years before his deposition the accused had asked Daulat (D. W. 2) to call Tulsiram for taking back some amount of his land revenue lying with him and he left before Tulsiram arrived. Daulat (D. W. 2) states that the accused had received Rs. 4 or Rs. 5 in excess "about 3 or 4 years back" and that "about 3 or 4 years back" he was sent to call Tulsiram and that the accused "returned Rs. 3 or Rs. 4 to him." When he was pressed to be more definite as regards the time when the money was returned to Tulsiram, he said it "was about 4 years back." He was examined as a witness on 6th December 1937 and consequently the amount was paid back in 1933. That can hardly prove a payment alleged to have been made in May 1935. The lower Appellate Court misdirected itself on the point of law and was wrong in persuading itself that "the story of the refund may be true." The lower

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1. **Akshoy Chandra v. Emperor, (1934) 21 A I R Cal 532=1934 Cr C 792=151 I C 22=35 Cr L J 1279=59 C L J 306=38 C W N 467.**
2. **Shiam Sundar v. Emperor, (1932) 19 A I R Oudh 145=1932 Cr C 222=136 I C 810=33 Cr L J 343=6 Luck 435=9 O W N 216.**
3. **Emperor v. Chaturbhuj Narain Choudhury, (1936) 23 A I R Pat 350=1936 Cr C 543=164 I C 74=37 Cr L J 877=15 Pat 108=17 P L T 302.**
4. **Bhikchand v. Emperor, (1934) 21 A I R Sind 22=1934 Cr C 220=155 I C 489=36 Cr L J 318=28 S L R 84.**
5. **Pritchard v. Emperor, (1928) 15 A I R Lah 382=112 I C 850=30 Cr L J 18.**

Appellate Court relied on a passage in I L R (1937) Nag 38[6] at p. 42, viz:

> Of course when the accused gives a reasonable explanation which may be true, then, even though the Judge or the jury, as the case may be, is not convinced that it is true, he is entitled to acquittal.

The words "reasonable explanation" are important. Whether an explanation is reasonable or not is to be determined on the facts of each case. In the present case, where the accused deliberately recovered Rs. 5 in excess and did not apply it for the purpose for which it had been paid, can his explanation that it was returned to a person other than the person paying it, be regarded as "reasonable"? If the lower Appellate Court had only had the patience to read the whole judgment in the reported case, it would have easily seen the real meaning of the passage on which it relied. The result is that the lower Appellate Court's order of acquittal is set aside and the trying Magistrate's finding and sentence are restored. The case deserved a deterrent sentence as awarded by the Magistrate. The accused will surrender to his bail and serve the balance of his sentence and will pay the fine of Rs. 25 if he did not pay or if he withdrew it after payment.

D.S./R.K. *Appeal allowed.*

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[6] Bapurao v. Emperor, (1936) 23 A I R Nag 160 =1936 Cr C 715=173 I C 639=39 Cr L J 349=I L R (1937) Nag 38.

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## A. I. R. 1938 Nagpur 448

GRUER J.

*Syed Alli Gulam Alli and others* *Accused*—Applicants.

v.

*Emperor.*

Criminal Revn. No. 102 of 1938, Decided on 4th May 1938, from order of Sessions Judge, Nagpur, D/- 3rd January 1938.

**Criminal P. C. (1898), S. 107 (2)—Jurisdiction of Sub-divisional Magistrate is confined to his own sub-division.**

The appointments of Sub-divisional Magistrates by the District Magistrate are carried out under S. 12 of the Code and he in fact defines the local areas and restricts the Magistrates' powers to such areas. The jurisdiction of a Sub-divisional Magistrate is confined to his own sub-division. Hence Sub-divisional Magistrate of Tajabad in Nagpur Tahsil has no jurisdiction in respect of person residing in Nagpur City which is a separate sub-division of the Nagpur District with a Sub-divisional Magistrate of its own : *A I R 1921 All 123 and A I R 1935 Pat 131, Rel. on.* [P 448 C 2 ; P 449 C 1]

B. R. Mandlekar—*for Applicants.*

**Order.**—Applicant 1, Syedali, resides in Nagpur City and the other three reside in Tajabad in Nagpur Tahsil. Proceedings against them under S. 107 are going on in the Court of Mr. N. L. Verma, Sub-divisional Magistrate, Nagpur interior. It is contended in revision that Mr. Verma has no jurisdiction to try this case. S. 107, Criminal P. C., Cl. 2, last part, provides that no proceeding shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction. Now from the preliminary order it appears that the breach of the peace was apprehended at Tajabad which, it is conceded, is within the jurisdiction of the Magistrate, but applicant 1 resides in Nagpur City over which this Magistrate has, it is said, no jurisdiction. Nagpur City is a separate subdivision of the Nagpur District with a Sub-divisional Magistrate of its own.

The learned Sessions Judge, Nagpur, considers that as this Magistrate like others was appointed under S. 12, Criminal P. C., by the Local Government as a First Class Magistrate of the Nagpur District, therefore his jurisdiction extends over the whole of the District and has not been limited by the District Magistrate who under S. 12 can define local areas within which such Magistrates may exercise that power. He holds that the appointment of Mr. Verma as Sub-divisional Magistrate, Nagpur interior, is merely a matter of distribution of business under S. 17 of the Code and that the jurisdiction over the whole of the District remains untouched. According to that view every Magistrate would have jurisdiction all over the district so that a case under S. 145, for instance, could be filed in any Court. That would make the provision in S. 107 (2) quite unnecessary, as the Sub-divisional Magistrate would have as extensive local jurisdiction as the District Magistrate himself. It is surely of the essence of the sub-divisional system that a Sub-divisional Officer should be responsible for his own sub-division and for nothing beyond it. I find myself unable to agree with the learned Sessions Judge. It appears to me that the appointments of Sub-divisional Magistrates by the District Magistrate are carried out under S. 12 of the Code and he in fact defines the local areas and restricts the Magistrates' powers to such areas. It was held in 59 I C 554[1] that a Sub-divisional Magistrate has no jurisdiction to take cognizance of matters outside the local area within which the District Magistrate has appointed him to act. In A I R 1935 Pat 131,[2] it was similarly held that the jurisdiction of a Sub-divisional Magistrate was confined to his own sub-division.

It is unfortunate that the case has progressed so far before this objection was effectively raised. I must hold that it is good in law and the result is that the Magistrate is found to have no jurisdiction to proceed against applicant 1. The proceedings against him are quashed. If the district authorities still think it necessary to take steps against him, they must be taken before the District Magistrate or the Additional District Magistrate so empowered under S. 10, Criminal P. C.

D.S./R.K. *Proceedings quashed.*

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[1] Kunj Behari Lal v. Lanua, (1921) 8 A I R All 123=59 I C 554=22 Cr L J 122=19 A L J 77.

[2] Mahangu Lal v. Emperor, (1935) 22 A I R Pat 131=1935 Cr C 331=154 I C 873=36 Cr L J 580=16 P L T 347.

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## * A. I. R. 1938 Nagpur 449

NIYOGI J.

*Narayanchandra Mitra* — Applicant.

v.

*Surendranath Mukerjee, Official Receiver and another* — Opposite Party.

Civil Revn. No. 578 of 1937, Decided on 7th March 1938.

*** Civil P. C. (1908), S. 80 — Setting up of claim to property on behalf of estate which receiver represents is not act done by public officer in official capacity.**

The mere setting up of a claim to property, for example the debt due to insolvent, on behalf of the estate which a receiver represents cannot be considered to be an act purporting to be done by a public officer in his official capacity so as to attract the application of S. 80. Hence in a suit against Official Receiver who has set up such a claim, notice under S. 80 is not necessary : *Case law reviewed.* [P 451 C 2]

R. S. Dabir — *for Applicant.*

D. N. Choudhari — *for Opposite Party.*

**Order.**—This is a plaintiff's application in revision against the judgment of the Small Cause Court, Saugor, in Small Cause Court Case No. 237 of 1937 decided on 12th July 1937. The suit out of which this proceeding arises is of a somewhat abnormal character. The applicant filed an interpleader suit on the allegations that he owed Rs. 400 to R. D. Pathak on two promissory notes each of Rs. 300, and Rs. 100, and that defendant 1 who is the Official Receiver appointed by the Insolvency Court to take charge of Pathak's estate and defendant 2 who represented himself to be the assignee of the two promissory notes, each demanded payment of the debt to the exclusion of the other. The plaintiff declared his willingness to place the amount due by him at the disposal of the Court and prayed that the Court would decide the validity of their respective claims and discharge the plaintiff from the liability.

Defendant 1, the Official Receiver of Pathak's estate, raised the plea that the plaintiff ought to have given him a notice as required by S. 80, Civil P. C., and that as no such notice was given the suit ought to be dismissed. The lower Court affirmed that contention and dismissed the suit. The question is whether in the circumstances of this case the receiver was entitled to a notice under S. 80, Civil P. C. That Section lays down that no suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, etc. The plaintiff alleged no act purporting to be done by the Official Receiver in his official capacity as giving him the right to sue. The only reference to defendant 1 made in the plaint is in para. 3, where it is said that the amount due on the promissory notes is claimed by "both defendant 1 and defendant 2". The plaintiff founded his cause of action against the Receiver on the simple ground that he "claimed", that is demanded payment of the amounts due on the two promissory notes. Is this an act which can be said to be an act done by the Official Receiver in his official capacity? A number of authorities were cited before me on either side to show the circumstances in which the Courts held that notice under S. 80, Civil P. C., was or was not necessary. The cases which bear on the particular issue in the case will now be considered in some detail. In 47 All 291,[1] the suit was one for a declaration of title to some share in a house. The plaintiffs and their brother, Bihari Lal, jointly owned the house. Bihari Lal was adjudicated an insolvent and the defendant in that suit was appointed an Official Receiver under S. 57, Provincial Insolvency Act, 5 of 1920. He took charge in that capacity of all the

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[1] Murari Lal v. E. V. David, (1925) 12 A I R All 241=84 I C 739=47 All 291=22 A L J 1116.

insolvent's estate including the house. It was held that the suit was not maintainable against him without the requisite notice under S. 80, Civil P. C. In this case there can be no doubt or dispute that the taking charge of the insolvent's estate by the Receiver was an act done in his official capacity. In 57 Cal 1127[2] the suit was to recover from the Official Receiver Rupees 16,660 which were alleged to have become irrecoverable and been lost by the wilful default and gross negligence of the Official Receiver to collect the same as being arrears of rent due from one Ramnarayan Jalan. It was held that in view of S. 3, General Clauses Act (10 of 1897), the word 'act' occurring in S. 80, Civil P. C., was wide enough to include an illegal omission. 51 Bom 725[3] dealt with a case against the Secretary of State and the Collector and District Magistrate of Nasik. The plaintiff there questioned the validity of certain notification issued by the Bombay Government and prayed for a permanent injunction restraining all executing action thereunder. Their Lordships of the Privy Council observed that S. 80, Civil P. C., was express, explicit and mandatory and that it admitted of no implications or exceptions and that a suit in which inter alia an injunction is prayed is still a suit within the words of the Section and that to read any qualification into it is an encroachment on the function of legislation. Their Lordships overruled the contention that the Collector's threatened enforcement of payment in pursuance of the notification was not an act done in his official capacity and pointed out that the act which was in reality complained of was the order already completed and issued, though the act to be restrained thereby was something apprehended in the future. In this case also there was no question raised or decided such as the one which arises in the present case. The cases so far examined do not afford any guidance to the decision of the question in the present case.

In this case the issue is whether the mere claim asserted by the Official Receiver as representing Pathak's estate was an act such as is contemplated in S. 80, Civil P. C. The claim made by the Official Receiver was nothing but an expression of a belief that Pathak's estate was entitled to receive the money due on the promissory notes or to put more emphatically, an assertion of a right of the original creditor to the exclusion of defendant 2 who claimed to be the assignee. Was this an "act", and was this done by the Receiver in his official capacity, or as one representing the estate? In 11 Mad 317[4] the suit was to recover money due on a promissory note executed by a deceased zamindar out of the estate of the deceased and of his son, the defendant, who was a minor under the Court of Wards and represented by the Collector having been appointed his guardian ad litem. The Collector contended that he was entitled to notice before suit under S. 424 of the old Code of Civil Procedure corresponding to S. 80 of the Code of 1908. It was held that as the suit was not one instituted against the Collector in his official capacity and no cause of action against him was stated in the plaint and no relief was prayed for against him and further that no personal decree was sought for against him, the Collector was not entitled to notice for the simple reason that he failed to pay the amount due on the promissory note. It was pointed out that mere failure to pay was not an act or omission. This case was followed in 13 Bom 343[5] where the Collector was impleaded in the suit not in respect of any alleged illegal act done by him but on the application of minor's personal guardian only to protect the minor's title.

In 7 Cal 499[6] it was pointed out that the provision requiring notice to be given to a public officer was to give them time and opportunity of making amends before the matter is brought into Court when it is alleged that they have committed an illegality in the discharge of their duties. In 48 All 821[7] it was held that S. 80, Civil P. C., would not apply to a suit against an Official Receiver where the suit was really a suit to establish and realize a charge over property and the Official Receiver was impleaded not on account of any specific action taken by him in respect of the property concerned but merely because he was for the time being in charge of it. In this case also, all that was alleged in the plaint against the

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[2] Prasaddas Sen v. K. S. Bonnerjee, (1931) 18 A I R Cal 61=130 I C 903=57 Cal 1127.

[3] Bhagchand Dagdusa v. Secretary of State, (1927) 14 A I R P C 176=104 I C 257=51 Bom 725=54 I A 338 (P C).

[4] Anantharaman v. Ramasami, (1888) 11 Mad 317.

[5] Bhau Balapa v. Nana, (1889) 13 Bom 343.

[6] Shahebzadee Shahunshah Begum v. Fergusson, (1881) 7 Cal 499.

[7] Skippers and Co. Ltd. v. E. V. David, (1927) 14 A I R All 132 = 99 I C 138 = 48 All 821 = 24 A L J 1067.

Official Receiver was that he had failed to pay the plaintiff in that case some balance of purchase money of some business. In A I R 1932 All 657[8] it was pointed out that notice was not necessary in every case in which a public officer is impleaded as a defendant, unless the suit is in respect of any act purporting to be done by him in his official capacity, that is to say, that the plaintiff's cause of action is essentially based on some act attributable to the public officer. In A I R 1930 Bom 11[9] the suit was to enforce a mortgage and it was held that it having been filed against the receiver as one representing the interest of the mortgagor by reason of operation of law and no relief against him personally being sought for, no notice to the receiver was necessary. The plaintiff in that case tried to make some capital out of the fact that the receiver had sealed the house in spite of the order that the plaintiff's possession should not be disturbed, but he was overruled on the ground that the plaintiff had not asked for damages against the Receiver for taking illegal possession of the house.

In 25 Bom L R 378[10] the plaintiff there brought a suit for a declaration of his title to get possession of the land without giving notice to the Official Assignee, because he had objected to the entry of the plaintiff's name in the Record of Rights, as being the purchaser of some land from the insolvent. It was pointed out that if the Official Assignee had taken up a certain attitude with regard to the property in question it was not such an act as was contemplated by S. 80 of the Code. Their Lordships of the Bombay High Court held that the suit could be entertained in the absence of S. 80, Civil P. C. The point appears to me to have been put beyond any controversy by their Lordships of the Privy Council in 61 Cal 470.[11] That was a suit for enforcement of a mortgage which had been executed by a manager of an estate, appointed under S. 95, Ben. Ten. Act. Their Lordships observed that mere omission to pay either interest or principal could not be treated as an act purporting to be done by the manager in his official capacity; although under S. 3, General Clauses Act, 1897, an act includes an illegal omission, the mere omission to pay the debt was not an illegal omission. The observations of their Lordships bearing on the question arising in the present case will repay quotation :

> The manager for the time being no doubt had an option to pay in order to save the sale, but failure to exercise an option is not in any sense a breach of duty. The appellant made no claim against respondent 1 personally. He was there only as representing the estate of which the sale was sought. In their Lordships' opinion, such a suit is not within the ambit of S. 80 and no notice of suit was required : 61 Cal 470[11] at p. 475.

It is clear from the cases reviewed above that mere setting up of a claim to property, as the debt in this case is, on behalf of the estate which a receiver represents cannot be considered to be an act purporting to be done by a public officer in his official capacity so as to attract the application of S. 80, Civil P. C. The result is that the lower Court's decree is set aside and the case is sent back to the lower Court for further trial. The non-applicants will pay the costs of the applicant in this revision. Pleader's fee Rs. 15.

D.S./R.K. *Revision allowed.*

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## A. I. R. 1938 Nagpur 451

GRILLE J.

*Gendsingh Tularamsingh Chatri* — *Plaintiff* — Appellant.

v.

*Gowardhan Tukaram Marar and another* — *Defendants*—Respondents.

Second Appeal No. 536 of 1935, Decided on 30th November 1937, from appellate decree of Dist. Judge, Chhindwara, D/- 9th September 1935.

**Contract Act (1872), S. 65 — Occupancy tenant executing deed of surrender to co-sharer malguzar in respect of field—Transfer amounting to transfer of occupancy rights—Landlord getting transfer set aside under S. 13, Tenancy Act, and entering into possession — Transferee co-sharer is not entitled to recover from lambardar under S. 65 the amount of consideration paid by him.**

**Where an occupancy tenant executes a deed of surrender in respect of a field amounting to a transfer of occupancy rights, in favour of a fractional co-sharer in the village and the lambardar gets the transfer set aside under S. 13, C. P. Tenancy Act, and enters into possession of the field the transferee co-sharer, whatever remedies he may have against the transferring tenant, is not entitled to recover under S. 65, Contract Act, from the lambardar the amount of the consideration paid by him. Having knowingly entered into a voidable contract with the object admittedly of cultivating the land himself, he has no remedy whatever under S. 65, Contract Act, against the lambardar,**

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[8] Mt. Shiyam Dei v. Bankey Lal, (1932) 19 A I R All 657=139 I C 484=1932 A L J 797.

[9] Kashi Bai v. Chunilal, (1930) 17 A I R Bom 11 = 122 I C 857 = 31 Bom L R 1199.

[10] Damodar v. Govindji, (1923) 10 A I R Bom 392 = 73 I C 240 = 25 Bom L R 378.

[11] Rebatimohan Das v. Jateendramohan Ghosh, (1934) 21 A I R P C 96 = 61 I C 171 = 61 Cal 470 (P C).

who has enforced the statutory right which he had the option to exercise. The landlord was not a beneficiary under the voidable contract, was not mentioned in it and was not a party to it. The fact that he did derive benefit by his action in avoiding the contract is immaterial. He received no benefit under the terms of the contract himself on which the plaintiff co-sharer is entitled to claim compensation from him : *A I R 1926 Nag 310, Ref.; A I R 1926 Nag 345, Disting.* [P 452 C 2; P 453 C 1, 2; P 454 C 1]

M. B. Kinkhede and A. R. Kulkarni — *for Appellant.*

K. K. Gandhe — *for Respondents.*

**Judgment.**—This is a second appeal by the plaintiff whose claim was decreed in the trial Court, and the decision was set aside in first appeal. There were three parties in the suit. An occupancy tenant had executed a deed of surrender which, it is undisputed, amounted to a transfer of an occupancy right to the plaintiff who is a fractional co-sharer in the village to the extent of 5½ pies for a consideration of Rs. 1550. The lambardar, who is the present respondent 1, under S. 13, Tenancy Act, had the transfer set aside in the Revenue Courts and entered into possession of the field. The plaintiff, the transferee, then sued the lambardar and the transferor tenant for the refund of Rs. 1550 under the provisions of S. 65, Contract Act. The trial Court held that he was entitled to a refund not from the transferring tenant who had actually received the money, as it held that the tenant had lost possession of the land and was in no way responsible for the dispossession and loss to the plaintiff and had not himself personally improved his own position in any way, but from the malguzar who, the trial Court held, had received advantage under a voidable contract in that he had obtained for nothing what he would otherwise have to pay for, and that he was bound to make restitution. The plaintiff's claim was then decreed to the extent of Rs. 1550 against the malguzar but dismissed against the transferring tenant.

The lambardar filed an appeal. The plaintiff also filed a cross-objection in respect of the order of the trial Court regarding costs which were directed to be borne as incurred. In neither the cross-objection nor the appeal was the transferring tenant made a party. The suit against him therefore stood dismissed, and the lower Appellate Court rightly held that it was unnecessary to consider the correctness of the decision of the trial Court in respect of his liability towards the plaintiff, although he had in fact received the money. The appeal was allowed on the ground that, although S. 65, Contract Act, applied and not S. 23, as had been argued on behalf of the lambardar, nevertheless the plaintiff could not enforce the terms of S. 65, Contract Act, against the lambardar because, whatever benefit the lambardar had received, it had not been received under the contract. The appeal succeeded and the plaintiff's claim stood dismissed in toto. He has now preferred a second appeal.

It is argued that the lower Appellate Court has taken an unduly narrow view of S. 65, Contract Act, and that, as it was the action of the plaintiff himself which resulted in the lambardar invoking the aid of the Tenancy Act and thus obtaining free possession of a field for which he would otherwise have had to pay a surrender value, he is entitled to recoup himself from the lambardar when the latter has dispossessed him. It is also contended that the plaintiff being a co-sharer has stronger equities in his favour than a stranger to the proprietary body would have, in that he is entitled to the extent of his share to participate in acquisitions made by the proprietary body, and that it has been held, in the case of a co-sharer individually acquiring a holding and the rest of the proprietary body suing to have the share included in the khudkhast of the proprietary body, that they are bound to pay a proportionate contribution to the expenses of the acquiring co-sharer : 10 C P L R 37[1] and 22 N L R 86.[2] It is also contended that the statutory remedy of the landlord whereby he can avoid a transfer of this nature under the terms of the Tenancy Act merely provides the landlord with a speedier remedy than the one he had before this provision was introduced in 1898 and saves the expense of going to the Civil Court, and that the statute cannot abrogate the privilege of a co-sharer to claim contribution when the proprietary body wishes to absorb the khudkasht acquired by a fractional co-sharer.

The contentions raised on behalf of the appellant are not tenable. His claim is that he should be compensated as he has been instrumental in enlarging the rights of the proprietary body. This view is incorrect. He knowingly entered into a voidable contract with the object admittedly of cultivating the land himself, and the lambardar

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1. Ganpat Rao v. Keshav Rao, (1897) 10 CPL R 37.
2. Waman Rao v. Shrawan, (1926) 13 A I R Nag 345=94 I C 941=22 N L R 86.

as representing the proprietary body avoided the contract under S. 13, Tenancy Act, within the statutory period of limitation. The plaintiff certainly cannot claim that he is the beneficial instrument of profit to the malguzar and that he is in equity entitled to compensation therefor. The Tenancy Act lays down that, when an occupancy tenant has transferred his holding otherwise than in the manner permitted by S. 12 of the Act, then either any person who, if he survived the tenant without nearer heirs, would inherit the holding or the landlord of such tenant may apply to the Revenue Officer to be placed in possession. This the landlord did and he was placed in possession, and I fail to see how the landlord acting under the statute should be liable to pay compensation to a fractional co-sharer for acting within his rights any more than he would be held liable to pay compensation to a stranger. Under the provisions of S. 13, Tenancy Act, either the heir of the transferring tenant or the landlord can apply for possession. If in the present case the application had been made by a reversioner, let us suppose for instance a nephew, it cannot be supposed for one moment that the plaintiff who was dispossessed would be able to recover compensation from the reversioner nephew. The lambardar has entered into possession under the same authority as a reversioner would have entered into possession and is no more liable to the plaintiff for compensation than the reversioner would have been.

In fact the plaintiff's position as a co-sharer has not entered into his pleadings at all. He does not claim for a refund of the consideration less a sum proportionate to his share in the village, which he might have urged if the proprietary body had sued him for possession, but he claims compensation for the whole amount; that is to say, his claim is founded on contract and specifically on S. 65, Contract Act, and not on any other principle of law. His plea that the lambardar had consented to the transfer and had subsequently resiled from his consent and that he was entitled to compensation on that account has been held disproved in both Courts below. There is therefore nothing on which the plaintiff can fasten his claim. The decision in 22 N L R 86[2] in which he relies on the passage,

> He (the lambardar) has chosen to sue in the Civil Court and, while nominally impeaching the transfer as illegal, he in reality founds his case upon it and claims proportionate possession from the defendants without paying his share of the cost of acquisition. In other words, he is attempting to obtain free in this suit what in any ordinary circumstances he would have to pay for,

does not help him in any way. A distinction between that case and the present one is contained in the sentences immediately preceding the passage quoted above:

> Now how do the equities stand in a case like the present? The lambardar did not attack the transfer with the special weapon the Tenancy Act put ready to his hands.

This is exactly what the lambardar has done in the present case, and having entered into possession by virtue of the statute, it was unnecessary for him to sue the plaintiff for possession. It is clear that the learned Officiating Judicial Commissioner regarded this as a vital distinction. The plaintiff is precluded, by his failure to join the transferring tenant as a party, from arguing what remedies he has, if any, against the transferring tenant who has received the money; against the malguzar who has enforced the statutory right which he had the option to exercise on a breach of the Tenancy Act, he has no remedy whatever under S. 65, Contract Act. The landlord was no beneficiary under the voidable contract, he is not mentioned in the contract, he was no party to the contract. It is true that he has obtained possession on behalf of the proprietary body of a field without payment. Had the tenant surrendered to his landlord, no doubt some terms between the landlord and the tenant would have been arranged; but it cannot be supposed that the figure would have approached the sum which has been found to have been paid for the transfer. Findlay O. J. C. in 22 N L R 86[2] quoted with approval the remarks of Baker J. C. and Prideaux A. J. C. in A I R 1926 Nag 310[3] concerning the desirability of checking attempts to evade the tenancy law, although he held that, where the lambardar had not availed himself of the provisions of the Tenancy Act but had sued a fractional cosharer for joint possession, he was bound to pay a proportionate cost of acquisition. Here there has been a definite attempt to evade the tenancy law which has been avoided under the provisions of the Tenancy Act itself. The plaintiff is not suing for joint possession; when the question of joint possession arises if such joint possession is refused, he is entitled to joint possession free of cost as there has been no cost of acquisition; but the plaintiff certainly cannot obtain full compensation for the money which he has lost on a voidable contract which has been avoided by the terms of the Tenancy Act, from a person who was not a party to the avoided contract and had received no benefit under the contract but who in fact avoided the contract himself. The fact that he did derive a benefit by his action in avoiding the contract is immaterial. He received no benefit under the terms of the contract himself on which the plaintiff was entitled to claim compensation from him. The result is that the appeal fails and is dismissed with costs.

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[3] Zingoba v. Kawtikabai, (1926) 13 A I R Nag 310=93 I C 106.

R.M./R.K. *Appeal dismissed.*

## A. I. R. 1938 Nagpur 454

NIYOGI J.

*Seth Balkisan and another*—Applicants.

v.

*Bhanuprasad Jamnaprasad Agarwala and another* — Non-Applicants.

Civil Revn. No. 73 of 1937, Decided on 12th November 1937, from order of Dist. Judge, Raipur, D/- 4th November 1936.

**(a) Provincial Insolvency Act (1920), S. 54 —Three months period contemplated in S. 54 runs from date of registration of transfer deed.**

The three months period contemplated in Sec. 54 runs from the date of registration of the transfer deed because it is by registration that the transfer becomes effective and the title passes from the transferor to the transferee : *A I R 1937 Nag 197, Foll.* [P 454 C 2]

**(b) Provincial Insolvency Act (1920), S. 54 —Period of three months for making application under S. 54 expiring during vacation— Application presented on opening day—It is competent under S. 4, Limitation Act, and S. 10, General Clauses Act.**

Where the period of three months prescribed for making an application under S. 54, Provincial Insolvency Act, expires during the vacation and the application is presented on the day on which the Court reopens after the vacation, such application is competent under S. 4, Limitation Act, and S. 10, General Clauses Act. The application is governed by principles bearing on the construction of statute of limitation as contradistinguished from a fiscal enactment such as the Court-fees Act : *A I R 1931 Rang 209 and A I R 1934 Mad 294, Rel. on ; 9 Mad 134, Disting.* [P 455 C 1, 2]

V. V. Kelkar and M. R. Bobde—*for Applicants.*

B. N. Bannerji and M. N. Jog —*for Non-applicants.*

**Order.**—This is an application to revise an order of the District Judge, Raipur, in Civil Appeal No. 28 of 1935, passed on 4th November 1936, on a matter arising out of insolvency proceedings. The facts are that one Banmalilal, non-applicant 2, was adjudicated insolvent on 11th April 1933, at the instance of Bhanuprasad, one of the creditors. On 16th June 1932, (the date on which the Court reopened after the vacation) that creditor, who is non-applicant 1 here, applied to the Insolvency Court for annulment of a mortgage executed on 13th December 1931 by the insolvent in favour of the applicants. That mortgage deed was registered on 10th March 1932. The ground for annulment was that the mortgage was in the nature of a fraudulent preference of one of the creditors of the insolvent to the prejudice of the others. The mortgage was annulled by the Insolvency Court and that Court's order was upheld by the lower Appellate Court.

The lower Appellate Court's order is attacked in this Court on three grounds. The first is, that the application which was filed on 16th June 1932 was invalid, as it was not presented within three months from the date of the execution of the mortgage deed, notwithstanding that it was within three months from the date of the registration. The second ground is that even on the assumption that the three months period commenced to run from the date of registration, the application, not having been filed within three months from that date was incompetent. And the third ground is that the Court's error as to the onus of proof vitiated the finding of fraudulent preference. As to the first ground this High Court reviewed the various authorities on the subject and pronounced its opinion in I L R (1937) Nag 403[1] that the three months' period contemplated in in S. 54, Provincial Insolvency Act, runs from the date of registration of the transfer deed, because it is by registration that the transfer becomes effective and the title passes from the transferor to the transferee. I am in entire agreement with the view taken in that case. It is evident that if the period of three months were taken to commence on the date of the execution of the transfer-deed, then, it would be open to the insolvent and the colluding creditor to defeat other creditors by merely delaying registration of the document for more than three months. The word 'transfer' means a valid and effective transfer which could only take place after registration and not by mere execution of document. To put a construction such as is pressed by the learned counsel for the applicants, namely that the word 'transfer' contemplates only the execution would obviously result in rendering S. 54, Provincial Insolvency Act, nugatory. There is therefore no force in the contention.

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[1] G. W. Godbole v. Marotisa, (1937) 24 A I R Nag 197=169 I C 683=I L R (1937) Nag 403.

As to the second ground the question arose in a case reported in 9 Rang 150[2] where it was held that by reason of the express terms of S. 29 (2) (a), Limitation Act, S. 4, Limitation Act, applies to applications made under the Provincial Insolvency Act. That is also the view of the Madras High Court in A I R 1934 Mad 294.[3] Even assuming that Sec. 29 (2) (a), Limitation Act does not apply, S. 10, General Clauses Act, provides that where any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open. S. 4, Limitation Act, and S. 10, General Clauses Act, embody the well-known principle *actus curiæ neminem gravabit* (the act of the Court shall prejudice no man). It is obvious that the circumstance that the Court was closed on the last day of limitation cannot destroy or impair the right of the applicant to file his application on the day the Court reopens. But it is urged that the expression "a petition presented within three months after the date thereof" is only descriptive of the application and that it does not lay down any period of limitation. I am unable to accede to this contention, ingenious as it is. Even if the expression is regarded as descriptive, still the question arises whether the last day of that period, being a *dies non* would not entitle the applicant to file it on the day on which the Court reopens. It thus again raises the question of limitation.

My attention is invited to a case reported in 9 Mad 134[4] where it was held that in computing the period of 89 days from the date of decree within which an application for review of judgment is to be presented on payment of half the fee leviable on the plaint or memorandum of appeal, the time during which the Court is closed for vacation cannot be excluded. Now the Court-fees Act is a fiscal enactment and as has been pointed out in that very case, is not in *pari materia* with the Limitation Act. S. 54, Provincial Insolvency Act, prescribes in my opinion a period of three months for making an application for annulment. That application must be governed by the principles bearing on the construction of the statute of limitation as contradistinguished from a fiscal enactment such as the Court-fees Act is. The second contention also must fail. As to the third contention it is pertinent to notice that the question of the onus of proof was never raised in the lower Appellate Court. At all events that question becomes immaterial as both parties have produced their evidence. That evidence has been fully considered by both the Courts below. The finding that the mortgage was effected with a view of giving the transferee preference over the other creditors is a question of fact and no strong ground has been made out to justify interference by this Court in revision. The result is that the application stands dismissed with costs. Counsel's fee Rs. 15.

R.M./R.K. *Application dismissed.*

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## A. I. R. 1938 Nagpur 455

NIYOGI J.

*Amraoti Town Municipal Committee — Defendant* — Applicant.

v.

*Shaikh Bhikan Shekh Latif — Plaintiff* — Opposite Party.

Civil Revn. Nos. 373 and 374 to 384 of 1937, Decided on 17th January 1938, from decree of Small Cause Court, Amraoti, D/- 25th March 1937.

**C. P. Municipalities Act (2 of 1922), S. 48 — Municipality having power to enhance tax on animals brought to slaughter house enhancing tax but omitting to consider objections against enhancement — Enhancing and collecting tax, though irregular, is act done under Act — Suits to recover amounts collected in excess of lawful rate are governed by S. 48.**

It is true that if a Municipal Committee exercises power which it did not possess, it should not be regarded as acting in pursuance of the statute governing its powers, and its acts should not be regarded as being those done under the statute. But there is a difference between a case when a corporate body exercises a power which is wholly absent and a case where it has power but it exercises it illegally or with material irregularity. In the former case the Municipal Committee's act from beginning to end is illegal ; whereas in the latter case the act is quite legal in the beginning but becomes illegal in the end. [P 457 C 1, 2]

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[2] Ma Than May v. Bailiff of the Township Court of Kyaunggon, (1931) 18 A I R Rang 209=134 I C 223=9 Rang 150.

[3] Narayana v. Official Receiver, South Malabar, (1934) 21 A I R Mad 294=150 I C 339.

[4] In re Kota, (1886) 9 Mad 134.

Where the Municipal Committee has power to enhance the tax on animals brought to slaughter house and follows the procedure laid down in S. 68, C. P. Municipalities Act, but in doing so it lapses into an irregularity, namely omission to consider the objections filed by the butchers, the Municipal Committee is certainly exercising, although irregularly, the power conferred on it by Sec. 68 and to that extent the Municipality is acting under the statute. Hence, the suits to recover amounts collected in excess of lawful rate are governed by Sec. 48 and if not filed within six months are barred by time : *A I R 1930 Nag 179, Ref.* ; *A I R 1929 Mad 409 and 32 All 491, Expl. and Disting.* [P 457 C 2 ; P 458 C 1]

K. V. Brahma — *for Applicant.*

R. N. Padhye — *for Opposite Party.*

**Order.** — This revision application and revision applications Nos. 374 to 384 of 1937 arise out of several suits filed against the Amraoti Town Municipal Committee to recover some amounts which had been illegally collected from the plaintiffs. The suits have been decreed and the defendant has filed the applications for revision. This order governs the disposal of all of them. In 1932 the defendant Municipal Committee proposed enhancement of a tax, then already in force, on every animal that was brought to the slaughter house from one anna to four annas. The Committee passed a resolution proposing enhancement of the tax and caused its proposal to be published in the Central Provinces Gazette in March 1932 in the manner prescribed by rules made under the Municipalities Act. No objection having been received, it again caused a fresh notice to be published in the Gazette in May 1932. Some objections were received thereafter and the Committee, without considering them, forwarded its proposal as well as the objections to the Local Government which issued a notification imposing the enhanced tax. In pursuance of the Local Government's notification which reasonably led the Committee to believe that it could collect the tax at the enhanced rate, it began to collect it from 1st May 1933. The butchers who were aggrieved filed Civil Suit No. 447 of 1933 for a declaration that the enhancement of the tax was illegal as their objections had not been considered. Their suit ended in a decree passed on 5th April 1934 since when the Committee ceased to collect the tax at the enhanced rate.

As the plaintiffs succeeded in their civil suit in getting a declaration that the enhancement of the tax was illegal they have sued to recover the amounts collected from them in excess of the lawful rate of one anna per animal from 1st May 1933 to 5th April 1934. It is urged on behalf of the applicant that the suits were barred by time, regard being had to Sec. 48, Municipalities Act. That Section is as follows :

> No suit shall be instituted against any committee or any member, officer or servant thereof or any person acting under the direction of any such committee, member, officer or servant for anything done or purporting to be done under this Act, until the expiration of two months next after notice in writing . . . . . . (2) every such suit shall be dismissed unless it is instituted within six months from the date of accrual of the alleged cause of action.

The question is whether the collection of the tax at the enhanced rate of four annas per animal was an act which falls within the ambit of the expression "anything done or purporting to be done under this Act." In 26 N L R 81[1] at page 87 an expression almost identical with the expression used in S. 48, Municipalities Act, was construed as relating only to an act done or purporting to be done in direct execution of the Act. It is urged on the other side that the Municipal Committee, in not having considered the objections filed against their proposal for the enhancement of the tax acted beyond their powers with the result that the tax at the enhanced rate became illegal and could not be recovered. As the act was illegal, that is to say, contrary to law, it is contended that it could not fall within the scope of S. 48, Municipalities Act. Reliance is placed on A I R 1929 Mad 409,[2] 32 All 491[3] and 30 Cal 317.[4] The last mentioned case does not appear to be in point and need not be discussed. The other two cases are distinguishable on the ground that the authority which imposed or collected the tax had no power to do so. It was acting entirely beyond the scope of its jurisdiction and therefore it contravened the statute which created it. In A I R 1929 Mad 409[2] the question was whether the committee was entitled to levy the tax on the plaintiff under S. 92, District Municipalities Act. It was held that the Municipal Committee had no power at all, and consequently the Municipal Committee's action was not regarded as one which was in pursuance of the Act. In fact the only provision in the Madras District Municipalities Act which was somewhat akin to S. 48, Central Provinces Municipalities Act, was S. 350 which provided that no suit for damage or compensation shall be instituted against the Municipal Council in respect of any 'act done in pursuance or execution or intended execution of this Act or any rule, regulation or order made under it or in respect of any alleged neglect or default in the execution of this Act, etc.

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[1] K. L. Niyogi & Co. v. District Council, Buldana, (1930) 17 A I R Nag 179=123 I C 903 =26 N L R 81.

[2] Municipal Council, Dindigul v. Bombay Co. Ltd., (1929) 16 A I R Mad 409=120 I C 867 =52 Mad 207=56 M L J 525.

[3] Rajputana Malwa Railway Co-operative Stores, Ltd. v. Ajmere Municipal Board, (1910) 32 All 491=6 I C 401=7 A L J 496.

[4] Tullaram v. Corporation of Calcutta, (1903) 30 Cal 317=7 C W N 329.

It further provided that every such suit shall be commenced within six months after the date on which the cause of action arose. It must be observed that the scope of Section 350, District Municipalities Act, Madras, is much restricted as compared with that of Section 48, Central Provinces Municipalities Act. It only speaks of "suit for damage or compensation," whereas Sec. 48 (1), Central Provinces Municipalities Act, speaks of "no suit" in quite general terms. Their Lordships of the Madras High Court were only invited to decide the question whether the suit which was brought there for refund of the amount illegally collected was a suit to recover moneys had and received or was one for damage or compensation. Their Lordships held that that was not a suit for damage or compensation and on that view the suit was excluded from the scope of Sec. 350, District Municipalities Act, Madras. In 32 All 491[3] the decision turned on the same issue, namely whether the Ajmere Board in imposing and collecting octroi duty for goods imported into India by sea was acting within its powers. It was found that a resolution of the Government of India which was in force within the territorial limits of the Ajmere Board exempted seaborne goods from liability to any octroi duty. It was therefore rightly held that the Ajmere Board was not entitled to the protective Section of the Municipal Act. The principle of the decision in the two cases was that if the Municipal Committee exercised a power which it did not possess it should not be regarded as acting in pursuance of the statute governing its powers, and its acts should not be regarded as being those done under the statute. I am in full agreement with that view, but that does not assist the non-applicants in this case where the facts are totally different.

Here the admitted facts are that the Municipal Committee had power to enhance the tax from one anna to four annas and that it did follow the procedure laid down in S. 68, Municipalities Act, but in doing so it lapsed into an irregularity, namely omission to consider the objections filed by the butchers, which rendered the tax illegal. Now there can be no question that the Municipal Committee, in imposing and collecting tax at four annas per animal, was acting exactly in accordance with S. 68. It must be observed that there is a difference between a case when a corporate body exercises a power which is wholly absent and a case where it has power but it exercises it illegally or with material irregularity. In the former case the Municipal Committee's act from beginning to end is illegal; whereas in the latter case the act is quite legal in the beginning but becomes illegal in the end. The distinction is pointedly expressed by a learned Judge of an English Court in (1864), 16 C. B. 568 cited at page 9 in the Street's Doctrine of Ultra Vires. It is as follows :

> Though in one sense unlawful it is still a thing done within the general scope of the authority of the Board. The act was intra vires as it was within the scope, but doing the act without complying with a statutory condition was ultra vires.

The present case, unlike those of Madras and Allahabad referred to above, falls within this principle. The enhancement of the tax was intra vires, as being within the scope of the Act, but became ultra vires only because the Committee did not comply with certain statutory conditions. In enhancing the tax and collecting it the Municipal Committee was certainly exercising, although irregularly, the power conferred on it by S. 68 and to that extent it appears to me that the contention that they were not acting under the statute is untenable. Much learned argument is addressed to show that S. 48, Central Provinces Municipalities Act, does not come into operation when moneys are collected under a contract or a quasi-contract, but it appears obvious that these considerations have no bearing on the issue. The payment made by the butchers was not under a contract but a payment, made under compulsion of a tax which the Municipal Committee had power to impose and collect; nor can it be said that the money was collected under an implied contract. For the foregoing reasons I hold that the suits are governed by Sec. 48, Central

Provinces Municipalities Act, and they not having been filed within six months as provided in S. 48 (2), C. P. Municipalities Act, are barred by time. They are therefore dismissed with costs in both Courts. Pleader's fees Rs. 5 in each case.

D.S./R.K. *Applications dismissed.*

## ✲ A. I. R. 1938 Nagpur 458

NIYOGI J.

*Karimullah Khan and another* — *Defendants* — Applicants.

v.

*Bhanu Pratap Singh Giriraj Singh* — *Plaintiff* — Non-Applicant.

Civil Revn. No. 191 of 1937, Decided on 10th January 1938, from order of Sub-Judge, Second Class, Raipur, D/- 26th January 1937.

**✲ Civil P. C. (1908), O. 1, R. 10—Suit filed in name of dead plaintiff is suit filed in name of wrong plaintiff—Defect is capable of being cured under O. 1, R. 10.**

Order 1, R. 10 only contemplates that a suit should have been filed in the name of a wrong person irrespective of whether he is living or a dead person. There is no difference between a suit filed in the name of a dead plaintiff and one filed in the name of a wrong person as plaintiff. The suit filed in the name of a dead plaintiff is manifestly one that is filed in the name of a wrong plaintiff. Hence the case comes within the ambit of O. 1, R. 10, and the defect is capable of being cured if the mistake is shown to have occurred in good faith, provided that in permitting the amendment no injustice results to the defendant : *A I R 1934 Nag 55; A I R 1927 Cal 880 and 31 Mad 86, Dissent.; A I R 1925 Mad 1210 (F B); A I R 1930 All 131 and A I R 1932 Lah 305, Rel. on.* [P 458 C 2 ; P 459 C 1]

In a suit filed by the manager of the Court of Wards on behalf of a ward, the manager is the real plaintiff. Any mistake in the name of the ward does not affect the substance of the suit and so amendment can be granted. [P 459 C 1]

A. Ahmed — *for Applicants.*

J. Sen — *for Non-applicant.*

**Order.**—This is a defendant's application in revision against the order of the Sub-Judge, Second Class, Raipur, in Civil Suit No. 52-A of 1936 passed on 26th January 1937. Civil Suit No. 52-A of 1936 was instituted by the manager of the Court of Wards, Raipur, on behalf of the proprietor of the Surmal estate, Tahsil Mahasamund, District Raipur, by presentation of a plaint on 14th August 1936. In the plaint there crept in a mistake as to the name of the ward due to inadvertence: instead of Lal Bhanupratap Singh, son of Giriraj Singh, his deceased father's name Giriraj Singh, son of Ramcharan Singh, was inserted. The defendant pointed out the mistake on 28th October 1936 and the plaintiff applied on 25th November 1936 for permission to amend the plaint. An issue was raised whether this mistake was made in good faith. The lower Court answered that issue in the affirmative and permitted the amendment of the plaint.

It is contended for the applicant that the plaint as originally filed was void as it was in the name of a dead plaintiff and that the question whether or not it was due to a bona fide mistake is irrelevant. Reliance is placed on A I R 1934 Nag 55,[1] A I R 1927 Cal 880[2] and 31 Mad 86.[3] In 49 Mad 18[4] a Full Bench of the Madras High Court repelled the contention in the case of an appeal filed against a dead person and held that the Appellate Court had power to direct amendment under S. 153, Civil P. C., and discretion to extend limitation against the legal representative brought on the record. This case was followed in A I R 1930 All 131[5] and A I R 1932 Lah 305[6] and distinguished in A I R 1934 Nag 55.[1]

It appears to me that the distinction drawn between a suit filed by a dead plaintiff and one filed in the name of a wrong person as plaintiff is without any difference. The suit filed in the name of a dead plaintiff is manifestly one that is filed in the name of a wrong plaintiff. To give an illustration : *X* affixes his signature to a plaint and sends it with a power of attorney to his pleader. *X* dies before it is presented by the pleader in ignorance of his death. Can it not be said that the suit was filed in the name of a wrong person as plaintiff? In either case the plaint is void and its presentation is improper. In A I R 1934 Nag 55[1] it was observed that the existence of a valid plaint or memorandum of appeal, as the case may be, was *sine qua non* for the application of O. 1, R. 10, Civil P. C. Now there can be a valid plaint, in spite of such a mistake, when there are more than one person suing as plaintiffs, but when a suit

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1. Hazarimal Bholaram v. Shriramchandraswami Dewasthan, Rampaili, (1934) 21 A I R Nag 55=148 I C 241.
2. Makram Ali v. Abdul Hamid, (1927) 14 A I R Cal 880=104 I C 623.
3. Veerappa Chetty v. Tindal Ponnan, (1908) 31 Mad 86=17 M L J 551.
4. Gopala Kristnayya v. Lakshmana Rao, (1925) 12 A I R Mad 1210=49 Mad 18=49 M L J 590 (F B).
5. Chatur Prasad v. Baijnath Prasad, (1930) 17 A I R All 131=123 I C 824.
6. Mehar Singh v. Labh Singh, (1932) 19 A I R Lah 305=138 I C 277=33 P L R 116.

is filed in the name of a wrong person as the sole plaintiff, it would be contradiction in terms to say that the plaint is valid. If *A* signs a plaint and authorizes his pleader to present it and the pleader by mistake inserts the name of *B* in the cause title and presents it, the question arises, is the plaint valid? Manifestly it is not valid because the person who purports to sue is *B* and the person who signs the plaint and authorizes the pleader to act is *A*. On the view taken in A I R 1934 Nag 55,[1] O. 1, R. 10, Civil P. C., can have no application when a suit is filed in the name of the wrong person as the sole plaintiff, notwithstanding its terms to the contrary. This view is therefore untenable as it contradicts the plain provisions of law. None would be so bold as to contend that the plaint filed in the name of *B* is a valid plaint. If it is invalid and O. 1, R. 10, Civil P. C., permits amendment, I fail to see why it should not so permit for the simple reason that a person in whose name the suit is wrongly filed happens to be a dead person. Why should the applicability of O. 1, R. 10, Civil P. C., depend upon "the wrong person" being alive or dead? On the plain reading of that enactment, I am led to think that it only contemplates that a suit should have been filed in the name of a wrong person irrespective of whether he is a living or a dead person.

I hold that the present case comes within the ambit of O. 1, R. 10, Civil P. C., and that the defect is capable of being cured if the mistake is shown to have occurred in good faith, provided that in permitting the plaintiff to amend it no injustice results to the defendant. Under S. 30, C. P. Court of Wards Act (24 of 1899), a suit on behalf of any Government ward has to be brought under a written authority of the Court of Wards and under S. 27, the Manager of the Court of Wards is to be named as the next friend. The real plaintiff is the manager and he sues on behalf of the ward. Any mistake in the name of the ward does not affect the substance of the suit. The mistake that has crept in was inadvertent and in no way made purposely to prejudice the defendant. The only question is whether it could be permitted to be corrected without any injustice to the defendant. There is ample limitation in respect of the claim for possession and the defendant is not in the least prejudiced by the amendment. The defendant would no doubt be prejudiced with regard to the relief of mesne profits as on the date of the amendment the plaintiff's claim had become barred by time. The non-applicant has however abandoned that relief in this Court and nothing further need be said about it. The result is that the application stands dismissed. I make no order as to costs.

D.S./R.K. *Application dismissed.*

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## * A. I. R. 1938 Nagpur 459

NIYOGI J.

*Mt. Mulabai w/o Jhalkan and another —Plaintiffs*—Applicants.

v.

*Balakdas Bhagwat Prashad — Defendant*—Non-applicant.

Civil Revn. No. 852 of 1936, D/- 21st December 1937, from decree of Small Cause Court, Damoh, D/- 26th October 1936.

*** Contract Act (1872), S. 69—Mortgagee paying off decree against mortgagor for arrears of land revenue in order to avert sale of property—Case falls under S. 69.**

There is no reason why a person legally bound to pay should be held to be not a person who is interested in the payment. As between a defaulting land-holder and his mortgagee, the former is personally bound to pay and this initial liability does not cease because to protect his security, the mortgagee pays off the arrears. Moreover S. 125 (Proviso) C. P. Land Revenue Act, does not override Sec. 65 (b), T. P. Act, which lays on the mortgagor, so long as the mortgagee is not in possession of the mortgaged property, the duty of paying all public charges accruing due in respect of the property. As between the mortgagee and the mortgagor, the latter is primarily bound to pay the arrear and when the mortgagee pays off the arrear he is discharging the mortgagor's obligation with a view to protect his own interest. The case therefore clearly falls under S. 69, Contract Act : *32 Cal 643 and A I R 1924 Pat 235, Disting.; A I R 1934 Cal 709; 6 N L R 27 and A I R 1934 Nag 84, Rel. on; A I R 1937 Nag 225, Approved.* [P 460 C 2; P 461 C 1]

J. Sen — *for Applicants.*

D. N. Chaudhuri — *for Non-applicant.*

**Order.**—This is an application in revision against the judgment of the Small Cause Court, Damoh, in Civil Suit No. 358 of 1936 dismissing the plaintiffs' suit. The plaintiffs, who are applicants here, had obtained a final decree for foreclosure on 5th July 1935 in respect of a malik makbuza field and took possession of the field on 16th August 1935. The lambardar of the village in which the field was situate filed Civil Suit No. 16 of 1933 against the plaintiffs' mortgagor for recovering the revenue due on account of the field for the years 1930-31, 1931-32 and obtained a decree on 24th February 1933. He attached the field and had it proclaimed for sale on

22nd April 1936. In order to avert the sale the plaintiffs paid off his decree. They filed the suit out of which this application arises against their erstwhile mortgagor for reimbursement of Rs. 196 which they had to pay to the lambardar for averting his sale. They founded their claim on Ss. 69 and 70, Contract Act. The lower Court rejected their claim and dismissed their suit.

The question is whether either S. 69 or S. 70, Contract Act, or both sustain the plaintiffs' claim. It cannot be disputed that the plaintiff was interested in paying off the decree in Civil Suit No. 16 of 1933 for the reason that he had to avert the sale of the field which in 1936 became his property. It is contended on behalf of the non-applicant that as mortgagees the plaintiffs were equally liable to pay the arrears of revenue as their mortgagor under S. 125 (Proviso) of the C. P. Land Revenue Act, and that S. 69, Contract Act, is not applicable. Reliance is placed on 32 Cal 643[1] in which it was held that the mortgagee was not entitled to the benefit of that Section for the reason that he had purchased the property subject to the first charge for arrears of revenue which he was legally liable to pay. Similar view was taken in 2 Pat 890.[2] In 61 Cal 864,[3] however, it was held that the Section applies to suits for contribution even where both the plaintiff and the defendant were liable for the money paid by the plaintiff. The question came up for consideration in numerous cases before the late Court of the Judicial Commissioner, Central Provinces, viz. 6 N L R 27,[4] 20 N L J 73[5] and 30 N L R 148.[6] In 6 N L R 27[4] the question was whether a proprietor who paid in full land revenue assessed on his village including some sir and khudkasht land which was in possession of the defendants could under S. 69, Contract Act, recover it from the latter.

The contention was raised on behalf of the defendants that since the plaintiffs were bound in law to pay the land revenue assessed on the village including the sir and khudkasht lands, they were not entitled to the benefit of S. 69, Contract Act. It was held that the provisions of the Section come into operation when two conditions are fulfilled. They were stated to be: (1) initial liability to pay, and (2) its discharge by a person interested to pay. That means that a person is entitled to invoke S. 69 if he was interested in the payment, notwithstanding that he was also legally liable to pay. In 30 N L R 148[6] a decree declaring a charge on some property for maintenance was sought to be enforced against property which had been mortgaged and the mortgagees who paid off the maintenance decree, were held entitled to reimbursement under S. 69 or S. 70, Contract Act. The reasoning was that the mortgagees were not personally bound to pay but that they were only interested in paying it to avert a sale of the property mortgaged to them. In A I R 1937 Nag 225[7] Pollock J. distinguished the cases in 32 Cal 643[1] and 2 Pat 890[2] on the ground that in those cases the persons who claimed to be recouped under S. 69, Contract Act, had chosen to purchase the property with knowledge of an existing charge on that property, and obtained, in consequence, the property at a cheaper rate. The learned Judge remarked that there was no reason why a person legally bound to pay should be held to be not a person who is interested in the payment. I respectfully agree with Pollock J. It is true that a mortgagee is liable to pay the arrears of land revenue but that does not exempt the mortgagor from the obligation to pay for the period during which he enjoyed the profits of the land.

The liability laid on the mortgagee is not personal. He may pay if he wishes to save his mortgaged property from sale. The intention of the Legislature in laying that obligation on the mortgagee is to make him eligible to pay. It only gives him an opportunity to pay which he may or may not avail himself of. The liability of the defaulting holder of the land is more comprehensive. Under S. 128, C. P. Land Revenue Act, an arrear payable to Government is recoverable by arrest and detention of the defaulter or his imprisonment in civil jail or by attachment and sale of his moveable property, or immovable property other than the land in respect of which the arrear has accrued. Thus the remedies against the defaulter are not restricted merely to selling the land in respect of which arrear has accrued. It is evident therefore that as between a defaulting landholder and his mortgagee the former is personally bound to pay and this initial liability does not cease because, to protect his security, the mortgagee pays off the arrear. Moreover, in my opinion, S. 125 (Proviso) Land Revenue Act, does not override S. 65 (b), T. P. Act, which lays on the mortgagor, so long as the mortgagee is not in possession of the mortgaged property, the duty of paying all public charges accruing due in respect of the property. As between the mortgagee and the mortgagor the latter was primarily bound to pay the arrear and when the mortgagee paid off the arrear he was discharging the mortgagor's obligation with a view to protect his own interest. The case therefore clearly falls under S. 69, Contract Act. The result is that the application succeeds and the plaintiffs' suit is decreed with costs in both Courts. Pleader's fees Rs. 15.

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[1] Manindra Chandra Nandy v. Jamahir Kumari, (1905) 32 Cal 643=9 C W N 670.

[2] Ranglal Sahu v. Kali Shankar, (1924) 11 A I R Pat 235=77 I C 73=2 Pat 890.

[3] Anandakishore Chaudhuri v. Panchu Kapali, (1934) 21 A I R Cal 709=152 I C 510=61 Cal 864=59 C L J 423=38 C W N 758.

[4] Chaturbhuj v. Chandirmool, (1910) 6 N L R 27=5 I C 705.

[5] Vishram v. Pannalal (1937) 24 A I R Nag 152=169 I C 298=20 N L J 73.

[6] Mt. Sawitribai v. Nanhelal, (1934) 21 A I R Nag 84=148 I C 815=30 N L R 148.

[7] Balwantrao v. Tulsa Pandharinath, (1937) 24 A I R Nag 225=171 I C 740.

D.S./R.K. *Application allowed.*

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## A. I. R. 1938 Nagpur 461

NIYOGI J.

*Purushottam Amrit and another* — Applicants.

v.

*Bhagwansao Tikaramsao Rangari and others* — Non-applicants.

Civil Revn. No. 229 of 1937, Decided on 21st February 1938, from order of Second Addl. Dist. Judge, Nagpur, D/- 2nd February 1937.

**Civil P. C. (1908), O. 1, Rr. 3, 5 — Sons of Hindu father suing their father and his creditor for declaration that debts incurred by father are tainted with immorality and are not binding on them — Suit is not bad for misjoinder of defendants and causes of action—Court may order separate trial of different issues affecting particular defendants.**

**Order 1, R. 3 not only contemplates joinder of the defendants but also of the causes of action. It is the act or transaction or the series of acts or transactions which give rise to a cause of action; and although all the defendants may not be jointly interested in one and the same cause of action, the fact that they are interested severally in the several acts or transactions constituting the series would bring them within the ambit of R. 3 of O. 1 ; O. 1, R. 5 makes it clear that it is not necessary that every defendant shall be interested as to all the reliefs claimed in any suit against him. O. 1, R. 5 is to be read with O. 1, Rule 3. [P 463 C 1]**

Where therefore the sons of a Hindu father bring a suit against their father and his creditors for a declaration that the debts incurred by the father are tainted with immorality and that their share in the property is not liable to attachment and sale in satisfaction of those debts, the suit is not bad for misjoinder of defendants and causes of action. The common question of law and fact which arises in the suit is whether or not the father was addicted to vices to feed which he made the alienations. The several alienations made by the father in favour of several defendants constitute series of acts or transactions and they are the same series of acts and transactions because they are vitiated by one circumstance, namely that they were incurred for immoral purposes : *A I R 1918 Cal 858 ; A I R 1928 Cal 199; A I R 1922 Mad 332 ; A I R 1926 Mad 949 and 11 Mad 106, Rel. on ; 34 Bom 358, Dissent.* [P 461 C 2 ; P 462 C 2 ; P 463 C 1, 2]

It is open to the Court however to avoid any apprehended embarrassment to order separate trial of the different issues affecting particular defendants on the lines of O. 2, R. 6. [P 463 C 2]

D. B. Najbille — *for Applicants.*

M. N. Gadgil—*for Non-applicants 1 to 3.*

**Order.**—This is a plaintiffs' application in revision against an interlocutory order dated 2nd February 1937 passed in Civil Suit No. 11-A of 1936 by the Second Additional District Judge, Nagpur, whereby he held that the suit was bad for misjoinder of defendants and causes of action and directed the plaintiffs to elect against which defendant or defendants they wished to prosecute their suit. The facts are that the plaintiffs who are the sons of defendant 7 sued him and his creditors for a declaration that the debts incurred by defendant 7 were tainted with immorality and that their 2/3rds share in the joint family property was not liable to attachment and sale in satisfaction of those debts. The lower Court following 34 Bom 358[1] held that the suit was multifarious. In that case the suit was by the sister, and heir of a mortgagee sued the mortgagor and the mortgagee's alleged adopted son who had obtained a decree on the mortgage for two reliefs : (1) for a declaration that the adoption was not validly made, and (2) that the decree passed in the mortgage suit was not binding on her. Davar J. following certain English authorities enunciated the rule that the plaintiff may in one action unite several causes of action against several defendants, provided that all such defendants are jointly liable in respect of each and all of such causes of action, and that the condition precedent to the plaintiff being allowed to join several causes of

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**[1] Umabai v. Bhau Balwant, (1910) 34 Bom 358 =3 I C 165=11 Bom L R 499.**

action against several defendants is that such defendants must all have a joint interest in the main question raised by the litigation and that causes of action joined in one suit against several defendants must be causes of action in which the defendants are all jointly interested. The learned Judge further remarked that :

> It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action in which all the defendants are more or less interested although the reliefs asked against them may vary.

This view was dissented from in 45 Cal 111[2] and 55 Cal 164.[3] The rule as to joinder of defendants is R. 3 of O. 1. Before 1908, the Rule was contained in S. 28 of the Code of 1882 and it ran as follows :

> All persons may be joined as defendants against whom any right to relief is alleged to exist, whether jointly, severally or in the alternative in respect of the same matter.

This Rule corresponds to R. 4 of O. 16 of the rules of the Supreme Court of England, but in 1896, R. 1 of O. 16 was amended in the words which were adopted by the Indian Legislature as R. 1 of O. 1. The Indian Legislature also amended S. 28 of the old Code of 1882 on the lines of R. 1 of O. 1. The effect of the alteration of R. 1 of the English Rules of Practice of 1896 has been materially to enlarge the construction placed upon R. 4 of the English Rules notwithstanding that no corresponding alteration was made in it. It can no longer be said that this Rule is an integral part of an order dealing only with joinder of parties and not with joinder of causes of action. In a series of recent cases which have been referred to in the two Calcutta cases cited above, the English Courts have accepted the principle that the alteration in R. 1 has altered the construction to be placed upon R. 4 in England and that the later Rule must be construed liberally. I may refer to the case in (1932) 2 K B 392,[4] where in view of the construction now placed on R. 4 of the English Rules of Practice an action by a person employed by a mother as companion for her son for wrongful dismissal was allowed to be consolidated with an action by the same plaintiff against the son for an indemnity against liabilities and disbursements. In 7 N L R 130[5] at p. 133 Drake-Brockman, J. C. referred to (1907) 76 L J K B 127[6] at p. 133 where Cozens-Hardy, L. J. observed as follows :

> Since the emendation of R. 1, O. 16, it is very difficult to say that O. 16 does not apply to causes of action as well as to parties.

This later development in the English Courts towards putting a liberal construction on Rule 4 of the English Rules of Practice corresponding to R. 3 of O. 1, Civil P. C., exhausts the reasoning of Davar J. in 34 Bom 358[1] of all its validity and it cannot be followed as a correct exposition of the scope of R. 3 of O. 1, Civil P. C. In Madras the practice seems to have been to permit joinder of creditors or decree-holders as defendants along with the members of the joint family in a partition suit in which it is alleged that the decrees obtained by certain creditors against the manager were not binding on the plaintiffs : *see* 45 Mad 194;[7] so also the joinder of several alienees from a limited owner on the ground that the alienations in their favour were not justified by legal necessity : *see* 49 Mad 833.[8] The practice was based on the rule propounded by Muttusami Ayyar J. in 11 Mad 106[9] at p. 111 to this effect :

> In our judgment, it makes no difference whether the right enforced is that of a coparcener or a reversioner, for the object in both is to reduce to possession a vested interest as well in property illegally alienated as in the property held by the managing member or by the tenant for life. In the view that the primary ground of action is the interest vested in possession as regards the whole of the property in suit, there is a unity of title, and the claim made is one in respect of the same cause of action.

Now in the present case the plaintiffs have a unity of title in respect of the various properties which are in possession of the several alienees. The common question of law and fact which arises in the suit is whether or not the father was addicted to vices to feed which he made the alienations. It is true that it is incumbent on the plaintiffs to prove as against each defendant alienee that the money borrowed

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2. **Ramendra Nath Ray v. Brojendra Nath Dass, (1918) 5 A I R Cal 858=41 I C 944 = 45 Cal 111=27 C L J 158=21 C W N 794.**
3. **Harendra Nath v. Purna Chandra, (1928) 15 A I R Cal 199=109 I C 755=55 Cal 164=32 C W N 885.**
4. **Bailey v. Curzon, (1932) 2 K B 392=101 L J K B 627=147 L T 269=48 T L R 283.**
5. **Mahadeo v. Nago, (1911) 7 N L R 130 = 12 I C 357.**
6. **Bullock v. London General Omnibus Co., (1907) 1 K B 264=76 L J K B 127 = 95 L T 905=23 T L R 62.**
7. **Shanmuka Nadan v. Arunachala Chetty, (1922) 9 A I R Mad 332=69 I C 961=45 Mad 194=42 M L J 97.**
8. **C. S. Gorin Raje Mudaliar v. Alogoppa Thamliram, (1926) 13 A I R Mad 949 = 96 I C 957 =49 Mad 833=51 M L J 123 (F B).**
9. **Mohomed v. Krishnan, (1888) 11 Mad 106.**

from him was used for an immoral purpose and to that extent it may be conceded that the cause of action against each of the alienees was distinct but does not preclude the several alienees from being joined in the suit under O. 1, R. 3, Civil P. C. It says:

> All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

It may be that as held in 34 Bom 358[1] the adjective 'same' applies also to the words 'series of acts or transactions.' The several alienations made by the father in favour of the several defendants constitute 'series of acts or transactions.' They were the same series of acts and transactions because, as alleged by the plaintiffs, they were all vitiated by one circumstance, namely that they were incurred for immoral purposes. It is this common feature which characterized all the debts borrowed by the father which put them in the same category. In this sense the successive borrowings can be regarded as forming one series of acts or transactions. Now, if they are so, it is immaterial whether the defendants against whom plaintiffs allege any right to relief are jointly, severally or in the alternative concerned. As held by the English Courts as well as by the Calcutta High Court, Rule 3 not only contemplates joinder of the defendants but also the causes of action. It is the act or transaction or the series of acts or transactions which give rise to a cause of action; and although all the defendants may not be jointly interested in one and the same cause of action, the fact that they are interested severally, in the several acts or transactions constituting the series would bring them within the ambit of R. 3, O. 1, Civil P. C. The lower Court seems to have been much concerned with some of the defendants sitting idle while the issue as affecting another defendant was being tried. That fear seems to have been inspired by the thought that all defendants must be jointly interested in the relief that the plaintiffs claim against all, but R. 5, O. 1 makes it clear that it shall not be necessary that every defendant shall be interested as to all the reliefs claimed in any suit against him. This Rule, as Mulla points out, is to be read with R. 3, O. 1, Civil P. C. It provides that where a suit is brought against several defendants the fact that every defendant is not interested in all the reliefs claimed in the suit does not imply misjoinder of defendants.

The present case is in principle of the same type as the one reported in 45 Cal 111[2] and the observations made by Woodroffe J. at p. 124 are fully applicable to it. The learned Judge observed:

> It is contended that it is not, it being argued that there are different sets of transactions and no common question of law or fact. The foundation of the case, on which the rest of it depends, is the alleged fraud of B. N. Dass. If such fraud is proved the question is, did the defendants who all claim under B. N. Dass obtain any title? If the plaintiff fails to prove fraud on the part of B. N. Dass, the case fails against all the defendants. If he proves fraud, it may be that the defendants may have a different answer by way of defence, but that does not make the case any the less one of a common question of law and fact. The same act or transaction which concerns all parties is the alleged fraud of B. N. Dass, and this involves a common question of law or fact.

In the present case the common question of fact which concerns all the defendants is whether the plaintiffs' father was given to immoral habits. If that fact is proved the several defendants may have different answers by way of defence, but that does not make the case any the less one of a common question of law or fact. I may refer to the observations made in (1921) 2 K B 1,[10] namely:

> Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

The vicious character of the father is the issue of capital importance in the case and in that issue every one of the defendants is vitally interested. That constitutes the dominant feature of the case, and the issue relating to each of the defendants as to whether the money borrowed from each was used for immoral purposes is of a subsidiary nature. It is therefore eminently desirable that the cardinal issue should be disposed of once and for all. In order to avoid any apprehended embarrassment, it is open to the lower Court to order separate trials of the different issues affecting particular defendants on the lines of O. 2, R. 6. If necessary, the suit may be sub-classed as A, B, C, D and so on in respect of each of the defendants who has a distinct and separate defence. The case is sent back to the lower Court for further trial. Costs will abide the result. Pleader's fees Rs. 25.

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[10] Payne v. British Time Recorder Co., Ltd., (1921) 2 K B 1=90 L J K B 445=124 L T 719=37 T L R 295.

R.M./R.K. *Case remanded.*

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## A. I. R. 1938 Nagpur 464

VIVIAN BOSE J.

*Narbada Prasad Ajodhyaprasad — Plaintiff* — Applicant.

v.

*Mt. Sunki w/o Kedarnath Roy — Defendant* — Non-Applicant.

Civil Revn. No. 427 of 1936, Decided on 27th October 1937, from order of Court of Small Causes, Banda, D/- 17th March 1936.

**(a) Promissory Note—Document not showing payee or not being payable to bearer is not a pronote.**

Where a document does not specify the person to whom the money is to be paid nor does it say that it is payable to the bearer, it is certainly not a promissory note. [P 464 C 2]

**(b) Deed — Construction — Document being acknowledgment as well as agreement to pay can be validated under Stamp Act.**

Where a document is nothing more than an ordinary receipt or an acknowledgment containing also a promise to pay, it does not fall under Art. 1, Sch. 1, Stamp Act, and since it is both an acknowledgment as well as an agreement, it must, under S. 6 (b), be charged with the higher duty, i. e. eight-annas under Art. 5 (c) and can be validated under S. 35. [P 464 C 2]

S. B. Gokhale—*for Applicant.*

**Order.** — I am considerably handicaped in this case as the non-applicant has not appeared and so I have not had the assistance of counsel on the other side. The suit is based on a document calling itself a demand note, which is in the following terms:

*Indul talab rukka* (demand note).

I am Kedarnath, son of Jugal Kishore, by caste a Choubey Brahman, resident of Kadri, Pargana Cawnpore, District Cawnpore.

Whereas Rs. 265 (in words two hundred and sixty five rupees) half whereof comes to Rs. 132-8-0 (in words one hundred and thirty-two rupees and eight annas) in the British currency (payable) on demand has been borrowed in cash by me for my own private necessary work from Narbada Prasad, son of Ajodhya Prasad, by caste, a Brahmin, resident of Amermow, District Saugor, I hereby agree that I will repay on demand the aforesaid amount together with interest thereon at the rate of two rupees per cent. per mensem and will satisfy the same in full. I have therefore executed this *Indul talab rukka* (demand note) so that the same may remain on record and be useful whenever necessary.

D/- 10th May 32 A. D.

(Signature of Kedarnath, in the hand of self. Received the amount at Amermow).

The lower Court calls it a promissory note and holding it to be insufficiently stamped has excluded it from evidence and so has dismissed the plaintiff's suit. The definition of a promissory note for the purposes of the Stamp Act is to be found in S. 2 (22). Except for certain cases which do not apply here, the definition is the same as that given in the Negotiable Instruments Act, 1881. Under S. 4 of that Act a promissory note is defined to be

> an instrument in writing . . . . . . containing an unconditional undertaking . . . . . to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument.

This document does not specify the person to whom the money is to be paid nor does it say that it is payable to the bearer. Under Expln. (ii) to S. 13 it is necessary that this should be expressly stated before the document can be taken to be a promissory note payable to bearer. Therefore the document, whatever else it may be, is certainly not a promissory note. Nor is it a bond as was argued by the learned counsel for the applicant. Under S. 2 (5), Cls. (b) and (c) of the same Act it is necessary for single bonds to be attested and under Cl. (a) there must be a condition that the bond will be void if a specified act is performed or not performed. There is no such condition here nor is there attestation. All that the executant does here is to say that he will pay Rs. 265, together with interest on it and that he "will satisfy the same in full." This is nothing more than an ordinary receipt or an acknowledgment containing also a promise to pay. Consequently it does not fall under Art. 1, Sch. 1, Stamp Act, and since it is both an acknowledgment as well as an agreement it must, under S. 6 (b), be charged with the higher duty, i. e. eight annas, under Art. 5 (c). Since it is under stamped and since it is not chargeable with a duty of one-anna only and since it is not a bill of exchange or a promissory note, the document can be validated under S. 35. The application for revision is allowed and the decree of the lower Court set aside. The plaintiff will be given an opportunity to validate the document and the case will then proceed in the usual way. As the non-applicant has not appeared and as the objection was raised by the Court and not by the defendant, there will be no order as to costs.

B.D./R.K. *Application allowed.*

## A. I. R. 1938 Nagpur 465

GRUER J.

*In re Ganpati Barwa Mahar and others* — *Accused* — Applicants.

Criminal Revn. No. 465 of 1937, Decided on 11th January 1938, from order of Addl. Sess. Judge, Wardha, D/- 16th September 1937.

**(a) Criminal P. C. (1898), S. 109 (a)—There can be concealment even if residence within local limits is well known—Continuity of concealment is question of fact in each case.**

There may be concealment within the meaning of S. 109 (a) even if the residence of the person concerned within the local limits is well known. So also no definite rule as to the continuity of concealment should be laid down. It is a question of fact in each case: *A I R 1929 All 33 (F B) and A I R 1935 Pat 69, Rel. on ; A I R 1918 Cal 887 and A I R 1926 Pat 569, Ref.* [P 465 C 2]

**(b) Criminal P. C. (1898), S. 109 — Applicability.**

Section 109 is one restrictive of liberty and must be applied only when strictly applicable. [P 465 C 2]

**(c) Criminal P. C. (1898), S. 109 — S. 109 penalizes taking of precautions to conceal, whether successful or not.**

Section 109 penalizes the taking of precautions to conceal, whether these precautions are successful or not. [P 466 C 1]

Adhikari — *for Applicants.*

W. R. Puranik, Advocate-General — *for the Crown.*

**Order.**—The applicants, Ganpati, Amir Ali and Aziz Khan, have been bound over for a year under Ss. 109/112, Criminal P. C. The question is whether the prosecution has proved that S. 109 (a) is applicable, i. e. whether these persons were taking precautions to conceal their presence within the local limits of the Magistrate's jurisdiction with a view to committing an offence. The two applicants, Amir Ali and Aziz Khan, were undoubtedly discovered in an unoccupied house in Hinganghat belonging to witness Ramswaroop. A number of articles found with them showed that they had made preparations for cheating by pretended duplication of currency notes. The main point is whether they had been taking precautions to conceal their presence. It is said that the case against Ganpati at least is incomplete as he was not found in this house at all. All that is proved against him is that he was waiting at the motor-stand on the day appointed for the arrival of the two makers of the notes and he then met them at the liquor shop; and he and Baliram (P. W. 6) followed the other two at some distance towards the house of Ramswaroop. Thereafter his movements are unknown until he was arrested that evening at the house where he was sleeping.

It has been held in some cases that concealment at a particular spot or at a particular time is not sufficient if a man's presence within the Magistrate's jurisdiction is well known: 49 All 240.[1] However, that was modified by a later Bench decision of the same High Court in 50 All 909[2] followed by the Patna High Court in A I R 1935 Pat 69.[3] I incline to the latter view that there may be concealment even if residence within the local limits is well known. There is also divergence of opinion whether concealment contemplated by the Section should be continuous: 22 C W N 163[4] on the one hand and 6 Pat 177[5] on the other: *see also* 50 All 909[2] cited above. The better view seems to be that no definite rule about continuity should be laid down and it is a question of fact in each case. In the present case the point hardly arises, as continuity of concealment is alleged by the prosecution. The learned Additional Sessions Judge is inaccurate in saying that what these applicants were charged with was that they were concealing their presence in an unoccupied house. The preliminary order is more general and says that they were concealing their presence at Hinganghat.

The case against Ganpati is certainly weaker than that against the others. His mother-in-law resided in Hinganghat and the police knew his haunts. His visit to the motor-stand and to the liquor shop and even his following the others can hardly amount to concealment. He may have aided the others to carry out their plans and to dissemble their presence in so doing, but he cannot be bound over because he abetted their concealment. The Section is one restrictive of liberty and must be applied only when strictly applicable. I allow the revision in the case of Ganpati

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1. Emperor v. Bhairon, (1927) 14 A I R All 50=97 I C 428=49 All 240=25 A L J 94.
2. Emperor v. Phuchai, (1929) 16 A I R All 33=113 I C 417=30 Cr L J 145=50 All 909=26 A L J 1257 (F B).
3. Emperor v. Bishi Sahara, (1935) 22 A I R Pat 69=1935 Cr C 139 = 155 I C 729=36 Cr L J 846=15 P L T 836.
4. Reshu Kaviraj v. Emperor, (1918) 5 A I R Cal 887 = 41 I C 649=18 Cr L J 825=27 C L J 382=22 C W N 163.
5. Rambirich Ahir v. Emperor, (1926) 13 A I R Pat 569=97 I C 648=27 Cr L J 1128=6 Pat 177=8 P L T 95.

and cancel his bond. There is more against the other two. It was not necessary for their purpose that they should not be seen by anybody on their visit to Hinganghat but only that they should elude the notice of the police and other persons who might suspect them. It will be noted that the Section penalizes the taking of precautions to conceal whether these precautions are successful or not. One precaution taken was that Upasia (P. W. 5) was deputed to be present at the motor-stand and warn the Babus if any policeman happened to be present so that incriminating articles might be thrown away: see the evidence of Baliram (P. W. 6). Another precaution was that the conspirators met in a courtyard behind the liquor shop, evidently a more retired place than the liquor shop itself. Then, according to Baliram, Amirali and the rest went to Ramswaroop's new house by another road saying that they should not go together. Finally, and especially, the meeting in the unoccupied house was a precaution to elude observation by too inquisitive persons while they were carrying out the farce of duplicating the notes. I think these facts taken together amount to taking precautions of concealment as contemplated by the Section. The application therefore in the case of Amir Ali and Aziz Khan is dismissed.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 466

NIYOGI J.

*Dr. Laxman Vasudeo Paranjpe — Defendant* — Applicant.

v.

*Municipal Committee, Nagpur — Plaintiff*—Opposite Party.

Civil Revn. No. 598 of 1937, Decided on 6th April 1938, from decree of Small Cause Court, Nagpur, D/- 9th July 1937.

**C. P. Municipalities Act (2 of 1922), S. 66, Rules under, R. 12 (a)—Part of dwelling house of rate payer used for residence of his indoor patients—Water used for personal convenience of such patients is for domestic purpose.**

The true test to determine whether water is used for non-domestic purpose is to see whether the water is directly used for any trade or business. If the trade or business requires for its prosecution the direct use of water, that use is clearly non-domestic; but when the business is of a nature where the use of the water is only incidental although it may be necessary so far as the persons connected with the business are concerned, then it does not cease to be a domestic purpose. Thus when a medical practitioner uses a part of his dwelling house for providing accommodation for the residence of his indoor patients, he does not use the water directly for his business. The water is used incidentally by persons for the same purpose for which he himself uses it as a part of the amenities of the building temporarily occupied by them. Hence the water used in connexion with the hospital, that is to say by the indoor patients residing in the building, is not used for any purpose other than domestic purpose. The water does not cease to be domestically used, only because it is used by the patients as opposed to the owner or his family or that the part of the dwelling house is used for professional or business purposes : *(1902) 2 Ch 746 ; (1902) 1 K B 310 ; (1904) 2 K B 174 ; (1907) 2 K B 611 ; (1911) 2 K B 38 ; (1912) A C 24 and (1914) A C 118, Rel. on.* [P 468 C 1 ; P 469 C 2 ; P 470 C 1]

R. N. Padhye — *for Applicant.*

Dr. W. S. Barlinge—*for Opposite Party.*

**Order.**—This is a defendant's application in revision against the judgment of the Small Cause Court, Nagpur, in Civil Suit No. 1782 of 1935, decided on 9th July 1937. The applicant owns and occupies a building in Circle No. 1 in Nagpur City which is assessed to private water rate on the annual letting value of the building. A part of that building is used for his private residence and part of it as a hospital. The Municipal Committee fixed a meter on the service pipe which supplied water to the building, and demanded from the applicant the charges for providing and maintaining the meter. The applicant protested against the fixation of the meter as the water was used by him only for domestic purposes and refused to pay the charges which amounted to Rs. 46-8-0. It was to recover that amount that the Municipal Committee, Nagpur, filed the suit out of which this revision petition arises. The issue which arose in the suit was whether the water used by the indoor patients residing in the applicant's building was used for domestic purposes. The lower Court held that it was not a domestic purpose and decreed the claim. The only question that arises for determination is whether or not the water which was consumed for the hospital purposes, namely by the indoor patients for drinking, washing and such other household purposes, can be said to have been used for domestic purposes. Before dealing with the issue it is necessary to advert to the rules framed by the Local Government under Section 66, C. P. Municipalities Act. Rule 1 says :

> There shall be imposed on every building or land which has a private supply from the municipal water works or any residents whereof use

water from such supply, a water rate according to the following scale on its gross annual rental value.

Rule 11 says:

> If the Committee think that in any building or land having a private supply, more water than a quantity circulated at the rate of 2000 gallons for every rupee paid as rate is used, a meter may, at the cost of the committee, be fixed on such part of the communication pipe as the committee think fit and thereupon an additional rate for the quantity used in excess of that covered by the rate under R. 1 shall be paid, etc.

Rule 12 (a) says:

> Every person on whose pipe a meter is put by the committee, shall, in addition to the rate otherwise payable for the use of the water, pay the following rate for the cost of providing and maintaining the meter. If the size of the meter be ½" then Rs. 6 per annum when water is used for trade or other than domestic purposes.

Rule 13 provides for special rate for supply of water to a mill, factory, educational or medical institution to be settled by special agreement. It would appear that R. 1, although wide in its terms, mainly refers to buildings which are ordinarily used as dwelling houses where the supply of water is regarded as one of the amenities of a house. The tax is assessed on the gross annual rental value of the building as a whole and the water supply is intended to be given for the use of the residents, that is persons residing in that building. There is no dispute that the water so used is used for a domestic purpose. R. 1 is wide enough to include a case of a building where the private supply of water may be used for trade or such other purpose except such cases as fall under R. 13. R. 11 is quite general in its terms as R. 1 and does not expressly restrict the user to domestic purposes only. It is when R. 11 is read with R. 12 that one can gather that rule contemplates the use of water for domestic purposes only. Meters are fixed both under R. 11 and R. 12, but in the former case, the Municipal Committee has to bear the cost and in the latter case, the person on whose pipe it is put has to pay for the cost of providing and maintaining at certain specified rate.

If the case falls under R. 11 the Municipal Committee's suit must fail. The learned counsel for the Municipal Committee vigorously contends that the water which is used by the applicant for his hospital purposes is used for "other than domestic purposes", the expression used in R. 12 (a). It is not easy to frame a comprehensive and precise definition of the expression "domestic uses" or "domestic purposes". The word "domestic" ordinarily means pertaining to one's home or one's household or family (Webster's Dictionary). That will include therefore the use of water for the ordinary and reasonable purposes of domestic life, such as drinking, cooking, washing and cleansing, and for watering of gardens forming part of the amenities of a house. The learned counsel for the Municipal Committee contends that the domestic use postulates two conditions: (1) that the water must be used only by the rate-payer and the members of his family, and (2) that the building in respect of which the rate is payable must not be used for any purpose other than that of a dwelling house of the rate-payer. Although he concedes that the use of the water for drinking, cooking or washing is in itself a domestic purpose, he argues that it ceases to be a domestic purpose if the user is by persons other than the tax-payer or the members of his family and when it is in a part of the building which is set apart as a hospital connected with his medical business, notwithstanding that it may be for drinking, cooking or washing. So according to him the person who actually uses the water and the character of the building in which the water is used determine the limits of the definition of the terms "domestic use" or "domestic purposes."

The argument is at first sight impressive but on analysis would be found to be inconclusive. Let us take the various situations which are likely to arise in the ordinary course of human life and examine each in the light of the principle contended for. Water may be used for drinking, washing etc., by the rate-payer and the members of his family, dependants, servants and any animals kept by him; it may also be used by his guests who casually come to reside in his house; it may be used by persons invited to a marriage feast, or if the rate-payer happens to own a large building which is much more than what is required for his private use the surplus portion of the building may be used for entertaining paying guests; or to take other class of instances, a part of the building may be used for a flour mill run by a steam engine or an aerated water factory. In this range of the variety of the use to which the building can be put there would be no difficulty in distinguishing the last two instances as those in which the water is used for other than domestic purposes, but it is not so easy to draw the line of distinction between the cases of casual guests and paying guests using the water. Apart from the distinguishing circumstance that one set of persons pays for the amenities and another set does not pay, both fall into the same class in so far as the character of the use of the water is concerned.

It cannot be reasonably contended that when a rate-payer entertains a guest in his house the water used by the guest is not used for domestic purposes, because he happens to be a person outside the group of the rate-payer's family. The non-applicant's learned counsel was obliged to concede that in such a case the use of the water by the guest did not fall outside the ambit of the meaning of the expression "domestic use". If that is so, why should the use by the same person be regarded as non-domestic because he happens to pay for his boarding and lodging ? Both the non-paying and paying guests, so long as they occupy any portion of the house, become "residents" of the house and consequently any use of water by them will not take the case out of the category of cases contemplated in R. 1 of the rules framed by the Local Government. The building will not cease to be a dwelling house providing amenities as any dwelling house would, because a part of it happens to be occupied by persons not related to or dependent on the rate-payer. The true test appears to be whether the water is directly used for any trade or business. If the trade or business requires for its prosecution the direct use of water, that use is clearly non-domestic, but when the business is of a nature where the use of the water is only incidental although it may be necessary so far as the persons connected with the business are concerned, then it does not cease to be a domestic purpose. Thus when a medical practitioner uses a part of his dwelling house for providing accommodation for the residence of his indoor patients he does not use the water directly for his business. The water is used incidentally by persons for the same purpose for which he himself uses it as a part of the amenities of the building temporarily occupied by them. I am therefore of the opinion that the water used in connexion with the hospital, that is to say by the indoor patients residing in the building is not used for any purpose other than domestic purpose.

Any doubt as to the answer to the question under consideration is dispelled by a glance at the course of decisions in England bearing on the construction of the expression 'domestic use' or 'domestic purposes'. The leading case on the point appears to be (1902) 2 Ch 746.[1] There the governors of a school constructed a swimming-bath for the use of boys. A fee was charged for the use of the bath. It was compulsory for the boarders but was charged to such only of the day boys as used the bath. The question arose whether under the circumstances the water supplied to the bath was not supplied for domestic purposes within the meaning of S. 53, Waterworks Clauses Act of 1863, but was supplied for business of the school. The contention which has been raised in this case was also put forward in that case. Romer L. J., dealing with that contention, observed :

> It has been argued that the only test whether a supply of water is required for domestic purposes is, whether the water is used and consumed by the occupier of the house for the private purposes of himself and his household. In my opinion that is too wide a proposition, and it is not the right test.

After discussing the matter he concluded:

> In my opinion you must approach the consideration of each case with some regard to what is reasonable, and see in each case whether the supply of water which is wanted is reasonably a supply for domestic purposes.

In (1902) 1 K B 310[2] where the occupier of a dwelling house carried on the business of a boarding house-keeper therein receiving persons to board and lodge who used the water of the company, water was only used in the house for cleansing, cooking, drinking and sanitary purposes. It was held that having regard to the use of the water in the house, the occupier was entitled to demand a supply of water at the rates specified in the Act for a supply for 'domestic purposes'. Lord Alverstone C. J. remarked in his judgment :

> Although it is true that the appellant is carrying on the business of a boarding house-keeper, he is not using the water for the purposes of his business in any proper or just sense, or in any other sense than that the water has been supplied for the domestic use of inmates of the house.

Darling J. held that :

> Where the water is used entirely for the domestic purposes of persons who are residing in the dwelling house which has been turned into a boarding house, I think that the supply is a supply for 'domestic purposes' within the meaning of the statute.

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[1] Barnard Castle Urban Council v. Wilson, (1902) 2 Ch 746=71 L J Ch 825=87 L T 279 =51 W R 102=18 T L R 748.

[2] Pidgeon v. Great Yarmouth Waterworks Company, (1902) 1 K B 310=71 L J K B 61=85 L T 632=66 J P 309=18 T L R 97.

Channel J. explained that the words supply of water for any trade, manufacture, or business mean some more direct use of the water in that business than the mere use of it for domestic purposes by the inmates of the house.

In (1904) 2 K B 174,[3] Buckley J. stressed that

> it is the character of the purpose, not the character of the premises in which the water is used, that is here the important factor.

The learned Judge observed :

> But, although that which is carried on upon the premises is a business, it is, in my opinion, perfectly consistent that in business premises water may be wanted for domestic purposes. The question is what is the character of the purpose, not what is the character of the place of user.

In (1907) 2 K B 611[4] it was held that water which is supplied to and used by a medical man for washing a motor car and for other purposes in connexion therewith, the motor car being used by him for the purposes of his profession or business of a physician and surgeon, is water supplied for domestic purposes. In (1911) 2 K B 38[5] the question was whether water which was supplied to the factory and there used for drinking and washing purposes by the workpeople and for cleansing urinals and water closets used by them was held to be water supplied for domestic purposes. There was a divergence of view on the question whether residence on the premises was essential for the use of the water to be regarded as domestic use, but there was no disagreement that the water used by the workpeople employed in the factory was water used for domestic purposes. Phillimore J. remarked that a house may be occupied solely for the purpose of trade or business or of a profession or calling and yet require water for domestic purposes. The position was further elucidated by Lord Coleridge J. by saying :

> Water so used is not used for a domestic purpose if the person using it uses it in connexion with or ancillary to a business. If the washing, the drinking, and the sanitary use of the water be for the workman's private convenience only, the fact that the water so used is supplied to a factory, even left at night without a caretaker, does not take out of the description 'domestic purpose where the workman is on the premises at regular work.

That case went up in appeal and was heard by three learned Judges, Vaughan Williams L. J., Farwell L. J. and Kennedy L. J. Farwell L. J. laid down the test to be "the use to which the water is put, not the nature of the premises" (*see* p. 65). Kennedy L. J. (*see* p. 69) dealing with an argument, which it is unnecessary here to repeat, said :

> The use of the water is domestic or not domestic, not according to the elaborateness of the appliances, but according to the nature of its application.

The case went up ultimately to the House of Lords, and the decision is reported in (1912) A C 24.[6] Lord Mersey at p. 32 makes it clear that when water is used for the mere personal convenience of men employed in a factory, it cannot be said to be water used for the purpose of the trade carried on in that factory. I may only refer to one more case reported in (1914) A C 118.[7] That was a decision on an appeal from the case reported in (1914) 1 K B 221.[8] In the last mentioned case Buckley L. J. had applied the test of the quality of the use in these words :

> The test is not whether the water is consumed or used in the course of the trade but whether the user of the water is in its nature domestic.

That test was accepted by the House of Lords as a sound test. The authorities reviewed above clearly show that the contention raised on behalf of the Municipal Committee is untenable. The use of the water for the personal convenience of the indoor patients residing in the applicant's building cannot be described as water used for purposes other than domestic. From the foregoing discussion it is evident that use of the water by persons other than the rate-payer and members of his family does not render the use other than domestic. The fact that the applicant uses his dwelling house partly for professional purposes, that is for residence of his indoor patients, and that the water is used by patients for drinking or washing does not alter the character of the use. The use of water for drinking or washing is admittedly a domestic purpose. It does not cease to be domestically used only because it is used by the patients as opposed to the owner or his family, or that the part of the dwelling house is used for professional or business purposes. The result is that the application succeeds and the plaintiff's suit stands dismissed with costs in both the Courts. Counsel's fee Rs. 30.

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[3] **South-West Subburban Water Co. v. St. Marylebone Union, (1904) 2 K B 174=73 L J K B 347=52 W R 378=68 J P 257=2 L G R 567=20 T L R 299.**

[4] **Harrogate Corporation v. Mackay, (1907) 2 K B 611=76 L J K B 977=97 L T 689=71 J P 458=51 S J 607=5 L G R 876=23 T L R 632.**

[5] **Metropolitan Water Board v. Colley's Patents, Ltd., (1911) 2 K B 38=80 L J K B 929.**

[6] **Colley's Patents, Ltd. v. Metropolitan Water Board, (1912) A C 24=81 L J K B 126=105 L T 674=56 S J 51=9 L G R 1159=76 J P 33=28 T L R 48.**

[7] **Metropolitan Water Board v. Avery, (1914) A C 118=83 L J K B 178=109 L T 762=58 S J 171=78 J P 121=12 L G R 95=30 T L R 189.**

[8] **Metropolitan Water Board v. Avery, (1914) 1 K B 221.**

D.S./R.K. *Application allowed.*

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## A. I. R. 1938 Nagpur 470

NIYOGI J.

*Mt. Anupa Bai w/o Gorelal Kirar— Plaintiff* — Appellant.

v.

*Bhagwant Singh and others — Defendants* — Respondents.

Second Appeal No. 105 of 1933, Decided on 9th April 1937, from appellate decree of District Judge, Jubbulpore, D/- 6th September 1932.

**(a) Contract Act (1872), S. 16 — Undue influence — Onus of proof —Three ingredients — Party pleading undue influence has to prove dominance and unfair gain — Other party has then to prove absence of use of such position.**

In the definition of undue influence there are three ingredients : (1) that the relations subsisting between the parties should be such that one of the parties is in a position to dominate the will of the other; (2) that the dominant party obtains an unfair advantage over the other, and (3) that the dominant party uses his dominant position to obtain that unfair advantage. Although these are three ingredients constituting undue influence, the party who pleads undue influence has in the first instance to prove only the first and second ingredients. When a person is proved to be in a position to dominate the will of another and the transaction appears on the face of it or on the evidence adduced, to be unconscionable, the onus of proving the absence of the operation of the third factor lies on the dominant party. [P 472 C 1]

**(b) Second Appeal — Error of law — Lower Court's findings based on misconception of real issue in case— High Court can hear appeal on facts.**

There is an error of law when a Court's finding proceeds upon a misconception of the real nature of the issue in the case, when several facts admitted or proved are not considered in their relation to each other and weighed as whole, when a certain legal consequence which naturally follows from admitted and proved facts is overlooked, or when a material part of admissible evidence which vitally bears on the point at issue is disregarded. A case which involves such an error of law must fall within the ambit of S. 100, Civil P. C.: *A I R 1929 P C 92 and A I R 1919 P C 29, Ref.; 18 Cal 23 (P C), Rel. on.* [P 472 C 2; P 473 C 1]

Where therefore lower Court's judgment is based on an error of law it cannot attain finality and High Court sitting in appeal over it can hear it on facts. [P 473 C 1]

**(c) Precedent — Value of — Law quite clear — Search for case law is useless.**

On a question on which the law is clear and unambiguous, it is unprofitable to wander in quest of principles in the wilderness of decided cases, for, when the law is clear, the decided cases only seek to apply the law to the particular circumstances which are presented for consideration. In such cases it has only to be seen whether certain facts which are established attract the application of the undisputed and well-recognized principle : *(1918) A C 304 and A I R 1933 Pat 306, Rel. on.* [P 473 C 2]

**(d) Second Appeal — Jurisdiction — Appellate Court can do what lower Courts could have done — Time granted by lower Court in its decree can be granted in appeal also.**

The ultimate Court of appeal must have jurisdiction to do that which it is competent for the trial Court to do : *A I R 1926 P C 34, Ref.* [P 474 C 2]

Where therefore a trial Court ordered that *A* should pay *B* such and such amount within a certain period on failure of which *A's* suit would stand dismissed and *B* filed an appeal against that order before that period expired and the first Appellate Court dismissed *A's* suit in toto, the High Court in reversing the decision of the lower Appellate Court can give *A* fresh period to pay up the amount to *B* : *A I R 1916 Pat 268 and 37 Cal 548, Rel. on.* [P 474 C 2]

M. B. Kinkhede and A. R. Kulkarni — *for Appellant.*

M. R. Bobde and D. N. Chaudhuri, and B. L. Gupta —*for Respondents 3 and 5 respectively.*

**Judgment.**—This is a plaintiff's appeal from a reversing judgment of the District Judge, Jubbulpore. The plaintiff sued for a declaration that the sale deed relating to 8 annas share of mouza Nainpur executed by her on 3rd March 1928 in favour of defendant 1, Himmat Singh, since deceased, who is now represented by his legal representatives, was invalid and that it should be set aside with an order to deliver back possession of it to the plaintiff. The proved facts which are now beyond controversy are that the plaintiff's husband died round about the year 1920 survived by two widows of whom the plaintiff was the junior one. The senior widow by name Mt. Yasodabai, who was managing the property after her husband's death, died in June 1927, and the plaintiff became the sole owner of the property which consisted of a house at Nainpur and 8 annas malguzari share of mouza Nainpur. Defendant 2 and his father Chhattar Singh, who claimed to be presumptive reversioners, contested the plaintiff's right to mutate her name in the Revenue Court, but her name was recorded in the register of proprietary mutations in spite of their dispute. Evidently the reversioners bore a grudge against her and their feelings became embittered. On the night of 30th January 1928 the plaintiff suffered from vomiting and purging which were naturally regarded by her as symptoms of poisoning with the result that a report was made to the police who removed her to the hospital at Mandla. She was discharged from the hospital on 7th February 1928. The sale deed in question was executed on 1st March 1928, the date which the document bears, in favour of Himmat Singh. The value of that share has been found by the lower Appellate Court to be Rs. 12,000. It is pertinent to notice that Himmat Singh was a well-to-do man who owned two villages. The sale deed was registered without any trouble, but when the plaintiff received notice of the mutation proceedings initiated by the purchaser Himmat Singh, she tried to resile from the transaction. In the mutation Court she contested Himmat Singh's right to take possession in pursuance of the sale deed, which she alleged had been executed under circumstances of fraud and undue influence. The mutation officer recorded Himmat Singh's name although he expressed his suspicions as to the bona fides of the sale deed. On 31st July 1928 Himmat Singh sold the village share to Khub Singh and his father Chhattar Singh, the presumptive reversioners, for Rs. 5500 which they did not pay in cash but treated as a debt and secured it by executing a mortgage in Himmat Singh's favour.

The plaintiff instituted the suit out of which this appeal arises on 26th June 1929 impeaching her conveyance dated 1st March 1928 on the grounds which are set forth in para. 3 of her plaint. Therein she states that she was an illiterate young and pardanashin woman who was unable to manage her village affairs and was indebted and harassed by relations, namely the reversioners. Then she mentions that poison was administered to her in February 1928 and that in her distress ensuing from that incident, defendant 1 offered an asylum to her and took her under his special care and protection. It was while she was under the protection of Himmat Singh that he made certain misrepresentations as to the extent of her debts and the danger of her property being sold by creditors and also that she had been threatened by Himmat Singh to transfer her 8 annas share in mouza Nainpur on pain of her exposure as being his mistress. There are other misrepresentations alleged which it is unnecessary to narrate here. The upshot of all these allegations in para. 3 was that she had been induced by undue influence and fraud on the part of Himmat Singh to execute the sale deed in his favour. Himmat Singh who was the only contesting party admitted that the plaintiff was illiterate, but denied that she was either young or pardanashin or unable to manage her village affairs. He, of course, denied having practised undue influence or fraud and asserted that on account of successive failure of crops and other causes, the plaintiff was compelled to part with her 8 annas share and that she had executed a contract of sale in that behalf on 5th January 1928, that is prior to her having been poisoned. He further asserted that the sale was justified by legal necessity. The trial Court found that the sale deed was the outcome of undue influence and fraud and passed a decree setting aside the sale and ordering delivery of possession to the plaintiff subject to payment by her of Rs. 3000 within two months.

The defendants appealed to the District Judge, Jubbulpore. The appellant preferred no appeal but applied to the lower Appellate Court for extension of time which was fixed in the original Court's decree for payment of Rs. 3000. The lower Appellate Court allowed the appeal and dismissed the suit in toto. At first sight the appeal struck me as contesting a pure finding of fact, but a slight examination of the pleadings and the evidence revealed to me, in point of law, a misdirection which vitiates the lower Appellate Court's judgment. The lower Appellate Court finds that the appellant was illiterate but that she was not strictly a pardanashin woman; that she was in the habit of transacting her business, that she had opportunity to take independent advice and probably took the advice of her pleader; that although she began to live under the roof of Himmat Singh at his villages Sunwara and Kudari after registration of the sale deed and Himmat Singh had kept a watchman over her to see that no outsider entered her house to repeat the attempt of poisoning her again, the theory of undue influence was untenable; that the fraudulent misrepresentations alleged were not proved; and lastly that though the property was sold for a quarter of its value, it was due to the plaintiff's foolishness as much as to the fact that she had only a qualified title of a

Hindu widow. The lower Appellate Court however disregarded an important part of the evidence indicating the particular relation in which Himmat Singh stood to plaintiff since she had been discharged from the hospital at Mandla for the reason that the plaintiff had falsely denied the receipt of consideration under the sale deed. It treated the case as entirely one of fraud and misrepresentation and did not address itself specifically to the question whether or not Himmat Singh was in a position to exercise influence on the plaintiff. The legal significance of the facts which it held proved was lost sight of.

It appears to me that the course of investigation pursued by the lower Appellate Court went wide of the primary issue in the case and indicates a lack of appreciation of the measure of the burden of proof which lay on the parties in view of the law applicable to the facts of the case. The law as to undue influence is contained in S. 16, Contract Act:

> A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

According to this description of undue influence there are three ingredients: (1) that the relations subsisting between the parties should be such that one of the parties is in a position to dominate the will of the other; (2) that the dominant party obtains an unfair advantage over the other; and (3) that the dominant party uses his dominant position to obtain that unfair advantage. Although these are three ingredients constituting undue influence, the party who pleads undue influence has in the first instance to prove only the first and second ingredients, as will be clear from the terms of S. 16 (3). That Section says that when a person is proved to be in a position to dominate the will of another and the transaction appears on the face of it or on the evidence adduced to be unconscionable, the onus of proving the absence of the operation of the third factor lies on the dominant party. It is clear therefore that the plaintiff had the burden laid on her of proving the primary issue which consisted of two parts: (1) that the sale deed on the face of it was unconscionable; and (2) that Himmat Singh stood in such a relation to her as would give him an opportunity to dominate her will. That was the measure of the burden which was incumbent on the plaintiff. She prima facie discharged the burden as the property which she sold for Rs. 3000 was found to be worth Rs. 12,000. The purchase of Himmat Singh of the property for a quarter of its value was on the face of it unconscionable. The burden of proving the particular relation of Himmat Singh towards her also lay incontestably on her shoulder. She stated in her plaint the general circumstances which brought Himmat Singh in contact with her and gave him a position which he could use to exercise some sort of influence on her. The particulars of the plea were not stated as they were unnecessary and the defendant also did not call upon her to state them. That plea was sought to be proved by oral evidence which was considered as trustworthy by the learned Judge of the original Court, who it may be remarked had the benefit of recording that evidence.

The lower Appellate Court guided itself by the allegations of fraud and undue influence in the plaint and reviewed the evidence in so far as it bore directly on the pleadings and found that there was neither fraud nor undue influence. As I have pointed out above, the plaintiff was in the first instance not required to prove fraud or misrepresentation nor even that there was undue influence; she had only to prove that the bargain was unfair and that the party who benefited by it was in a position to influence her. This aspect of the evidence escaped the attention of the lower Appellate Court as will be shown in the sequel with the result that it negatived what he described as the undue influence theory as also the plea of fraud and misrepresentation. Now it appears to me clear that there has been a misconception of what the central issue in the case was, and the investigation conducted by the lower Appellate Court went widely astray in consequence of the failure to appreciate the precise point in issue.

There is an error of law when a Court's finding proceeds upon a misconception of the real nature of the issue in the case, when several facts admitted or proved are not considered in their relation to each other and weighed as a whole, when a certain legal consequence which naturally flows from admitted and proved facts is overlooked, or when a material part of admissible evidence which vitally bears on the point at issue is disregarded. A case which involves such an error of law must in my opinion fall within the ambit of S. 100, Civil P. C: *see* 25 N L R 68,[1] 15 N L R 97[2] and 17 I A 122,[3] at p. 127, where Lord Macnaghten pointed out that an erroneous finding of fact is a different thing from an error or defect in procedure. Where there is error or defect in the procedure, the finding of fact is vitiated and cannot be accepted as final in second appeal.

As the lower Appellate Court's finding is not in conformity to law and cannot therefore claim any finality, I have heard the whole case on facts. A vigorous and lengthy argument backed by a mass of case law on either side has been addressed. Reference has been made to A I R 1927 Cal 889,[4] 17 C L J 221,[5] 60 C L J 25,[6] 9 Luck 178,[7] 23 All 137,[8] 36 All 81,[9] 12 Pat 359,[10] A I R 1935 P C 146,[11] 8 N L R 150[12] and others. I am at this stage reminded of the dictum of Lord Haldane occurring in (1918) A C 304[13] at p. 316 in these terms:

> We ought, in applying the statute to particular facts, to direct our efforts rather to giving effect to broad principles with freedom in applying them to individual circumstances than to searching for guidance from mere apparent analogies with the particular facts of previous cases, analogies which rarely embody the full truth.

I should be following a course reprobated by the noble Lord were I to seek for guidance in the mere analogy with the particular facts of some previously decided cases. On a question on which the law is clear and unambiguous, it is unprofitable to wander in quest of principles in the wilderness of decided cases, for, when the law is clear, the decided cases only seek to apply the law to the particular circumstances which are presented for consideration. In such cases it has only to be seen whether certain facts which are established attract the application of the undisputed and well-recognized principle. In 12 Pat 359[10] the learned Judges who reviewed the previous decisions concluded as follows:

> Each case would have to be decided on its own merits and that the Court will have to be satisfied whether the act in question was a free act of the lady and whether she understood fully the consequences.

It is therefore unnecessary to review the previous cases cited before me. All that is necessary is to look into the facts which are put forward as are calculated to show that Himmat Singh was in a position to exercise some sort of influence on the plaintiff at the time when she executed the conveyance under consideration. (His Lordship after discussing the evidence in detail continued). Now ultimately one comes to this conclusion: here is a woman who, though not strictly pardanashin, was illiterate and was one who was not competent to judge the value of her own property. She was harassed by her relatives and her life was threatened. She finds herself alone unbefriended in a hospital where Himmat Singh turns up to relieve her loneliness and a relation bordering on intimacy grows up between them. She leaves the hospital on 7th February and goes to her house at Nainpur where she lives in company with Himmat Singh for some days and later receives him as a frequent visitor. Himmat Singh becomes the custodian of her personal safety, if not also a steward of her estate. Towards the end of that month she suddenly sells her valuable property for a trivial amount. After the registration, Himmat Singh keeps her for a month in his villages: it transpires from his own evidence that the plaintiff was living at Kudari when the notice of mutation case was served on her. When he found that the plaintiff was disillusioned and began to see him in his true colours and contested his right in the mutation Court (it did not fail to suspect foul play), he transfers that property to the reversioners. All these circumstances taken together must compel the conclusion that the plaintiff was not dealing at arm's length with Himmat Singh. At all events during the period between her discharge from the hospital and her having left Kudari to avoid service of the notice from the mutation Court, there can be no shadow of doubt that she was under the control of Himmat Singh. The plaintiff could not possibly give any better evidence than what she has given, and that evidence ought to suffice at least to shift the burden on to the shoulders of Himmat Singh and his transferees of proving that the transfer under consideration was not induced by undue influence. There is not an iota of such evidence, and such evidence as there is, tends to confirm the plaintiff's evidence.

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[1] Atmaram Bhagwant v. Collector of Nagpur, (1929) 16 A I R P C 92=114 I C 587=25 N L R 68 (P C).

[2] Damusa v. Abdul Samad, (1919) 6 A I R P C 29=51 I C 177=47 Cal 107=15 N L R 97=46 I A 140 (P C).

[3] Mt. Durga Choudharain v. Jawahir Singh Choudhri, (1891) 18 Cal 23=17 I A 122=5 Sar 560 (P C).

[4] Ram Sundar Saha v. Kali Narain Sen, (1927) 14 A I R Cal 889=104 I C 527=55 Cal 285.

[5] Kali Prosonno Bhattacharyya v. Protap Singh, (1913) 17 C L J 221=18 I C 965.

[6] Purna Chandra v. Sarojini Choudhurani, (1935) 22 A I R Cal 234=155 I C 1027=60 C L J 25.

[7] Someshwar Dutt v. Tribhawan Dutt, (1934) 21 A I R P C 130=149 I C 480=9 Luck 178 =61 I A 224 (P C).

[8] Hodges v. Delhi and London Bank, Ltd., (1901) 23 All 137 = 27 I A 168 = 7 Sar 767 (P C).

[9] Kali Bakhsh Singh v. Ram Gopal Singh, (1913) 36 All 81=21 I C 985=41 I A 23 = 12 A L J 115 (P C).

[10] Sabitri Thakurain v. F. A. Savi, (1933) 20 A I R Pat 306=145 I C 1=12 Pat 359 = 14 P L T Sup 1.

[11] Homeshwar Singh v. Kameshwar, (1935) 22 A I R P C 146=157 I C 1 (P C).

[12] Suratsingh v. Baldeo, (1912) 8 N L R 150=17 I C 363.

[13] Charles R. Davidson & Co. v. M'Robb, (1918) A C 304=87 L J P C 58 = 118 L T 451 = 34 T L R 213=55 S C L R 185=62 S J 347=10 B W C C 673.

The next question is whether, if the appellant succeeds, this Court can grant a fresh period for payment of the purchase money which the appellant received. It is strenuously urged on behalf of the respondent on the authority in 49 Mad 435[14] that as she did not file an appeal in the lower Appellate Court, that part of the decree which was in her favour remains intact. The argument is that there were in reality two decrees: one decree ordering delivery of possession subject to payment, and another decree directing dismissal of the suit on failure to pay. On this footing, it is urged that the reversal of one decree would not affect the other decree, that is to say the decree to the extent that it stands in appellant's favour. I appreciate the ingenuity of the argument, but I am unable to discern any force in it. Assuming that there were two decrees, the second part of the decree (which is represented as a separate decree) was dependent on the first part. The plaintiff was directed to pay Rs. 3000 because the sale deed was set aside and she was held entitled to possession. It would be preposterous to say that her liability to pay subsists even though the sale deed is not set aside and possession is not to be delivered to her. As soon as the lower Appellate Court dismissed the suit in appeal, that Court's decree wiped out that of the trial Court. So far as this Court is concerned, there is only one decree, namely the lower Appellate Court's decree. Now if that decree is set aside here, the decree of the original Court will naturally be restored; and the question would be whether it is humanly possible for this Court to restore the decree, if it is to be worth anything to the appellant, precisely in the terms of the first Court's decree. That decree provided only two months' time which expired on 4th March 1932. It is obviously impossible to restore that part of the decree. To do complete justice between the parties, it is incumbent on this Court to grant a fresh period to enable the appellant to pay Rs. 3000. The question is whether this Court has jurisdiction. I should think this Court has. The ultimate Court of Appeal must have jurisdiction to do that which it is competent for the trial Court to do.

In 1 Pat L J 92[15] it was held that the Court which passes a decree providing time for payment of the pre-emption price has jurisdiction to extend that period. Now that this Court in appeal is seized of the case, that power to extend time can only be exercised by the Appellate Court: *see* 37 Cal 548.[16] It may be pertinent to observe here that an application was made by the appellant in the lower Appellate Court on 29th February 1932 praying for extension of time, but that application was not dealt with pending the appeal. The appeal to the lower Appellate Court was filed on 5th February 1932, that is within two months which rendered the carrying out of the direction for payment of the amount useless as the prayer on the appeal was for the dismissal of the whole suit. In view of all these circumstances I think it right to exercise the undoubted jurisdiction of this Court, while restoring the first Court's decree to provide for a fresh period to enable the appellant to deposit the amount of Rs. 3000. The result is that the appeal succeeds with costs and the decree of the trial Court will be restored subject to this variation, that the appellant will deposit the sum of Rs. 3000 on or before 1st August 1937, failing to do which her suit will be dismissed.

B.D./R.K. *Appeal allowed.*

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[14] Mahomed Khaleel Shirazi & Sons v. Les Tanneries Lyounaises, (1926) 13 A I R P C 34 = 94 I C 767=49 Mad 435=53 I A 84 (P C).

[15] Abu Muhammad Mian v. Mukut Pertap Narain, (1916) 3 A I R Pat 268=34 I C 88 = 1 Pat L J 92=20 C W N 860.

[16] Permanand Das v. Kripasindhu Roy, (1910) 37 Cal 548=6 I C 275=14 C W N 584.

## * A. I. R. 1938 Nagpur 475

NIYOGI J.

*Ramchandra Jagannath Marwadi — Defendant 1* — Applicant.

v.

*Kayam Hussain Abdul Ali Bohra, Plaintiff and another, Defendant 2*— Non-applicants.

Civil Revn. No. 210 of 1937, Decided on 3rd December 1937, from order of Third Sub-Judge, Second Class, Nagpur, D/- 25th January 1937.

*** Civil P. C. (1908), O. 21, R. 58—Objection to attachment can be made even after sale.**

The attachment does not cease when the property is sold in execution; and a valid objection can be made even after sale to the attachment under O. 21, R. 58: *A I R 1928 Rang 80, Dissent.; A I R 1931 Mad 782, Rel. on; 1 N L R 167, Approved ; A I R 1931 P C 33 and A I R 1937 Nag 98, Disting.* [P 476 C 2]

P. P. Deo — *for Applicant.*

R. G. Rau — *for Non-applicant No. 1.*

**Order.**—This is a petition to revise an interlocutory order passed by the third Subordinate Judge, Second Class, Nagpur, in Civil Suit No. 39-A of 1936, on 15th January 1937. The two questions which arise for determination are (1) whether an objection to attachment is competent after the sale of the attached property, and (2) whether the value of the suit for purposes of court-fees and jurisdiction is the value of the property in dispute when the judgment-debtor is impleaded in the suit instituted under O. 21, R. 63, Civil P. C. Ramchandra, defendant, obtained a decree against Kurban Hussain on 9th August 1932 and attached certain property in execution of that decree. The judgment-debtor's property was sold in execution on 6th January 1935. Subsequent to the sale, namely on 12th January 1935, the non-applicant No. 1 Kayam Hussain lodged an objection to the attachment of the property. That was dismissed summarily, and the sale was confirmed on 27th April 1935. The disappointed objector instituted the suit out of which this revision petition arises under O. 21, R. 63, Civil P. C., to establish the right which he claimed to the property in dispute. Two preliminary grounds were raised by the defendant but they were overruled. Hence this revision application by the defendant Ramchandra.

On behalf of the applicant, who is the decree-holder, it is contended that the objection to attachment was not tenable as it was made after the date of the execution sale and that the objection itself being void the objector could not avail himself of the provisions of O. 21, R. 63, Civil P. C. Reliance is placed on 5 Rang 751[1] wherein it was held that an application for removal of attachment under O. 21, R. 58, Civil P. C., should be made before the property attached has been sold and that a Court acts in excess of jurisdiction if it entertains such an application after sale. This case was considered in 55 Mad 251[2] but was not followed. The view expressed by the late Court of the Judicial Commissioner, Nagpur, in 1 N L R 167[3] is also against that taken in the Rangoon case. It appears to me that the view of the Nagpur Judicial Commissioner's Court is the sound one. O. 21, R. 55, Civil P. C., enumerates the various events on the happening of which the attachment will be deemed to have been removed. O. 21, R. 57, also provides that the attachment will determine if the execution application is dismissed for default of the decree-holder. It may be a valid argument to say that the Rr. 55 and 57 are not exhaustive of all the circumstances which would result in the termination of the attachment, but it must be borne in mind that if the sale, which is an important stage in the execution proceedings, had been regarded by the Legislature as resulting in the removal of attachment, there was nothing to preclude the Legislature from expressly saying so. Absence of mention of sale as determining the attachment either in R. 55 or R. 57 goes to indicate the mind of the Legislature to regard the sale as not impairing the attachment rather than the contrary. It has to be seen whether there is any element in the sale itself which militates against the continuance of the attachment. It does not appear reasonable to assume that mere holding of the sale would have that result, because the object of attachment is to ensure an uninterrupted transfer of the judgment-debtor's right, title and interest to the execution purchaser. As has been pointed out by their Lordships of the Privy Council in 42 Cal 72[4] the object of the attachment is to prevent or avoid private alienation by the judgment-debtor.

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1. Maung Po Pe v. Maung Kwa, (1928) 15 A I R Rang 80=107 I C 161=5 Rang 751.
2. Jagannadham v. B. Pydayya, (1931) 18 A I R Mad 782=134 I C 809=55 Mad 251=61 M L J 884.
3. Bhagchand v. Mt. Jhunia, (1905) 1 N L R 167.
4. Raghunath Das v. Sundar Das, (1914) 1 A I R P C 129=24 I C 304=42 Cal 72=41 I A 251 (P C).

If that is the object, the attachment must subsist so long as title remains with judgment-debtor to tempt him to sell the property privately.

It may be contended that when the Court itself has held the sale, the judgment-debtor cannot possibly sell it again privately. This argument looks specious but is not sound, because the sale held by the Court is liable to be set aside for irregularity or illegality in conducting and publishing the sale or fraud on the part of the parties. Since an execution sale is liable to reversal in certain circumstances, and the Code does not provide for a fresh attachment to be made in the event of the sale being set aside, it must be predicated that either the attachment ceases with the sale and is revived on its reversal, or that it remains in force notwithstanding the sale. If it is assumed that the attachment ceases with the execution sale, then the judgment-debtor may dispose of his property with impunity in the interval between the sale and its reversal and thus preclude the executing Court from putting up the property to sale again. A hypothesis which leads to such a startling and absurd conclusion cannot but be rejected. It must therefore follow that the attachment must be deemed to continue in spite of the sale until it is confirmed. It is only after confirmation of the sale that all fear of the judgment-debtor's surreptitiously disposing of the property will cease. It is argued by the learned counsel for the applicant that as soon as a sale is held by the Court its power to execute the decree comes to an end. Reference is made to 27 N L R 95[5] and 19 N L J 296.[6] All that their Lordships of the Privy Council said in the first mentioned case was that the Court has no option but to confirm the sale under R. 92, where no application is made under Rr. 89, 90 or 91, but it does not appear to have any bearing on the question under consideration. There is nothing in any of the two cases to suggest that the executing Court becomes functus officio as soon as the execution sale is held. If that were so, the executing Court would have no power to deal with any application made under Rr. 89, 90 or 91 and these rules would be rendered nugatory.

I am therefore of the opinion that the attachment does not cease when the property is sold in execution and that a valid objection can be made after sale to the attachment under O. 21, R. 58. In the present case such an objection was made but was dismissed by the execution Court. That dismissal must be under R. 60 of O. 21, and consequently the disappointed objector was entitled to file a suit under O. 21, R. 63. It is unnecessary to decide the second question as the non-applicant decree-holder has struck out the name of the judgment-debtor from the plaint and the question of the amount of court-fees leviable in the suit does not arise. The value of the property may be Rs. 3000, but it was sold to satisfy the decree for Rs. 700. As the matter in dispute is now confined only to the objector and the decree-holder, the value of the suit would be the value of the decree, namely Rs. 700 as found by the Court below. The application is dismissed. I make no order as to costs.

D.S./R.K. *Application dismissed.*

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## ✲ A. I. R. 1938 Nagpur 476

STONE C. J. AND NIYOGI J.

*Ganpat Rao and others — Plaintiffs —* Appellants.

v.

*Ishwar Sing and another — Defendants 2 and 3 —* Respondents.

First Appeal No. 112 of 1933, Decided on 18th September 1936, from decree of Addl. Dist, Judge, Wardha, D/- 29th April 1933.

**✲ (a) Hindu Law — Alienation — Alienation by managing member during adults' minority —For ratification by adults of such alienation there must be communication of their election to alienee.**

No man, contract apart, is bound finally to a choice whether to affirm or disaffirm or an expression of opinion as to the binding nature of a contract unless (1) he has thereby in some way brought his decision to the knowledge of the other side, or (2) his subsequent actions show an approbation of the contract the binding nature of which upon him is in question. Hence for ratification or affirmation by adults of an alienation made during their minority by a managing member of the family there must be communication to the alienee by the ratifiers before the act becomes irrevocable : *A I R 1918 P C 196 ; (1882) 7 A C 345 and (1914) 2 K B 61, Rel. on.* [P 478 C 1]

**(b) Hindu Law—Alienation—Partial necessity — Mortgage and sale — Part of mortgage money for legal necessity—Mortgage is binding to that extent.**

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[5] Nanhelal v. Umrao Singh, (1931) 18 A I R P C 33=130 I C 686=27 N L R 95=58 I A 50 (P C).

[6] Haji Dada Kachia Mallik Haji Wali Mohammad v. Pannalal, (1937) 24 A I R Nag 98=169 I C 99=19 N L J 296.

A mortgage and a sale transaction stand on a different footing. A sale is either wholly good or bad ; a mortgage can be good in part, or capable of being supported as to part ; and if it should appear that part of the consideration is for necessity, that part would be binding. [P 479 C 1]

**(c) Hindu Law—Alienation—Manager — To support alienation lender must show not merely necessary purpose but necessity for loan — Manager, to knowledge of lender, having large resources and actual cash — Mortgage to pay land revenue is not binding on estate.**

For an alienation by manager to be valid, what has to be shown is that the loan is for legal necessity, not that the money is wanted, or is stated to be wanted, and enquiries confirm that want for a necessary purpose. The difference is important. Where the manager has, to the knowledge of the lender, large available resources, and actual cash at hand, he cannot bind the estate if he borrows ostensibly to pay land revenue. The purpose is necessity, but there is no necessity for the loan, where there are apparently large resources, a large income and an unencumbered estate. The lender must show not merely a necessary purpose but a necessity for the loan. If, after reasonable enquiries, he, as a reasonable man, is satisfied of that necessity, that is sufficient ; he is not concerned with a misapplication of the money lent, but it must be the necessity for the loan that he must satisfy himself about. [P 479 C 1, 2]

M. R. Bobde and B. L. Gupta — *for Appellants.*

T. L. Sheode, W. R. Puranik and W. B. Pendharkar — *for Respondents.*

**Judgment.**—This appeal is by the plaintiffs whose suit on a morgage bond has been dismissed against defendants 2 and 3, members of the joint Hindu family whose managing member executed the bond and who were minors at the time of the transaction. The relationship between the managing member and the minors was that of step-brothers. It is accordingly sought to make the minors liable on one of two grounds : (a) legal necessity or the benefit of the estate ; (b) affirmation when adults. It will be convenient to examine the second ground first. Different terms have been used to express the legal consequence of the acknowledgments alleged to have been made. It has been said that the minors, when they came of age, either affirmed, or ratified, or elected to be bound by the transaction. The matter does not turn on the expression used, but on the legal consequences of the facts which are as follows : The pleadings allege pressure, a threatened suit, an admission of liability, a request for time and a giving of time. This alleges in effect a new contract based on consideration—the giving of time. That new contract has not been pressed before us, and the argument did not proceed on any such basis. What was urged was that Ex. 1 D-1 and Ex. 1 D-2 amount to an affirmation, ratification, or election.

Exhibit 1 D-1 is a document to which the three brothers Himmatsingh, Ishwarsingh and Lalsingh were parties. Of them Himmatsingh was the managing member, executant of the suit bond. The other two were minors at the date of the bond, majors at the date of Ex. 1 D-1. This document recites that the estate is encumbered, that it is wholly mortgaged to Dewaji (the first of the mortgagees under the suit mortgage bond which was in favour of six mortgagees). It proceeds :

> We are indebted to him and Ghatate and others. It is necessary for us to repay their debts. We should repay the debts now . . . . but it is not possible to repay the debts entirely.

They then state what is to be done to improve the management of the estate so as to make it possible to get clear of debt, the scheme being to appoint a manager who is to be free from the interference of any of the brothers and who is to pay none of them more than sufficient for bare needs and to accumulate the income after allowing for the necessary outgoings. Ex. 1 D-2 is a letter written by Ishwarsingh to Himmatsingh which contains the following relevant sentences : "We owe moneys to Dewaji Sonar and others. We all admit the said debts." It is said that as a consequence of these two documents, though uncommunicated to the plaintiffs, and though not acted upon by the plaintiffs, Ishwarsingh and Lalsingh cannot now be heard to say that they are not bound (that is, estoppel applies) or must be treated as having adopted, ratified, or elected to be bound by the transaction.

In support of this proposition Katiar's Law of Agency (pp. 287 and 288) was referred to. The learned author is there considering the outstanding features of ratification of an agent's acts by a principal. On the other hand in 42 Mad 523[1] at p. 538 the Judicial Committee considered the term to use when a reversioner affirms or disaffirms an alienation by a widow. Lord Dunedin there observes :

> If therefore a reversioner, after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification. In

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[1] Rangasami Gounden v. Nachiappa Gounden, (1918) 5 A I R P C 196=50 I C 498=42 Mad 523=46 I A 72 (P C).

some cases it has been expressed as an election to hold the deed good.

In a case of a widow's alienation which raised the discussion whether as against a reversioner it was voidable or void, Lord Davey in 34 Cal 329[2] at p. 333 expressed the opinion of the Judicial Committee as follows :

> Her alienation is not therefore absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property.

Whether the plaintiffs' case be founded on ratification of affirmation, or election, however, in our opinion there must be a communication before the act becomes irrevocable. If ratification be the term used, then S. 197, Contract Act, applies. It was urged by counsel that there is nothing in 38 Mad 997[3] to show that there need be communication to make ratification not merely effective but final ; yet in that case at page 1008 there are the following sentences:

> Mr. Seshagiri Ayyar for the appellants contends that no communication of the ratification is necessary, and that any expression (written or oral) of a resolve to ratify a contract is absolutely irrevocable even though uncommunicated and though the ratifier may change his mind a moment later. This is a startling proposition and one in support of which no authority has been cited.

In our opinion, as appears from S. 196, Contract Act, ratification, strictly speaking, is a part of the law of agency. The present facts will only bind if they amount to something which operates as an election or which constitutes a final and unalterable decision to treat the contract as binding which will preclude the party so acting from changing his mind and which will, in truth, amount to an estoppel. No man, contract apart, is bound finally to a choice whether to affirm or disaffirm or an expression of opinion as to the binding nature of a contract unless (1) he has thereby in some way brought his decision to the knowledge of the other side, or (2) his subsequent actions show an approbation of the contract the binding nature of which upon him is in question, as for example if he sells the subject-matter which only belongs to him on the basis that he has affirmed. Lord Blackburn in (1882) 7 A C 345[4] at pages 360 and 361—cited with approval by Atkin J. (as he then was) in (1914) 2 K B 61[5] at p. 66—dealing with election, expresses the matter as follows:

> The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him ; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further ; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

Here neither (1) nor (2) is present. It is quite possible for a man knowing that the manager of his family has incurred debts to take steps to conserve the family income with a view to the paying off of those debts without his approbating the contract. He may, for example, be the kind of man who whether bound in law or not considers such a debt a moral obligation which he wishes to discharge, or he may, taking notice of the fact of past debts, be desirous of preventing the incurring of future debts. We are accordingly of the opinion that defendants 2 and 3 are not bound as a consequence of Exs. 1 D-1 and 1 D-2. Nor do we think these operate to shift the burden of proof.

That leaves outstanding the question whether this mortgage transaction was for legal necessity or the benefit of the estate. As was pointed out by the learned trial Judge, this is not the case of a mortgage by a father to pay off antecedent debts so as to fall within the second proposition laid down in 46 All 95.[6] It is a case of a loan by a brother, or rather step-brother. The learned Judge, in a careful judgment that has the great merit of considering both fact and law and restricting his observations to matters that are important and relevant, has fully appreciated this vital distinction and has also considered not merely whether there was necessity but also whether the transaction could be supported on the ground that it was prudent. He stresses, and rightly, the broad features here present, a young man coming into a very considerable estate with a large income within a few years, becoming involved with money-lenders for expenses such as land revenue and seeds which obviously should be payable out of income. No adequate enquiry by the lender, a greater and greater indebtedness as debt piles on debt with the culmination that though the estate brought in, according to the lender, Rs. 35,000 (of which Rs. 16,000 only went in cultivation expenses) and although, according to the lender, the lands were worth two lakhs, the whole was mortgaged after a few years of this young man's management to secure the suit debt of Rs. 33,000, a debt lent at a rate of interest of 1 per cent. per month with compound interest at Re. 1-4-0 per cent. per month, with annual rests, on defaulted instalments, though the security, if his share alone was bound, was twice the amount advanced and, if the minors' shares were bound, six times the actual amount advanced. He observes:

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[2] Bijoy Gopal Mukerji v. Krishna Mahishi Debi, (1907) 34 Cal 329=34 I A 87=17 M L J 154 (P C).

[3] Rajagopalacharyulu v. Secretary of State, (1914) 1 A I R Mad 174=22 I C 107 = 38 Mad 997.

[4] Scarf v. Jardine, (1882) 7 A C 345=51 L J Q B 612=47 L T 258=30 W R 893.

[5] Codling v. John Mowlem and Co. Ltd., (1914) 2 K B 61 = 83 L J K B 445 = (1914) W C & I Rep 1.

[6] Brij Narain v. Mangal Prasad, (1924) 11 A I R P C 50 = 77 I C 689 = 46 All 95 = 51 I A 129 (P C).

> It has been shown that part of the mortgage debt has been spent in paying off arrears of land revenue. No doubt a loan incurred for payment of a land revenue is to be called debt incurred for necessity but in the present case a loan on that account is nothing but an insignificant part of the whole. Such an amount could have been raised on the personal responsibility of Himmat Singh.

This has been the most criticized part of the judgment. It was rightly urged that a mortgage and a sale transaction stand on a different footing. A sale is either wholly good or bad; a mortgage can be good in parts, or capable of being supported as to part and if it should appear that part of the consideration is for necessity, that part would be binding. It was accordingly said that if the payment of land revenue amounts to necessity, this mortgage is binding to that extent. We are of the opinion however that what has to be shown is that the loan is for legal necessity, not that the money is wanted, or is stated to be wanted, and inquiries confirm that want, for a necessary purpose. The difference is important. The manager may have, to the knowledge of the lender large available resources, he may have actual cash at hand. Can he still bind the estate if he borrows ostensibly to pay land revenue? Clearly not. The purpose is necessity, but there is no necessity for the loan, where, as here, there are apparently large resources, a large income and an unencumbered estate (to begin with). The lender must show not merely a necessary purpose but a necessity for the loan. If, after reasonable inquiries, he, as a reasonable man, is satisfied of that necessity, that is sufficient; he is not concerned with a misapplication of the money lent, but it must be the necessity for the loan that he must satisfy himself about — were it otherwise, minors (whose power to claim partition is limited) would be at the mercy of spendthrifts who spent the family income on themselves and borrowed money for necessary family expenses.

When however one comes to consider the case in detail, all difficulty disappears. Here we have a case of a father dying leaving a young son aged 16 and two other sons by another wife, the one aged two and the other posthumous. The deceased left a money-lending business worth Rupees 64,000, 1100 khundies of grain, 16 or 17 villages and no debts. Three years later Rs. 500 is being borrowed (Ex. P-32) in cash for a purpose not stated. Five years later, 31-6-16 tolas of gold are being pledged for some hundreds of rupees — Rs. 700 is said to have been borrowed later to pay this off. By 1916 (eight years after the father's death) money is being borrowed to pay trifling matters (for such an estate) as Rs. 461-9-0 for land revenue and Rupees 177-7-6 for purchase of grain; as the learned trial Judge finds, no proper inquiry was made by the lender, though the circumstances would certainly raise in any mind a curiosity as to why such expenses could not be paid out of revenue, future if not past. Instead, this lender stated he was astonished—and appears to have left it at that. The suit bond for Rs. 33,000 is stated to be entered into in order to pay three debts, Rs. 20,000 to Bhikamchand Laxmichand, Rs. 10,000 to the Co-operative Bank, Wardha, Rs. 3000 to Ramchandra Narayan Sonar. The first item was due under Ex. P-2 which was a mortgage for Rs. 10,000 at a high rate of interest (Rupee 1-2-0, in default Rupees 2 per month compound, with annual rests). This was stated to be borrowed for Rs. 1463-11-0 land revenue, Rs. 2239-5-0 to pay off a mortgage bond due to Co-operative Bank, Rupees 6297 cash.

Obviously the cash item cannot be supported. The Rs. 2239-5-0 is said to be (in the mortgage bond Ex. P-50) "for payment of land revenue and improvement of fields." Actually the money was paid in cash and there is nothing to show that it was wanted for land revenue, or that inquiry was made. It obviously fails. That leaves for later consideration the remaining item of Rs. 1463-11-0. The second item, Rs. 10,000 due to the Co-operative Bank, is the consequence of borrowing from that Bank in 1921 Rs. 8767 which, in turn, is alleged to have been required for (1) weeding and (2) paying Sambu. Sambu had sold property to the family in 1914 for Rs. 4500, received as to Rs. 500 in cash and Rs. 4000 by a mortgage bond. That bond was payable on 12th July 1915 and would have been time-barred in 1918. The 1921 loan was not therefore required to pay this, and there is nothing else shown to support it; nor is it shown how the money was in fact applied or how much was required for "weeding." As for the Rs. 3000 item, it is apparent from the evidence of P. W. 3 that there was no necessity and no inquiries. It remains to consider the Rs. 1463-11-0. It will be remembered that the Rs. 2239-5-0 loan, part of the Rs. 10,000 loan, was in turn stated to be borrowed for land revenue. The lender was called as a witness. This is his account of how that purpose of the loan came to be stated:

> I was told by Himmatsingh that money was required to pay land revenue and so it was so mentioned.

Later he said:

> I believed in what Himmat Singh said about his needs and made the payments. I made no further inquiry on the point.

That representation having proved so successful on that occasion, this spendthrift seems to have repeated it on the occasion of the Rs. 10,000 loan. No inquiry seems to have been made and we are not satisfied that there was in fact any necessity to borrow for this purpose. The appeal accordingly fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 480

POLLOCK J.

*Ganpatrao Sakharamji Patil* — Appellant.

v.

*Motilal Hiralal Pardeshi Teli* — Respondent.

Second Appeal No. 468 of 1937, Decided on 22nd September 1937.

**Landlord and Tenant — Rights of tenant — Land in growing town obtained by tenant to build residential house — Presumption is that land was acquired with right of transfer.**

Where a man obtains land in order to build a residential house in a growing town, the ordinary presumption would be that the land was acquired with a right of transfer and if the landlord contends that the tenant had no right to transfer the building which he had built and which he was occupying, it is for him to show that under the terms of the license the right of the tenant was limited and it was expressly agreed that he was incompetent to make a transfer: *A I R 1934 All 336, Foll.; A I R 1931 Mad 216, Disting.*

[P 480 C 2]

V. V. Kelkar — *for Appellant.*

**Judgment.** — It is obvious and it is admitted that Mallanna was placed in possession of the site in dispute by the plaintiff in order that he might erect a residential house thereon. The rights of the parties depend entirely on the terms of the original contract. The site in dispute is not technically a part of the abadi, but it is actually a part of Wardha town. Where a man obtains land in order to build a residential house in a growing town, the ordinary presumption would be, in my opinion, that the land was acquired with a right of transfer, and I entirely agree with the decision in A I R 1934 All 336[1] that if the landlord contends that the tenant had no right to transfer the building which he had built and which he was occupying, it is for him to show that under the terms of the license the right of the tenant was limited and it was expressly agreed that he would be incompetent to make a transfer. The decision in 54 Mad 554[2] is clearly distinguishable on the facts. The first Court relied on a case which it cited as I L R 1 Luck 238.* The name was not given, and as the reference has been incorrectly given, I have been unable to trace the case; nor was the learned counsel, who appeared for the appellant in this Court and relied on the case, able to tell me where it could be found. In my opinion the case was correctly decided by the lower Appellate Court and the appeal is dismissed without notice to the respondent.

R.M./R.K. *Appeal dismissed.*

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[1] Ram Bharose v. Bishnath Prasad, (1934) 21 A I R All 336=153 I C 692=1934 A L J 728.

[2] Chinnan v. Ranjithammal, (1931) 18 A I R Mad 216 = 131 I C 175 = 54 Mad 554 = 60 M L J 709.

* [The correct reference appears to be 1 Luck Cas 238: Ram Bharosay v. Qamar Zamani Begam, (1927) 14 A I R Oudh 314 = 103 I C 681=1 Luck Cas 238—*Ed.*]

## ✲ A. I. R. 1938 Nagpur 481

NIYOGI J.

*Motilal Shioji Ram — Defendant —* Applicant.

v.

*Shambhoolal Ganpatlal —* Opposite Party.

Civil Revn. No. 483 of 1937, Decided on 20th January 1938, from order of Addl. Dist. Judge, Bhandara, D/- 6th July 1937.

**(a) Court-fees Act (1870), S. 12—Only decision as to valuation is final under S. 12—Decision on dispute as to class in which suit falls is not final.**

Section 12 only makes a decision final as to any question which relates to valuation for the purpose of determining the amount of any fee, that is to say, that Section applies to a case where the contestants are agreed as to the particular Section of the Court-fees Act which is applicable to it, but dispute the valuation of the property. It does not apply where there is a dispute as to the class in which the suit falls. If there is a doubt as to what Section would apply to the suit as framed by the plaintiff and relief formulated, then it raises a question of principle, the jurisdiction to determine which is not impaired by S. 12 : *A I R 1925 Nag 435 ; 23 Bom 486 ; 17 C W N 503 and 16 C L J 375, Rel. on.* [P 481 C 2 ; P 482 C 1]

**✲ (b) Court-fees Act (1870), S. 7, Cl. (v) (e) and Sch. 2 Art. 17 (6)—Suit for recovery of possession of temple for managing it and conducting worship—Art. 17 (6) applies—It is immaterial whether temple is public or private.**

A temple which is devoted absolutely to religious purposes, even if it is regarded as a house, has no market value within the terms of S. 7, Cl. (v) (e) and a suit for recovery of possession of it for the purpose of managing it and conducting its worship falls under Article 17 (6) of Sch. 2. And it makes no difference as to the marketability of the temple whether it is private or public. The temple, so long as it stands as a temple dedicated to a deity installed in it, remains as a property of the deity and consequently whether it is private in the sense that it is meant mainly or exclusively for the worship of the persons who founded it does not make it any more marketable than it is when the public at large are allowed to enter and worship there. In either case the property belongs primarily to the deity and therefore it must fall within the category of *res extra commercium* : *A I R 1924 Mad 19, Applied ; A I R 1929 Rang 134 & 372 and A I R 1932 All 593, Rel. on.* [P 482 C 1, 2]

A. R. Kulkarni and N. K. Banerji — *for Applicant.*

R. N. Padhye — *for Opposite Party.*

**Order.—This is a defendant's application in revision against an order passed in Miscellaneous Appeal No. 8 of 1936 by the Additional District Judge, Bhandara, on 6th July 1937. It involves a question as to the court-fees leviable on the relief claimed in the plaint. The Court of first instance was of opinion that the court-fees** were leviable on the ad valorem basis on the value of the property in dispute of which the plaintiff sought possession, whereas the lower Appellate Court took a contrary view and held that the nature of the property was such as was incapable of valuation and that the court-fees were payable in accordance with Sch. 2, Art. 17 (6), Court-fees Act. The plaintiff claims to be a member of a joint family of which the defendant is also a member. He avers in the plaint that the property in dispute which is a temple was the joint property of the parties and that on 8th November 1929 there was an agreement between them whereby it was settled that each party was to manage the temple in annual rotation and appropriate the offerings made to the deity. The plaintiff therefore prayed for the reliefs that the possession of the temple including its premises and the materials of worship should be delivered to him for one year for the purpose of conducting the worship there and appropriating the offerings and generally to manage it. It is unnecessary to reiterate the other reliefs as there is no dispute regarding them. The defendant pleaded that the market value of the temple was Rs. 10,000 and that the plaintiff should be called upon to pay court-fees on that amount which, according to him, was also the value for the purposes of jurisdiction. The Court of first instance, as already mentioned, upheld this plea, and being of opinion that the market value of the temple was Rupees 8000 which was beyond its jurisdiction returned the plaint for presentation to the proper Court. The plaintiff went up in appeal with the result already mentioned.

It is vigorously argued on behalf of the applicant here that no appeal lay to the lower Appellate Court in view of the terms of S. 12, Court-fees Act. The appeal was filed under O. 43, Rule 1 (a), on the ground that the plaint was returned for presentation to proper Court. The plaintiff had therefore apart from any bar arising from S. 12, Court-fees Act, as contended here, right to go up in appeal. Therefore the question would be whether in that appeal it was not open to the lower Appellate Court to consider the question as to the court-fees payable on the plaint. In my opinion the lower Appellate Court was quite competent to deal with the matter as to the court-fees, because S. 12 only makes a decision final as to any question which relates to valuation for the purpose of determining the amount of any fee, that is to say, that Section applies to a case where the contestants are agreed as to the particular Section of the Court-fees Act which is applicable to it, but dispute the valuation of the property. It does not apply where there is a dispute as to the class in which the suit falls. If there is a doubt as to what Section would apply to the suit as framed by the plaintiff and relief formulated, then it raises a question of principle, the jurisdiction to determine which is not impaired by Sec. 12, Court-fees Act: *see* A I R 1925 Nag 435,[1] 23 Bom 486,[2] 17 C W N 503[3] and 16 C L J 375.[4] I therefore hold that the lower Appellate Court had jurisdiction to decide the issue relating to court-fees. Undoubtedly it had power to decide the question of jurisdiction.

The next question is whether the temple of which possession is sought by the plaintiff is capable of being valued. In 46 Mad 782[5] it was held that a temple which is devoted absolutely to religious purposes, even if it is regarded as a house, has no market value within the terms of S. 7, Cl. (iv) (e), and that a suit for recovery of possession of it by a person claiming as a trustee against another also claiming as a trustee falls under Art. 17 (6), Sch. 2 of the same Act. The principle applied to this case was that there is no market for a public temple and therefore it can have no market value. The same view was taken in 7 Rang 245[6] and A I R 1932 All 593.[7] It is further contended that the temple in dispute is not a public but a private temple. I do not see what difference it makes to the marketability of the temple whether it is private or public. The temple, so long as it stands as a temple dedicated to a deity installed in it, remains as a property of the deity and consequently where it is private in the sense that it is meant mainly or exclusively for the worship of the persons who founded it does not make it any more marketable than it is when the public at large are allowed to enter and worship there. In either case the property belongs primarily to the deity and therefore it must fall within the category of *res extra commercium*. It is pointed out that the plaintiff in 46 Mad 782[5] claimed as a trustee but in this suit he claims as an owner. I do not find anywhere in the plaint or in the pleadings that the plaintiff sets up his ownership as such. He is only trying to assert his right to manage the temple and to conduct worship of the deity and appropriate the offerings for a period of 12 months. The question of ownership does not enter into the picture at all. The nature of the right which is claimed by him is that of a manager, a shebait or an archaka and not that of an owner. It is therefore clear that the present case falls within the ambit of 46 Mad 782.[5]

On this view the court-fees are payable according to Sch. 2, Art. 17 (6). The plaintiff has already paid Rs. 15 which is quite sufficient to cover the claim made by him. The application is dismissed with costs. Pleader's fees Rs. 15.

K.S./R.K. *Application dismissed.*

## ✲ A. I. R. 1938 Nagpur 482

STONE C. J. AND NIYOGI J.

*Ganpatrao Madhorao Potdar and others* — Applicants.

v.

*Ishwarsingh Gangaramsingh and another* — Non-applicants.

Misc. Case No. 7 of 1937, Decided on 26th November 1937, for leave to appeal to His Majesty in Council, against Judgment and decree of Stone C. J. and Niyogi J. *reported in A I R 1938 Nag 476.*

**✲ (a) Hindu Law — Joint family — Loan by mortgage not for benefit of family incurred by Manager — Agreement among brothers admitting such debt but agreement not communicated to mortgagee—Mortgage held not ratified by other brothers.**

A manager of a joint Hindu family raised a loan by way of mortgage which was not for the benefit of the family. In a subsequent agreement among the brothers this debt was admitted by them but the agreement was not communicated to the mortgagee:

*Held* that the agreement did not amount to ratification of the mortgage debt by the other brothers: *A I R 1914 Mad 174, Expl.; (1882) 7 A C 345 and (1914) 2 K B 61, Ref.* [P 483 C 2]

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[1] Govind v. Vithabai, (1925) 12 A I R Nag 435 =87 I C 911.

[2] Dada v. Nagesh, (1899) 23 Bom 486.

[3] Peari Sha v. Suriamal Marwari, (1913) 17 C W N 503=16 I C 575=16 C L J 371.

[4] Sundar Mal Marwari v. Murray, (1913) 16 C L J 375=16 I C 963.

[5] Rajagopala Naidu v. Ramasubramania Ayyar, (1924) 11 A I R Mad 19=74 I C 198=46 Mad 782=45 M L J 274 (F B).

[6] U Pyinnya v. U Dipa, (1929) 16 A I R Rang 134 & 372=118 I C 609=7 Rang 245 (F B).

[7] Parsottamanand v. Mayanand, (1932) 19 A I R All 593=142 I C 251=54 All 869=1932 A L J 777.

**(b) Hindu Law—Alienation—Legal necessity—Property yielding decent income—Loan for small amount for paying off arrears of land revenue raised by alienation—Alienation held not for benefit of family.**

It is impossible to give a precise definition of the expression "benefit of the estate" applicable to all cases. Whether or not a particular transaction is beneficial will depend on the particular circumstances of each case. The purpose of a loan may be necessary; yet the debt may not be necessary if the property was yielding decent income; the alienation would be much less necessary if the amount is so small that it could have been raised on personal security. Hence where family property which yields sufficient income is alienated for paying off arrears of land revenue, the alienation cannot be said to be for the benefit of the family: *6 M I A 393 (P C), Expl.; A I R 1917 P C 33, Rel. on.* [P 484 C 2]

**(c) Civil P. C. (1908), S. 110 — Legal principle well defined — Misapplication of it does not raise substantial question of law.**

Where the legal principles such as were applied in the case are well defined, a misapplication of such principles does not raise any substantial question of law: *A I R 1928 All 61 and A I R 1931 Lah 753, Rel. on.* [P 484 C 2; P 485 C 1]

M. R. Bobde — *for Applicants.*

T. L. Sheode — *for Non-applicants.*

**Order.**—This is an application for a certificate of leave to appeal to His Majesty in Council from the judgment in First Appeal No. 112 of 1933,* whereby the original Court's decree was affirmed. To appreciate the points now raised it will be useful to recite the salient facts. The suit was instituted to recover Rs. 64,000 due on a mortgage deed which had been executed on 2nd July 1922 by Himmat Singh (husband of defendant 1) for himself and as representing his half brothers, Ishwar Singh and Lal Singh, then minors. Their father died about the year 1918 leaving behind considerable property consisting of money lending business to the extent of Rs. 64,000, 1100 khandis of grain, 16 villages but no debts. At his death Himmat Singh was aged 16, Ishwar Singh 2 and Lal Singh was in *græmio matris*. Soon after, Himmat Singh commenced borrowing loans which eventually culminated in heavy incumbrances on the family property. The suit bond for Rs. 33,000 was executed for the purpose of satisfying old debts which had been partly borrowed for payment of land revenue. By 1928 the financial condition of the brothers became critical and they, in order to save their estate, entered into an arrangement among themselves to ensure proper management of it and liquidate their debts. Under that arrangement the entire property was to be managed by an outsider without the interference of any of the brothers. The document which embodied this arrangement contained the following recitals: "We are indebted to him (i. e. the plaintiff) and Ghatate and others. It is necessary for us to repay their debts". That document was executed on 4th July 1928. It was followed by a letter written by Ishwar Singh to his brother Himmat Singh on 17th July 1928. That letter contained the following recitals: "We owe moneys to Dewaji Sonar (the plaintiff) and others. We all admit the said debts."

The plaintiffs were unable to prove that the debts borrowed by Himmat Singh were justified by legal necessity, but they raised two contentions, (1) that the agreement dated 4th July 1928 entered into by the brothers inter se and the letter dated 17th July 1928 amounted to ratification or affirmation of the plaintiffs' mortgage, and (2) that some amount which Himmat Singh had borrowed to pay off arrears of land revenue was payable by his brothers as the payment of the land revenue averted sale of the villages; in other words that the sum was borrowed for the benefit of the family. The trial Court overruled these contentions. On appeal both these points were unsuccessfully pressed in this Court. Now, in this proceeding it is urged that the aforesaid contentions involve a substantial question of law. We are unable to assent to these contentions for the reasons which follow.

It is common ground that the agreement which the brothers concluded among themselves was not communicated to the mortgagees. We hold on examination of the authorities bearing on the subject, that there can be no ratification of a contract unless it is communicated to the other side or that subsequent actions show an approbation of the contract. It is argued that the correctness of the law so enunciated is not beyond controversy and that there may reasonably be room for difference of opinion. The opinion expressed by Sadashiva Ayyar J. in 38 Mad 997[1] is referred to by way of an illustration. This case was considered by us and we were of opinion that Sadashiva Ayyar J. did not differ in principle as is evident from the learned Judge's observations at page 1025, viz.:

> **The engagement of the Government has to be gathered, not from formal communications passing**

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* Reported in (1938) 25 A I R Nag 476.

[1] Rajagopalacharyulu v. Secretary of State, (1914) 1 A I R Mad 174=22 IC 107=38 Mad 997.

in large numbers between the Governor-in-Council and each of the landholders, inamdars and ryots but from formal declarations of Government acted upon by Government Officers, from the conduct of parties evidently based on such declaration and from the implied acceptances of such conducts on both sides . . . . Ratification by a long course of conduct is not less effective than a ratification by a formal declaration.

The question whether or not a communication of ratification is necessary does not appear to have been considered by Sadashiva Ayyar J., but was considered by Ayling J. in the light of Ss. 196-250, Contract Act. His opinion has been already referred to in our judgment and that opinion is in consonance with the dicta of Lord Blackburn in (1882) 7 A C 345[2] at pp. 360 and 361 and Atkin J. (as he then was) in (1914) 2 K B 61[3] at p. 66. It is however contended that the considerations which apply to ratification of acts of agents cannot be imported into Hindu law. This is a fresh argument since at the hearing of the appeal the appellants' learned counsel himself relied on Katier's Law of Agency, pages 287-288. There is no sound reason why, when the appellant asks this Court to make the manager's contract binding on other coparceners, the principles of contract cannot enter into consideration. Moreover, even confining the case to Hindu law alone, it cannot be denied that an affirmation of the manager's act of borrowing loan or alienating family property is a solemn juristic act. That presupposes deliberation. Their Lordships of the Privy Council while dealing with the nature of reversioner's alleged consent to widow's alienation made important observations which are pertinent to the point under consideration. They are as follows :

> Their Lordships think that when a 'stringent equity,' to use Lord Hobhouse's expression in the course of the argument in 23 I A 1[4] at p. 4, arising out of an alleged consent by the reversioners, is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interest and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appears to have been relied upon in this case.

In 42 Cal 876[5] at p. 886 there was no evidence in the case to show that the so-called affirmation was the outcome of the intelligent understanding of the nature of the manager's dealings and the contention now raised is devoid of any force. The next question is whether the transfer of family property to secure a loan incurred to pay off arrears of land revenue was for the benefit of the family. To say that the loan averted the sale of the villages is but to present a superficial aspect of the case. As their Lordships of the Privy Council observed in 40 Mad 709[6] at p. 718 it is impossible to give a precise definition of the expression "benefit of the estate" applicable to all cases. It must consequently follow that whether or not a particular transaction is beneficial will depend on the particular circumstances of each case. On an exhaustive consideration of the material facts bearing on the issue, we find that the alienation of family property was not beneficial to the family. The purpose of a loan may be necessary; yet the debt may not be necessary if the property was yielding, as in this case, decent income; the alienation would be much less necessary if the amount is so small that it could, as in this case, have been raised on personal security. Our attention is invited to the classical dictum of their Lordships of the Privy Council in 6 M I A 393[7] at p. 423 and it is urged that a creditor or an alienee is "not affected by the precedent mismanagement of the estate." True, but that is so where, to use their Lordships' expression, "the charge is one that a prudent owner would make in order to benefit the estate." It is only in such a case that "a bona fide lender is not affected by the precedent mismanagement of the estate." It will not do to overlook the vital qualification introduced by the words "a prudent owner" and "a bona fide lender." On these essential points the findings are wholly against the transferees.

We are of opinion that this case does not raise any substantial question of law. The legal principles such as were applied in the case are well defined, about the correctness of which there can be no reasonable divergence of opinion. The case does not involve any such point of law as would call for fresh definition or enunciation. Granting for the nonce that the well-recognized principles of law were misapplied, such misapplication does not raise any substantial question of law : *vide* 50 All 208[8] and 13 Lah 251.[9] The application is dismissed with costs. Counsel's fees Rs. 50.

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[2] Benjamin Scarf v. Jardine, (1882) 7 A C 345= 51 L J Q B 612=47 L T 258=30 W R 893.

[3] Codling v. John Mowlem & Co. Ltd., (1914) 2 K B 61=83 L J K B 445=108 L T 1033= 29 T L R 619=6 B W C C 767.

[4] Jiwan Singh v. Misrilal, (1896) 18 All 146= 23 I A 1=6 Sar 675 (P C).

[5] Hari Kisan Bhagat v. Kashiprasad Singh, (1914) 1 A I R P C 90=27 I C 674=42 Cal 876=42 I A 64 (P C).

[6] Palaniappa Chetty v. Devasikamony Pandara Sannadhi, (1917) 4 A I R P C 33=39 I C 722 =40 Mad 709=44 I A 147 (P C).

[7] Hunooman Persaud Panday v. Mt. Babooee Munraj Konnweree, (1854-57) 6 M I A 393= 18 W R 81=2 Suther 29=1 Sar 552 (P C).

K.S./R.K. *Application dismissed.*

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[8] Mathura Kurmi v. Jagdeo Singh, (1928) 15 A I R All 61=107 I C 33=50 All 208=25 A L J 970.

[9] Mt. Umrao Bibi v. Ramkishen, (1931) 18 A I R Lah 753=134 I C 790=13 Lah 251=32 PLR 599.

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## A. I. R. 1938 Nagpur 485

STONE C. J. AND VIVIAN BOSE J.

*Commissioner of Income-tax, U. P. and C. P., Lucknow*—Applicant.

v.

*Achhrulal Munnalal* — Opposite Party.

Misc. Judicial Case No. 57 of 1935, Decided on 22nd March 1938.

**(a) Income-tax Act (1922), S. 66—Question as framed defective — High Court should re-frame it.**

Where the question as framed is defective and the Income-tax Commissioner has felt a difficulty in stating a case and has asked the High Court to re-frame the question, the High Court should re-frame it if it is necessary to do so : *A I R 1925 Mad 1242, Rel. on.* [P 486 C 1]

**(b) Income-tax Act (1922), S. 13 — Regular mode of accounting may not be one regularly employed.**

A mode of accounting might be perfectly regular in the sense that it follows one of the standard methods and yet not be the one regularly employed by the assessee, and that is what one has to see under S. 13 : *A I R 1930 P C 56 and A I R 1938 P C 1, Rel. on.* [P 486 C 1]

**(c) Income-tax Act (1922), S. 13 — Method of accounting regularly employed — Method being such that income or profits not deducible from it—Income-tax Officer must proceed under latter half of Proviso to S. 13 — He cannot proceed under S. 23 (3) as that Section does not deal with computation of income.**

Where the assessee has adopted in a year the method of accounting which he had used in the two previous years, that is enough to attract the provisions of S. 13, and it is incumbent on the Income-tax Officer next to determine whether the income, profits and gains for purposes of Sec. 10 could be properly deduced from these accounts. Where the closing stock is undervalued, that is not possible and so it becomes the duty of the Income-tax Officer to proceed under the latter half of the Proviso to Sec. 13 : *A I R 1938 P C 1, Rel. on.* [P 486 C 2]

He cannot proceed under Sec. 23 (3) because S. 23 deals with matter of assessment and not with the "computation of the income, profits and gains for the purposes of Ss. 10, 11 and 12." It deals with the 'return' and not primarily with the accounts. [P 486 C 2]

**(d) Income-tax Act (1922), S. 13, Proviso — Judgment under, must be properly exercised—Flat rate is not always proper when true income can be ascertained without much trouble.**

The judgment of the Income-tax Officer under the Proviso must be properly exercised. It is misleading to describe this duty of the Income-tax Officer as a discretionary power. The application of a flat rate is not always proper when a truer state of the income can be ascertained without much trouble : *A I R 1938 P C 1, Rel. on.* [P 487 C 1]

**(e) Income-tax Act (1922), S. 13 — Transactions in silver and gold—Accounts in respect of silver though defective accepted — There is no obligation to accept those in respect of gold as well.**

An assessee dealt in the transactions of gold and silver. The Income-tax Officer accepted the accounts in respect of silver even though they contained some defects :

*Held* that the Income-tax Officer was not bound to accept those relating to gold as well. [P 487 C 1]

D. N. Chaudhari — *for Applicant.*

A. V. Wazalwar — *for Opposite Party.*

**Order.** — On 19th September 1934, Niyogi, Additional Judicial Commissioner, as he then was, directed the Commissioner of Income-tax to state a case and refer the following question under S. 66 (3), Income-tax Act :

> Whether regard being had to the regular method of accounting followed by the assessee in respect of transactions relating to gold and silver, it was open to the Commissioner of Income-tax to assess under the Proviso to S. 13, Income-tax Act.

In our opinion, the only answer possible to this question in the form in which it is couched is 'yes'. Section 13 states that

> income, profits and gains shall be computed for the purposes of Ss. 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee.

The question as posed assumes that there was a regular method of accounting. If that is so, then clearly the assessment can and must be under this Section. But that does not reflect the dispute between the parties, nor indeed is the question discussed in the body of the order. If the considerations with which Niyogi A. J. C. was dealing are correct, then the assessment must be taken to have been not under Sec. 13 but under the Proviso to it, and the question will then be not whether there was a regular mode of accounting but whether, in the opinion of the Income-tax Officer, it was possible to deduce the income, profits and gains properly from the method of accounting actually employed; nor would that end the matter, for, if in the opinion of the Income-tax Officer, that was not possible, then the further question would have arisen, namely whether his opinion was final. The Income-tax Commissioner has felt a like difficulty in stating a case and has asked us to re-frame the question. We agree that it will be necessary to do so. The Madras High Court acted similarly in 48 Mad 836[1] at p. 839.

As regards the underlying assumption in the question proposed, namely that there is "regular mode of accounting" in this case, that again is not what S. 13 deals with. A mode of accounting might be perfectly regular in the sense that it follows one of the standard methods and yet not be the one regularly employed by the assessee, and that is that we have to see under S. 13 : *see* 54 Bom 213[2] and A I R 1938 P C 1.[3] This is a matter which Niyogi A. J. C. has not considered and as the Commissioner of Income-tax questions it, we must examine it now.

The Income-tax Commissioner's statement discloses that the assessee produced no accounts before 1930-31 but produced accounts for the first time in that year. They were not accepted because there were certain defects in them, but it is clear from the description given that they were made up according to the mercantile system. Accounts were again produced in 1931-32 and, according to the Commissioner, again there were not enough details to enable the authorities to check the accuracy of the closing stock. 1932-33 is the year in dispute. The only defect so far as the present reference is concerned is the undervaluation (according to the defendant) of the closing stock. The Commissioner's order dated 7th August 1933 describes the position in these words:

> The whole question is whether or not the closing stock is properly valued and whether the income made by the business in gold is somehow or other absorbed in the undervaluation of the closing stock.

On these facts it is clear that the assessee adopted in the year 1932-33 the method of accounting which he had used in the two previous years and that, in our opinion, is enough to attract the provisions of S. 13. That being so, it was incumbent on the Income-tax Officer next to determine whether the income, profits and gains for purposes of Sec. 10 could be properly deduced from these accounts. In our opinion if the closing stock was undervalued, as the Commissioner states it was, then that was not possible and so it became the duty of the Income-tax Officer to proceed under the latter half of the Proviso to S. 13. The position is exactly the same as the one in A I R 1938 P C 1[3] at p. 3. But the Commissioner states that this was not what the Income-tax Officer did. He says the assessment was made under S. 23 (3) and not under the Proviso to S. 13. If that is so, then the Income-tax Officer or the Assistant Commissioner on appeal have not proceeded according to law. They have not applied their minds to the only provision under which they had power to proceed and the Income-tax Officer will now have to do so : *see* A I R 1938 P C 1[3] at page 3.

Section 23 deals with matters of assessment and not with the "computation of the income, profits and gains for the purposes of Ss. 10, 11 and 12". It deals with the "return" and not primarily with the accounts. Under S. 22 (1), the return has to be in a prescribed form and this form provides separately for the heads of assessable income detailed in Sec. 6. Three of them, namely business, professional earnings and other sources are covered by Ss. 10, 11 and 12. If the return is "correct and complete" then the Income-tax Officer has to "assess the total income of the assessee" and determine the sum payable by him "on the basis of such return." He is bound to do this and has no option to do anything else. Since the Commissioner of Income-tax is clear that the Income-tax Officer has not acted under the Proviso to S. 13, it will now be for him to proceed to the proper discharge of his duty under that provision of law. It is in the circumstances unnecessary for us to decide whether we could have interfered if he had acted under the Proviso and had still applied a flat rate, but we would draw attention to

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1. Commissioner of Income-tax v. Chengalvaraya Chetti, (1925) 12 A I R Mad 1242 = 91 I C 137=48 Mad 836=49 M L J 425.
2. Commissioner of Income-tax v. Ahmedabad New Cotton Mills Co. Ltd., (1930) 17 A I R P C 56=121 I C 543=54 Bom 213 = 57 I A 21 (P C).
3. Commissioner of Income-tax v. Sarangpur Cotton Manufacturing Co. Ltd., (1938) 25 A I R P C 1 = 172 I C 1=I L R (1938) Bom 289=32 S L R 225=65 I A 1 (P C).

the remarks of their Lordships of the Privy Council in A I R 1938 P C 1[3] at p. 3:

> The judgment of the Income-tax Officer under the Proviso must be properly exercised. It is misleading to describe this duty of the Income-tax Officer as a discretionary power.

We would also refer to the cases which state that the application of a flat rate is not always proper when a truer state of the income can be ascertained without much trouble. It will be for the Income-tax Officer to consider whether it would not be fairer and more proper to apply the rate obtaining at the relevant date for the best quality of gold to the quantity given in the accounts rather than to resort arbitrarily to a flat rate. As regards the argument of the assessee that the Income-tax Officer having accepted the accounts in respect of the transactions in silver, though they contained some defects, he was therefore bound to accept those relating to the gold as well, we need only say that, in our opinion, there is no such obligation. The costs of this reference will be paid by the applicant, the Commissioner of Income-tax.

D.S./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 487

GRILLE C. J.

*Vithoo Raghoji Bari* — *Accused* Applicant.

v.

*Emperor*.

Criminal Revn. No. 175 of 1938, Decided on 11th July 1938, from order of Sessions Judge, Amraoti, D/- 21st April 1938.

**(a) Criminal P. C. (1898), Ss. 537 (a), 195 — Irregularity in complaint made by one Court to another is curable under sub-s. (a) of S. 537.**

Although it is no longer possible to apply the provisions of S. 537 in the case of want of sanction required by S. 195 an irregularity in a complaint made by one Court to another is curable under sub-section (a) of S. 537, since a complaint made by a Court is, for the purposes of Sec. 537 in no wise different from a complaint made by a private individual: *A I R 1927 Oudh 326, Commented upon.* [P 489 C 1]

**(b) Criminal P. C. (1898), Ss. 476, 476-B— Appellate Court has power under S. 476-B to remand case to lower Court for purpose of filing complaint *(Obiter)*.**

Where an appeal is filed under S. 476-B against the order of a Court refusing to file a complaint under S. 476, the Appellate Court has under Sec. 476-B the power to remand the case to the lower Court for the purpose of filing a complaint: *A I R 1934 Mad 52 (F B); A I R 1931 Cal 604 and A I R 1938 Pat 99, Foll.; A I R 1929 Cal 195; A I R 1935 Oudh 59 and A I R 1931 Lah 761, Not foll.* [P 488 C 1, 2]

**(c) Criminal P. C. (1898), Ss. 195, 476-B — Court refusing to grant petition praying that it should lay complaint is not debarred from laying one suo motu after reconsideration of facts or on remand by Appellate Court.**

Whatever the powers of an Appellate Court are to remand a case when an appeal has been filed before it under S. 476-B, the power of a Court to lay a complaint in respect of an offence committed before it remains unimpaired and the Court which has once declined to accede to a petition that it should lay a complaint, is not debarred from laying one suo motu if, on a further consideration it finds, whether such conclusion is reached on a further study of facts or on an elucidation of a higher tribunal, that there is really a case for making a complaint: *Case law discussed.* [P 489 C 2]

**(d) Criminal P. C. (1898), Ss. 195, 476 — Person against whom complaint is made not availing himself of remedies open to him to get order set aside before trial — He cannot, after trial, contend that complaint was not valid complaint.**

Where a person, against whom a complaint under Sec. 476 is made, fails to avail himself of the remedies which are open to him before his trial begins, he is not entitled when once the Magistrate has tried the case, to argue that the complaint was not a valid complaint and that there was a lack of jurisdiction by reason of the incompetence of the Court to make it: *A I R 1938 Pat 99 and A I R 1929 Cal 203, Rel. on.* [P 490 C 1]

**(e) Criminal P. C. (1898), S. 368—Essential feature in verifying that deposition has been read over or interpreted to witness is certificate signed by presiding officer of Court.**

The essential feature in verifying that a deposition has been read over and interpreted to a witness is the certificate signed by the presiding officer of the Court. This is a statutory provision. Any initialling by the reader prior to the signature by the Judge is unessential and is merely done for the reader's own convenience or for the more certain satisfaction of the Judge; but, when the Judge has certified that the evidence has been read over to the witness it must be presumed until the contrary is shown that this has been done. [P 490 C 2]

M. R. Bobde and D. L. Limaye — *for Applicant.*

W. R. Puranik, Advocate-General — *for the Crown.*

**Order.**—The applicant Vithoo has been convicted of perjury and has been sentenced to four months' rigorous imprisonment and a fine of Rs. 100 with two months' rigorous imprisonment in default. His appeal failed and he has come before this Court in revision. The statement in respect of which he has been convicted occurred in a trial in the Court of the Second Subordinate Judge, Second Class, Amraoti. On an application made to the Court by the plaintiff in the case (the accused Vithoo was a witness for the defence) the Court declined to lay a complaint in the Criminal Court. A civil appeal against this order was filed in the Court of the Second Additional District Judge, Amraoti. The order of the Subordinate Judge was set aside, and the concluding part of the order after discussing the evidence is in these terms:

> The result is that the appeal succeeds. The appeal is allowed and the order of the lower Court is set aside and it is hereby directed that the respondent Vithoo who was examined as D. W. 2 on 11th January 1935 in Civil Suit No. 277-B of 1934, in the Court of the Second Subordinate Judge, Second Class, Amraoti, shall be prosecuted for the offence of giving false evidence punishable under S. 193, I. P. C. The complaint under Section 193, I. P. C., shall be filed by the Judge of the Court of the Second Subordinate Judge, Second Class, against Vithoo under S. 193, I. P. C., in the light of the above remarks made in this order. The record will be sent to the Second Subordinate Judge, Second Class, for doing the needful.

The Subordinate Judge then duly lodged a complaint, and at the end of the complaint added the following note:

> The accused has not appeared before this Court. Hence he could not be sent in custody nor could any security be taken for his appearance. The original application for sanction to prosecute was dismissed. The complaint is made after the appeal on that order has been allowed. The address of the accused is given herewith. He may be summoned to appear and stand the trial.

It is contended before me, and it was also argued in the Courts below, that the prosecution of the accused Vithoo is illegal as the complaint was made by a Court which had no jurisdiction to make it, and reliance is placed on the wording of Section 476-B, Criminal P. C., for the proposition that the complaint should have been made by the Civil Appellate Court which reversed the order of the Subordinate Judge. On this point both the Magistrate who convicted the accused and the Sessions Judge who heard the appeal were of the opinion that the Appellate Court had power to remand the case to the original Court for the purpose of filing a complaint. What the Magistrate actually held was that, although S. 476-B, Criminal P. C., only gave the Appellate Court power to file a complaint itself, there was nothing in the Criminal Procedure Code which forbade the laying of a complaint by the lower Court, and that the fact that the Appellate Court's direction was made to the lower Court could be taken as full compliance with the provisions of S. 476-B, Criminal P. C. The conclusion thus set out is somewhat illogical. The learned Sessions Judge on this point held that the two opposing views were set out in 55 Cal 1277[1] and in 57 Mad 177[2] and held that the decision of the Full Bench of the Madras High Court embodied the correct view, which was that the Civil Appellate Court, under S. 476-B, Criminal P. C., had the power to remand the case to the Court from which the appeal was made.

In 55 Cal 1277[1] the District Judge had acted in exactly the same way as the Additional District Judge has acted in the present case, and it was held that the District Judge had no power to make such a direction, and the case, which was heard in revision against the District Judge's order, was remanded to the District Judge to proceed according to law, that is to say, the District Judge was directed to file a complaint himself. The view that the District Judge in such circumstances has no power to order a remand and to direct the trial Court to make a preliminary inquiry and come to a fresh decision whether a complaint should be made or not, is upheld by the Lahore High Court in 13 Lah 342.[3] This view however is not accepted by the Madras High Court, which in the case cited came to a contrary conclusion, and the Calcutta High Court in a later decision, (59 Cal 68)[4] held that, whether the Civil Procedure Code or the Criminal Procedure Code applied to appeals from orders of Courts passed under S. 476, Criminal P. C., the District Judge, i. e. the Appellate Court, had ample powers to remit the case for further inquiry. In the judgment no reference is made to the decision in 55 Cal 1277.[1] The Chief Court of Lucknow, in 10 Luck 335,[5] held that, when proceedings under S. 476, Criminal P. C., were initiated in a Magistrate's Court, an order of the Sessions Judge under S. 476-B directing a further inquiry was ultra vires, although it was conceded that, if the proceedings were initiated in the Civil Court, the High Court had power in revision to interfere under S. 115, Civil P. C., although were the matter a criminal one, the High Court could only revise the

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[1] **Manir Ahamed v. Jogesh Chandra, (1929) 16 A I R Cal 195=115 I C 36=55 Cal 1277.**

[2] **Janardana Rao v. Lakshmi Narsamma, (1934) 21 A I R Mad 52=1934 Cr C 52=147 I C 351 =35 Cr L J 392=57 Mad 177=65 M L J 873 (F B).**

[3] **Dhanpat Rai v. Balak Ram, (1931) 18 A I R Lah 761=1931 Cr C 1065=135 I C 594=33 Cr L J 178=13 Lah 342=33 P L R 558 (F B).**

[4] **Surendranath Maiti v. Sushilkumar Chakrabarti, (1931) 18 A I R Cal 604=1931 Cr C 756 =134 I C 1063=33 Cr L J 38=59 Cal 68=35 C W N 775.**

[5] **Mendi Lal v. Ram Adhin, (1935) 22 A I R Oudh 59=1935 Cr C 113=153 I C 104=36 Cr L J 254=10 Luck 335=11 O W N 1469.**

Appellate Court's order under the provisions of S. 439, Criminal P. C.

In 2 Luck 646[6] it was held that irregularities in proceedings taken under S. 476, Criminal P. C., could not be condoned under the provisions of S. 537, Criminal P. C., the reason given there being that although by sub-sec. (b) of S. 537 before amendment, condonation was permissible, by reason of the omission of that sub-section by the Amending Act of 1923, such condonation was no longer possible. With all respect, I am of opinion that the law as there stated is too widely enunciated. Although it is no longer possible to apply the provisions of S. 537 in the case of want of sanction required by S. 195, Criminal P. C., an irregularity in a complaint made by one Court to another is curable under sub-s. (a), since a complaint made by a Court is, for the purposes of S. 537, Criminal P. C., in no wise different from a complaint made by a private individual. The High Court of Patna in 16 Pat 650[7] takes the same view as the Madras High Court and the Calcutta High Court in the later decision, and expressly dissents from the Lahore and the Lucknow decisions and the earlier Calcutta case in 55 Cal 1277[1] on the ground that the provisions of S. 476-B, Criminal P. C., as to the powers of the Appellate Court are not exhaustive. The view of this Court and the Judicial Commissioner's Court has been that the procedure governing appeals under S. 476-B is to be derived from the Civil Procedure Code: A I R 1937 Nag 91[8] and 16 N L R 23.[9]

It is not, in my opinion, necessary to discuss and resolve these conflicting views, since they relate to powers of the Appellate Court, and those powers are not really in question in the case before me. It is sufficient on this point to indicate that I consider the view taken in Calcutta, Madras and Patna with all respect to be the better view. Whatever view may be taken of the District Judge's powers, it does not follow by any means that the Subordinate Judge had no power to make the complaint or that he was deprived of his power to make it because he had previously refused to accede to a petition that he should make one. If a complaint is dismissed, there is provision in the Criminal P. C., for an inquiry, and possibly a trial, on the same facts, and this is also true in circumstances where an accused person has been discharged, and I can see no reason why a Court, after having declined to accede to a petition that it should lay a complaint, is debarred from laying one suo motu if, on a further consideration, it finds, whether such conclusion is reached on a further study of the facts or on an elucidation by a higher tribunal, that there is really a case for making a complaint. Whatever, then, the powers of an Appellate Court are to remand a case when an appeal has been filed before it under S. 476-B, Criminal P. C., it appears to me that the powers of a Court to lay a complaint in respect of an offence committed before it, remain unimpaired.

There is yet a further aspect of the question for consideration. The cases which have been cited heretofore with the exception in 16 Pat 650[7] are all cases taken in civil revision concerning the powers of an Appellate District Court under S. 476-B, Criminal P. C. In 16 Pat 650[7] the position was the same as in the case before me, and the decision was taken on a criminal revision after the accused had been convicted on a complaint laid by a Civil Court and after an appeal had failed, and it was held that at that stage the validity of the complaint could not be questioned. Reliance was placed on the remarks of Rankin C. J. in A I R 1929 Cal 203[10] that the contention that the matter of the validity of the complaint could be argued after the trial and the appeal had been concluded without any steps being taken to appeal against the complaint made under S. 476, Criminal P. C., could not be too formally rejected, and that the question whether there was a complaint or whether there was no complaint could only be agitated in the manner provided, i. e. by an appeal under S. 476-B, Criminal P. C., or by a revision against such appellate order. Now, in the case before me there was an application in revision against the order of the District Judge setting aside the order of the Subordinate Judge and directing that a complaint should be filed. Neither party was able to

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**[6] Dore Sah v. Emperor, (1927) 14 A I R Oudh 326=103 I C 409=28 Cr L J 681=2 Luck 646=4 O W N 640.**

**[7] Kunjo Chaudhary v. Emperor, (1938) 25 A I R Pat 99=173 I C 742=39 Cr L J 353=16 Pat 650=19 P L T 21.**

**[8] Bhola Nath v. Achheram, (1937) 24 A I R Nag 91=169 I C 816=I L R (1938) Nag 298.**

**[9] Babulal v. Emperor, (1920) 7 A I R Nag 146=55 I C 286=21 Cr L J 270=16 N L R 23.**

**[10] Jabbar Ali v. Emperor, (1929) 16 A I R Cal 203=116 I C 632=30 Cr L J 656 = 49 C L J 193.**

refer me to the proceedings in revision or to state what happened therein. I have traced out these proceedings and the decision is embodied in Civ. Revn. No. 312 of 1937.[11] I find that all that was urged on behalf of the present applicant-accused in these revision proceedings was that the order should be set aside on its merits, and the point was not raised, as it should have been raised, that the order of the Additional District Judge suffered from any legal defect. The order of this Court runs:

> I can find no illegality or irregularity in the procedure of the Appellate Court, and I therefore have no power to interfere in revision. The application is dismissed.

Presumably the learned counsel for the applicant in that case did not draw the Court's attention to the fact that the Additional District Judge instead of laying a complaint himself had directed the Court below to do so, since presumably the only result in his favour would have been a direction by this Court, following the lines in 55 Cal 1277,[1] that the Additional District Judge should lay a complaint himself. Again, when the Subordinate Judge did lay his complaint, it was open to the applicant, if he felt aggrieved, to have the matter set right by a further appeal against the Subordinate Judge's order. In respectful agreement with the reasoning adopted in 16 Pat 650[7] and A I R 1929 Cal 203,[10] I am of opinion that, as the applicant failed to avail himself of the remedies which were open to him before his trial began, he is not entitled, when once the Magistrate has tried the case, to argue that the complaint was not a valid complaint and that there was a lack of jurisdiction by reason of the incompetence of the Subordinate Judge to make it. It is hardly necessary to add that there is no question whatever of the applicant having undergone any prejudice by the complaint having been filed by the Subordinate Judge and not by the Additional District Judge.

Turning now to the facts of the case itself, it is contended that the conviction is bad because, in the first place, the deposition in respect of which the applicant was convicted was not interpreted to him and, secondly, that what he stated in the Court did not in law amount to perjury. The first contention is based on the facts that, although the deposition sheet bears an endorsement to the effect that the evidence has been interpreted and admitted correct and bears the Judge's signature to that effect, it does not bear as other deposition sheets do bear, the initials of the Court Reader who actually read over and interpreted the deposition to the witness. The Court Reader who was called as a witness naturally does not remember among the many depositions which he had interpreted, the deposition interpreted to this particular witness, but he says that he must have done so. The essential feature in verifying that this has been done is the certificate signed by the presiding officer of the Court. This is a statutory provision. Any initialling by the Reader prior to the signature by the Judge is unessential and is merely done for the Reader's own convenience or for the more certain satisfaction of the Judge; but when the Judge has certified that the evidence has been read over to the witness, it must be presumed until the contrary is shown that this has been done, and the well-known maxim has been correctly applied by the learned Sessions Judge. (The judgment then discussed the evidence and proceeded.) The sentence awarded for this deliberate act of perjury is extremely lenient and there is no case whatever for a reduction of the sentence. The application for revision fails and is dismissed, and the applicant will surrender to his bail before the District Magistrate, Amraoti, on the date which has already been communicated to him.

R.M./R.K. *Application dismissed.*

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## A. I. R. 1938 Nagpur 490

POLLOCK J.

*Thakursingh Bhawanisingh Khatri* — Appellant.

v.

*Mt. Parwatibai w/o Chunnilal Khatri* — Respondent.

Second Appeal No. 138 of 1936, Decided on 22nd March 1938, from appellate decree of 2nd Addl. Dist. Judge, Hoshangabad, D/- 20th November 1935.

**(a) C. P. Land Revenue Act (2 of 1917), S. 187 — S. 187 lays the primary responsibility to collect land revenue on sadar lambardar.**

**Section 187 which lays down that it is the duty of the sadar lambardar to collect from the lambardars the land revenue assessed and pay it to the Government, lays a primary responsibility on the sadar lambardar, though his ultimate responsibility may be no more and no less than that of other cosharers who are all jointly and severally**

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[11] **Vithu v. Bansidharilal, Civil Revn. No. 312 of 1937, decided on 11th July 1937.**

liable for the entire land revenue of the village. It is the duty of the sadar lambardar to collect from the lambardars the land revenue assessed on the mahal and to collect does not merely mean to sit still and accept what is brought to him : *A I R 1926 Nag 274 and A I R 1926 Nag 318, Expl.* [P 491 C 2; P 492 C 1]

**(b) C. P. Land Revenue Act (2 of 1917), S. 157—Words "any land revenue due by any proprietor"—Meaning of.**

It is not justifiable to read the words in S. 157 "any land revenue due by any proprietor" as meaning any land revenue due by any proprietor qua proprietor and to leave it open to the lambardar to neglect his duty with impunity. [P 492 C 1]

**(c) C. P. Land Revenue Act (2 of 1917), S. 157—*P*, a cosharer and lambardar of patti, holding her share free of assessment—*P* failing to collect and pay land revenue — Sadar lambardar getting amount recovered from *P* under S. 157—*P* herself paying land revenue due in subsequent year and suing sadar lambardar to recover both amounts paid by her—Suit by *P* held to be misconceived—Amount for first year held to be legally realized—Payment for second year held merely to discharge liability imposed on *P*.**

*P* was a cosharer in a patti and also its lambardar. The land revenue due from the patti was assessed on the share held by other cosharers, *P's* share being held free of assessment. On failure by *P* to collect as lambardar, the revenue assessed on the patti and to pay it to the sadar lambardar, the latter paid the entire land revenue of the village and applied under S. 157 to recover from *P* the land revenue assessed on her patti and the amount was recovered by the tahsildar. In the following year, *P* herself paid the land revenue in the treasury to avoid any action being taken against her. *P* then brought a suit against the sadar lambardar to recover these two sums :

*Held* that *P* being the proprietor and the entire land revenue of the patti being due by her, the tahsildar was legally entitled under S. 157 to recover the amount from her. *P* had misconceived her remedy in bringing the suit. The proper course for her was to have sued her cosharers for their share of the land revenue or she could have applied to the tahsildar to recover it from them or she could have sued the sadar lambardar for her share of the village profits. The payment made by *P* in the subsequent year merely discharged the liability imposed upon her as lambardar and no suit lay to recover the amount. [P 492 C 1]

V. K. Rajwade — *for Appellant.*

Abdul Razak — *for Respondent.*

**Judgment** — The plaintiff-respondent Mt. Parwati Bai is a cosharer in patti No. 3 in mauza Besawa and is the lambardar of that patti. The land revenue assessed on this patti is Rs. 105-5-4, but this land revenue is assessed on the share held by the other cosharers, Parwati Bai's share being held free of assessment. The defendant-appellant Thakur Singh is the sadar lambardar of the village. It was the duty of Parwati Bai as lambardar of patti No. 3, to collect the land revenue assessed on that patti and to pay it to the sadar lambardar. In the year Sambat 1987 (1930-31) she omitted to do so, but Thakur Singh paid the entire land revenue assessed on the village into the treasury and then applied to the tahsildar under S. 157, C. P. Land Revenue Act, to recover from Parwati Bai the land revenue assessed on the patti No. 3. The tahsildar recovered Rs. 116-9-4 from Parwati Bai. In the following year Parwati Bai paid Rs. 110 into the treasury in order to avoid any action being taken against her as in the previous year. She has brought the present suit to recover these two sums. Under S. 188 (1), C. P. Land Revenue Act, it is the duty of every lambardar to collect and pay to the sadar lambardar so much of the land revenue as may be payable through him. It was therefore the duty of Parwati Bai to collect the land revenue assessed on her patti and to pay it to Thakur Singh. She omitted to do so. S. 157 provides that any sadar lambardar who had paid any land revenue due by any proprietor may apply to the Deputy Commissioner to recover the amount on his behalf. The learned Additional District Judge has held that under S. 157 nothing can be recovered from a proprietor except that portion of the land revenue assessed on his share. In coming to this conclusion he has relied on certain obiter dicta in 22 N L R 37[1] and 23 N L R 31.[2] In 22 N L R 37[1] it was remarked :

> We cannot see that any primary responsibility with reference to the payment rests on the sadar lambardar under the new arrangement introduced by the Land Revenue Act of 1917.

With due respect it seems to me that S. 187, which lays down that it is the duty of the sadar lambardar to collect from the lambardars the land revenue assessed and pay it to Government, lays a primary responsibility on the sadar lambardar, though his ultimate responsibility may be no more and no less than that of other cosharers who are all jointly and severally liable for the entire land revenue of the village. Again the remark in 23 N L R 31[2] that the sadar lambardar has nothing whatever to do but to accept the money which the other lambardars pay to him under S. 123 and to send it on with that for his own patti to the treasury is not, in my opinion,

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1. **Anandrao v. Daulat, (1926) 13 A I R Nag 274 =92 I C 909=22 N L R 37.**
2. **Keshao Rao Buti v. Krishnarao Komati, (1926) 13 A I R Nag 318=93 I C 121=23 N L R 31.**

an accurate interpretation of S. 187 (5). It is the duty of the sadar lambardar to collect from the lambardars the land revenue assessed on the mahal, and to collect does not merely mean to sit still and accept what is brought to him. Under S. 188 it was the duty of the lambardar of patti No. 3 to pay the land revenue assessed on that patti to the sadar lambardar and that the land revenue was due from Parwati Bai. I do not think that it is justifiable to read the words in S. 157 "any land revenue due by any proprietor" as meaning any land revenue due by any proprietor qua proprietor and to leave it open to the lambardar to neglect his duty with impunity. Parwati Bai was a proprietor and the entire land revenue of her patti was due from her and in my opinion the tahsildar was entitled under S. 157 to recover that amount from her.

In the particular circumstances of this case I think that the tahsildar would have been justified in refusing to recover this amount from Parwati Bai as she held her share free from assessment and the rents had been collected by the sadar lambardar. The tahsildar however acted legally in recovering the amount from her and Parwati Bai has misconceived her remedy in bringing this suit. She could have sued her cosharers for their share of the land revenue or she could have applied to the tahsildar to recover it from them or she could have sued the sadar lambardar for her share of the village profits, but the present suit to recover an amount that was legally realized from her will not lie. Similarly, her payment of Rs. 110 that was made into the treasury in the following year merely discharged the liability imposed upon her as a lambardar. The learned Additional District Judge correctly held that no suit would lie to recover this amount. The appeal must therefore be allowed and the suit will stand dismissed with costs throughout. The cross-objection is dismissed with costs. In view of the conduct of the defendant who is himself one of the cosharers in patti No. 3, I allow no counsel's fee in this Court.

R.M./R.K. *Appeal allowed.*

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## ✲ A. I. R. 1938 Nagpur 492

NIYOGI J.

*Ramdhar Ram Karanlal Agarwal — Defendant* — Applicant.

v.

*Santadhar Ramkaranlal Agarwal and another — Plaintiffs —* Opposite Party.

Civil Revn. No. 112 of 1937, Decided on 1st December 1937, from order of the Small Cause Court, Mandla D/- 5th December 1936.

**✲ (a) Civil P. C. (1908), O. 23, R. 3—Parties appointing arbitrators to settle their dispute—Award can be accepted as agreement between parties.**

The power given by Para. 20 of Sch. 2, Civil P. C., cannot override the general power given to parties under O. 23, R. 3, Civil P. C., to adjust their disputes by a lawful compromise at any time after suit. The award is not entertained as an award but as an agreement between the parties disposing of their dispute and it is this agreement which the Court has power under O. 23, R. 3 to record and pass a decree in terms thereof. In principle there is no difference between an agreement of the parties and an award by arbitrators who are appointed by the parties themselves to settle their dispute, because in either case the parties are bound by their own agreement. An award therefore assumes the character of an agreement as soon as it is delivered whether the parties accept it or not : *A I R 1926 Nag 405 ; A I R 1928 Nag 173 ; A I R 1927 Bom 565; A I R 1931 Oudh 127 ; A I R 1935 Rang 58 ; A I R 1925 All 503; A I R 1925 Mad 50 and A I R 1927 P C 204, Foll.; A I R 1922 Cal 404, Dissent.* [P 493 C 1]

**(b) Award—Validity—Absence of one arbitrator at all sittings affects award.**

If any one of the arbitrators was not present at all the sittings, that would affect the validity of the award : *7 All 523 and 12 Mad 113, Rel. on.* [P 493 C 2]

K. K. Gandhe — *for Applicant.*

S. B. Gokhale — *for Opposite Party.*

**Order.**—The non-applicants filed two suits in different Courts. The parties asked for adjournment of the suits to enable them to compromise out of Court. Some time later the defendant intimated to the Judge of the Small Cause Court at Mandla where one of the two suits was pending that the disputes between the parties had been submitted to arbitrators and that they had delivered their award. On the strength of the award he prayed for the dismissal of the suit as having been compromised out of Court. It may at the outset be remarked that the prayer for dismissal of the suit was not proper. It ought to have been that a decree in terms of the award should be passed, but this point is not material at this stage. The award was not accepted by the lower Court for the reason that the parties had submitted their differences to a set of arbitrators without the intervention of the Court. In taking this view, the lower Court followed 49 Cal 608.[1] It has however overlooked the rulings of the late Court of the Judicial Commissioner, Nagpur, reported in 23 N L R 100[2] and 24 N L R 55[3] which are binding authorities on all subordinate Courts of this Province. In these cases it was held that the power given by Para. 20 of Sch. 2, Civil P. C., cannot override the general power given to parties under O. 23, R. 3, Civil P. C., to adjust their disputes by a lawful compromise at any time after suit. The award is not entertained as an award but as an agreement between the parties disposing of their dispute and it is this agreement which the Court has power under O. 23, R. 3, to record and pass a decree in terms thereof. The view taken in the Nagpur cases cited above is supported by the rulings of almost every High Court in India except the Calcutta High Court as will appear from 51 Bom 908,[4] 6 Luck 591,[5] 9 Rang 39,[6] 47 All 637[7] and A I R 1925 Mad 50.[8] The weight of authorities is decidedly against the view taken in 49 Cal 608.[1] My own view is in accord with that enunciated in the two Nagpur cases cited above. In principle there is no difference between an agreement of the parties and an award by arbitrators who are appointed by the parties themselves to settle their dispute, because in either case the parties are bound by their own agreement. An award therefore assumes the character of an agreement as soon as it is delivered whether the parties accept it or not. In 53 M L J 345[9] their Lordships of the Privy Council also admitted an award in circumstances similar to those of the present case as an agreement under O. 23, R. 3. This disposes of this revision petition.

The learned Counsel for the non-applicants has brought to my notice certain recitals in the award which indicate that one of the arbitrators was not present at all the sittings. If that is so, that would affect the validity of the award in view of the cases 7 in All 523[10] and 12 Mad 113.[11] This Court however cannot deal with the point in a summary way before further facts are elicited by a formal inquiry into the nature of the procedure followed by the arbitrators while discharging the duty allotted to them by the parties. The lower Court will have to inquire into the procedure followed by the arbitrators to see if any of the arbitrators did not take part in the proceedings throughout. This case will now go back to the lower Court for investigation of the issue as to the validity of the award. It will be open to the parties to offer pleadings and produce such evidence as they think necessary. Both parties have incurred costs in this proceeding. I direct that the costs of these proceedings will abide the event. Pleader's fees Rs. 10.

D.S./R.K. *Case remanded.*

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[1] Amar Chand v. Banwari Lall, (1922) 9 A I R Cal 404=69 I C 808=49 Cal 608.

[2] Namdarkhan v. Nanhoo, (1926) 13 A I R Nag 405=95 I C 89=23 N L R 100.

[3] Naraindas Bhagwanji & Co. v. Kalyanji Mawaji & Co., (1928) 15 AIR Nag 173=107 I C 525=24 N L R 55.

[4] Chanbasappa v. Basalingayya, (1927) 14 A I R Bom 565=105 I C 516=51 Bom 908=29 Bom L R 1254 (F B).

[5] Basaoo v. Jagan Nath, (1931) 18 A I R Oudh 127=131 I C 443=6 Luck 591=8 O W N 71.

[6] Laljee Serang v. Chander Bhan, (1931) 18 A I R Rang 58=131 I C 57=9 Rang 39.

[7] Gajendra Singh v. Durga Kumari, (1925) 12 A I R All 503=88 I C 768=47 All 637=23 A L J 561 (F B).

[8] Dorayya v. Venkanna, (1925) 12 A I R Mad 50=76 I C 502.

[9] Mehdi Ali Khan v. Ghanshiam Singh, (1927) 14 A I R P C 204=104 I C 375=53 M L J 345 (P C).

[10] Nand Ram v. Fakir Chand, (1885) 7 All 523=1885 A W N 139.

[11] Thammiraju v. Bapiraju, (1889) 12 Mad 113.

## A. I. R. 1938 Nagpur 493

NIYOGI J.

*Purushottamrao Bhauji Barde*
*Accused* — Applicant
v.
*Emperor.*

Criminal Revn. No. 164 of 1938, Decided on 14th June 1938, from order of Sessions Judge, Raipur, D/. 14th April 1938.

**Criminal P. C. (1898), Ss. 350 (1), 537 and 439 — Magistrate on claim by accused for de novo trial making note of claim and directing witnesses to be resummoned — He must be deemed to have directed de novo trial —Omission in subsequent trial to examine witnesses in chief amounts to illegality which vitiates trial — Whether retrial should be ordered depends upon discretion of High Court.**

**Where a Magistrate on a claim by accused for a de novo trial makes note of his claim and orders the witnesses to be resummoned, he must be deemed to have directed a de novo trial (including inquiry) and failure on the part of the Magistrate**

in the subsequent trial to examine the witnesses in chief amounts to an illegality, which vitiates the trial, and the mere fact that the accused acquiesces in the procedure adopted by the Magistrate does not estop him from raising the plea of illegality of the trial. The question whether a retrial should be ordered in such a case is a matter depending upon the discretion of the High Court which is to be exercised with due regard to the facts and circumstances of the case. [P 495 C 1]

Where the case was two years old and the accused, apart from anxiety and worry of a protracted trial, had served the major portion of his sentence and had himself received serious injuries in the scuffle, these circumstances were held to be sufficient to bring home to a man of normal sense the grave consequences of his unlawful act and retrial was not ordered : *12 C W N 138; A I R 1925 Mad 1280; A I R 1934 Nag 209; A I R 1926 Sind 158; A I R 1934 Mad 475; A I R 1936 Nag 220 and Cri. Revn. No. 474 of 1937, Rel. on; AIR 1936 Nag 153, Explained.* [P 495 C 1, 2]

R. W. Fulay — *for Applicant.*

W. R. Puranik, Advocate-General — *for the Crown.*

**Order.** — This is an application in revision against conviction of the offence under S. 325, I. P. C., and the sentence of four months' rigorous imprisonment with a fine of Rs. 40 and further an order under 106, Criminal P. C., for entering into a bond for keeping the peace. The case arose out of a dispute relating to the possession of a village Karanja Bhilai which was held by one Annapurna Bai as a widow. On her death rival claims were set up by her nephew Vishnu Panth Dhok and Radha Bai, the applicant's sister, who adopted a son named Kamalakar whose cause is espoused by the applicant.

On 6th August 1936, at 8 A. M. the applicant went to the house of Annapurna Bai and, in a quarrel which ensued, assaulted one Somnath, the complainant, with a lathi causing fracture of the middle of his right ulna bone. The case was protracted on account of the transfers of the Magistrates trying it. It was initiated on 3rd September 1936 before Mr. Naidu who framed a charge on 15th October 1936. The applicant cross-examined the prosecution witnesses after the charge and entered upon his defence. At that stage Mr. Naidu was transferred and succeeded by another Magistrate who noted in the order sheet against date 13th December 1936 : "The accused insists that the witnesses be re-heard. I allow cross-examination after charge." The applicant cross-examined the witnesses again and was called upon to enter on his defence. Then the proceedings were held up for reasons which it is unnecessary to mention here. In the meantime the Magistrate was transferred and succeeded by Mr. Verma who wrote in the order sheet against 14th June 1937 : "Accused present. He claims a de novo trial. All the prosecution witnesses be summoned to appear on 2nd July 1937," on which day the applicant cross-examined the witnesses.

It has been necessary to recall this history in view of the argument addressed by the applicant's learned counsel that the trial was vitiated in consequence of the omission to examine the witnesses afresh on 2nd July 1937. My attention is invited to 12 C W N 138,[1] A I R 1925 Mad 1280,[2] A I R 1934 Nag 209,[3] A I R 1926 Sind 158,[4] A I R 1934 Mad 475,[5] A I R 1936 Nag 220[6] and Cri Revn. No. 474 of 1937[7] as authorities for the proposition that the omission to subject the witnesses to examination in chief rendered the trial illegal and nugatory. The learned Advocate-General relying on ILR (1936) Nag 92[8] contends that the charge once framed could not be wiped out notwithstanding that the accused claimed his privilege under S. 350 (1), Proviso (a). Careful perusal of the last mentioned case will show that it does not lay down any such rigid rule. The facts of that case were identically similar to those of the present case. In the cited case the Magistrate (Mr. Choubey) noted in the order sheet that the accused claimed a de novo trial and he ordered prosecution witnesses to be resummoned. He presumably heard even the evidence in examination-in-chief and passed an order of discharge. The contention raised in that case was that the order of discharge, following on the framing of a charge against the accused, amounted to an order of acquittal. Gruer J. after discussion of the reported decisions, came to the conclusion that an accused under Proviso (a) to sub-s. 1 of S. 350, Criminal P. C., was only entitled to have the witnesses re-summoned for purposes of cross-examination after the charge. The learned Judge held that although the accused had only the limited right, it is open to the Magistrate to order a de novo trial under sub-s. 1. He construed Mr. Choubey's order as one ordering a de novo trial under sub-s. 1 of S. 350, Criminal P. C., and concluded that the previous charge having been wiped out, the order passed by the Magistrate was one of discharge and not of acquittal.

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[1] Sobh Nath Singh v. Emperor, (1908) 12 CWN 138=6 Cr L J 431.

[2] Narayana Reddi v. Bojanna, (1925) 12 A I R Mad 1280=90 I C 668=26 Cr L J 1596=49 M L J 423.

[3] Ibrahim v. Emperor, (1934) 21 A I R Nag 209 =1934 Cr C 980=152 I C 236=36 Cr L J 41.

[4] Sidik v. Emperor, (1926) 13 A I R Sind 158= 92 I C 748=27 Cr L J 332=20 S L R 50.

[5] Ramalingam Pillai v. Emperor, (1934) 21 A I R Mad 475=1934 Cr C 801=151 I C 309 =35 Cr L J 1363=57 Mad 1019=67 M L J 293.

[6] Emperor v. Ganpat, (1936) 23 A I R Nag 220 =1936 Cr C 937=165 I C 830=38 Cr L J 15.

[7] Ganeshmal v. Emperor, Criminal Revision No. 474 of 1937.

[8] Tukaram v. Emperor, (1936) 23 A I R Nag 153=1936 Cr C 708=164 I C 744=37 Cr L J 983=I L R (1936) Nag 92.

In the present case also the Magistrate noted the accused's claim for a de novo trial and ordered the witnesses to be re-summoned. On the interpretation put upon such conduct of the Magistrate by Gruer J. in the above mentioned case, the Magistrate in the present case, must be deemed to have directed a de novo trial (including inquiry). If so, the failure to examine the witnesses in chief was a manifest illegality which vitiated the trial as held by Gruer J. in Criminal Revision No. 474 of 1937[7] and in other cases mentioned already. The next question is whether the applicant is estopped from raising the plea of the illegality of the trial by reason of his acquiescence in the procedure adopted by the Magistrate. In A I R 1934 Nag 209[3] Grille J. no doubt held that there was nothing illegal, when the previous depositions are treated as part of the record but it must not be overlooked that in that case it was so done at the express wish of the accused's counsel and after due consideration by the Court. It is also pertinent to notice that Grille J. remarked that nothing can authorize the wholesale transfer of evidence from one case to another in a criminal trial (*ibid* p. 212). In the present case the accused did not expressly wish that the examination-in-chief of the witnesses recorded by the previous Magistrate should be treated as part of this record and the Magistrate also did not apply his judicial mind to the question. The trial must therefore be held to be illegal.

The next question is whether a re-trial should be ordered in this case as was done by Gruer J. in Criminal Revision No. 474 of 1937[7] and other cases cited above. That is a matter depending on the discretion of this Court which is to be exercised with due regard to the facts and circumstances of this case. The case is nearly two years old. Apart from the anxiety and worry which a protracted criminal trial necessarily imposes on a person under trial, the applicant has already served the major part of the sentence (taking into consideration the two months' general remission accorded by the Hon'ble the Premier on 14th June 1937). The accused himself received serious injuries in the scuffle and was paid back in his own coin. These circumstances are sufficient to bring home to a man of normal sense the grave consequences of his unlawful aggression. For these reasons I only quash the conviction and the sentence without directing a fresh trial. The applicant's bail will be cancelled. His fine, if paid, will be refunded and the bond for keeping the peace will be discharged.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 495

STONE C. J. AND VIVIAN BOSE J.

*Mt. Bhuli w/o Nirbhadeo Raghvi* — Appellant.

v.

*Bajabai w/o Domadeo Raghvi and another* — Respondents.

Misc. Appeal No. 5 of 1935, Decided on 1st February 1938, from order of Addl. Dist. Judge, Nagpur, D/- 5th January 1935.

**Guardians and Wards Act (1890), Ss. 48 and 47—Order appointing guardian and fixing amount of maintenance of ward — Order is neither appealable nor revisable.**

Where a Court appoints a guardian and in the same order makes a provision for the maintenance of the ward by fixing the amount of maintenance, the order does not fall within any of the instances mentioned in S. 47 and hence the order according to S. 48 is not appealable. The order is also not open to revision : *A I R 1926 All 301, Approved and Foll. ; A I R 1923 Lah 89 and A I R 1931 Bom 193, Not foll.* [P 496 C 2]

G. V. Moharrir — *for Appellant.*

V. R. Gharpurey — *for Respondents.*

**Order.** — This appeal is brought against an order dated 5th January 1935 made under the Guardians and Wards Act. Before we come to the case we desire to say that the delay in the hearing of this appeal is to be regretted. The appeal is concerned with the guardianship and the maintenance of a child and as a consequence of the order that is made it is said on the one hand that it is an impossible order having regard to the value of the estate and on the other hand that all these years—now more than three—the minor, a child, has only received in all Rs. 90, and though a child he is a growing boy who has passed from the age of 11 to the age of 14 years during the pendency of this small matter. It seems desirable that in cases like this where the maintenance of a person depends on the result some greater expedition should be shown. To turn from that to the appeal itself, the material facts are as follows: The applicant in this matter is the aunt of the minor. The non-applicant is his step-mother. The application has resulted in the non-applicant being made the guardian of the property and no order being made as to the guardianship of the person, but the minor has been left in the custody of his aunt, the applicant. The non-applicant has been directed to furnish security in the sum of Rs. 1000 and has been put in charge, without apparently security having been received from her, of the property which, according to the applicant's own case is worth Rs. 4300 of which Rs. 1000 is represented by a house and Rs. 100 by a dilapidated and more or less ruinous shed, leaving Rs. 3200 as the value of the fields from which the income is to be derived, those fields carrying a burden of Rs. 90 a year rent.

So far as we can see and have been informed those figures form the only basis on which the calculation of the appropriate amount of maintenance has been made. The amount of that maintenance has been fixed at Rs. 200 a year and this, it is urged in appeal, is an excessive amount which the property cannot possibly bear, with the result that the non-applicant has had imposed upon her obligations which she cannot carry out. It is asked that in appeal the figures should be altered. It is to be observed that, as the widow of the minor's father, she has a widow's right of maintenance and that right of maintenance, we understand, is a charge on the property in question. Accordingly she not only has to receive her maintenance out of this property but she has a charge on the property as a security for that maintenance. It is also sought in appeal to gain for her the personal custody of this minor boy. The learned Judge who heard the matter when the child was 11 was of the opinion that the non-applicant had no affection for the boy and that he would be happier in the custody of his aunt. He was of the opinion that the non-applicant's interest were adverse to those of the minor and that the minor could not be happy with her. Accordingly he refused to make her the guardian of the person. We see no reason to come to another conclusion on that point. So far as the order relating to the amount of maintenance is concerned, counsel for the respondent took the point that no appeal lies from that order. The matters in relation to which an appeal lies to the High Court from an order made by a Court are limited by the Guardians and Wards Act, S. 48 as read in with S. 47. S. 48 says:

> Save as provided by the last foregoing Section, and by S. 622, Civil P. C., (S. 115 of the Code of 1908) an order made under this Act shall be final, and shall not be liable to be contested by suit or otherwise.

Section 47 details the matters in respect of which an appeal lies Section by Section. If S. 34 is referred to it will be seen that that Section is the one which empowers a guardian to come to Court and ask for maintenance, the sub-section being (e):

> 'Where a guardian of the property of a ward has been appointed . . . . . he shall' (e) 'apply, for the maintenance . . . . . . of the ward, . . . . .'

It is true that in this matter S. 34 was not the Section under which the order was made. This was not a case of a guardian applying to a Court but a Court appointing a guardian and in that same order making provision for the maintenance of the minor. Had the guardian already been appointed, that guardian would have had to apply under S. 34 (e), and had an application been made and had an order thereupon been passed fixing such and such a figure as the appropriate figure for maintenance, it is clear from the terms of S. 47 that the case would not have fallen within any of the instances mentioned in that Section, and accordingly, consequent upon the provisions of S. 48, no right of appeal would have existed. It has been however suggested, on the authority in 55 I C 587[1] that such an order made under S. 34, and by parity of reasoning the order here under consideration, would have been open to revision. That matter in turn was considered by a Bench of the Allahabad High Court in 48 All 300[2] at page 301 where 55 I C 587[1] was not followed. On the other hand in Bombay in 55 Bom 145[3] at page 148 the learned Chief Justice of Bombay expressed the view:

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1. Ramjas v. Chani, (1923) 10 A I R Lah 89=55 I C 587.
2. In the matter of Durgabai, (1926) 13 A I R All 301=92 IC 482=48 All 300=24 ALJ 301.
3. Jalbhai Cursetji v. Jerbai Hormusji, (1931) 18 A I R Bom 193=128 I C 431=55 Bom 145 =32 Bom L R 1301.

. . . . the Court, apart from Cl. 15, Letters Patent, has inherent jurisdiction to hear an appeal in a matter of this sort affecting a ward of Court,

and that an appeal lies in cases other than those detailed in S. 47 despite the provisions of Sec. 48. Of those authorities we prefer the conclusion arrived at in 48 All 300,[2] and we propose to do what the learned Judges did in that case. We have no materials before us to show what the correct maintenance should be and it would accordingly be exceedingly difficult, even if we had the power to interfere with the discretionary figure. But we must observe two things that do appear from the material on record: (1) that the estate is very small, and (2) that the non-applicant has a widow's right of maintenance out of that estate. It may well be that bearing those facts in mind the Court that appointed this guardian may consider it right to enquire more fully into the question of the amount of maintenance, and if it thinks fit, on such enquiry, vary the amount of maintenance accordingly so that the matter may be fairly disposed of not only in the interests of the minor but also in the interests of the widow whose interests also have to be regarded. With those observations the appeal is dismissed. Each side will pay its own costs.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 497

STONE C. J. AND VIVIAN BOSE J.

*Narmadaprashad Sheocharan — Defendant* — Appellant.

v.

*Narayansingh and another — Plaintiffs* — Respondents.

Second Appeal No. 216 of 1935, Decided on 22nd March 1938, from appellate decree of District Judge, Jubbulpore, D/- 22nd December 1934.

**(a) Registration Act (1908), S. 17 (a)—Deed of agreement relating to theka for cutting timber, dealing with good deal more than mere sale of trees coupled with right to enter upon land to cut and remove them—Document held to create rights and interests in immovable property and held to require registration under S. 17 (a).**

In determining whether a document has to be registered, one is concerned, not with the object which the transaction relates to, but with the rights which the instrument creates or declares. If the right in question amounts to a right, title or interest in immovable property, then the instrument (being non-testamentary) must be registered. [P 498 C 2]

The defendant executed an ikrarnama or a deed of agreement in favour of the plaintiff to the effect that he had taken the latter's jungle on theka for two years for cutting sagon (teak) wood. The instrument dealt with a good deal more than the sale of trees coupled with the right to enter upon the land in order to cut and remove them. The exact trees sold were not specified nor were they capable of determination. Only those over 11 inches in girth were to be cut. At least 25 to 30 trees per acre were to be left. The provisions made it impossible to fix the exact subject-matter of the sale beforehand and the land was likely to produce growth. A time limit for cutting the wood was fixed, with a provision for six months extension. The consideration was Rs. 7000 and that was to be paid, whatever the amount of the timber cut, and even if no timber was cut at all. There was a provision for the payment of the sum in instalments and also for the payment of the interest. In addition there was a forfeiture clause if two instalments were not paid with rights of re-entry :

*Held* that the document created rights, and interests in immovable property itself and required registration under Sec. 17 (a). The terms of the document were foreign to a sale of timber (a moveable) coupled with a license to enter and remove. There was something more than a mere license to enter in order to cut and remove ascertained timber sold and that something more created rights and interests in immovable property : *28 All 277 and A I R 1931 All 392 Disting.* [P 498 C 2; P 499 C 1]

**(b) Easements Act (1882), S. 4—No servient and dominant tenements—Profits a prendre in gross cannot be regarded as easements** ***(Obiter).***

Profits *a prendre* in gross, where there is an absence of servient and dominant tenements, cannot be regarded as easements in India under S. 4, Easements Act and S. 3, Limitation Act. [P 499 C 1]

**(c) Registration Act (1908), S. 17 (a) — License does not create interest in immovable property** ***(Obiter).***

A license, whether revocable or not, does not in itself create an interest in immovable property. [P 499 C 1]

D. N. Chaudhuri — *for Appellant.*

J. Sen — *for Respondents.*

**Judgment.** — The question at issue is whether the document on which the suit is based requires registration. The facts are these: On 27th May 1929 the defendant executed a document which calls itself an ikrarnama or deed of agreement in favour of the plaintiff. Its terms in so far as they are relevant to the appeal before us are as follows :

I have taken your jungle of mouza Kutrigaon, settlement No. 279, tahsil Patan, District Jubbulpore, between the way of Rajolabhat leading to Dane Baba and the river Hiran up to the backside of your (illegible) mouza Kutrigaon, towards the east, for cutting sagon (teak) wood, for two years i. e. from 1st June 1929 to 31st May 1931, for Rs. 7000, in words seven thousand rupees, on the conditions laid down below. So I will abide by these conditions and cut all the wood. If I fail

> to cut the wood I will get the period extended by you by six months, i. e. up to 30th November 1931 . . . .
>
> (2) The period of the theka is from 1st June 1929 to 31st May 1931 that is for two years. But I will be entitled to cut the wood from the date of execution of the agreement. If within the period of the theka I cut the wood of the jungle of the theka and want to take away the same soon (before the expiry of the period of the theka), I will pay the entire amount of the remaining instalments in a lump. . . . .
>
> (4) That I will cut all the wood of the aforesaid theka leaving the stumps according to the Government Forest Rules. I will be entitled to cut all the wood thicker than eleven inches The wood of less than the above thickness shall remain in your possession.
>
> (5) That I will cut the wood of the jungle in two parts. After I have cut all the wood of one part, you shall enter into the possession of that part, and then I will not be entitled to cut the wood of that part for the second time.
>
> (6) That I will leave 25 to 30 (twenty-five to thirty) trees per acre for seed. The same shall be watched by your servants. If there be any mistake, they may point out the same and the same shall be corrected.

The consideration was Rs. 7000 out of which Rs. 1000 was according to the document paid in advance and the remaining Rs. 6000 was payable in four instalments with an enabling clause under which the defendant was entitled to pay in instalments before due date if he so desired. A penalty was provided for default, namely payment of interest at eight annas per cent. per month, on the defaulted instalments and there was also an exigibility clause under which the whole became payable at once on default of two instalments. This also involved forfeiture with a right of re-entry. The counterpart to this document is Ex. P 6. It sets forth the same terms. This question has been considered at length in First Appeal No. 10 of 1935[1] to which one of us (Stone C. J.) was a party. According to that view the document in question creates a license coupled with a grant which amounts to a profits *a prendre* in gross and as such requires registration.

The only distinguishing feature between that case and this is that tendu leaves which were in question there, have not been excluded from the definition of immovable property in the Transfer of Property and Registration Acts, nor have they been included in the definition of moveable property in the Registration Act, whereas standing timber has. But the decision does not turn upon the question whether tendu leaves are moveable or immovable property. In determining whether a document has to be registered, one is concerned not with the object which the transaction relates to but with the rights which the instrument creates or declares. If the right in question amounts to a right, title or interest in immovable property, then the instrument (being non-testamentary) must be registered. The question here is: does this document create a "right, title or interest . . . . to or in immovable property"? If it does, then it requires registration under S. 17 (a), Registration Act.

The Allahabad view is that a transaction of this kind amounts to a sale of the timber coupled with a license to enter upon the land in order to cut and remove the goods sold and that therefore it does not require registration: 28 All 277[2] and A I R 1931 All 392.[3] It does not require registration because the rights created on a sale of moveables are not to or in immovable property and a license to enter does not require registration. Here however the instrument deals with a good deal more than the sale of trees coupled with the right to enter upon the land in order to cut and remove them. It is to be observed that the exact trees sold are not specified nor are they capable of determination. They are to be cut over a period of two years. Only those over 11 inches in girth were to be cut. During the two years trees will grow into that class. At least 25 to 30 trees per acre were to be left. These provisions make it impossible to fix the exact subject-matter of the sale beforehand. The land will produce the growth: *see* (1668) 1 Wms Saund 275[4]. A time limit is fixed with a provision for a six months extension. The consideration is Rs. 7000 and this has to be paid whatever the amount of timber cut and even if no timber is cut at all. There is a provision for the payment of this sum in instalments and also for the payment of interest. In addition, there is a forfeiture clause if two instalments are not paid with rights of re-entry. All this is foreign to a sale of timber (a moveable) coupled with a license to enter and remove. It creates rights and interests in the immovable property itself and consequently the document requires registration.

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[1] **Mulji Sickka & Co. v. Nurmohammad Abdul Gani,** *Reported in* **(1938) 25 A I R Nag 377.**

[2] **Mathuradas v. Jadubir Thapa, (1906) 28 All 277=1906 A W N 4=3 A L J 138.**

[3] **In re Rai Balamgir, (1931) 18 A I R All 392=133 I C 157=1931 A L J 608 (F B).**

[4] **Duppa v. Mayo, (1668) 1 Wms. Saund, 275=85 R R 336.**

It may perhaps be remarked in passing that though profits *a prendre* are regarded as easements in India because of Sec. 4, Easements Act, and S. 3, Limitation Act, this does not apply to profits *a prendre* in gross where there is an absence of servient and dominant tenements. But it is not necessary to decide in this case whether a sale of standing timber amounts to a profit or whether it confers an interest in the property sold under the Sale of Goods Act, for, whichever way the matter is viewed, the result is the same in this particular case because of the terms of the document under consideration. There is something more than a mere license to enter in order to cut and remove ascertained timber sold and that something more creates rights and interests in immovable property. Had there been a simple sale of ascertained trees with a license to enter in order to cut and remove, the position might have been different, for a contract which transfers the legal interest to a purchaser of a purely chattel interest might be regarded as a sale coupled with a license which license would not be revocable until the purpose of the transaction was effected: *see* (1909) 2 Ch 440,[5] (1875) 1 C P D 35[6] and (1668) 1 Wms Saund 275;[4] *see also* (1915) 1 K B 1.[7] A license whether revocable or not does not in itself create an interest to or in immovable property and so it is possible that in those circumstances registration would not be required. But that is not the position here because of the terms of this particular document and we make it clear that we are not here expressing an opinion on the other question one way or the other. The appeal succeeds and the trial Court's decision will be restored. In view of the fact that the plea of registration was not taken in the lower Court, each side will bear its own costs in this and the lower Appellate Court.

R.M./R.K. *Appeal allowed.*

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[5] Jones v. Tankerville, (1909) 2 Ch 440=78 L J Ch 674=101 L T 202=25 T L R 714.

[6] Marshall v. Green, (1875) 1 C P D 35=45 L J C P 153=33 L T 404=24 W R 175.

[7] Hurst v. Picture Theatres, Ltd (1915) 1 K B 1=84 L J K B 1837=111 L T 972=58 S J 739=30 T L R 642.

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## A. I. R. 1938 Nagpur 499

NIYOGI J.

*District Council of Seoni and another* — Applicants.

v.

*Nanhariyaram Sharma* — Opposite Party.

Civil Revn. No. 745 of 1937, Decided on 7th April 1938, from order of Sub-Judge, Second Class, Seoni, D/- 3rd Sept. 1937.

**C. P. Local Self-Government Act (4 of 1920), Sec. 73 (2) — Employee removed from service by order of Chairman of District Council — Appeal by employee to Deputy Commissioner — Chairman's order set aside — Decision of Deputy Commissioner upheld by Commissioner — Local Self-Government moved for revision of Commissioner's order — Minister setting aside Commissioner's order and restoring that of Chairman — Suit by employee for damages for wrongful dismissal — Cause of action held arose on date of Minister's order.**

When an aggrieved party obtains relief at one time but as a result of some proceeding he is deprived of it and he is relegated to his original position, a new cause of action should be deemed to accrue in his favour: *12 M I A 244 (P C); 23 Cal 775 and A I R 1934 P C 134, Applied; A I R 1920 Mad 1 (F B); A I R 1920 Mad 663 and A I R 1921 Lah 71, Rel. on; Case law reviewed.* [P 501 C 2]

In pursuance of a resolution the Chairman of a District Council issued an order to an employee informing him that his services were dispensed with. The employee appealed to the Deputy Commissioner who set aside the Chairman's order. The Deputy Commissioner's order was upheld by the Commissioner. The District Council thereupon moved the Local Government for revision of Commissioner's order and the Minister for Local Self-Government reversed the Commissioner's order and restored that of the Chairman, District Council. The employee filed a suit challenging the legality of the order of the Chairman as well as that of the Minister for Local Self-Government and prayed for damages for wrongful removal from service:

*Held* that the period of limitation, viz. six months prescribed by S. 73 (2) must be computed from the date of the Minister's order as the cause of action for the suit arose on the day on which the Minister passed his order which had the effect of making the Chairman's order final and effective. [P 501 C 2]

G. R. Pradhan — *for Applicants.*

M. Samiullakhan — *for Opposite Party.*

**Order.**—This is an application for revision of an interlocutory order passed on 3rd September 1937 by the Subordinate Judge, Second Class, Seoni, in Civil Suit No. 25-A of 1937. Upon this application arises a question of limitation. The non-applicant (plaintiff) was employed as a sub-overseer in the service of the District Council, Seoni. By a resolution passed at a special meeting of the District Council on 20th May 1934, it decided to abolish one of two posts of sub-overseers. In pursuance of this resolution the Chairman of the Council issued on 22nd May 1934 an order to the non-applicant informing him that his services were dispensed with, with effect from 25th June 1934. The non-applicant appealed to the Deputy Commissioner who set aside the Chairman's order. The Deputy Commissioner's order was upheld by the Commissioner on 21st August 1935. The District Council thereon moved the Local Government for revision of Commissioner's order and the Hon'ble the Minister for Local Self-Government reversed the Commissioner's order and restored that of the Chairman, District Council. This order which was passed on 3rd March 1936 was communicated to the non-applicant on 7th March 1936. The non-applicant filed the suit out of which this revision application arises on 8th July 1936. In that suit he challenges the legality of the order of the Chairman as well as that of the Hon'ble the Minister for Local Self-Government and prays for damages for wrongful removal from service. He specifically avers that the cause of action for his suit arose on 7th March 1936 on which day the Hon'ble the Minister's order was communicated to him. The lower Court repelled the contention raised by the District Council that the suit was barred by time. This revision petition is directed against that order.

On behalf of the applicants it is vigorously argued that the period of limitation, viz. six months prescribed by Sec. 73 (2), C. P. Local Self-Government Act, must be computed from the date of the Chairman's order and not from the date of the Hon'ble the Minister's order. It is said that there can be but one cause of action and that it could be no other than the Chairman's order which entitled the non-applicant to prefer an appeal, and further that when once time began to run no subsequent disability or inability to sue would stop it. The question is not free from difficulty. The principle applicable to such a case as the present has to be deduced from a series of decisions of the Privy Council. They are : 12 M I A 244,[1] 11 All 47,[2] 23 Cal 775,[3] 27 Mad 143,[4] 31 All 68,[5] 43 Cal 660,[6] 35 All 227,[7] 46 Cal 694[8] and 67 M L J 79.[9] These cases as pointed out in 29 C W N 973[10] and 43 Mad 185[11] may be divided into two groups : (1) those in which the starting point of limitation fixed by the statute have been held to have arisen at a subsequent date, that is, those which lay down that a fresh cause of action may arise under some circumstances, (2) those in which the operation of the statute was held to have suspended after it had begun to run. Before dealing with those cases I may briefly advert to the material circumstances of the present case.

The Chairman of the District Council served a notice on the non-applicant on 22nd May 1934. That gave him a two-fold right, (a) to prefer an appeal to the Deputy Commissioner under the rules framed by the Local Government, or (b) to file a suit under Sec. 73, C. P. Local Self-Government Act. I may in passing observe that doubts and disputes as to the question of limitation as have arisen in this case can well be set at rest if a Section on the lines of S. 192 (2), Berar Land Revenue Code, is inserted in the Local Self-Government Act. The non-applicant very naturally sought the cheaper, quicker and less cumbrous remedy of appealing to the Deputy Commissioner. He succeeded there and also in the Court of the Commissioner. The Chairman's order having been set aside, the non-applicant obtained the desired relief and his cause of action was extinguished. It was only when the Chairman's order was restored by the

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1. Ranee Surno Moyee v. Shooshee Mokhee Burmonia, (1869) 12 M I A 244=2 Beng L R 10 =11 W R 5 (P C).
2. Bassu Kuar v. Dhun Singh, (1889) 11 All 47 =15 I A 211=5 Sar 260 P C).
3. Baijnath Sahai v. Ramgut Singh, (1896) 23 Cal 775=23 I A 45=7 Sar 1 (P C).
4. Rangayya Appa Rao v. Bobba Sriramulu. (1904) 27 Mad 143=14 M L J 1=31 I A 17= 8 Sar 617 (P C).
5. Amma Bibi v. Udit Narain Misra, (1909) 31 All 68=1 I C 890=36 I A 44 (P C).
6. Nrityamoni Dassi v. Lakhan Chandra Sen, (1916) 3 A I R P C 96=33 I C 452=43 Cal 660 (P C).
7. Soni Ram v. Kanhaiya Lal, (1913) 35 All 227 =19 I C 291=40 I A 74 (P C).
8. Mani Singh v. Nawab Bahadur of Murshidabad, (1918) 5 A I R P C 180=50 I C 202=46 Cal 694=46 I A 60 (P C).
9. Chandra Mani Saha v. Sreemati Anarjan Bibi, (1934) 21 A I R P C 134=150 I C 11=61 Cal 945=61 I A 248=67 M L J 79 (P C).
10. Sm. Sarat Kamini Dasi v. Nagendra Nath Pal, (1926) 13 A I R Cal 65=89 I C 1000=43 C L J 155=29 C W N 973.
11. Muthu Korakkai Chetty v. Madar Ammal, (1920) 7 A I R Mad 1=54 I C 66=43 Mad 185=38 M L J 1 (F B).

Hon'ble the Minister that his grievance was revived. That raises a series of questions: (a) Can it be said that the limitation for his suit remained suspended during the time that he was pursuing his remedy departmentally? (b) Is the Chairman's order his only cause of action? (c) Does the Hon'ble the Minister's order revive the defunct cause of action or create a new one?

Answers to these questions have to be sought for in the several decisions of the Privy Council cited already. In 12 M I A 244[1] a sale under the Patni Regulation was set aside and the patnidars were restored to possession. The zamindar sued the patnidars to recover arrears of rent which had accrued before and during the time they were out of possession. Their Lordships overruled the defendants' contention on the point of limitation on the view that the arrears of rent must be taken to have become due in the year in which the patnidars were restored to possession. In 11 All 47[2] a debtor agreed to convey property in partial satisfaction of his debt but dispute arose as to the terms of the conveyance which, in consequence of a litigation, fell through. On the suit by the creditor to recover his debt, it was held that the decree of the Court brought about a new state of things and imposed a new obligation on the debtor to pay his debt. In 23 Cal 775[3] the Board of Revenue discharged an order of the Commissioner, dated 25th January 1884 whereby a sale had been confirmed; but afterwards on 21st August 1886 discharged its own order and restored that of the Commissioner. It was held that the confirmation of the sale dated only from 21st August 1886, and not from 25th January 1884. Lord Davey who delivered the judgment of the Board observed that there was no final, conclusive or definitive order confirming the sale until the final judgment of the Board of Revenue. In 27 Mad 143[4] the limitation was held to begin not from the end of the Fasli year but from the time when, in appropriate proceedings, the rent came to be ascertained and finally fixed. The case in 31 All 68[5] is similar to 11 All 47.[2] In 43 Cal 660[6] it was observed, while confirming the High Court's decision, that the limitation would remain in suspense while the plaintiffs were bona fide litigating for their rights in the Courts of justice. Their Lordships do not refer to Sec. 14, Limitation Act, which did not expressly apply. The observations made there cannot, as pointed out by Abdul Rahim, Offg. C. J. in 43 Mad 185,[11] be regarded as laying down any rule of exclusion of time in addition to those specifically provided for in the Limitation Act. That their Lordships did not intend to introduce a new rule of exclusion founded on considerations of equity is clear from the view their Lordships took in 35 All 227,[7] 46 Cal 670[12] and 46 Cal 694.[8] In 67 M L J 79[9] it was held that for purpose of Art. 180 the time begins to run not from the formal order confirming the sale, but when it becomes effective and final after the proceedings for setting aside the sale terminate. Except in 43 Cal 660,[6] in no case have their Lordships of the Privy Council adumbrated any principle to justify suspension of limitation that may conflict with the clear terms of S. 9, Limitation Act.

On examination of authorities I think the rule of the decisions in 12 M I A 244,[1] 23 Cal 775[3] and 67 M L J 79[9] should be applied in this case. That rule appears to be that when an aggrieved party obtains relief at one time but as a result of some proceeding he is deprived of it and he is relegated to his original position, a new cause of action should be deemed to accrue in his favour. This is a rule of construction and not a rule of law. It was applied in 43 Mad 185,[11] 43 Mad 845[13] and 2 Lah 320.[14] On behalf of the applicants much stress is laid on 35 All 227[7] and 4 Lah 90,[15] but they lend no assistance in the present case. It was held there that the mere fusion of the interests of the mortgagee and mortgagor did not have the effect of suspending limitation. The foregoing discussion leads me to the conclusion that the cause of action for the suit arose on the day on which the Hon'ble the Minister passed his order which had the effect of making the Chairman's order final and effective. I therefore agree with the lower Court that the suit was within time. The application is dismissed with costs. Counsel's fees Rupees 25.

D.S./R.K. *Application dismissed.*

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**12. Juscurn Boid v. Pirthichand Lal, (1918) 5 A I R P C 151=50 I C 444=46 Cal 670=46 I A 52 (P C).**

**13. Muthuveerappa Chetty v. Adaikappa Chetty, (1920) 7 A I R Mad 663=59 I C 472=43 Mad 845=39 M L J 312.**

**14. Kartar Singh v. Bhagat Singh, (1921) 8 A I R Lah 71=64 I C 454=2 Lah 320=114 P L R 1921.**

**15. Hukam Chand v. Shahab Din, (1924) 11 A I R Lah 40=71 I C 495=4 Lah 90.**

## * A I. R. 1938 Nagpur 502

STONE C. J. AND NIYOGI J.

*Shree Madhaorao Narayanrao Ghatate* — Applicant.

v.

*Baliram Narayan Gadkari and another* — Non-applicants.

First Appeal No. 56 of 1935, Decided on 17th December 1937, from order of Addl. Dist. Judge, Nagpur, D/- 15th April 1925.

*** Civil P. C. (1908), O. 22, R. 12—O. 22, R. 12 only excludes from its operation proceedings in execution in original Court - It does not apply to appeals from orders made in execution proceedings which are governed by O. 22, R. 11—O. 22, R. 12 does not exempt appellant appealing from order passed in execution proceedings from making application for bringing legal representative of deceased respondent on record within time prescribed by law.**

Order 22, R. 12 only excludes from its operation the proceedings in execution in the original Court and does not apply to appeals from orders made in execution proceedings. Such appeals are governed by O. 22, R. 11. O. 22, R. 12 does not therefore exempt an appellant appealing from an order passed in execution proceedings from making an application for bringing the legal representatives of a deceased respondent on record within the time prescribed by law. An appeal, which arises from execution proceedings, cannot be regarded as a proceeding in execution within the meaning of O. 22, R. 12 and O. 22, R. 12 must be construed as referring only to proceedings in the execution Court and not to those in Appellate Court, which hears appeals arising from execution proceedings. The proceeding which O. 22, R 12 contemplates is that specified in S. 50, which does not apply to appeals, but only to a proceeding in an original Court : *A I R 1932 Mad 574 and A I R 1933 All 388, Rel. on ; A I R 1923 Lah 560, A I R 1925 Nag 239 and A I R 1929 Pat 565 (F B) Not foll.* [P 503 C 2 ; P 504 C 1]

G. J. Chati — *for Applicant.*

W. H. Dhabe and K. A. Potey — *for Non-applicants (Yadaorao and Mt. Anpurna Bai).*

A. V. Wazalwar — *for Non-applicant (Madhukar).*

**Order.**—Pending this appeal, respondent 1 Baliram died on 17th November 1936 and respondent 2 Potey died on 26th November 1936. The appellant filed his application for bringing their respective legal representatives on the record on 6th April 1937. That application was manifestly barred by time, if it is regarded as one made under O. 22, R. 4, Civil P. C., i. e. for substitution of the names of the legal representatives. It is however within time as one made for setting aside abatement of the appeal. The reason given for the failure to apply within the period of limitation is that the appellant learnt about the respondents' death "on or before 1st March 1937 as he was busy for two or three months in election work" and that the appellant's servants could not get the correct information as to who were the legal representatives. We cannot accept this explanation for delay. The affidavit which has been filed to verify the allegations is not made by the appellant himself as he ought to have done but by his agent. The statement that he came to know about the death on or before 1st March 1937 is equivocal and vague. The affidavit filed by the legal representatives of respondent 2 leaves but little room for doubt that the appellant had full knowledge of respondent 2's death within the time prescribed by law for making the requisite application. That the appellant was engaged in the election activities is not sufficient to account for his ignorance of the respondent's death. Moreover, the election was over on 12th February 1937 and he had still three days time to apply for substitution of respondent 1's and 12 days time for that of respondent 2's legal representatives. It must be held that the appellant has been unable to show sufficient cause for his failure to apply within the time prescribed by law.

It is next contended that the appellant was not bound to apply for making the legal representatives of the deceased respondents parties to the appeal within three months. This contention is based on the assumption that R. 12 of O. 22, Civil P. C., exempts the appellant from making such an application. It is true that this appeal arises out of execution proceedings but the question is whether R. 12 applies to appeals from orders made in execution proceedings. On this point there is a conflict of judicial opinion. The Lahore and Patna High Courts have held that R. 12 has the effect of excluding from the operation of Rr. 3, 4 and 8 of O. 22, Civil P. C., appeals arising from execution proceedings and that there can be no abatement of such appeals In A I R 1925 Nag 239[1] Kinkhede A. J. C. was inclined to the same view. On the other hand, the Madras High Court has held that an appeal against an order in execution is not a proceeding in execution of a decree and that R. 12 does not apply to such appeals to save them from abatement. The view of the Allahabad High

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[1] **Mt. Sarjabai v. Dhanraj, (1925) 12 A I R Nag 239=86 I C 11.**

Court also is similar to that of the Madras High Court. Examining the authorities it would appear that in 74 I C 577[2] and A I R 1925 Nag 239,[1] the learned Judges gave no reasons in support of their opinions. In 9 Pat 372[3] the question was considered by a Full Bench and the majority of Judges decided that an appeal against an order made in execution proceedings did not abate in view of R. 12, O. 22. Das J. dissented and held otherwise. The Lahore and Patna cases were considered by the Madras High Court in 55 Mad 1006[4] and it was held that an appeal from an order made in execution proceedings was not an execution proceeding and that it was governed by R. 11 and not by R. 12. In 55 All 509[5] this view was accepted as being correct.

The cardinal question is whether an appeal from an order in execution proceedings stands on a footing different from other classes of appeals. O. 41, Civil P. C., which provides the procedure relating to appeals, does not make any distinction between appeals arising from execution proceedings and those preferred against decrees. There is therefore no reason why R. 11 of O. 22, should not apply to an appeal falling under S. 47, Civil P. C., as the present appeal does.

An appeal which arises from execution proceedings cannot be regarded as a "proceeding in execution". S. 50, Civil P. C., provides that where a judgment-debtor dies before the decree has been fully satisfied the holder of the decree may apply to the Court which passed it to execute the decree against the legal representative of the deceased. It is because of this special provision that R. 12 of O. 22 excludes the execution proceedings from the operation of Rr. 3, 4 and 8 of that Order. R. 12 must therefore be construed as referring only to the proceedings in the executing Court and not to those in the Appellate Court which hears appeals arising from execution proceedings. It cannot be overlooked that the Civil Procedure Code itself makes a clear cut distinction between the execution proceedings and appeals. As regards execution proceedings it lays down the procedure in Part 2 and O. 21 and as regards appeals in Part 7 and Orders 41, 42, 43, 44 and 45. There is nothing in the Code to show that the Legislature intended to make any distinction between appeals from decrees in suits and appealable orders passed in execution. Both these classes of appeals are governed by the provisions of O. 41. In 9 Pat 372[3] Kulwant Sahay J. was of opinion that the words "proceedings in execution of a decree or order" in R. 12 of O. 22, Civil P. C., included proceedings in appeal against orders passed in the execution proceedings. It must therefore be seen whether the wider meaning is borne out by the relevant provisions in the Civil Procedure Code. R. 12 of O. 22 contains a negative provision excluding the execution proceedings from the operation of Rr. 3, 4 and 8 of that Order. The positive provision is contained in Sec. 50, Civil P. C. Does this Section apply to appeals? It does not say so. Does it apply by necessary implication? The answer is to be sought in the scheme of the Civil Procedure Code relating to procedure in suits and miscellaneous proceedings or powers of the original and the Appellate Court. The Civil Procedure Code makes specific provision in regard to the former in S. 141 and S. 107 (2) in regard to the latter. Similarly Rules 3, 4 and 8 of O. 22 do not apply *proprio vigore* to appeals but by virtue of R. 11 of that Order. Is there any such specific provision in the Code to extend the operation of Sec. 50, Civil P. C., to appeals arising from execution proceedings? There is none. The conclusion is therefore inevitable that Sec. 50, Civil P. C., does not apply to appeals arising from execution proceedings but only to those in the original Court and that R. 12 of O. 22 only excludes the proceedings in the original Court. The view taken by Kulwant Sahay J. that R. 11 is controlled by R. 12, is, with due respect, open to question and cannot be accepted as sound.

There is further an important feature which distinguishes the execution proceedings in the original Court from the appeals arising out of them. While there can be succession of applications for execution, there can be but one appeal. Kulwant Sahay J. concedes that there is this difference and that an appeal can be filed but once. The learned Judge however endea-

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**2. Mir Khan v. Sharfu Punnun, (1923) 10 A I R Lah 560=74 I C 577.**

**3. Muhammad Taki v. Fateh Bahadur Singh, (1929) 16 A I R Pat 565=122 I C 148=9 Pat 372=10 P L T 768 (F B).**

**4. Rajah of Kalahasti v. Jagannadha Rayanimgar, (1932) 19 A I R Mad 574=139 I C 409=55 Mad 1006=63 M L J 827.**

**5. Chhanga Mal v. Ram Dularey, (1933) 20 A I R All 386=144 I C 391=55 All 509=1933 A L J 706.**

vours to overcome the difficulty by permitting the legal representatives of a deceased appellant to apply for leave to prosecute the appeal any time within three years under the residuary Art. 181, Limitation Act. The answer to this is obviously the one which Das J. gave, viz. that when the Legislature has provided a special procedure for obtaining such leave, it is not open to a litigant to have recourse to another procedure not provided in the Code.

The majority of the learned Judges in 9 Pat 372[3] were of opinion that an appeal against an order in execution proceeding is itself a continuation of the execution proceedings; it may or may not be so, but the crucial question, as pointed out in 55 Mad 1006,[4] is whether such an appeal is a proceeding in execution within the meaning of O. 22, R. 12. It has already been shown above that the proceeding which Rule 12 contemplates is that specified in S. 50, Civil P. C., which does not apply to appeals but only to a proceeding in the original Court. The application is dismissed with costs. Pleader's fees Rs. 25.

R.M./R.K. *Application dismissed.*

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## A. I. R. 1938 Nagpur 504

VIVIAN BOSE J.

*Deputy Commissioner, Hoshangabad*— Applicant.

v.

*Firoz Khan and another* — Non-applicants.

Civil Revn. Nos. 329, 330 and 331 of 1936, Decided on 13th August 1937, from order of the Dist. Judge, Hoshangabad, D/- 31st January 1936.

**(a) C. P. Land Alienation Act (2 of 1916), S. 25 (2) — Application by Deputy Commissioner to High Court — Mode of presentation need not be in any particular form.**

Under S. 25 (2), the Deputy Commissioner has to apply to the High Court. It does not matter how the application is presented, either personally or through post or in any other way; the only thing necessary is that an application reaches the Court. [P 504 C 2; P 505 C 1]

**(b) C. P. Land Alienation Act (2 of 1916), S. 25 (2)—Order of attachment involves alienation — Copy of order should be sent to Deputy Commissioner.**

In the case of a simple money decree, the order of attachment involves permanent alienation, mortgage or lease of land and so the copies of such orders ought to be sent to the Deputy Commissioner under S. 25 (1). If it is not sent, then the Courts have failed to perform their duty and the Deputy Commissioner is entitled to apply under S. 25 (2) within two months of the date on which he is informed of such order, the manner in which he obtains his information being immaterial : *A I R 1938 Nag 281, Foll.* [P 505 C 1]

**(c) Civil P. C. (1908), S. 60 — Attachment— Property not liable to be sold cannot be attached.**

If a property cannot be sold, then it cannot be attached either: *A I R 1938 Nag 281, Rel. on.* [P 506 C 1]

*Non-applicant 1 in person.*

**Order.** — This order will govern Civil Revision Nos. 329, 330 and 331 of 1936. Three simple money decrees were obtained against Kalkasingh, Satyadrigdeosingh and Halku respectively. In the three cases out of which these revisions respectively arise, each of the judgment-debtors is admittedly a member of an aboriginal tribe to whom the provisions of the C. P. Land Alienation Act of 1916 apply. In execution, the immovable property of these persons was attached by their respective decree-holders. The fact that the judgment-debtors were members of an aboriginal tribe was not brought to the notice of the executing Court and so the properties being land revenue paying estates, the papers were sent to the Collector for execution under Sch. 3, Civil P. C. The Deputy Commissioner thereupon applied on 2nd December 1935 to the District Judge under S. 25 (2), Land Alienation Act, for revision of this order of execution. The learned District Judge declined to interfere on two grounds: first because, in his opinion, the Act prohibits sale of the property in such cases but not attachment and secondly, because he considered that the application should have been presented to the proper revenue authorities and not to him. He therefore returned the application for presentation to the proper Court. The Deputy Commissioner now applies to this Court under S. 25 (3), Land Alienation Act, for revision of that order. The application to this Court was sent by post and objection is raised at the outset to its maintainability on the ground of improper presentation. It is argued that S. 25 (5) of the Act, relieves the Deputy Commissioner of appearance so far as the disposal of the application is concerned but not as regards its presentation. I am unable to accept this reading of the Act. The object is clearly to bring to the notice of the Court an illegality in its decree or order and thus to save the property of a certain class of persons. S. 25 (5) states that no stamp shall be required upon such application, and the provisions of the Code of Civil Procedure, 1908, as regards appeals shall apply so far as may be, to the procedure of the Code on receipt of such application.

It is clear then that the Act does not contemplate that the ordinary rules of procedure in respect of the presentation of applications are to be followed for it states expressly that these rules are not to apply until receipt of the application. Therefore it does not matter how the application reaches this Court; all that is necessary is that it should arrive. I disallow the preliminary objection. The Deputy Commissioner has not appeared before me but the judgment-debtors and each of the three decree-holders are present; one of the decree-holders appears in person and the others being represented by counsel. It is argued on behalf of the decree-holders that S. 25 (2) does not apply in ths case of a money decree because the decree or order must in itself involve the permanent alienation, mortgage or lease of the property. This matter was dealt with by a Bench of this Court, of which I was a member in First Appeal No. 81 of 1934.[1] It was pointed out there that in the case of a simple money decree the order of attachment involves permanent alienation, mortgage or lease of land and so the copies of such orders ought to be sent to the Deputy Commissioner under S. 25 (1). If it is not sent, then the Courts have failed to perform their duty and the Deputy Commissioner is entitled to apply under S. 25 (2) within two months of the date on which he is informed of such order the manner in which he obtains his information being immaterial. I am therefore of opinion that the Deputy Commissioner had a right to make the present application.

But a more fatal objection is that of limitation. It applies to Civil Revision Nos. 329 and 330 of 1936 but not to Civil Revision No. 331 of 1936. In the two former cases, the Collector finding that the judgment-debtors were members of an aboriginal tribe came to the conclusion that he had no power to order sale of the property without the sanction of the Deputy Commissioner under S. 16, Land Alienation Act; consequently he sent the papers to the Deputy Commissioner for sanction. In Civil Revision No. 329 of 1936, the sanction was accorded on 4th March 1934, and in Civil Revision No. 330 of 1936 on 2nd December 1932. It is clear then that the fact that there were such orders outstanding against two of the judgment-debtors was brought to the knowledge of the Deputy Commissioner more than two months before the application dated 2nd December 1935 which he made in the lower Court. Since S. 25 (2) allows the Deputy Commissioner only two months from the date on which he obtains the necessary information, it is clear his present application is beyond time, and in any case he would not be allowed to play fast and loose in this manner. I am told that consequent on his sanction the sales have already taken place in these two cases, possession delivered and the sales confirmed.

The third case, Civil Revision No. 331 of 1936, is different. No sanction was asked for in that case and consequently there is nothing to disprove the Deputy Commissioner's assertion that he came to know of the order against the judgment-debtor in that case within two months of the making of the application. It is unfortunate that this particular decree-holder is unrepresented before me, but I have been through the order-sheets in his case, and I am indebted to the assistance of counsel for the other decree-holders who have gone through the papers thoroughly, and I am satisfied that the matter did not come to the knowledge of the Deputy Commissioner more than two months before his application. The decree-holder in this case who appeared in person was not able to suggest any other date on which the Deputy Commissioner came to know about this matter. Consequently the application in this case is within time. With respect to Civil Revision No. 329 of 1936 sanction was given by the Subdivisional Officer and not by the Deputy Commissioner. It is argued that the knowledge of the Subdivisional Officer cannot be imputed to the Deputy Commissioner. But in the Narsinghpur Subdivision the Subdivisional Officer of Narsinghpur is the Deputy Commissioner for these purposes. Under S. 21, Land Alienation Act the Governor-General in Council is empowered to confer the powers of a Deputy Commissioner for the purposes of that Act upon any other officer in Narsinghpur. These powers have been conferred upon the Subdivisional Officer by Notification No. 5252-T-119-XII, published in Part 1 of the C. P. Gazette dated 28th November 1931. Therefore the knowledge of the

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[1] **Daulat Shah Bapu v. Mt. Saraswati Bai, (1938) 25 A I R Nag 281=173 I C 877.**

Subdivisional Officer is knowledge of the Deputy Commissioner, for he is the Deputy Commissioner for these purposes.

It was argued on behalf of the judgment-debtors that the two months limitation does not apply to these cases because the Deputy Commissioner has two months from the date on which he receives copies of the order from the Courts. Since he has received no such copies in the present case limitation has not commenced to run. I am referred to A I R 1935 Lah 274[2] for this proposition. The Lahore case merely states that it is the duty of the Courts to send the copy of the order or decree to the Deputy Commissioner in such cases, and further that when this is not done and the decree is sent for execution to the Collector, neither the knowledge of the Collector nor of some clerk in the Deputy Commissioner's office can be taken to be the knowledge of the Deputy Commissioner. That of course is not the case here. As I have said the Deputy Commissioner himself in one case, and in the other the person who is taken to be the Deputy Commissioner for this purpose, passed the order. S. 25 (2) states that two months run from the date "upon which he is informed of such decree or order." It does not lay down any limitation as to the manner in which the information is to be received by him. I therefore hold that in the two cases in respect to which this argument applies the Deputy Commissioner was informed more than two months before he applied to the District Judge, and consequently this application is barred. Dealing now with the two objections raised by the lower Court, first as regards the objection that the provisions of the Land Alienation Act prohibit sale but not attachment, it was decided in First Appeal No. 81 of 1934[1] to which I have just referred, that this is not so; if the property cannot be sold then it cannot be attached either. As regards the other objection, namely that the application lies to the revenue authorities, there is no foundation for that. The Deputy Commissioner has no power to apply to any revenue authority. He is not a party to the proceedings and the only action he can take in the matter is under S. 25, Land Alienation Act.

It was argued lastly that the order of the executing Court was illegal at its inception and consequently need not be set aside at all and that therefore no question of limitation arises, and I was referred to 26 N L R 60.[3] But that deals with a question of execution. All it says is that an executing Court can, in certain circumstances, go behind the decree and question its validity. I am not dealing with this matter. The judgment-debtor may or may not have the right to question the validity of the proceedings in the executing Court. All I am considering here is an application made by the Deputy Commissioner under S. 25. If the application is made beyond limitation it is clear it must be rejected. The result then is that the Deputy Commissioner's application is allowed in Civil Revision No. 331 of 1936 and rejected in Civil Revision Nos. 329 and 330 of 1936. As the decree-holder was not represented before me, and as it may be possible that he has material in his possession to prove sanction in his case also, or to prove otherwise that the Deputy Commissioner received the information about the order more than two months before his application to the lower Court, I remand that case to the District Judge for disposal. There will be no order as to costs in any of the three revisions.

B.D./R.K. *Order accordingly.*

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[2] Deputy Commissioner, Kangra v. Sanatan Dharm Rajput High School, (1935) 22 A I R Lah 274.

[3] Kashinath v. Harda Central Bank, (1929) 16 A I R Nag 357=120 I C 732=26 N L R 60.

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## A. I. R. 1938 Nagpur 506

STONE C. J. AND VIVIAN BOSE J.

*Abdul Razak Bhurekhan Musalman* — Appellant.

v.

*Seth Nandlal Sheolal and others* — Respondents.

First Appeals Nos. 166 and 174 of 1934, Decided on 7-4-1938, from decree of Addl. Dist. Judge, Khandwa, D/- 26th June 1934.

**(a) Limitation Act (1908), Arts. 139, 142, 144—*P* leasing out house to *D's* father *B* in 1893—*B* executing rent note in 1897 agreeing to pay monthly rent regularly - In case of default of 3 months, lessor to get houses vacated immediately—Lessee also agreeing to pay interest on arrears *B* dying in 1910—No rent paid either by *B* or by *D* since 1900—*P* suing *D* in 1931 for possession and mesne profits—Rent note held created tenancy for indefinite term, which on three months arrears, reduced itself to tenancy-at-will —*B* being at time of his death in 1910 merely tenant-at-will, tenancy ended on his death and *D's* possession from 1910 was adverse Whichever of Arts. 139, 142 and 144 applied suit by *P* held barred—**

**D's possession could not be regarded as permissive—D held not estopped under S. 116, Evidence Act.**

*P* leased on 20th March 1893 out to *D's* father, *B*, a house consisting of five blocks. *B* executed a rent note in favour of his lessors, material portion of which was as follows: "You have got six houses in *M* mohalla at *K*. I have taken them on a rent of Rs. 12-8-0 per mensem. I will pay the amount regularly every month. If I make a default for three months, you may get your houses vacated immediately. I will pay interest at Re. 1 per cent. per month till satisfaction on the amount that may be found due against me on account of chadat (arrears)." *B* died in 1910. No one paid any rent after 1910. *P* sued *D* in 1931 for possession of the property and for mesne profits:

*Held* that the rent note created a tenancy of indefinite term which, as soon as three months' rent was in arrears, reduced itself to tenancy-at-will, because on that event occurring, the landlord became entitled to eject the tenant without notice. That there being a contract to the contrary the resulting holding could not be regarded as a monthly tenancy. That the question whether *D* was a tenant-on-sufferance did not arise in the case. That *B*, being merely a tenant-at-will at the time of his death, by 1910 latest, i.e. on *B's* death, the relationship of landlord and tenant between the parties had ended, and, in so far as *B's* son *D* was in possession, he was in as a wrong-doer and his possession adverse. That whichever of Arts. 139, 142 and 144 applied, *P's* suit for possession was barred by limitation. That *D's* possession could not be said to be permissive merely because *P* paid some charges in connexion with the property as that did not show consent. That once the tenancy had come to an end there could be no estoppel under S. 116, Evidence Act. There being no tenancy continuing after *B's* death at latest, the period of statutory estoppel was at an end: *8 M I A 43 (P C) and A I R 1928 P C 146, Disting.; Case law discussed.* [P 510 C 2; P 511 C 1, 2]

**(b) Landlord and Tenant—Tenancy-at-will—Determination of.**

A tenancy-at-will, in English law is determined by the death of either party or by either doing any act, inconsistent with the continuance of the tenancy. A lease from month to month is, of course, heritable: *(1842) 9 M & W 643 and A I R 1937 Nag 321, Rel. on.* [P 509 C 2]

**(c) Landlord and Tenant—Tenancy at sufferance - English fiction of tenancy at sufferance appears to be recognized in India** *(Obiter)*.

The law in India appears to recognize the English fiction of tenancy-at-sufferance. Whether the fiction should be imported into India depends on whether it is consonant with justice, equity and good conscience, bearing in mind the conditions of affairs and the statutory law here applicable: *Case law discussed.* [P 510 C 2]

**(d) Landlord and Tenant—Tenant by sufferance whether trespasser** *(Quaere)*.

Whether a tenant by sufferance is in the same position as a trespasser: *22 Bom 893, Doubted; (1789) 2 R R 728, Explained.* [P 510 C 1]

**(e) Transfer of Property Act (1882), S. 51—Transferee of property making improvements on it under bona fide belief that he is absolutely entitled to it—Acquiescence on part of transferor—Transferee misled by acquiescence—On proof that transferee has no title, he is entitled to remove what he has built provided he returns land in the state it was.**

The rule in (1865) 1 H L 129 is subject in India to the exception that a party building on the land of another is allowed to remove the building. The right does not of course exist when the action is mala fide and tortious but when there is acquiescence and a bona fide belief on the part of the person building that he had title, then if it should appear, that the person building has no title and was misled by the acquiescence, he is entitled to remove what he has built so long as he substantially returns the land in the state it was: *(1865) 1 H L 129, Ref.; 20 Bom 298 and 2 N L R 4, Rel. on.* [P 511 C 2]

**(f) Landlord and Tenant—Liability of tenant—Agreement between parties imposing obligation on tenant to do plastering and repairs of premises—Condition does not impose on tenant obligation to build house which falls down.**

The mere fact that an agreement between a landlord and tenant, embodied in a rent note, imposes an obligation on the tenant to do plastering and repairs of the premises leased out, does not impose on the tenant an obligation to rebuild a house which falls down, or is reconstructed in obedience to a dilapidation notice. [P 511 C 2; P 512 C 1]

A. Razak Khan — *for Appellant.*

M. B. Kinkhede and R. K. Rao, and A. R. Kulkarni — *for Respondents 1 to 3 and 4 respectively.*

**Judgment.**—This judgment covers First Appeals Nos. 166 of 1934 and 174 of 1934. Of these two appeals, which were heard together, one (First Appeal No. 174 of 1934) is by the first defendant and the other (First Appeal No. 166 of 1934) is by the plaintiffs. The plaintiff family has been torn by dissensions which may account for the somewhat extraordinary succession of events. In this suit we find Bhikarilal, a member of the family of the plaintiffs (all being descended from Jagannath though through different lines), joined as defendant 4. The story starts with a lease granted on 20th March 1893. The subject-matter is a number of houses but we are here concerned with a tenement said to consist of five blocks, each block comprising two chasmas (a chasma being that portion between pillars). We next find a rent note being executed by Bhure Khan. Bhure Khan is defendant 1's father. As the case turns to some extent upon this document it is desirable to set out the material portion.

The person speaking is Bhure Khan, he is to be regarded as addressing the landlords, Seth Sheolalji (father of plaintiffs 1 and 2) and Hiralal (adoptive father of plaintiff 3):

> You have got six houses in Maliwada Mohalla at Khandwa. I have taken them on a rent of Rs. 12-8-0 per mensem. I will pay the amount regularly every month. If I make default for three months you may get your houses vacated immediately. I will pay interest at Re. 1 per cent. per mensem till satisfaction, on the amount that may be found due against me on account of chadat (arrears). The particulars of the houses taken on rent are as below:
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> 1. One and a half storied, tiled house of ten chasmas of the run of four sagtis with its facing towards the East.

Item 1 is the subject-matter of this suit whereby the plaintiffs seek possession and mesne profits together with certain other reliefs not agitated in this appeal. The defence is one of adverse possession. The defendant also says that he has incurred expenditure in building on part of the site with plaintiffs' knowledge and consent and should in any event be allowed credit for the amount expended. The learned Judge has decreed possession, rejected the claim for accounts, permitted the defendant to remove his superstructure. The defendant says that possession should not have been ordered and that in any event he should have been allowed his expenditure upon the superstructure. The plaintiffs say, in their appeal that accounts should have been ordered and that the first defendant should not have been permitted to remove the superstructure. The findings on Issues 5, 6 and 7 (viz. that these are not proved) are also challenged by the plaintiffs. These issues are:

> 5. Did Bhure Khan and defendant 1 occupy two blocks on a monthly rent of Rs. 5 from 1900 onwards? 6. What rent was in arrears upto the year 1923? 7. Was defendant 1 allowed to build the Southern portion of the house, i. e. the blocks Nos. 1 and 2 and the compound wall on the understanding that the amount expended by him on the construction should be given credit towards the arrears of rent?

Bhure Khan died in 1910. No one paid any rent after 1900. The main question will be whether the leasehold interest, whatever it was, came to an end in 1910 (or before) or whether defendant 1, his son, remained on, without paying rent in the capacity of representative of a lessee; or whether, the leasehold interest determining, the son was in adverse possession so as to be able to claim the benefit of the Statute of Limitation. If so entitled, what Article applies—Art. 139, 142 or 144? Before embarking upon an analysis for the purpose of discovering the answers to be given to these questions it is necessary to state another fact. In 1900 the lessor, his brother and cousin took from Bhure Khan and from defendant 1 (the question of defendant 1's then minority arises) a bond the obligation to pay which is cast in the first person singular. This bond is said to be in respect of arrears of rent and in some way to fix defendant 1 with the position of tenant because, being a party, and, according to the plaintiffs, not a minor, he has agreed to pay these arrears. The learned Judge finds, after an examination of the account books and hearing P. W. 13 that this bond was partly in respect of rent in arrear. He also finds that defendant 1 was then a minor. He further finds that it did not amount to a new contract of lease. The finding of minority has been strongly attacked. We have had our attention directed to the fact that defendant 1 a month before this bond presented a document for registration (which he could not properly do if a minor), that there is evidence that he was 28 or 29 in about 1910 and that in a plaint he is described at 40 in 1922. Some point was also made, founded on Ex. D-1, but we find it impossible to see how that alleged notice helps one way or the other on the question of defendant 1's minority in 1900. None of this evidence appears to us to be of any weight. For example, what weight can one attach to this: (D. W. 7 in cross-examination): "Defendant 1's father as far as I remember died one year after my coming to Khandwa. It may be 1910. Defendant 1 was about 28 or 29 then." From that we are asked to infer that he must have been 18 on 23rd July 1900. We prefer the evidence on which the learned Judge relies, viz. Ex. D-24. This is a school certificate dated 1st April 1897. It states the age of defendant 1 as 13 years 2 months.

Thus the bond of 1900, not being binding on defendant 1 and not creating a new lease, can be regarded as passing out of the story. We are thus left with the rent note of 1897. It has been argued that that document evidences a lease for less than one year, viz. a lease from month to month alternatively for three months and therefore amounts to a lease for a term less than one year. Alternatively it is said that under S. 106, T. P. Act, as this is a lease of immovable property not for agricultural or manufacturing purpose it must be deemed, in the absence of a contract to the contrary, to be a lease from month to month. On the true construction of the document we are of the opinion that it creates a tenancy of an indefinite term which, as soon as three months' rent is in arrear, reduces to a tenancy-at-will because on that event occurring, the landlord becomes entitled to eject the tenant without notice. There is accordingly a contract to the contrary and the resulting holding cannot be regarded as a monthly tenancy. One obviously cannot be a monthly tenant where the landlord cannot get possession until there is three months' rent owing. This therefore is a case of a lease for an indeterminate term which becomes a tenancy-at-will on the happening of an event which has occurred.

Counsel for defendant 1 suggested in his argument that the result of such a lease is to make the father of defendant 1 a tenant-at-will which ended with the father's death by a reference to 8 M I A 43[1] at pp. 64 and 65. If however that case were on all fours it would be destructive of defendant 1's case for their Lordships observe at p. 65 "he (the lessee) and they after him could not be treated as trespassers, but were in as tenants-at-will." Their Lordships so found however in that case because they held that the agreement there amounted to an interest difficult to define but more like a freehold interest than any other and, not being capable of being created by a mere writing could only operate as an agreement. The persons holding under this agreement having been let in, would be tenants-at-will. It was expressly stated that the lessee's death would not determine the quasi-freehold interest. In that case the term was to continue until after the occurrence of a contingent uncertain event (which never happened). That is not this case. This case is nearer to 7 Pat 649[2] where it was debated whether the uncertain term was or was not heritable and it was held by the Judicial Committee on the facts there present that it was not heritable. The case however is also distinguishable because (as appears from the report of the case in the High Court, A I R 1925 Pat 357[3] at p. 359), it was not contested that the interest conferred was of a life-estate. Such an estate would end with the tenant's death.

It is however of little purpose to cite cases on quite different facts such as 4 Pat 139[4] and 36 Mad 557.[5] On the construction of this lease we are of the opinion that the term was indefinite and after three months' rent was in arrear the landlord could turn the tenant out at will and without giving him any notice. That position had been reached many years before the death of Bhure Khan in 1910. Thus when Bhure Khan died he was a tenant-at-will. Such a tenancy amounts, in our opinion, to no estate at all and is not heritable. A tenancy-at-will, in English law, is determined by the death of either party, or by either doing any act inconsistent with the continuance of the tenancy : Coke on Littletone 55-b ; (1842) 9 M & W 643[6] at p. 646. A lease from month to month is, of course, heritable : I L R (1937) Nag 406.[7]

A number of cases were cited before us in which the position of a tenant holding over, after the determination of a term certain, and without paying rent, was considered. In English law such a person would be deemed a tenant at sufferance. This, the lowest estate, is a fiction designed by English lawyers, to prevent the tenant holding over from lapsing into the position of a trespasser. It is turned into a tenancy-at-will if the landlord assents to the possession, or, if he receives rent, into a tenancy from year to year : (1830) 1 B & Ad 365.[8] It does not, in our view, arise in this case and it is accordingly unnecessary to consider whether this fiction has been imported into India though we may observe that in 24 Bom 504[9] and in 30 N L R 155[10] it appears to have been assumed that tenancies by sufferance exist here as in England though we observe that in 24 Bom 504[9] the possession of the person holding over, (i. e. the tenant by sufferance) was treated as wrongful. In argument it was suggested that 24 Bom 504[9] was approved by the Privy Council in 26 C W N 722.[11] Their Lordships however in that case appear to have disposed of the appeal as raising a question of fact only. 24 Bom 504[9] was cited in one of the judgments appealed from and is cited as deciding that a tenancy by sufferance does not apply in this country. We do not so read the judgment of Jenkins C. J. who, indeed, cites Coke on Littleton. In that case what was decided was that Art. 139 applies, that Article applying when the possession began in tenancy though there was no relationship of landlord and tenant, because no privity, after the term had determined. That there was no privity was a proposition forwarded in Coke on Littleton. There was no suggestion that the law in India rejected the fiction of a tenancy at sufferance.

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[1] Sreemutty Anundomohey Dossee v. John Doe, (1859) 8 M I A 43=4 W R 51 (P C).

[2] Kamakhya Narayan Singh v. Ram Raksha Singh, (1928) 15 A I R P C 146=109 I C 663 =55 I A 212=7 Pat 649 (P C).

[3] Charan Mahton v. Kamakhya Narayan, (1925) 12 A I R Pat 357=86 I C 387=6 P L T 98.

[4] Ram Rachhya Singh v. Kumar Kamakhya Narain, (1925) 12 A I R Pat 216=84 I C 586 =4 Pat 139=6 P L T 12.

[5] Manicka Mudaliar v. Chinnappa Mudaliar, (1913) 36 Mad 557=16 I C 1002.

[6] Turner v. Doe, (1842) 9 M & W 643 = 11 L J Ex 453=60 R R 850.

[7] Rajib Hussain v. Nawab Yanuskhan, (1937) 24 A I R Nag 321=172 I C 543=I L R (1937) Nag 406.

[8] Doe v. Morse, (1830) 1 B & Ad 365=109 E R 822.

[9] Chandri v. Daji Bhau, (1900) 24 Bom 504=2 Bom L R 491.

[10] Shri Gopi Nath Maharaj Sansthan v. Moti, (1934) 21 A I R Nag 67 = 148 I C 561 = 30 N L R 155.

It was pointed out that Art. 139 must have application to cases where the relationship of landlord and tenant has determined because otherwise the suit for possession would be out of the question. Clearly a landlord cannot sue for possession unless before suit he has caused the tenancy in some manner to come to an end. It is true that Candy J. at p. 509 speaks about tenancies at sufferance in terms that suggest the possession is wrongful but we do not understand him to say that there is no tenancy at sufferance in India. Candy J.'s view that the holding, after the determination of the term, is wrongful, is founded on 22 Bom 893.[12] 22 Bom 893[12] is based on English authorities commencing with Comyn's Digest and states that a tenant by sufferance is in the same position as a trespasser. This we respectfully doubt. In (1789) 1 H Bl 97[13] the case relied on in 22 Bom 893[12] for the proposition that a tenant on sufferance is sometimes called a trespasser, it will be found that the term "trespasser" was only used by counsel who stated that that was what the person in possession clearly was not (we have access only to the Revised Reports which occasionally contract the reports reproduced). The action was in ejectment. Under the old system of pleadings trespass would not have lain in such circumstances but ejectment would. Being liable to be sued in ejectment without notice, there was very little practical difference between his position and that of a trespasser except that limitation would not run and the form of action would be different. The fiction was designed for the benefit of landlords. Whether the fiction should be imported into India depends, in our opinion, on whether it is consonant with justice, equity and good conscience bearing in mind the conditions of affairs and the statutory law here applicable. We do not pursue the matter however as here we are concerned, in our opinion, with a tenancy-at-will which terminated on the death of the landlord, alternatively of Bhure Khan, whichever was first.

It is not necessary to enquire which, for, at latest by 1910, the relationship of landlord and tenant had ended and in so far as defendant 1 was in possession he was in as a wrong-doer, as was his father before him if the landlord predeceased the father. It is not necessary to determine in this case whether Arts. 139, 142 or 144 applies, for whatever view be taken of the nature of defendant 1's possession the result is the same. The position is obvious if Art. 142 or Art. 144 applies. It is not as apparent if Art. 139 applies. That Article can only apply when there is a tenant whose tenancy has determined. In point of fact defendant 1 has never been a tenant. His father's tenancy, which as we have shown, was at will, determined at his death and therefore defendant 1 inherited nothing. He was a wrong-doer and like any other wrong-doer had the right to prescribe for an absolute title or for some lesser estate. It is clear from his pleadings that he purported to claim through his father. He said that his father had purchased this property and held it in his own right and that when he died the defendant inherited whatever interest his father had. He set up no independent title in himself except in respect of a matter which has been found against him. He said that on 8th March 1911 he himself openly asserted a hostile right but that has been found against him. He is therefore in no better position than Bhure Khan would have been in if he had been alive and if for some reason his tenancy-at-will had determined in 1910. In that event of course Art. 139 would have applied and time would have run from the year 1910, and if defendant 1 had inherited this estate at sufferance, as he can (*see* 18 Halsbury p. 438) and as he purports to have done, then the flow of limitation would have continued and the claim would still be beyond time. Therefore even from this point of view the claim so far as two blocks are concerned is barred.

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[11] **Bhugwan Ramanuj Das v. Ramkrishna Bose, (1922) 9 A I R P C 184 = 74 I C 561 = 26 C W N 722 (P C).**

[12] **Kantheppa v. Sheshappa, (1898) 22 Bom 893.**

[13] **Roe v. Ward, (1789) 1 H Bl 97=2 R R 728.**

It was suggested that defendant 1's possession was permissive because the plaintiffs have paid some charges connected with this property, but in our opinion that does not show consent. Of course, this assumes a fiction, namely that the tenancy at sufferance commenced before Bhure Khan died. In point of fact it did not and the fiction cannot be carried further than the circumstances warrant. It is said that S. 116, Evidence Act, creates an estoppel, here defendant 1 being in as the representative of his father who entered as tenant : A I R 1937 P C 251.[14] This branch of the argument proceeds on the fundamental assumption that Bhure Khan's tenancy in some way was inherited by defendant 1 either because it was a tenancy from month to month (I L R (1937) Nag 406)[7] or because the occupation started as a permissive occupation or because defendant 1 has pleaded the lease of 27th July 1897 and must therefore be treated as holding in the capacity of tenant or because in some way the plaintiffs have assented to defendant 1's tenancy.

We have already negatived assent. We have also disposed of the argument based on the view that Bhure Khan's tenancy was a monthly tenancy. We do not consider that the fact that Bhure Khan was at one time a tenant or that the fact that defendant 1 (in the alternative) accepts that origin of the possession makes any difference once it appears that that tenancy had come to an end. Once the tenancy is at an end there is nothing for S. 116, Evidence Act, to fasten on to. Defendant 1 does not claim through a tenant. There is here, at latest after Bhure Khan's death and probably before, no tenancy continuing and the period of the statutory estoppel is consequently ended. It was also argued that Bhure Khan was a monthly lessee before the rent note of 1897 was signed and if the rent note is inoperative one is thrown back upon the pre-existing position and therefore Bhure Khan was a tenant from month to month. We are clearly of the opinion however that after 1897 Bhure Khan held under the terms of the rent note of 1897 and the monthly tenancy was at an end. That in our opinion disposes of the claim so far as the two blocks 3 and 4 of which defendant 1 has been in possession since the death of his father. We turn now to the two blocks upon which defendant 1 has built, that is to say, blocks 1 and 2. The fifth block is not in contest in this appeal. Nothing has been said about it.

The facts appear to be that defendant 1 was allowed to reconstruct two of the blocks and the compound wall around about 1922. The plaintiffs' story that this was the result of an oral agreement whereby defendant 1 built in lieu of paying rent, an obviously fantastic story, has been found against. It has been suggested that defendant 1 used the plaintiffs' materials which were derived from buildings on the site which had fallen down or been demolished and that in any case following the English rule in (1865) 1 H L 129[15] the defendant has neither a right to compensation nor the right to recover the materials. As was pointed out in 20 Bom 298[16] relied on in 2 N L R 4[17] at page 5 the rule in (1865) 1 H L 129[15] is subject, in India, to the exception that a party building on the land of another is allowed to remove the building. We must not be taken as saying that however mala fide or tortious the act, there is any such right but when there is, as here, acquiescence and as here, a bona fide belief on the part of the person building that he has title, then if it should appear that the person building has no title and was misled by the acquiescence, we are of the opinion that he is entitled to remove what he has built so long as he substantially returns the land in the state it was. Here the position was that dilapidation notices were being served. It was urged that as the rent note imposed an obligation on the tenant to do plastering and repairs, therefore defendant 1 had in any event to restore the houses. This of course proceeds on the assumption that defendant 1 was a tenant, an assumption already rejected. Apart from that, such a clause would not impose on a tenant an obligation to rebuild a house which fell down or was reconstructed in obedience to a dilapidation notice.

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[14] **Krishna Prosad v. Baraboni Coal Concern, (1937) 24 A I R P C 251 = 169 I C 556 = 81 S L R 625=64 I A 311=I L R (1938) 1 Cal 1 (P C).**

[15] **Ramsden v. Dyson (1865) 1 H L 129=12 Jur (N S) 506=14 W R 926=149 R R 543.**

[16] **Premji Jivan Bhate v. Haji Cassum Juma Abmed, (1896) 20 Bom 298.**

[17] **Seth Mohan Lal Parwar v. Choudhri Chunni Lal Parwar, (1906) 2 N L R 4.**

According to defendant 1 he spent some Rs. 3500 on these two blocks. Plaintiffs say some Rs. 700 was spent and the learned Judge finds he spent Rs. 800. The reconstruction took place in 1923 and therefore defendant 1 appears to have let the reconstructed houses to a succession of tenants. We invited counsel for the appellant (defendant 1) to show that for twelve years defendant 1 had been in possession of blocks 1 and 2 but he was not able to show possession before the reconstruction. We are satisfied that defendant 1 spent a considerable sum of money in reconstructing these houses [valued by the plaintiffs' agent (Ex. D. 28) after consulting the plaintiffs, at Rs. 7000 for buildings alone] and that he did so believing that he had title and that the plaintiffs stood by and allowed him to incur this expenditure. We are accordingly of the opinion that the learned Judge was right in permitting defendant 1 to remove the superstructure on blocks 1 and 2 and the compound wall.

The Appeal No. 166 of 1934, so far as accounts are concerned, has not been pressed. The Appeal No. 166 of 1934 accordingly fails and is dismissed with costs. The Appeal No. 174 of 1934 partly succeeds, defendant 1 being entitled to retain possession of blocks 3 and 4 and the decree is varied accordingly. The rest of Appeal No. 174 of 1934 is dismissed. The order for costs in the lower Court will stand but as the plaintiffs have not succeeded in respect of items 3 and 4, defendant 1's costs, which he was given in proportion to the claim dismissed, will automatically be increased. The costs in First Appeal No. 174 of 1934 will be proportionate to success and failure.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 512

GRUER J.

*In re Bihari Gayaprashad Barai* — Non-applicant.

Criminal Revn. No. 92 of 1938, Decided on 23rd March 1938, reference made by Addl. Dist. Magistrate, Raipur.

**Criminal P. C. (1898), S. 139-A (2)—Magistrate cannot order either side to bring civil suit.**

Section 139-A (2) says that if the Magistrate on enquiry finds that there is any reliable evidence in support of the non-applicant's denial of the existence of a public right he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court. The Magistrate is however not empowered to order either side to bring a civil suit : *A I R 1930 All 658, Rel. on.* [P 512 C 2]

**Order.** — Certain residents of village Khuteri lodged a complaint under S. 133, Criminal P. C., against Bihari for causing obstruction to a nala by erecting a dam across it in his own field, thereby causing the public road khasra No. 393 to be inundated. After enquiry the Magistrate came to the conclusion that the non-applicant's denial of the right of free passage of water through his field was a bona fide one. He stayed the proceedings until decision of the matter in dispute by a competent Civil Court, directing that a civil suit should be brought by the non-applicant himself. The case has now been reported by the Additional District Magistrate, Raipur, with a recommendation that this last order directing Bihari to bring a civil suit should be set aside. The reference has been properly made and must be accepted. S. 139-A (2), Criminal P. C., says that if the Magistrate on enquiry finds that there is any reliable evidence in support of the non-applicant's denial of the existence of a public right, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court. The Magistrate is not empowered to order either side to bring a civil suit. This follows from the Section itself. The point was considered in 52 All 592,[1] which pointed out that the Magistrate cannot compel either party to go to the Civil Court; if the denial is proved the Criminal Court holds its hand and it will be the business of the applicant to bring a civil suit if he likes. In the present case there was no reason for the non-applicant to take the initiative, and he should not be compelled to do so. The applicants can, if they so wish, and if they do not, things will go on as before. The order requiring Bihari to file a civil suit is vacated.

D.S./R.K. *Order vacated.*

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[1] Rozan v. Foujdar, (1930) 17 A I R All 658= 1930 Cr C 907=125 I C 452=31 Cr L J 839= 52 All 592=1930 A L J 815.

## * * A. I. R. 1938 Nagpur 513

### FULL BENCH

STONE C. J. GRUER AND VIVIAN BOSE JJ.

*Venkatesh Yeshwant Deshpande*
Applicant
v.
*Emperor.*

Misc. Criminal Case No. 40 of 1938, Decided on 30th September 1938.

**(a) General Clauses Act (1897), S. 21 — Order under S. 401, Criminal P. C., granting remission of punishment falls in category different from order contemplated in S. 21, General Clauses Act** (Per *Niyogi J.*).

It is a well-recognized rule of construction that the words used in a statute must be interpreted according to their context. S. 21, General Clauses Act, must therefore be read in the light of Ss. 14 to 20 which precede and Ss. 22 to 24 which follow. These considerations make it clear that the word 'order' used in S. 21 is a legislative or statutory order, that is, an order having the force of law. The order passed under S. 401, Criminal P. C., granting remission of punishment falls in a category different from the order contemplated in Sec. 21, General Clauses Act. [P 515 C 2; P 516 C 1]

**(b) Criminal P. C. (1898), S. 491—Object explained** (Per *Niyogi J.*)

The object of S. 491, as the habeas corpus proceeding in England, is to enable a person under detention in public or private custody to test its legality. [P 516 C 1]

**(c) Criminal P. C. (1898), S. 401 - Order under S. 401 by Local Government—Nature explained.**

Though an order under S. 401 passed by the Local Government is in the name of the Governor because that is the constitutional form it has to take, it is in reality an order of the Provincial Government. [P 516 C 2]

**(d) Criminal P. C. (1898), S. 401 (1) — 'Power' to suspend or remit.**

Viewing sub-s. (1) as a whole it is the clear intention of the Legislature to confer a 'power' to suspend or remit a sentence. [P 517 C 2]

*** * (e) Criminal P. C. (1898), S. 401 — Order of unconditional remission of sentence — Government cannot subsequently restore sentence—Even assuming that Government has power to cancel order of remission, such power cannot be exercised later than date on which prisoner is due for release under uncancelled order of remission** (Per *Full Bench.*).

It is not open to Government, after remitting a sentence unconditionally, and in absence of fraud or mistake, to cancel the order and restore the sentence. Even assuming that the Government has such power, an order remitting sentence which has been acted upon to the extent of informing the Legislature of the remission, cannot be amended or cancelled or suspended by the Assistant Legal Remembrancer writing to the Superintendent of Central Jail a memorandum telling the Superintendent to keep a prisoner in custody until he is told to let him go. That is not the way that orders are amended. When the amending order is passed some days after an application under S. 491 for writ of Habeaus Corpus had been launched and after the prisoner was entitled to be released under the order of remission, any possible *locus paenitentiae* is clearly at an end. [P 518 C 1; P 520 C 1]

**(f) Criminal P. C. (1898), S. 401—Scope of power of Local Government explained** (Per *Bose J.*).

Executive Government has not got unfettered and unqualified freedom of action in the matter of suspension and remission of sentence. Its powers in this respect are in a sense derived from a statutory delegation of the Royal Prerogative of pardon; not co-extensive with it, and not superior to it. That being so, the rights of the Executive cannot be greater than those of His Majesty himself except and unless they are specifically enlarged by statute. Even if it be supposed that the Executive Government has power to cancel order remitting sentence, the Government must be prepared to substantiate and justify its action and must give reasons first to the person concerned and then, if the matter reaches Court, to that tribunal: *(1916) 2 K B 742, Rel. on.* [P 518 C 2 ; P 519 C 2]

**(g) Criminal P. C. (1898), S. 401—Order of remission - Effect.**

The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation. [P 520 C 1]

J. Sen, B. L. Gupta, M. Adhikari and N. T. Mangalmurti — *for Applicant.*

W. R. Puranik, Advocate-General — *for the Crown.*

### ORDER OF REFERENCE

*Niyogi J.*—This is an application made by Venkatesh Yeshwant Deshpande, a prisoner in the Central Jail, Nagpur, under S. 491, Criminal P. C., for issue of an order to be set at liberty. The applicant was convicted by the Sessions Judge, Amraoti, in Sessions Trial No. 8 of 1936 of an offence punishable under S. 120-B, I. P. C., and sentenced to two years' rigorous imprisonment and to pay a fine of Rs. 1000. His appeal to the High Court was dismissed on 14th June 1937, and he surrendered to his bail on 22nd June 1937 on which day he was re-committed to jail. The date of his release would thus be 21st June 1939. It appears that he made some applications to the Local Government under Sec. 401, Criminal P. C., and he succeeded in getting remission of one year by an order of the Local Government passed on 24th February 1938. On 24th March 1938 the Hon'ble the Premier announced a general remission of two months respecting all the prisoners throughout C. P. and Berar in commemoration of the introduction of jail reforms. The applicant also earned his usual remission for good conduct and industry under Rule 130 of the Rules issued by the Government of India under the Prisoners Act, the total number of days numbering 27 up to the end of the first quarter of 1938.

The applicant contends that taking into account all these remissions he was entitled to be released on 16th April 1938 and complains that he is being illegally and improperly detained in prison notwithstanding that he has served the unremitted portion of his sentence and also paid his fine in full on 16th July 1937. The applicant's learned counsel, Mr. J. Sen, advocate, appeared on 23rd May 1938 forenoon with a motion for the issue of an order under S. 491 (b), Criminal P. C. On hearing him and taking into consideration the Local Government's order dated 24th February 1938, I admitted the application and forthwith issued notice to the Advocate-General and the matter was heard at length on 30th and 31st May 1938.

The learned Advocate-General admits that on 24th February 1938 the Local Government granted remission of one year and that it was communicated to the applicant in due course. He further admits that there was general remission of two months announced by the Hon'ble the Premier on 24th March 1938 and also that the applicant was entitled to the usual remission for good conduct and industry. He concedes that in consideration of these remissions the applicant was entitled to be released on 16th April 1938. He however contends that on 14th April 1938 that is two days before the due date of release, the Local Government varied its previous order dated 24th February 1938 and directed that he should not be released until further orders, and further that that order was rescinded by a fresh order passed on 28th May 1938. He therefore denies that the applicant at any material time was illegally or improperly detained in prison and opposes the application.

The arguments covered rather a wide field involving discussion of the fundamental principles as to the liberty of the subject and the urgency of the issue of an order under S. 491 which is in the nature of the writ of habeas corpus, and reference was made to numerous English and Indian decisions bearing on the question. It however appears to me that it is unnecessary to go into this abstract question, as the issue which arises on the present application is of a limited and defined character, although not free from complexity. The main questions in this case are (1) whether the remission granted by the Local Government on 24th February 1938 took effect immediately or it did not take effect until 16th April 1938, (2) whether the Local Government's order of 14th April 1938 that the prisoner should not be released was a valid order and could operate to withdraw the remission already granted under S. 401, Criminal P. C., on 24th February 1938 and (3) whether the Local Government's order passed on 28th May 1938 was according to law. In view of the novel and exceptional nature of the application, the importance of the case and the complexity of the issues involved, I am of opinion that this case should be dealt with by the Division Criminal Bench of the High Court. I would therefore reserve my final opinion on the issue involved and I should guard myself against being understood as conclusively determining the matters in controversy in the observations which follow.

In order to decide whether this proceeding should be allowed to continue or not I have to examine cursorily the arguments put forward on either side. If the learned Advocate General's contention is valid and should prevail, the dismissal of the application must follow as a matter of course. It is therefore necessary to consider the points raised in support of the legality of the Local Government's orders dated 14th April 1938 and 28th May 1938. I may first deal with the order dated 14th April 1938. That purports to be a memorandum addressed to the Superintendent of the Central Jail, Nagpur, and it says :

> In continuation of this department endorsement No. 670-433 XIX, dated 24th February 1938, I am directed to inform you that pending further orders the prisoner V. Y. Deshpande should not be released.

It bears the signature of the Assistant Legal Remembrancer for Secretary to Government C. P. and Berar, Judicial Department. The argument of the learned Advocate-General is that this memorandum must be read as a part of the letter referred to therein. The obvious objections to this course are that there would be two contradictory orders in one and the same correspondence, namely (1) remitting the sentence, and (2) commanding detention of the prisoner. That the first letter was unconditional in its terms and as such was understood by the jail authorities as an order to grant remission forthwith, is evident from the fact that in the history ticket of the prisoner against date 26th February 1938 is noted

> on mercy petition from outside, the Governor of the C. P. and Berar has remitted under Sec. 401,

Criminal P. C., 1898, a portion of one year of the sentence of two years.

The remission granted on 24th February 1938 was not encumbered with any condition which under S. 401, the Local Government was certainly empowerd to impose. As the remission was granted without any condition as contemplated in Sec. 401 (1), it would be contrary to the letter and spirit of that Section to impose a condition at a later date. The memorandum dated 14th April 1938 may be read either as supplementary to the first or independently of it. On the first alternative, it leads to the startling and anomalous result that while the prisoner was granted remission of punishment, he would be denied the benefit of it. Is it reasonable to predicate of the Local Government as saying "We remit your punishment, nevertheless we will not release you when your term of imprisonment expires, but will continue to detain you as long as we choose"? Such an order would be repugnant to Sec. 401, Criminal P. C. It must be observed that Sec. 401 (1), Criminal P. C., speaks of suspension of the execution of the sentence or remission of the whole or part of the punishment but it makes no mention of release. Consequently the memorandum dated 14th April 1938 which only prohibits the release of the prisoner cannot be covered by Sec. 401, Criminal P. C. The remission of punishment is a solemn juristic act, whereas release is a ministerial routine and is purely mechanical. The order addressed to the prison authority to detain the prisoner physically could not impair the legal effect of the remission of the punishment which that document did not purport to affect. Consequently, whether the remission of punishment came into force on 24th February 1938 or 16th April 1938 there was no legal impediment to its operation with the result that the prisoner became entitled to be set at liberty at the end of one year's imprisonment. The legal right which the prisoner acquired as the result of the remission of his punishment could not be taken away by the prohibitory order. That mere inhibition of the routine act of release could nullify the legal effect of the remission of the punishment is a proposition the soundness of which is open to grave doubt. It is pertinent to notice here that on 28th May 1938 an order was passed rescinding the order dated 24th February 1938. In that rescission is implicit the admission that the remission of punishment under the first order dated 24th February 1938 had continued in force during the interval, notwithstanding the memorandum of 14th April 1938. If that was in force until 28th May 1938, its validity on 16th April 1938 cannot be challenged. It must therefore follow that the prisoner was legally entitled to be released on 16th April 1938 and that his detention since that date is contrary to law.

The learned Advocate-General contends that the memorandum dated 14th April 1938 should be construed as order varying the first order of 24th February 1938. Variation affects the substance of the order varied but there is nothing in the memorandum which affects the substance of the first order. It is further doubtful whether the previous order could be varied. The only authority relied on is S. 21, General Clauses Act, which has been specifically mentioned in the order dated 28th May 1938. That Section runs as follows:

> Where by any Central Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add, to amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

Was the order dated 24th February 1938 one of the nature contemplated in S. 21, General Clauses Act? It is a well recognized rule of construction that the words used in a statute must be interpreted according to their context. S. 21, General Clauses Act, must therefore be read in the light of Ss. 14 to 20 which precede and Ss. 22 to 24 which follow. S. 21 occurs among Sections which are grouped under the heading "Provisions as to orders, rules, etc. made under enactments." The relevant words in S. 21 are:

> Where by any Central Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred.

The power to issue orders, etc. is the power indicated in S. 14 of that Act, and such provisions are, to mention a few, to be found in S. 6, Air Craft Act, 22 of 1934, S. 6, Factories Act, 25 of 1934, S. 9, Lepers Act, 3 of 1898, S. 21, Prisoners Act, 3 of 1900 and Ss. 9 to 39, Criminal P. C. The word 'order' is used in S. 21 along with "notifications, rules and bye-laws." They are all comprised in the expression 'Indian law' which is defined in S. 27 (a), General Clauses Act, as inserted by the Government of India (Adaptation of Indian Laws), Order, 1937. There the Indian law is described as including any law, ordinance, order, bye-law, rule or regulation passed or made at any time by any competent Legislature, authority or person in British India. The meaning of the word "orders" becomes clear when S. 21 is read in conjunction with S. 24. These considerations make it clear that the word 'order' used in S. 21, General Clauses Act, is a legislative or statutory order, that is an order having the force of law. The order passed under S. 401 granting remission of punishment falls in a category different from the order contemplated in S. 21, General Clauses Act. The applicability of that Section is therefore highly doubtful.

The object of S. 491, as the Habeas Corpus proceeding in England, is to enable a person under detention in public or private custody to test its legality. The applicant is therefore fully entitled to take recourse to S. 491. The foregoing discussion clearly shows that the order under which the applicant was detained and the subsequent order which rescinded the remission of punishment do not appear to be quite in conformity with law. There is also the important question whether the order passed on 28th May 1938, rescinding the previous order after the prisoner filed this application in Court should be given effect to. The applicant has in my opinion established a strong prima facie case for his being set at liberty under S. 491, Criminal P. C.

An order will now issue to the Superintendent, Central Jail, Nagpur, to produce the applicant V. Y. Deshpande, B Class Prisoner No. 3144 before me to-morrow at 10-30 A. M. to be dealt with according to law.

### Order of the Full Bench

**Stone C. J. and Gruer J.**—This matter raises a point of some interest owing to the fact that it is an application in the nature of a writ of Habeas Corpus whereby the applicant seeks to be set at liberty immediately and because the facts of the case are somewhat remarkable and, we hope, unique. The applicant was sentenced under S. 120-B, I. P. C., that is to say, for criminal conspiracy, and was sentenced to two years' rigorous imprisonment and a fine of Rs. 1000 or in default, to an additional sentence of six months. The Rs. 1000 fine was paid and accordingly as his sentence began on 22nd June 1937, he would be entitled to release on 21st June 1939, subject to any remissions under the Prisoners Act which in this case amounted to 42 days, subject to the two months' remission which came into effect on 15th April 1938, had that been applicable to his case, and subject to a remission made by the order which is the centre of controversy here. The order was passed under the powers conferred by S. 401, Criminal P. C., on 24th February 1938.

It is in the following form :

> ORDER.
>
> The Governor of the Central Provinces and Berar is pleased to remit, under S. 401, Criminal P. C., 1898 (5 of 1898) a portion of one year of the sentence of two years' rigorous imprisonment and a fine of Rs. 1000 passed on the petitioner.
>
> By order of the Governor,
> Central Provinces and Berar
> Secretary to Government,
> Central Provinces and Berar.
> Judicial Department.
>
> Nagpur,
> 24th Feb. 1938.

It is perhaps necessary to explain that though the order is in the name of the Governor, that is the constitutional form it has to take. It is in reality an order of the Provincial Government. In view of the general misunderstanding on this point the Provincial Government felt it necessary, after it had issued its order of cancellation dated 28th May 1938, to issue a press communique explaining this difference. It should be understood that what is here involved are the acts, powers and privileges of the Provincial Government and not of His Excellency the Governor.

That order having been passed and communicated to the Superintendent of the jail where the applicant was confined, the result was that the date of release was altered to 21st June 1938, again subject to any other remissions owing to the good conduct of the applicant or otherwise. The history ticket contains the following amendments in red: Sentence "2-0-0 (Two years) R. I." is struck out and in red is put "One year R. I. on Mercy Petition." Date of release "22nd June 1939" is struck out and in red is put "21st June 1938." On 26th February 1938 there is an entry about the remission to the following effect:

> On Mercy Petition from outside the Governor of the C. P. and Berar has remitted under S. 401, Criminal P. C., 1898, a portion of one year of the sentence of two years and fine Rs. 1000 : Vide C. P. Government No. 670-433-XIX dated 24th February 1938.

On 29th March 1938 in the Legislative Assembly the Government was questioned about remissions and the Minister in charge tabled a list of remissions which had been made and the one under consideration is No. 41. On 20th May 1938 the present application was filed.

According to the history ticket originally it was written "16th April 1938. Two months special remission awarded by Government". That relates to a general remission of two months made apparently to all prisoners by Government. That "16th April 1938" is scored out in red and under it is put "15th April 1938". The effect of that, had it applied to this man, would have been to still further antedate the date of his release and would have brought it down to 16th April 1938. On 14th April 1938, it is said with a view to keeping this man properly in prison until after 16th April 1938 and until Government had time to consider this case, the following communication was sent by letter headed memorandum addressed to the Superintendent, Central Jail, Nagpur.

> In continuation of this Department endorsement No 670 (671)/433-XIX, dated 24th February 1938, I am directed to inform you that pending further orders the prisoner V. Y. Deshpande should not be released.
>
> Sd/- V. N. DEO,
>
> Assistant Legal Remembrancer,
>
> For Secretary to Government, Central Provinces and Berar, Judicial Department.

That was followed, eight days after this application has been made to the Court and during an adjournment which had been asked for, by an order from Government. The purported effect of that order was to rescind the order passed on 24th February 1938. Consequently instead of the applicant being entitled to be released on 16th April 1938 he would not become entitled to release until long after this application was made, were that order effective.

It is urged on behalf of Government that the Government is entitled to rescind its order by the communication above mentioned dated 14th April 1938, alternatively it rescinded the order of February by the order dated 28th May 1938. It is further said that if the latter is the rescinding instrument then, despite the fact that the order was passed after the application was made, and although it is conceded that normally applications are considered on the facts as existing at the time of the application, still in a habeas corpus matter what one has to consider is whether at the time of the hearing the applicant was or was not entitled to be set at large, and at the time of the hearing, which is after 28th May 1938, the applicant was not entitled to be set at large.

That leads to the question as to the power of Government to cancel an order of this kind, generally, in any circumstances or, particularly, in these circumstances. The wide general power is founded upon S. 21, General Clauses Act. That Act may broadly be said, as to S. 20, to confer power to make orders in certain cases, and as to S. 21, to confer power to rescind such orders. It has been strenuously contended for the applicant, that the order in contemplation in the case of S. 20, if one regards the General Clauses Act as a whole and in particular Ss. 14 to 22, are orders of a legislative character. We do not feel called upon to pronounce any decision on this matter because even granted that the words 'any order' mean what they say and that the Sections relate to any order and anybody empowered to make any order and enable a person so empowered by an Act of the Governor-General in Council to make any order or to cancel any order he has made, still it is obvious that such a power contained in the General Clauses Act must be subject in any particular case to the special legislation relating to that case and to the circumstances. The special legislation in this case is the Criminal Procedure Code, S. 401, the first sub-section of which, read in with the Government of India (Adaptation of Indian Laws) Order, 1937, gives a power to the Provincial Government inter alia to suspend or to remit the whole or any part of a sentence. It is under that power that the order of 24th February 1938 was made. It has been argued that here no 'power' is contained in that sub-section and that the side note cannot be used to import a power which is not in terms conferred; but we think viewing the sub-section as a whole it is the clear intention of the Legislature to confer such a power. Accordingly if it stood there alone the power thus conferred would be a power within the meaning of S. 21, General Clauses Act. If however one looks at sub-s. 3 one finds that it reads as follows:

> If any condition on which a sentence has been suspended or remitted is, in the opinion of the Governor-General in Council or of the Local Government, as the case may be, not fulfilled, the Governor-General in Council or the Local Government may cancel the suspension or remission and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the un-expired portion of the sentence.

In our opinion it is at least arguable that that means that the power of cancellation only applies in the case of orders of remission where the order of remission was conditional and where the condition has not been fulfilled. If it were the intention of the Legislature to apply to this kind of order the powers of cancellation conferred by S. 21, General Clauses Act, this subsection was completely unnecessary for, clearly a conditional remission, where the condition is broken, could be rescinded if an unconditional remission could be rescinded under the general power. Having that provision in mind and the general sense, and purpose of this Section, we incline to the view that it is not open to Government after remitting a sentence unconditionally, to restore it. Different considerations would arise in cases of fraud or mistake. No such case is made out here.

It is not however necessary to decide whether Government has any and if so what power to cancel such an order, because whether that could or could not be done in a proper case it would have to be done in a very different way, at a very different time and in very different circumstances from the way, time and circumstances present here. An order of this kind which has been acted upon to the extent of altering the history ticket, to the extent of informing the Legislature of the remission, cannot be amended or cancelled or suspended by the Assistant Legal Remembrancer writing to the Superintendent of the Central Jail a memorandum telling the Superintendent to keep a prisoner in custody until he is told to let him go. That is not the way that orders are amended and it is not the way that this order was amended because the amending order is dated the 28th May whereas the above memorandum is dated 14th April. The trouble about the amending order, even assuming a power in Government to rescind such an order, is that it was passed eight days after this application had been launched and one month and 12 days after the prisoner was entitled to be released under the order of 24th February 1938. Any possible *locus paenitentiæ* was clearly at an end when the amending order was passed. In the circumstances we have no doubt at all that the application must succeed.

We do not consider it within our province to pass any comments on the various steps that were taken save that we see nothing in the record to show that Government when it asked for the adjournment of these proceedings were attempting to get time merely for the purpose of cancelling an order and thereby, as they thought, preparing the ground for a successful resistance of this application. Further we have little doubt that Government in the steps it has taken to resist this application had before it the sole purpose of putting right a most regrettable departure from proper courses made when the order of 24th February 1938 was passed. The order of 24th February is still more remarkable when one bears in mind the fact that this particular prisoner, a few months, hardly more than a few weeks, before his successful petition, had a petition for remission dismissed. The result is that the applicant will be set at liberty as prayed and the bail bond will be cancelled.

**Vivian Bose J.**—I fully agree with the order which my Lord the Chief Justice has delivered and at first I had not intended delivering a separate order, but as the question is one of great constitutional importance I feel, upon reflection, that I ought to express my own opinion. The matter is of first impression. No case like this has ever been known before, and since the right claimed on behalf of the Crown is not to be found in express terms anywhere, I consider it desirable to emphasise certain constitutional principles which, in my view, are fundamental, and which, I feel, ought to govern this question. I do not think that the Executive Government has got unfettered and unqualified freedom of action in these matters. Viewed in a broad and liberal light its powers in this respect are in a sense derived from a statutory delegation of the Royal Prerogative of pardon ; not co-extensive with it, and not superior to it ; in fact S. 401 (5), Criminal P. C., leaves the right of His Majesty and of the Governor-General, when such right is delegated to him, intact : but certainly of a like general character.

That being so, I cannot think that the rights of the executive can be greater than those of His Majesty himself except and unless, and only in so far as they are specifically enlarged by statute. I do not think it is possible to urge that the intention of the Legislature was to confer by implication upon the Executive Government in India powers which the Crown itself does not possess under some general provision of law, especially when the matter trespasses upon so fundamental a right as that of the liberty and freedom of the subject. That the Sovereign's powers in respect of his prerogative are limited is undoubted.

The matter is put thus in Halsbury's Laws of England, Hailsham Edition, Vol. 6, page 444:

> The prerogative is thus created and limited by the Common law and the Sovereign can claim no prerogative except such as the law allows, nor such as are contrary to . . . . the liberties of the subject . . . . . .

The passage continues :

> The Courts have jurisdiction therefore to enquire into the existence or extent of any alleged prerogative . . . . . If any prerogative is disputed they must decide the question whether or not it exists in the same way as they decide any other question of law,

and again at page 455 :

> Claims made by the Crown cannot be supported by mere pretence of prerogative, since the Courts have power to determine the extent and the legality or otherwise of any alleged prerogative, nor may illegal acts be rendered justifiable by the plea of the King's commands or State necessity. The Crown is bound to observe the law both by statute and by the terms of the Coronation oath, which embodies the contract between the Crown and people upon which the title to the Crown originally depended, and still in large measure depends. Upon any doubtful point of prerogative the Crown and its Ministers must therefore bow to the decision of the legal tribunals.

Even in respect of pardons the right is restricted. I quote again from Halsbury (page 477):

> The right of pardon is moreover confined to offences of a public nature where the Crown is prosecutor and has some vested interest either in fact or by implication; and where any right or benefit is vested in a subject by statute or otherwise, the Crown, by a pardon, cannot affect it or take it away.

If then the very right to grant a pardon is so restricted and circumscribed, how much more must be the right to retract a pardon once it has been granted, even if such a right exists The constitution is jealous of all such claims and the Courts will be slow to enlarge them. As Lord Herschell said in (1890) 15 A C 506[1] at p. 527 : "The law of this country has been very jealous of any infringement of personal liberty" and that applies to India also. To quote from Halsbury again (page 477) :

> The Crown enjoys the exclusive and inseparable right of granting pardons, and this privilege cannot be claimed by any other person either by grant or prescription.

In the face of these rigorous safeguards I cannot see how any right can be claimed in these matters unless they have been expressly conferred in explicit terms. And to quote Scrutton L. J. in (1923) 92 L J K B 797[2] at page 802 :

> This care is not to be exercised less vigilantly because the subject whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases in which you have no sympathy at all . . . . . And the subject is entitled only to be deprived of his liberty by due process of law, although that due process, if taken, will probably send him to prison. A man undoubtedly guilty of murder must yet be released if due forms of law have not been followed in his conviction. It is quite possible, even probable that the subject in this case is guilty of high treason; he is still entitled only to be deprived of his liberty by due process of law,

and that applies here too. I do not say that an order of remission is never open to recall. It may be in certain circumstances; fraud and mistake for example might justify such action. But I am clear that it cannot be done arbitrarily. The matter vitally affects the liberty of the subject, and so, if such power exists at all, it can in my opinion only be exercised in circumstances which a Court of justice would uphold on general grounds of justice, equity and good conscience, and of public policy. In every case Government must be prepared to substantiate and justify its action and that means that it must give reasons, first to the person concerned, and then, if the matter reaches Court, to that tribunal. It cannot merely say, as here, "I have done it and that is all that need be said. I have the right and I have the power." To quote Low J. in (1916) 2 K B 742[3] :

> I do not agree that it is for the Executive to come here and simply say : 'The man is in custody, and therefore the right of the High Court to interfere does not apply because the custody is at the moment technically legal.'' I say that this answer of the Crown will not do if this Court is satisfied that what is really in contemplation is the exercise of an abuse of power. The arm of the law would have grown very short, and the power of the Court very feeble, if that were the case.

The constitution guarantees freedom and liberty to every subject and he cannot be deprived of it arbitrarily. In order to prevent abuse of power and an arbitrary or irresponsible exercise of authority in this behalf, elaborate machinery has been set up which (except when some special statute specifically and expressly directs otherwise) must be set in motion and faithfully followed to the end before any person can be deprived of his liberty. In every case where it is necessary to send a man to jail or to detain him in custody for more than a few hours (again special statutes excepted), reasons have to be given and justification shown to the person concerned on the face of the order. If His Majesty's subjects must be incarcerated or deprived of their liberties or detained in custody, they are entitled to know the reason why and the authority under which action is taken. They are entitled to be brought before Court and have the matter adjudicated upon by an impartial Judge or Magistrate who in turn must publicly justify his own action.

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[1] Cox v. Hakes, (1890) 15 A C 506=60 L J Q B 89=63 L T 392=39 W R 145=17 Cox C C 158=54 J P 820.

[2] Rex v. Home Secretary; Ex parte O'Brien, (1923) 2 K B 361=92 L J K B 797 = 27 Cox C C 433 = 87 J P 166 = 39 T L R 487 = 21 L G R 419=67 S J 553.

[3] Rex v. Brixton Prison (Governor) Sarno, (1916) 2 K B 742=86 L J K B 62 = 115 L T 608=80 J P 389 = 32 T L R 717=14 L G R 1060.

Warrants of arrest must specify the charge; judgments and orders must be fortified by reasons and ordinarily must be publicly delivered in open Court. I cannot think that the Legislature intended to sweep away such fundamental rights safeguarded under the constitution with such elaborate and anxious care by a general provision like Sec. 21, General Clauses Act, especially when Sec. 401, Criminal P. C., contains indications to the contrary. See in this connexion the Earl of Birkenhead's remarks in (1923) A C 603[4] at page 610 :

> But I should myself ....... decline utterly to believe that a Section couched in terms so general availed to deprive the subject of an ancient and universally recognized constitutional right.

It is not necessary for me to decide here whether Government has any, and if so what, power to cancel an order of remission of sentence apart from fraud or mistake. There may be a *locus pœnitentiæ*, but if there is, then clearly there must come a point beyond which it cannot be exercised. I am clear that in no case (fraud and mistake excepted, though even there consideration of public policy may intervene; I say nothing about that) can that point be placed later than the date on which the prisoner is due for release under an uncancelled order of remission. I do not say it cannot be placed earlier. I need not decide that, but I am clear that in no case can it be placed later.

The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation; suspension is separately provided for. In fact, in the case of a pardon in England statutory and other disqualification following upon conviction are removed, and the pardoned man is enabled to maintain an action against any person who afterwards defames him in respect of the offence for which he was convicted: 6 Halsbury, Hailsham Edition, pages 478 and 479.

That may not apply in full here but the effect of an order of remission is certainly to entitle the prisoner to his freedom on a certain date. Therefore, once that day arrives, he is entitled to release, and in the eyes of the law he is a free man from that moment and no free man can be deprived of his liberty or re-incarcerated or detained in custody without the order of a competent Court. He must be re-sentenced, and only a competent Court can do that, not the executive Government, and in any case, in no event can it be done, as I read the constitution, without reasons being given and justification furnished on the face of the order itself. The prisoner must know, and the Court to which an application for a writ of habeas corpus (or as S. 491 puts it "in the nature of habeas corpus") is made, must know, on the face of the order itself, the justification for detaining him in custody. Otherwise he is entitled to immediate release. Think what the contention of the Crown in this case means. Pushed to its logical conclusion Government would be able to release a man sentenced to death and remit the whole of his sentence upon conditions. Years afterwards, perhaps half a century later, even after all the conditions imposed have been fulfilled, it would be entitled to haul him back to prison and hang him without being called upon to give even the semblance of a reason.

It is, in my opinion, monstrous that such a possibility should be thought to exist as a legal right under the constitution even if it be unthinkable in the present circumstances that the power would ever be exercised; the danger would always be there; remote perhaps in the extreme form in which I have put it, but not so remote when we come to humbler situations more nearly approaching the present case. I cannot for a moment think that the power exists. It has certainly not been conferred in express terms anywhere and I decline to imply it. There is one more point upon which I wish to touch and that is to deal with the letter of 14th April 1938 which, according to the Crown, had the effect of cancelling the order of remission. I wish to make it plain that in my opinion all matters touching the liberty of the subject are so fundamental and important under the constitution that they cannot be toyed with by mere departmental communications from one officer of Government to another. In England a pardon has to be either under the Great Seal or by a Sign Manual Warrant counter signed by a principal Secretary of State, and in cases of the more serious offences the pardon has to specify the offence, otherwise it is ineffectual: 6 Halsbury, ibid p. 478. It is a solemn constitutional act performed in the name of His Majesty by or on behalf of the Government, as a whole. It is not the personal gift of an individual minister acting according to the dictates of his fancy, even though under the cabinet rules of business, the right to act may have been delegated to him. It is still Government, acting as a whole and not the minister. Conditions in India are not less stringent. The powers exercisable under S. 401 vest in the Provincial Government and not in an individual minister. Under S. 59 (1), Government of India Act

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[4] Home Secretary v. O'Brien, (1923) A C 603=92 L J K B 830=129 L T 577=27 Cox C C 466=67 S J 747=39 T L R 638.

> all executive action of the Government of a Province shall be expressed to be taken in the name of the Governor,

and under Section 59 (2):

> Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor.

We were not shown these rules but were told that they require the signature of a Secretary to Government. The order of remission dated 24th February 1938 complied with those conditions. Now it is clear that if all these formalities are necessary for the release of a man or for a remission of his sentence, they must be equally necessary for a retracing of those steps. Even under S. 21, General Clauses Act, only the authority given the power to make an order would have the right to recall it, and if that authority can only act in a certain solemn way when making the order, it is at least incumbent upon it to be equally solemn when cancelling it; also, in any case no lesser authority can arrogate to itself the right and the power to recall an order of release which a greater authority has given.

Now what do we find here: not an order, but a memorandum; not something publicly addressed to the world at large, but a letter to the Superintendent of the Central Jail at Nagpur, not an order issued on behalf of Government in the name of the Governor but a mere departmental intimation from one officer of Government (the Assistant Legal Remembrancer signing for the Secretary to the Provincial Government, Judicial Department, not for or "by order of the Governor"), to another. It does not purport to cancel or recall or amend the order of remission but is merely a "continuation of this department endorsement No. 670 (it should be 671 because 670 is not an endorsement but a copy of the order), 433-XIX, dated 24th February 1938," and what does that endorsement contain? Merely this:

> Copy forwarded (that is, a copy of the order granting remission) to the Superintendent, Central Jail, Nagpur, for information, with reference to correspondence ending with his letter No. 630-W dated 18-2-1938 and favour of communication to the petitioner with the request that he will kindly obtain the petitioner's acknowledgment and retain it in his office.

Government having in effect solemnly directed the release of this man by a certain date, a casual communication is sent to the Superintendent of the jail by an authority not disclosed but certainly not Government as such (for it can only act in this behalf in a certain way) and for reasons not disclosed, to detain him in custody "pending further orders".

It is all gravely disquieting. Consider these facts. On 26th October 1937, a petition for remission of sentence is dismissed. On 24-2-1938 just four months later another is solemnly allowed by a Government, order issued in the name of the Governor of the Province and signed by a Secretary. The due date for release is 16th April 1938. Two days before this and seven weeks after the order of remission comes this extraordinary missive of 14th April 1938 which without even pretending to cancel or modify the order of Government dated 24th February 1938, directs the Superintendent of the jail not to release the prisoner "pending further orders;" and the prisoner's history ticket, which purports to record events in chronological order as they occur, contains an entry dated 16th April 1938 "Released on remission." It is scored out and underneath it and clearly written after it, is an entry dated 2 days earlier (that is to say 14th April 1938) "Detained by order of Government"; and the only order produced is this curious memorandum. Five weeks pass and still no orders are issued and then on 20th May 1938 comes this application for a writ of habeas corpus. What does it all mean? Something seems to be seriously wrong.

But however that may be, I am clear that orders of Government affecting the liberty of the subject cannot be passed in this inconsequential way (I am referring to the memorandum of 14th April). Such orders are solemn constitutional acts and are rigorously circumscribed by statutory provisions and rules. Men's liberties cannot be signed away in this casual fashion. Governments cannot function in this haphazard manner. They cannot play fast and loose with men's lives.

It follows that the order of Government solemnly and legally made on 24th February 1938 had not been recalled on 16th April 1938. Under that order the prisoner was entitled to immediate and unconditional release on that day. He was therefore in the eyes of the law a free man from that moment. Thereafter he could not be kept in custody except in accordance with the due processes of law, that is to say except by being re-sentenced by a competent Court. He has not been so re-sentenced. He is therefore entitled to immediate and unconditional release. I concur in the order of my Lord the Chief Justice.

D.S./R.K. *Applicant set at liberty.*

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## * A. I. R. 1938 Nagpur 522

VIVIAN BOSE J.

*Bhagirath Birdichand Marwadi* — Appellant.

v.

*Vishwasrao Pundalik and another* — Respondents.

Second Appeal No. 18 of 1936, Decided on 4th February 1938.

**(a) Malicious Prosecution — Suit for — From fact of plaintiff's acquittal it does not follow that defendant's version was false or that there was absence of reasonable and probable cause.**

In a suit for damages for malicious prosecution the burden is ordinarily on the plaintiff to prove absence of reasonable and probable cause : *A I R 1926 P C 46, Rel. on.* [P 523 C 2]

It is true that when the plaintiff is acquitted by the Criminal Courts he should be deemed to be innocent : *25 Bom 332, Rel. on.* [P 523 C 2]

But from this it does not follow that defendant's version of the incident was wholly false or that he must have known it to be false. The defendant's story may be true in every single respect and yet the plaintiff may still have been innocent : *A I R 1929 All 265 and A I R 1929 All 878, Dissent.; A I R 1929 Nag 260 and A I R 1933 Mad 429, Approved.* [P 523 C 2 ; P 524 C 1]

*** (b) Malicious Prosecution — Suit for — Reasons on which previous judgment of Criminal Court is based are not relevant.**

In the absence of res judicata, the reasons upon which a judgment proceeds are entirely irrelevant in a subsequent litigation except in the special circumstances specifically provided for by the Evidence Act. This law has been applied to suits for malicious prosecution. Hence in a suit for malicious prosecution the reasons upon which previous judgment of Criminal Court is based are not relevant : *A I R 1931 P C 89 ; A I R 1930 Nag 1 (F B) and A I R 1922 All 209, Rel. on.* [P 524 C 1]

*** (c) Second Appeal — Question of law — Evidence evenly balanced — Conclusion being impossible, Court using onus as determining factor — Question of onus becomes one of law and not of fact.**

A question of law does not arise every time an inference is made from a set of proved facts. It can only arise if the ultimate inference is itself a question of law and not one of fact : *A I R 1931 Nag 67, Approved; A I R 1937 Nag 230, Ref.* [P 525 C 1]

Where the onus is used as the determining factor in the whole case because the tribunal finds the evidence pro and con so evenly balanced or so equally worthless that it can come to no sure conclusion, then the question of onus becomes one of law and not one of fact as it would otherwise be : *(1927) A C 515, Rel. on ; A I R 1932 P C 28, Explained and Disting.* [P 525 C 1]

V. L. Prabhune and V. D. Kale — *for Appellant.*

M. R. Bobde — *for Respondent 1.*

**Judgment.** — The plaintiff sued the defendants in the trial Court for damages for malicious prosecution and succeeded. He was given a decree for Rs. 850 but that was reversed on appeal, the lower Appellate Court holding that he had not succeeded either in establishing the absence of reasonable and probable cause or in showing that the defendants or either of them was the real prosecutor. The plaintiff appeals here. The facts briefly are these. The defendants, who are respectively Chairman of the Co-operative Bank at Daryapur and a Cattle Pound Inspector, were going to the village of Umri in a damni on 11th May 1932. A suit-case belonging to defendant 2 was tied on to the step of the damni at the rear by a rope. When they reached Umri, they alighted and told the driver of the damni to drive on to a neighbouring village Kuberi and said that they would follow on foot after finishing their business at Umri. When the driver reached Kuberi, he missed the suit-case and thinking it might have fallen off along the way retraced his steps to Umri and there informed his master of the loss.

They all proceeded to Kuberi and there, according to the version of the defendants, they found that the rope had been deliberately cut. They suspected a Mahomedan boy (later identified as Syed Umru) who seems to have been following them and through him were directed to the plaintiff's house at Umri. When they got there, the plaintiff told them that he had their suit-case and would return it to them if they would tear up a report to the police which they had already written and promise not to make another. They did so and made the requisite promise and thereupon the plaintiff, after turning other people in the house out, brought the suit-case from an adjoining room and handed it over to them. They found that one of the locks had been tampered with but that otherwise it was all right and that nothing was missing from it. Three days later, namely on 14th May 1932, defendant 2 made a report to the police setting out the facts given above. The police prosecuted and the trial Court convicted Syed Umru of theft under Sec. 379, I. P. C., and the plaintiff Bhagirath of receiving stolen property knowing it to be stolen under S. 411. Both appealed and both were acquitted; so it is patent that the prosecution terminated in the plaintiff's favour.

It is not denied (at any rate not in this Court) that defendant 2 lost his suit-case and that it was later returned to him at Umri, but the plaintiff denies that it was stolen and also denies that the defendants discovered the rope to be cut. He also denies that the lock was damaged. His version as given in the witness-box (P. W. 12) is that the defendants came to his house in order to inspect the Haisiyat Register of the Umri Co-operative Society thinking that it was with him because he was the Sir Panch of the Society. He told them that the register was with the secretary and on being asked to go and fetch it, refused to do so. This led to some unpleasantness and after the defendants had abused him, they left his house. As they proceeded down the street, the plaintiff saw Syed Ibru, the father of Syed Umru, come out of his house and hand the suit-case over to the defendant saying that it had been picked up on the road between Umri and Kuberi.

The learned Judge of the lower Appellate Court found the evidence so equally balanced that he could not decide which of these two stories was true and which false. He laid the burden of proof on the plaintiff and held that as he had not been able to establish the absence of reasonable and probable cause, he must fail. It is true the learned Judge says in one place in his judgment that he is not satisfied that the plaintiff's version is true, but on the whole I think his conclusion is that the evidence was so equally balanced that he was not able to choose between the two stories. The case was therefore decided, so far as this point was concerned, solely on the burden of proof. It is not denied that the burden in such cases is ordinarily on the plaintiff; in fact in the face of the Privy Council decision in 1 Luck 215[1] that would be futile, but the learned counsel for the plaintiff argues that there is a wide difference between a defendant who had based his prosecution on information supplied to him by others and one who had acted on information which according to him was within his own knowledge. In the latter case, he argues, the burden is on the defendant and not on the plaintiff. He puts the matter in this way.

First of all, he states that the plaintiff must be deemed to be innocent until the contrary is established because he has been acquitted by the Criminal Courts and for this he relies on a sentence in a judgment of the Judicial Committee in 25 Bom 332[2] at p. 335. So far as that is concerned I quite agree with him; so we start with the position that the plaintiff was innocent of the charges made against him by the defendants. The next step in the argument of the learned counsel is that if that is accepted, then it must follow that the defendants' version is false and since the defendants were speaking of facts within their own knowledge, they must have known it to be false. If that is so, then there can be no reasonable and probable cause, for it is impossible to hold that a person has reasonable cause for believing that facts which he knew to be false are or can be true; and from this it follows that there must have been malice. Two decisions of Dalal J. in A I R 1929 All 265[3] and A I R 1929 All 878[4] were relied on in support of this line of reasoning. With the utmost respect I am unable to agree. The fallacy to my mind lies in concluding that the plaintiff's version of

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1. Balbhadar Singh v. Budri Shah, (1926) 13 A I R P C 46=95 I C 329=1 Luck 215=29 O C 163 (P C).
2. Pestonji Muncherji Mody v. Queen Insurance Co., (1901) 25 Bom 332=2 Bom L R 938=4 C W N 781 (P C).
3. Mohammad Daud Khan v. Jai Lal, (1929) 16 A I R All 265=116 I C 852.
4. Kishun Mal v. Sakal Raj Mal, (1929) 16 A I R All 878=122 I C 760.

the incident is wholly true and the defendant's wholly false simply because it must be assumed, until the contrary is shown, that the plaintiff was innocent. The defendants' story may be true in every single respect and yet the plaintiff may still have been innocent. For instance, the plaintiff may not have known that the property was stolen property and may simply have kept it till claimed by the rightful owner and the defendants' threat of a report to the police may have frightened him into behaving as he did. Other possibilities also suggest themselves but that is enough to show that the one does not necessarily follow from the other as has been argued and if it does not, then the burden is still on the plaintiff. The view urged by Dalal J. has already been rejected by Jackson A. J. C. in 25 N L R 180[5] at p. 181 and also by a Division Bench of the Madras High Court in 56 Mad 641[6] at p. 643. I respectfully agree.

But the learned counsel goes even further than this. He says that the judgments of the Criminal Courts are relevant and that not only the alternate decision, that is to say, the fact of acquittal, but also the reasons on which it is based must be accepted as evidence and when that is done, the plaintiff has discharged the onus which initially lay upon him because in this case, the Court which acquitted him considered the defendant's entire case to be false. That, in my opinion, goes much too far. The general law about the relevancy of previous judgments has been considered by the Privy Council in 58 Cal 1187[7] at p. 1198 and by a Full Bench of the Nagpur Judicial Commissioner's Court in 26 N L R 33.[8] It is clear that, in the absence of res judicata, the reasons upon which a judgment proceeds are entirely irrelevant in a subsequent litigation except in the special circumstances specifically provided for by the Evidence Act. This law has been applied, and in my opinion rightly, to suits for malicious prosecution in 26 N L R 33[8] and in 44 All 485.[9] Whether the dicta in these two decisions about proof of the plaintiff's innocence conflict with that of the Privy Council in 25 Bom 332[2] at p. 335 need not be considered because I am clear that in this case, at any rate, the plaintiff's innocence must be assumed because of the acquittal, but beyond that the plaintiff cannot go. It was also argued that when a case is decided solely on the burden of proof the evidence not being relied on at all, then that raises a question of law which can be considered in second appeal and that that opens up the whole question and entitles the Court of second appeal not only to examine the question of onus but also the evidence out of which that question arises. Their Lordships' decision in 59 Cal 1012[10] at page 1022 was relied on and it was argued that though that was a case of second appeal in the High Court, their Lordships reconsidered the evidence and I was referred to the following passage:

> Their Lordships agree with the conclusion of the Subordinate Judge on the evidence that the respondent got possession of that share of the land that was available for possession apart from the sisters' share; indeed, this admission is involved in the respondent's own evidence.

It is not necessary to examine this ruling at length. I am clear that neither the High Court nor their Lordships examined the evidence relating to what was called there a question of fact because the matter was res judicata, but I am equally clear that in the circumstances of that case they would have examined the evidence had the question still been open. The difference between that case and the present one is this. In that case, the final Court of fact had not examined the evidence and come to a conclusion about it, whereas in the present case before me, it has. In the Privy Council case, only one witness was looked at by the lower Appellate Court, namely the defendant, and the plaintiff's evidence was ignored. If the burden was on the plaintiff as was held there, then of course no decision could have been given against him without an examination of his evidence. It is very different when the evidence on both sides is examined and a conclusion reached even if that conclusion be that the evidence is so equally balanced that no conclusion can be drawn from it and that therefore resort must be had to the burden of proof. The passage on which the learned counsel for the appellant relies related to an alternative case about abatement of rent which had been set up for the first time before their Lordships. It turned on a question of the defendant's possession over another part of the property and did not relate to the portion of the property in respect of which the case had been fought out in the Courts below. The first Court had given a finding on the point but not the other Courts, and their Lordships looking into the evidence relating to that question agreed with the learned trial Judge that possession of that part of the property had been given to the defendants. The position which arises here is analogous to the one in 28 N L R 312[11] where Grille, A. J. C. stated that

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[5] Hussenuddin v. Kisan, (1929) 16 A I R Nag 260=121 I C 44=25 N L R 180.

[6] Pedda Venkatapathi v. Balappa, (1933) 20 A I R Mad 429=143 I C 825=56 Mad 641.

[7] Gobindanarayan Singh v. Shyamlal Singh, (1931) 18 A I R P C 89=131 I C 753=58 Cal 1187=58 I A 125 (P C).

[8] Shankar v. Kesheo, (1930) 17 A I R Nag 1=121 I C 644=26 N L R 33 (F B).

[9] Goberdhan Singh v. Ram Badan Singh, (1922) 9 A I R All 209=67 I C 65=44 All 485=20 A L J 284.

[10] Jogeshchandra Ray v. Emdad Miya, (1932) 19 A I R P C 28=136 I C 398=59 Cal 1012=59 I A 29 (P C).

> in a case of mixed question of fact and law this Court is bound to accept the facts as found in the lower Appellate Court but is entitled to ascertain whether the inferences drawn from those facts are legitimate.

The facts found here by the lower Appellate Court are that it is impossible on the evidence in this case to decide which story is true. That, in my opinion, is as much a finding of fact as one stating that one story is true and the other false. Accepting that finding the resultant question is one of law, namely where does the burden of proof lie? Of course I respectfully agree with the decision in 27 N L R 8[12] that a question of law does not arise every time an inference is made from a set of proved facts. It can only arise if the ultimate inference is itself a question of law and not one of fact. I have myself examined this position at length in Second Appeal No. 69 of 1935.[13] But that is not the point here. There can be no doubt that when the onus is used as the determining factor in the whole case because the tribunal finds the evidence pro and con so evenly balanced or so equally worthless that it can come to no sure conclusion, then the question of onus becomes one of law and not one of fact as it would otherwise be: *see* (1927) A C 515.[14] It is hardly necessary to refer to the last question raised, namely that a Court of fact is bound to come to one conclusion or the other when there is evidence and that it cannot have resort to the burden of proof. Apart from the Privy Council ruling just cited, it will be seen that their Lordships did exactly what the learned District Judge has done here in 1 Luck 215[1] at p. 230 which was also a case of malicious prosecution. As the onus was rightly placed in this case by the lower Appellate Court, the appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 525

STONE C. J. AND VIVIAN BOSE J.

*Birdichand and others — Decree-holders* — Appellants.

v.

*Ganpatsao Narayansao Kalar — Judgment-debtor* — Respondent.

Misc. Appeal No. 156 of 1936, Decided on 7th April 1938.

**(a) Execution—Sale—Setting aside — Sale in execution of decree cannot be set aside, even if decree under which sale took place is not merely varied but reversed.**

A sale in execution of a decree cannot be set aside, even if the decree under which the sale took place is not merely varied but reversed. The mere fact that the sale has not been confirmed makes no difference, when it is bound to be confirmed, an application under O. 21, R. 90 having been made and disallowed. No doubt, where there is an appeal from preliminary decree and the preliminary decree is varied by the Appellate Court so that the final decree is different from that passed by the trial Court, it is the final decree which carries into effect the preliminary decree as varied by the Appellate Court, that is the effective final decree; but although this would cause the decree under which the sale took place to merge in the final decree of the Appellate Court, that fact, in the absence of any stay, rendering it improper to proceed with the execution of trial Court's final decree, would not invalidate the sale as against the third party purchaser, though different considerations might apply where the decree-holder is the purchaser: *10 All 166 ; A I R 1917 All 163 and A I R 1931 All 655, Rel. on.* [P 526 C 1 ; P 527 C 1]

**(b) Civil P. C. (1908), O. 21, R. 90 — Whether application under O. 21, R. 90 on behalf of minor, not by guardian ad litem appointed to act for him, but by his mother is effective application *(Quaere)*.**

Whether an application under O. 21, R. 90 to set aside a sale made on behalf of a minor, not by the guardian ad litem appointed to act for him but by his mother, is an effective application: *1 N L R 128 and A I R 1924 All 79, Ref.* [P 526 C 2]

**(c) Civil P. C. (1908), O. 21, R. 92 (2), Proviso—Applicability.**

The Proviso to O. 21, R. 92 (2) does not relate to O. 21, R. 92 (1). [P 526 C 2]

**(d) Civil P. C. (1908), O. 43, R. 1 (j) — Appeal from order setting aside sale in execution of decree — Auction-purchaser, although served with notice, expressing no interest—It is unnecessary to join him as party to appeal—Appeal does not fail by failure to join him.**

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11. Ajodhiaprasad v. Parashram, (1933) 20 A I R Nag 23=141 I C 281=28 N L R 312.
12. Chintaman Rao v. Vithal, (1931) 18 A I R Nag 67=131 I C 662=27 N L R 8.
13. Gangadin Bhairon Prasad v. Bahoranlal Beniram, (1937) 24 A I R Nag 280=171 I C 860.
14. Robins v. National Trust Co., (1927) A C 515 =96 L J P C 84=137 L T 1=71 S J 158=43 T L R 243.

Where on an appeal being filed from an order setting aside a sale in execution of a decree, the auction-purchaser, although served with notice, expresses no interest one way or the other, it is unnecessary to join him as a party to the appeal and the appeal cannot fail by reason of failure to join him. The case would be different if the purpose of the appeal is to set aside the sale : *A I R 1932 Pat 255, Rel. on ; A I R 1930 Nag 5, Disting.* [P 527 C 1]

M. R. Bobde — *for Appellants.*

S. R. Mangrulkar — *for Respondent.*

**Order.**—This is an appeal from an order dated 23rd April 1936 made in execution of a decree passed in a mortgage suit. The order was made on an application which sought to set aside a sale. The Court has set aside the sale for the reason that the sale was held in execution of a final decree passed by the trial Court following upon a preliminary decree which final decree was passed during the pendency of an appeal taken from the preliminary decree which appeal was partly successful. The success consisted in the fact that whereas the original preliminary decree had been passed on the basis that both father and son were liable for the whole decretal debt, in appeal the quantum of liability was somewhat reduced but the son's liability was very considerably reduced, the mortgage debt of some Rs. 18,000 being, so far as the son's share was concerned, reduced to Rs. 7819-4-0 including costs which sum was held to be binding on the joint family, the balance of Rs. 10,298-10-4 being found to be binding on the father alone.

The purchaser at the court auction was a third party. That third party auction-purchaser is not a party to this appeal not having been joined because on notice given the auction-purchaser's widow and representative stated that she is not interested one way or another whether the sale be confirmed or set aside. The decree-holder asks for the confirmation of the sale in order that he may receive the money. The judgment-debtor, a minor, opposes the confirmation because he hopes that now if there is a fresh sale this property which was sold for Rs. 11,100, but which he thinks is worth Rs. 20,000, would fetch a better price. It seems to us that this matter is concluded by 10 All 166[1] because as the Privy Council pointed out a sale cannot be set aside even if the decree under which the sale took place in execution is not merely varied but reversed. It is true that in that case the sale had been confirmed but in our opinion that makes no difference when it is borne in mind that under O. 21, R. 92 this sale must be confirmed. That is to say, the Court is required to confirm a sale unless there is a successful application under Rr. 89, 90 or R. 91 of O. 21. There has been an application made in this case under R. 90 but that application has been disallowed and in any case was an ineffective application because it was made by a person not a party. That is to say, the minor having had a guardian ad litem appointed, the application was made not by his guardian ad litem but by his mother: 1 N L R 128[2] and 45 All 623.[3] It is true that his mother much later and long after the time to make an application had passed got the guardian ad litem removed and had herself made guardian ad litem but she was then out of time and no fresh effective application was made by her. We have great doubt whether the application she made was an effective application at all. However, it was considered and it was dismissed. Accordingly this is a case where an application was made under R. 90 and disallowed. It follows directly in our opinion that under the provisions of O. 21, R. 92 (1) the Court is bound to confirm the sale. We are quite clear that the proviso to R. 92 (2) does not relate to R. 92 (1). It is said, however, that the Court has power to refuse to confirm a sale where the provisions of S. 144 are applicable and it is said that here the decree having been varied the party who has suffered as a consequence of any act done under the varied decree would be entitled to restitution.

In our opinion, however, the Privy Council decision makes it plain that merely because a decree has been not merely varied but reversed that does not entitle the Court to set aside a sale to a third party. But here all such difficulties verily disappear when the facts are considered. There is here no question of restitution. Here under the varied decree Rs. 7819-4-0 is binding on the joint family. Consequently the sale of joint family property for Rupees 11,100 of which Rs. 5550 would be allocatable to the father's share and Rs. 5550 to the son's share would be proper. Under the varied decree not only is Rs. 7819-4-0 binding on the joint family but Rupees 10,298-10-4 is binding on the father alone.

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[1] Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan, (1888) 10 All 166=15 I A 12=5 Sar 129 (P C).

[2] Mt. Kisni v. Ghulaji Teli, (1905) 1 N L R 128.

[3] Bhagelu v. Dharma, (1924) 11 A I R All 79=75 I C 898=45 All 623=21 A L J 591.

It follows directly that in addition to the property sold a great deal more could properly be sold so far as the father's share is concerned and a little more could be sold so far as the son's share is concerned.

It is very true that in this case the appeal was from the preliminary decree and it is also well established that where there is an appeal from a preliminary decree and in the Appellate Court the preliminary decree is varied so that the final decree is different from that passed by the trial Court, it is the final decree which carries into effect the preliminary decree as varied by the Appellate Court, that is the effective final decree: 39 All 641.[4] But although this would cause the decree under which the sale took place to merge in the final decree of the Appellate Court, that fact, in the absence of any stay rendering it improper to proceed with the execution of the trial Court's final decree would not invalidate the sale as against the third party purchaser, though different considerations might apply where the decree-holder is the purchaser: A I R 1931 All 655.[5]

Finally it is said that this appeal must fail because the auction-purchaser has not been joined: 26 N L R 127[6] at p. 129. But in our opinion in this case after the auction-purchaser had been given notice and had expressed no interest one way or another, it was entirely unnecessary to join him: 11 Pat 504.[7] It would have been quite different were the purpose of the appeal to set aside the sale: 26 N L R 127.[6] 26 N L R 127[6] was a case where the purpose of the appeal was to set aside the sale and no notice was given to the auction-purchaser who was the person most likely to be affected and not unnaturally the Court held that in the absence of the person most concerned the appeal could not succeed. Here notice has been given. The auction-purchaser has not shown any interest one way or another and in any event the purpose of the appeal is to confirm the sale. Presumably a person when he bids at an auction wants to buy the property and therefore the appeal is helping on his interest rather than the reverse. In our opinion, accordingly the appeal succeeds with costs and the sale must be confirmed.

R.M./R.K. *Appeal allowed.*

## A. I. R. 1938 Nagpur 527

GRUER J.

*Sheokisandas Agarchand Daga Maheshri*

v.

*Daudas Ramgopal and others.*

Civil Revn. No. 761 of 1937, Decided on 5th July 1938.

**Court-fee—Appeal—Final decree in suit for accounts—Court-fee on appeal must be paid on amount mentioned in final decree.**

In an appeal against a final decree in a suit for dissolution of partnership and accounts, court-fee has to be paid on the amount mentioned in the final decree and not on the provisional valuation put in the plaint: *A I R 1938 Mad 435 (F B); A I R 1917 Mad 668; A I R 1929 Cal 815 and A I R 1937 Lah 694, Rel. on.* [P 527 C 2; P 528 C 1]

R. N. Padhye — *for Applicant.*

W. B. Pendharkar—*for Opposite Party.*

**Order.**—The short point is whether in an appeal by a defendant against a final decree in a suit for dissolution of partnership and accounts, court-fee has to be paid on the amount mentioned in the final decree or on the provisional valuation put in the suit by the plaintiff when he instituted it. No good reason is apparent, either on the score of justice or of convenience, why the appellant should not be called on to pay on the real, ascertained value of the appeal which he is preferring. The ground for allowing a provisional estimate, i. e. the uncertainty about the amount due, no longer exists after a final decree has been passed. Applicant relies on 56 Mad 705,[1] but that case has been overruled in a convincing judgment by a Full Bench of the same High Court in A I R 1938 Mad 435[2] following 39 Mad 725.[3] We are not concerned here with cases dealing with preliminary decrees where the amount of claim may be still undetermined. Another authority against the applicant is 57 Cal 463[4] in which S. 7, sub-s. 4 (f), Court-fees Act, and not Art. 17, Sch. 2, was held applicable. Even in the case of a preliminary decree it has just recently been held in the Division Bench case in

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[4] **Gajadhar Singh v. Kishan Jiwan Lal, (1917) 4 A I R All 163=42 I C 93=39 All 641=15 A L J 784 (S B).**

[5] **Shadi Lal v. Jagdamba Sahai, (1931) 18 A I R All 655=133 I C 622=1931 A L J 668.**

[6] **Haridas v. Mofatlal, (1930) 17 A I R Nag 5=121 I C 658=26 N L R 127.**

[7] **Nitai Dutta v. Bishun Lal Sao, (1932) 19 A I R Pat 255=139 I C 810=11 Pat 504=13 P L T 488.**

[1] **In re Venkatanadham, (1933) 20 A I R Mad 830=141 I C 602=56 Mad 705.**

[2] **In re Dhanukodi Nayakkar, (1938) 25 A I R Mad 435=175 I C 470=I L R (1938) Mad 598=(1938) 1 M L J 628 (F B).**

[3] **Srinivasacharlu v. Perindevamma, (1917) 4 AIR Mad 668=33 I C 602=39 Mad 725 (FB).**

[4] **Kantichandra Tarafdar v. Radharaman, (1929) 16 A I R Cal 815=124 I C 77=57 Cal 463.**

I L R (1937) Lah 196[5] which distinguishes on the facts 10 Lah 737[6] that an appeal against such a decree must bear court-fees ad valorem on the amount at which the relief is valued in the plaint. In the present case the defendant has no option but to value the relief at the figure which he has been ordered to pay by the decree against him. This application fails and is dismissed with costs. Pleader's fee Rs. 15.

B.D./R.K. *Application dismissed.*

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[5] Feroze Din v. Mohammad Din, (1937) 24 A I R Lah 694=171 IC 837=I L R (1937) Lah 196.

[6] Faizullah v. Mauladad, (1929) 16 AIR P C 147 =117 I C 493=10 Lah 737=56 I A 232 (PC).

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## A. I. R. 1938 Nagpur 528

STONE C. J. AND VIVIAN BOSE J.

*Tejraj Rajmal Marwadi and others*

v.

*Rampyari w/o Kundanmal Marwadi.*

First Appeal No. 63-B of 1935, Decided on 18th February 1938.

**Succession Act (1925), Sec. 214 (1) (b)—Decree-holder dying during execution—Wife applying for substitution and for proceeding with execution — Succession certificate held essential — Time for production should be granted.**

During execution proceedings the decree-holder died. His wife claiming to be his representative put in an application praying that her name be substituted and the execution be proceeded with: *Held* that such application came under S. 214 (1) (b) and production of succession certificate was essential, and that time should be given for such production : *26 Cal 839 and A I R 1920 Cal 580, Ref.; 16 All 259, Disting.* [P 528 C 2]

W. B. Pendharkar — *for Appellants.*

B. B. Waikar — *for Respondent.*

**Judgment.** — By S. 214 (1) (b), Succession Act, it is provided as follows :

> (1) No Court shall—
>
> (b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of (inter alia a succession certificate).

Here *X* obtained a decree (dated 13th March 1933), applied for execution (dated 28th April 1934), and died (dated 12th May 1934). His widow put in what has been called in this matter a "substitution application" on 30th June 1934. That is to say, she applied for her name to be substituted for that of her deceased husband. What was sought however by that application is to be found by reading what was asked for : "The applicant's name be recorded in place of the deceased decree-holder, and the execution case be proceeded with further." The grounds for that prayer were two : (1) the husband had died, and (2) the applicant was his heir.

Now it is said she was not proceeding on her application but on his application and therefore S. 214 (1) (b) does not apply: 26 Cal 839,[1] and 57 I C 902[2] which simply follows 26 Cal 839.[1] 26 Cal 839[1] dissents from a Full Bench judgment reported in 16 All 259.[3] The latter case however appears to us to be distinguishable, for it was concerned with a suit, not with execution proceedings. Since the new Rule, O. 22, R. 12, was made the old question whether execution proceedings abate on death has been set at rest. Abatement does not apply to execution proceedings. The result of that is however that the heirs need not take steps for substitution under O. 22, R. 3 but may apply to carry on the proceedings or may file a fresh application. In other words, execution proceedings do not abate but live on and, as some one must take the next step and death terminates all agencies, the person entitled, i. e. the personal representative or heir, can come before the Court. That person when he comes will be claiming for himself, at least where he, or she, is heir or beneficially interested.

The proper application is for leave to carry on (or proceed with) the pending execution proceedings. Such an application would fall within the words "upon an application of a person claiming to be so entitled." "To be so entitled" means, as is plain from S. 214 (1) (a) "to be entitled to any part of the deceased's estate." This widow claims to be so entitled and she makes an application, which is necessary before the Court can proceed with a pending execution. The Court cannot, on that application, proceed with the execution unless a succession certificate is produced. The appeal is accordingly dismissed with costs. We cannot but observe that in this case execution has been avoided for three and a half years because a succession certificate was not produced. We understand there is no difficulty or expense involved in producing a succession certificate and it would seem to be wise in such cases whether a succession certificate is strictly necessary or not to take the course taken by counsel in 16 All 259[3] and ask for time to produce the succession certificate.

B.D./R.K. *Appeal dismissed.*

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[1] **Mahomed Yusuf v. Abdur Rahim Bepari, (1899) 26 Cal 839=4 C W N 558.**

[2] **Kshetra Mohan v. Azizullah Mea, (1920) 7 A I R Cal 580=57 I C 902.**

[3] **Fateh Chand v. Muhammad Bakhsh, (1894) 16 All 259=1894 A W N 74.**

## * A. I. R. 1938 Nagpur 529

GRILLE AND GRUER JJ.

*Provincial Govt. C. P. and Berar*
v.
*Balaram Jagannath and another.*

Criminal Appeal No. 137 of 1938, Decided on 19th July 1938.

*** Penal Code (1860), S. 184 —No Physical act of obstruction is necessary to constitute offence under S. 184—Creating disturbance at public auction which prevents bids being heard and necessitates closing of auction amounts to offence under S. 184.**

The word 'obstructs' in S. 184 does not mean physical obstruction and in order to constitute an offence under S. 184, no physical act of obstruction is necessary. A proceeding can be obstructed by measures, other than physical measures, taken against the person, who is conducting the proceedings. [P 529 C 2; P 530 C 1]

A concerted plan at a public auction, to prevent the auction being carried out by raising shouts or disturbance, which prevents bids being heard, and necessitates the closing of the auction, amounts to obstructing the auction and constitutes an offence under S. 184 : *A I R 1928 Lah 827 and A I R 1933 All 759; Disting.; 7 P R 1905 Cr, Expl.* [P 529 C 2]

W. R. Puranik, Advocate-General — *for Appellant.*

W. Datt — *for Accused.*

**Judgment.** — This is an appeal by the Provincial Government against the acquittal of Balaram and Chaitram, brothers, of an offence under S. 184, I. P. C. The trying Magistrate considered it established that at an auction sale of immovable property conducted by the Tahsildar of Hoshangabad the accused used abusive language at the sale with the result that the sale had to be postponed. The learned Magistrate, however felt himself unable to convict them as he held that the word 'obstructs' in S. 184 meant physical obstruction, that is to say actual resistance or obstruction put in the way of the public servant. It is contended by the learned Advocate-General that this is a mistaken view and that under S. 184, I. P. C., no physical act of obstruction is necessary.

It is conceded on behalf of the accused persons that the defence of alibi which was set up in the trial Court is worthless and of no avail. Authorities have been cited in addition to the one quoted by the learned Magistrate himself namely A I R 1928 Lah 827[1] for the proposition that obstruction must be physical obstruction. We would however point out that the cases cited, with the exception of one to which we shall refer later, have reference to offences either under S. 186 or S. 225-B, I. P. C. Manifestly for an offence under S. 225-B, I. P. C., to have been committed, there must be some physical act against the person who is effecting the lawful apprehension and under S. 186, I. P. C., the obstruction which is punishable is the obstrution of any public servant. In such cases, although it has been held that there can be no obstruction which is not a physical obstruction, it has, nevertheless, been laid down in 55 All 985[2] that even under S. 186 actual physical obstruction is not necessary to complete the offence if threats are accompanied either by overt acts or by menacing attitude or show of physical force, in fact if one of the ingredients of the offence amounts to an assault as contemplated by S. 352, I. P. C. Now S. 184, I. P. C., does not deal with the obstruction of any public servant or of any person but with the obstruction of a proceeding which is being conducted by lawful authority, and a proceeding can be obstructed by measures other than physical measures taken against the person who is conducting the proceeding. At a public auction a concerted plan to prevent the auction being carried out by raising shouts or disturbance which would prevent bids being heard and necessitating closing of the auction would certainly amount to obstructing that auction. In the present case, when the bid of Rs. 100 had been offered, the two accused began to abuse the person who bid and when the Tahsildar who was holding the sale intervened they abused him also. There is also evidence that when they were requested to leave the room where the sale was being held they did so but continued their abuse from outside and deterred people from entering the room and deterred them from making bids. No further bid above Rs. 100 was offered owing to abuses and threats by the intending bidders and the sale had to be postponed. The sale of property was therefore obstructed. The only case to which we have been referred which deals specifically with S. 184 is a case of the year 1904 reported in 2 Cr L J 44[3] where Rennie J. held :

> I am unable to see that a mere posting up of placards asserting a title to the land claimed can

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[1] **Mt. Darkan v. Emperor, (1928) 15 A I R Lah 827=110 I C 101=29 Cr L J 645.**

[2] **Emperor v. Tohfa, (1933) 20 A I R All 759=1933 Cr C 1324=146 I C 183=34 Cr L J 1211 =55 All 985=1933 A L J 952.**

[3] **King-Emperor v. Gopal Rai, (1905) 7 P R 1905 Cr=96 P L R 1905=2 Cr L J 44.**

be regarded as obstruction under S. 184, I. P. C. On the contrary I think a claimant is well advised in doing so as otherwise he might be told that he stood by and made no protest.

With this view we are in respectful agreement. The learned Judge however then added, "I think the obstruction must be physical". This is an obiter dictum as the observation does not appear necessary for a decision of the case and also with all respect we are of opinion that it ignores the essential difference in the obstruction contemplated in Ss. 184 and 186, I. P. C. S. 186 postulates some show of physical force whereas S. 184 does not. It has been argued that what the accused persons did was either merely to display resentment and bad temper at their land being sold or else to continue a boycott against the sale which had originated in their village before the sale began and which in itself is not actionable. We are unable to agree with these contentions. The threats uttered to the actual bidder and to the audience of potential bidders disclose an intent to prevent the sale being held and that intention was successfully carried out. If there had been a boycott arranged previously, as the learned counsel for the accused assumes, what took place was not a continuation of the boycott but a fresh offence consequent on some person having broken a previous agreement. We are satisfied that the accused persons attended the sale with the deliberate intention of hindering the proceedings and that they did so successfully by means of abuses and threats and that their action amounts to an offence under S. 184, I. P. C.

It may be considered that the incident is a trifling one and an unworthy subject of appeal by the Government. It is, in our opinion, however very necessary to correct the misapprehension of the law which exists in the mind of the Magistrate, a misapprehension which might have very serious consequences if allowed to persist and which might render the holding of sales in execution of decrees extremely difficult. The law must be correctly laid down and it is necessary to allow the appeal. We do not propose to sentence the accused persons to imprisonment. Their land has been sold and they are not in a position to pay a substantial fine. We consider that in the circumstances it will be sufficient to set aside the order of acquittal and to convict the accused under S. 184 and sentence them to a fine of Rs. 10 each with a week's rigorous imprisonment in default. A fortnight's time is given for the payment of the fines.

R.M./R.K. *Accused convicted.*

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## A. I. R. 1938 Nagpur 530

VIVIAN BOSE J.

*Jamshed Karimuddin Musalman* — Appellant.

v.

*Kunjilal Harsukh Kalar and another* — Respondents.

Second Appeal No. 169 of 1936, Decided on 28th July 1938, from appellate decree of Addl. Dist. Judge, Betul, D/- 20th February 1936.

**(a) Contract—Suit for damages for breach of contract—Plaintiff must furnish necessary particulars of breach and his claims.**

A defendant in a suit for damages for breach of contract is entitled to know exactly what case he has to meet and he must be afforded an opportunity to investigate the details of the claim so that he can call evidence about it if he can, and so he can attack the plaintiff's estimate of damages as well as the basis on which it is grounded. The plaintiff is therefore bound to furnish the necessary particulars. [P 531 C 2]

**(b) C. P. Land Revenue Act (2 of 1917), Ss. 220 (q) and 202 — Suit for damages for breach of conditions in contract—Civil Court's jurisdiction is not barred.**

Section 202 (1) does not entitle the Chief Commissioner to enquire into a breach of contract and assess and award damages in respect of it. The mere fact that the same set of facts gives rise to a civil action for damages as well as to revenue proceedings under S. 202 does not confer jurisdiction upon him to usurp the functions of the Civil Courts, any more than a similar set of conditions entitles the Civil and Criminal Courts to trespass upon the province of each other in cases of defamation. Hence, in a suit for damages for breach of certain conditions in an agreement, Civil Court's jurisdiction is not barred. [P 532 C 1]

**(c) Civil P. C. (1908), O. 26, R. 18 and S. 99—Commission issued behind back of defendant—Irregularity not causing prejudice to defendant — Decree cannot be varied in second appeal.**

It is true that O. 26, R. 9 leaves the matter to the discretion of the Court and does not provide for the presence of the parties when a commission is issued, but natural justice requires that such acts should not be done behind the back of one of the parties. Where commission is issued behind the back of defendant, the decree cannot be reversed in second appeal if this irregularity does not cause prejudice to the defendant. [P 532 C 2]

**(d) Costs—Costs should be proportionate to success and failure.**

Where Court has not decreed the whole claim, only proportionate costs should be allowed, i. e. costs should be proportionate to success and failure. [P 534 C 1]

K. B. Tare, K. M. Dharmadhikari and Abdul Razak — *for Appellant.*

M. R. Bobde, R. P. Awasthi and B. T. Ambkar — *for Respondent No. 1.*

**Judgment.**—This is a suit for damages arising out of a breach of certain conditions embodied in a contract Ex. P-1 which was executed on 26th September 1929. The document lets out the plaintiff's jungle to the defendant for a period terminating on 26th March 1931. In that interval the defendant was at liberty to cut and remove the standing timber subject to the conditions mentioned in the deed. The relevant conditions are as follows:

(1) The jungle shall be cut in accordance with the Government (Forest) rules and also in accordance with the undermentioned terms:

(2) The stumps shall be made in accordance with the Government rules, that is flush with the ground. We will not cause any sort of damage and if we do so we will be liable to pay the expenses.

(3) Should we cut the jungle in contravention of the Government rules. . . . we, the thekedars, will be liable and responsible therefor and will not be entitled to even a pie out of the lease money that we have already paid.

(4) Should we cut any kind of wood in contravention of the terms, that is, should we cut any wood (off the girth) of 1½ feet or less than 1½ feet, we will be liable to pay at the rate of Rs. 10 per tree to the malguzar. We will not cut trees within 20 yards on either side of the nala (stream) that retains water up to the month of January . . .

(8) As regards particular kind of wood, e. g. Sagon (teak), Sal and timber, 30 trees per acre shall be left standing, while the number of trees of all kinds left standing shall be 90 per acre . . . .

(10) We will not cut any trees within 20 yards from the boundary line of the Government forest.

(11) If there be any irregularity of any kind in making stumps, we, the thekadars, will be liable to pay the expenses.

The plaintiff complained that there had been a breach of the above conditions but said that he was not able to estimate the damage properly and that it would be necessary to appoint a Government Forest Officer to do that. Tentatively however he placed the figure at Rs. 2000. He furnished no particulars. The defendant denied that he had violated the terms of the agreement in any way and called upon the plaintiff to furnish particulars of the breach of which he complained. The plaintiff again stated that he was unable to specify the exact damage done and asked the Court to issue a commission, but eventually on 15th February 1932 he filed a list containing the necessary particulars. It shows breach of Cls. 4, 8 and 10 above.

It was argued that the plaintiff was not bound to furnish particulars and that a round and general figure was all that was required. I am unable to agree. A defendant is entitled to know exactly what case he has to meet and he must be afforded an opportunity to investigate the details of the claim so that he can call evidence about it if he can, and so he can attack the plaintiff's estimate of damages as well as the basis on which it is grounded. Here a breach of certain conditions of an agreement forms the subject-matter of the plaintiff's complaint. The defendant is entitled to know which conditions and the exact manner in which they have been violated. The plaintiff claims that the breach consists in the cutting of unauthorized trees. It is obviously impossible to assess damages in such a case until the Court knows whether any trees have been cut and if so how many. The plaintiff is therefore bound to furnish the necessary particulars. The forest is his and he is in a position to know exactly what trees have been wrongfully cut.

It was argued that the forest was in the possession and control of the defendant and so the plaintiff could not furnish the necessary particulars. That however is incorrect. On the date of the suit the forest was in the plaintiff's possession and all that he had to do was to go and count a certain number of stumps within a specified area and assess the value of the damage. If he had not the necessary qualifications and experience to do that himself, it was his duty to engage those who had and to come to Court with a clear cut case. I see no reason therefore for allowing a departure from the normal rule that a plaintiff must be tied down to his claim and to the particulars which he is bound to furnish in support of it. This is particularly so as the danger of subsequent fellings has clearly to be guarded against. The first Court dismissed the plaintiff's claim but the lower Appellate Court allowed a portion of it, that is to say, it decreed Rs. 1364.5.0 of the Rs. 2000 claimed, so the defendant appeals. His first ground of attack is that the suit is not maintainable at all: that S. 220 (q) bars it. The foundation of this argument is that the breaches complained of also constitute breaches of the Government Forest Rules framed under S. 202, Land Revenue Act; in fact the first clause of the agreement makes these rules applicable and according to the learned counsel for the defendant the latter part of Cl. 4 is nothing but a reproduction of R. 5 (e) which is to be found at p. 704 of Kathalay's useful commentary on the Land Revenue Act. Therefore, according to the contention under consideration, this is one of the questions which is connected with and which arises out of the exercise of power under S. 202 and consequently the jurisdiction of the Civil Courts is barred. I do not agree. S. 220 debars a Civil Court from entertaining any suit or application which is instituted or made

> to obtain a decision or order on any matter which the Chief Commissioner or any Revenue Officer is empowered to determine, decide or dispose of "and in particular" any question connected with or arising out of the powers under S. 202.

Now what decision is the plaintiff endeavouring to obtain from the Civil Court in this suit? It is clearly damages for the breach of certain conditions in an agreement. Is the Chief Commissioner or any Revenue Officer empowered to "determine, decide or dispose of" that matter either under S. 202 or by any other Section of the Act? Clearly not. S. 202 (1) empowers the Chief Commissioner to make rules regulating the contract and management of the forest growth on the lands of any estate or mahal, and the right of user over such forest growth and is also entitled to attach to the breach of such rules certain pecuniary penalties. But this does not entitle him to enquire into a breach of contract and assess and award damages in respect of it. The mere fact that the same set of facts gives rise to a civil action for damages as well as to revenue proceedings under Sec. 202 does not confer jurisdiction upon him to usurp the functions of the Civil Courts, any more than a similar set of conditions entitles the Civil and Criminal Courts to trespass upon the province of each other in cases of defamation. All that the defendant can claim, as he can in an action for defamation, is that any compensation he may have been ordered to pay to the plaintiff should be taken into consideration in assessing the damages here, and also the fact that he has been exposed by reasons of the plaintiff's action (if indeed that be the case) to the trouble and expense of a double set of proceedings. It is immaterial on the view, so far as the want of jurisdiction is concerned, whether the Revenue Courts had actually proceeded against the defendant or not. I understand they had done so and had decided in his favour, but that, as I have said, makes no difference to the question of jurisdiction.

The next point is this. The Court ordered a commission to issue to one Garu Dayal on 12th September 1932 for ascertaining the number of trees cut by the defendant in contravention of the agreement, etc. He replied that he was unable to accept and so on 10th December 1932, a date on which the defendant was not present and when no date had been fixed for hearing, the plaintiff filed an application asking for the appointment of Mr. Pitley a Forest Ranger. This was granted the same day, behind the back of the defendant and the commission was issued accordingly. Mr. Pitley was told to submit his report by 10th January 1933 which was the next date of hearing. It is contended by the learned counsel for the defendant-appellant that the learned trial Judge ignored the mandatory provision of O. 26, R. 18 under which he was entitled to notice and that therefore the report cannot form part of the record of this case as it would otherwise be under O. 26, R. 10. There can be no doubt that the procedure adopted was irregular. It is true, O. 26, R. 9 leaves the matter to the discretion of the Court and does not provide for the presence of the parties when a commission is issued, but natural justice requires that such acts should not be done behind the back of one of the parties; S. 99, Civil P. C. also directs that no decree is to be reversed or substantially varied on appeal because of any irregularity in the proceedings which does not affect the merits of the case or the jurisdiction of the Court. Therefore what has to be seen is whether this fact has occasioned any prejudice to the defendant. I am clear it has not.

Defendant 1 (we are not concerned with the second here) appeared on the next day, viz. 10th January 1933, both personally as well as by counsel. The commission was not returned as it should have been and the question of his remuneration was discussed in the presence of the parties and the Commissioner was told to submit his report on or before the next hearing which was fixed for 6th February 1933. The defendant raised no objection and had ample opportunity to find out all he wanted about the matter then. Indeed this objection was not taken in either of the Courts below and we hear of it for the first time in second appeal; not only that, but the defendant, far from objecting, actually joined the plaintiff on 24th November 1933 in asking that the Commissioner be examined as a witness. As a matter of fact a summons had already been sent to defendant 1 by the Commissioner by registered letter and was received by defendant 1 on 9th January 1933, the day before the hearing of the 10th. I am satisfied therefore that no prejudice has been caused, quite apart from the letter dated 1st April 1933 from the Commissioner to the Court. This letter appears to have accompanied the report and other proceedings. In it the Commissioner states that he had summoned the defendant through the Court but that he did not appear. However as there may be some doubt about the admissibility of this document in evidence, I do not rely on it and base my decision on the other facts given above.

The next objection is about the examination of the Commissioner as a witness. The Commissioner Mr. Pitley stated that he could not attend as he was in the Raigarh State and so the Court directed him to be examined on commission. The defendant complains that he was not told of the date of this examination and so had no opportunity of cross-examination. Here again the conduct of the defendant shows that he did not want to attend. On 22nd December 1933, the defendant stated that he did not want to examine his witness till Mr. Pitley had been examined. On 18th April 1934, orders were issued for the examination of Mr. Pitley on commission and the Court said:

> Defendant to summon his witnesses as plaintiff would close after the commission report is received. Case for evidence for 21st September 1934.

On that date the plaintiff stated that he had no witnesses but the defendant was not called upon to proceed, the Court ordering that "the defendant shall examine his witnesses after the report is received." On 17th November 1934, the report of the commission which had been received the previous day was filed with the record in the presence of the parties. The defendant was then told to summon his witnesses for 20th February 1935. He raised no objection either then or at any other stage, and proceeded in due course to examine his witnesses. Had he raised an objection immediately the defect could easily have been cured and another commission issued.

The next objection is a purely technical one. It is urged that under O. 26, R. 8 evidence taken on commission cannot be read as evidence in the suit without the consent of the party against whom it is offered and it is stated that the defendant has not consented. But this ignores the provision in sub-cl. (a). When the person who gave the evidence is beyond the jurisdiction of the Court the rule does not apply. Mr. Pitley was in the Raigarh State and so beyond the jurisdiction of the first Court and consequently this evidence was rightly read.

As regards the merits, the questions involved are one of fact. It was argued that there is nothing to prove that the defendant caused the damage and his learned counsel urged that the plaintiff himself or one of his lessees might have cut the trees after the defendant's term expired. My attention was drawn to the fact that Mr. Pitley's report shows a larger number of trees than the plaintiff's list which was filed much earlier, and it is argued that the only possible explanation to account for the difference is that the plaintiff himself was felling trees after the defendant had left. But this is a pure question of fact. There is evidence to show that some of the plaintiff's witnesses had examined the ground even during the continuance of the lease and had found signs of illegal cutting, and the defendant himself admitted as D. W. 3 that he had cut trees within 20 yards of the Marghat nala; his excuse being that the tahsildar had told him that as the nala had no water in it he was at liberty to cut the trees. In the circumstances, the Court had ample evidence on which to base its findings especially as the suit was very promptly filed within a month of the termination of the lease.

As regards this last point, the learned counsel for the defendant urges that Cl. 4 of the agreement only prevented trees within 20 yards on either side of the nalas having water in them in January from being cut, but as this particular nala was dry even in December there was no infringement of the rules. This however is not what the agreement says. It speaks of a stream "which retains water up to the month of January" and in any case R. 5 (e), to which a reference has already been made prohibits cutting within these areas of stream which "ordinarily retain water till January." In view of Cl. (1), the sentence quoted from Cl. (c) must be read in conjunction with this rule. There is therefore no force in this contention either.

The only point of any substance in the appeal is that the commission has given figures which exceed the plaintiff's list of particulars and the lower Appellate Court relying on the commission report has travelled beyond the plaintiff's own claim. This of course he was not entitled to do, especially as there has not been an application for amendment at any stage; not even before me. The decree will therefore have to be reduced. The differences are these : In the list the plaintiff complained under Col. 2 that 176 trees had been cut. The commission found that 193 trees had been cut and he valued them at Rs. 198-15-0. It is evident from the report that slightly different valuations have been placed upon trees of different size and it is not possible for me to determine from the materials at my disposal the size of the 17 trees which have to be excluded, but as the difference can only be of a rupee or two it is clearly not worth while sending the case back for ascertaining their exact value. A rough estimate of Rs. 17 based on an average is near enough for all practical purposes. Therefore I reduce the decree by Rs. 17 under this head.

The other point of difference is in Col. 3. The difference here is large. The plaintiff complained of only 89 trees in his list whereas the commission has found that there are 202 trees. In this case he has assessed each tree at a uniform value, namely Rs. 1-12-3. Therefore, all that the plaintiff is entitled to under this head is Rs. 157 to the nearest rupee. That is to say the claim under this head will have to be reduced by Rs. 144. Adding the other Rs. 17 to this the total, reduction in the amount decreed comes to Rs. 161. The decree will be modified accordingly. There is a complaint about costs also. The lower Court did not decree the whole claim and so following the usual rule only proportionate costs should have been allowed. I therefore set aside the decree of the lower Appellate Court so far as the costs are concerned and direct that costs shall be proportionate to success and failure throughout. The rest of the appeal is dismissed.

D.S./R.K. *Decree modified.*

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## A. I. R. 1938 Nagpur 534

STONE C. J. AND VIVIAN BOSE J.

*Rajaram Daduji Kunbi* — *Decree-holder* — Appellant.

v.

*Paiku and another* — *Judgment-debtors*—Respondents.

Misc. Appeal No. 221 of 1936, Decided on 26th July 1938, from order of District Judge, Nagpur, D/- 15th July 1936.

**(a) Civil P. C. (1908), Sec. 47 (2), Order 21, R. 63 — *A* obtaining decree in Court of First Subordinate Judge, Second Class, at *N* on 26th April 1929 and applying for execution on 15th July 1930 and attaching moveable property — Property released from attachment on objection by third party and application for execution dismissed on 23rd January 1931— *A* filing suit under O. 21, R. 63 on 14th April 1931 in Court of Second Subordinate Judge, Second Class, at *N*—Suit dismissed on 28th June 1932—First and second appeals also dismissed on 19th March 1933 and 26th June 1935 respectively—*A* filing second execution application in respect of property not covered by former proceedings on 20th August 1935 — Application held barred by limitation — Suit under O. 21, R. 63, held could not be regarded as step-in-aid of execution and suit under O. 21, R. 63 held not instituted in "proper Court" within Art. 182 (5), Limitation Act — Plaint in suit under O. 21, R. 63 held could not be regarded as an application even under S. 47 (2) and second application could no be treated as revival of first—Ss. 15 and 14 (2), Limitation Act, held did not apply.**

*A* obtained a decree on 26th April 1929 in the Court of the First Subordinate Judge, Second Class, at *N* and filed an execution application on 15th July 1930 and attached certain moveable property. On objection by a third party, the property was released from attachment and the execution application was dismissed on 23rd January 1931, as wholly infructuous. *A* thereupon filed a civil suit for the usual declaration under Order 21, R. 63 on 14th April 1931. The suit was instituted in the Court of the Second Subordinate Judge, Second Class, and was dismissed on 28th June 1932. A first and second appeal from the same were also dismissed, the former on 19th March 1933 and the latter on 26th June 1935. *A* then filed a second execution application in respect of some other property not covered by the former proceedings, on 20th August 1935 :

*Held* that the application was not within time. The claim suit under Order 21, R. 63 could not be regarded as a step-in-aid of execution within the meaning of Art. 182 (5) of Limitation Act and the plaint in the suit could not be regarded as an application referred to in Art. 182 (5). Further the Court in which the decree was obtained and the previous execution application was filed and the Court in which the claim suit was instituted, were different Courts and therefore the claim suit was not instituted in the "proper Court" within the meaning of Article 182 (5). The plaint could not be regarded as an application even under Sec. 47 (2), Civil P. C., as the special provisions of O. 21, Rule 63 prevailed over the more general

terms of Sec. 47 (2). The property involved in the first execution application and the claim suit, not being the same as involved in the second execution application, the latter application could not be treated as revival of the first. Also S. 15 or S. 14 (2), Limitation Act, did not apply : *5 Cal 595; 17 Cal 268 and A I R 1923 Bom 431, Rel. on; A I R 1930 Oudh 468, Dissent.; 35 Cal 202 (P C); A I R 1915 Mad 495 and 23 Cal 829, Disting.*
[P 535 C 2; P 536 C 2; P 537 C 1, 2]

**(b) Limitation Act (1908), Sec. 1 — Effect must be given to provisions of Act unhampered by questions of expediency.**

The Limitation Act is an exhaustive Code in itself and effect must be given to its provisions unhampered by questions of expediency and the like : *A I R 1928 Mad 509 and A I R 1927 All 446, Rel. on.* [P 535 C 2]

**(c) C. P. Courts Act (1 of 1917), Ss. 16 and 26 — Different Subordinate Judges of same class are distinct and separate Courts.**

In absence of an Additional Judge or Additional Judges specially appointed under Sec. 26, only one Judge to each Court is contemplated. Different Subordinate Judges of the same class created under S. 16 are distinct and separate Courts.
[P 536 C 1]

**(d) Civil P. C. (1908), Sec. 47 (2) — Option under Sec. 47 (2) cannot be exercised merely to bring application within limitation—Option under Sec. 47 (2) must be exercised when the suit or application is filed.**

The option given by S. 47 (2) is expressly "subject to any objections as to limitation". If therefore the application for execution is barred by time but for the option given, it cannot be exercised merely to bring the application within limitation. Further the discretion given under Sec. 47 (2) cannot be exercised at any stage of the suit or proceeding. It must be exercised when the plaint or application is filed and after the procedure has once been determined, (subject, of course, to the usual control of the Appellate or Revisional Court), it cannot thereafter be altered.
[P 536 C 2]

**(e) Civil P. C. (1908), S. 47 (1), (2)— Words "the Court" in Sec. 47 (2) refer to the Court specified in Sec. 47 (1) and not to Court trying separate suit.**

The words "the Court" used in sub-sec. (2) of S. 47 refer to the Court specified in sub-s. (1), that is to say "the Court executing the decree" and not to a Court trying a "separate suit". The latter kind of Court has been expressly excluded.
[P 537 C 1]

M. B. Kinkhede — *for Appellant.*

R. N. Padhye — *for Respondents.*

**Order.**—On 26th April 1929 the appellant who is the decree-holder before us obtained the decree which is now under execution in the Court of the First Subordinate Judge, Second Class, Nagpur. On 15th July 1930 he filed an execution application and attached certain moveable property. A third party objected and the property was released from attachment. The execution application was then dismissed on 23rd January 1931 as wholly infructuous. The appellant thereupon filed a civil suit (Civil Suit No. 243 of 1931) under O. 21, Rule 63 for the usual declaration on 14th April 1931. This suit was instituted in the Court of the Second Subordinate Judge, Second Class, and was dismissed on 28th June 1932. A first and second appeal followed, both of which were also dismissed, the former on 14th March 1933 and the latter on 26th June 1935. Thereupon the appellant filed a second execution application, the one out of which this appeal arises, in respect of some other property not covered by the former proceedings, on 20th August 1935 and the question before us is whether this application is within time. The first Court held it was and the lower Appellate Court that it was not, so the decree-holder has appealed here.

It is argued on his behalf that the claim suit under O. 21, R. 63 must be regarded as a step-in-aid of execution within the meaning of Art. 182 (5), Limitation Act, the plaint in that suit being the application referred to in Cl. (5). There is a difference of opinion on this point between 6 Luck 234[1] which holds that it is and 5 Cal 595,[2] 17 Cal 268[3] and 47 Bom 783[4] which hold that it is not. After careful consideration we prefer the latter view. In the first place it must be accepted that the Limitation Act is an exhaustive Code in itself and that effect must be given to its provisions unhampered by questions of expediency and the like. In this we agree with 51 Mad 549[5] at page 559 and with 49 All 565[6] at p. 573. In the next it is to be observed that the period of limitation for these matters has been fixed at three years by Art. 182, and that all that Cl. (5) of Col. 3 of that Article does is to fix the starting point of that period. It commences with the words: "where the application next hereinafter mentioned has been made." Now the application next hereinafter mentioned is :

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1. S. Hasan Shah v. Mohammad Amir Mirza, (1930) 17 A I R Oudh 468=128 I C 728=6 Luck 234=7 O W N 887.
2. Kristo Coomar Nag v. Mahabat Khan, (1880) 5 Cal 595.
3. Raghunandan Pershad v. Bhugoo Lall, (1890) 17 Cal 268.
4. Govinddas Rajaramdas v. Ganpatdas Narotamdas, (1923) 10 A I R Bom 431=73 I C 1030=47 Bom 783=25 Bom L R 518.
5. Ammalu Amma v. Narayanan Nair, (1928) 15 A I R Mad 509=111 I C 210=51 Mad 549.
6. Ramcharan Sahu v. Mata Prasad, (1927) 14 A I R All 446=102 I C 96=49 All 565=25 A L J 425.

An application made . . . . . to the proper Court for execution, or to take some step-in-aid of execution of the decree or order.

Three things are therefore necessary: (1) There must be an application, (2) it must be made to the proper Court and (3) it must be either for execution, or to take some step-in-aid of execution. The words "proper Court" are defined in Expl. II to Art. 182 to mean "the Court whose duty it is to execute the decree or order". The Court in which the decree under execution was passed was the Court of the First Subordinate Judge, Second Class, while the Court in which the claim suit was filed was the Court of the Second Subordinate Judge, Second Class. The execution application out of which these proceedings arise was filed in the Court which passed the decree. It is argued on behalf of the appellant that these two Courts are the same and that the First and the Second Subordinate Judges are merely different Judges of the one Court. We do not deny that it is possible for a Court of the Subordinate Judge, Second Class, to have more than one Judge attached to it, but that is not the case here.

Under S. 16, C. P. Courts Act, the Local Government is entitled to establish as many Courts of Subordinate Judges of each class for any district as it may deem fit. It is also empowered under Section 26 to appoint an additional Judge or Judges to a Court of a Subordinate Judge of either class whenever it thinks it necessary or expedient to do so. Therefore it is clear that in the first place the Court has to be created and that in the absence of an Additional Judge or Additional Judges specially appointed under S. 26, only one Judge to each Court is contemplated. The decree under execution was obtained in Civil Suit No. 239 of 1927. The Court of the First Subordinate Judge, Second Class, in which it was obtained was created by Notification No. 2355-1248-V, dated 29th October 1923. It is in these terms:

> . . . . . the Governor in Council is pleased to declare that with effect from 1st November 1923, there shall be the following Courts . . . . . of Subordinate Judges of the Second Class in the Central Provinces: Nagpur 2.

Notifications in precisely similar terms were repeated in 1931 (No. 1898-1658-V, dated 31st October 1931) and in 1933 (No. 2683-2057-V, dated 23rd December 1933) except that in the last notification the number of these Courts was increased from 2 to 4. It is clear then that at all material times (the claim suit was instituted on 11th April 1931 and the second execution application now under consideration was filed on 20th August 1935) Nagpur had more than one Court of a Subordinate Judge of the Second Class. We have not been shown, though we afforded counsel for the appellant the opportunity of doing so, any notification under which an additional Judge or additional Judges have been appointed to any of these Courts of a Subordinate Judge of the Second Class in Nagpur. It follows then that the two Courts now under consideration were separate and distinct Courts and that therefore the claim suit was not instituted in the "proper Court" within the meaning of Art. 182 (5).

The next point is that there must be an application and on this there is, as we have said, a divergence of opinion between Calcutta and Bombay on the one hand and Lucknow on the other. There can, we think, be no doubt that a plaint cannot ordinarily be regarded as an application and since under Cl. (5) the application has to be filed "in the Court whose duty it is to execute the decree" it cannot include a plaint unless there is some special provision of law which permits it. According to the Lucknow decision this special provision is to be found in S. 47 (2), Civil P. C. That entitles an executing Court "subject to any objection as to limitation or jurisdiction, to treat a proceeding under this Section as a suit or a suit as a proceeding." It is argued therefore that the executing Court here is entitled to treat the claim suit as proceedings in execution and so to regard the plaint as an application. With the utmost respect for the learned Lucknow Judges we are unable to agree.

In the first place the option given by S. 47 (2) is expressly "subject to any objection as to limitation" and that is the very objection which has now been raised. Therefore, if the application is, or rather would be, barred by time but for the option given, it clearly cannot be exercised merely to bring the claim within limitation. In the second place we do not think that the discretion given there can be exercised at this stage. It must in our opinion be exercised when the plaint or the application is filed, and after the procedure has once been determined at that stage (subject of course to the usual control of an appellate or revisional Court) it cannot thereafter be altered. The main differences between an application in execution and a regular suit lie in the procedure followed, so it is difficult to see how once the regular procedure for a suit has been determined upon and followed out to the end some other Court can at some other time, long after all is over, turn round and call that which was and could not have been anything but a suit, a proceeding under S. 47.

There is yet another difficulty. The words "the Court" used in sub-s. (2) refer to the Court specified in sub-s. (1), that is to say "the Court executing the decree" and not to a Court trying a "separate suit". The latter kind of Court has been expressly excluded. Now O. 21, R. 63 under which the claim suit was filed provides that the order in the objection proceedings shall be conclusive, subject only to the result of a suit which a party against whom the order has been made has been given the right to institute. It is clear that the word "suit" has been used here in contradistinction to the word "application" and that the procedure contemplated is the procedure of a regular suit as contrasted with the more summary procedure of an application in execution. In the circumstances we are unable to see how there is any discretion left to a Court under S. 47 (2) when a claim suit is in question. The special provisions of O. 21, R. 63 must naturally prevail over the more general terms of S. 47 (2).

Three other cases were cited in this behalf, but we do not think they apply. In 35 Cal 202[7] at p. 207 the question before the Privy Council was about court-fees and we hardly think that an incidental remark in the judgment to the effect that a plaint in a claim suit is in effect "for revision of a summary decision" can be regarded as decisive of the present matter. Moreover, the claim suit which their Lordships were considering succeeded whereas the one here failed. If the suit succeeds, there is room for argument, though we express no opinion on that, that the original application revives and so there is no need for a second one. But there is no room for such an argument when the claim suit fails. That also distinguishes 38 Mad 535[8] and 23 Cal 829.[9] It has also to be observed that the property in dispute in the first execution application and in the claim suit was not the property in dispute here, so the second execution application out of which this appeal arises cannot be regarded as a revival of the first from any point of view.

We were then asked to apply Sec. 15, Limitation Act. None of the cases cited under this head apply. They do not refer to S. 15 nor do they deal with claim suits. The nearest approach to the present question is to be found in a passage quoted from B. B. Mitra's Limitation Act, Edn. 6, Vol. 2, p. 877, namely "that it is essential to look to the real effect of the order and not merely its form." But, in our opinion, neither the real effect of any of the orders we are considering here nor their forms have any bearing on S. 15. That Section only applies when an application has been stayed by "injunction or order." The application in question here has not been stayed by anything. It could have been made or continued side by side with the claim suit and in fact even alongside the first execution application itself. Therefore S. 15 does not apply.

Section 14 (2), Limitation Act, was also relied on but that has no application either. In the first place the other civil proceeding, which the applicant was prosecuting with due diligence, must have been "for the same relief." The reliefs here are quite distinct in the two proceedings. They relate to entirely different sets of properties. In the next place, the other civil proceeding has failed because the Court in which it was prosecuted was unable to entertain it "from defect of jurisdiction, or other cause of a like nature." That condition has not been fulfilled at all. The Court in the claim suit had jurisdiction to entertain that suit and not only did so but actually decided it. The result is that the appeal fails and is dismissed with costs. Counsel's fee Rs. 15.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 537

GRUER J.

*Asalatkhan Hajikhan Musalman* — *Defendant* — Applicant.

v.

*Samsherkhan Hajikhan Musalman* — *Plaintiff* — Non-applicant.

**Civil Revn. No. 746 of 1937, Decided on 15th August 1938, from order of 2nd Sub-Judge, Second Class, Nagpur, D/- 30th August 1937.**

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[7] **Phul Kumari v. Ghanshyam Misra, (1908) 35 Cal 202=35 I A 22=7 C L J 36=12 C W N 169 (P C).**

[8] **Krishnappa Chetty v. Abdul Khader Sahib, (1915) 2 A I R Mad 495=25 I C 11=38 Mad 535=26 M L J 449.**

[9] **Bonomali Rai v. Prosunno Narain Chowdhary, (1896) 23 Cal 829.**

**(a) Court-fees Act (1870), Ss. 7 (iv), 7 (v), Sch. 2, Art. 17 (vi) — Suit for removal of defendant from mutawalliship of wakf property and for appointment of plaintiff in his place and for rendition of account by defendant, falls under S. 7 (iv) and not S. 7 (v)—It is governed by Art. 17 (vi).**

A suit, styled as being one for removal of mutwalli and for rendition of accounts, in which the plaintiff prays that the defendant should be removed from the mutwalliship of certain wakf property, that he should himself be appointed in his place, and that the defendant should be asked to give accounts and a permanent injunction be issued against him restraining him from preventing the plaintiff from coming and occupying his portion in the residential house, falls under S. 7, Cl. (iv) and Art. 17 (vi) of Sch. 2, Court-fees Act and not under S. 7, Cl. (v). The action is one of a personal character and not one for possession and the plaintiff, if he succeeds on merits, is entitled to get a decree for the relief which he asks on the court-fees paid by him : *Case law discussed.* [P 539 C 2]

**(b) Civil P. C. (1908), S. 115 — Question of jurisdiction directly involved — Application is maintainable.**

When in a application for revision, a question of jurisdiction is directly involved, the application is fit for consideration under S. 115. [P 538 C 2]

**(c) Court-fees Act (1870)—Interpretation.**

If there is any doubt, Court ought to lean, in the matter of court-fees, towards an interpretation favourable to the litigant. [P 539 C 2]

R. N. Padhye — *for Applicant.*

Y. S. Tambe — *for Non-applicant.*

**Order.**—This suit is styled in the plaint "for removal of mutwalli and rendition of account valued at Rs. 2525". It takes its rise out of a wakf deed executed by the father of the parties in 1927. The property covered by the deed is mentioned in the schedule of the plaint and consists of certain houses in Nagpur City and a 16-annas malguzari share in a village in the Nagpur District. The defendant applicant Asalatkhan is the brother of the plaintiff non-applicant Samsherkhan. There had been previous litigation amongst these brothers and their eldest brother Sahebkhan, who was the first mutwalli after his father's death. The future management of the wakf estate was laid down in a compromise decree passed in 1932. It is alleged that the present mutwalli Samsherkhan has not been acting according to the terms of the wakf deed and the compromise application but has been mismanaging the estate. The reliefs claimed are as follows:

(1) Removal of the defendant from mutwalliship of the property mentioned in Sch. A and appointment of plaintiff as mutwalli in his place.

(2) The defendant be ordered to give accounts.

(3) That interest be awarded on the amount found due to the plaintiff on these accounts.

(4) A permanent injunction be issued against the defendant restraining him from preventing the plaintiff from coming and occupying his portion in the residential house.

Objection was taken to the suit by the defendant who said that it is in essence a suit for possession of the wakf property and should have been valued accordingly and that court-fee should have been paid ad valorem. If that be done then even according to the plaintiff's valuation of the property in Sch. A, the suit would not be triable by the Second Subordinate Judge, Second Class, Nagpur, in whose Court it has been brought. Plaintiff has valued the relief of rendition of account at Rs. 2500 provisionally, at Rs. 15 for removal of defendant from mutwalliship and his appointment in his place and at Rs. 10 for the relief of injunction. The lower Court finds that plaintiff's share of profits as sought should be Rs. 3000 and accepting the valuation of other reliefs, fixed the figure of Rs. 3025 for court-fee and jurisdiction.

As a question of jurisdiction is directly involved, the application is fit for consideration under Section 115, Civil P. C. The defendant claims that the suit falls under S. 7, Cl. (v), Court-fees Act; while according to the plaintiff it falls under S. 7, Cl. (v) and Art. 17 (vi) of Sch. 2 of the Act. The applicant defendant relies on four cases: 8 Mad 516,[1] 28 All 112,[2] A I R 1925 Mad 804[3] and A I R 1932 All 593.[4] The first case certainly favours him. It dealt with a private trust in a Hindu family and the prayer was for the removal of one member and appointment of the plaintiff as manager in his stead. It was held that this could not be done without a prayer for ejectment of the manager from the property and as it exceeded Rs. 2500 in value, the District Munsif had no jurisdiction. 28 All 112[2] was a suit under S. 539 of the old Code of Civil Procedure which corresponds to S. 92 of the present Code. This is a point of distinction from the present suit and it was held that it was not necessary in such a case for the plaintiffs to sue for possession. All that they could obtain would be a decree appointing a trustee or trustees,

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1. Sonachala v. Manika, (1885) 8 Mad 516.
2. Ghazaffar Hussain Khan v. Yawar Husain, (1906) 28 All 112=2 A L J 591=1905 A W N 201.
3. In re Mahammad Gouse, (1925) 12 A I R Mad 804=88 I C 209=48 M L J 571.
4. Parsottamanand v. Mayanand, (1932) 19 A I R All 593=142 I C 251=54 All 869=1932 A L J 777.

not necessarily themselves, declaring the properties affected by the trust and directing the trustee to bring those properties into possession. If the trustee were resisted, then a second suit for possession would have to be brought on payment of the full court-fees. Plaintiff in the present case also points out that he has not claimed possession and will be satisfied with a decree strictly according to the reliefs set forth by him. He concedes that if he is resisted he may have to bring a suit for possession later on. But he thinks that this is unlikely, as most of the property is in the hands of tenants. In a third case, A I R 1925 Mad 804,[3] cases under S. 92, Civil P. C., were distinguished and it was held that the plaintiff who claimed to succeed as sajjada of two Durgas was bound to ask for possession and had, as a matter of fact, prayed for possession. This suit then is no direct authority for the defendant. In A I R 1932 All 593[4] there was also a definite prayer for possession as mahant and it was held that the word 'possession' under S. 7 (v), Court-fees Act, makes no distinction between possession as beneficial owner and possession as a trustee or manager, and hence full court-fees were payable.

Out of the cases cited for the non-applicant, the following deal with either S. 539 of the old Code or S. 92 of the present Code: 19 All 60,[5] 19 All 104,[6] 48 M L J 514[7] and 8 Lah 730.[8] It seems clearly established that cases falling under these Sections do not require a stamp ad valorem as if for possession. 4 Mad 146[9] was a case from Malabar for the removal of the karnavan or manager of a tarwad estate, which seems to be a sort of religious trust. It was held that it would be erroneous to value such a claim as if it were for the recovery of possession of the land, for the possession of the property was throughout in the tarwad and was not affected by a change in the person who filled the office of manager. In A I R 1934 Pat 647[10] the learned Judges said that the case before them was analogous to one governed by S. 92, Civil P. C., and that what was really in dispute was a right to the mutwalliship and not to the property. The mutwalli did not derive any personal benefit from his possession as the income of all the property was to be devoted to the purposes of the trust. The applicant argues that the present case is distinguishable as most of the income from the property is for distribution by the mutwalli and only a small part is absorbed in the religious object of the wakf. In A I R 1934 Cal 250[11] it was contended that the real motive of the suit was to get hold of the properties, but it was found that the plaintiff was not entitled to possession of the debutter properties as a personal right and he need not pay ad valorem fee. In a recent Oudh Chief Court case reported in 171 I C 468[12] the claim was also for possession of the office of mutwalli and the authorities for and against the levying of full court-fees have been marshalled. The conclusion was that the trend of all the decisions of almost all the High Courts is in favour of such a suit being stamped under Art. 17 (vi), Sch. 2, Court-fees Act. It was held that the claim for appointment of mutwallis was in order, although plaintiffs could not obtain possession of the property by execution of the decree. Plaintiffs' learned counsel accepted that position and the action was therefore held to be of a personal character and not one for possession of the property and so was allowed to proceed.

I think a similar consideration ought to prevail in the present case. The plaintiff has chosen not to claim possession. I see no good reason however why he should not, if he succeeds on the merits, get a decree for the reliefs which he asks on the court-fees paid by him. If there is any doubt, Courts ought to lean in the matter of court-fees towards an interpretation favourable to the litigant. Plaintiff has already paid court-fee on the profits he expects to get out of the wakf, and, in my opinion, it is undesirable to probe further into the question of benefit as a preliminary to deciding the court-fees. The applicant himself had brought a similar suit on which, I understand, ad valorem fees were neither demanded nor paid, so that the present objection does not come with good grace from him. I see no sufficient reason for holding that the plaint is under-stamped. The value for jurisdiction will be the value for court-fees and so the case can proceed where it now lies. This application is dismissed with costs. Pleader's fee will be Rs. 50.

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[5] **Thakuri v. Bramha Narain, (1897) 19 All 60 =1896 A W N 187.**

[6] **Muhammad Siraj-ul-Haq v. Imam-ud-din, (1897) 19 All 104=1896 A W N 189.**

[7] **Sudalaimuthu Pillai v. Soma Sundaram Pillai, (1925) 12 A I R Mad 722 = 87 I C 25 = 48 M L J 514.**

[8] **Beli Ram v. Ishar Dass, (1928) 15 A I R Lah 113=110 I C 264=8 Lah 730=29 P L R 97.**

[9] **Govindan Nambiar v. Krishnan Nambiar, (1882) 4 Mad 146.**

[10] **Maulvi Sayeed v. Tafazul Hussain, (1934) 21 A I R Pat 647=153 I C 296.**

[11] **Hriday Kishore v. Hari Bhussan, (1934) 21 A I R Cal 250=149 I C 1044 = 58 C L J 171.**

[12] **Gauri Shankar v. Mohan Lal, (1938) 25 A I R Oudh 20=171 I C 468=1937 O W N 1149.**

R.M./R.K. *Application dismissed.*

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## * A. I. R. 1938 Nagpur 540

STONE C. J. AND NIYOGI J.

*Raje Gopalrao* — Appellant.

v.

*Raje Devidas and others* — Respondents.

Miscellaneous Appeal No. 31-B of 1935, Decided on 5th August 1936, from order of Second Addl. Dist. Judge, Akola, D/- 29th April 1935.

* **(a) Receiver—Application for appointment —Application and order should both name particular person as receiver—There should not be two separate orders—Only order naming particular person as receiver is appealable.**

(Per *Stone C. J.*) An application for the appointment of a receiver should not merely ask for the appointment of a receiver but should name out the person whom the applicant wants to be appointed as a receiver. If the application does not name out a receiver the Court should adjourn the matter for the naming of a receiver. It should not leave the matter of appointment at large. There should not be two distinct orders, one stating that it is just and convenient to appoint a receiver and then a later order appointing a particular person as a receiver. [P 541 C 1, 2]

(Per *Niyogi J.*) An order stating that it is just and convenient to appoint a receiver merely expresses the opinion of the Judge as to the expediency of the appointment of a receiver. Such an order is not appealable. But an order which ultimately appoints a particular person as a receiver is a final order, and is appealable under O. 43, R. 1, Civil P. C.: *13 C L J 157; A I R 1915 All 129; A I R 1915 Bom 41 and A I R 1920 All 149, Rel. on*; *A I R 1918 Mad 1146 (F B), Not foll.* [P 543 C 2]

**(b) Interpretation of Statutes—Case under Indian statute law—Principle of English law should not be imported.**

(Per *Niyogi J.*) On a matter which is governed by the express provisions of statute law in force in India, it may be dangerous to import the considerations borrowed from English law. [P 543 C 1]

M. R. Bobde — *for Appellant.*

M. B. Kinkhede — *for Respondents.*

**Stone C. J.**—A preliminary objection has been taken to the maintainability of this appeal on the ground that the only order under which the appeal lies is O. 43, R. 1 (s), which enables an appeal to be taken against an order under R. 1 of O. 40. Rule 1 of O. 40 is in the following terms so far as material:

> Where it appears to the Court to be just and convenient, the Court may by order (a) appoint a receiver of any property, whether before or after decree.

An application was made in this matter for the appointment of a receiver. It was made under O. 40, Rr. 1 and 3. It prayed that "the Court be pleased to appoint a receiver of the said property". On that there was passed an order under O. 40, Rr. 1 and 3, Civil P. C., which ends, after consideration of the merits and the law, as follows:

> The application for the appointment of receiver is therefore granted. Costs will abide the result of the suit.
>
> 3. The defendant shall put the receiver in possession of the property referred to . . .

Now it is said that the only kind of order made under O. 40, R. 1, that is appealable is a final order, that no order is a final order under that order unless it appoints a receiver by name because until a receiver by name is appointed, the matter is in an inchoate state and there is something still to be done, that is to say, a receiver by name must be appointed by some other order because of course the property cannot be put in the possession of nobody, and there is nobody to take possession of it until the Court has decided not merely that a receiver is to be appointed, but who that receiver should be. In support of the argument, a number of cases have been cited of which 42 All 227[1] states the decisions one way or another as they stood in 1919. In that case a Bench of the Allahabad High Court observed:

> It is an admitted fact that no receiver has up to the present time, been appointed. So there is no order by the Court below actually appointing a receiver, but merely an expression by the Court of its intention to appoint. O. 43, R. 1, Cl. (s) grants a right of appeal against an order under R. 1 of O. 40. O. 40, R. 1 says that, where it appears to the Court to be just and convenient, the Court may by order appoint a receiver, and it is therefore clear that the law gives a right of appeal only against an order appointing a receiver and not against an expression by the Court below of its intention to appoint. The matter is covered by many decisions. It was decided by the Calcutta High Court in 13 C L J 157[2] and also by the Bombay High Court in 17 Bom L R 510[3] and also

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[1] Muhammad Askari v. Nisar Hussain, (1920) 7 A I R All 149=54 I C 520=42 All 227=18 A L J 212.

[2] Upendra Nath v. Bhupendra Nath, (1911) 13 C L J 157=9 I C 582.

[3] Narbadashankar Mugatram Vyas v. Kevaldas Raghunathdas, (1915) 2 A I R Bom 41=29 I C 504=17 Bom L R 510.

by our own Court in 13 A L J 79.[4] The only decision in favour of the present appellant is one of the Madras High Court in 40 Mad 18.[5]

The Bench thereupon considered 40 Mad 18[5] observing that it was a case which had been referred by two Judges who took a view different from that which the Full Bench eventually took, and the Full Bench was divided, two being in favour of the view expressed and one against: 40 Mad 18[5] took the view that where there has been an order stating that a receiver will be appointed but not mentioning who the receiver shall be, that is an appealable order. The view expressed in 40 Mad 18[5] was followed in 1 Pat 625,[6] A I R 1923 Lah 48[7] and A I R 1932 Pat 360[8] took a similar view. In my opinion, the point raised in the above series of cases does not fall to be determined here. But as, in my opinion, a practice admittedly prevails in this province which is apt to lead to trouble, it may be desirable, in the light of the views expressed in those cases, to indicate what, in my opinion, the proper practice should be.

Here the first mistake, though I am informed it is a universal mistake or rather a universal practice, is to apply for the appointment of a receiver generally without in any way indicating who is to be appointed receiver. As a consequence of the application thus being at large, leaving the matter, if the application be granted, in the air, it is possible to find an order granting the application which carries the application no further. It is no good to have an order of the Court saying that a receiver is to be appointed. What is wanted is the appointment of somebody whom the Court is to place in possession of the property which he has to receive. Therefore, it is in my opinion preferable for the applicant to ask for the appointment of a named receiver. Whether that person will be appointed or not, does not matter. The Court may appoint him, or may direct the appointment of somebody else.

But, if the application does not name any receiver, then in my opinion the proper course to take is not to make an order stating that a receiver is appointed, leaving at large who he shall be; nor is it proper to make an order granting the application and still leaving the matter at large as to who the receiver ought to be. The proper course to take is to adjourn the matter for the name of a receiver to be placed before the Court so that the Court can appoint a receiver on the adjourned date. In other words, there should not be two orders one stating that the Court finds it just and convenient to appoint a receiver and stopping at that and then a later order appointing a particular person as receiver. There should be one order appointing a receiver who is named.

If the above cases are examined, it will be found that they turn upon whether the order that is being appealed against is a final order or something less than a final order. They consider whether, when the Court says a receiver shall be appointed, it is merely finding that this is a case where it is just and convenient to appoint a receiver (in which case it is of course a mere finding leading to a subsequent order) or whether the Court is making an order which is final. If it is final, since it is made under O. 40, R. 1, it is appealable. If it is not final but is leading up to some other order that is final, then it is the other order that is appealable and not this order. That sort of difficulty could, in my opinion, be avoided by not making something that purports to be an order at one date, and an order stating that a receiver is appointed without the name of the receiver, and then making another order at a later date stating who the receiver shall be.

To make two separate orders, in my opinion, might cause great inconvenience and some injustice. It may well be that such an order as the first named, that is to say, an order stating that a receiver will be appointed but leaving at large who he shall be, or an order such as it was stated was made in this case that the application is granted, when the application is merely an application for appointment of a receiver unnamed, is not such an order as O. 40, R. 1 (a) contemplates. It may be that such an order cannot be appealed against as not being a final order. But it is that order that decides the matter of substance between the parties. On the other hand it may be that that order is appealable in which case, if the person aggrieved by it waits until the next order appointing the receiver by name is passed, he will find himself on appeal met by the argument that his appeal is out of time. No litigant should, in my opinion, be placed on the horns of this kind of dilemma and it can be very easily avoided by taking care that there is only one order and that that order appoints the receiver by name. Many cases may arise where such an order will be preceded by an announcement by the Court that it has come to the conclusion that in the circumstances of the case a receiver should be appointed. But that announcement should not be so made as to amount to an order.

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[4] Ramji v. Koman Das, (1915) 2 A I R All 129 =27 I C 646=13 A L J 79.

[5] Palaniappa Chetty v. Palaniappa Chetty, (1918) 5 A I R Mad 1146=40 I C 185=40 Mad 18=32 M L J 304 (F B).

[6] Govind Ram v. Ganesh Das, (1922) 9 A I R Pat 577=69 I C 929=1 Pat 625=4 P L T 210.

[7] Firm Raghbir Singh v. Narijan Singh, (1923) 10 A I R Lah 48=72 I C 569.

[8] Nrisingha Charan v. Rajniti Prasad, (1932) 19 A I R Pat 360=142 I C 800=13 P L T 525.

In this case however these difficulties largely disappear when one considers the facts. I have quoted the end of the order appealed against and it will be observed that it directs the defendant to put the receiver in possession of the property. At the same time it never states who the receiver is and it accordingly directs the defendant to do something that is manifestly impossible. When one looks at an order and sees that it is directing a party to do something that is manifestly impossible, one is justified in seeing whether that order correctly expresses what the learned Judge did. For that purpose we have looked at the order sheet and we find that the order sheet is as follows :

> Order passed regarding appointment of receiver. Mr. Shirsalkar M. G. is appointed receiver and is directed to furnish security to the extent of Rs. 6000 in two sureties of Rs. 3000 each till 2nd May 1935, when further orders will be passed.

It appears to us, therefore, that the order that was passed on 29th April 1935, is not correctly represented by the order that was signed by the Additional Sub-Judge and it must be amended by adding after the words "costs will abide the result of the suit", the following words : "Mr. Shirsalkar is appointed receiver and is directed to furnish security to the extent of Rs. 6000 in two sureties of Rs. 3000 each till 2nd May 1935, when further orders will be passed". Further orders were passed on 3rd May 1935, Mr. Shirsalkar by that date having furnished security, there was then issued to Mr. Shirsalkar Form 9 (Appendix F, Civil P. C.) modified, that is to say, instead of its reading "you are hereby (subject to your giving security to the satisfaction of the Court) appointed Receiver . . .", it is stated "you are hereby (having given the security to the satisfaction of the Court) appointed Receiver . . .". It is now said that it was that order that was the final order, that that order should have been appealed from and that the order passed on 29th April 1935 was a preliminary or a provisional order or a mere finding from which no appeal lay. Further it is said that even if one makes the addition above mentioned to this order, still it is a conditional order and 13 C L J 157[2] and 14 C L J 489[9] are relied on in support of that proposition. I should desire to consider, when it arises, the question whether an order appointing a receiver subject to his giving security is a conditional order at all having in mind Form 9 above cited. If it be a conditional order, then it would seem that all orders passed by Indian Courts appointing receivers in the ordinary way and using the ordinary forms are conditional orders, not final orders, and not appealable—a very serious conclusion to which, as at present advised, I should not come. But, however that may be in this case, there is no question of the appointment of Mr. Shirsalkar being made conditional upon his giving security. He is according to the terms of the order sheet appointed receiver simpliciter. That appointment is coupled with the direction that he shall find security and that the matter is going to be considered at a later date, from which I infer that if he had failed to furnish security on that later date, his receivership would have been brought to an end. That this receivership began then and there is apparent from Cl. 3 of the order appealed against which directs the defendant to put the receiver in possession of the property which must be construed as meaning that the defendant should put the receiver in possession of the property forthwith.

It is further urged by way of objection that in any case this appeal should not be heard because the appellant has failed to file the right order, that he has filed the order typed at pp. 20 to 25 of the paper-book in 37-B of 1935, and he should have filed some other order, which has never been issued, discoverable by looking at the order sheet in this case. In my opinion however up to 29th April 1935, there was only one order. That order as it stands and as typed in the paper-book abovementioned is obviously defective and contains some hiatus for, as above observed, it directs the defendant to put the receiver in possession but does not mention who the receiver is. That being so, as above observed, this Court is entitled to bridge that hiatus if it can properly be done, that is to say, if the Court passing that order has merely made a slip and the order does not carry out the direction of the Court. We find on looking at the order-sheet that there has been a slip, that the Court did appoint a receiver and that that receiver's name should have appeared in this order, and we correct the order accordingly. Having reached that position that there is only one order which we correct the appellant could only attach to his appeal the one order that was in existence. That one order as it was before amendment was imperfect. We amend it and make it conform with the Judge's real order as apparent from the order-sheet. So amended, it is an order appointing a receiver by name in the ordinary way whereupon, in my opinion, the objection clearly fails.

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[9] **Srinivas Prosad Singh v. Kesho Prosad Singh, (1911) 14 C L J 489 = 12 I C 745.**

**Niyogi J.** — While agreeing with the conclusions of my Lord the Chief Justice I may add the few words which follow: There has been on the question a difference of opinion between the Madras and Patna High Courts on one side and the other High Courts on the other. The difference of opinion turns on the question whether the order of the Judge which says that it is just and convenient to appoint a receiver is a provisional order or a final order within the meaning of R. 1 of O. 40, Civil P. C. A Full Bench of the Madras High Court by two Judges against one, relying upon the practice prevailing in England in this matter, considered that the proper interpretation to be put upon R. 1 is to regard the order merely expressing the opinion of the Judge as to the expediency of appointing a receiver in the case as an order giving a right of appeal to the aggrieved party. On a matter which is governed by the express provisions of statute law in force in India, it may be dangerous to import the considerations borrowed from English law. The matter must really be decided on the true construction of R. 1 of O. 40. It says:

> Where it appears to the Court to be just and convenient, the Court may by order appoint a receiver . . . . .

It presupposes that the Court before passing an order appointing a receiver has satisfied itself about the justice and convenience of the appointment of a receiver. An expression of opinion by the Judge, whether it is named an order or a finding, that the case is a fit one for the appointment of a receiver can hardly be operative by itself so as to affect one or the other party. It is only when that expression is followed by an operative order that it would affect the interests of the party against whom it is passed so as to give him a right of appeal. That order is the order appointing a receiver contemplated by R. 1 and for the true construction of this word "order" one must read the expression in conjunction with Form 9, Appendix F, Civil P. C. That form indisputably shows that the appointment of a receiver is to be made by name so that he may give security so as to be eligible to perform his duties as receiver. From these considerations, it must follow that the only order which is appealable is the order appointing a receiver by name and that alone would give the party aggrieved a right of appeal. There is a principle underlying this because, if an appeal is permitted from a finding which contains merely an expression of the opinion of the Judge as to the expediency of the appointment of a receiver, no receiver may ultimately be appointed and the appeal would be of a purely academic character and the order would be infructuous. That was exactly the case in 13 C L J 157,[2] 13 A L J 79,[4] 17 Bom L R 510[3] and 42 All 227.[1] In all these cases the receiver had not been appointed before the appeal came on for hearing. This difficulty would show that the interpretation put upon the word "order" by the majority of the Full Bench in 40 Mad 18,[6] is open to objection.

Now turning to the facts of this case although I agree with the learned counsel for the respondents on the point of law raised by him, I am not prepared to throw out the appeal on the ground that it has not been directed against the final order. The order which was passed on 29th April 1935, a certified copy of which has been filed by the appellant along with his memo of appeal was, as has been pointed out by my Lord, the final order and intended to be as such by the lower Court. But it was left incomplete for some reason which does not appear on the record, but at the same hearing it was completed by the order appointing Mr. Shirsalkar as the receiver. This order must be read as a part of the order, certified copy of which has been filed by the appellant. If so read, it is clear that he would not lose his right of appeal. It is urged on behalf of the respondent that the appellant ought to have filed a certified copy of the order appointing Mr. Shirsalkar as the receiver in accordance with the requirements of Order 41, R. 1, read with O. 43, R. 1. I am of opinion that the order, certified copy of which has been filed by the appellant, is the final order. The fact that it was imperfect would not make it any the less a final order. I therefore agree with my Lord in overruling the contention of the respondents.

B.D./R.K. *Objection overruled.*

## A. I. R. 1938 Nagpur 544

VIVIAN BOSE J.

*Ramadhin Ramnathsao Bani* — Appellant.

v.

*Seth Sheodutt Rai Ganeshram Marwadi* — Respondent.

Misc. Appeal No. 204 of 1936, Decided on 3rd August 1938, from order of Addl. Dist. Judge, Raipur, D/- 27th July 1936.

**(a) Civil P. C. (1908), Sec. 60 — Protection given can be waived by judgment-debtor — Agriculturist mortgaging his agricultural house —Protection held waived.**

The protection given under Sec. 60 is for the benefit of the judgment-debtor and can be waived by him : *A I R 1920 Cal 424 and A I R 1927 Pat 233, Rel. on.* [P 544 C 2]

Therefore, if *A* chooses specifically to mortgage his agricultural houses he must be taken to have waived the privilege conferred upon him by this Section : *4 Bom 25 and A I R 1924 All 328 (F B), Rel. on.* [P 544 C 2]

**(b) C. P. Land Revenue Act (2 of 1917), S. 203 — Malguzar mortgaging his proprietary rights and house in abadi — Mortgagee obtaining decrees on mortgages — Foreclosure of proprietary interest — Mortgagor becoming ex-proprietary tenant of his sir lands — House mortgaged sought to be attached — Contention that house was not attachable under S. 203 as mortgagor was tenant — Mortgagor held entitled to a house site and not to particular house or site and hence house is attachable.**

A malguzar mortgaged his village which included his *sir* lands. He also mortgaged his house in the abadi. Mortgagee obtained decrees on his mortgages and foreclosed the proprietary interest, on which the mortgagor became an expro-prietary tenant of the *sir* lands. When the mortgagee sought to execute his decree against the house the mortgagor contended that under S. 203 he was entitled to a house in the abadi and as such the house was not attachable :

*Held* that the mortgagor was only entitled to a house site of reasonable dimensions in the abadi as a tenant and not to any particular site or house and hence the house was attachable : *A I R 1918 P C 84, Disting.* [P 546 C 1]

A. R. Kulkarni — *for Appellant.*

Dr. D. W. Kathalay — *for Respondent.*

**Order.**—We are concerned in this appeal with two houses which were mortgaged to the respondent-decree-holder. He sued upon his mortgage and eventually obtained a final decree for foreclosure. He now seeks to execute this decree. Two difficulties arise. One of the houses is situate at mauza Rajim. The judgment-debtor is a tenant in that village and this house which stands in the abadi is the only house which he possesses in that village. The judgment-debtor claims that he is an agriculturist and says that this house, which according to him is required for his agricultural operations, is exempt under S. 60, Civil P. C., as well as under S. 203, C. P. Land Revenue Act. The other house is situate in mauza Kulharikot. The judgment-debtor was the malguzar of this village and held *sir* lands in it which he mortgaged to the decree-holder. Now that the mortgage has been foreclosed he has become the ex-proprietary occupancy tenant of the *sir* lands. Therefore he claims that he is now a tenant of the village and being a tenant this house, which also stands in the abadi, is also exempt from attachment for the reasons given above.

The objection under S. 60 (c), Civil P. C. is easily disposed of. The protection given there is for the benefit of the judgment-debtor and can be waived by him: 24 C W N 575[1] and 6 Pat 254.[2] Therefore, if he chooses specifically to mortgage his agricultural houses he must be taken to have waived the privilege conferred upon him by this Section: 4 Bom 25[3] and 46 All 489.[4] It is to be observed that the Section is limited to cases of "attachment and sale". No question of attachment arises in a mortgage suit, especially in one for foreclosure, and so this Section does not apply. The position under S. 203, C. P. Land Revenue Act, especially when read with S. 49, C. P. Tenancy Act, is however not so simple. It is clear that under Sec. 49 the judgment-debtor lost his right to occupy the *sir* land in mouza Kulharikot (I will deal with this village first) as proprietor, the moment the decree for foreclosure was passed. Therefore he became an occupancy tenant of that land and was from that moment, so far as the present point is concerned, in the same position as any other tenant.

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[1] Uzir Biswas v. Haradeb Das Agarwalla, (1920) 7 A I R Cal 424=57 I C 249=24 C W N 575.

[2] Ganga Bishun Ram Gajadhar Ram v. Jagmohan Ram, (1927) 14 A I R Pat 233 = 102 I C 616=6 Pat 254=8 P L T 563.

[3] Bhagwandas v. Hathibhai, (1879) 4 Bom 25.

[4] Mubarak Husain v. Ahmad, (1924) 11 A I R All 328 = 84 I C 749=46 All 489=22 A L J 321 (F B).

Under S. 203 every tenant is entitled to a house site of reasonable dimensions in the abadi free of rent, and the question is whether this entitles a person who has deliberately mortgaged his house to the malguzar to claim the right to occupy the very site on which his house stands notwithstanding the mortgage. The anomaly is particularly obvious in the case of an ex-proprietary occupancy tenant, for, as malguzar, he may have had a palatial house quite unsuited to the requirements of a tenant and it hardly seems likely that Sec. 203 was intended to preserve a palatial residence to a person who may only have a few acres of *sir* land left to his name, especially when he has himself by his own act mortgaged it away. In the ordinary way I would not have felt any difficulty about the matter. As malguzar the judgment-debtor had every right to dispose of his property in the abadi, both in respect of the material of the house as well as of the site. S. 49, Tenancy Act, does not step in to preserve to an ex-proprietor any rights in the abadi by virtue of his transfer, nor does S. 203. Therefore, this part of the property ought under all ordinary rules of law to pass to the transferee just as much as the transferor's rights in say khudkasht lands. All that S. 203 does is to confer upon the transferor when he became a tenant, and even then qua tenant and not qua ex-proprietor, a right to a house site of reasonable dimensions, not to any particular house site which he chooses to demand whatever its dimensions, but to a house site of reasonable dimensions. The proprietor of the mahal is primarily entitled to allot the site but if any dispute arises regarding the allotment, then S. 203 (4) directs that it shall be settled by a Revenue Officer not below the rank of a Tahsildar.

It is also clear both from the Section (*see* the Proviso to sub-s. 3) as well as from the rulings that the privileges conferred under S. 203 relate to the house site and not to the materials of the house itself. Therefore a tenant who has been allotted a house site in the abadi is free to sell or mortgage the materials of his house, though he cannot transfer the site unless the malguzar consents. S. 203 (8) expressly exempts the terms of any contract between the proprietor and the holder of a site in the abadi. Therefore transfers of the site can also be effected with the consent of the malguzar. Consequently, since S. 203 does not prevent the proprietor of the abadi from transferring his own property when he is a proprietor, and since it does not confer any rights or privileges upon him by reason of the transfer, and since it allows transfers even by tenants with the joint consent of the tenant and the proprietor, it seems to me that the usual rule must prevail and that the judgment-debtor must be held to his contract and be bound by his own consent. As I have said ordinarily I would not have felt any doubt about the matter but the ruling reported in 14 N L R 165[5] at p. 174 raises a difficulty. That was also a case in which the malguzars of a village became exproprietary tenants of the *sir* under a final decree for foreclosure and this is what Batton and Stanyon A. J. C.s say about the houses in the abadi:

> As regards houses in the abadi, the rights of the judgment-debtors now rest on the wajib-ul-arz, and the decree-holder, though undoubtedly owner of the soil and possibly by operation of the law of mortgage, owner also of the houses standing on the soil, cannot evict them while they remain occupancy tenants.

The case went up to their Lordships of the Privy Council but though the Board supported the judgment of the learned Additional Judicial Commissioners generally, this particular point was not before them. However, even so it remains a Bench decision which under the convention now obtaining binds me, so the only question is whether it can be distinguished. I think it can. S. 203 of the present Land Revenue Act was not in existence at that date and so the learned Judicial Commissioners were not considering its provision, and though the Section is based on the customs obtaining in the various wazib-ul-arzes then in force these documents were not uniform in their terms. Unfortunately the terms of the particular wazib-ul-arz which governed that case have not been reproduced in the judgment and so it is not possible to determine whether they were identical with the terms of S. 203. It seems to me unlikely that they could have been and in the absence of anything to show that the terms were the same, I feel free to follow my own view. I therefore hold that the judgment-debtor is liable to eviction and that his only rights in mauza Kulharikot are to obtain a house site of reasonable dimensions from the proprietor and failing him from the Revenue Officer appointed for the purpose under the Land Revenue Act.

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[5] Narayan Ganesh Ghatate v. Baliram, (1918) 5 A I R P C 84=48 I C 141=46 Cal 76=14 N L R 165=45 I A 179 (P C).

As regards the other village Rajim the situation is different. The judgment-debtor had no proprietary rights in it at the time of the mortgage and therefore it must be assumed, until the contrary is shown, since they are admittedly tenants in the village, that the house site in question was assigned to them by the proprietors under S. 203. I am informed this village is not one of the villages notified under the Proviso to sub-sec. 7 and so it follows, the judgment-debtors had no right to transfer the site without the consent of the malguzar ; all that they could do was to mortgage the materials under the Proviso to sub-s. (3).

But the difficulty is that this question was not raised, as it should have been, before decree, and since the decree directs foreclosure of the whole, and since the law allows a transfer with consent, it follows the decree cannot be challenged at the execution stage. Of course the rights of the proprietor who was not a party to this suit cannot be affected and if he chooses to step in and assert his rights to the site as opposed to the materials, and if he chooses to maintain the judgment-debtor in possession, his objection will naturally have to be heard. But so far as the judgment-debtor is concerned the decree must be regarded as final. The order of the lower Court is upheld and the appeal is dismissed with costs.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 546

NIYOGI AND GRUER JJ.

*G. N. Godbole, Receiver (In Insolvency Case No. 4 of 1932)* — Appellant.

v.

*Mt. Nani Bai w/o Mahadeo Deshmukh and another* — Respondents.

Second Appeal No. 162-B of 1935, Decided on 22nd July 1938.

**(a) Provincial Insolvency Act (1920), Ss. 4, 56 (3)—Receiver purporting to realize assets of insolvent must show that they belong to him—He cannot remove stranger in possession—Even if proceedings under S. 4 be held to be tantamount to suit under S. 53, T. P. Act, such suit must be within six years as provided by Art. 120, Limitation Act.**

For the Receiver to realize the assets of the insolvent, they must be shown to belong to the insolvent. If they do not, the Receiver has no present right to remove a stranger in possession ; he would have to file a separate suit against him. Even on the view that proceedings under S. 4, Insolvency Act, should be held to be tantamount to a suit under Sec. 53, T. P. Act, it would follow that the suit would have to be within time when the insolvency proceedings began. This would be six years under Art. 120, Limitation Act, from the date of accrual of the cause of action : *A I R 1931 Lah 70, Rel. on.* [P 548 C 1]

**(b) Provincial Insolvency Act (1920), Ss. 53, 54 and 4—Scope of—Ss. 53 and 54 confer jurisdiction upon Insolvency Court and limit operation of S. 4.**

Sections 53 and 54 do not merely lay down a rule of substantive law or a rule of evidence favouring the Official Receiver but also confer jurisdiction upon a Court of Insolvency and hence limit the operation of S. 4 : *A I R 1930 Oudh 314, Rel. on* ; *A I R 1929 All 105, Commented upon* ; *(View of Sen J. approved.)* [P 549 C 1]

**(c) Provincial Insolvency Act (1920), Ss. 4, 53—S. 4 does not empower Insolvency Court to annul transactions entered into more than two years prior to petition on ground that they are voidable under S. 53, T. P. Act—Such transactions must be challenged by separate proceedings in Civil Court — Question whether transaction is fraudulent can be agitated only under S. 53 which only covers transactions made within two years of petition.**

Section 4, Insolvency Act, does not empower an Insolvency Court to annul transactions entered into more than two years prior to the petition for insolvency, which are voidable under the ordinary law under S. 53, Transfer of Property Act. Such transactions must be challenged, if at all, by separate proceedings in a Civil Court and not in an Insolvency Court under the Insolvency Act. If the Insolvency Court is competent to determine the legality and propriety of transfers which had taken place more than two years before the order of adjudication, there could have been no object in prescribing a shorter term in S. 53 of the Act. The question whether a transaction is bogus or fraudulent is therefore one which cannot be agitated in an Insolvency Court except under S. 53 of the Insolvency Act which only covers transfers made within two years of the petition : *A I R 1930 Oudh 314 ; A I R 1921 Mad 204 and A I R 1932 Pat 129, Rel. on ; A I R 1929 All 105, Ref., (Sen J.'s view approved) ; A I R 1926 All 470, Expl. ; A I R 1932 Cal 642, Disting.* [P 549 C 1, 2]

**(d) Practice—Pleadings—Calling deed both fraudulent and bogus is not clear piece of pleading—Deed may be fraudulent without being bogus.**

To call a deed both fraudulent and bogus is not a clear case of pleading. Fraud would nearly always be committed in executing a bogus deed, but a deed may be fraudulent without being bogus and so it is better to keep the positions separate. [P 547 C 1]

M. R. Bobde — *for Appellant.*

M. B. Kinkhede and A. R. Kulkarni — *for Respondents.*

**Judgment.**—This appeal arises out of insolvency proceedings in which one Mahadeo Deshmukh was adjudicated insolvent on 29th July 1932 on his application dated 16th January 1932. The present appellant is the Receiver in that case and the respondents are Mt. Nanibai, wife of Mahadeo and Sahebrao, their minor son. The question at issue was whether the Receiver was entitled to have declared void a partition which took place in that family on 22nd February 1923 as evidenced by a deed of partition of that date and to pursue the shares which went to the wife and son, in order to satisfy pre-partition debts incurred by the insolvent. These debts are acknowledged in promissory notes dated 11th June 1922 and 4th August 1922 in favour of Madanlal and Shriram respectively, on which about Rs. 3100 were due on decrees when the insolvency case was started.

The Receiver's application dated 20th January 1933 purports to be under Sec. 4, Insolvency Act, and states that the deed of partition is fraudulent and bogus, intended to shield the property from creditors, that the minor son and the wife are shown in the village papers as in possession of their shares and so the deed must be set aside before the Receiver can take actual possession; hence the prayer that, being void as against the Receiver it should be set aside.

To call a deed both fraudulent and bogus is not a clear piece of pleading. By 'bogus' is meant that the partition was a mere cloak or blind, i. e. there was no partition but a pretence of making one. On the other hand, to say that a fraudulent deed of partition was effected means that there was a real partition executed with a fraudulent intent. Of course fraud would nearly always be committed in executing a bogus deed, but a deed may be fraudulent without being bogus, and so it is better to keep the positions separate. The trial Court however finds that in the present case the partition deed is fraudulent and bogus and liable to be annulled, while the lower Appellate Court finds that there was nothing fraudulent or bogus about the partition which should not be annulled so long afterwards. The first Court also found that these pre-partition debts were incurred by the insolvent as manager and for joint family purposes, and that finding has not been interfered with by the lower Appellate Court. The decision of the latter Court depends on its finding that provision was made in the partition deed for the payment of existing debts and so there was no fraud on creditors, and secondly, it is found that the remedy of the Receiver is barred by limitation.

Although this is a second appeal the findings of fact are questioned by learned counsel for the appellant. It is therefore necessary to settle them before seeking for the law to be applied. There can be no doubt that the partition was real and not bogus. The shares were determined, and it was carried into effect by mutation of names and has been acted on for a number of years by the giving of kabuliyats mentioned by the witnesses. It was also not contended that it was unreal in so far as the insolvent's brother Rangarao was concerned. The finding of the lower Appellate Court on this point is therefore unassailable. Secondly, were the debts borrowed by Mahadeo as manager for family purposes? The Receiver proved that Mahadeo was a young man of extravagant, and to a certain extent of dissipated habits, but he failed to prove that these particular debts were incurred for the purposes of vice. On the contrary the first Court believed the evidence that the debts were incurred for agricultural purposes. If so, they would be binding even if there would have been no necessity to borrow them if Mahadeo had been more careful of his money. The lower Appellate Court, although it recognizes that Mahadeo was a young man of weak intellect and dissipated habits does not find that the debts were not binding; on the contrary it proceeds on the assumption that they were, but that the non-applicants are protected because they made provision for their payment. The concurrent finding of the two Courts on the point must be accepted by us.

Taking the partition to be a real transaction, and assuming for argument's sake that it was made to elude the creditors, let us see what follows. It has been established in two recent cases of this Court, I L R (1938) Nag 10[1] and I L R (1938) Nag 136,[2] following 51 Mad 361[3] and 42

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[1] Firm Govindram Dwarkadas v. Nathulal, (1937) 24 A I R Nag 45=170 I C 724=I L R (1938) Nag 10.

[2] Jainarayan Mulchand v. Sonaji, (1938) 25 A I R Nag 24=174 I C 621=I L R (1938) Nag 136.

[3] Subramania Ayyar v. Sabapathy Ayyar, (1928) 15 A I R Mad 657=110 I C 141=51 Mad 361 =54 M L J 726 (F B).

Mad 711[4] and other authorities that a creditor cannot in execution of a decree against a father alone on a pre-partition debt proceed against the shares allotted to the sons at partition, the reason being that after partition that property neither belongs to the father nor has he any disposing power over it. In such circumstances the only course for the creditor would be to file a suit against the son on the score of his pious obligation to pay his father's debts and get a decree to reach the son's share. Now, in insolvency the creditor cannot proceed against the son's property directly when the son is not adjudicated insolvent. He could however have either filed a suit against the son as above, or sued under S. 53, T. P. Act, for a declaration that the partition was fraudulent and did not bind him. Is the Receiver in any better position than this? If he can invoke S. 53, Provincial Insolvency Act, he undoubtedly is, but when he has to fall back on Sec. 4 of that Act, how is he situated?

The words in that Section "subject to the provisions of this Act" are certainly not otiose, and one of the provisions which must apply is Sec. 56 (3). This is conceded even when it is argued that Sec. 4 is not subject to Sec. 53, for instance by Dalal J. in 51 All 550[5] at p. 557. For the Receiver to realize the assets they must be shown to belong to the insolvent. If they do not, the receiver has no present right to remove a stranger in possession; he would have to file a separate suit against him. Even on the view that proceedings under S. 4, Insolvency Act, should be held to be tantamount to a suit under S. 53, T. P. Act, it would follow that the suit would have to be within time when the insolvency proceedings began. This would be six years under Art. 120, Limitation Act, from the date of accrual of the cause of action: 12 Lah 262.[6]

Authorities certainly differ on this question whether Sec. 4, Provincial Insolvency Act, allows the Court to travel beyond the restriction of two years fixed by S. 53 of the Act, and deal with a transfer alleged to be voidable because it is in fraud of creditors, as distinct from bogus or sham. In 48 All 414[7] the transaction, a lease, was entirely fictitious. Sulaiman J. distinguished such a transfer from one of the kind under discussion, i. e. one which was a good transfer when originally made but subject to an option of avoiding it to be exercised by the Receiver. He held that Section applies to the fictitious transfer, while Mukerji J. held that it applies to neither kind and that the only possible Section was Sec. 53 for which the alleged distinction in the nature of these transactions did not exist. It would appear that Sulaiman J. did not give a decided opinion about voidable transfers. He did say that the limitation of two years prescribed under S. 53 is applicable to all cases where the transfer when originally made was a good one, but he also said that he would require further consideration before expressing any final opinion as to whether the expression "of any nature whatsoever" in S. 4 would cover a prayer to avoid a document voidable under S. 53, T. P. Act. In 51 All 550[5] the following two questions were referred to a Full Bench:

> (1) Whether an Insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication, having regard to the provisions of Sec. 53, Insolvency Act.
>
> (2) Would it make any difference if the receiver alleges that no transfer had been intended from the very beginning and no title had passed, the transaction being a mere paper transaction and void?

Dalal and King JJ. answered the first question in the affirmative, and so far then the second did not arise. Sen J. dissenting held that only where the transfer was intended not to be operative could the Receiver apply for its annulment under S. 4. In reviewing previous authorities, Dalal J. said that Sulaiman J. in 48 All 414[7] was of opinion that the jurisdiction of the Insolvency Court extended to all transactions raising questions of title whatever their date may be. With due respect we think that Sulaiman J. did not go to that length. At p. 557 of 51 All 550[5] Dalal J. lays down that S. 4 deals with jurisdiction and the words "subject to the provisions of this Act" mean that the jurisdiction is circumscribed only by such subsequent Sections as deal with the jurisdiction of the Court. On this view he holds that it is circumscribed by S. 56 but not by Ss. 53 and 54. We confess that we are unable to follow this distinction, and prefer the reasoning of Sen J. who says that Ss. 53 and 54 do not merely lay down a rule of substantive law or a rule of evidence favouring the Official Receiver but also confer jurisdiction upon a Court of Insolvency, and hence limit the operation of Sec. 4. The Judge pertinently asks if Sec. 56 imposes restrictions upon the power of the Court of Insolvency, why not S. 53.

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[4] Arumugam Chetty v. Muthu Koundan, (1919) 6 A I R Mad 75=52 I C 525=42 Mad 711=37 M L J 166 (F B).

[5] Anwar Khan v. Muhammad Khan, (1929) 16 A I R All 105=113 I C 819=51 All 550=1929 A L J 155 (F B).

[6] Lal Singh v. Jai Chand, (1931) 18 A I R Lah 70=130 I C 778=12 Lah 262=31 P L R 1014.

[7] Hari Chand Rai v. Moti Ram, (1926) 13 A I R All 470=94 I C 429=48 All 414=24 A L J 495.

The view expressed by Sen J. was followed in 5 Luck 742[8] by Muhammad Raza and Pullan JJ. This case is precisely in point as the deed in question was alleged to be in fraud of creditors, executed to defeat them and not binding on the Receiver or the creditors. The learned Judges referred to the conflict of authority between the Allahabad and Calcutta High Courts which led to the genesis of S. 4, and approved of the opinion of the Madras High Court in 44 Mad 524,[9] that the Section declares what has been the law all through. Referring to Sen J.'s judgment, they say :

> The learned Judge has laid emphasis on the limited nature of the jurisdiction of the Insolvency Court as clear from the Act itself and we would support this view by referring to the head-note which appears to the Act over the Ss. 51 and 55 inclusive. The head-note runs : 'Effect of insolvency on antecedent transactions.' We do not consider that where in Sec. 53, which is governed by this heading, the Act gives the Court power to annul transactions entered into within two years, we should go out of our way to find that a general Section in the same Act gives power to the Court to annul transactions which may have been entered into at any time and which are viodable under the ordinary law under S. 53, T. P. Act. In our opinion transactions of this nature must be challenged, if at all, in the ordinary Civil Court and not in the Insolvency Court. This was the view expressed by a Bench of this Court in 5 O W N 964,[10] and it appears from the judgment of the Full Bench of the Allahabad High Court, to which we have referred, that the Judges of the Court are far from being unanimous in holding the contrary view.

These remarks have our respectful concurrence and we also feel the force of Sen J.'s observation :

> If the Insolvency Court is competent to determine the legality and propriety of transfers which had taken place more than two years before the orders of adjudication there could have been no object in prescribing a shorter term in Sec. 53 of the Act.

We are aware that in 59 Cal 1135,[11] after a review of the authorities, the opinions of Mukerji and Sen JJ. were not followed, and it was held that the Insolvency Court could decide questions of title where S. 53 had no application. The matter before the Court however was a sham or benami transaction and not a real but fraudulent one, and so these remarks are really obiter dicta so far as we are now concerned. We would indeed agree with these remarks of Mukerji J. in the Calcutta case[11]:

> It has been argued that S. 55, Cl. (c) of the Act militates against the avoidance of transfers under Sec. 53, T. P. Act. In my opinion, the true interpretation of that Section is that insolvency itself will not invalidate the transfer except in cases provided for by the Act itself, but the avoidance of transfers under the general law or under S. 53, T. P. Act, is not affected by the Section.

We have to add to this only that in our opinion such avoidance under the general law or under the Transfer of Property Act must be by separate proceedings and not under the Insolvency Act. In 11 Pat 9[12] the Judges had to deal with a transaction alleged to be benami and in fact no transfer at all. However a clear distinction was drawn by the Judges between such cases and those of real transfers, and their opinion was that S. 4 was controlled by S. 53 only in respect of real transfers made by the insolvent. In view of their discussion of the whole question, that opinion, though in part obiter, is valuable.

In the above discussion we have proceeded on the assumption that the partition could be avoided because no proper provision has been made for payment of debts. Our conclusion being, that whether this be so or not, the question could not be agitated in the Insolvency Court except under S. 53 of that Act, we need not launch into a detailed examination of the nature of the partition. We note briefly the objections to it that it repudiates the debts incurred by Mahadeo and throws the liability for their payment upon the share allotted to him which share is less by eight pies than that to which he was legally entitled. Further, it does not provide for the debts before allotting the shares but says that Mahadeo should pay them out of his share. On the other hand it appears that at the moment the property allotted to Mahadeo was Rs. 10,000 which was more than sufficient to cover the debts amounting then to about Rs. 9000, Sulaiman Ag. C. J. in 53 All 868[13] at p. 877 has discussed what the making of a proper provision for debt means, and the above arrangement certainly does not come up to his criterion as the debts were not provided for before the father was given his share in the remainder; nor was that share his legal one on a par with that of his son. On that view of the matter the partition might have been avoided if appropriate steps to do so outside the Insolvency Act had been taken in time. As things are, we find that the decision of the lower Court is correct, and dismiss this appeal with costs on the appellant. Pleader's fee Rs. 100.

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[8] Amjad Ali v. Nand Lal, (1930) 17 A I R Oudh 314=128 I C 217=5 Luck 742=7 O W N 377.

[9] Official Receiver, Tinnevelly v. Sankaralinga Mudaliar, (1921) 8 A I R Mad 204=62 I C 495=44 Mad 524=40 M L J 219.

[10] Hinge Lal v. Jawahir Prasad, (1928) 5 O W N 964=114 I C 126.

[11] Radhakrishna Thakur v. Official Receiver, (1932) 19 A I R Cal 642=139 I C 323=59 Cal 1135=56 C L J 446=36 C W N 492.

[12] Biseswar Chaudhury v. Kanhai Singh, (1932) 19 A I R Pat 129=136 I C 299=11 Pat 9=13 P L T 298.

R.M./R.K. *Appeal dismissed.*

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13. Bankey Lal v. Durga Prasad, (1931) 18 A I R All 512=135 I C 139=53 All 868=1931 ALJ 917 (F B).

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## * A. I. R. 1938 Nagpur 550

STONE C. J. AND VIVIAN BOSE J.

*Seth Suganmal and others — Plaintiffs* — Appellants.

v.

*Mt. Umraobi w/o Abdul Hannan and others — Defendants* — Respondents.

First Appeal No. 101 of 1935, Decided on 7th March 1938, from decree of Sub-Judge, First Class, Balaghat, D/- 26th August 1935.

*** (a) Registration Act (1908), Ss. 87, 49, 72—Defect in registration one of jurisdiction as opposed to one of procedure is not curable under S. 87 —Sec. 49 applies and document is inadmissible in evidence — Documents registered through mistake of every one including Sub-Registrar at a place at which no portion of property mentioned in document is situate within jurisdiction of Sub-Registrar—Registration is wholly void — Parties concerned cannot however be made to suffer by reason of defect — Decision by competent Court that registration is invalid is enough to enable the parties to present document for re-registration and for Registrar to register it as if document is presented for registration for the first time—No question of limitation arises—If registration is refused, civil suit will lie under Sec. 72 to compel registration.**

Registration to be effective must be in accordance with the provisions of the Registration Act. If it is not, and if the defect is not curable as a defect of procedure under S. 87, then S. 49 applies and the document cannot be used for any purpose specified therein. S. 87 deals with defects of procedure and if the defect is one of jurisdiction, as opposed to one of procedure, then it is not curable. [P 551 C 2]

Where therefore by a mistake on the part of everybody concerned, including the Sub-Registrar, a document is registered at a place, although no portion of the property is situate within the jurisdiction of the Sub-Registrar there, the defect being a defect of jurisdiction, it is not curable under S. 87 and registration of the document is wholly invalid and the document is inoperative to effect the transfer, although there is no misdescription, fraud or attempt to mislead : *2 I A 210 (P C) ; A I R 1931 P C 52 ; 23 All 233 (P C) ; A I R 1929 P C 279 and 18 Cal 556, Rel. on ; A I R 1936 P C 301, Disting.* [P 551 C 1, 2]

The parties however cannot be made to suffer by reason of the defect in registration and cannot be placed in a worse position than they would have been if the Registrar had done his duty and refused to register the document on the ground that it did not lie within his sub-district, and if it is held by a Court competent to decide the matter, that the registration is invalid because the Sub-Registrar had no jurisdiction to accept the document for registration, the property comprised in it being outside the territorial limits of his jurisdiction, that is enough to enable the parties to present the document for re-registration and is enough to enable the proper registering authority to proceed as if the document was being presented to him for registration for the first time. No question of limitation arises because there is no limitation for the re-registration of a document. If the registration is refused and upon appeal the Registrar also refuses to direct registration, then a civil suit will lie under S. 72 to compel registration. [P 553 C 1, 2]

**(b) Partnership Act (1932), Ss. 4, 8 — Mere fact that two persons or sets of persons separately advance money to third on joint security does not make them partners—Isolated act of money-lending cannot be regarded as trade or occupation.**

The mere fact that two persons or sets of persons separately advance money to a third on a joint security does not make them partners. There can be a partnership in respect of a single venture. S. 8 is clear about that; but before that can happen the other requisites of partnership must be present. Under S. 4 there must be a "business" and there must be an agreement to share the profits of that business, and the business must be carried on by all or any of the partners acting for all. An isolated act of money-lending on a joint security cannot be regarded as constituting a business within the meaning of that definition. Money-lending may be regarded as a trade or an occupation but not an isolated act of lending money. [P 553 C 2 ; P 554 C 1]

J. Sen — *for Appellants.*

D. N. Chaudhari — *for Respondents.*

**Judgment.** — The plaintiffs-appellants sued on a mortgage dated 14th December 1928 for Rs. 4000. The property covered by the mortgage is situate at Balaghat, but by a mistake on the part of everybody concerned, including the Sub-Registrar, the document was registered at Baihar, although no portion of the property was situate within the jurisdiction of the Sub-Registrar there. There was no misdescription and there was no fraud; nor was there any attempt to mislead. The deed sets out the situation of the property truthfully and accurately as follows :

> In lieu of this amount we have hereby mortgaged without possession with you our houses in mouza Lamta, Talke Mau, Tahsil and District Balaghat.

The defendants' case is that the Sub-Registrar at Baihar had no jurisdiction to register the deed and so the registration is wholly invalid, and that is the real question we have to investigate here. The learned Judge of the lower Court finds that there was fraud, but we agree with counsel for the plaintiffs-appellants that there is no trace of fraud to be found. It was not pleaded and there is no hint of it in the evidence, nor is there any issue about it. The lower Court's finding is this :

> The Sub-Registrar who registered the document must have naturally thought that a document presented before him could be registered there, and to this extent the parties practised a fraud on him in the hope that their troubles of going to Balaghat would be avoided in case the Sub-Registrar does not detect his want of jurisdiction to register the document at Baihar.

We agree that this is pure conjecture. The learned counsel for the defendants-respondents endeavoured to support this finding by reference to the following statement made by the plaintiffs' counsel :

> The executants resided at Baihar and some of them being females, they induced the mortgagees to go over to Baihar, where the bond was scribed and registered as a matter of convenience.

He stated that this indicated an improper motive which in the circumstances amounted to fraud. We are unable to read the statement in that light. At the utmost it means that the parties thought the document could be registered at Baihar as well as at some other place, and Baihar being the more convenient, they naturally selected that. This is particularly so when we find that the plaintiffs brought the question of fraud to the notice of the defendants by going out of their way specially to emphasize that there had been no fraud twice in the course of their statements and even then the defendants did not attempt to raise the issue. In the circumstances it is impossible to sustain this finding. What then is the legal position? If a document is wrongly registered because every one concerned, including the Sub-Registrar, has made an innocent mistake in good faith, can it be given effect to as a registered instrument?

There are a number of rulings which decide that if fraud is present, then the document cannot be acted upon, but that is because of the general principle of law that fraud vitiates all. It is not peculiar to registered instruments and does not spring out of the Act. 41 Cal 972,[1] 59 Mad 539[2] and 56 All 468[3] are all illustrations of that, and so though they happen to deal with registered instruments, they are not relevant here. But 10 Pat 481[4] which is also a Privy Council ruling is in point. What their Lordships say there is that registration to be effective must be in accordance with the provisions of the Act and that if it is not, and if the defect is not curable as a defect of procedure under S. 87, then S. 49 applies and the document cannot be used for any of the purposes specified therein. They point out that S. 87 deals with defects of procedure and state that if the defect is one of jurisdiction as opposed to one of procedure, then it is not curable. To the same effect are 23 All 233[5] at p. 241 and 7 Rang 624[6] at p. 632. In the latter case their Lordships observed at p. 632 that want of territorial jurisdiction is one of the defects which is not curable. In the circumstances we have no option but to hold that the document is inoperative to effect a mortgage. It is true their Lordships indicated more liberal lines of interpretation in 24 W R 75[7] at p. 77 and that their Lordships repeated these observations in 7 Rang 624[6] and in 63 Cal 1[8] at p. 8, but they were all cases of defects in procedure

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1. Harendra Lal v. Haridasi Debi, (1914) 1 A I R P C 67=23 I C 637=41 Cal 972=41 I A 110 (P C).
2. Venkatarama Rao v. Sobhanadri Appa Rao, (1936) 23 A I R P C 91=161 I C 29=59 Mad 539=63 I A 169 (P C).
3. Collector of Gorakhpur v. Ram Sundar Mal, (1934) 21 A I R P C 157=150 I C 545=56 All 468=61 I A 286 (P C).
4. Dottie Karan v. Lachmi Prasad Sinha, (1931) 18 A I R P C 52=131 I C 321=10 Pat 481=58 I A 58 (P C).
5. Mujib-un-nissa, v. Abdur Rahim, (1901) 23 All 233=28 I A 15=7 Sar 829 (P C).
6. Ma Pwa May v. Chettiyar Firm, (1929) 16 A I R P C 279=120 I C 645=7 Rang 624=56 I A 379 (P C).
7. Sah Mukhun Lall Panday v. Sah Koondun Lall, (1875) 2 I A 210 = 24 W R 75 = 3 Sar 509=15 Beng L R 228 (P C).
8. Sateendranath Chaudhuri v. Jateendranath Chaudhuri, (1935) 22 A I R P C 165=157 I C 419=63 Cal 1=62 I A 265 (P C).

and in view of what their Lordships say about want of territorial jurisdiction, it is unfortunately impossible for us to come to any other conclusion. This is also the view of a Calcutta Full Bench in 18 Cal 556.[9]

As regards I L R (1936) Nag 104,[10] there was no want of inherent jurisdiction in the Sub-Registrar in that case. The property being situate within his sub-district he was empowered to take seisin of the document and to exercise the powers vested in him of determining whether, on the face of it, the deed purported to make a prohibited transfer. Having exercised those functions, right or wrong, and having registered the document, their Lordships held that the registration could not be ignored. But in the view which their Lordships take in the other cases we have cited, it is impossible for us to hold that the Sub-Registrar of Baihar had seisin of the matter we are now considering. He was therefore incapable of exercising any powers in respect of the document in question here.

That however does not end the matter. We would be sorry to administer the law in such a manifestly unjust manner unless driven to it. Consider the following case. The property conveyed lies along the border of two adjacent sub-districts. The boundary between them is not clearly defined and a doubt exists as to whether the property lies in sub-district A or sub-district B. A deed in respect of this property is presented to the Sub-Registrar at A. He refuses to register it on the ground that the property lies in sub-district B. The document is then taken to the other Sub-Registrar and he also refuses to register because, in his opinion, the property is situate in sub-district A. What is to happen? Are the unfortunate parties to be without any remedy? What is to happen if either registers mistakenly thinking that the property lies within his jurisdiction. Are the parties still to suffer?

Let us go a step further. The parties finding that they cannot obtain registration either at A or at B go in appeal to the Registrar under S. 72 and he decides in favour of one or the other and decides wrongly. Can his decision be questioned years after and the document be invalidated? It would be monstrous if the law was as unjust as that. It would be shocking if the Courts could not give relief. We cannot believe that the system of justice which we administer is so bankrupt of resource and good sense as to be unable to afford a remedy. If the trouble had arisen in the Civil Courts, the matter would of course have been curable under S. 21, Civil P. C. But in view of their Lordships' pronouncements, we cannot take that view in a case of wrong registration. All the same we are of opinion that the parties cannot be placed in a worse position than they would have been in, if the Sub-Registrar had done his duty and refused to register the document on the ground that the property did not lie within his sub-district. Had he done that, one of the two things would have happened. The parties would either have gone to the Sub-Registrar at Balaghat or they would have appealed to the Registrar under S. 72 and he would then have decided where the document should be registered. The position is much the same as the one which occurred in 24 W R 75[7] and the observations of Sir Barnes Peacock about the necessity of protecting persons who are not easily able to obtain proper legal advice and who therefore rely upon a public officer to do the right thing by them are of peculiar force here. Also as their Lordships observe:

> If the registering officer refuses to register, the mistake may be rectified upon appeal under S. 83 (now S. 72) or upon petition under Sec. 84 (now Ss. 73-75) as the case may be; but if he registers where he ought not to register, innocent persons may be misled and may not discover until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights.

The facts of that case were as follows: A document was executed on 10th July 1868 and it was registered on 12th November 1868 when it ought not have been registered. In course of time, a suit was instituted and the objection about invalid registration was upheld. The document was then re-presented for registration and this time registration was refused on two grounds: (1) that it was beyond time and (2) that no refusal to register had been endorsed on the deed. On this a petition was presented to the High Court and the High Court ordered registration. Thereupon the registering authorities complied and registered the document. Further litigation ensued and the matter eventually went up to the Privy Council. Their Lordships held that the High Court had no power to order registration and so their order was a nullity; but they also decided that the registering officer had authority of his own motion to re-register and having exercised that authority, the mere fact that he was influenced by an incompetent order of the High Court in doing what he might have done without it, did not invalidate the registration. In examining the Registrar's powers to re-register, their Lordships observed that

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[9] Baij Nath Tewari v. Sheo Sahoy Bhagu, (1891) 18 Cal 556 (F B).

[10] Parashram Balaji Deshmukh v. Asaram, (1936) 23 A I R P C 301=164 I C 345=I L R (1936) Nag 104 (P C).

> though the statute makes it imperative to present an instrument for registration within four months from the date of its execution, no time is fixed within which a deed presented and accepted for registration must be registered; and indeed, from the nature of the requirements of the Act, the period within which the registration must be completed could not have been fixed.

They held that it was competent for the registering authority in those circumstances voluntarily to register the document and that it was not necessary to have the orders of a District or other Court to authorize re-registration. As regards the absence of an endorsement containing a refusal to register, their Lordships observed that

> when it was declared by a competent Court that the registration was invalid, the registering officer might still have proceeded to compel the appearance of the vendors and, upon their appearance and admission of the execution of the deed, to register it.

This then seems to be the solution of the present difficulty. As a Court competent to decide the matter we hold that the registration was invalid because the Sub-Registrar at Baihar had no jurisdiction to accept the document for registration, the property comprised in it lying outside the territorial limits of his jurisdiction. That, as their Lordships observe, is enough to enable the parties to present the document for re-registration and is enough to enable the proper registering authority to proceed as if the document was being presented before him for registration for the first time. No question of limitation can arise because, as their Lordships held, there is no limitation for the re-registration of a document. We therefore adjourn this appeal to enable the document to be re-registered and allow the plaintiffs two months from this date, but no more to re-present it for registration before the proper registering authority. When that has been done, a formal order decreeing the plaintiffs' claim with costs will be made. Of course we have no power to order re-registration. That power, as their Lordships point out, resides

> in the civil Court within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered. (S. 77 of the present Act.)

But in view of our observations and in view of the decision of their Lordships of the Privy Council in 24 W R 75,[7] we can hardly think that there will be any trouble. If however registration is refused and upon appeal the Registrar also refuses to direct registration, then a Civil suit will lie under S. 72 to compel registration and we would be obliged to keep this appeal pending until the matter is finally settled. A number of other points have been raised but it is not necessary to consider them here except the objection about want of registration under the Partnership Act. The deed Ex. P-1 is in favour of Suganmal and Chunnilal, two brothers (plaintiffs 1 and 2) and Kirodimal and Rameshwar, who are also brothers (plaintiffs 5 and 6). They are not members of one family nor indeed do they belong to the same caste. The first two are Oswals and the other two are Agarwals, but they joined together in this venture and the defendants state that that in itself constitutes them partners. It is admitted that they have nothing else in the shape of business in common. The consideration of the mortgage Rs. 4000 was made up as follows: Rs. 1250 was due to the family firm of the first four plaintiffs and a like sum to plaintiffs 4 and 5 on account of old transactions. These debts had nothing in common and the liability for each was admittedly separate and distinct. As regards the balance of the consideration, Rs. 1500, it was advanced by the two sets of plaintiffs half and half. Therefore the only link between the various plaintiffs is the mortgage. Does the mere fact that two persons or sets of persons separately advance money to a third on a joint security make them partners? We are clear it does not.

We do not deny that there can be a partnership in respect of a single adventure. S. 8, Partnership Act, is clear about that, but before that can happen the other requisites of partnership must be present. Under S. 4 there must be a "business" and there must be an agreement to share the profits of that business, and the business must be carried on by all or any of the partners acting for all. We cannot regard an isolated act of money-lending on a joint security as constituting a business within the meaning of that definition. Business is defined in the Act to include "every trade, occupation or profession." Now money-lending may be regarded as either a trade or an occupation but not an isolated act of lending money.

Of course we recognize that there were previous dealings between each set of plaintiffs separately and the defendants and that each set separately can be regarded as money-lenders carrying on a money-lending business, but that is not what we have to consider. It is the joint adventure that we have to test and so far as that is concerned, it is no more than an isolated act. There is nothing to indicate that this was the first of a series of such acts entered upon as a business with a view to sharing the profits, and in the absence of evidence that cannot be assumed; as a matter of fact it has not even been pleaded, and since the mortgage was executed in 1928, we have no doubt that plenty of other evidence would have been forthcoming if there had been any substance in this allegation about partnership. The objection therefore fails. As observed before, this appeal will remain pending until the document in question has been re-registered.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Nagpur 554

NIYOGI AND POLLOCK JJ.

*afterwards*

NIYOGI J.

*Surajdeen Durga Prasad — Plaintiff —* Appellant.

v.

*Ishwari Prasad Nanha and another — Defendants* — Respondents.

Second Appeal No. 350 of 1935, Decided on 12th August 1938, from appellate decree of Addl. Dist. Judge, Saugor, D/- 8th April 1935.

**(a) C. P. Land Revenue Act (2 of 1917), Ss. 125 and 127 — Notice of demand is not obligatory.**

It is not obligatory on the Tahsildar to cause notice of the demand to be served on any defaulter; it is a step which under S. 127 depends on the discretion of that officer. [P 556 C 2]

**(b) C. P. Land Revenue Act (2 of 1917), S. 125—'Assigns' — Non-possessory mortgagee is not included.**

The word "assigns" used in S. 125 does not include a non-possessory mortgagee. [P 557 C 2]

**(c) C. P. Land Revenue Act (2 of 1917), S. 128—Instructions in Revenue Manual are executive orders—Failure to observe them does not invalidate sale.**

Instructions contained in Revenue Manual, Vol. II, page 43, are mere executive instructions and have not the force of law. Failure to observe the instructions does not amount to an illegality so as to invalidate the sale. [P 557 C 2]

**(d) C. P. Land Revenue Act (2 of 1917), S. 138 — Sale free of incumbrance is general rule — When sale should be with burden of incumbrance explained.**

Under S. 138 sale free of incumbrances is the rule, and sale subject to incumbrances is an exception. The Deputy Commissioner would make an order only when he does not wish to sell free of incumbrances. That would be when he gets notice of the existence of incumbrances. It is therefore for the mortgagee to see that his mortgage is brought to the knowledge of that officer. [P 557 C 2]

D. N. Choudhary — *for Appellant.*

R. N. Padhye and W. B. Pendharkar — *for Respondent 1.*

### ORDER OF REFERENCE

*Niyogi J.* — After having heard this appeal at some length I am inclined to think that this appeal, in view of the value of the subject-matter as well as the important questions of law involved in it, is a fit one for being heard by the Division Bench. The facts are simple. The plaintiff's suit is one to recover possession of village Motiya. The plaintiff had obtained on 29th September 1922 a final decree for sale on a mortgage which was for an amount exceeding Rs. 7000. The decree was sent to the Collector for execution and the village Motiya was sold on 15th December 1932 and the plaintiff became the purchaser. The sale in his favour was confirmed on 7th February 1933. It is on the strength of this sale that the plaintiff lays his claim to the village. During the pendency of the Collector's proceedings that village was sold on 1st October 1932 free from incumbrances under the orders of the Deputy Commissioner for default in payment of land revenue for 1931-32 amounting to Rs. 122-4-6 and it was purchased by the defendant Ishwari Prasad for Rs. 202 free of incumbrance.

The competition is between the two purchasers. The plaintiff who was the later purchaser attacked the previous sale in defendant's favour on the ground that it had been held during the pendency of the Collector's proceedings and that consequently the defendant's sale could not bind him. He also asserted it as a fictitious and fraudulent sale. The defendant on the other hand contended that there was in fact no sale of mouza Motiya in favour of the plaintiff and that in any case the sale having been conducted by a zamadar, that is to say an officer below the rank of Naib Tahsildar, it was not a valid sale. The Courts below held that the doctrine of lis pendens did not come into operation as the sale in favour of the defendant was for recovering the arrears of land revenue which was the first charge on the village and that the mortgagee's right could not prevail against the Crown's prerogative right of first charge on the village. It was further held that there was no sale in fact of mauza Motiya in plaintiff's favour and that, if it was held, it was invalid. The plaintiff's plea that the defendant's sale was fraudulent was negatived. On these findings both the Courts below agreed in dismissing the suit.

On behalf of the appellant the findings that the defendant's sale was not affected by the doctrine of lis pendens and that the defendant's sale was not fraudulent are not challenged here, but the other findings are impeached, and it is also contended that the sale in favour of the defendant was ultra vires of the Revenue Officers and was therefore void and ineffective. As to the question whether there was actually a sale of mauza Motiya, the position is this. The sale by auction was commenced by the tahsil zamadar on 15th December 1932. On that date the highest bid offered was the one of Rs. 3900 by the plaintiff Surajdin. It appears that on that day the tahsildar was on tour and the report was made to him on 16th December 1932. The tahsildar did not accept the bid as final and ordered the auction to be continued. The record does not show whether the property was again auctioned as directed by the tahsildar, but the tahsildar on the next day, that is 17th December 1932, reported to the Sub-Divisional Officer that the village Motiya had already been auctioned on 1st October 1932 and was knocked down in favour of the defendant, Ishwari Prasad, and that it had been sanctioned by the Deputy Commissioner on 15th November 1932. In spite of this report the Sub-Divisional Officer confirmed the sale of mauza Motiya in plaintiff's favour and ordered sale certificate to be issued to the plaintiff. The question which now arises here is whether the village Motiya was actually sold to the plaintiff and if it was not, whether he was entitled to the sale certificate.

In this connexion there arises another question. Under S. 141, C. P. Land Revenue Act, 1917, every sale of immovable property is required to be held by public auction, either by the Deputy Commissioner or by a Revenue Officer appointed by him in this behalf. In accordance with the rules framed by the Local Government as to execution of decrees transferred to Collectors, the Deputy Commissioner is empowered to depute by an order any officer subordinate to him not below the rank of Naib Tahsildar to conduct the sale: *see* Rule 10 (2) of the Rules at page 173, C. P. Revenue Manual, Vol. II. That means that according to the rules the sales in Collector's proceedings cannot be conducted by any officer below the rank of Naib Tahsildars. In this case the sale was actually conducted by a zamadar who was below the rank of a Naib Tahsildar. Consequently the question arises whether the sale so conducted was a valid sale and if not valid initially whether it could be validated by the subsequent confirmation by the Sub-Divisional Officer.

The above questions of law are not so material as the one which follows. It is as to the legality of the auction sale held on 1st October 1932 in defendant's favour, to recover the arrears of land revenue. If this sale was a valid sale then the subsequent sale in favour of the plaintiff even though valid will convey no title to him as the title had already passed to the defendant, but if the sale in favour of the defendant was invalid then even if the plaintiff's sale is invalid the plaintiff will be relegated to his execution proceedings which he would have to revive. The appellant attacks the sale on the ground that the obligatory provisions in regard to sales of revenue paying villages held for non-payment of arrears of land revenue as embodied in S. 128, C. P. Land Revenue Act, read with instructions contained in Revenue Manual, Vol. II, p. 43, were not complied with. It is urged that no notice of demand was served on the plaintiff although as a mortgagee the plaintiff was liable to pay arrears of revenue and was a defaulter within the meaning of that term used in S. 125, C. P. Land Revenue Act. It is further urged that all the facts which were necessary to be stated as required by the instructions issued by the Local Government were not set forth in the report made by the Subordinate Revenue Officer to the Deputy Commissioner to justify the sale of the village free from incumbrances, and that it was also the duty of the Deputy Commissioner to enquire whether the various alternative courses mentioned in S. 128, C. P. Land Revenue Act, had been exhausted before he ordered the village to be sold free of incumbrances. The question which on this contention arises is whether the sale in defendant's favour can be invalidated on the ground that the Revenue Officers who were responsible for holding it failed to observe the law and the Local Government's instructions governing such sales.

This case is important for this reason that in consequence of the failure on the part of the Revenue Officers to apprise the mortgagee of the village of the default made by the owner in payment of land revenue which amounted to only Rs. 122 and some annas, the result has been that on the one hand the plaintiff who was the mortgagee lost his security which was worth more than Rs. 7000 and the defendant has got the property free from incumbrances for the paltry sum of Rs. 202. The sale in favour of the defendant has therefore resulted in great injustice and it is incumbent on the Courts of justice to scrutinize the transaction minutely to see if it was in conformity with the letter and spirit of the law governing revenue sales. It is for this reason that I think that this is an eminently fit case for being heard by the Division Bench of the High Court.

The questions of law which arise in this appeal may be summarized as follows: (1) Whether in fact mauza Motiya was sold by auction? (2) Whether the sale held by the zamadar, who was an officer below the rank of Naib Tahsildar, was a valid sale? (3) If the sale was never held or having been held, it was invalid, whether its confirmation by the Sub-divisional Officer and the eventual issue of sale certificate resulted in validating the sale? (4) Whether the sale in defendant's favour held on 1st October 1932 can be regarded as a valid sale if it is found that the Revenue Officers concerned failed to conform to the requirements of S. 128, C. P. Land Revenue Act, and the Local Government's instructions contained in Volume II of the C. P. Land Revenue Manual.

I refer this case to my lord the Chief Justice for directing it to be heard by the Division Bench.

## OPINION

**Niyogi and Pollock JJ.**—It is unnecessary to recapitulate the facts as they are already set forth in the Order of Reference. The main question which goes to the root of the case and which has been elaborately debated at the Bar is: Whether the sale in defendant's favour held on 1st October 1932 can be regarded as a valid sale if it is found that the Revenue Officers failed to conform to the requirements of Sec. 128, C. P. Land Revenue Act, and the Local Government's instructions contained in Volume II of the C. P. Revenue Manual.

It may be recalled that the village Motiya was sold free of incumbrance for recovering arrears of land revenue. On behalf of the appellant (plaintiff) it is contended that under S. 125, C. P. Land Revenue Act, he, as a mortgagee of the village, should be deemed to be a defaulter to whom notice of demand ought to have been given under S. 127 of that Act, before putting the village to sale. It must be observed at the outset that it is not obligatory on the Tahsildar to cause notice of the demand to be served on any defaulter; it is a step which under S. 127 depends on the discretion of that officer. Granting for the nonce that the Tahsildar should have issued a notice of demand, the question is "Was the plaintiff as a mortgagee simpliciter entitled to any notice?" Sec. 125 declares that all the persons with whom settlement was made, their representatives and assigns shall become jointly and severally liable for such arrear and shall be deemed to be defaulters within the meaning of the Act. The Explanation appended to that Section says that the term "assigns" in this Section includes a mortgagee in possession and a thekedar. The plaintiff was indeed a mortgagee but not a mortgagee in possession. Did the Legislature intend to attach so wide a meaning to the word "assigns" as to include a mortgagee not in possession? It cannot be presumed that the Legislature appended the Explanation without attaching to it any special significance. The intention of the framers of the Act has therefore to be gathered by reading the word "assigns" in the light of the Explanation. The word "assigns" is complementary to the word "representatives" used in Sec. 125. "Assign" means a person substituted for another by an act of some kind or another. Every one who takes by an act, e. g. a deed or will, of a prior owner, is his assign: Stroud's Judicial Dictionary, p. 131 (Edn. 2). It is used in opposition to "representatives", receiver in bankruptcy or heir who take *ex lege*, i. e. by operation of law. The words "representatives and assigns" therefore signify transferees by operation of law or act of parties. The word "assigns" applies to purchasers, donees, lessees or mortgagees with or without possession. If the Legislature intended to attach this comprehensive meaning to the word "assigns" it would not have appended the Explanation to S. 125. When the Explanation expressly mentions mortgagees with possession, it indicates that the intention was to exclude all those mortgagees who are not in possession. The interpretation proposed on appellant's behalf would render the Explanation otiose. General words such as the word "assigns" must no doubt receive a general construction, but that will be so when there is in the statute itself no ground for restricting their meaning: *see* Halsbury's Laws of England, Vol. 27, p. 151, Sec. 284, Edn. 1. The Explanation to S. 125 makes the proposed construction untenable.

The significance of the inclusion of the mortgagee in possession will be evident by reference to Expln. 2 appended to Cl. 5 of S. 2, and to sub-s. 5 of S. 187, C. P. Land Revenue Act. In both these Explanations occur the expression "mortgagee with possession." Under S. 122 of that Act the land revenue assessed on any estate is declared to be a first charge on the estate and on the rents or profits thereof. It must be noticed that the charge is both on the estate and the rents or profits and not merely on the estate. That indicates that a person who holds interest in the estate as well as the profits is liable to pay the land revenue and not the one who holds only an interest in the estate. S. 133 of the Act speaks of the exclusion of a defaulter from possession of the estate attached. That clearly indicates that possession is an indispensable factor. The appellant's learned counsel prays in aid of his construction of the word "assigns" the recent amendment of S. 138 inserted on 1st March 1937 under which the Deputy Commissioner is required to cause a notice of sale to be issued to the mortgagee, if the existence of the mortgage incumbrance is brought to his notice. That only gives a right to the mortgagee to apply for setting aside sale, when held under Ss. 145 and 146, C. P. Land Revenue Act, but it does not bring him within the category of "defaulter" within the meaning of that term in S. 125 so as to impose an obligation on the Deputy Commissioner to cause a notice of demand to be served on him. A mortgagee without possession may be entitled to pay the arrears of land revenue but that he can do so only to protect his own interest and not as one liable to pay. All these considerations point to the inference that possession is essential to attract the liability to pay land revenue. The foregoing discussion makes it amply clear that the word "assigns" used in S. 125, C. P. Land Revenue Act, does not include a non-possessory mortgagee.

The next contention is that in holding the sale of the village Motiya the revenue officers did not follow the instructions contained in Revenue Manual, Vol. II, page 43. They are mere executive instructions and have not the force of law. Failure to observe the instructions does not amount to an illegality so as to invalidate the sale. It is idle to contend that the Deputy Commissioner did not expressly pass any order that the village should be sold free of incumbrances when he signed the sale proclamation which was in terms of S. 138. Under that Section sale free of incumbrances is the rule, and sale subject to incumbrances is an exception. The Deputy Commissioner would make an order only when he does not wish to sell free of incumbrances. That would be when he gets notice of the existence of incumbrances. It was therefore for the plaintiff to see that his mortgage was brought to the knowledge of that officer. As the plaintiff did not take steps in that direction, he has only himself to thank for the unfortunate result.

Lastly it is urged that the sale was not in conformity with S. 141, C. P. Land Revenue Act. The sale was held by the Tahsildar who presumably was the officer appointed by the Deputy Commissioner for that purpose. It is unnecessary to go into the question whether the subsequent sale in plaintiff's favour was actually completed and whether, if completed, the confirmation of it was valid. As the title had validly passed to the defendant as the result of the sale held on 1st October 1932, the plaintiff's sale, even if properly held, could not convey any title to him. Nor can his capacity as a mortgagee help him in the suit as the defendant purchased the village free of incumbrances. The answer to question 4 is that the sale dated 1st October 1932 was a valid sale. It is unnecessary to consider questions 1, 2 and 3 relating to the sale in plaintiff's favour.

## Final Judgment

**Niyogi J.**—The facts of the case need not be reiterated as they are fully set forth in my Order of Reference dated 4th March 1937. The question which was referred to the Special Bench was whether the sale dated 1st October 1932 in defendant-respondent's favour was a valid sale. That Bench pronounced its opinion that it was a valid sale. Consequently the plaintiff-appellant could not acquire a valid title from the subsequent sale on 15th December 1932. The appeal thus fails and is dismissed with costs. Counsel's fees Rs. 50. R. B. D. N Chowdhury, advocate for the appellant, prays for leave to file an appeal under the Letters Patent. As the central issue of law was determined by a Bench of two Judges, I do not see my way to grant the leave asked for.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Nagpur 558

GRUER J.

*Maroti Vithoba — Judgment-Debtor —* Appellant.

v.

*Kisanlal Sheonarain—Decree-holder — Auction-purchaser* — Respondent.

Misc. Appeal No. 1 of 1937, Decided on 20th July 1938, from order of Addl. Dist. Judge, Khamgaon, D/- 11th November 1936.

**(a) Limitation Act (1908), Art. 166 — Art. 166 applies to all applications under S. 47, Civil P. C.**

The applicability of Art. 166, Limitation Act, is very wide, and there is no ground for holding that it is restricted to applications under O. 21, Rr. 72 and 89 to 91. The Article applies to all applications under S. 47, Civil P. C.: *A I R 1920 Cal 165, Rel. on.* [P 559 C 1]

**(b) Civil P. C. (1908), S. 47, and O. 21, R. 90—Objection as to saleability of property not raised on date fixed for proclamation and issue of sale warrant but raised before sale—Objection is maintainable.**

Order 21, R. 90 applies only to irregularities or fraud in publishing or conducting a sale, not to questions of saleability. The objection as to saleability comes under S. 47. If the Legislature had intended that no objection to the saleability of property could lie unless taken before the drawing up of the proclamation of sale, it would have said so in the Rules under O. 21. [P 559 C 1, 2; P 560 C 1]

Where objection to saleability of property is not taken on the date fixed for the proclamation and issue of sale warrant, the judgment-debtor is not barred on the principle of res judicata from raising it afterwards and the objection raised before the sale takes place is maintainable: *A I R 1935 All 1016, Foll.; A I R 1934 Nag 82, Rel. on.* [P 560 C 2]

D. T. Mangalmoorti — *for Appellant.*

B. R. Mandlekar — *for Respondent.*

**Order.** — The appellant-judgment-debtor objected under S. 60, Civil P. C., to the sale of his property (three houses) on the ground that they belonged to and were occupied by an agriculturist. The objection was rejected by the Judge in execution proceedings as being designedly and unnecessarily delayed and this decision was upheld by the Additional District Judge in appeal. The judgment-debtor had been served with a sale notice on 11th November 1935, but did not appear on 7th December 1935, the date of hearing. So proclamation and sale warrant were ordered to be issued. The judgment-debtor put in an objection on 9th April 1936 while the sale was held on 27th April 1936. His objection was rejected, as above stated, on 21st July 1936, on which date the sale was also confirmed. The contention for the appellant is that the application was in time as it was made before sale took place; and even if it had been made after, it would have been in time if made within 30 days from the date of sale under Art. 166, Limitation Act. The contention for the other side is that the objection ought to have been taken on or by 7th December 1935, the date fixed for issue of sale warrant, and as no objection was taken, the principle of constructive res judicata applies and the judgment-debtor is precluded from raising it at a later stage.

The question is not free from difficulty, and in reading the case law it has to be remembered that the provisions of the old Civil Procedure Code regarding sale were different, and also that until Art. 166, Limitation Act, was amended in 1927 it was doubted whether it applied to applications by judgment-debtors. Respondent's learned counsel relies on 21 N L R 23[1] in which one Rukhmabai, some days before sale took place, objected that the property attached (a field) was her own personal property and not liable to be sold under a decree passed against her as representative of her deceased husband. The rejection of this application was upheld by the learned Additional Judicial Commissioner on general principles of law: that she might and ought to have urged her objection to the sale at the stage when proclamation of sale was settled, and it was not open to her to raise this point later. In an unpublished ruling, *Laxmibai* v. *Sewakram*[2] Bose J. has followed that case but on the more particular ground that the principle of constructive res judicata should be extended to execution proceedings. The decision was that as the judgment-debtor, Seocharan, had not taken an objection under S. 60, Civil P. C., in the first execution proceedings when he might and ought to have done, so his legal representatives could not raise it in the second proceedings. The learned Judge observes that

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[1] Mt. Rukhmabai v. Ramchandra, (1925) 12 A I R Nag 320=88 I C 831=21 N L R 23.

> there must be some correct stage for filing objections. 21 N L R 23[1] states it is when the proclamation for sale is settled. Other cases state that it is when notice is issued to the judgment-debtors. Whichever of the two it may be, there is no doubt that it must be raised at any early stage of the proceedings. Litigation would continue to an impossible length if any other rule applied.

The argument is reasonable but how is it to be reconciled with Art. 166, Limitation Act? The applicability of that Article is very wide, and there is no ground for holding that it is restricted to applications under O. 21, Rr. 72 and 89 to 91. There is a consensus of opinion that it applies to all applications under Sec. 47, Civil P. C. For instance, in 46 Cal 975[3] it was held that it applied to an application to set aside a sale on the ground that the personal property of the applicant was sold in execution of a decree against the applicant's father, a case very similar to 21 N L R 23.[1] If then Rukhmabai in that case would have been in time if she took her objection after the sale within 30 days of it, how could her application preferred before the sale be deemed to be too late? It is said that O. 21, R. 90, Civil P. C., applies, including the local amendment refusing to entertain applications not made at the earliest possible opportunity. But Rule 90 applies only to irregularities or fraud in publishing or conducting a sale, not to questions of saleability. The lower Courts seem to have employed language proper to O. 21, R. 58, which does provide that no investigation shall be made under that Rule where the Court considers that the claim or objection was designedly or unnecessarily delayed. It is pointed out for the appellant that the application here is not under this Order but under Sec. 47 which says: "All questions arising between the parties to the suit, etc., shall be determined", and does not include any Proviso as in O. 21, R. 58.

The question was considered by a Bench of the Allahabad High Court in an unreported judgment, *Pokhar Singh* v. *Tula Ram*,[4] which does not seem to have been brought to the notice of Bose J. In that case the judgment-debtor, although noticed, did not appear at all to object until after the sale was held when he put in separate applications under O. 21, R. 90, and Sec. 47, the latter being on the same ground taken by the present judgment-debtor. The learned Judges discuss the case in 29 All 612[5] which held that a judgment-debtor who might have raised objections prior to sale but who refrained from doing so and might have appealed from the order for sale, had no right after the sale to prefer an objection that the property sold was not legally saleable. That case was distinguished on the ground that it was one under the old Civil Procedure Code, and as it was generally held that S. 284 of that Code ordering sale of a property was appealable whereas the corresponding provision, O. 21, R. 64 of the present Code, is no longer appealable so that it could no longer be said that the debtor had a right of appeal of which he did not avail himself. The Judges went on to state that in their opinion the right to object to the sale of a non-saleable property arises after such a sale has taken place, and until confirmation of sale it is impossible to say that there has been by necessary implication any decision at any stage of the case that the property was saleable which would be conclusive as between the parties and would operate as a bar against all objections. They further note—what I have already stated—that such an objection to saleability is not under O. 21, R. 89 or R. 90, but is under Sec. 47 of the Code, which prescribes no time limit for the raising of such objections. If the judgment-debtor was negligent at an earlier stage, this may affect the question of costs but would not necessarily amount to an estoppel against him as there should be no estoppel against a statutory right.

I feel myself pressed by this reasoning and think that the order of sale cannot operate as res judicata. In fact, it does not amount to a final decision of a matter in issue between the parties because if it had done so it would have been open to appeal. If the Legislature had intended that no objection to the saleability of property could lie unless taken before the drawing up of the proclamation of sale, I think it would have said so in the Rules under O. 21. Reference has also been made to 30 N L R 135.[6] In that case it was held that an objection such as the present by a judgment-debtor is one under S. 47, and Art. 166, Limitation Act, applies to it, and also that such an application by a judgment-debtor cannot be heard after the sale has been held, and that it must be made before the sale. From this it follows at least that the Judge considered that an application before sale would be tenable. Following the view taken in A I R 1935 All 1016[4] I hold that the objection though delayed was maintainable and should not have been rejected without investigation. The order of the lower Court is set aside, and the case is sent back for determination of the objection on its merits. If it succeeds the sale of course will have to be set aside. As the objection was delayed I disallow costs concerning it to the judgment-debtor throughout. Costs will be borne as incurred.

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[2] *Reported in* (1936) 23 A I R Nag 123=165 I C 948=I L R (1936) Nag 30.

[3] Satish Chandra v. Nishi Chandra Dutta, (1920) 7 A I R Cal 165=54 I C 431=46 Cal 975.

[4] *Reported in* (1935) 22 A I R All 1016=158 I C 202=1935 A L J 1137.

[5] Umed v. Jas Ram, (1907) 29 All 612.

D.S./R.K. *Appeal allowed.*

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[6] Sobha v. Mt. Chhaganbai, (1934) 21 A I R Nag 82=148 I C 200=30 N L R 135.

END

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# OUDH CHIEF COURT
# 1938

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" Mr. George Hector Thomas, Bar-at-law *(Acting)*.

" Khan Bahadur Zia-ul-Hasan, B.A., LL.B. *(Acting)*.

### Puisne Judges:

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| | 13 Luck 662 |
| 18 | 1937 O W N 1127 |
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| 20 | 1937 O L R 555 |
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| 22 | 1937 O L R 601 |
| | 1937 O W N 1159 |
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| | 1937 O L R 574 |
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| 26 | 1937 O W N 1058 |
| | 171 I C 481 |
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| | 13 Luck 697 |
| 33 | 1937 O W N 1169 |
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| 35 | 1937 O W N 1181 |
| | 1937 O L R 595 |
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| 37 | 1937 O L R 584 |
| | 1937 O W N 1202 |
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| | 13 Luck 672 |
| 40 | 1937 O L R 599 |
| | 172 I C 297 |
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| 42 | 1937 O W N 1073 |
| | 1937 O L R 569 |
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| 44 | 1937 O L R 576 |
| | 1937 O W N 1176 |
| | 171 I C 887 |
| | 13 Luck 655 |
| 45 | 1937 O L R 604 |
| | 1937 O W N 1248 |
| | 172 I C 306 |
| 45 | 13 Luck 689 |
| 48 | 1937 O W N 863 |
| | 1937 O L R 476 |
| | 170 I C 656 |
| | 13 Luck 466 |
| 50 | 1937 O W N 1233 |
| | 1938 O L R 6 |
| | 172 I C 515 |
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| | 13 Luck 666 |
| 51 | 1937 O W N 1211 |
| | 1937 O L R 607 |
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| 54 | 1938 O L R 19 |
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| | 1938 O W N 115 |
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| | 13 Luck 680 |
| 61 | 172 I C 642 |
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| 65 | 1938 O L R 14 |
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| 69 | 1938 O W N 67 |
| | 1938 O L R 44 |
| | 172 I C 882 |
| | 13 Luck 723 |
| 77 | 1938 O W N 130 |
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| 80 | 1938 O L R 8 |
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| | 13 Luck 720 |
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| 87 | 1938 A W R 9 |
| | 173 I C 10 |
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| 88 | 1938 O L R 108 |
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| 90 | 1938 O W N 155 |
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| | 13 Luck 753 |
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| 95 | 1938 O W N 218 |
| | 1938 O L R 117 |
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| | 1938 O L R 122 |
| | 173 I C 610 |
| | 14 Luck 9 |
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| 99 | 1938 O W N 288 |
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| | 173 I C 643 |
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| 100 | 1938 O W N 257 |
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| 101 | 1938 O W N 230 |
| | 1938 O L R 125 |
| | 13 Luck 757 |
| | 173 I C 631 |
| 103 | 1938 O W N 348 |
| | 1938 O L R 154 |
| | 173 I C 980 |
| 106 | 1938 O W N 316 |
| | 173 I C 880 |
| | 1938 O L R 146 |
| 107 | 1938 O W N 331 |
| | 1938 A W R 26 |
| | 1938 O L R 143 |
| | 173 I C 865 |
| | 1938 R D 405 |
| | 14 Luck 13 |
| 110 | 1938 O W N 355 |
| | 1938 O L R 157 |
| | 173 I C 991 |
| 112 | 1938 O W N 360 |
| | 1938 O L R 147 |
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| 119 | 1938 O L R 182 |
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| 122 | 1938 O L R 196 |
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| 122FB | 14 Luck 22 |
| 125 | 1938 O L R 186 |
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| 135 | 1938 O W N 429 |
| | 1938 O L R 178 |
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| 137 | 1938 O W N 500 |
| | 1938 A W R 46 |
| | 1938 R D 534 |
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| | 174 I C 940 |
| 139 | 1938 O W N 453 |
| | 1938 R D 488 |
| | 1938 O L R 195 |
| | 1938 A W R 42 |
| | 174 I C 550 |
| 140 | 1938 O W N 547 |
| FB | 1938 O L R 252 |
| | 175 I C 32 |
| | 1938 R D 575 |
| 146 | 1938 O W N 561 |
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| 152 | 1938 O L R 228 |
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| 156 | 1938 O W N 535 |
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| 162 | 1938 O W N 494 |
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| 165 | 1938 O L R 297 |
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| 169 | 1938 O L R 276 |
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| 171 | 1938 O L R 231 |
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| 175 | 1938 O W N 462 |
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| 182 | 1938 O L R 290 |
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| 184 | 1938 O W N 573 |

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| 188 | 1938 O W N | 758 |
| | 1938 O L R | 371 |
| | 177 I C | 77 |
| 190 | 1938 O W N | 711 |
| | 1938 O L R | 353 |
| | 176 I C | 958 |
| 192 | 1938 O W N | 683 |
| | 1938 A W R | 66 |
| | 1938 R D | 686 |
| | 1938 O L R | 350 |
| | 176 I C | 903 |
| 195 | 1938 O W N | 676 |
| | 1938 O L R | 355 |
| | 176 I C | 948 |
| | 39 Cr L J | 831 |
| 199 | 1938 O W N | 833 |
| | 1938 O L R | 373 |
| | 177 I C | 90 |
| | 39 Cr L J | 862 |
| 201 FB | 1938 O L R | 425 |
| | 1938 O W N | 889 |
| | 177 I C | 550 |
| 204 | 1938 O W N | 739 |
| | 1938 R D | 717 |
| | 1938 O L R | 367 |
| | 1938 A W R | 72 |
| | 177 I C | 61 |
| 206 FB | 1938 O W N | 871 |
| | 1938 O L R | 417 |
| | 177 I C | 392 |
| 208 | 1938 R D | 738 |
| | 1938 O W N | 836 |
| 208 | 1938 A W R | 81 |
| | 1938 O L R | 409 |
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| 210 | 1938 O W N | 806 |
| | 1938 O L R | 375 |
| | 177 I C | 100 |
| 212 | 1938 O W N | 881 |
| | 1938 O L R | 399 |
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| | 39 Cr L J | 854 |
| 213 | 1938 O W N | 779 |
| | 1938 O L R | 369 |
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| 214 | 1938 O W N | 744 |
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| | 1938 A W R | 71 |
| | 177 I C | 52 |
| 216 | 1938 O W N | 748 |
| | 1938 O L R | 370 |
| | 177 I C | 74 |
| | 39 Cr L J | 853 |
| 217 | 1938 O W N | 775 |
| | 1938 O L R | 382 |
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| | 177 I C | 136 |
| 218 | 1938 O L R | 402 |
| | 1938 O W N | 841 |
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| | 39 Cr L J | 858 |
| 221 | 1938 O W N | 911 |
| | 1938 R D | 765 |
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| | 177 I C | 543 |
| 224 | 1938 O W N | 801 |
| | 1938 R D | 723 |
| | 1938 O L R | 376 |
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| 225 | 1938 O W N | 805 |
| | 1938 O L R | 366 |
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| 227 | 1938 O W N | 878 |
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| | 1938 A W R | 90 |
| 229 | 1938 O W N | 916 |
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| 230 | 1938 O W N | 922 |
| | 1938 O L R | 433 |
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| 232 | 1938 O W N | 896 |
| | 1938 R D | 764 |
| | 1938 O L R | 411 |
| | 177 I C | 366 |
| | 1938 A W R | 118 |
| 233 | 1938 O W N | 919 |
| | 1938 O L R | 421 |
| | 177 I C | 386 |
| | 39 Cr L J | 889 |
| 234 FB | 1938 O W N | 1001 |
| | 1938 A W R | 122 |
| | 1938 O L R | 454 |
| | 1938 R D | 810 |
| | 177 I C | 962 |
| 238 | 1938 O W N | 937 |
| | 1938 O L R | 435 |
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| 247 | 1938 O W N | 898 |
| | 1938 O L R | 394 |
| | 177 I C | 193 |
| | 39 Cr L J | 849 |
| 249 | 1938 O W N | 958 |
| 249 | 1938 O L R | 429 |
| | 177 I C | 559 |
| | 39 Cr L J | 929 |
| 250 | 1938 O W N | 1045 |
| | 1938 O L R | 476 |
| | 178 I C | 242 |
| 251 | 1938 O W N | 1039 |
| | 1938 O L R | 461 |
| | 177 I C | 969 |
| 253 | 1938 O W N | 1064 |
| | 1938 A W R | 96 |
| | 1938 O L R | 465 |
| | 178 I C | 169 |
| | 40 Cr L J | 1 |
| 256 | 1938 O W N | 1057 |
| | 1938 A W R | 92 |
| | 1938 O L R | 469 |
| | 178 I C | 162 |
| | 40 Cr L J | 14 |
| 259 | 1938 O W N | 1043 |
| | 1938 O L R | 463 |
| | 177 I C | 979 |
| 260 | 1938 R D | 737 |
| | 1938 A W R | 79 |
| | 1938 O L R | 386 |
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| | 1938 OWN | 831 |
| 261 | 1938 O W N | 1062 |
| | 1938 A W R | 92 |
| | 1938 O L R | 472 |
| | 178 I C | 248 |
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| 262 | 1938 O W N | 1054 |
| | 1938 A W R | 85 |
| | 1938 O L R | 467 |
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| 263 | 1938 O W N | 960 |
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| 61 | 1938 | PC | 7 |
| 64 | 1937 | O | 177 |
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| 159 | 1937 | O | 430 |
| 162 | „ | „ | 233 |
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| 192 | „ | „ | 268 |
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| 201 | „ | „ | 256 |
| 204 | „ | „ | 244 |
| 209 | „ | „ | 338 |
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| 219 | „ | „ | 438 |
| 230 | „ | „ | 361 |
| 237 | „ | „ | 365 |
| 241 | „ | „ | 327 |
| 246 | „ | „ | 344 |
| 252 | „ | „ | 386 |
| 255 | „ | „ | 229 |
| 263 | „ | „ | 364 |
| 266 | „ | „ | 328 |
| 270 | „ | „ | 341 |
| 279 | „ | „ | 323 |
| 287 | „ | „ | 312 |
| 303 | 1937 | O | 330 |
| 306 | „ | „ | 320 |
| 309 | „ | „ | 337 |
| 312 | „ | „ | 385 |
| 317 | „ | „ | 241 |
| 323 | „ | „ | 394 |
| 331 | „ | „ | 358 |
| 334 | „ | „ | 391 |
| 340 | „ | „ | 379 |
| 344 | „ | „ | 373 |
| 353 | „ | „ | 351 |
| 357 | „ | „ | 406 |
| 365 | „ | „ | 347 |
| 369 | „ | „ | 398 |
| 373 | „ | „ | 405 |
| 376 | „ | „ | 387 |
| 380 | „ | „ | 402 |
| 386 | „ | „ | 397 |
| 389 | „ | „ | 401 |
| 392 | „ | „ | 389 |
| 397 | „ | „ | 414 |
| 402 | „ | „ | 369 |
| 405 | „ | „ | 445 |
| 409 | „ | „ | 473 |
| 425 | „ | „ | 426 |
| 428 | „ | „ | 436 |
| 433 | 1937 | O | 427 |
| 437 | „ | „ | 444 |
| 439 | „ | „ | 434 |
| 442 | „ | „ | 449 |
| 444 | „ | „ | 456 |
| 446 | „ | „ | 454 |
| 450 | „ | „ | 446 |
| 455 | „ | „ | 448 |
| 458 | „ | „ | 465 |
| 463 | „ | „ | 463 |
| 466 | 1938 | „ | 48 |
| 470 | 1937 | „ | 460 |
| 474 | „ | „ | 476 |
| 480 | „ | „ | 487 |
| 482 | „ | „ | 467 |
| 484 | „ | „ | 493 |
| 494 | 1938 | PC | 169 |
| 508 | „ | „ | 210 |
| 523 | 1937 | O | 381 |
| 531 | „ | „ | 410 |
| 541 | „ | „ | 468 |
| 544 | „ | „ | 469 |
| 549 | „ | „ | 471 |
| 554 | „ | „ | 488 |
| 560 | „ | „ | 481 |
| 568 | „ | „ | 498 |
| 577 | 1937 | O | 490 |
| 581 | „ | „ | 359 |
| 584 | „ | „ | 484 |
| 597 | „ | „ | 513 |
| 609 | „ | „ | 507 |
| 614 | „ | „ | 523 |
| 618 | „ | „ | 524 |
| 623 | „ | „ | 528 |
| 625 | 1938 | „ | 10 |
| 628 | „ | „ | 1 |
| 646 | „ | PC | 252 |
| 655 | „ | O | 44 |
| 662 | „ | „ | 17 |
| 666 | „ | „ | 50 |
| 669 | „ | „ | 16 |
| 672 | „ | „ | 37 |
| 680 | „ | „ | 57 |
| 689 | „ | „ | 45 |
| 697 | „ | „ | 26 |
| 713 | „ | „ | 51 |
| 720 | „ | „ | 81 |
| 723 | „ | „ | 69 |
| 746 | „ | „ | 84 |
| 753 | „ | „ | 90 |
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|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1938 | PC | 4 | 108 | 1938 | O | 88 | 235 | 1938 | PC | 152 | 364 | 1938 | PC | 276 | 458 | 1939 | O | 64 |
| 3 | " | " | 8 | 110 | " | PC | 77 | 242 | " | O | 137 | 366 | " | O | 225 | 459 | " | " | 31 |
| 6 | " | O | 50 | 112 | " | " | 80 | 244 | " | " | 175 | 367 | " | " | 204 | 461 | 1938 | " | 251 |
| 8 | " | " | 80 | 117 | " | O | 95 | 252 | " | " | 140 | 369 | " | " | 213 | 463 | " | " | 259 |
| 10 | " | " | 57 | 119 | " | PC | 67 | 259 | " | " | 156 | 370 | " | " | 216 | 464 | 1939 | " | 16 |
| 13 | " | " | 61 | 122 | " | O | 97 | 265 | " | " | 146 | 371 | " | " | 188 | 465 | 1938 | " | 253 |
| 14 | " | " | 65 | 124 | " | " | 98 | 271 | " | " | 184 | 373 | " | " | 199 | 467 | " | " | 262 |
| 19 | " | " | 54 | 125 | " | " | 101 | 276 | " | " | 169 | 375 | " | " | 210 | 468 | 1939 | " | 35 |
| 21 | " | " | 62 | 127 | " | PC | 93 | 278 | " | PC | 184 | 376 | " | " | 224 | 469 | 1938 | " | 256 |
| 24 | " | " | 56 | 132 | " | O | 99 | 282 | " | " | 169 | 378 | " | PC | 263 | 472 | " | " | 261 |
| 25 | " | PC | 20 | 133 | " | " | 100 | 288 | " | " | 181 | 382 | " | " | 217 | 475 | 1939 | " | 15 |
| 29 | " | " | 12 | 137 | " | PC | 113 | 290 | " | O | 182 | 384 | " | " | 248 | 476 | 1938 | " | 250 |
| 33 | 1937 | " | 240 | 143 | " | O | 107 | 291 | " | PC | 175 | 386 | " | O | 260 | 477 | 1939 | " | 14 |
| 34 | 1938 | O | 81 | 146 | " | " | 106 | 297 | " | O | 165 | 388 | " | PC | 250 | 478 | " | " | 1 |
| 35 | " | " | 84 | 147 | " | " | 112 | 301 | " | PC | 189 | 390 | " | O | 227 | 483 | " | " | 33 |
| 42 | " | PC | 59 | 154 | " | " | 103 | 303 | " | O | 183 | 391 | " | PC | 245 | 485 | " | " | 42 |
| 44 | " | O | 69 | 157 | " | " | 110 | 304 | " | PC | 191 | 394 | " | O | 247 | 486 | " | " | 10 |
| 53 | " | PC | 61 | 159 | " | PC | 110 | 309 | " | " | 195 | 395 | " | PC | 259 | 489 | " | " | 36 |
| 57 | " | " | 49 | 166 | " | " | 121 | 312 | " | " | 198 | 399 | " | O | 212 | 490 | " | PC | 8 |
| 60 | " | O | 83 | 169 | " | " | 123 | 317 | " | " | 183 | 402 | " | " | 218 | 494 | " | O | 40 |
| 61 | " | PC | 34 | 175 | " | " | 118 | 319 | " | " | 202 | 405 | " | PC | 266 | 496 | 1938 | PC | 277 |
| 66 | " | " | 38 | 178 | " | O | 135 | 321 | " | " | 210 | 409 | " | O | 208 | 501 | " | " | 292 |
| 68a | " | O | 86 | 182 | " | " | 119 | 328 | " | " | 223 | 411 | " | " | 232 | 504 | 1939 | O | 60 |
| 68b | " | PC | 52 | 186 | " | " | 125 | 330 | " | " | 216 | 412 | " | PC | 254 | 505 | 1938 | PC | 231 |
| 74 | " | O | 87 | 189 | " | PC | 130 | | | | | 417 | " | O | 206 | 509 | 1939 | O | 38 |
| 76 | " | PC | 15 | 195 | " | O | 139 | 332 | " | " | 219 | 421 | " | " | 233 | 510 | 1938 | PC | 290 |
| 80 | " | O | 77 | 196 | " | " | 122 | 336 | " | " | 228 | 422 | " | " | 221 | 512 | 1939 | O | 37 |
| 83 | " | PC | 87 | 200 | " | PC | 139 | 337 | " | " | 232 | 425 | " | " | 201 | 513 | " | " | 61 |
| 87 | " | " | 65 | 204 | " | O | 127 | 344 | " | " | 230 | 429 | " | " | 249 | 514 | 1938 | PC | 295 |
| 88 | " | O | 94 | | | | | 347 | " | " | 243 | 430 | " | " | 229 | | | | |
| 90 | " | PC | 66 | 212 | " | " | 162 | 350 | " | O | 192 | 432 | " | " | 263 | 520 | 1939 | O | 48 |
| 92 | " | " | 71 | 215 | " | " | 154 | 353 | " | " | 190 | 433 | " | " | 230 | 521 | 1938 | PC | 284 |
| 94 | " | O | 90 | 218 | " | PC | 165 | 355 | " | " | 195 | 435 | " | " | 238 | 527 | 1939 | O | 17 |
| 95 | " | PC | 84 | 223 | " | " | 159 | 359 | " | " | 186 | 445 | " | " | 226 | 548 | " | " | 65 |
| 101 | " | O | 91 | 228 | " | O | 152 | 361 | " | PC | 252 | 446 | 1939 | " | 2 | 552a | " | " | 43 |
| 104 | " | PC | 73 | 231 | " | " | 171 | 363 | " | O | 214 | 454 | 1938 | " | 234 | 552b | " | " | 90 |

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|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1938 | PC | 8 | 201 | 1938 | PC | 65 | 475 | 1938 | O | 154 | 715 | 1938 | PC | 219 | 896 | 1938 | O | 232 |
| 7 | " | O | 80 | 203 | " | " | 66 | 480 | " | " | 125 | 722 | " | O | 169 | 898 | " | " | 247 |
| 10 | " | PC | 4 | 206 | " | " | 52 | 489 | " | " | 127 | 727 | " | PC | 189 | 906 | " | PC | 243 |
| 15 | " | " | 12 | 218 | " | O | 95 | 494 | " | " | 162 | 731 | " | " | 198 | 911 | " | O | 221 |
| 23 | " | O | 40 | 225 | " | " | 98 | 500 | " | " | 187 | 733 | " | O | 204 | 916 | " | " | 229 |
| 40 | " | " | 62 | 226 | " | " | 97 | 504 | " | PC | 139 | 744 | " | " | 214 | 919 | " | " | 233 |
| 46 | " | " | 81 | 230 | " | " | 101 | 513 | " | O | 171 | 748 | " | " | 216 | 922 | " | " | 230 |
| 48 | " | PC | 59 | 233 | " | PC | 80 | 521 | " | PC | 165 | 753 | " | A | 461 | 925 | " | A | 423 |
| 52 | " | " | 61 | 245 | " | " | 73 | 531 | " | O | 152 | 758 | " | O | 188 | 937 | " | O | 238 |
| 59 | " | O | 88 | 253 | " | " | 71 | 535 | " | " | 156 | 763 | " | A | 456 | 958 | " | " | 249 |
| 62 | " | " | 84 | 257 | " | O | 100 | 547 | " | " | 140 | 775 | " | O | 217 | 960 | " | " | 263 |
| 67 | " | " | 69 | 261 | " | PC | 67 | 561 | " | " | 146 | 779 | " | " | 213 | 964 | 1939 | " | 2 |
| 88 | " | A | 97 | 268 | " | " | 113 | 578 | " | " | 184 | 783 | " | PC | 252 | 983 | 1938 | " | 226 |
| 90 | " | PC | 87 | 288 | " | O | 99 | 581 | " | PC | 169 | 796 | " | " | 215 | 985 | " | A | 577 |
| 97 | " | " | 38 | 299 | " | PC | 110 | 591 | " | A | 386 | 801 | " | O | 224 | 1001 | " | O | 234 |
| 104 | " | O | 65 | 318 | " | A | 217 | 595 | " | O | 182 | 805 | " | " | 225 | 1009 | " | PC | 191 |
| 115 | " | " | 56 | 326 | " | PC | 121 | 596 | " | " | 183 | 806 | " | " | 210 | 1018a | 1939 | O | 64 |
| 117 | " | PC | 84 | 331 | " | O | 107 | 599 | " | " | 165 | 809 | " | PC | 266 | 1018b | " | " | 31 |
| 126 | " | O | 54 | 346 | " | " | 106 | 608 | " | PC | 210 | 816 | " | " | 250 | 1021 | 1938 | A | 593 |
| 130 | " | " | 77 | 348 | " | " | 108 | 619 | " | " | 183 | 819 | " | " | 254 | 1039 | " | O | 251 |
| 135 | " | " | 86 | 355 | " | " | 110 | 621 | " | " | 175 | 831 | " | O | 260 | 1043 | " | " | 259 |
| 136 | " | " | 87 | 360 | " | " | 112 | 634 | " | " | 228 | 833 | " | " | 199 | 1045 | " | " | 250 |
| 138 | " | PC | 98 | 377 | " | " | 122 | 642 | " | A | 418 | 836 | " | " | 208 | 1051 | 1939 | " | 35 |
| 148 | " | O | 61 | 385 | " | PC | 118 | 652 | " | PC | 181 | 841 | " | " | 218 | 1053 | " | " | 16 |
| 152 | " | " | 94 | 390 | " | " | 123 | 655 | " | " | 216 | 846 | " | PC | 232 | 1054 | 1938 | " | 262 |
| 155 | " | " | 90 | 401 | " | O | 127 | 676 | " | O | 195 | 859 | " | " | 159 | | | | |
| 158 | " | PC | 20 | 416 | " | PC | 130 | 683 | " | " | 192 | 869 | " | " | 276 | 1057 | " | " | 256 |
| 167 | " | " | 84 | 429 | " | O | 135 | 688 | " | PC | 202 | 871 | " | O | 206 | 1062 | " | " | 261 |
| 176 | " | O | 91 | 433 | " | A | 221 | 693 | " | " | 195 | 878 | " | " | 227 | 1064 | " | " | 253 |
| 184 | " | " | 88 | 453 | " | O | 139 | 698 | " | " | 184 | 881 | " | " | 212 | 1074 | 1939 | " | 10 |
| 188 | " | PC | 15 | 454 | " | " | 119 | 706 | " | O | 186 | 888 | " | PC | 280 | 1096 | " | " | 14 |
| 196 | " | " | 77 | 462 | " | " | 175 | 711 | " | " | 190 | 889 | " | O | 201 | 1099 | " | " | 15 |

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| OWN | AIR | | | OWN | AIR | | | OWN | AIR | | | OWN | AIR | | | OWN | AIR | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1101 | 1939 | O | 1 | 1127 | 1939 | O | 38 | 1153 | 1939 | O | 61 | 1248 | 1938 | PC | 290 | 1354 | 1939 | O | 65 |
| 1103 | " | " | 33 | 1130 | " | " | 37 | 1211 | " | " | 48 | 1251 | " | FC | 1 | 1361 | " | " | 45 |
| 1109 | " | " | 40 | 1132 | " | " | 60 | 1216 | " | FC | 8 | 1256 | " | PC | 295 | | | | |
| 1121 | " | " | 42 | 1134 | " | " | 36 | 1221 | " | O | 43 | 1265 | 1939 | O | 90 | 1363 | " | " | 54 |
| 1124 | " | " | 44 | 1147 | 1938 | PC | 277 | 1223 | " | A | 37 | 1267 | " | " | 17 | 1368 | " | " | 57 |

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|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 20 | 1937 | A | 794 | 101 | 1938 | A | 55 | 259 | 1938 | O | 91 | 587 | 1938 | A | 432 | 782 | 1938 | A | 564 |
| 22 | 1938 | " | 50 | 102 | " | " | 76 | 274 | " | A | 158 | 589 | " | " | 390 | 790 | " | " | 615 |
| 23 | " | " | 80 | 104 | " | " | 68 | 295 | " | " | 212 | 606 | " | PC | 210 | 794 | " | " | 611 |
| 26 | " | " | 53 | 106 | " | " | 65 | 297 | " | " | 198 | 628 | " | A | 396 | 804 | " | " | 617 |
| 31 | " | " | 88 | 139 | " | " | 108 | 298 | " | " | 215 | 662 | " | PC | 219 | 810 | " | O | 234 |
| 32 | " | " | 85 | 140 | " | " | 134 | 312 | " | " | 235 | 680 | " | A | 461 | 815 | " | A | 655 |
| 34 | " | " | 86 | 142 | " | " | 97 | 367 | " | " | 213 | 683 | " | " | 515 | 829 | 1939 | " | 22 |
| 36 | " | " | 146 | 144 | " | " | 135 | 399 | " | PC | 77 | 686 | " | O | 192 | 831 | 1938 | " | 617 |
| 37 | " | " | 42 | 145 | " | " | 128 | 405b | " | O | 107 | 690 | " | A | 456 | 833 | 1939 | " | 31 |
| 43 | " | " | 82 | 146 | " | " | 119 | 458 | " | A | 259 | 698 | " | " | 467 | 844 | " | " | 19 |
| 47 | " | " | 74 | 149 | " | " | 124 | 463 | " | " | 316 | 700 | " | " | 479 | 855 | " | O | 10 |
| 49 | " | " | 39 | 153 | " | " | 136 | 488 | " | O | 139 | 702 | " | " | 469 | 865 | " | A | 23 |
| 52 | " | " | 20 | 197 | " | O | 98 | 491 | " | A | 314 | 706 | " | " | 502 | 867 | " | " | 17 |
| 63 | " | " | 75 | 205 | " | A | 167 | 494 | " | " | 206 | 708 | " | O | 169 | 873 | " | O | 40 |
| 65 | " | " | 52 | 209 | " | " | 165 | 495 | " | " | 304 | 714 | " | A | 511 | 876 | " | A | 75 |
| 66 | " | " | 37 | 212 | " | O | 86 | 496 | " | " | 308 | 717 | " | O | 204 | 879 | " | " | 47 |
| 69 | " | O | 50 | 213 | " | " | 87 | 499 | " | O | 119 | 723 | " | " | 224 | 880 | " | " | 59 |
| 71 | " | A | 36 | 214 | " | PJ | 20 | 504 | " | " | 98 | 725 | " | A | 375 | 891 | " | O | 44 |
| 72 | " | " | 48 | 219 | " | O | 54 | 505 | " | A | 321 | 727 | " | " | 391 | 893 | " | A | 157 |
| 79 | " | " | 47 | 221 | " | " | 83 | 530 | " | O | 162 | 737 | " | O | 260 | 895 | " | " | 37 |
| 81 | " | " | 35 | 223 | " | A | 153 | 534 | " | " | 137 | 738 | " | " | 208 | 910 | " | " | 121 |
| 84 | " | " | 6 | 228 | " | " | 129 | 561 | " | A | 434 | 755 | " | " | 227 | 922 | " | O | 48 |
| 87 | " | " | 31 | 230 | " | " | 188 | 567 | " | O | 156 | 764 | " | " | 232 | 924 | " | A | 88 |
| 88 | " | " | 29 | 233 | " | " | 144 | 575 | " | " | 140 | 765 | " | " | 221 | 927 | " | O | 43 |
| 90 | " | " | 26 | 238 | " | " | 151 | 584 | " | " | 184 | 768 | " | A | 586 | 951 | " | A | 97 |

# CASES OVERRULED

### IN

## A. I. R. 1938 OUDH

| | |
|---|---|
| **Amjad** Ali v. Muhammad Ali, (1927) 4 O W N 993=2 Luck 757=A I R 1927 Oudh 506=105 I C 912 | Overruled in A I R 1938 Oudh 122 (F B). |
| **Bank** of Upper India Ltd. v. Abdul Ali, (1936) 1936 O W N 522=1936 O L R 308=A I R 1936 Oudh 317=162 I C 750 | Overruled in A I R 1938 Oudh 1 (F B). |
| Girja Charan v. Sheoraj Singh, (1928) 5 O W N 686=4 Luck 22=A I R 1928 Oudh 376=111 I C 903 | Overruled in A I R 1938 Oudh 122 (F B). |
| Kishan Lal Atal v. Ummatul Fatima Begam, (1914) 17 O C 207=A I R 1914 Oudh 233=25 I C 384 | Overruled in A I R 1938 Oudh 45. |

# THE
# ALL INDIA REPORTER
# 1938
## Oudh Chief Court

### ** A. I. R. 1938 Oudh 1
### FULL BENCH

SRIVASTAVA C. J., ZIAUL HASAN AND SMITH JJ.

*Mt. Rup Rani and another* — *Plaintiffs* — Appellants.

v.

*Bithal Das* — *Defendant* — Respondent.

First Appeal No. 133 of 1935, Decided on 21st October 1937, against order of Civil Judge, Mohanlalganj, Lucknow, D/- 30th November 1935.

*** (a) Court-fees—Proper court-fee payable should be determined on substance of claim gathered from plaint and not merely on its language:** *1936 O W N 522=A I R 1936 Oudh 317=162 I C 750, OVERRULED.*

No doubt the Court-fees Act, being a fiscal enactment, its provisions should be strictly construed; but they should not be so construed as to furnish a chance of escape and a means of evasion. Language is meant to be used as a vehicle for expression of one's thoughts. Where, however, it is abused for the purpose of concealing the real thoughts, it is the duty of a Court of justice to look to the substance of the claim to be gathered from the whole plaint, and not to allow itself to be deceived by the language of the relief used for evading the payment of proper court-fee by concealing the real purpose of the suit: *A I R 1934 Oudh 505, Approved; 39 Cal 704, Rel. on; 1936 O W N 522=A I R 1936 Oudh 317=162 I C 750,* **Overruled.** [P 6 C 2; P 7 C 2]

**** (b) Court-fees Act (1870), S. 7 (iv) (c) and Sch. 2, Art. 17 (iii)—Decree in partition suit—Suit by one party for declaration that decree is collusive, illegal and void—Consequential relief should be deemed to be implied in prayer for declaration—Plaint should bear ad valorem court-fee under S. 7 (iv) (c).**

Even though a consequential relief may not be expressly prayed for, yet if such a relief is implicit in the declaration and is a necessary consequence of it, it must be deemed to be included within the declaration prayed for in the suit. When a person who is a party to a decree asks for a declaration about the decree being illegal and void, the grant of such a declaration in his favour necessarily has the effect of setting aside the decree and relieving him of the obligations under it. [P 7 C 1]

Where therefore a party to a partition suit institutes a suit for a declaration that the decree passed in the partition suit is collusive, illegal and void, a consequential relief should be deemed to be implied in the prayer for the declaration claimed in the suit, and the plaint should therefore bear an ad valorem court-fee under S. 7 (iv) (c): *Case law discussed.* [P 2 C 2; P 7 C 1, 2]

Moreover, the declaration sought in such case does not relate either to the plaintiff's legal character or to any right as to any property, and is not therefore one contemplated by S. 42, Specific Relief Act. In this view of the matter also, the suit cannot be regarded as "a suit to obtain a declaratory decree where no consequential relief is prayed": *39 Cal 704, Rel. on.* [P 7 C 1]

Naziruddin and S. B. Bajpai — *for Appellants.*

Radha Krishna and P. D. Rastogi — *for Respondent.*

### OPINION

**Srivastava C. J.**—The facts of the case which has given rise to this reference to a Full Bench are briefly these: One Munnu Lal had two sons, Bithal Das born of his first wife and Jagdish Prasad born of his second wife, Mt. Rup Rani. In 1929 Munnu Lal, acting for himself and as guardian of his minor son Jagdish Prasad, and Mt. Rup Rani instituted a suit for partition of the joint family property against Bithal Das. A preliminary decree for partition was passed by the Civil Judge of Lucknow on 23rd April 1930, which decree was made final on 31st May 1931. As a result of this decree, Munnu Lal, his two sons and his wife Mt. Rup Rani were awarded each a one-fourth share in the family properties and Bithal Das, defendant, in addition to certain immovable and other properties allotted to his share was given a money decree against the plaintiffs for Rupees 8,772-5-0 by way of compensation for the deficiency in his share. The minor Jagdish Prasad under the guardianship of his mother Mt. Rup Rani made an appeal against the final decree to the Chief Court, but the appeal was unsuccessful. Bithal Das in execution of his money decree attached certain houses which were allotted at the partition to the shares of Munnu Lal, Jagdish Prasad and Mt. Rup Rani, and put them to sale. Thereupon, Mt. Rup Rani for herself and as guardian of her minor son Jagdish Prasad instituted the present suit for a declaration that the above mentioned decree passed in the partition suit was collusive, illegal and void. It was alleged that Munnu Lal acted in the partition suit in collusion with his eldest son, defendant 2, and that as a result of it the plaintiff had got less than their proper share and that the sum of Rs. 8,946-9.0 had been wrongly made a charge on their share. The aforesaid houses were sold, but on the application of the plaintiffs made to the lower Court the confirmation of sale was stayed pending decision of the suit. The suit was valued for the purpose of jurisdiction at Rs 10,000, but a court-fee of Rs. 10 was paid on the declaratory relief sought in the plaint. Munnu Lal who was impleaded as defendant 1 died during the pendency of the suit, and his name was struck off leaving Bithal Das as the sole defendant in the case. The learned Civil Judge relying on the decisions of the Judicial Commissioner's Court in 24 O C 361,[1] and of this Court in 8 Luck 668,[2] held that in determining the question of court-fee the substance of the relief asked for must be looked into and that looked at in this light the consequential relief of getting the previous decree and the partition effected thereunder set aside was necessarily implied in the declaratory relief claimed in the plaint. He accordingly held that ad valorem court-fee must be paid on the plaint. As the plaintiffs failed to make good the deficiency he rejected the plaint. The plaintiffs appealed against this order of the Civil Judge to this Court. Simultaneously with the appeal the plaintiffs also made an application purporting to be under O. 39, R. 1, O. 21, R. 29 and S. 151, Civil P. C., praying for stay of confirmation of the sale of their house property referred to above till the decision of the appeal. An interim order staying confirmation of the sale was passed on the very day when the application was made which order was subsequently confirmed after notice to the defendant. When the appeal came up for hearing before a Division Bench, it was noticed that there was some conflict in the principles enunciated in two Bench decisions of this Court, namely 11 O W N 1292[3] and 1936 O W N 522[4] The Division Bench therefore thought it advisable to refer the following questions for decision by a Full Bench:

> 1. Whether the question of proper court-fee payable in a suit is to be determined mainly on the language of the relief claimed in the plaint or on the substance of the claim to be gathered from the whole plaint? and
>
> 2. Whether a consequential relief should be deemed to be implied in the prayer for declaration claimed in the present suit and the plaint should therefore bear an ad valorem court-fee or whether it should be treated merely as a declaratory suit governed by Art. 17 (iii) of Sch. 2, Court-fees Act?

The counsel for the parties have referred us to a large number of decisions of various High Courts. Some of the cases referred to by them are cases in which suits were instituted for declarations in respect of deeds and instruments. As different considerations such as those arising on the provisions of S. 39, Specific Relief Act, apply to suits for cancellation of deeds, I propose to confine myself to decisions in suits relating to decrees. The only decision of the Bombay High Court to which our attention has been drawn is 20 Bom 736.[5] It was held in this case that a suit in which the only prayer is to have a decree set aside as null and void is a suit for a declaratory decree without consequential relief; and Art. 17, Cl. (iii) and not S. 7, Cl. (iv), Court-fees Act (7 of 1870) is applicable to it. It appears from the judgment in this case that the Court had not sufficient knowledge of the facts and so it was remarked that "it may be that a mere declaration will effect all that the plaintiff wants". Nothing was said as to whether the determination of the question of court-fee must be based mainly on the language of the relief claimed in the plaint or on the substance of the claim to be gathered from the whole plaint. The case in 20 Bom 736[5] was followed by the Calcutta High Court in 30 Cal 788.[6] Relying upon the Bombay case, the Calcutta High Court also held that a suit in which the only prayer is to have it declared that a certain decree is ineffectual and inoperative against the plaintiffs, is a suit for a declaratory decree without consequential relief and falls within Sch. 2, Art. 17, Cl. (iii) and not under S. 7, Cl. (iv) (c), Court-fees Act (7 of 1870). It was also remarked in this case that the safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint, and not to speculate upon what may be the ulterior effect of his success. A contrary view appears to have been taken in 39 Cal 704,[7] in which one of the reliefs claimed was that a decree which was pending execution

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[1] Sripal Singh v. Jagdish Narayan, (1921) 8 A I R Oudh 217=65 I C 980=24 O C 361.

[2] Lallo Prasad v. Sahebdin Singh, (1934) 21 A I R Oudh 212=150 I C 722=8 Luck 668=11 O W N 488.

[3] Mathura Prasad v. Ram Lal (1934) 21 A I R Oudh 505=152 I C 312=11 O W N 1292.

[4] Bank of Upper India Ltd. v. Abdul Ali, (1936) 23 A I R Oudh 317=162 I C 750=1936 O W N 522.

[5] Shrimant Sagajirao v. S. Smith, (1896) 20 Bom 736.

> has been collusively and fraudulently obtained and it is ineffectual, inoperative and invalid ; and that for the satisfaction of the said decree, the mortgaged property in question mentioned in said decree cannot be sold.

The following observations made by Sir Lawrence Jenkins in this case are instructive and may be usefully quoted :

> It is a common fashion to attempt an evasion of court-fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful it cannot be touched, but the device does not merit encouragement or favour . . The section (S. 42, Specific Relief Act), does not sanction every form of declaration, but only a declaration that the plaintiff is 'entitled to any legal character or to any right as to any property'; it is the disregard of this that accounts for multiform and at times eccentric declarations which find a place in Indian plaints. . . . .
>
> Now, what are the declarations that are sought in this case? None relate to the plaintiff's legal character; so only those are permissible which relate to 'any right as to any property'. Of the declarations in the first prayer of the plaint, none as expressed is a declaration of this character: it may be that the proposition at which the plaintiff aims is in some measure involved in those declarations, but that is not what is sanctioned by S. 42.
>
> The second prayer is open to the same comment. The third prayer expressly seeks relief, though it is general in its terms. I fail then to see how this is such a suit as S. 42, Specific Relief Act, contemplates; and if it is not, then it is not 'a suit to obtain a declaratory decree where no consequential relief is prayed', as sanctioned by law.
>
> The proceedings of this suit confirm this view, for the plaintiff has successfully sought an interim injunction restraining the defendants, and at this moment, the defendants are restrained by an injunction from pursuing the rights they assert to be theirs.
>
> That an injunction is consequential relief is, I think, clear ; the language of the Specific Relief Act favours that view, and it is one that has the sanction of Indian decisions and also of the Court of Chancery in (1860) 1 Dr & Sm 342.[8]

In result it was held that the court-fee of Rs. 10 was not sufficient Turning now to the cases decided in the Madras High Courts, a Full Bench of that Court in 38 Mad 922[9] held that a suit for a declaration that a decree passed against the plaintiff for a debt was not binding on him is nonetheless a suit for a declaratory decree with consequential relief within the meaning of S 7, Cl. (iv) (c). Court-fees Act. It may be noted that in the plaint in this suit, the plaintiff had claimed not only a declaration that a mortgage decree was not binding on the plaintiff, but also an injunction restraining the defendant from executing the same. The Division Bench, however, did not confine the reference to such a case but made a comprehensive reference including a question relating to a claim asking merely for a declaration. The Full Bench referred with approval to the principle enunciated in an earlier case in 30 Mad 18,[10] that the substance, and not the language, of the plaint must be looked to.

It may be noted that in the Madras Presidency a new sub-section has been added in 1922 as S. 7 (iv-A) which expressly provides for suits for cancellation of a decree for recovery of money or property having a money value. In 56 Mad 212[11] it was held that the intention of the Legislature is that a suit in which the plaintiff prays for a decree that a previous decree obtained against him is of no effect against him on account of fraud in obtaining it and that, so far as he is concerned, that decree is wiped out, however he may choose to word his prayer, comes within the new S. 7 (iv-A), if the previous decree was one for recovery of money or property having a money value. Again in A I R 1936 Mad 470[12] it was laid down that the principle to be followed in determining the question of proper court-fee is that the substance of the relief claimed, and not the form and language of the plaint, must be looked at. It was further held that if a party to a decree sues to set aside or cancel that decree, S. 7 (iv-A) governs the court-fee; but if the party suing was not a party to a decree which he seeks to have declared not binding on him, the appropriate provision of the Court-fees Act is Art. 17-A. Lastly in A I R 1937 Mad 449,[13] a distinction was drawn between an obligation imposed on a party by a decree and an obligation imposed on a party by the personal law by which he is governed in pursuance of the decree. In the former case he is bound to sue for cancellation, and in such a case even if he sues for a bare declaration, it necessarily involves cancellation, and therefore it was held that the form of the relief he prays for is immaterial.

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[6] Zinnatunnessa Khatun v. Girindra Nath Mukerjee, (1903) 30 Cal 788.

[7] Deokali Koer v. Kedar Nath, (1912) 39 Cal 704=15 I C 427=16 C W N 888.

[8] Marsh v. Keith, (1860) 1 Dr & Sm 342=30 L J Ch 127=6 Jur (N S) 1182=9 W R 115=3 L T 498.

[9] Arunachalam Chetty v. Rangasawmy Pillai, (1915) 2 A I R Mad 948 =28 I C 79=38 Mad 922=28 M L J 118 (F B).

[10] C. V. Sankaran Nair v. C. V. Gopala Menon, (1907) 30 Mad 18.

[11] Venkatasiva Rao v. Venkatanarasimha Satyanarayanamurty, (1932) 19 A I R Mad 605=139 I C 817=63 M L J 764=56 Mad 212.

[12] Abdullah v. Subramanyan Pattar (1936) 23 A I R Mad 470=163 I C 208=71 M L J 383.

In A I R 1925 Lah 346,[14] the decision of the Madras High Court in 38 Mad 922[9] was followed, and it was held that a suit for a declaration that a mortgage decree passed against the plaintiff was not binding on him as having been obtained by fraud and praying that the former case be restarted, should be stamped ad valorem. The Madras Full Bench decision in 38 Mad 922[9] and the Calcutta decision in 39 Cal 704[7] were followed, and the cases in 20 Bom 736[5] and 30 Cal 788[6] were dissented from by another Bench of the same Court in 8 Lah 531.[15] In two later cases in A I R 1929 Lah 463[16] and 13 Lah 391[17] also the same view was taken, and it was held that where the plaintiff's object in bringing a declaratory suit is to get rid of a decree passed against him in a previous suit, the suit is one involving a prayer for setting aside the decree, and the plaint must bear an ad valorem court-fee. The principle that the substance and not merely the language of the plaint is to be looked at in deciding whether a case falls or not within the ambit of S. 7 (iv) (c), Court-fees Act, was also affirmed in both these cases.

In 1 Pat 197[18] certain members of a joint Hindu family sued for a declaration that a sale of joint family property held in execution of a decree obtained against two members of the family was null and void to the extent of the plaintiffs' shares in the property. The Taxing Officer relying on the decision in 39 Cal 704,[7] reported that the suit was in fact a suit for a declaration with consequential relief, and that court-fee was therefore payable ad valorem. This view was accepted by a Bench consisting of Das and Bucknill JJ. In A I R 1925 Pat 210[19] Das J. held that the question of court-fee has to be decided with reference to the claim and that the Court cannot insist on court-fee on consequential relief not actually asked on the ground that the plaintiff has cast the reliefs in such a form as to conceal the real nature of the relief, though if consequential relief is not asked when it could have been asked, the suit may be dismissed. It might be noted that the judgment makes no reference to any cases either of the Patna High Court or of any other High Court. In 10 Pat 432[20] Kulwant Sahay J. held that the substance of a plaint, and not merely the exact reliefs asked for, ought to be looked into in order to determine the court-fee payable on it. Nothing more need be said about this case as it is one relating to a claim for a declaration about a deed of gift.

In 53 All 552[21] it was held by a Bench consisting of Banerji and King JJ. that the question of court-fee must be decided on the plaint and the relief actually asked for therein. It was also observed that fiscal statutes must be strictly construed, and that when the plaintiff has carefully refrained from asking for consequential relief, it is not for the Court to consider that he should nevertheless be deemed to have asked for consequential relief. So it was held that where the only prayer made in the plaint was for a declaration that a certain compromise decree was void and ineffectual as against the plaintiff, the proper court-fee payable was one of Rs. 10 under Art. 17, Cl. (iii) of Sch. 2, Court-fees Act. In 54 All 812[22] a suit was brought on the basis of a mortgage against the mortgagor and his son and nephew who were apparently members of the joint family with him. The two last-named persons being minors, were represented by a guardian ad litem. The suit was decided on the basis of a compromise. The son and the nephew thereafter brought a suit impugning the mortgage and alleging that the compromise was fraudulent, and that the decree was obtained on account of the negligence and collusion of their guardian. The reliefs claimed were (1) that the mortgage deed be declared (or adjudged) void and be cancelled; and (2) that the compromise, the preliminary decree and the final decree be cancelled. A Full Bench consisting of Sir Shah Mahommad Sulaiman C. J. and Mukerji, Banerji, King and Pullan JJ. held that both the reliefs were governed by Sch. 1, Art. 1, Court-fees Act. At pages 822 and 823 of the report the learned Judges observed as follows:

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[13] Vallabhacharyulu v. Rangacharyulu, (1937) 24 A I R Mad 449.

[14] Harnam Singh v. Hayat, (1925) 12 A I R Lah 346=86 I C 680=26 P L R 73.

[15] Hakim Rai v. Ishar Das-Gorakh Rai, (1927) 14 A I R Lah 499=102 I C 46=8 Lah 531 = 29 P L R 602.

[16] Bindraban v. Punjab National Bank Ltd., Ambala, (1929) 16 A I R Lah 463 = 116 I C 895=30 P L R 176.

[17] Sri Kishan Das v. Sat Narain, (1932) 19 A I R Lah 132 = 135 I C 499 = 13 Lah 391 = 32 P L R 729.

[18] Surendra Narain Singh v. Shambihari Singh, (1922) 9 A I R Pat 404=1 Pat 197.

[19] Narayan Singh v. Dildar Ali Khan, (1925) 12 A I R Pat 210=80 I C 544 = 3 Pat 915 = 6 P L T 191.

[20] Kamla Prasad v. Jagarnath Prasad, (1931) 18 A I R Pat 78=130 I C 46=10 Pat 432 = 13 P L T 155.

[21] Radha Krishna v. Ram Narain, (1931) 18 A I R All 369 = 131 I C 604 = 53 All 552= 1931 A L J 235.

> The Court has to see what is the nature of the suit and of the reliefs claimed, having regard to the provisions of S. 7, Court-fees Act. If a substantive relief is claimed, though clothed in the garb of a declaratory decree with a consequential relief, the Court is entitled to see what is the real nature of the relief, and if satisfied that it is not a mere consequential relief but a substantive relief, it can demand the proper court-fee on that relief, irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief. . . .
>
> In our opinion a relief for the cancellation of a decree, or to be more accurate, for the setting aside of a decree, is not a declaratory relief only. The effect is not merely a declaration as to a person's character or status as contemplated by S. 42 Specific Relief Act, but the effect will be to render the decree void and incapable of execution and will free the plaintiff from all further liability under it. The claim, therefore, is not merely for a declaratory relief falling under Sch. 2, Art. 17 (iii). Nor does the relief fall under S. 7 (iv) (c). There is no prayer for a declaration that the decree is void, or for a declaration of any sort, so the relief that the decree be set aside cannot be regarded as a 'consequential' relief in any sense of that word. We hold that the court-fee in respect of the prayer for cancellation of the decree is payable under Sch. 1, Art. 1 on the value of the decree.

In 55 All 791[23], the matter came again before a Full Bench consisting of Sir Shah Mahommad Sulaiman C. J., Sir Lal Gopal Mukerji and King JJ. In this case the plaintiff had prayed for a declaration that a certain decree was not binding on him and it was altogether void and ineffectual. It was held that inasmuch as the plaintiff merely asks for a declaration, the suit was one for obtaining a declaratory decree and no ad valorem court-fee for such a relief can be charged. It was observed that this view should be followed, if nothing else, on the principle of *stare decisis*. The earlier Full Bench case in 54 All 812[22] was distinguished on the ground that the plaintiff in that case had in express terms asked for the cancellation of the compromise and the decree. Our attention was also drawn to yet another Full Bench decision of the same Court in 58 All 146,[24] in which Niamatullah and Rachhpal Singh JJ. (Bennet J. dissenting) held that where a plaintiff desires no more than a declaratory relief of the nature described in S. 42, the Court must proceed on that footing for all purposes of court-fee. I do not propose to go into the details of this case as it relates to a declaration in respect of a deed in which much of the discussion centred on the provisions of S. 39, Specific Relief Act. In A I R 1932 All 316[25] Niamatullah J. held that the question of court-fee must be determined with reference to the plaint as it is, and not as it ought to have been. The same view was taken by a Bench of that Court in A I R 1932 All 560.[26] In 1934 A L J 955,[27] where one of the reliefs asked for by the plaintiff was that a compromise and the decree passed on the basis of it were improper and void as against the plaintiff, and did not in any way affect the plaintiff's right, Sir Shah Mahommad Sulai-

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22. Kalu Ram v. Babu Lal, (1932) 19 AIR All 485 =139 IC 82=54 All 812=1932 ALJ 684 (FB).

23. Sri Krishna Chandra v. Mahabir Prasad, (1933) 20 A I R All 488 = 149 I C 198 = 55 All 791=1933 A L J 673 (F B).

24. Bishan Sarup v. Musa Mal, (1935) 22 A I R All 817=156 I C 494 = 58 All 146 = 1935 A L J 869 (F B).

25. Mohammad Ismail v. Liyaqat Husain, (1932) 19 A I R All 316=140 I C 191=1932 A L J 165.

26. Brij Gopal v. Suraj Karan, (1932) 19 A I R All 560=141 I C 112=1932 A L J 466.

27. Suraj Ket Prasad v. Chandra Mal, (1934) 21 A I R All 1071=153 I C 517=1934 A L J 955.

man C. J. held that the plaintiff in asking for a declaration that the compromise was improper and void as against the plaintiff was asking for the cancellation of this instrument, and was bound to pay ad valorem court-fee under Sch. 1, Art. 1, Court fees Act, in accordance with the Full Bench decision in 54 All 812[22] The last case of this Court to which our attention has been drawn is A I R 1937 All 411[28] In this case an ex parte decree was passed against the plaintiff for certain loss in a business started by his father. The plaintiff brought a suit for a declaration that he was not personally liable for the loss in the new business started by his father out of the ancestral funds, which he had no right to do. He stated that he did not want the cancellation of the ex parte decree. A Bench consisting of Harries and Rachhpal Singh JJ. held that in substance the plaint asked for a further relief. In fact the plaintiff wanted that in so far as he was personally concerned, the ex parte decree against him should be cancelled and set aside, which claim could not amount to a mere declaration. Referring to the Full Bench decision in 55 All 791,[23] their Lordships observed as follows :

> In our opinion the ruling is no authority for the contention that it is not open to the Court to look to the allegations in the plaint in order to see whether the suit was one for a mere declaration or whether in effect the plaintiff was claiming a further relief though the real nature of the relief was concealed by him.

They further observed as follows :

> It appears to us for the reasons given above, that it is always open to the Court to find out by looking into the allegations in the plaint as to whether or not the court-fee paid is sufficient. In fact it is a duty which is cast upon the Court under S. 6, Court-fees Act, to which we have made a reference already.

Lastly, reference may be made to the cases decided in this province. In 24 O C 361[1] a suit was brought for setting aside the preliminary and the final decrees passed in a mortgage suit on the basis of a compromise sanctioned by the Court on the ground that they were obtained by fraud, and that the plaintiff who was a minor was not properly represented in the suit. It was held that as the result of granting the declaration would be to wipe out the preliminary and final decrees, loss of the title of the decree-holders and the relegation of the decree-holders to the position of the mortgagees seeking to enforce their mortgage, the relief for declaration also involved a consequential relief, and an ad valorem court-fee was payable under S. 7 (iv) (c), Court-fees Act. In 8 Luck 668.[2] decided by me, the plaintiffs had brought a suit for a declaration that a decree obtained against their father who was dead was not binding on them, and that the joint family property which they had obtained by right of survivorship was not open to attachment in execution of the said decree. It was held that the consequential relief was implicit in the declaration asked for, and that an ad valorem court-fee was payable on the suit. In 11 O W N 1292,[3] a Bench of this Court consisting of Nanavutty and Smith JJ. held that it was the bounden duty of Courts to look into the substance of the relief claimed, and that ad valorem court-fee was payable in a case where the plaint is deliberately cast in such a form as to evade payment of court-fee, though the plaint was virtually one for a declaration with consequential relief. In 1936 O W N 522,[4] a suit was brought for getting rid of a liability to pay maintenance substantially by setting aside a decree which declared it to be a charge on certain property. It was held by a Bench consisting of King C. J. and Nanavutty J. that for the purpose of fixing the amount of court-fee in a suit of this kind, the Court must look primarily to the language of the plaint. It was further held that it would not be proper to treat the plaint as if a consequential relief had been prayed.

The foregoing review of the case-law shows a sharp conflict of judicial opinion not only between various High Courts, but also amongst different Judges of the same Court. It has been said that the Court-fees Act being a fiscal enactment, its provisions should be strictly construed, but, as observed by Jenkins C. J. in 39 Cal 704,[7] they should not be so construed as to furnish a chance of escape and a means of evasion. Language is meant to be used as a vehicle for expression of one's thoughts ; where, however, it is abused for the purpose of concealing the real thoughts, it seems to me to be clearly the duty of a Court of justice to look to the substance of the plaint, and not to allow itself to be deceived by the language used for evading the payment of proper duty by concealing the real purpose of the suit.

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[28] Kailash Narain v. Gopi Nath, (1937) 24 A I R All 411=170 I C 459=I L R (1937) All 259= 1937 A L J 562.

In this connexion reference may also be made to the provisions of S. 6, Court-fees Act, which imposes on Courts the duty of not receiving a document of any of the kinds specified as chargeable in the first or second schedule of the Act unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such a document. Emphasis was laid on the words used in Art. 17, Cl. (iii), namely "to obtain a declaration where no consequential relief is prayed for". In my opinion, even though a consequential relief may not be expressly prayed for, yet if such a relief is implicit in the declaration and is a necessary consequence of it, it must be deemed to be included within the declaration prayed for in the suit. When a person who is a party to a decree asks for a declaration about the decree being illegal and void, the grant of such a declaration in his favour necessarily has the effect of setting aside the decree and relieving him of the obligations under it. I am therefore of opinion that the declaration claimed by the plaintiffs in the present suit carries with it the consequential relief of the setting aside of the decree. The plain object of the plaintiffs is to relieve themselves of the liability for payment of the sum of Rs. 8,748-6-0. In fact, the learned counsel for the plaintiffs-appellants has frankly admitted this. It is also worthy of note that though in order to evade the payment of ad valorem court-fee the plaintiffs have not claimed any relief by way of injunction, yet they had tried to secure that object by getting an order from the lower Court, and again from this Court, for stay of confirmation of the sale which has taken place in execution of the previous decree. It is obvious that if the plaintiffs succeed in getting the declaration, the effect of it would be to wipe out the decree and the sale which has taken place in execution of it. I might also point out that as was held in 39 Cal 704,[7] the declaration sought in this case does not relate either to the plaintiffs' legal character or to any right as to any property, and is not therefore one contemplated by S. 42, Specific Relief Act. In this view of the matter also, the present suit cannot be regarded as "a suit to obtain a declaratory decree where no consequential relief is prayed".

For the above reasons my answer to the questions referred to the Full Bench is as follows: (1) The question of the proper court-fee payable in a suit is to be determined on the substance of the claim to be gathered from the whole plaint, and not merely on the language of the relief claimed in the plaint. (2) A consequential relief should be deemed to be implied in the prayer for the declaration claimed in the present suit, and the plaint should therefore bear an ad valorem court-fee under S. 7 (iv) (c), Court-fees Act.

**Smith J.**—I have read the judgment of his Lordship the Chief Judge. He has elaborately discussed the voluminous case-law bearing upon the points at issue, and has shown that it is very conflicting. The view he has taken is substantially the same as that which was taken by a Bench of this Court, of which I was a member, in the decision reported in 11 O W N 1292.[3] In that case we followed the decision in 39 Cal 704,[7] which has been quoted with approval by his Lordship the Chief Judge in the present case. I would therefore answer the questions referred to the Full Bench in the manner in which his Lordship the Chief Judge has answered them.

**Ziaul Hasan J.** — Although there is conflict of judicial opinion on the first of the questions referred to the Full Bench, nevertheless I think that the reasons for answering that question in the manner in which it has been answered by the Hon'ble the Chief Judge far outweigh those that can be advanced for the opposite view. I therefore concur in the answers to the questions given by my Lord the Chief Judge.

D.S./R.K. *Answer accordingly.*

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## A. I. R. 1938 Oudh 7

ZIAUL HASAN J.

*Puttoo Lal* — Applicant.

v.

*Sahu and others* — *Decree-holders* — Opposite Party.

Civil Revn. Appln. No. 171 of 1936, Decided on 14th September 1937, from order of Munsif, Lucknow, D/- 14th September 1936.

**(a) Civil P. C. (1908), S. 152—Full pleader's fee awarded against an admitting defendant contrary to rules —Judgment and decree can be amended under S. 152.**

Where a Court awards the full pleader's fees even as against an admitting defendant in violation of the rules, the judgment and the decree can be amended under S. 152 as it is an error arising from an accidental slip. [P 8 C 1, 2]

**(b) Oudh Chief Court Rules (Civil Rules) Ch. 7, R. 289, para. 6—Para. 6 covers case of contesting defendants.**

Paragraph 6 of R. 289 of Ch. 7 of the Oudh Civil Rules does contemplate not only those cases in which none of the defendants has put up a contest and the entire suit has been decreed either ex parte or on admission of the defendants, but also those cases in which there are contesting defendants. [P 8 C 2]

H. D. Chandra — *for Applicant.*

Ganesh Prasad and M. L. Tewari — *for Opposite Party.*

**Order.**—This is an application for revision of an order of the learned Munsif of Lucknow dismissing an application of the applicant for amendment of a decree under S. 152, Civil P. C. A suit was brought against the applicant as well as some others, and while the applicant admitted the plaintiffs' claim the other defendants contested it. It was eventually decreed with costs against all the defendants. The decree-holders tried to execute the decree as regards costs against the present applicant and thereupon he put in an application praying that as he had admitted the plaintiffs' claim, no costs should have been awarded against him. The learned Munsif came to the conclusion that as the decree was in conformity with the judgment, no application for amendment of the decree was entertainable. The contention that no costs at all should have been awarded against the applicant is of course untenable and is not pressed before me. It is contended however that under Ch. 7, R. 289, para. 6, Oudh Civil Rules, pleader's fee against the applicant should have been only one-fourth of the full fee. I am of opinion that this contention is well-founded. R. 289, para. 6 of Ch. 7 runs as follows:

> When such suits or appeals are decided ex parte or on confession of judgment, or when an appeal is rejected under O. 41, R. 10 of the Code, and in the matter of applications under Paras. 17 and 20 of Sch. 2 to the said Code, one-quarter of the fees payable in the case of suits or appeals decided on the merits after contest.

It is therefore clear that as the applicant had confessed judgment, only one-fourth of the legal fee should have been taxed against him. As to whether or not the application was maintainable under S. 152, Civil P. C., I am of opinion that it certainly was. S. 152 provides:

> Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

It was obviously an error arising from an accidental slip that full pleader's fees were taxed against the applicant in the decree. If the learned Munsif by decreeing the suit "with costs" against all the defendants meant that full costs should be allowed against all the defendants in that case, the judgment as well as the decree could be amended under S. 152, Civil P. C.; but in view of the rule quoted above, it must be presumed that what was meant was that legal costs should be awarded against the various defendants. On behalf of the opposite parties, it is contended that para. 6 of R. 289 contemplates only those cases in which none of the defendants has put up a contest and the entire suit has been decreed either ex parte or on admission of the defendants. I cannot accept this contention for which no authority can be shown by the learned counsel for the opposite parties and which is, I believe, against the usual practice of the Courts. The application is allowed with costs and the decree of the learned Munsif ordered to be amended in the light of the above finding.

K.B./R.K. *Application allowed.*

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## ✻ A. I. R. 1938 Oudh 8

SMITH AND MADELEY JJ.

*Sh. Fazal Azim—Objector*—Appellant.

v.

*Tulshi Ram and others* — — Respondents.

Execution Decree Appeal No. 34 of 1936, Decided on 30th September 1937, against order of Dist. Judge, Rae Bareli, D/- 10th July 1936.

**✻ Provincial Insolvency Act (1920), S. 78—Admission of debt by insolvent in his petition for adjudication is not sufficient proof of debt and cannot save limitation.**

The provisions of S. 33 (1) make proof of debts obligatory, after the passing of an order of adjudication, upon creditors who desire to have their claims considered. The modes of proof mentioned in S. 49 are of course not exhaustive, but the fact remains that some form of proof must be supplied by a creditor who wishes to have his debt considered. A mere admission of the debt by the debtor in his petition for adjudication would not amount to proof under the Insolvency Act and therefore would not save limitation under S. 78 (2) of the

Act: *A I R 1934 Nag 282, Rel. on; A I R 1929 Cal 159, Dissent.* [P 9 C 2]

L. S. Misra — *for Appellant.*

P. L. Varma — *for Respondents.*

**Judgment.**—This is an appeal from an appellate decision by the learned District Judge of Rae Bareli. A money decree was obtained in the year 1924 against one Shaikh Fazal Azim. Applications for execution were made, one of which, made on 8th August 1932, was disposed of on 23rd August 1932. On 2nd September 1932, the judgment-debtor applied to be adjudicated insolvent, and he was so adjudicated on 3rd August 1933, but the adjudication was annulled on 15th July 1935. Thereafter, on 13th September 1935, the decree-holders made a further application for execution of the decree; that application was consigned to records on 7th November 1935, and a further application was made on 20th November 1935. The judgment-debtor contended that the application of 13th September 1935 was barred by time, and that consequently the application of 20th November 1935 was also barred by time. The learned Courts below held that the application was within time, and the judgment-debtor has preferred this appeal against that decision.

The only point taken before us on behalf of the appellant is that the decree in question was not proved in the insolvency Court, and that in these circumstances the period from the date of the order of adjudication to the date of the order of annulment could not be excluded for purposes of limitation under the provisions of S. 78 (2), Provincial Insolvency Act, since, according to the Proviso to that section, nothing in the section applies to a suit or application in respect of a debt provable but not proved under the Act. The learned counsel for the appellant contends that under the provisions of S. 33 (1) of the Act it was necessary for these decree-holders to prove their debt, and that the fact that a decree had already been passed in their favour did not absolve them from the necessity of proving it. His argument is that the mention by the insolvent of this decretal debt in his insolvency petition in no way relieved the decree-holders of the necessity of proving it. In support of his contention, he relies on decisions reported in A I R 1932 Lah 173[1] and A I R 1934 Nag 282.[2] A decision reported in A I R 1929 Cal 159,[3] he admits to be against him, but that decision, he urges, should not be followed.

The learned counsel for the opposite parties relies on this Calcutta decision. His argument is that the modes of proof mentioned in S. 49, Provincial Insolvency Act, are not exhaustive, and that the mention of this debt and decree by the insolvent in his petition can be regarded as sufficient proof of them. He refers to the definition of the word "proof" given in S. 3, Evidence Act. In our opinion the provisions of S. 33 (1), Provincial Insolvency Act, make proof of debts obligatory, after the passing of an order of adjudication, upon creditors who desire to have their claims considered. The modes of proof mentioned in S. 49 of the Act are of course not exhaustive, but the fact remains that some form of proof must be supplied by a creditor who wishes to have his debt considered, and with all respect we cannot agree with the view that was taken in the Calcutta case above referred to. We agree with what was said by the learned Judge of the Nagpur Court towards the end of his judgment in the case referred to above. His words were:

> I would again affirm that a mere admission of the debt due on the bond by the debtor in his petition for adjudication would not amount to proof under the Insolvency Act and therefore would not save limitation under S. 78 (2) of the Act.

The result is that we take the view that the debt in question was provable under the Act, but was not in fact proved, so that in view of the Proviso to S. 78, Insolvency Act, the period from the date of the order of adjudication to the date of the order of annulment cannot, in the present case, be excluded for the purposes of limitation. If that period is not excluded, the execution application of 13th September 1935 was beyond time, and consequently the application of 20th November 1935 was also time-barred. We therefore allow this appeal. The result is that the last-mentioned execution application must stand dismissed as time-barred. The appellant is allowed his costs here and in the Courts below.

D.S./R.K. *Appeal allowed.*

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[1] Walaiti Ram v. Partap Singh, A I R 1932 Lah 173=135 I C 194=32 P L R 905.

[2] Mannasao Kalesar v. Rambharosa, A I R 1934 Nag 282=153 I C 533=31 N L R 101.

[3] Krishna Chandra Das v. Jotindra Nath, A I R 1929 Cal 159=114 I C 415=48 C L J 574.

## A. I. R. 1938 Oudh 10

SRIVASTAVA AG. C. J. AND ZIAUL HASAN J.

*Sheo Prasad Lal* — Applicant.

v.

*Mt. Prakash Rani* — Opposite Party.

Civil Revn. Appln. No. 50 of 1936, Decided on 22nd September 1937, from order of Addl. Civil Judge, Sultanpur, D/- 12th December 1935.

**Civil P. C. (1908), O. 34, R. 1—Suit by prior mortgagee—Subsequent mortgagee impleaded as party along with mortgagor — Suit decreed against mortgagor but dismissed against subsequent mortgagee—Suit by subsequent mortgagee on his mortgage – Prior mortgagee is necessary party as person interested in redemption of suit property—Application to be made party by prior mortgagee dismissed—Revision is competent.**

*S*, a prior simple mortgagee, brought a suit upon his mortgage and impleaded *P*, a subsequent mortgagee, and *K* a purchaser of the equity of redemption. The suit was decreed as against *K* but was dismissed as against *P*. In a subsequent suit brought by *P* upon his mortgage, *S* applied for adding himself as party to the suit. The application was dismissed. In revision :

*Held* that the order of the Court below, though in a sense interlocutory, did decide the case so far as it related to the prayer of the applicant. [P 10 C 2]

*Held also* that as *S* held a decree for sale against the mortgagor, he had an interest in the mortgaged property and in the right to redeem the same. *S* was therefore entitled to right of redemption under S. 91, T P. Act, in spite of the dismissal of his suit against *P*. He was therefore a necessary party under O. 34, R. 1, Civil P. C. [P 10 C 2; P 11 C 1]

Radha Krishna and S. C. Das — *for Applicant.*

N. Banerji — *for Opposite Party.*

**Order.**—This is an application in revision against an order of the learned Additional Civil Judge of Sultanpur dismissing the applicant's application to be made a party to a suit brought by the opposite party, Mt. Prakash Rani. On 20th December 1920 a certain Mt. Raj Bibi and her son Tahir Raza executed a deed of simple mortgage in favour of the present applicant Subsequently, on 5th September 1921, they mortgaged the property by way of conditional sale to the opposite party Mt. Prakash Rani. In 1923 the mortgagors brought a suit for cancellation of the applicant's mortgage, but a decree was passed on 16th February 1924 on a compromise by which the mortgage was held to be binding on the mortgagors. In 1926 the mortgagors sold their equity of redemption to one Kuar Prasad. In 1932 the present applicant brought a suit on his mortgage and impleaded Kuar Prasad and Mt. Prakash Rani. The suit was decreed against Kuar Prasad but dismissed as against Prakash Rani as it was held that the mortgage had not been proved against her. This decree was passed on 22nd April 1933 The applicant preferred an appeal to this Court but the appeal was dismissed. On 5th September 1935, the opposite party Mt. Prakash Rani brought a suit on the basis of her mortgage of 5th September 1921 and it was to this suit that the applicant wanted to be made a party. The application was dismissed by the learned Additional Civil Judge on the ground that as the applicant's suit on the mortgage of 20th December 1920 was dismissed as against Mt. Prakash Rani, the applicant was not entitled to be made a defendant to the suit brought by Prakash Rani on her own mortgage.

We are of opinion that this application must succeed. So far as the maintainability of the present application is concerned, we think that the order of the Court below, though in a sense interlocutory, did decide a case so far as it related to the prayer of the present applicant. On the merits also, we consider that it was necessary that the applicant should be made a party to Prakash Rani's suit. It is not denied that the applicant holds a decree as against the mortgagor for sale of the property, the subject of Prakash Rani's suit, though that decree is not binding on her. Under S. 91, T. P. Act, "any person who has any interest in the property mortgaged or in or upon the right to redeem the same" is entitled to redeem the property and it cannot be disputed that by virtue of the decree for sale in his favour, the present applicant is a person who has an interest in the property and in the right to redeem the same. Therefore the applicant has a right of redemption under S. 91, T P. Act, and the fact that his suit was dismissed as against the opposite party is in our judgment no bar to his claiming a right to redeem the property under S. 91. S. 91 imposes no conditions or limitations on the right to redeem the mortgaged property of any person who has any interest in the property or in the right to redeem it, and we therefore see no reason why the fact that the applicant's suit was dismissed against the opposite party should be taken into consideration in judging whether the applicant has a right of redemption under S. 91. The only effect of the dismissal of the applicant's suit against Prakash Rani is that he has lost priority as against Prakash Rani, but that dismissal should not in our opinion deprive the applicant of his right to redeem the property if he chooses to redeem it. Under O. 34, R 1, Civil P. C.,

> all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage

and as it has been found that the applicant has an interest in the property, he was not only a proper but a necessary party to Mt. Prakash Rani's suit under O. 34 R. 1, Civil P. C. We therefore allow this application with costs, and setting aside the learned Additional Civil Judge's order, direct that the applicant be made a party to the opposite party's suit.

K.B./R.K. *Application allowed.*

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## * A. I. R. 1938 Oudh 11

SMITH J.

*Gajadhar and others* — *Plaintiffs* — Applicants.

v.

*Uma Datt and others* — *Defendants* — Opposite Party.

Civil Revn. Appln. No. 110 of 1935, Decided on 15th September 1937, from order of Munsif, Rae Bareli, D/- 28th September 1935.

*** (a) Civil P. C. (1908), O. 5, R. 20 (2) — Substituted service is not necessarily due service—Its adequacy can be contested by party concerned.**

Order 5, R. 20 (2) says that service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally, but it does not follow that substituted service is necessarily due service, the adequacy of which can never be contested by the party concerned : *A I R 1931 Mad 813 and A I R 1931 All 727 (F B), Rel. on ; A I R 1931 Oudh 369, Disting.* [P 12 C 1]

*** (b) Civil P. C. (1908), O. 9, R. 13—Decree ex parte against one defendant and on contest against others — Such defendant not made party to appeal by rest — Appeal dismissed—Ex parte decree is not merged in appellate decree — Application to set it aside is maintainable.**

**Where a decree is passed ex parte against some defendants and on contest against others and the absentee defendants are not parties to the appeal against the decree either as appellant or as pro forma respondents, and the appeal is dismissed, the decree of the original Court does not merge in that of the Court of Appeal and the absentee defendants are entitled to apply under O. 9,** R. 13 to the Court which passed the decree for an order to set it aside against them : *A I R 1917 All 281 and A I R 1932 All 340, Rel. on ; A I R 1921 Oudh 141 and A I R 1929 Oudh 35, Disting.* [P 12 C 1, 2]

S. D. Chaurasia — *for Applicants.*

P. N. Chaudhri — *for Opposite Party 1.*

**Order.**—This is an application in revision against an order passed by the learned Munsif of Rae Bareli, by which he set aside an ex parte decree which had been passed on 30th November 1934, against one Uma Datt. There were three other defendants in the suit, Shambhu, Har Datt and Jagdish Prasad—the suit was one for redemption, and it resulted in a preliminary decree being passed on the date above mentioned. I understand that the decree has not yet been made final. There was an appeal preferred by Jagdish Prasad and Har Datt against the preliminary decree, but the appeal was dismissed on 5th February 1935. In that appeal neither Uma Datt nor Shambhu was impleaded, either as an appellant or as a pro forma respondent. After the decision of the appeal, the plaintiffs applied on 28th February 1935 for a final decree, and on 14th May 1935 Uma Datt applied for the setting aside of the preliminary decree passed ex parte against him. The learned Munsif held that there had been no due service of notice on him, and that he only came to know of the decree some time in the month of Baisakh, which in the year 1935 covered the period from 19th April till 18th May. The result was that the learned Munsif set aside the ex parte decree against Uma Datt subject to his paying Rs. 10 as costs to the other side. The plaintiffs in the suit have now made this application in revision.

It appears that substituted service was directed to be made upon Uma Datt for the hearing of the suit by means of a publication in the Pioneer, and the notice was published in an issue of that paper dated 8th November 1934. The contention of the learned counsel for the applicants is that the substituted service thus made must be regarded as due service for the purpose of Art. 164 of Sch. 1, Lim. Act, having regard to the provisions of O. 5, R. 20 (2), Civil P. C. He makes reference to a decision of a learned Single Judge of this Court reported in A I R 1931 Oudh 369.[1] That decision followed a decision of the Madras High Court reported in A I R 1928 Mad 815,[2] but that decision was dissented from in a later decision of the Madras High Court reported in A I R 1931 Mad 813.[3] Moreover, in the case of this Court the applicant for the setting aside of the ex parte decree did not raise any plea that the substituted service was not duly effected, or that it was improperly ordered on insufficient material. I do not think, in the circumstances, that there is any reason for my interfering in revision with that part of the order of the learned Munsif by which he held that Uma Datt had not been duly served by publication. It is to be noted that O. 5, R. 20 (2), Civil P. C., says that service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally, but, as was pointed out in A I R 1931 Mad 813,[3] it does not follow that substituted service is necessarily due service, the adequacy of which can never be contested by the party concerned. A similar view was taken in a Full Bench decision of the Allahabad High Court reported in A I R 1931 All 727.[4]

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[1] Thakur Prasad v. Lala Barati Lal, A I R 1931 Oudh 369=132 I C 778=8 O W N 845.

The other contention of the learned counsel for the applicants is that the preliminary decree merged in the appellate decree, and that the learned Munsif had thereafter no jurisdiction to set aside the ex parte decree against Uma Datt. In that connexion he made reference to a decision of the late Court of the Judicial Commissioner reported in A I R 1921 Oudh 141[5] and a decision of this Court reported in A I R 1929 Oudh 35.[6] These two decisions appeared at first sight to cover the facts of the present case, but in reality they appear not to do so, since Uma Datt was, as has been mentioned already, not a party to the appeal that was preferred against the preliminary decree, either as an appellant or as a pro forma respondent. In these circumstances it is contended by his learned counsel that his position is not affected by that appeal, and he was entitled to apply under O. 9, R. 13, Civil P. C., to the Court which passed the decree for an order to set it aside as against him. Reference was made to two decisions reported in 39 All 13[7] and 54 All 423.[8] There is nothing to show that in the cases of this Court and the late Court of the Judicial Commissioner any question arose of a party having been entirely omitted from an appeal. Following the principles laid down in the Allahabad rulings just referred to, I think that there was no legal bar to the Munsif's setting aside the ex parte decree against Uma Datt, and I accordingly dismiss this application with costs.

S.C./R.K. *Application dismissed.*

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[2] Shariba Beeby v. Abdul Salam, A I R 1928 Mad 815=110 I C 490=51 Mad 860=55 M L J 565.

[3] Gyanammal v. Abdul Hussain Sahib, A I R 1931 Mad 813=134 I C 1202=55 Mad 223=61 M L J 920.

[4] Ram Bharose v. Ganga Singh, A I R 1931 All 727=136 I C 609 = 54 All 154 = 1931 A L J 1049 (F B).

[5] Mahabali Parshad v. Balbhaddar Singh, A I R 1921 Oudh 141=64 I C 303=24 O C 282.

[6] Girdhari Lal v. Deputy Commissioner, Gonda, A I R 1929 Oudh 35=114 I C 319 = 4 Luck 201=5 O W N 1037.

[7] Gajraj Mati Tiwarin v. Shami Nath Rai, A I R 1917 All 281=36 I C 307=39 All 13=14 A L J 853.

[8] Raghunandan Chaube v. Bhuwal Tewari, A I R 1932 All 340=140 I C 178=54 All 423=1932 A L J 257.

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## A. I. R. 1938 Oudh 12

ZIAUL HASAN J.

*Firm Ram Rachhpal-Shiam Lal,*
*Decree-holder* — Applicant.

v.

*Gur Narain Brothers, Decree-holder and another, Judgment-debtor* — Opposite Party.

Civil Revn. Appln. No. 140 of 1936, Decided on 2nd September 1937, from order of Judge, Small Cause Court, Lucknow, D/- 14th December 1936.

**(a) Civil P. C. (1908), S. 73 (2) — S. 73 (2) does not apply where one decree-holder does not deny right of another to receive rateable assets.**

Section 73 (2) does not apply to a case in which one decree-holder who is entitled to rateable assets does not deny the right to receive the same of another decree-holder who has withdrawn all the assets liable to be rateably distributed. [P 13 C 2]

**(b) Civil P. C. (1908) Ss. 63 and 73 —Court of inferior grade should send sale proceeds to superior Court — Transfer of decree to Court realizing assets is not condition precedent to application under S. 63.**

Section 63 contemplates a case where attachments of the same property have been made by different Courts at the instance of different decree-holders of the common judgment-debtor and it is the duty of the Court of the inferior grade to send the sale proceeds to the superior Court. S. 73 does not require the transfer of a decree to the Court where the process of a realization takes place as a condition precedent to an application under S. 63 : *13 O C 291 and A I R 1936 Cal 723, Rel. on.* [P 14 C 1]

M. L. Tilhari and B. N. Roy — *for Applicant.*

K. N. Tondon — *for Opposite Party.*

**Order.** — This is an application under S. 25, Provincial Small Cause Courts Act, against an order passed by the learned Judge, Small Cause Court, Lucknow, in execution proceedings. The opposite party No. 1, namely Gur Narain Brothers, obtained a money decree against opposite party No. 2, Sita Ram Bhola Nath, from the Court of Small Causes, for Rs. 656-6-0 and Rs. 135-6-0 costs. On 8th September 1935 this decree was put in execution and a prayer was made for the attachment and sale of some moveable property of the judgment-debtor. This property was sold in several lots on different dates from 28th July to 1st August 1936. The present applicants obtained their decree for Rupees 3,000 odd against the same judgment-debtor from the Court of the Second Sub-Judge Delhi on 29th June 1936. This decree was transferred to this district for execution on 22nd July 1936 and was sent by the learned District Judge of Lucknow to the Civil Judge, Mohanlalganj. An application for execution was put in by the applicants before the Civil Judge, Mohanlalganj on 24th July 1936, praying that the property attached by the Judge, Small Cause Court, Lucknow in execution of the decree of Gur Narain Brothers be attached and rateable distribution be made of the assets. An order of attachment was thereupon sent by the Civil Judge Mohanlalganj to the Judge, Small Cause Court, Lucknow on 31st July 1936. On 1st August 1936 the Civil Judge Mohanlalganj sent a rubkar to the Judge, Small Cause Court, Lucknow asking him to sell the property and to send the sale proceeds to his Court for rateable distribution. To this the learned Judge, Small Cause Court, replied on 5th August 1936 that the attached property had already been sold in his Court and there were several other decree-holders who claimed rateable distribution. He also asked the learned Civil Judge to direct the decree-holders (the present applicants) to put in an application in his Court if they wanted rateable distribution. On 12th August 1936 the learned Civil Judge Mohanlalganj again wrote to the Judge, Small Cause Court, asking him to

> send the remaining attached property and all the sale proceeds to this Court which will determine the claims of the decree-holder of your Court as laid down in S. 63, Civil P. C.

This requisition was not complied with and on 11th September 1936 the learned Judge, Small Cause Court, who also exercised insolvency powers, intimated to the Civil Judge, Mohanlalganj that owing to one of the creditors of the judgment-debtor applying for the judgment-debtors being adjudged insolvents, the proceeding in execution has been suspended and the property made over to the receiver. There was further correspondence between the two Courts till 9th December 1936, when in the insolvency case it was decided that the receiver should take the unsold property only but not the proceeds of the sale held in execution of Gur Narain Brothers' decree. On 14th December 1936 the present applicants applied to the learned Judge, Small Cause Court, to send the sale proceeds to the Court of the Civil Judge, Mohanlalganj. This application was dismissed with the following order :

> I have seen the file. No attachment of money has been ordered. The application be rejected with reference to the order dated 1st August 1936 and O. 21, R. 52.

It is this order which is the subject of the present application for revision. On behalf of the opposite party No. 1 a preliminary objection is taken that no revision lies as a remedy was open to the applicants by way of a suit under S. 73, Cl. (2), Civil P. C. That sub-section provides :

> Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

It is said that opposite party No. 1 has withdrawn the money that was in the Court of the learned Judge, Small Cause Court, Lucknow. I doubt however if this sub-section applies to the present case in which the applicants do not deny the opposite party No. 1's right to receive rateable assets. I therefore overrule the preliminary objection. Coming to the merits, I am of opinion that the order of the learned Judge, Small Cause Court, was wrong. He is not correct in saying that no attachment of money had been ordered by the Civil Judge, Mohanlalganj. As a matter of fact I have shown above that the learned Civil Judge attached both the property and the sale proceeds. Under O. 21, R. 52, Civil P. C., where property to be attached is in the custody of any Court, the attachment is made by a notice to such Court requesting that such property may be held subject to the further orders of the Court from which the notice is issued. We have seen that the learned Civil Judge, Mohanlalganj attached the property by sending notice to the Judge, Small Cause Court, on 31st July 1936, and that he also attached the sale proceeds by several rubkars one of which was dated 12th August 1936.

It is said on behalf of the opposite party No. 1 that the attachment made by the the learned Civil Judge, Mohanlalganj was illegal and that the applicants should have applied for rateable distribution to the Judge, Small Cause Court. This contention is to my mind wholly untenable. In the first place in view of the amount of the applicant's decree, execution of that decree was beyond the pecuniary jurisdiction of the Judge, Small Cause Court, and in the second place under S. 63, Civil P. C., the Court of the Civil Judge, Mohanlalganj was the proper Court to distribute the assets. In 13 O C 291[1] it was held that S. 295 of Act 14 of 1882 (corresponding to S. 73 of the present Code) did not require the transfer of a decree to the Court where the process of realization takes place as a condition precedent to an application under S. 285 (S. 63 of the new Code) and therefore a fortiori it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realization takes place. In A I R 1936 Cal 723[2] it was held that S. 63 contemplates a case where attachments of the same property have been made by different Courts at the instance of different decree-holders of the common judgment-debtor and that it is the duty of the Court of the inferior grade to send the sale proceeds to the superior Court. It is not necessary to refer to other cases on the point as the provisions of S. 63, Civil P. C. are quite clear. The application is allowed with costs and the order of the lower Court set aside. The opposite party No. 1 should be made to re-deposit the money which should then be sent to the Court of Civil Judge, Mohanlalganj for rateable distribution.

S.C./R.K. *Application allowed.*

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[1] Mohan Lal v. Humayun Jah, (1910) 13 O C 291=8 I C 372.

[2] Surendra Kumar v. Jamini Kumar, A I R 1936 Cal 723=166 I C 178 = I L R (1937) 1 Cal 391=40 C W N 1307.

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## A. I. R. 1938 Oudh 14

MADELEY J.

*Ram Sarup — Plaintiff —* Appellant.

v.

*Brij Mohan Lal — Defendant —* Respondent.

Second Appeal No. 330 of 1935, Decided on 25th August 1937, against order of Sub-Judge, Barabanki, D/- 24th August 1935.

**Minor — Contract by — Contract entered into during minority cannot be ratified on attaining majority—Old contract is not good consideration for new contract Suit on new contract — No presumption of consideration arises under S. 118 Negotiable Instruments Act—Nor can compensation be allowed.**

A contract entered into by a minor being null and void, its subsequent ratification by the minor on attaining the age of majority cannot form a valid contract on which a suit can be maintained. The consideration which passed under the earlier contract cannot be imported into a new contract into which the minor entered on attaining majority. [P 15 C 1]

Where therefore a 'bond' executed by minor during his minority was incorporated as consideration for another bond executed by him on attaining majority, and the suit was brought on the basis of the latter bond :

*Held* that the first bond was void ab initio and could not form a basis for the latter one. Presumption of consideration arising under S. 118 was not available as the bond was void. [P 15 C 2]

*Held further* that no compensation could be allowed as there was no consideration : *A I R 1935 Lah 561 (F B), Rel. on ; 30 Cal 539 (P C), Ref.* [P 15 C 2]

K. P. Misra — *for Appellant.*

R. N. Lal and Murli Manohar Lal — *for Respondent.*

**Judgment.** — This is a second appeal against a decision of the Subordinate Judge of Barabanki allowing an appeal and reversing a decree of the Honorary Munsif of Zaidpur. The facts of the case are that when the defendant was a minor, he executed a bond in favour of the plaintiff. On 11th August 1935, after defendant had attained his majority, he executed another bond in lieu of the previous one. The plaintiff brought this suit on the basis of the second bond. The Honorary Munsif decreed the suit. The learned Subordinate Judge relying upon A I R 1928 All 440[1] allowed the appeal on the ground that the first bond having been given by a person during minority was void and could not form valid consideration for another bond which he executed subsequently after coming of age. In this Court it is urged that there is considerable conflict of opinion upon this question and that it is a question which ought to be referred to a Bench. It has been held in some cases in spite of the clear terms of the Act that a bond executed by a minor is not void ab initio but voidable. If it is not void ab initio, counsel argues that it is something which could be consideration for the second bond. Furthermore, in some cases it has been held to be valid consideration for a second bond. Moreover, it is argued that under S. 25 (2), Contract Act, a second bond can be enforced. S. 25 (2) provides that an agreement made without consideration is not void if it is a promise to compensate a person who has already voluntarily done something for the promisor. It is argued that the appellant provided money for the respondent while he was a minor and that this was a voluntary doing of something for the minor. In the Allahabad ruling relied upon by the lower Appellate Court, Mukerji J. dissented from the majority of the Bench relying upon this section. It is further urged that in any case compensation should be allowed to the appellant under S. 41, Specific Relief Act.

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[1] Suraj Narain v. Sukhu Aheer, A I R 1928 All 440=112 I C 159=51 All 164=26 A L J 1024 (F B).

It is true that there was once a conflict of opinion whether a contract entered into by a minor was void or only voidable, but this has been set at rest by the decision of the Privy Council in 30 Cal 539[2] at page 546. The rulings of the Lahore High Court and the Calcutta High Court which have been quoted as examples of a contract made by a minor being treated as valid consideration for another contract entered into by him after he had attained his majority have been considered in a recent Full Bench ruling of the Lahore High Court in 16 Lah 546.[3] There it was held that a contract entered into by a minor being null and void, its subsequent ratification by the minor on attaining the age of majority cannot form a valid contract on which a suit can be maintained. The consideration which passed under the earlier contract cannot be imported into the contract into which the minor entered on attaining majority. The Lahore High Court therefore after considering previous rulings of its own Court and of the Calcutta High Court has come to the same conclusion as the Allahabad High Court.

Coming to the question of S. 25(2), Contract Act, I think that the Full Bench ruling of the Lahore High Court above quoted really covers this question as well when it says the consideration which passed under the earlier contract cannot be imported into the contract into which the minor entered on attaining majority. Furthermore, in this case it is not proved that there was any consideration for the first contract. The appellant's learned counsel argues that such consideration must be presumed. Such a presumption can only arise under S. 118, Negotiable Instruments Act, and this bond being void is not a negotiable instrument, nor, I think, could such a presumption ever arise with regard to a contract made by a minor. The reason why the law will not recognize a contract made by a minor seems to be that a minor has not yet reached years of discretion. Such a person would therefore be liable to be deceived and to enter into contracts without consideration. It must be pointed out, moreover, since the consideration for the first bond cannot be imported into the second bond, the cause of action, if any, under S. 25 (2) will be quite different from the cause of action in this case.

As to the argument that the appellant should get compensation because this Court is cancelling or rescinding a contract, namely that contained in the second bond, the answer is that even supposing the effect of this decision can be called a cancelling or rescission of the contract, no compensation could be allowed for the simple reason that the contract is without consideration. I do not therefore consider that there is any conflict of recent decisions which would justify me in referring this case to a Bench. The law applicable to the case seems to be perfectly clear and well ascertained. I therefore dismiss the appeal with costs.

B.D./R.K. *Appeal dismissed.*

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[2] Mohori Bibee v. Dharmodas Ghose, (1903) 30 Cal 539=30 I A 114 = 7 C W N 441 = 8 Sar 874 (P C).

[3] Gobind Ram v. Pirānditta, A I R 1935 Lah 561=158 I C 248 = 16 Lah 546 = 37 P L R 690 (F B).

## A. I. R. 1938 Oudh 16

SRIVASTAVA AG. C. J.

*Gauri Shankar — Defendant* — Appellant.

v.

*Lala and another, Plaintiffs and another, Defendant* — Respondents.

Second Appeal No. 166 of 1935, Decided on 20th September 1937, against order of Dist. Judge, Rae Bareli, D/- 25th March 1935.

**Mortgage—Redemption—Suit for — Mortgagor must prove existence of mortgage on which he bases his claim—On failure to prove specific mortgage, he cannot set up different mortgage and claim decree upon it.**

When the mortgagor brings a suit for redemption on the basis of a specific mortgage, it is his duty to establish the existence of that mortgage and he cannot, on his failure to prove the specific mortgage set up by him, be allowed to make out a new case by claiming a decree on the basis of the defendant being admitted or proved to be a mortgagee whether under some unknown mortgage or under a different mortgage: *3 O C 173; A I R 1925 Oudh 250 and A I R 1926 Oudh 546, Rel. on.* [P 16 C 2]

R. B. Lal and M. M. Lal — *for Appellant.*

Radha Krishna — *for Respondents Nos. 1 and 2.*

**Judgment.**—This is a second appeal by one of the defendants against an appellate decree of the learned District Judge of Rae Bareli upholding the decree of the learned Munsif of that place. It arises out of a suit for redemption of a mortgage. The plaintiffs' case was that they were the legal representatives of one Binda who in 1876 had made a mortgage with possession of the three groves in suit in favour of one Ram Ghulam, the predecessor-in-title of the defendants for Rs. 50. The defendants denied the pedigree set up by the plaintiffs and denied the alleged mortgage. The learned Munsif held the alleged mortgage to be proved and also found that the plaintiffs were the legal representatives of the mortgagor Binda. He accordingly decreed the plaintiffs' claim. On appeal the learned District Judge upheld the trial Court's finding about the plaintiffs being the legal representatives of Binda. He further held that the mortgage in dispute did not come into existence in 1876 but came into existence in 1868. As the plaintiffs' claim, treated as one based on a mortgage of 1868, was on the face of it barred by limitation at the date of institution of the suit, the learned District Judge further went into the question of limitation and found that limitation was saved under S. 19, Limitation Act, by reason of an acknowledgment made in 1893. In result he upheld the decree of the Munsif and dismissed the appeal.

The only contention urged on behalf of the appellant is that the plaintiffs having failed to prove the specific mortgage of 1876 on which they had based their claim for redemption, the learned District Judge was in error in giving the plaintiffs a decree for redemption in respect of a different mortgage namely one alleged to have been made in 1868. It is also complained that the learned District Judge was wrong in raising up for the first time in appeal the question of acknowledgment for the purpose of saving limitation when no such acknowledgment was set up in the pleadings as required by O. 7, R. 6, Civil P. C. I am of opinion that the appeal must succeed. There is a long course of decisions in this Court in which it has been held that in such suits for redemption the plaintiff must establish the specific mortgage set up by him in his plaint and must also show the mortgage in suit to be subsisting: 3 O C 173[1], 1 O W N 130[2] and A I R 1926 Oudh 546.[3] The learned counsel for the plaintiffs-respondents has contended in reply that all these cases were distinguishable because in none of them the particular mortgage under which the defendants were in possession was proved, all that was proved being that they were in possession as mortgagees. Assuming this to be so, I do not think that the distinction pointed out would make any difference in the application of the principle underlying them. When the plaintiff brings a suit on the basis of a specific mortgage, it is his duty to establish the existence of that mortgage and he cannot, on his failure to prove the specific mortgage set up by him, be allowed to make out a new case by claiming a decree on the basis of the defendant being admitted or proved to be a mortgagee, whether under some unknown mortgage or under a different mortgage. In the circumstances I am of opinion that the learned District Judge was wrong in making out an entirely new case which the defendant had no opportunity of meeting by giving the plaintiffs a decree on the basis of an alleged mortgage of 1868.

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[1] Salik Ram v. Ramanand, (1900) 3 O C 173.

[2] Jagjiwan Singh v. Gajraj Singh, A I R 1925 Oudh 250=80 I C 543=1 O W N 130.

[3] Mahadeo Lal v. Pirthipal Singh, A I R 1926 Oudh 546=96 I C 253.

A request was also made to me on behalf of the plaintiffs that they may be allowed to amend their plaint so as to convert the suit into a suit for redemption of the mortgage of 1868. It is admitted that if the plaintiffs have to institute a fresh suit it would be as much within limitation as the present suit. In the circumstances I think it would be proper that the plaintiffs institute a fresh suit in respect of the mortgage of 1868 so that all the pleadings with regard to it may be gone into afresh. There would be no advantage in ordering a fresh trial after allowing amendment of the plaint in this very suit. I accordingly allow the appeal, set aside the decrees of the lower Courts and dismiss the plaintiffs' suit with costs throughout.

K.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Oudh 17

SRIVASTAVA AG. C. J.

*Mt. Shiv Nath Kunwar* — Appellant.

v.

*Lachhmi Narain* — Respondent.

Second Appeal No. 405 of 1935, Decided on 22nd September 1937, against order of Civil Judge, Sultanpur, D/- 2nd September 1935.

**Transfer of Property Act (1882), S. 11—Sale of property for cash consideration—Stipulation in sale deed for payment of rent to vendor—Such stipulation is illegal and without consideration—Deed cannot be construed as perpetual lease.**

Where a vendor makes an absolute conveyance of his property to the vendee by sale for a cash consideration, the stipulation in the sale deed for payment of a certain amount to the vendor out of the profits of the property by way of rent is clear restriction on the enjoyment of the right created absolutely in favour of the vendee. Such a restriction being repugnant to the interest created, is not only illegal but without consideration and cannot be enforced. Such a deed cannot be construed as a perpetual lease, nor can the agreement to pay rent be made binding on the vendee : *A I R 1924 All 400 and A I R 1916 Mad 298, Disting.* [P 18 C 1]

M. Wasim and Ali Hasan — *for Appellant.*

B. B. Lal and M. M. Lal — *for Respondent.*

**Judgment.**—This is a second appeal by the plaintiff who has been unsuccessful in both the lower Courts. The admitted facts of the case are that one Mt. Phuljhari who was an under-proprietor of the plots in suit, executed a sale deed in respect of them on 12th October 1914, in favour of Ramadhin, father of the defendant, for a cash consideration of Rs. 1,000. The sale deed contained a stipulation to the effect that from 1329 Fasli corresponding to 1922 the vendee will pay Rs. 47 per annum as rent to the vendor in respect of the land sold. On 3rd March 1922 Mt. Phuljhari assigned her right to recover the aforesaid rent to the plaintiff. In 1930 the plaintiff made an application to the Record Officer, district Sultanpur, to have this rent of Rs. 47 payable to her entered in the village records. The Record Officer having rejected this application, the plaintiff instituted the present suit for a declaration that as a representative of the vendor, she was entitled to get Rupees 47 per annum rent in respect of the land in suit from the defendant and for a decree for Rs. 141 for arrears of rent for three years preceding the suit. Both the lower Courts have held that as the sale deed dated 12th October 1914 was an absolute transfer of title, the stipulation regarding the payment of rent was invalid and unenforceable.

The learned counsel for the plaintiff-appellant contends that the sale deed executed by Mt. Phuljhari should on a proper interpretation of all its terms be construed as a perpetual lease and held enforceable as such. He further contends in the alternative that independent of the nature of the transaction, the stipulation for payment of Rs. 47 per annum is a personal contract which is binding on the parties and their representatives and transferees. In my opinion neither of these contentions can succeed. It is clear beyond all doubt that the deed dated 12th October 1914 purports to be and is in fact a sale and nothing but a sale. All through the document, the parties are referred to as the vendor and the vendee (baya and mushtari) and the land transferred as the land sold (arazi mubaiya). The sale is described as bai kamil. It further provides that the vendee will remain in possession of the land sold with all rights of transfer of every kind from generation to generation like the executant and that thereafter the executant and her heirs had no concern of any sort and no right (haq) left in the land sold. It is further added that all the rights (tamam haq) in respect of the property sold were transferred in favour of the vendee. Thus, on an examination of the terms of the deed there can be no doubt that it was an out and out sale of the property in favour of the vendee. The stipulation relied on by the plaintiff is to the effect that the vendee after payment of Government revenue (shall pay) Rs. 47 per annum to the executant and her heirs and would appropriate to himself the balance of the profits. It is further stated that the aforesaid rent (lagan) shall be payable from 1329 Fasli.

In my opinion this condition for payment of rent is altogether repugnant to the nature of the transaction which, as I have just observed, is an out and out sale. When the vendor, who was admittedly an under-proprietor, made an absolute conveyance of her under-proprietary rights, she was not left with any interest in the property which could entitle her to claim rent. S. 11, T. P. Act, provides that where on transfer of property an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. In the present case there is no room for doubt that interest was created absolutely in favour of the vendee. The stipulation for payment of a certain sum out of the profits of the property by way of rent is a clear restriction on the enjoyment of the right created absolutely in favour of the vendee. Such a restriction being repugnant to the interest created, it cannot be enforced against the vendee who is entitled to enjoy the profits of the property as if there was no such restriction. It is also clear that the sale deed was for a cash consideration of Rs. 1,000. The agreement for payment of Rs. 47 as annual rent is therefore not only illegal but also without consideration. I have therefore no hesitation in holding that the deed in suit cannot be construed as a perpetual lease, nor can the agreement for payment of rent be made binding on the defendant.

Reliance was placed on the decision of the Allahabad High Court in 46 All 333[1] and on the decision of the Madras High Court in 39 Mad 462.[2] The first of the cases was a suit for pre-emption brought upon the basis of the village wajib-ul-arz which evidenced a contract of pre-emption amongst the co-sharers. It was signed by the father of the plaintiff and the grandfather of the vendor. It was held that such a contract was enforceable not only against the co-sharers who had originally signed the wajib-ul-arz but also against their transferees with notice or gratuitous transferees. In the Madras case it was held that a contract to convey or reconvey immovable properties whenever demanded for a certain amount is only a personal contract and does not create any interest in immovable property and is therefore enforceable and not void as contravening the rule against perpetuities. Thus it will be seen that neither of these two cases has anything in common with the present case and both of them are clearly distinguishable. The result therefore is that the appeal fails and is dismissed with costs.

S.C./R.K. *Appeal dismissed.*

## A. I. R. 1938 Oudh 18

SRIVASTAVA AG. C. J.

*Pateshwari Din and another* — *Defendants* — Appellants.

v.

*Mahant Sarju Dass* — *Plaintiff* — Respondent.

Second Appeal No. 133 of 1935, Decided on 22nd September 1937, against order of Civil Judge, Fyzabad, D/- 16th February 1935.

**Res judicata — Adverse finding against party in previous suit — But decree wholly in his favour — Finding is not res judicata against him in subsequent suit.**

Where a decree in a previous suit is wholly in favour of a person and gives him all the reliefs sought for by him, he has no right of appeal against the decree so as to enable him to contest any adverse finding against him in such suit. Hence such adverse finding cannot operate as res judicata as against him in a subsequent suit: *A I R 1924 P C 144, Expl.*; *A I R 1930 Oudh 124, Rel. on.* [P 19 C 2; P 20 C 1]

H. H. Zaidi — *for Appellants.*

Radha Krishna and Ali Hussain — *for Respondent.*

**Judgment.**—This is an appeal by the defendants against an appellate decree of the learned Civil Judge of Fyzabad reversing the decree of the learned Munsif of that place. The facts of the case are that on 11th June 1928 one Sarju Prasad made a mortgage of one grove in favour of the plaintiff. In May 1929 Sarju Prasad instituted a suit for partition of the joint family property against his brother Pateshwari Din and his nephew Bhagwati Prasad. A decree based on a compromise was passed in this suit in December 1929. It was followed by a final decree for partition which is dated 21st May 1931. As a result of this partition, half of the grove which had been mortgaged by Sarju Prasad in favour of the plaintiff was allotted to the share of Pateshwari Din and Bhagwati Prasad. The plaintiff brought a suit on the basis of his mortgage against Sarju Prasad alone, and obtained a decree for sale which was made final on 23rd February 1931. So Pateshwari Din, Bhagwati Prasad and Babu Lal son of Sarju Prasad brought a suit for a declaration that the grove mortgaged under the deed dated 11th June 1928 was exclusively owned by them and was not liable to sale in execution of the plaintiff's decree. The learned Munsif who tried the suit found that the mortgage in the plaintiff's favour was executed for family necessity and that Sarju Prasad executed it as manager of the family. He therefore dismissed the suit on 16th April 1932. All the three persons Pateshwari Din, Bhagwati Prasad and Babu Lal appealed against the decree of the Munsif. The Appellate Court on 21st February 1933 upheld the findings of the Munsif about the mortgage in question being for family necessity and about Sarju Prasad being the manager of the joint family. It accordingly considered the mortgage deed dated 11th June 1928 to be binding on the plaintiffs of that suit. However, it was of opinion that the decree dated 23rd February 1931 was not binding on Pateshwari Din and Bhagwati Prasad as they were not parties to it. In the result it allowed the appeal of Pateshwari Din and Bhagwati Prasad and gave them a declaration that they and their shares in the property in suit were not bound by the decree in question and by the sale held under it. Thereupon the plaintiff instituted the present suit against Pateshwari Din and Bhagwati Prasad for recovery of half of the mortgage money due under the mortgage dated 11th June 1928 by sale of half of the share of the grove. The learned Munsif dismissed the suit. On appeal the learned Civil Judge held that the finding of the Appellate Court in the earlier declaratory suit that the mortgage in suit was executed by the manager for family necessity and was as such binding on Pateshwari Din and Bhagwati Prasad operates as res judicata and that the learned Munsif was wrong in not treating it as such. He accordingly allowed the appeal and decreed the plaintiff's claim.

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[1] Basdeo Rai v. Jhagru Rai, A I R 1924 All 40 =83 I C 390=46 All 333=22 A L J 265.

[2] Avula Charamudi v. M. Raghavulu, A I R 1916 Mad 298=28 I C 871=39 Mad 462=28 M L J 471.

The only question which I am called upon to decide is whether the above mentioned finding of the Appellate Court in earlier declaratory suit operates as res judicata or not in the present suit. As already stated, the decree of the Appellate Court allowed the appeal of Pateshwari Din and Bhagwati Prasad and granted them a declaration that they were not bound by the decree for sale and the sale which had taken place in execution of it so far as it affected their shares. Thus there can be no doubt that the decree was wholly in favour of Pateshwari Din and Bhagwati Prasad and gave them all the relief sought for by them. The question therefore is reduced to this, namely whether in such a case Pateshwari Din and Bhagwati Prasad had any right of appeal against the decree which could enable them to contest the adverse finding of the Appellate Court about the mortgage being binding on them. The learned Civil Judge has observed "that in India. . . . .there is no provision that no appeal will lie if a decree is in favour of the appellant".

This is an amazing provision which even the learned counsel for the respondent is not prepared to support. No doubt a right of appeal is a creature of the statute and one has to look to the provisions of the Code of Civil Procedure to find out whether in a particular case an appeal is competent or not. S. 96, Civil P. C., provides for appeals from original decrees and S. 100 for appeals from appellate decrees. S. 104 makes provision for appeals against certain orders. There is no provision for any appeal against a mere finding irrespective of the decree or order. I have therefore no doubt at all that Pateshwari Din and Bhagwati Prasad had no right of appeal against the decree of the Appellate Court. It follows that they had no right of redress against any adverse findings contained in the judgment of the Appellate Court, and those findings cannot therefore operate as res judicata. The learned Civil Judge seems to have gone astray due to some misapprehension as regards the effect of the decision of their Lordships of the Privy Council in 51 I A 293[1] at p. 302. However, I do not think that he had any excuse for the misapprehension when his attention appears to have been drawn to the decision of a Bench of this Court in 6 O W N 1320.[2] The case in 51 I A 293[1] was discussed at some length by the Bench, and the following observations made in that case might be usefully quoted :

> But the point which is of serious consideration in this connexion is that the Privy Council case was decided in both the Courts against the party as against whom the finding as to the jotedari right was given in the second Court and in the circumstances it was open to that party to challenge the correctness of the decree by taking an appeal to a higher tribunal and thereby also to challenge the correctness of the finding on the jotedari right. He did not do so. The finding was therefore held to constitute res judicata in the subsequent suit. This cannot be predicated of the present case. We have endeavoured to explain the decision of their Lordships of the Judicial Committee in 51 I A 293[1] at some length for the reason that within the experience of both of us the decision is quoted in support of a plea of res judicata in respect of a finding alone by overlooking the fact that the party against whom the finding was given had a right of appeal against the whole decree.

I have therefore no hesitation in holding that the lower Appellate Court was wrong in holding that the previous finding about the deed in suit being binding on the appellants, operates as res judicata in the present suit. I therefore allow the appeal with costs, set aside the decree of the lower Appellate Court and send the case back to the Court of the Civil Judge for the appeal being re-admitted at its original number and disposed of on the merits according to law.

D.S./R.K. *Appeal allowed.*

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[1] Midnapur Zamindary Co. Ltd. v. Naresh Narayan Roy, A I R 1924 P C 144=80 I C 827=51 I A 293=51 Cal 631 (P C).

[2] Chandrika Singh v. Chokhey Singh, A I R 1930 Oudh 124=122 I C 610=4 Luck 404=6 O W N 1320.

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## A. I. R. 1938 Oudh 20

ZIAUL HASAN AND SMITH JJ.

*In re Court-fees in*

*Gauri Shankar and others—Plaintiffs* —Appellants.

v.

*Mohan Lal—Defendant*—Respondent.

In re Court-fees in First Appeal No. 4 of 1937, Decided on 17th September 1937, against order of Sessions and Civil Judge, Lucknow, D/- 28th October 1936.

**Court-fees Act (1870), Sch. 2, Art. 17 (vi)—Suit for removal of existing mutawalli and for appointment of another, falls under Art. 17 (vi).**

A suit asking for the removal of an existing mutawalli and the appointment of someone else in his place comes under Art. 17 (vi) of Sch. 2. Such relief should not be presumed to be one for possession of the trust property : *Case law referred.* [P 20 C 2; P 21 C 1, 2]

Harish Chandra and Makund Behari Lal — *for Appellants.*

Radha Krishna and Rama Pat Ram — *for Respondent.*

**Ziaul Hasan J.**— In this case the office report is that there is a deficiency of Rs.407 in the court-fee paid on the memorandum of appeal, and of Rs. 380 in respect of the court-fee that was payable by the plaintiffs-appellants in the trial Court. In their suit the plaintiffs prayed for the following reliefs : (a) That plaintiffs 1 and 2 be appointed mutawallis of Thakurji (plaintiff 3) and defendant be ordered not to interfere with the plaintiffs' management and worship. (b) If it be held that the defendant is the legal mutawalli, he may be ordered to render accounts and whatever may be found due be decreed in favour of plaintiff 3. (c) If plaintiffs 1 and 2 for any reason be not appointed mutawallis, a Board may be constituted consisting of plaintiffs 1 and 2 and the defendant to manage the temple; and (d) if for any reason reliefs (a) and (c) be not granted, the defendant be restrained by a perpetual injunction from resisting plaintiffs 1 and 2 in taking part in the worship and in the management. The suit was dismissed by the trial Court and the plaintiffs have brought the present appeal. They have valued relief (a) at Rs. 5,000, relief (b) at Rs. 1,000 and relief (d) at Rs. 100. The office reports that the plaintiffs-appellants should pay ad valorem court-fee on relief (a) valued at Rs. 5,000. The learned counsel for the plaintiffs-appellants however contends that the case falls under Art. 17 (vi), of Sch. 2, Court-fees Act, as it is not possible to estimate at a money value the subject matter in dispute, namely the appointment of the plaintiffs as mutawallis in place of the defendant. The learned counsel for the defendant-respondent had also appeared and argued the case before us in support of the office report.

I am of opinion that the contention of the learned counsel for the appellants should be accepted. There is a consensus of recent authorities in support of the view that an appeal asking for the removal of an existing mutawalli and the appointment of someone else in his place comes under Art. 17 (vi) of Sch. 2, Court-fees Act. I may refer to A I R 1934 Pat 647,[1] 19 All 60,[2] 8 Lah 730[3] and A I R 1925 Mad 722.[4] In 8 Lah 730,[3] along with the reliefs that the mahant be removed and a new mahant and a committee be appointed, it was also prayed that the property of the trust be made over to the new mahant and the newly appointed committee, but in spite of the latter prayer it was held that Art. 17 (vi), of Sch. 2 applied to the suit. Similarly, in A I R 1925 Mad 722,[4] there was also a prayer that the trustees should be asked to make good to the trust itself the amount of money due by them and hand over possession of the immovable property, but it was held that these reliefs could not be treated as part of the subject matter of the dispute between the parties, that they were mere ancillary reliefs and that the relief claimed clearly fell under Art. 17 (vi), Court-fees Act. It was argued on behalf of the respondent that while the Lahore and Madras cases were under S. 92, Civil P. C., the Allahabad case was under Act 20 of 1863; but I fail to see that these facts can have any effect on the nature of the reliefs sought so far as the question of the proper court-fee is concerned and the learned counsel for the respondent has not been able to satisfy me on the point. The Patna case was moreover not one under any statutory provision but was an ordinary suit for the removal of the trustees of a mosque.

The office had relied on 8 Mad 516,[5] 17 I C 270,[6] 87 I C 190,[7] 10 Bom 60,[8] A I R 1925 Mad 804[9] and A I R 1932 All 593;[10] but in A I R 1925 Mad 804,[9] A I R 1932 All 593[10] and 87 I C 190[7] there was also a prayer for possession of the property and naturally ad valorem court-fee was asked for. The cases in 8 Mad 516,[5] 17 I C 270[6] and 10 Bom 60[8] no doubt support the office report, but it appears to me that the trend of the modern decisions in almost all the High Courts is in favour of the appellants. I cannot also accept the contention that relief (a) claimed by the plaintiffs-appellants is in reality one for possession of the trust property. In my view, the criterion is to see whether by obtaining this relief the plaintiffs could obtain possession of the property by execution of the decree and the learned counsel for the respondent could not go so far as to say that they could. It was however contended that the latter words of relief (a) of the plaint containing the prayer that the defendant be ordered not to interfere with the plaintiffs' management and worship would entitle the plaintiffs [if the suit be decreed according to relief (a) containing these words] to obtain possession of the property; but as the learned counsel for the appellants says, these words may be considered as a superfluity. In fact, the learned counsel states that his clients would be content to get a decree (should his appeal succeed) in terms of relief (a) shorn of these words. In A I R 1930 All 866[11] it was held that a suit for possession of the office of mutawalli is an action of a personal character and is not "a suit for possession of any property". I am therefore unable to accept the argument that relief (a) of the plaint should be presumed to be one for possession of the trust property. I would therefore reject the office report and hold that the court-fee paid by the appellants is sufficient.

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[1] Maulavi Sayeed v. Shah Tafazul Hussain, A I R 1934 Pat 647=158 I C 296.

[2] Thakuri v. Bramha Narain, (1896) 19 All 60=1896 A W N 187.

[3] Beli Ram v. Ishar Dass, A I R 1928 Lah 118=110 I C 264=8 Lah 780=29 P L R 97.

[4] Sudalaimuthu Pillai v. Somasundaram Pillai, A I R 1925 Mad 722=87 I C 25=48 M L J 514.

[5] Sonachala v. Manika, (1885) 8 Mad 516.

[6] Basawa Singh v. Sardarni Bhagwan Kuar, (1912) 17 I C 270=216 P L R 1912.

[7] Manni Lal v. Radhey Gopalji, A I R 1925 All 602=87 I C 190=47 All 501=23 A L J 344.

[8] Raghunath Ganesh v. Gangadhar Bhikaji, (1886) 10 Bom 60.

[9] In re Mohammad Gouse, A I R 1925 Mad 804=88 I C 209=48 M L J 571.

[10] Parsottamanand Giri v. Mayanand Giri, A I R 1925 All 593=87 I C 679.

[11] Abdul Alim v. Abdul Hamid, A I R 1930 All 866=129 I C 875.

**Smith J.**—I have read what my learned brother has said, and I agree with his conclusions, and have nothing to add.

**By Court.**—We reject the office report and hold that the court-fee paid is sufficient.

D.S./R.K. *Report rejected.*

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## A. I. R. 1938 Oudh 22

SRIVASTAVA AG. C. J. AND SMITH J.

*Captain Raja Durga Narain Singh Sahib—Defendant*—Appellant.

v.

*Lala Ram Kishen Das, Plaintiff and others, Defendants* — Respondents.

First Appeal No. 66 of 1935, Decided on 7th September 1937, against order of Civil Judge, Hardoi, D/- 25th March 1935.

**Transfer of Property Act (1882), S. 92 — Sale of part of mortgaged property to satisfy mortgage decree — Part of consideration left with vendee for payment to mortgagee — No evidence regarding payment of money due under mortgage—Right of vendee to be subrogated – Question does not arise.**

Where a mortgagor sells part of the mortgaged property for satisfying a mortgage decree and leaves a part of the consideration with vendee for payment to the mortgagee, in absence of evidence that the money due under the mortgage has been paid, no question of the right of the vendee to be subrogated can arise. [P 24 C 1]

M. Wasim and B. P. Misra — *for Appellant.*

Radha Krishna, Naziruddin, Wasi Ahmad, Akhtar and C. P. Lal — *for Respondent 1.*

**Judgment.**—This is an appeal from a decision by the learned Subordinate Judge of Hardoi. The facts, briefly stated, are as follows: The descendants of one Madho Singh (the details of the pedigree are not disputed, and are given in para. 4 of the plaint), formerly constituted a Hindu joint family which afterwards disrupted. Before the separation, Ganga Bakhsh Singh, the son of Madho Singh, and Gopal Singh, Bisheshar Singh and Narain Singh, the three sons of Bechan Singh, another son of Madho Singh, executed on 1st April 1908 a mortgage deed (Ex. A-5) of certain zamindari shares for Rs. 12,000 in favour of two mortgagees, Pandit Shiam Manohar Nath and Pandit Manharan Nath. On 4th August 1915, Gopal Singh and Narain Singh, two of the sons of Bechan Singh, and four sons of Ganga Bakhsh Singh, named Shankar Singh, Makund Singh, Birbal Singh and Sheo Datt Singh, mortgaged certain zamindari properties for a sum of Rs. 11,000 in favour of those same two mortgagees: *vide* Ex. A-6. In the year 1917, Raghubar Singh, son of Bisheshar Singh, separated from the rest of the family, and in the year 1919 there was a further separation amongst the members who had remained joint after separation of Raghubar Singh, and the debts due from the family were allocated amongst the various separated branches. On 31st May 1926, Narain Singh, on his own behalf and as guardian of his minor son, Baij Nath Singh, together with his major son Naunihal Singh (alias Nanhe Singh) executed a mortgage deed (Ex. 1) of certain zamindari shares for Rs. 8,900 in favour of one Lala Ram Kishen Dass, to whom Narain Singh's branch of the family was indebted to the extent of some Rs. 8,000 under the terms of the partition of 1919, and in whose favour Narain Singh had executed two promissory notes on 24th June 1920, which promissory notes were renewed by him on 9th June 1923. It is this mortgage deed (Ex. 1) of 31st May 1926 which forms the basis of the present suit by Lala Ram Kishen Dass. The first five defendants are Narain Singh, his two sons, Naunihal Singh and Baij Nath Singh, and Sripal Singh and Krishnapal Singh, the two sons of Naunihal Singh. Defendant 6 is Captain Raja Durga Narain Singh, who was impleaded as a transferee in 1933 of part of the mortgaged property.

Various defences were raised in the suit, but in the end the learned Subordinate Judge gave the plaintiff a preliminary decree for sale of the mortgaged property for the sum of Rs. 11,682, with costs and interest. He disallowed a claim by Captain Raja Durga Narain Singh, defendant 6, that he should be subrogated to the rights of certain mortgagees to whom he was said to have made a payment under the terms of the sale deed (Ex. A-1) of 14th September 1933, in his favour. The main defendants 1 to 5 have accepted the decree of the learned Court below. This appeal is by defendant 6 only. How the sale deed in his favour was brought about, we now proceed to explain. The original of this deed, it should be mentioned, is Ex. A-1, a copy of it is Ex. 2 printed at page 44 of part 3 of printed book. It is said that on 14th July 1920, Gopal Singh, Bisheshar Singh, and Narain Singh, sons of Bechan Singh, and Shankar Singh, Makund Singh, and Birbal Singh, sons of Ganga Bakhsh Singh, executed a mortgage deed (Ex. A-2) of certain zamindari properties for a sum of Rs. 25,719 in favour of Pandit Manharan Nath and Pandit Kailash Nath, the consideration of this deed being for the most part the amounts due under the two mortgages (Exs. A-5 and A-6) referred to above of 1st April 1908 and 4th August 1915, which amounts were set-off in this later deed. A copy of the deed of 14th July 1920 was sought to be produced in the case. It appears from the proceedings of 5th March 1935 in the learned Court below that the pleader for defendant 6 applied for an adjournment to enable him to summon a certain record which was said to contain the original deed. It was explained by the pleader that the original had not been summoned earlier owing to a misapprehension.

The learned Subordinate Judge took the view that the non-production of the original of the deed in question was inexcusable, and he declined to grant an adjournment to enable it to be produced. He further held that secondary evidence of the document was inadmissible, and a copy of the deed that it was sought to produce was accordingly rejected. However, there has been produced a copy (Ex. 13) of the plaint in a suit instituted by two plaintiffs Pandit Kailash Nath Shargha, and his father, Pandit Shiam Manohar Nath Shargha, on the basis of a mortgage deed dated 14th July 1920, executed by Gopal Singh, Bisheshar Singh, Narain Singh, Shankar Singh, Makund Singh, and Birbal Singh, and a decree for Rs. 33,101-14-3 was passed in that suit on 19th February 1929: *vide* Ex. A-7. The decree was transferred to the Deputy Commissioner of Hardoi for execution, and on 12th September 1933, he gave permission for the sale of part of the mortgaged property with a view to satisfying the decree: *vide* Ex. A-4. Thereafter, on 14th September 1933, Narain Singh on his own behalf and as guardian of his minor son, Baij Nath Singh, together with his major son, Naunihal Singh, executed a sale deed (Ex. A-1) in respect of certain properties in favour of Captain Raja Durga Narain Singh for Rs. 8,500, out of which Rs. 8,200 was left for payment to Pandit Kailash Nath Shargha. This payment was, according to the case of defendant 6, duly made and it is on the basis of that payment that he claims to be subrogated to the rights of the mortgagees of the deed of 14th July 1920. These mortgagees, as we have mentioned already, are said to have been Pandit Manharan Nath and Pandit Kailash Nath, but it appears from the plaint (Ex. 13), that the deed went, by partition in the year 1922, to Pandit Kailash Nath and his father, Pandit Shiam Manohar Nath.

The fact that the original mortgage deed of 14th July 1920 was not produced seems to be of no material importance. As we have shown, there were undoubtedly a suit and a decree on the basis of it, and furthermore the present plaintiff was himself defendant 19 in that suit. The questions calling for decision are: (1) Did Raja Durga Narain Singh make to the decree-holders under the decree Ex. A-7, of 19th February 1929, the payment of Rs. 8,200, which he was required by the terms of the sale deed (Ex. A-1) in his favour to pay? (2) Was the rest of the amount due under the decree, Ex. A-7, also paid to the decree-holders, by other persons? (3) If both the payments above referred to were made, is Raja Durga Narain Singh entitled to be subrogated, to the extent of the payment made by him, to the rights of the decree-holders above referred to?

It appears that a clerk, Parmeshuri Dayal, in the Collectorate at Hardoi was summoned to produce the register of revenue deposits for 1933-34. He was D. W. 1, and his evidence is printed at page 17 of part 1 of the printed record. It was objected however by the pleader for the plaintiff that defendant 6 had not mentioned this revenue register in his list of documents, and had obtained no permission for its production, nor had any certified copy of it been filed. The learned Subordinate Judge took the view that there was no reason for allowing the document to come into evidence at that late stage, and he accordingly refused to allow it to come on record: *vide* his order of 5th March 1935, printed at page 17. Thereupon the pleader for defendant 6 said that Parmeshuri Dayal D. W. 1, should be discharged. The only evidence on the record to prove that defendant 6 actually paid the sum that he was bound under the terms of his sale deed to pay to the holders of the decree, Ex. A-7, is that of Anand Behari Lal D. W. 2, who said that he was the general agent of defendant 6 and that the sale consideration of the deed in favour of defendant 6 was deposited by him (the witness) in the Hardoi treasury for payment of the decretal amount in favour of "Shargha Saheb". By "Shargha Saheb" the witness obviously meant the decree-holder or decree-holders, under the decree (Ex. A-7). This evidence is no doubt some evidence of the payment of the amount in question, but as is contended by the learned counsel for the plaintiff-respondent, it is not the best evidence that could have been produced, and it is difficult to hold that it can be said fully to prove the payment in question. As regards the payment of the rest of the amount due under the decree, Ex. A-7, the learned counsel for the appellant frankly concedes that there is no evidence on the record to prove that that money was paid. In these circumstances, the concluding paragraph of S. 92, T. P. Act, is a clear bar to the right of subrogation claimed by the appellant.

In these circumstances, it is not necessary to consider how the matter would have stood, if both the payments referred to by us in the first two questions stated above had been fully proved. The contention of the learned counsel for the appellant was that his client comes within the classes of persons mentioned in S. 91, T. P. Act, and that for the purpose of subrogation his case is covered by para. 1 of S. 92, and not by para. 3 of that section. If para. 3 is applied, the appellant would admittedly be out of Court by reason of the fact that there was not registered instrument by the mortgagors agreeing to his being subrogated. The question whether para. 1 or para. 3 of S. 92 would have been applicable, if the payments mentioned above had been proved to have been made, is not free from difficulty, but in the absence of satisfactory proof of those payments the question does not arise. According to the view taken in a very recent Full Bench decision of the Allahabad High Court reported in 1937 A L J 659,[1] the appellant would not have been entitled to subrogation in the absence of a registered agreement in writing by the mortgagors, even if the payments had been fully made, and the mortgage redeemed in full. The learned counsel for the appellant, however, referred us to a ruling reported in 1934 A L J 887,[2] and a case of this Court reported in 1935 O W N 622.[3] The learned counsel on the opposite side referred us to that same decision of this Court, and also to another case reported in 11 O W N 619.[4] In view of what we have said above, it is not necessary for us to discuss these rulings in detail, since the appellant has failed on the grounds stated. We accordingly dismiss this appeal with costs.

D.S./R.K. *Appeal dismissed.*

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[1] Hira Singh v. Jai Singh, A I R 1937 All 588 =1937 A L J 659 (F B).

[2] Umed Singh v. Babu Ram, A I R 1934 All 1035=150 I C 937=1934 A L J 887.

[3] Sukhram Dass v. Mahbub Khan, A I R 1935 Oudh 399=155 I C 905=11 Luck 224 =1935 O W N 622.

[4] Mohammad Raza v. Bilqis Jehan Begam, A I R 1934 Oudh 213=149 I C 84=11 O W N 619.

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## A. I. R. 1938 Oudh 24

SRIVASTAVA AG. C. J.

*Abdul Majid Khan — Plaintiff —* Appellant.

v.

*Beni Din and another — Defendants —* Respondents.

Second Appeal No. 387 of 1935, Decided on 28th September 1937, against order of Sub-Judge, Partabgarh, D/- 17th September 1935.

**Contract — Repudiation — Object of contract illegal—Whole contract becomes illegal —Parties to such contract are prima facie in pari delicto—Money paid under such contract cannot be recovered back unless contract remains executory or unless party proves that he is not in pari delicto.**

Where the object of the contract is illegal, the whole transaction is tainted with illegality, and no right of action exists in respect of anything arising out of the transaction. In such case the maxim *in pari delicto potior est conditio defendantis* applies, and the test for determining whether an action lies is to see whether the plaintiff can make out his claim without relying on the illegal transaction to which he was a party. Money paid or goods delivered in pursuance of an illegal contract can be recovered from the other party so long as the contract remains executory, provided that notice is given repudiating the contract before the action is brought. If, however, the illegal purpose has been carried out or the contract has been substantially performed, money paid under the contract can no longer be recovered except where it appears that the parties were not in pari delicto. The parties to an illegal contract are prima facie in pari delicto, and in order to recover money paid in pursuance thereof, the onus is on the party seeking so to do to exculpate himself from participation in such illegality. [P 25 C 2]

A sale deed was executed by the vendor with the object of stifling criminal prosecution. It was found that both the parties to the sale deed were in pari delicto and there was no undue influence on the vendor as there were cross-complaints between the parties when the sale deed was executed. The prosecutions were withdrawn and the illegal object was fully carried out. After nine years the vendor brought a suit to set aside the sale deed and to recover possession :

*Held* that under the circumstances no relief could be granted to the vendor as the illegal purpose was fully carried out. [P 26 C 1]

M. Wasim and Ali Husain — *for Appellant.*

Radha Krishna and K. P. Srivastava — *for Respondents.*

**Judgment.**—The admitted facts of the case are that under two sale deeds dated 13th June and 12th September 1910 Beni Din, defendant 1, transferred certain groves and trees to Abdul Majid Khan, plaintiff. In 1923 Beni Din brought a suit for enforcement of an alleged oral condition of re-purchase and for the return of the aforesaid groves and trees to him. This suit was dismissed on 4th December 1923. In 1925 Baldi, defendant 2, who is the uncle of Beni Din, defendant 1, made a complaint in the Criminal Court against Arsh Mohammad Khan, son of the plaintiff, under S. 323, 147, 342 and 384, I. P. C. Arsh Mohammad Khan and Maiku Pasi, a servant of the plaintiff, also made a counter complaint under Ss. 323 and 426, I. P. C., and S. 24 of Act 1 of 1871 against Beni Din, Baldi and a few others. During the pendency of these criminal cases, the plaintiff on 28th September 1925 executed the sale deed Ex. 2 in favour of defendant 1 in respect of the aforesaid property. The plaintiff has instituted the present suit after nine years on 9th October 1934, to have the sale deed Ex. 2 set aside. The plaintiff's case was that defendant 1 threatened the plaintiff that if the groves in suit were not transferred to him he would get the plaintiff's son convicted. Therefore, in order to save the son, he executed the sale deed under the undue influence of Beni Din. The learned Munsif who tried the suit held that the sale deed Ex. 2 was without consideration and that it was executed under undue influence and with the object of stifling the prosecution for offences which were not compoundable by law. He therefore gave the plaintiff a declaration that he was the owner and also a decree for possession of the groves in suit except half of the grove No. 346. On appeal the learned Civil Judge while agreeing with the learned Munsif that the sale deed in question was executed with the object of stifling the criminal prosecution, disagreed with him on the question of undue influence. He found that there was no exercise of any undue influence and that both the parties were in pari delicto. He further found that as the illegal purpose of the transaction had been achieved by both the parties, the property should be allowed to lie where it falls, and the plaintiff was not entitled to any assistance from the Court. He therefore allowed the defendants' appeal and dismissed the plaintiff's suit. The law bearing on the subject has been summed up in Halsbury's Laws of England, Vol. 7, paras. 248 and 249, as follows:

> *248.* .... Where the object of the contract is illegal, the whole transaction is tainted with illegality, and no right of action exists in respect of anything arising out of the transaction. In such a case the maxim *in pari delicto potior est conditio defendantis* applies, and the test for determining whether an action lies is to see whether the plaintiff can make out his claim without relying on the illegal transaction to which he was a party.
>
> The illegality of a contract may be set up by way of defence to an action on the contract, even if it does not appear on the face of the contract ; but in order to obtain relief in equity by getting the contract set aside, the applicant must prove, not only that the contract was illegal, but that he was induced to enter into it by pressure or undue influence ....
>
> *249.* Money paid or goods delivered in pursuance of an illegal contract can be recovered from the other party so long as the contract remains executory, provided that notice is given repudiating the contract before the action is brought ; ... If, however, the illegal purpose has been carried out or the contract has been substantially performed, money paid under the contract can no longer be recovered, except where it appears that the parties were not in pari delicto, for instance, where the plaintiff shows that he was induced to enter into the contract by fraud, duress or oppression on the part of the defendant, or that a fiduciary relationship existed between the parties which renders it inequitable for the defendant to insist upon the bargain that he made with the plaintiff, or where the contract is made illegal by statute with the object of protecting a particular class of persons to which the plaintiff belongs ... The parties to an illegal contract are prima facie in pari delicto, and in order to recover money paid in pursuance thereof, the onus is on the party seeking so to do to exculpate himself from participation in such illegality.

In the present case both the Courts below are unanimous in finding that the transaction is illegal inasmuch as the object of the parties was to stifle the criminal prosecution. The lower Appellate Court has further found that both the parties were in pari delicto. These findings have not been seriously questioned. It has, however, been argued that the present action was not founded upon the illegal agreement but on repudiation of it inasmuch as its object was not to enforce the agreement but to repudiate it. In my opinion as the prosecutions were withdrawn and the illegal purpose had been fully completed, therefore the distinction sought to be drawn does not make any difference in the application of the principle, and the plaintiff cannot be allowed to recover back the property unless the case can be brought within one of the exceptions mentioned in the passages quoted above. The *locus pœnitentiæ* allowed to a party in such a case can be availed of only so long as the contract remains executory and the illegal purpose has not been carried out. There is no suggestion of the existence of any fiduciary relationship between the parties, but it was argued that there was a difference in the degree of the guilt of the plaintiff and the defendant and that in that sense the parties were not in pari delicto because the defendant had been induced to enter into it by pressure and undue influence. This matter seems to me to be more or less concluded by the finding of the lower Appellate Court that there was no undue influence. The trial Court in arriving at a contrary finding seems to have completely overlooked the fact that there were two cross criminal cases. The lower Appellate Court, however, was of opinion that because of the two cross cases it could not be said that one of the parties was in a position of domination rather than the other. I can see no sufficient ground to disagree with this opinion of the lower Appellate Court.

It was also argued that as it was found that the alleged money consideration had never been paid, therefore the transaction was unconscionable and the burden of proving that the contract was not induced by undue influence should, under S. 16 (3), Contract Act, lie upon the defendant. The application of the principle enunciated in this sub-section presupposes that one of the persons is in a position to dominate the will of another. In the present case as I have already held, in agreement with the lower Appellate Court, it is not possible to say that the defendant was in a position to dominate the will of the plaintiff. The rule regarding burden of proof enacted in this sub-section cannot therefore help the plaintiff. The result therefore is that the appeal fails and is dismissed with costs.

K.B./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Oudh 26

THOMAS AND ZIAUL HASAN JJ.

*Ram Bharose and others — Defendants* — Appellants.

v.

*Diwan Rameshwar Prasad Singh— Plaintiff* — Respondent.

First Appeal No. 64 of 1935, Decided on 8th September 1937, against order of Sub-Judge, Partabgarh, D/- 25th March 1935.

**(a) Gift — Validity of — Deed of gift by talukdar of his whole estate in favour of minor son — Mere fact that estate is heavily indebted and that donor wants to put it under superintendence of Court of Wards cannot make it fictitious.**

Where a talukdar executes a deed of gift in favour of his minor son of the whole of his estate reciting in it that the estate is heavily indebted and that he desires to put it under the superintendence of the Court of Wards to liquidate those debts, such recital is not inconsistent with the genuineness of the gift and cannot make the deed of gift a fictitious one. [P 29 C 1]

**(b) Evidence Act (1872), Ss. 11 (1), 21 and 32 (7)—Genuineness of gift, a fact in issue—Statements by deceased donor in certain deeds that gift is fictitious — Statements are admissible under S. 32 (7) and are relevant under S. 11 (1) — S. 21, Exceptions 2 and 3, apply to such statements.**

The question was whether a certain deed of gift was fictitious or genuine. The deceased donor had made a statement in his will that the deed of gift was a fictitious one. A similar statement was also made by the daughter-in-law of the donor in a deed of relinquishment in his favour :

*Held* that the statements were admissible under S. 32 (7) and therefore Exceptions 2 and 3 of S. 21 were applicable. [P 29 C 2]

*Held also* that the statements were relevant under S. 11 (1). [P 29 C 2]

**(c) Oudh Estates Act (1 of 1869), S. 17 — Gift—Validity of—Both conditions mentioned in S. 17 are essential for validity—Acceptance of gift by donee is not necessary.**

In order that a gift may be valid under S. 17, the deed of gift should be registered within one month and possession should be delivered within six months of the execution of the deed. Both these conditions are essential for the validity of the gift. Acceptance of the gift by the donee is not necessary : *A I R 1927 Oudh 278, Rel. on; 2 O C 244, Dissent.* [P 30 C 2]

**(d) Transfer of Property Act (1882), S. 122 — Validity of acceptance — Donee's legal disability to accept gift—Gift can be accepted by competent agent on his behalf — Accept-**

**ance is presumed after donee's possession — Mutation of minor donee's name by his donor father as his guardian is sufficient acceptance on his behalf.**

Where the donee is incapable of signifying his acceptance to a gift by reason of age or of his being an impersonal being such as a deity, the acceptance required can be made on his behalf by somebody else competent to act as an agent and acceptance will be presumed after his possession, actual or constructive, by the donee. [P 30 C 2; P 31 C 1]

Where therefore the donor is the father and his minor son the donee and the father applies for mutation of names in favour of the donee and continues to act in dealing with the gifted property on behalf of the minor as his guardian, there is a sufficient acceptance of the gift on behalf of the minor : *A I R 1924 Pat 657 and A I R 1932 All 444, Rel. on.* [P 31 C 1]

**(e) Oudh Estates Act (1 of 1869), S. 22 (11) —Interpretation.**

The expression "ordinary law" in S. 22 (11) includes custom and the terms of the talukdar's sanad : *A I R 1922 P C 289; A I R 1930 Oudh 481; A I R 1931 Oudh 327; A I R 1932 Oudh 172; A I R 1936 Oudh 340 and 163 I C 748, Rel. on.* [P 31 C 1]

**(f) Oudh Estates Act (1 of 1869), S. 11, Para. 1—Widow.**

Under S. 11, Para. 1 a widow of a talukdar is not empowered to transfer the estate. [P 32 C 1]

**(g) Oudh Estates Act (1 of 1869), S. 3 — Talukdar or grantee cannot change prescribed line of succession—Widow of talukdar relinquishing her rights to taluk in favour of person so as to make him fresh stock of descent—Relinquishment is invalid.**

As the Oudh Estates Act provides special rules for succession to the estates of talukdars and grantees, no talukdar or grantee, much less the widow of a talukdar, has power to change the prescribed line of succession. [P 32 C 1]

Where therefore the widow of a talukdar relinquishes her rights to the taluk in favour of a person so as to make him a fresh stock of descent, when under the law somebody else is entitled to succeed to the taluk on her death, the relinquishment is invalid : *A I R 1918 P C 196, Disting.* [P 32 C 1]

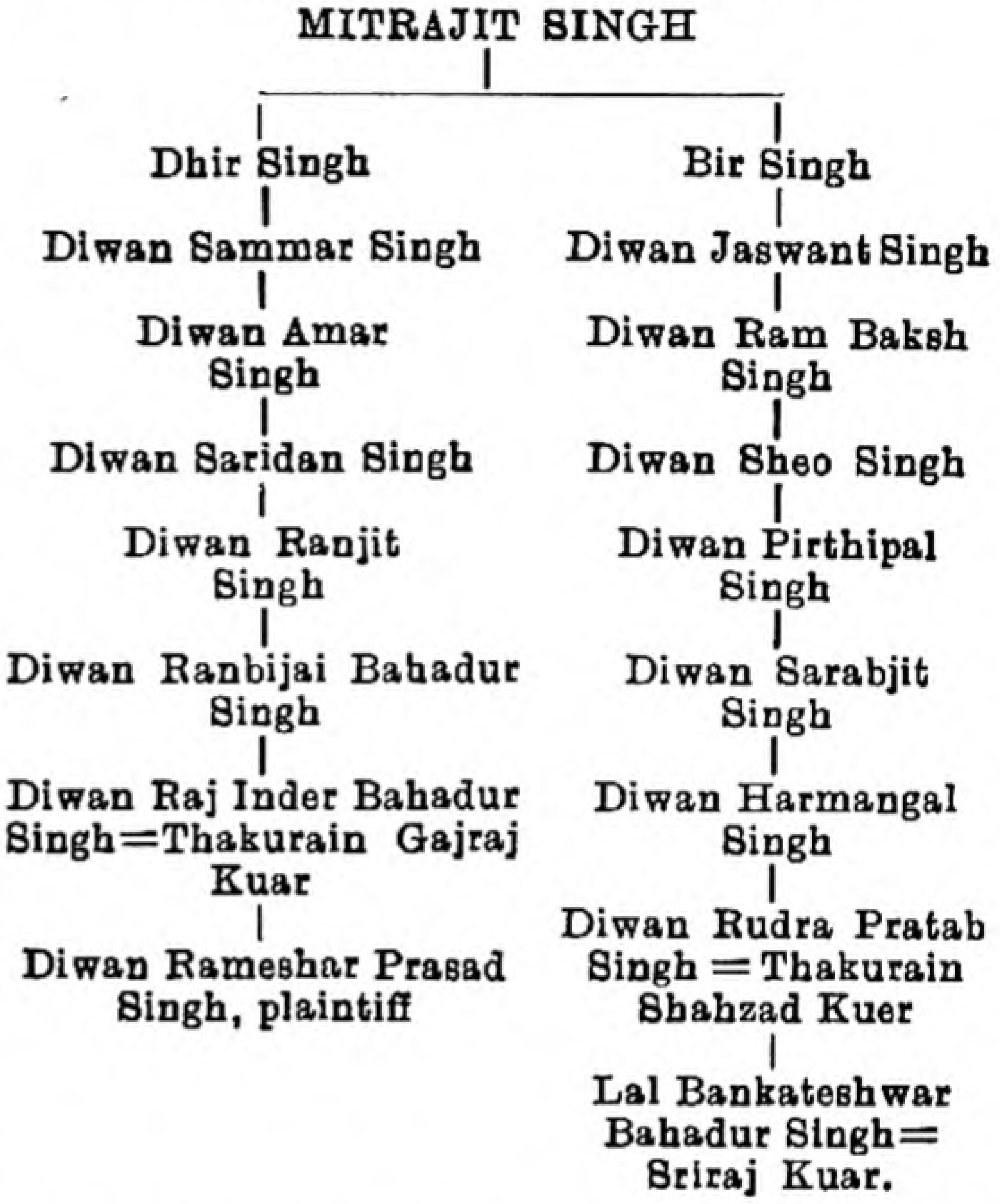
**(h) Hindu Law—Widow—Adverse possession against—Reversioner.**

Under the Hindu law an adverse possession against a Hindu female heir will not be effective against and binding on the reversioners. [P 32 C 2]

Haider Husain, H. H. Zaidi and Ram Swarup Nigam—*for Appellants.*

M. Wasim and Radha Krishna — *for Respondent.*

**Judgment.** — This is a first appeal against a judgment and decree of the learned Civil Judge of Partabgarh decreeing the plaintiff-respondent's suit for possession of village Nadipur and for mesne profits amounting to Rs. 996-9-2. The village in suit is comprised in the taluka of Uriyadih Jamtali of which Harmangal Singh was the first talukdar, being entered in list 1 prepared under S. 8, Oudh Estates Act at No. 261, and in list 2 at No. 121. The following pedigree will show the relationship of the plaintiff Rameshwar Prasad Singh with Harmangal Singh :


MITRAJIT SINGH
Dhir Singh
Bir Singh
Diwan Sammar Singh
Diwan Jaswant Singh
Diwan Amar Singh
Diwan Ram Baksh Singh
Diwan Saridan Singh
Diwan Sheo Singh
Diwan Ranjit Singh
Diwan Pirthipal Singh
Diwan Ranbijai Bahadur Singh
Diwan Sarabjit Singh
Diwan Raj Inder Bahadur Singh=Thakurain Gajraj Kuar
Diwan Harmangal Singh
Diwan Rameshar Prasad Singh, plaintiff
Diwan Rudra Pratab Singh = Thakurain Shahzad Kuer
Lal Bankateshwar Bahadur Singh= Sriraj Kuar.

Harmangal Singh was succeeded on his death by his son Rudra Pratab Singh. On 21st August 1896, Rudra Pratab Singh executed a deed of gift (Ex. 7) in respect of the entire taluka in favour of his son Bankateshwar Bahadur Singh, who was about ten years of age at the time. On 5th October 1899, Bankateshwar Bahadur Singh died leaving a widow, Thakurain Sriraj Kuar and on 13th April 1901, Thakurain Sriraj Kuar executed a deed of relinquishment (Ex. A-3) in respect of the taluka in favour of her father-in-law, R. P. Singh. On 19th April 1901, R. P. Singh executed a will (Ex. A-2) by which he devised the entire taluka to his wife Shahzad Kuar for her life and after her to Thakurain Sriraj Kuar. R. P. Singh died on 11th March 1908, and was succeeded by his widow Shahzad Kuar. On 16th January 1918, Shahzad Kuar died and was succeeded by Sriraj Kuar. When the latter died on 4th February 1932, various persons, including the present plaintiffs, laid claim to the estate. The matter was referred by the contending parties to arbitration with the Deputy Commissioner of Partabgarh as the sarpanch. The arbitrators gave their award on 28th April 1933, by which the village of Nadipur, which is in dispute, along with some other villages was given to the present plaintiff. The plaintiff obtained mutation in his favour on 31st July 1933. The defendants claimed to be in possession of the village in suit by virtue of a usufructuary mortgage deed (Ex. A-1 dated 6th August 1915) executed by Thakurain Shahzad Kuar. There was a case under S. 145, Criminal P. C., between the present parties and on 14th July 1933, the Criminal Court confirmed the defendants' possession over the village as against the plaintiff. On 10th July 1934, the plaintiff brought the present suit against the defendants for possession of the village and for Rs. 1,200 mesne profits.

The plaintiff's case is that by virtue of the deed of gift (Ex. 7) executed by R. P. Singh on 21st August 1896, B. B. Singh became the absolute owner of the taluqa, that he was succeeded by his widow Sriraj Kuar as a life estate holder under S. 22, Oudh Estates Act, and that after the death of Thaukrain Sriraj Kuar he became entitled to the village in suit under the arbitrators' award of 28th April 1933. With regard to the deed of relinquishment (Ex. A-3) executed by Sriraj Kuar in favour of R. P. Singh, the plaintiff's case is that Sriraj Kuar being in possession for life only under the Oudh Estates Act, she had no right to execute that deed and that it is therefore invalid. With regard to the mortgage deed set up by the defendants, his case is that the relinquishment by Sriraj Kuar being invalid, R. P. Singh got no interest thereby in the taluqa and that consequently Thakurain Shahzad Kuar could derive no legal title to the taluqa through R. P. Singh and was not competent to make the mortgage in favour of the defendants.

The defendants' contention is that the deed of gift (Ex. 7) was executed by R. P. Singh fictitiously as he was heavily indebted and wanted the taluqa to be taken over by the Court of Wards and because he thought that the Court of Wards would take the taluqa under their management if he should transfer it to his minor son, B. B. Singh. The defendants say that in spite of the execution of the deed of gift in favour of B. B. Singh, R. P. Singh remained in possession of the entire taluqa and that when the purpose for which the fictitious gift was made failed by reason of the refusal of the Court of Wards to take over management and when B. B. Singh died, R. P. Singh obtained a formal relinquishment from B. B. Singh's widow, Sriraj Kuar. They further allege that Thakurain Shahzad Kuar obtained the entire taluqa as an absolute owner after R. P. Singh's death under the will (Ex. A-2) and that Shahzad Kuar was therefore perfectly competent to make the mortgage in question. They also say that Thakurain Sriraj Kuar was competent to execute the deed of relinquishment referred to above and further plead that they have perfected their mortgagee rights by adverse possession. The other pleas of the defendants were that the mortgage in question was made by Shahzad Kuar for legal necessity and that they are protected by S. 41, T. P. Act. On the pleas raised by the defendants, the trial Court framed a number of issues but the learned Judge decided ten of them and decreed the plaintiff's suit.

In appeal before us, the following points were argued by the learned counsel for parties: (1) Was the gift in favour of B. B. Singh fictitious or genuine? (2) Was the relinquishment of her rights by Sriraj Kuar in favour of R. P. Singh valid? (3) Was Thakurain Shahzad Kuar absolute owner of the estate under the will of her husband? (4) Was Thakurain Shahzad Kuar in adverse possession of the taluqa and is the mortgage in favour of the defendants therefore unassailable? (5) Was the mortgage made by Shahzad Kuar for legel necessity and is it binding on the plaintiff? The other grounds of appeal contained in the memorandum of appeal were not pressed by the learned counsel for the appellants. We take up the above points seriatim.

*First point*: This is the most important question in the present appeal. The deed of gift being on the face of it a perfectly valid and genuine document, it was for the defendants to prove that it was executed fictitiously, but they have in our opinion entirely failed to prove this. Much stress is laid on the fact that, as recited in the deed of gift itself, R. P. Singh's taluqa was heavily indebted and that he desired to put it under the management of the Court of Wards to liquidate those debts. It is said that as his attempts to put it under the management of the Court of Wards on his own behalf failed, he executed the deed of gift in question in favour of his minor son in order to gain his object. The facts that the taluqa was indebted and that R. P. Singh wanted that the Court of Wards should undertake its management are not however inconsistent with the genuineness of the gift. For the purpose that the Court of Wards should take over the management of the taluqa, it was not necessary that the gift in favour of R. P. Singh's minor son should be fictitious. Indeed, the purpose could be better achieved by there being a genuine deed of gift in favour of the minor. We are therefore unable to accept the argument that the fact of R. P. Singh trying to put the taluqa under the superintendence of the Court of Wards leads to the conclusion that the deed of gift in question was executed fictitiously. The defendants rely on certain statements made by Sriraj Kuar and R. P. Singh in the deeds of relinquishment, Ex. A.3 and will, Ex. A.2, respectively. In the former Sriraj Kuar says:

> In order to arrange for discharge of debts of bankers through Court of Wards my father-in-law, Dewan Rudra Partab Singh fictitiously executed a registered deed of gift in respect of taluqa Uriya Dih Jamtali on 21st August 1896, in favour of my husband .... the Dewan himself remained actually the owner in possession of the said taluqa. .... with the object of placing the estate under the management of the Court of Wards .... My husband never had any sort of objection against the ownership and possession of the Dewan;

and further says: "I declare that the deed of gift .... was quite fictitious". Similarly, in his will in favour of his wife and daughter-in-law, Rudra Pratab Singh made the following statement:

> On 21st August 1896, I having executed a fictitious deed of gift in favour of my son .... got the mutation effected in his favour under my guardianship though in fact I was the owner in possession thereof. ... The ownership and possession over the taluqa of Uriya Dih Jamtali vested in me entirely even in the lifetime of Lal and I am still vested therewith.

On behalf of the plaintiff-respondent it is said that these statements are inadmissible in evidence. We do not however agree with this view. Reliance in the first place is placed on S. 6, Evidence Act and particularly on Illus. (a) to that section. That section runs as follows:

> The facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

It is argued that for the statements to be admissible in evidence it was necessary that they should have been made at or about the time of the execution of the deed of gift. S. 6, Evidence Act, however shows only one of the ways in which a fact can be relevant and it cannot be argued that because a fact or statement is not relevant under this section, it is not relevant at all. Then, the learned counsel relies on S. 21, Evidence Act, which says that admissions cannot be proved by or on behalf of the person who makes them or by his representative-in-interest except in three cases and the learned counsel's contention is that the statements under consideration do not fall under any of the exceptions mentioned in S. 21. We do not accept this view also. In our view these statements come possibly under the second exception by being admissible under S. 32 (7), Evidence Act, and certainly under the third exception which is to the following effect:

> An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

It seems to us that the statements in question are relevant under Cl. 1 of S. 11, Evidence Act, because they are inconsistent with the fact in issue. It was said that S. 11, Evidence Act, related to facts and not to statements, but "fact" includes "anything, state of things, or relation of things capable of being perceived by the senses" (*vide* S. 3) and a statement is thus included in the definition of "fact", as is clear from Illus. (a) to S. 6 also which was relied on by the learned counsel himself. In his judgment in Suits Nos. 2 and 3 of 1935 which one Rai Krishnapal Singh brought in this Court in the lifetime of Sriraj Kuar to get certain transfers made by Sriraj Kuar declared invalid, and which were tried on the Original Side by King J., the learned Judge was of opinion that the statements in question which were relied on before him also were inadmissible owing to the provisions of S. 92 Evidence Act. With respect we are unable to agree. S. 92 deals with the contradiction, or variation or addition to or subtraction from the terms of a document and not with an allegation regarding the nature of the document itself. The learned counsel for the respondent before us does not also take his stand on S. 92, Evidence Act. We therefore see no reason to hold that the statements relied on by the defendants are irrelevant or inadmissible.

But though we hold that the statements in question are admissible, we are definitely of opinion that they have little evidentiary value. When B. B. Singh died only about three years after the gift in his favour, it was not only in the interest of R. P. Singh but a matter of the utmost importance to him that he should be in possession of the Taluka as proprietor rather than let Sriraj Kuar be the talukdaria and himself be dependent on her, and it is clear that he could not achieve this object unless he made it appear that the deed of gift which he had executed in favour of his minor son was fictitious. Sriraj Kuar was a young widow living at the house of her father-in-law, and as in those days re-marriage of Hindu widows was unheard of especially among the higher classes, she had to spend the whole of her life in the family of her father-in-law and could not therefore afford to go against his wishes and to offend him. In these circumstances, she could not but accede to R. P. Singh's wishes and had to execute the deed of relinquishment and to say in it that the deed of gift in favour of her husband was fictitious. Similarly in his will, dated 19th April 1901, R. P. Singh in order to show his right to dispose of the taluka and to rely on the relinquishment made in his favour by Sriraj Kuar, had perforce to say that the deed of gift executed by him in favour of B. B. Singh was fictitious. It is thus clear that the statements in question were prompted by the exigencies of the situation and can by no means be relied upon as representing the true state of facts. The appellants have absolutely failed to satisfy us that the gift in question was fictitious and we therefore hold that it was a genuine transaction. We may note that King J. also came to the same conclusion about the gift in Rai Krishnapal Singh's suit referred to above.

Some legal objections to the validity of the gift were also put forward though it was at last conceded that if the gift be held to be genuine, all the requirements of law for the validity of the gift had been fulfilled. It was said that under S. 17, Oudh Estates Act, which held good at the time of the execution of the deed of gift in question and was only repealed in 1910, it was necessary not only that the deed of gift should be registered within one month from the date of its execution but also that delivery of possession should have been made within six months after the execution of the deed. The registration of the deed of gift in question was effected on the very date of its execution, but it was contended that delivery of possession was not made as required by S. 17. Now, although in 2 O C 244[1] it was held that in order that a gift be valid under the Oudh Estates Act all that was required by S. 17 was either that the deed of gift should be registered within a month or that possession should be delivered within six months of the execution of the deed, yet we agree with the learned counsel's contention that the language of S. 17 obviously means that both the conditions must be fulfilled in order to make the gift valid. This view is supported by the decision in 1 L C 97[2] which is a judgment of King J. In Suits Nos. 2 and 3 of 1935 and in Ex. 39 of the record, there is however ample proof of the fact that the gift in question was followed by delivery of possession soon after the gift. R. P. Singh himself applied for mutation being effected in favour of the donee and it was accordingly effected. Receipts to tenants were given in the name of the donee and suits were filed and defended in his name after the gift. None of these facts is disputed and they are in our judgment quite sufficient to prove delivery of possession to the donee.

Next it was said that both under the Hindu law and under S. 122, T. P. Act, it is necessary that a gift should be accepted by the donee. We perfectly agree with King J. that the gift in question is governed by the Oudh Estates Act which is a special Act and not by the general Hindu law or by S. 122, T. P. Act. S. 17, Oudh Estates Act did not render it necessary for the validity of a gift that it should be accepted by a donee, but even if acceptance be deemed necessary in the present case, on this point also there is sufficient evidence of the acceptance of the gift on behalf of B. B. Singh. In the case of the donee being incapable of signifying his acceptance by reason of age or of his being an impersonal being, such as a deity, the acceptance required can be made on his behalf by somebody else competent to act as an agent (*vide* 3 Pat 842[3]) and acceptance will be presumed after his possession, actual or constructive, by the donee: *vide* 54 All 534.[4] In the present case the donee was a minor and his natural guardian was the father, the donor himself. We have mentioned that R. P. Singh himself applied for mutation of names in favour of the donee and that he continued to act in dealing with the property on behalf of the minor as his guardian and this is to our mind sufficient acceptance on behalf of the minor donee. In fact, as noted above, the learned counsel for the appellant himself conceded that he could not very well press the legal objections to the validity of the gift in the present case. We therefore decide this point against the appellants.

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[1] Ram Lal v. Mt. Jani Begam, (1899) 2 O C 244.

[2] Krishnapal Singh v. Sriraj Kuar, A I R 1927 Oudh 278=104 I C 299=1 L C 97.

[3] Deo Saran Bharthi v. Deoki Bharthi, A I R 1924 Pat 657=80 I C 980=3 Pat 842=5 P L T 305.

*Second point.*—The question is whether the relinquishment made by Sriraj Kuar in favour of R. P. Singh was valid and conferred any rights on R. P. Singh. It was argued by the learned counsel for the appellants that relinquishment by Sriraj Kuar was no more than a surrender of the widow's estate to the next reversioner which had the effect of ending the widow's rights and vesting the property immediately in the reversioner. S. 22, Oudh Estates Act, contains special rules of succession for intestate taluqdars and grantees and after providing for succession by various heirs in clauses 1 to 10, the unamended Act in Cl. 11 provided :

> Or in default of any such descendant then to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar or grantee, heir or legatee are subject.

It was argued that as the relinquishment in question was made at a time when the unamended Act was in force, it should be seen who would have been entitled to the estate after the death of Sriraj Kuar under the "ordinary law" to which Sriraj Kuar was subject. Now, although formerly doubt existed as to whether the expression "ordinary law" in S. 22 (11), Oudh Estates Act, meant only the personal law or such law as modified by custom or the terms of a sanad, it is now to be deemed as settled that "ordinary law" includes custom and the terms of a taluqdar's sanad. In 49 I A 276[5] their Lordships of the Judicial Committee dealing with a case under S. 23, Oudh Estates Act, clearly laid down that the words "ordinary law" in S. 23, like the similar words in S. 22, Cl. 11, include the rule of succession laid down in the sanad by which the estate had been granted. This decision has since been consistently followed by this Court : *vide* 7 O W N 1010,[6] 8 O W N 772,[7] 9 O W N 304[8] and A I R 1936 Oudh 340[9] and was again repeated by their Lordships of the Privy Council in 11 O W N 1641.[10] We take it therefore that in 1901 when the deed of relinquishment was executed by Sriraj Kuar in favour of R. P. Singh, the latter was a person entitled to the estate under S. 22 (11), Oudh Estates Act, if Sriraj Kuar had died, since there is admittedly a sanad of primogeniture succession in the family. The question however is whether Sriraj Kuar had the power to relinquish the estate in favour of R. P. Singh. We have heard the learned counsel at length on this point and after giving our best consideration to it, have come to the conclusion that Sriraj Kuar had no such power. Para. 1 of S. 11, Oudh Estates Act, provides :

> Subject to the provisions of this Act, and to all the conditions under which the estate was conferred by the British Government, every taluqdar and grantee and every heir and legatee of a taluqdar and grantee, of sound mind and not a minor, shall be competent to transfer the whole or any portion of this estate, or of his right and interest therein during his lifetime, by sale, exchange, mortgage, lease or gift, and to bequeath by his will to any person the whole or any portion of such estate, right and interest.

"Estate" is defined in the Act as the taluqa or immovable property acquired or held by a taluqdar or grantee in the manner mentioned in S. 3, S. 4 or S. 5 or the immovable property conferred by a special grant of the British Government upon a grantee and 'heir' is defined as a person who inherits property otherwise than as a widow under the special provisions of this Act. It is not denied that the taluqa in question was an estate within the meaning of the Act and from para. 1 of S. 11 and the definition of the term "heir" it is quite clear that the Legislature did not intend to give the power of transfer in respect of an estate to a widow. Further, the Oudh Estates Act provides special rules for succession to the estates of taluqdars and grantees and no taluqdar or grantee, much less the widow of a taluqdar, has power to change the prescribed line of succession. Therefore Sriraj Kuar had no power to relinquish the taluqa in favour of R. P. Singh so as to make him a fresh stock of descent when under the law somebody else would be entitled to succeed to the taluqa on her death, and the relinquishment, the effect of which was to contravene the provisions of the Oudh Estates Act, must be held to be invalid. Reliance was placed by the learned counsel for the appellants on the case in 46 I A 72[11] in which their Lordships held that a Hindu widow can surrender her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time, but that case was of an ordinary Hindu widow and not of a widow governed by the Oudh Estates Act.

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[4] Anandi Devi v. Mohan Lal, A I R 1932 All 444=137 I C 756 = 54 All 534=1932 A L J 885.

[5] Badri Narain Singh v. Harnam Kuar, A I R 1922 P C 289=68 I C 1000=44 All 449=49 I A 276=25 O C 318 (P C).

[6] Abadi Begam v. Mohammad Khalil Khan, A I R 1930 Oudh 431=7 O W N 1010.

[7] Dal Bahadur Singh v. Har Bakhsh Singh, A I R 1931 Oudh 327=132 I C 785=6 Luck 730=8 O W N 772.

[8] Ganesh Bakhsh Singh v. Ajudhiya Bakhsh Singh, A I R 1932 Oudh 172=137 I C 349=7 Luck 564=9 O W N 304.

[9] Mata Bakhsh Singh v. Ajodhiya Bakhsh Singh, A I R 1936 Oudh 340=163 I C 770.

[10] Dal Bahadur Singh v. Har Bakhsh Singh, (1934) 11 O W N 1641=168 I C 748.

Reference was also made to Halsbury's Laws of England, Vol 24, page 292, paragraph 526, and it was argued that a surrender was recognized by the English law also, but, in the first place, surrender and release under the English law arise out of a grant and do not relate to inheritance: *vide* Halsbury's Laws of England, Vol. 24, page 212, para. 402, and in the second place, in face of the special provisions of the Oudh Estates Act to which Sriraj Kuar was subject qua the estate in her possession, no other law can be applicable to her. It was argued that the Oudh Estates Act being silent as to the power of a widow to surrender her rights to the next reversioner, the ordinary Hindu law should be looked to and applied and in support of this contention reliance was placed on 3 Luck 76,[12] 50 I A 69[13] and 9 O W N 478,[14] but in our judgment it is not correct to say that the Oudh Estates Act is silent on the point, and we have already given our reasons for holding that that Act bars an alienation by a taluqdar's widow. We therefore hold that the relinquishment in question was unauthorized and therefore invalid.

*Third point.* — In view of the findings recorded above, the question whether Thakurain Shahzad Kuar got only a life estate or was made absolute owner of the estate by the will of R. P. Singh does not arise. As we have held the gift in favour of B. B. Singh to be genuine and valid, he became the absolute owner of the taluqa and as Sriraj Kuar's relinquishment has been held to be invalid, R. P. Singh got no interest in the taluqa to bequeath to his wife or anybody else. The will in favour of Shahzad Kuar was consequently invalid and the taluqa must go after Sriraj Kuar's death to those entitled to it by the provisions of the amended Oudh Estates Act of 1910. This point also goes against the appellants.

*Fourth point.*— The plea that Shahzad Kuar had completed her title by adverse possession by tacking R. P. Singh's possession on to her own has no force as it was only in 1932 that Sriraj Kuar died and the present plaintiff succeeded to the estate Even under the ordinary Hindu law it is well settled that adverse possession against a Hindu female heir will not be effective against and binding on the reversioners.

*Fifth point.*—As the gift in favour of B. B. Singh has been held to be valid and the relinquishment made by Sriraj Kuar in favour of R. P. Singh invalid, Shahzad Kuar had no right to make the mortgage in question in favour of the appellants and the plaintiff is not at all bound by that mortgage.

The result is that we hold that the suit of the plaintiff-respondent was rightly decreed by the Court below and dismiss this appeal with costs.

K.B./R.K. *Appeal dismissed.*

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[11] Rangaswami Gounden v. Nachiappa Gounden, A I R 1918 P C 196=50 I C 498=46 I A 72=42 Mad 523 (P C).

[12] Raghuraj Chandra v. Subhadra Kunwar, A I R 1928 P C 87=108 I C 673=55 I A 139=3 Luck 76 (P C).

[13] Harnath Kuar v. Indar Bahadur Singh, A I R 1922 P C 403=71 I C 629=50 I A 69=45 All 179=26 O C 223 (P C).

[14] Jadunath Kuar v. Bisheshar Bakhsh Singh, A I R 1932 P C 142=136 I C 747=59 I A 173=9 O W N 478 (P C).

## * A. I. R. 1938 Oudh 33

SMITH AND MADELEY JJ.

*Girraj — Defendant* —Appellant.

v.

*Pt. Sankatha Prasad and others — Plaintiffs* — Respondents.

Second Appeal No. 44 of 1936, Decided on 19th October 1937, against decree of Dist. Judge, Sitapur, D/- 17th October 1935.

**(a) Civil P. C. (1908), O. 21, R. 63 — Suit under — Whether excludes operation of S. 53, T. P. Act** (*Quære*).

It is doubtful whether the fact that a person institutes his suit according to the provisions of O. 21, R. 63, Civil P. C., is sufficient in itself to exclude the operation of the provisions of S. 53 (1), T. P. Act. [P 34 C 1]

*** (b) Transfer of Property Act (1882), S. 53 — Representative suit — Suit not brought in representative character—No objection taken — Objection to form of suit cannot be taken in appeal.**

Where a suit which should have been a suit of representative character is not brought in a representative capacity and no objection is taken as to the form of the suit in the trial Court but is only raised for the first time in appeal, the objection cannot be allowed in the Appellate Court. The Court has inherent jurisdiction in a case of this nature although its jurisdiction is irregularly invoked and the person sued by his conduct is precluded from maintaining in appeal that the suit was not maintainable as framed : *A I R 1936 Rang 117, Rel. on*; *A I R 1919 Mad 257, Expl.* [P 35 C 1]

B. N. Chak — *for Appellant.*

R. N. Shukla — *for Respondent 1.*

**Judgment.** — This is a second appeal from a decision by the learned District Judge of Sitapur, by which he dismissed an appeal from a decision by the learned Subordinate Judge of Kheri. The facts are set out in the judgment of the learned District Judge. All that we need state here is that in execution of a decree obtained by him on a mortgage, Rai Bahadur Pandit Sankatha Prasad attached a house as the property of his mortgagor Gobardhan Singh. Thereupon the house was claimed by Gobardhan Singh's daughter Mt. Ratan Kuar on the basis of a deed of gift and an objection was also put forward by one Girraj who claimed that he was a mortgagee of the house from Mt. Ratan Kuar. The objection of Mt. Ratan Kuar was disallowed by the executing Court, but that Court held that Girraj was a bona fide transferee for consideration, the result being that the house was ordered to be sold subject to the mortgage in his favour. Thereupon the decree-holder instituted the suit out of which this appeal arises for a declaration that the house in question is owned by defendant 3 (Gobardhan Singh) and that it is liable to be sold in execution of the plaintiffs' decree and that it is not subject to any mortgage in favour of defendant 1 (Girraj). It was asked that the mortgage deed in favour of Girraj be declared ineffectual as against the plaintiff. In para. 4 of the plaint it was set forth that the defendants knew that the house belonged to defendant 3, and that defendant 2 (Mt. Ratan Kuar) had no right to mortgage it, and no rights accrued to defendant 1 under the deed which it was said was fictitious and collusive. The Courts below have both found that the deed of gift in favour of Mt. Ratan Kuar was fictitious and that no consideration was proved for the mortgage deed in favour of Girraj. The plaintiffs' suit was accordingly decreed. The appeal before the learned District Judge was by Girraj alone, and he is the appellant in this second appeal also.

The only point taken before us by the learned counsel for the appellant is that the suit offended against the provisions of para. 4 of S. 53 (1), T. P. Act. The argument is that substantially it was a suit by a decree-holder creditor to avoid transfers on the ground that they had been made with intent to defeat or delay the creditors of Gobardhan Singh and that in those circumstances the suit was bound to be instituted on behalf of or for the benefit of all the creditors. The learned counsel for the plaintiff-respondent contended in reply to this argument that O. 21, R. 63, Civil P. C., confers a special right of suit which is unfettered by the provisions of S. 53, T. P. Act. He further contended that the point based upon the provisions of S. 53 (1), T. P. Act, not having been taken in the trial Court, it cannot be taken now. In support of his contention that a plaintiff who comes into Court under the provisions of O. 21, R. 63, Civil P. C., is in a special position, the learned counsel for the plaintiff-respondent made reference to a decision of the Lahore High Court reported in A I R 1931 Lah 430.[1] The relevant portion of that decision runs as follows :

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[1] Din Muhammad v. Uma Dat-Hans Raj, (1931) 18 A I R Lah 430=133 I C 118=32 P L R 201.

> It was pointed out in 42 Mad 143=51 I C 714[2] that the defeated party in a claim petition had a statutory right of suit given to him under O. 21, R. 63, Civil P. C. which could not be defeated by any rule of practice which had no statutory basis. Such party is placed by that Rule in a specially unfavourable position as regards limitation, but on the other hand he is freed from other restrictions as to the nature of the suit to be brought which an ordinary creditor may labour under.

The concluding portion of this passage certainly supports the contention of the learned counsel, but the Transfer of Property Act does not apply to the Punjab, and the necessity in certain circumstances of filing what is usually described as a representative suit rests now in the parts of India to which the Transfer of Property Act applies upon the statutory provisions contained in S. 53 (1) of the Act. The Madras decision relied on in the Lahore case is of the year 1918, long prior to the amendments made in S. 53, T. P. Act, in the year 1929. We therefore entertain considerable doubts as to whether the fact that the plaintiff instituted this suit according to the provisions of O. 21, R. 63, Civil P. C., is sufficient in itself to exclude the operation of the provisions of S. 53 (1), T. P. Act.

The learned counsel for the appellant conceded that the actual averments in the plaint do not attract the provisions of S. 53 (1), but he contended that the mode in which the suit was conducted, and the type of evidence that was recorded, show that the suit was really of such a nature that the provisions of that section would apply. Here again the question is not beyond doubt, but we do not think it necessary definitely to decide that point, since even if it be conceded that the suit ought to have been brought on behalf of, or for the benefit of, all the creditors of Gobardhan Singh, we do not think that we can allow this appeal on that ground only. The point now taken, as has been mentioned already, was not taken in the trial Court, and we were given by the learned counsel for the appellant to understand that it was not taken before the lower Appellate Court either. It is true that the point was not taken in the grounds of appeal in that Court, but the concluding part of the judgment of the learned District Judge shows that it was taken before him in arguments. He briefly dismissed the point relying on 42 Mad 143[2] and A I R 1931 Lah 430.[1] In one sense therefore, this point was not taken in appeal before the Court below since it was not mentioned in the grounds of appeal, but in another sense it was taken since it was undoubtedly mentioned before the learned District Judge. It seems to us however that it makes no difference whether the point was first taken in first appeal or in second appeal. In the Madras case referred to above it was said, at page 150 :

> But if a suit had been proceeded with, without any objection being taken to its form on the ground of its not being on behalf of all the creditors and a decree had been passed setting aside a transfer as fraudulent, it seems to me that there is no justification for allowing such an objection to be raised for the first time in appeal or for ignoring the findings arrived at by the lower Court and dismissing the suit as not being of a representative character. Such a course will make the Court really an instrument for the support of a proved fraud.

As we have said already, that decision was prior to the amendments introduced into the Transfer of Property Act in 1929; but the principle laid down in the passage quoted above may, we think, be regarded as applicable even with S. 53 (1) standing as it now does. In any case, we have been referred to a recent decision of a Bench of the Rangoon High Court reported in A I R 1936 Rang 117.[3] It was there said (we quote from the head-note) :

> Where a suit is brought under O. 21, R. 63 by an attaching creditor to establish his right to attach and bring to sale certain property by avoiding a transfer of the property on the ground that it has been made with intent to defeat or delay the creditors of the transferor, it is the duty of the trial Court to see that the suit is brought in a representative capacity and it can, if such a suit is brought by one creditor in his individual capacity, direct the plaintiff to take proper steps to put matters right.
>
> Where however such a suit is not brought in a representative capacity and no objection is taken as to the form of the suit in the trial Court but is only raised for the first time in appeal, the objection cannot be allowed in the Appellate Court. The Court has inherent jurisdiction in a case of this nature although its jurisdiction is irregularly invoked and the defendant by his conduct is precluded from maintaining in appeal that the suit was not maintainable as framed.

The learned counsel for the appellant urges that this decision followed an unreported decision of the Rangoon High Court, but we do not see that this makes any difference. The body of the reported decision above referred to shows that in the unreported case the point that a suit ought to have been brought in a representative capacity, but was not so brought, was taken in first appeal but was overruled, and on second appeal it was held that in such a case if objection was not taken to the form of the suit in the trial Court, but was only raised for the first time in the appeal, the objection could not be allowed in the Appellate Court. The relevant portion of the decision in the unreported case is quoted in extenso in the reported decision, and we do not think it necessary to quote it again here. Following the view taken by the Rangoon High Court, we hold that we cannot allow this point based upon S. 53 (1), T. P. Act, to be taken now, and we accordingly dismiss this appeal with costs.

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[2] Puthiyapurayil Pokker v. Kunhamad, (1919) 6 A I R Mad 257=51 I C 714=42 Mad 143 =36 M L J 231.

[3] Asgar Ali v. C. V. R. M. Firm, (1936) 23 A I R Rang 117=161 I C 887=14 Rang 81.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Oudh 35

SMITH AND MADELEY JJ.

*Thakur Rameshar Bux Singh and others — Defendants* — Appellants.

v.

*Thakurain Patraj Kuer, Plaintiff and another, Defendant* — Respondents.

Second Appeal No. 153 of 1935, Decided on 21st October 1937, against order of 1st Sub-Judge, Bahraich, D/- 5th February 1935.

**Hindu Law—Widow—Nature of property—Execution against—Limited interest for lifetime and unlimited interest representing whole estate—Both are attachable—Property purchased in execution of personal decree against widow—Death of widow — Vendee's interest ceases automatically — No reversioner's suit to set aside sale is necessary—Attaching creditor can bring suit under O. 21, R. 63, Civil P. C.**

A widow has two kinds of interests in the estate, (1) a limited interest for her lifetime, and (2) an unlimited interest as representing the whole estate. It is possible for either of these two to be sold in execution of a decree, but a mere perusal of a sale-certificate and a sale-proclamation will not ordinarily show which of these two interests was transferred to the auction-purchaser. Nevertheless, if the interest transferred was merely the life-interest of the widow, nothing more than this can be conveyed to the auction-purchaser, and it follows that upon the death of the widow the interest of the auction-purchaser terminates. Even though he remains in possession, he does so without any right or title. Where the right and title of the vendees has thus terminated, the sale deed does not require to be set aside by any reversioner. An attaching creditor whose attachment has been removed on objection by the vendee can bring a suit under O. 21, R. 63 and he is not debarred from showing that the interest transferred to the vendee was only a widow's limited interest : *A I R 1916 Cal 423; 10 Cal 985; A I R 1927 P C 41; A I R 1925 Oudh 243 and A I R 1934 Cal 162, Rel. on.* [P 37 C 1, 2]

M. Wasim and Ali Mohammad — *for Appellants.*

Radha Krishna — *for Respondent 1.*

**Judgment.**—This is an appeal against a decision of the first Subordinate Judge of Bahraich allowing an appeal against a decree of the Munsif of Qaisarganj, district Bahraich. The suit was brought by Mt. Patraj Kuar, the present respondent, under O. 21, R. 63, Civil P. C., for a declaration that Chak Banarsi, patti Ram Kuar, mahal Dharampore, pergana Hisampore, is saleable in execution of her decree. The Munsif dismissed the suit, but the lower Appellate Court decreed it.

The circumstances which led up to the case are as follows. On 19th June 1911, Thakur Sukhraj Singh executed a mortgage deed for Rs. 14,000 in favour of Thakur Bisheshwar Bakhsh Singh, the husband of Mt. Patraj Kuar. Both the mortgagor and the mortgagee died. Thereafter, Mt. Patraj Kuar, as representative of the mortgagee, sued Mt. Ram Kuar, widow and representative of the mortgagor, on the basis of the mortgage, and obtained a decree for sale of the mortgaged property. This decree was dated 15th February 1927. The decree however was only partly satisfied by the sale of the mortgaged property. Mt. Ram Kuar died sometime before 1930. In 1930 Mt. Patraj Kuar applied for and obtained a personal decree against the assets of Thakur Sukhraj Singh in the hands of Thakur Mahadeo Bakhsh Singh, defendant 6 in this case, and next reversioner after the death of Mt. Ram Kuar. Mt. Patraj Kuar then attached the property now in suit. But in 1930 one Jadunath Singh, father of defendants-appellants 1 to 5, had bought the property in suit in execution of a decree in his favour against Mt. Ram Kuar in her personal capacity. When Mt. Patraj Kuar attached this property, defendants 1 to 5 filed objections as heirs of their deceased father, Jadunath Singh, on the ground that they had bought the property at Court auction, and it belonged to them. The objection was allowed, and the property was released from attachment. Then Mt. Patraj Kuar brought this suit under O. 21, R. 63, Civil

P. C. Mahadeo Bakhsh Singh did not contest the suit, and he put in no appearance either in the lower Courts or in this Court.

Only two points have been argued in this appeal. One is whether the sale to Jadunath Singh is void or only voidable after the death of the widow. The plaintiff-respondent argues that the sale was of the widow's interest only and after the death of the widow it is a mere nullity, and the contesting defendants are in no better position than that of trespassers. On the other hand, the defendants-appellants argue that the sale is not a nullity after the death of the widow, but is merely a voidable transaction, and that until it is avoided they are the legal owners of the property. They further argue (and this is the second point), that the only person who can avoid the sale deed is the reversioner. They argue that voluntary and involuntary transfers by a Hindu widow are on exactly the same footing and the same principles apply. A number of rulings have been cited by the learned counsel for the appellants in support of the contention that in case of voluntary transfers, only the reversioner can get the sale deed set aside. We need not go into these rulings, because the learned counsel for the plaintiff-respondent admits this principle of law to be correct. He admits that where the sale deed purports to transfer the property simpliciter, and does not limit the interest transferred to the widow's life-interest, only the reversioner can avoid the sale deed. But he argues that it would be perfectly possible for a widow to transfer her life-interest expressly, and in such a case after the death of the widow the transferees would be in the position of trespassers. Similarly, he argues, in case of a Court auction the nature of the suit itself indicates what interest was sold, whether it was an unlimited interest, the suit having been decreed against the widow as representative of the whole estate, or whether it was the widow's limited interest, the suit having been decreed against the widow in her personal capacity only and not as representative of the whole estate. In the latter case he says that the auction-purchasers are in no better position than the holders of a sale deed transferring expressly the widow's life-interest only, and a creditor of the estate can get a declaration under O. 21, R. 63, Civil P. C. treating the sale certificate as a nullity because the interest which it transferred has ceased to exist.

We are of opinion that this contention is correct. In Jadunath Singh v. Mt. Ram Kuar, the suit was against the widow personally, and not as representative of the whole estate. The contesting defendants in this present suit raised a plea that the money was borrowed for legal necessity, but this point was found against the defendants-appellants, and was not re-agitated in the lower Appellate Court. It is clear, therefore, that the money was taken by the widow from Jadunath Singh in her personal capacity, and further that the suit was brought, and a decree obtained, against her in her personal capacity. In Mayne's Hindu Law, Para. 641, the effect of execution for the debt of a female is given thus :

> A sale in execution of a decree against a female heir is merely an involuntary alienation, and will be judged of by the previous principles. Where the suit is founded upon a purely personal debt or contract of her own, the decree can only be against her own person and property, and a sale in execution will only convey her own interest in the property. But even though the foundation of the decree be liability which might bind the reversioner, that alone is not sufficient. The suit must be so framed as to show that it is not merely a personal demand upon the female in possession, but that it is intended to bind the entire estate, and the interests of all those who come after her. The reason of this is that, although in a suit brought to recover, or charge an estate of which a Hindu female is the proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest; still, and on this very account, the plaintiff is bound to give notice that he is seeking so large a remedy, in order to put those who may be ultimately affected upon their guard, and to enable them to protect themselves. If, therefore, the suit is framed so as only to claim a personal decree against the heiress, the plaintiff will be relieved from the necessity of proving anything beyond her personal liability. But then the decree can only be executed against the female holder personally and against her limited interest in the land.

This proposition is also laid down in 32 I C 580,[1] a Bench ruling of the Calcutta High Court:

> Where a suit against a female heir is founded upon a purely personal debt or contract of her own, the decree can only be against her own personal property and a sale in execution of such a decree can only convey her own interest in the property,

and again,

> In order that a decree may operate against the estate, the suit must be so framed as to show that

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[1] Narayan Singh v. Rajkumari Godabari Koeri, (1916) 3 A I R Cal 423=32 I C 580=22 C L J 400.

it is not merely a personal demand upon the female in possession, but that it is intended to bind the entire estate and the interests of all those who come after her.

10 Cal 985[2] is to the same effect. A I R 1927 P C 41[3] lays it down that where a creditor files a suit against a limited owner as such, and not against the estate of the last male holder, and a decree is passed personally against the limited owner, the decree and the auction sale of property following thereon does not bind the reversioner, although the foundation of the decree be a liability which might bind the reversion. In 1 O W N 710[4] it was held, at p. 726, that in deciding whether a sale in execution of a mortgage-decree against a Hindu widow would bind the reversioners or not, the Court must look beyond the decree to the form of the suit, or possibly even to the terms of the bond itself. In 60 Cal 1236,[5] it was held that the expression "right, title and interest of a widow", used in a sale proclamation, is ambiguous, and may indicate either the limited interest of the widow, i. e. "widow's interest", or the "entire estate". In order to determine what property passed by such a sale, the Court should apply the tests: (1) what was liable to be sold, and (2) what in fact was sold.

It is clear from all these authorities that a widow has two kinds of interests in the estate (1) a limited interest for her life time, and (2) an unlimited interest as representing the whole estate. It is possible for either of these two to be sold in execution of a decree, but a mere perusal of the sale-certificate and the sale-proclamation will not ordinarily show which of these two interests was transferred to the auction purchaser. Nevertheless, if the interest transferred was merely the life-interest of the widow, nothing more than this can be conveyed to the auction purchaser, and it follows that upon the death of the widow the interest of the auction purchaser terminates. Even though he remains in possession, he does so without any right or title. It is urged on behalf of the appellants that only the reversioner has the right of bringing a suit to set aside a sale whether it be voluntary or involuntary. But it appears to us that where the right and title of the vendee has terminated, the sale deed does not require to be set aside. Under O. 21, R. 63, Civil P. C., an attaching creditor can bring a suit for declaration when the property has been released owing to an objection under O. 21, R. 60. The plaintiff in this case therefore clearly had a right of suit under O. 21, R. 63, Civil P. C. We do not think that she can be debarred from showing by mere examination of the record of the case that the nature of the interest transferred was a widow's limited interest. How far she should be allowed to go behind the record to the underlying facts, it is not necessary to decide in this case. An analogus case which has been particularly relied upon by the lower Appellate Court is 10 Cal 985,[2] cited above. Of all these decisions this appears to have been the only one where the suit was brought by any other person than the reversioner. In this case it appears that the plaintiff-appellant was the purchaser of the interest of one Behari Lal, the heir in reversion, and it is argued on behalf of the appellants in the present case that this being so, he was the representative of the reversioner, and that his bringing the suit was no exception to the general rule that only the reversioner can get a sale by a Hindu widow set aside.

For the reasons given above, we do not think that this argument can affect the present case, because the interest of the appellants had already terminated when the suit was brought, and a cursory examination of the proceedings which led up to the sale was sufficient to show that only the widow's interest had been transferred. We therefore dismiss this appeal with costs.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Oudh 37

SRIVASTAVA C. J. AND SMITH J.

*Baij Nath and others — Plaintiffs —* Appellants.

v.

*Pandit Mahabir Prasad and another — Defendants —* Respondents.

**Second Appeal No. 310 of 1935, Decided on 27th October 1937, against decree of Sub-Judge, Partabgarh, D/ 10th July 1935.**

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[2] Jugul Kishore v. Jotendro Mohun Tagore, (1884) 10 Cal 985=11 IA 66=4 Sar 553 (P C).

[3] Lalit Mohan Pal v. Dayamoyi Roy, (1927) 14 A I R P C 41=105 I C 469 (P C).

[4] Mt. Raj Kunwari v. Mt. Kunwar Kunwari, (1925) 12 A I R Oudh 243=92 I C 332=1 O W N 710.

[5] Nagendrabala Dasee v. Panchanan Mourie, (1934) 21 A I R Cal 162=149 I C 1053=60 Cal 1236.

**Oudh Laws Act (18 of 1876), Ss. 10 and 11 —Pre-emption of part of property by paying part of 'price aforesaid' is not allowed.**

There is no provision made in the Oudh Laws Act for tendering part of the 'price aforesaid' or for pre-empting part of the property proposed to be sold on payment of a proportionate share of the price : *A I R 1934 P C 153, Foll.* [P 38 C 2; P 40 C 1]

Hyder Husain and H. H. Zaidi — *for Appellants.*

L. S. Misra and Radha Krishna Srivastava — *for Respondent 1.*

Jagdish Narain for M. Makund Behari Lal — *for Respondent 2.*

**Judgment.**—On 19th August 1933, Ram Nath, defendant 2, executed a sale deed in favour of Mahabir Prasad, defendant 1, in respect of three distinct properties, namely (1) a fractional share of superior proprietary rights in village Bhanapur: (2) a fractional share of under-proprietary rights in village Paramnathpur; and (3) two tenancy groves in village Paramnathpur, for a lump sum of Rs. 4,000. Baij Nath and Ram Kumar, who are the superior proprietors in village Bhanapur, instituted Suit No. 182 of 1934 claiming pre-emption of the Bhanapur property. Another suit, No. 183 of 1934, was instituted by Daulat Singh and Sarnet Singh, superior proprietors in village Paramnathpur, for pre-emption of the under-proprietary rights in Paramnathpur. A third suit, No. 186 of of 1934, was instituted for pre-emption of the same under-proprietary rights by one Bhola, who is an under-proprietor in village Paramnathpur, and has also been found to be a relation of the vendor. The respective plaintiffs in all the three suits asked for a decree for pre-emption of the property which they were entitled to pre-empt on payment of a proportionate amount of the price.

Before the suits could reach the stage of trial, Baij Nath, Ram Kumar, Daulat Singh and Sarnet Singh instituted another suit, No. 190 of 1934, claiming a joint decree in favour of all the four plaintiffs in respect of the shares in Bhanapur and Paramnathpur, and in the alternative a decree in favour of plaintiffs 1 and 2 in respect of the property in village Bhanapur, and a decree in favour of plaintiffs 3 and 4 in respect of the property in village Paramnathpur, on payment of the proportionate amount of the real consideration of the sale deed. After the institution of this suit, they withdrew Suits Nos. 182 and 183 of 1934. So only Suits Nos. 186 and 190 of 1934 were tried, and the trial of these suits being consolidated, Suit No. 190 of 1934 was treated as the leading suit. Of the various defences raised in the suit there is only one which is material for the purpose of these second appeals before us. It was based on the decision of their Lordships of the Judicial Committee in 61 I A 235,[1] and was to the effect that there could be no pre-emption of part of the property sold on payment of a proportionate price. It may be noted that the evident object of the 4 plaintiffs in Suit No. 190 of 1934 in instituting that suit and in withdrawing the two separate suits previously instituted by them was to overcome the obstacle raised by the aforesaid Privy Council decision. However, both the lower Courts came to the conclusion that the suits were not maintainable as they offended against the principles enunciated by their Lordships of the Judicial Committee in the ruling referred to above. We should also note that all the parties before us are agreed that the two groves in Paramnathpur covered by the sale deed being held in tenancy right could not be the subject of pre-emption.

The position therefore is that one of the items of property conveyed under the sale deed is not pre-emptible, and none of the plaintiffs in the two suits has a right of pre-emption in respect of both of the remaining two items of property included in the sale deed. The question therefore is whether in such a case any of the plaintiffs can be given a decree for pre-emption in respect only of the property which he is entitled to pre-empt on payment of a proportionate price. In other words, is it permissible under the provisions of the Oudh Laws Act to pass a decree for pre-emption of part of the property sold on payment of a proportionate share of the price?

Before addressing ourselves to this question we might observe that it is altogether out of the question to pass a joint decree in favour of the four plaintiffs in the leading suit in respect of the properties both in Bhanapur and Paramnathpur as admittedly plaintiffs 1 and 2 are strangers to village Paramnathpur and plaintiffs 3 and 4 have no interest in village Bhanapur. In fact the claim for a joint decree was not seriously pressed before us. It is equally obvious that no decree for pre-emption can be passed in respect of the groves because admittedly the vendor did not possess any proprietary rights therein. In the circumstances, if a decree for pre-emption can be passed at all, there can be no escape from apportionment of the price, because if several persons are given decrees for different portions of the property, each of them cannot obviously be made liable to pay the whole price as it would involve the vendee being paid his price several times over.

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[1] Birendra Bikram Singh v. Brij Mohan Pande, (1934) 21 A I R P C 153=151 I C 74=61 I A 235=9 Luck 407 (P C).

Turning now to the main question in the case, the learned counsel for the appellants has relied on the decisions of the late Court of the Judicial Commissioner of Oudh in 4 O C 397[2] and 13 O C 260[3] in support of their claim for pre-emption. ~~These~~ These decisions no doubt support the plaintiffs' claim. In fact we have no hesitation in saying that it has been the well established law in this province that where the plaintiff has a right as to a part only of the property conveyed by a deed, he can only obtain a decree for pre-emption of that part, and where the consideration for the whole is a lump sum, he is entitled to such decree on payment of a proportionate part of the consideration. However, we have to determine the effect of the pronouncement of their Lordships of the Judicial Committee in 61 I A 235[1] on this point. It is therefore necessary to closely examine the facts of that case, and the observations made by their Lordships in respect of the relevant provisions of the Oudh Laws Act. The sale deed in that case related to a taluqdari estate consisting of 163 villages constituting a single proprietary mahal, for which the proprietor paid the land revenue, although the villages were separately assessed. The under-proprietors in two of these villages filed two separate suits for pre-emption of the two villages in which the plaintiff or plaintiffs respectively had under-proprietary rights on payment of the proportionate price. Their Lordships considered the provisions of Ss. 6 to 13, Oudh Laws Act, and held that

> The provisions of Ss. 10, 11 and 12 of the above mentioned Act tend to show that the claims of the plaintiffs in the two suits are not such as were contemplated by the Legislature.

The following observations of their Lordships may be usefully quoted :

> Under S. 10 the person proposing to sell any property in respect of which any persons have a right of pre-emption is bound to give notice to the persons concerned of the price at which he is willing to sell such property, and S. 11 provides that a person having a right of pre-emption in respect of the property proposed to be sold shall lose such right unless, within three months from the date of such notice, he or his agent pays or tenders 'the price aforesaid' to the person so proposing to sell. How could the provisions of these sections apply to the facts of this case ?
>
> If they do apply, the vendor of the taluqdari mahal would have to give notice to the members of the under-proprietary village communities, if any, in all the 163 villages of the price at which he was willing to sell the taluqdari mahal, namely Rs. 5,50,000 and in order to comply with S. 11 any member of an under-proprietary village community who claimed a right of pre-emption, would be bound to tender the 'price aforesaid', although he desired to pre-empt one village only as in these suits, for there is no provision made in the Act for tendering part of the 'price aforesaid' or for pre-empting part of the property proposed to be sold . . . .
>
> Section 13, which deals with the grounds on which a suit under the Act may be brought, points to the same conclusion ; for, S. 13 (b) refers to a tender having been made under S. 11 or S. 12 and refused. Such tender must be of the price at which the vendor is willing to sell the property in question or of the amount due in respect of the mortgage specified in the notice.
>
> In the cases now under consideration, the property sold by the vendor was the whole taluqdari mahal containing 163 villages.
>
> The plaintiffs in each suit claimed to pre-empt one of the said villages only. It would be absurd to suggest that they would be bound to tender the whole of the price, namely Rs. 5,50,000 which was the price at which the vendor was willing to sell, and yet there is no provision in the Act which would enable the plaintiffs to tender the amounts at which the plaintiffs valued the two villages respectively as stated in their plaints or any amount other than the said Rs. 5,50,000. These considerations, in their Lordships' opinion, are conclusive as showing that the claims of the plaintiffs as stated in their plaints are not within the above-mentioned Act and are therefore not maintainable.

We think that this aspect of the law as emphasized by their Lordships in the passages quoted above did not receive attention in the earlier cases decided in this province. S. 6, the opening section of Ch. 2, Oudh Laws Act, which deals with pre-emption, runs as follows :

> The right of pre-emption is a right of the persons hereinafter mentioned or referred to, to acquire, in the cases hereinafter specified, immovable property in preference to all other persons.

The words 'in the cases hereinafter specified' used in this section show that the right of pre-emption is limited to the cases specified in the sections which follow S. 6. S. 10 requires the vendor to give notice to the persons concerned of the price at which he is willing to sell the property. It may be pointed out that the notice need not be given individually to every person entitled to pre-empt, but may be stuck up on the chaupal or other public place of the village or city in which the property is situate. S. 11 makes it obligatory on a person having a right of pre-emption to pay or tender 'the price aforesaid' to the person proposing to sell within three months from the date of such notice. Lastly, S. 13 states the grounds on which a suit can be maintained for enforcing the right of pre-emption. Strict compliance with these provisions contained in Ch. 2, Oudh Laws Act, is clearly impossible if a person seeks to enforce pre-emption in respect of only a part of the property sold on payment of only a proportionate share of the price. We therefore think that the Courts below were right in holding that the present suits for pre-emption of part of the property, which necessarily involved apportionment of price, were not maintainable.

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[2] Karam Husain v. Raghubar Dayal, (1901) 4 O C 397.

[3] Mahabir Prasad v. Ram Jiwan Lal, (1910) 13 O C 260=8 I C 272.

It has been forcibly argued by the learned counsel for the plaintiffs-appellants that the application of the decision of their Lordships of the Judicial Committee should be confined to the facts of that particular case, and that it should not be interpreted so as to have the effect of revolutionising the law in the province as it has been understood hitherto. Even if it is conceded that the case before their Lordships related to one single item of property, namely the taluqdari mahal consisting of 163 villages, and that in that sense it is possible to distinguish it from the facts of this case, which show that the sale deed related to two, if not three, distinct items of property, yet the principle deduced by their Lordships from the provisions of Ss. 6 to 13, Oudh Laws Act that

> There is no provision made in the Act for tendering part of the 'price aforesaid' or for pre-empting part of the property proposed to be sold

is fully applicable to the present case also. We venture to think that the Legislature in enacting these provisions did not take into consideration the case of a composite sale deed like the one before us in which several distinct properties are sold together for a lump price. The view which has hitherto prevailed in this province that in such a case, if the plaintiff is entitled to pre-empt only part of the property sold, he should be given a decree for pre-emption of that part on payment of the proportionate price, is no doubt a most equitable one. We are conscious that the effect of our decision in the present case would be to debar many persons from exercising their right of pre-emption, or even, as the learned counsel for the appellants put it, practically to nullify the right of pre-emption in those cases in which several properties are sold together, yet we think that this consideration cannot afford any justification for our circumventing the provisions of the statute as authoritatively construed by their Lordships of the Judicial Committee. The proper remedy for the apprehended hardship to the rights of pre-emptors in such cases is for the Legislature to make the necessary amendment in the provisions of the law. With these remarks we dismiss the appeals with costs.

D.S./R.K. *Appeals dismissed.*

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## A. I. R. 1938 Oudh 40

THOMAS AND ZIAUL HASAN JJ.

*Mt. Jwala Devi and another — Defendants* — Appellants.

v.

*Ahmad Hasan — Plaintiff —* Respondent.

First Appeal No. 71 of 1935, Decided on 27th October 1937, against decree of Sub-Judge, Unao, D/- 27th March 1935.

**(a) Court-fees Act (1870), S. 7 (v) (d) and (e) — Suit by under-proprietor for possession of land with building and guava grove thereon —Building substantial structure and trees not self-grown but planted — Separate court-fee should be paid on market value of building and trees.**

A person claiming under-proprietary rights in land by virtue of a permanent lease executed in his favour brought a suit for possession of the land and the building and a guava grove thereon. The building was not a tenant's house or any other building necessary for the enjoyment of the land but a substantial structure used as a tannery. Similarly the trees were not self-grown but were planted :

*Held* that in such circumstances the building and grove could not be said to be appurtenant to the land and hence a separate court-fee under S. 7 (v) (e) should be paid on the market value of the building and the grove. [P 42 C 1]

**(b) Oudh Civil Rules, R. 269-A —Clauses (d) and (e) can be applied together.**

Clause (d) of R. 269-A is not exclusive of Cl. (e) and hence Cls. (d) and (e) can be applied together. [P 42 C 1]

**(c) Oudh Civil Rules, R. 269-A, Cl. (d) — Suit for under-proprietary rights in land — 'Rental value' is rent at which land has been actually let out to under-proprietor.**

If the suit is for superior proprietary rights in the land, the 'rental value' of the land means the rent at which land could be let out to cultivating tenants. But this would not be so where only under-proprietary rights are claimed. In such a case it would be the rent at which the land has been let out to the under-proprietor. [P 42 C 2]

L. S. Misra and Sri Ram — *for Appellants.*

M. Wasim and Ali Hasan — *for Respondent.*

**Judgment.** — This first appeal against the decree of the learned Civil Judge of Unao dated 27th March 1935, in Suit No. 76 of 1934, was filed by the defendants to the suit on 13th July 1935, valuing the appeal at Rs. 5,000. Previously to that on 9th May 1935, they had filed an appeal against the same decree in the Court of the learned District Judge of Unao, valuing their appeal at Rs. 700 only. The office reported in this first appeal that there was a deficiency in the court-fee paid both on the plaint and on the appeal. The office report came up before a Bench of which one of us was a member on 24th March 1936, and it was thought advisable that the decision of the question of the proper court-fee be postponed till the decision of the appellants' appeal pending in the Court of the District Judge. That appeal has now been decided and second civil Appeal No. 315 of 1936 has been brought by the defendants against the decree of the learned District Judge who dismissed their appeal.

Two questions now arise for decision. The first is how far the office report is correct and whether there is any deficiency in the court-fee paid by the plaintiff-respondent and the defendants-appellants and the second is what should be the correct valuation of the suit and whether the appeal against the decree of the learned Civil Judge lies to this Court or to the Court of the District Judge. To take up the question of court-fee first. The suit was for possession of about 31 bighas of land situated in the village of Natwa Mohal Gauri Shankar together with trees and buildings situated thereon, and for Rs. 2,053-8-0 as damages and mesne profits. The plaintiff-respondent claimed to have under-proprietary rights in the land by virtue of a permanent lease executed in his favour by the predecessor-in-interest of the defendants-appellants. The lease was said to be for building purposes and the plaintiff claimed to have constructed a building on the land and to have planted a guava grove. The plaintiff valued his suit for purposes of court-fee at Rs. 2,153-8-0, that is to say, he valued the relief for possession of the land at Rs. 100 and the relief for recovery of damages and mesne profits at Rs. 2,053-8-0. He put no separate valuation on the building and the grove. The defendants raised a plea in the trial Court that the court-fee paid was insufficient, but the learned Civil Judge in his judgment says that this plea was not pressed. Accordingly he held that the court-fee paid was sufficient. The present appeal has been valued by the defendants as noted above at Rs. 5,000. The question is what should be the proper valuation of the suit and the appeal for purposes of court-fee.

It is not disputed that the suit comes under S. 7 (v) (d), Court-fees Act which says that where the land (the subject matter of a suit) forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed with land revenue, the amount of court-fee payable under the Act shall be computed on the market value of the land. As the yearly rent at which the land in suit was let out to the plaintiff-respondent is Rs. 10, the plaintiff has calculated the market value of the land at 20 times the rent, that is at Rs. 200. We are of opinion that this calculation is correct and the learned Counsel for the appellants has not referred us to any evidence on which the market value of the land could be fixed at a higher figure.

We are of opinion however that under S. 7 (v) (e), Court-fees Act a separate court-fee should have been paid by the plaintiff-respondent on the market value of the building and the trees of which possession was sought along with the land. As he prayed for possession not only of the land but also of the building and the trees, the latter were as much the subject matter of the suit as the land itself. It was contended by the learned counsel for the respondent that the building and the trees were appurtenant to the land and no separate court-fee was required. We do not agree with this view. The building in question is not a tenant's house or any other building necessary for the enjoyment of the land but a substantial structure used as a tannery. Similarly the trees in suit are not self-grown trees which might be said to go with the land but are said to constitute a grove planted by the plaintiff-respondent. The fact that the building was erected and the grove planted by the plaintiff himself is immaterial. Moreover, it is in evidence that the building in suit fetches a rent of Rs. 120 a year, so that it is absurd to suppose that the building is appurtenant to the land, the market value of which is only Rs. 200. We are therefore of opinion that the court-fee should be paid not only on the market value of the land but also on that of the building and trees in suit. We take the market value of the building to be Rs. 2,400 at twenty times the annual rent. With regard to the guava trees, the plaintiff's evidence is that they are twenty-eight in number and their market value may in our opinion be fixed at Rs. 56. The total valuation of the suit for purposes of court-fee should therefore be rupees 2,400 for the relief of possession of the building, Rs. 200 for the relief about the land, Rs. 56 for the relief about the trees and Rs. 2,053-8-0 for the relief for recovery of damages and mesne profits (total Rs. 4,709-8-0). The valuation of the appeal should be Rs. 2,400 about the building, Rs. 200 about the land, Rs. 56 about the trees and Rs. 500 only (the amount decreed in favour of the plaintiff-respondent) about damages and mesne profits, total rupees 3,156. Both the plaintiff-respondent and the defendants-appellants will therefore make good the deficiency in the court-fee paid by them within a month from this date.

As regards the valuation of the suit and the appeal for purposes of jurisdiction, we are of opinion that both Cls. (d) and (e) of R. 269-A of the Oudh Civil Rules apply. The learned counsel for the plaintiff-respondent argues that Cl. (d) was exclusive not only of Cls. (a), (b) and (c), but of (e) also, but we do not think so. As said above, the building and the trees were as much the subject of the suit as the land itself and there is no reason why Cls. (d) and (e) should not apply together to the suit. Now, under Cl. (d) the value of the land in suit for purposes of jurisdiction will have to be determined by multiplying the rental value of the land by twenty and we agree with the learned counsel for the plaintiff that in the present case the rental value of the land should be taken to be Rs. 10 a year, namely the rent at which the land has actually been let out to the plaintiff.

The learned counsel for the appellants contended that "rental value" of land meant the rent at which land could be let out to cultivating tenants. We are of opinion that this would be so if the suit was for superior proprietary rights in the land but not where only under-proprietary rights are claimed. No doubt in relief (a) of the plaint the plaintiff claims "proprietary" possession over the land, but in view of the fact that on his own showing he is only a permanent lessee of the land, he cannot as a matter of fact claim superior proprietary rights in the land in suit, though he can claim proprietary rights in the building and the trees. As the land in suit has actually been let out to the plaintiff on a rent of Rs. 10 a year, we think this is the proper letting value of the land. So far as the building and the trees in suit are concerned, their value for purposes of jurisdiction is their market value under Cl. (e) of R. 269-A. We have held above that the building has a market value of Rs. 2,400 and the trees of Rs. 56. Therefore the total valuation of the suit for purposes of jurisdiction would be Rs. 4,709-8-0 including Rs. 2,053-8-0 the amount of damages and mesne profits claimed. The valuation of the appeal for purposes of jurisdiction will also be the same as that for purposes of court-fee, namely Rs. 3,156. The result is that this first appeal is not maintainable and is hereby dismissed with costs. The Second Appeal No. 315 of 1936 will come up for hearing after the parties have paid up the court-fee according to the above order.

D.S./R.K. *F. A. dismissed.*

## A. I. R. 1938 Oudh 42

THOMAS AND ZIAUL HASAN JJ.

*Prag — Plaintiff* — Applicant.

v.

*Rampal Singh — Defendant* — Opposite Party.

Civil Revn. Appln. No. 99 of 1935, Decided on 8th September 1937, from order of Munsif, Rae Bareli, D/- 22nd July 1935.

**Limitation Act (1908), Art. 75—Waiver—Bond payable in instalments making whole amount due on default of one instalment—First two instalments paid by obligor —Obligee bringing suit to recover instalments basing his claim on default of fourth and fifth instalments—Held there was waiver.**

A money bond provided for payment of the principal amount by five equal instalments and in case of default of any instalment the whole amount was to be due. The obligee sued to recover the outstanding instalments basing his cause of action on the fourth and fifth instalments. Only first two instalments however in fact had been paid :

*Held* that the fact that the obligee had based his cause of action on the default of the fourth and the fifth instalments, was sufficient to prove waiver on the part of the obligee within the meaning of Art. 75 : *A I R 1932 Oudh 176, Rel. on* ; *Case law referred.* [P 43 C 1]

Sri Ram — *for Applicant.*

Parmatma Saran Duvedi — *for Opposite Party.*

**Order.**—This is an application under S. 25, Provincial Small Cause Courts Act, for revision of an order of the learned Judge, Small Cause Court, Rae Bareli, dismissing the applicant's suit for money on a bond dated 16th August 1928, executed in his favour by the defendant opposite party. The amount of the bond, Rs. 250, was payable by yearly instalments of Rs. 50 commencing from the end of May 1929. The applicant's case was that the first three instalments and Rs. 26 out of the fourth instalment were paid by the defendant and he sued for recovery of Rs. 89, that is Rs. 24 about instalment that fell due on 31st May 1932, Rs. 50, the instalment of 31st May 1933 and Rs. 15 interest. The defendant denied the alleged payments and the learned Judge holding that there was no evidence to show that any instalment after the second instalment of 1930 was paid and that there was no waiver, dismissed the suit as time-barred under Art. 75, Limitation Act.

After a consideration of the case-law on the subject, we have come to the conclusion that this application must be allowed. If the plaintiff's allegation that the first three instalments and a portion of the fourth were duly paid to him be accepted, no question of waiver arises; but even if it be supposed, though there is no definite finding of the learned lower Court to that effect, that no instalment other than the first two was paid by the defendant, waiver under Art. 75, Limitation Act, is evidenced by the fact that the applicant based his cause of action on the default made about the fourth and fifth instalments. The case in 9 O W N 250[1] decided by a learned Judge of this Court (the present Chief Judge) is exactly in point. The facts of that case were very similar to those of the case before us and the learned Judge said :

> The very fact that the cause of action has been based on the defaults which occurred in case of each of the last three instalments shows that the plaintiff placed reliance on each of the defaults and did not avail himself of the provision which gave him the option to sue for the whole amount on the happening of the first default.

Referring to the fact that the plaintiff pleaded payment of the first instalment and was unable to prove it to the satisfaction of the trial Court, the learned Judge said :

> The only effect of it is that it is not possible to say that the plaintiff waived the benefit of the provision in respect of the first instalment.

This decision is supported by a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in A I R 1925 Oudh 34[2] which, though relied on by the learned Judge of the Court below being against the plaintiff, contains the following remark :

> If he (the plaintiff) had sued for the unpaid instalments only, he might have been held to have waived his right to sue (for the entire amount).

The learned Judge of the Court below has relied on the cases in A I R 1926 Cal 789,[3] A I R 1925 Oudh 373,[4] A I R 1925 Oudh 34[2] and A I R 1923 Bom 207;[5] but in the first of these cases the finding was that there was no waiver; in the second it was not considered necessary to decide the question of waiver as the application for revision was held not to be maintainable; the third case decides no more than that mere omission to sue for the whole of the balance will not operate as waiver and we have already referred to the learned Judge's opinion in this case that if the suit had been for the unpaid instalments, the plaintiff could have been held to have waived his right to sue for the entire amount; the facts of the fourth case were quite different and have no bearing on the present case.

The learned counsel for the opposite party has also relied on some more cases, namely, A I R 1934 All 1039,[6] A I R 1932

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[1] Nageshar Prasad Dube v. Bakridi, A I R 1932 Oudh 176=137 I C 223=9 O W N 250.

[2] Mt. Mohanya v. Panna Lal, A I R 1925 Oudh 34=79 I C 848.

[3] Basanta Kumar Singha v. Nabin Chandra, A I R 1926 Cal 789=96 I C 594=53 Cal 277.

[4] Bankey Lal v. Ram Lal, A I R 1925 Oudh 373=86 I C 918.

[5] Hansraj Godhaji v. Bapu Krishnaswami, A I R 1923 Bom 207=72 I C 275=25 Bom L R 153.

[6] Sukh Lal v. Bhoora, A I R 1934 All 1039= 153 I C 205=1934 A L J 1056.

Nag 1[7] and A I R 1935 Mad 303.[8] In none of these cases also was anything decided contrary to what was laid down in 9 O W N 250.[1] In the Allahabad and Nagpur cases, all that was decided was that mere inaction or omission to sue within the prescribed period cannot amount automatically to waiver within the meaning of Col. 3 of Art. 75. The Madras case also lays down no more than that suits on bonds or promissory notes payable by instalments which provide that if default be made in payment of one or more instalments, the whole shall be due are governed by Art. 75 of the Act and the period of limitation is to be computed from the date the first default is made unless waiver is pleaded and proved. In view of the authority of our own Court with which we fully agree, we are of opinion that the learned Judge of the trial Court was wrong in dismissing the suit as time-barred. As the bond in suit was admitted by the defendant and the only plea raised was that of limitation, we set aside the decree of the lower Court and decree the plaintiff's suit with costs in both the Courts.

K.B./R.K. *Suit decreed.*

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[7] Vishwanath v. Sadashiva, A I R 1932 Nag 1=135 I C 414 =28 N L R 44 (F B).

[8] Gopala Menon v. Kallingalakath, A I R 1935 Mad 303=156 I C 443=68 M L J 214.

## A. I. R. 1938 Oudh 44

SRIVASTAVA C. J. AND THOMAS J.

*Bansidhar and another—Plaintiffs*—Appellants.

v.

*Mt. Nawab Jahan Begam and others—Defendants*—Respondents.

Second Appeal No. 338 of 1935, Decided on 8th October 1937, against order of Dist. Judge, Lucknow, D/- 8th July 1935.

**Transfer of Property Act (1882), S. 53 — Mahomedan giving his property to wife in lieu of dower—Transfer does not come under S. 53 being only a case of preference to particular creditor — Dower not ascertained — Position of wife as creditor is not changed.**

Where a Mahomedan transfers his estate to his wife in lieu of her dower, he only prefers one creditor—his wife—to another. Thereby he does not remove the property from the creditors for his own benefit so as to come within the provisions of S. 53, T. P. Act. The fact that the dower of the wife is unascertained and has to be determined by the Court under S. 5, Oudh Laws Act, does not change her position as one of the creditors of her husband : *A I R 1916 P C 238 and A I R 1915 P C 115, Rel. on.* [P 45 C 1, 2]

D. K. Seth — *for Appellants.*

Nazirudddin — *for Respondent 1.*

**Judgment.**—This is a second appeal by the plaintiffs arising out of a suit under S. 53, T. P. Act, for a declaration that certain transfers made by defendant 2 in favour of his wife, defendant 1, were fraudulent and fictitious and had been made only in order to defraud the creditors. The facts of the case which are not disputed are that on 22nd and 25th January 1932, defendant 2 executed two deeds of gift in favour of his wife in lieu of dower debt. Plaintiff 1, Bansi Dhar, who is one of the creditors of the husband, instituted a suit on 25th January 1932, on the basis of a promissory note for Rs. 822 dated 26th January 1929. This suit was decreed on 26th August 1932. The same plaintiff instituted another suit on 20th June 1932, on the basis of another promissory note for Rs. 2,184 dated 12th June 1929. This suit was also decreed on 23rd December 1932. Plaintiff 2 was impleaded as another creditor of defendant 2, but there is no evidence on the record to show the extent of his debt. The learned District Judge has held that besides the property forming subject of the gift, defendant 2 was possessed of other property worth about Rs. 1,600 which has been attached by plaintiff 1. He has further found that the dower debt of defendant 1 had not been paid up and remained due at the time of the execution of the deeds of gift in question. There is also evidence which has been believed by the lower Appellate Court showing that the amount fixed for dower was Rs. 40,000 and that the property forming subject of the two deeds of gift was worth about Rs. 8,000. Taking all these facts and circumstances into consideration, the lower Appellate Court has held that there was nothing to suggest that there was any bad faith on the part of defendant 1 except the mere fact that she was the wife of defendant 2.

In 43 Cal 521[1] it was held by their Lordships of the Privy Council that the transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors for the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor, and leave another unpaid. Where it was found that the transfer impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it followed that no ground for impeaching it lay in the fact that the plaintiff who also was a creditor was a loser by payment being made to the preferred creditor, there being in the case no question of bankruptcy. Similarly in 44 Cal 662[2] it was held that the preferring of one creditor to another by the judgment-debtor did not make the transfer a fraudulent one. A debtor, for all that is contained in S. 53, T. P. Act, may pay his debts in any order he pleases, and prefer any creditor he chooses. In the present case it is quite clear from the findings of the lower Appellate Court that the transfers in question are genuine and that it is not possible to say that defendant 2 has retained any benefit for himself or that the object of the transfers was to remove the property from the creditors for the benefit of the debtor. It is therefore a case merely of one creditor being preferred to another.

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[1] Musahar Sahu v. Hakim Lal, (1915) 2 A I R P C 115=32 I C 343=43 I A 104=43 Cal 521 (P C).

We are therefore of opinion that the Courts below were right in holding that the transfers impugned by the plaintiffs did not offend against the provisions of S. 53, T. P. Act. It has however been contended that the position of a dower debt in the province of Oudh is a peculiar one inasmuch as under S. 5, Oudh Laws Act, the amount of dower payable to the wife has to be fixed by the Court with due regard to various circumstances. It was further argued that in the circumstances the amount of dower debt being a variable quantity, the position of the wife was different from that of an ordinary creditor and the principle laid down by their Lordships of the Judicial Committee in the cases cited above had no application to this case. We regret we cannot accede to the argument. It is no doubt true that if there is any dispute regarding the amount of dower debt payable by the husband or his representatives which has to be determined by a Court of law, the Court is required under S. 5, Oudh Laws Act, to fix the amount of dower payable with due regard to the various considerations laid down in the section. But this does not by any means imply that the position of the wife is not that of a creditor. The fact that in a particular case the amount of the debt payable by the debtor has to be ascertained by the Court cannot take the case out of the category of a debt or the person from whom the debt is payable out of the category of a debtor. We are therefore of opinion that the argument has no substance. We accordingly uphold the decree of the lower Appellate Court and dismiss the appeal with costs.

B.D./R.K. *Appeal dismissed.*

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## * * A. I. R. 1938 Oudh 45

ZIAUL HASAN AND SMITH JJ.

*Nawab Shahanshah Begam — Decree-holder* — Appellant.

v.

*Ch. Akbar Husain—Judgment-debtor*— Respondent.

Ex. First Appeal No. 36 of 1935, Decided on 9th November 1937, against decree of Sub-Judge, Lucknow, D/- 21st February 1935.

*** * Civil P. C. (1908), S. 52—Income accruing to deceased judgment-debtor's property in hands of his heir can be taken in execution—Heir is personally liable to the extent of income appropriated by him** : *17 O C 207= A I R 1914 Oudh 233=25 I C 384, Overruled.*

The income of the property of a deceased judgment-debtor accruing after the property has devolved on his heir can be treated as the estate of the deceased judgment-debtor and can be taken in execution. The heir cannot appropriate the income and can be made personally liable to the extent of the income appropriated by him : *A I R 1928 Oudh 40, Approved*; *17 O C 207=A I R 1914 Oudh 233=25 I C 384*, **Overruled** ; *Case law discussed.* [P 48 C 1]

Radha Krishna, Bishambhar Nath, Abid Husain, S. M. Naqi and Tashuq Mirza — *for Appellant.*

H. Husain and Mohd. Ayub — *for Respondent.*

**Smith J.**—This is an appeal against an order made by the learned Subordinate Judge of Lucknow in connexion with execution proceedings by one Nawab Shahinshah Begam against Chaudhri Akbar Husain and others. The facts are not fully stated in the order of the learned Subordinate Judge, but they appear to be as follows. On 16th January 1917 one Mohammad Husain (he seems also to have been known as Chaudri Mohammad Husain, and Chaudhri Shaikh Mohammad Husain) executed a mortgage deed for Rs. 45,000, carrying interest at 12 annas per Rs. 100

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[2] Mina Kumari Bibi v. Bijoy Singh Dudhuria, (1916) 3 A I R P C 238=40 I C 242=44 I A 72 =44 Cal 662 (P C).

per mensem, in favour of Nawab Shahinshah Begam. She afterwards sued on the basis of this mortgage deed in the year 1921, and obtained a preliminary decree on 21st February 1922 in the Court of the Subordinate Judge of Lucknow. Mohammad Husain had died on 20th December 1917 and the main defendant was Chaudhri Akbar Husain, his grandson, who had succeeded to the taluqa. Along with him were impleaded various parties who were said to be entitled to maintenance allowances under an alleged will of Mohammad Husain dated 18th January 1913. A decree absolute was passed on 5th May 1923. An appeal against the preliminary decree was decided by the late Court of the Judicial Commissioner on 12th September 1923.* The operative part of the decision in appeal is as follows :

> The appeal is allowed to the extent that the respondent will not be permitted to proceed against the Ghazipur property. She is only permitted to execute her decree by the sale of Jabri, and if the proceeds of this are insufficient, she may execute it as a simple money decree against the estate of the mortgagor for the balance still unrecovered. The period of six months for payment of the decretal amount will be calculated from the date of the decree of this Court. In other respects the decree of the lower Court will stand. The plaintiff-respondent will get her costs in the lower Court. Parties will bear their own costs in this Court.

The decree-holder afterwards bought the mortgaged property, Jabri Khurd in 1926, and Ghazipur in 1929, and she also bought the superior proprietary rights in another village, called Khalilabad, in 1932. These purchases however fell very far short of satisfying the entire amount due to the decree-holder, and on 9th-18th April 1934 she made an execution application out of which these present proceedings have arisen. The amount stated in the application to be still outstanding was Rupees 96,927-5-0. It was alleged in the statement of facts appended to the application that Chaudhri Akbar Husain had been in possession of certain villages for various periods after the death of Chaudhri Mohammad Husain, and had appropriated the income from them to the extent of Rupees 46,855-5-9½ and this amount, it was suggested, he was bound to pay to the decree-holder. The prayer was that his pay be attached (Chaudhri Akbar Husain is a member of the Indian Civil Service) and the amount in question be in that way realised. Chaudhri Akbar Husain put in objections raising a number of points. The learned Subordinate Judge referred to a case reported in 17 O C 207,[1] for the proposition that the rents and profits of the property of a deceased person accruing after the property has devolved on his heirs cannot be taken by a creditor of the deceased till the sequestration of the property by attachment or otherwise, nor can those heirs be made personally liable to the extent of those profits prior to the sequestration. Such profits, according to that decision, cannot be treated as the estate of the deceased, and the heirs of the deceased are entitled to appropriate them. The learned Subordinate Judge distinguished decisions reported in 47 Mad 411[2] and A I R 1930 Lah 204.[3] The result was that this preliminary objection was allowed and the execution application was ordered to be consigned to records. Against that order this appeal has been preferred by the decree-holder.

The section of the Code of Civil Procedure that has to be considered is S. 52, more particularly sub-s. 2, in view of the fact that the corpus of the property has already been put to sale by the decree-holder, and has been purchased by her herself. The learned counsel for the appellant relied on a number of decisions. The first of these is contained in 1 I A 268.[4] The decision is a long one, and with it is connected a decision beginning at p. 282 of that same volume. The relevant portion of the judgment in 1 I A 268[4] is contained in page 315 and is as follows :

> "Prima facie the polliem was hereditary. If it was hereditary and descended to the minor son as the heir of his father, the income of the zamindari was liable to pay the debts incurred by the deceased zamindar".

(A "polliem" appears to be a special from of zamindari tenure in southern India, the holder of it being known as a "poligar".)

The next case is reported in 15 W R 285.[5] It was there held, to quote from the head-note :

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* *Vide* A I R 1924 Oudh 302.

[1] Kishan Lal Atal v. Ummat-ul-Fatima Begam, (1914) 1 A I R Oudh 233=25 I C 384=17 O C 207.

[2] Kadirvelusami Nayagar v. Eastern Development Corporation Ltd. London, (1924) 11 A I R Mad 630=80 I C 163=46 M L J 261=47 Mad 411 (F B).

[3] Kishan Chand v. Mauj Din, (1930) 17 A I R Lah 204=125 I C 187=31 P L R 292.

[4] Oolagappa Chetty v. Arbuthnot, (1873) 1 I A 268=14 Beng L R 115=21 W R 358=5 M H C R 303 (P C).

[5] Aseemoonissa v. Ameeroonissa Khatoon, (1871) 15 W R 285.

When a party is proceeded against as the representative of a deceased judgment-debtor, and it is proved that property which belonged to the deceased judgment-debtor has come into his hands, it lies upon him to account for such property, and to include in his account mesne profits whether accruing in the shape of rents or of interest.

Next comes the decision reported in 47 Mad 411.[2] That was a Full Bench decision. In his judgment the learned Chief Justice said that the case referred to above, 1 I A 268,[4] is a direct authority for the proposition that the income of landed property which has passed from one zamindar to the next, the property being an impartible "Raj", is liable to execution for the debts of the deceased zamindar. A similar view was taken by a Bench of the Madras High Court in a decision reported in 30 M L J 391.[6] That decision referred with approval to the decision mentioned above in 15 W R 285.[5] Next there is a case of our own Court in 4 O W N 98.[7] It was there said that rents and profits are legal incidents of immovable property, and must bear the same character as the property itself. That decision followed the decisions mentioned above in 1 I A 268[4] and 47 Mad 411.[2] Lastly the learned counsel for the appellant relied upon the case reported in A I R 1930 Lah 204.[3] It was there said, to quote from the head-note:

> Where the heirs inheriting the property of the judgment-debtor do not show that they have applied the income of the land towards the payment of the debts due by the judgment-debtor, the decree can be executed personally against them.

With reference to the decision in 17 O C 207,[1] upon which the learned Subordinate Judge based his decision, the learned counsel maintained that that case stands alone, and he has pointed out to us that in the Commentary on the Civil Procedure Code by Chitaley and Annaji Rao this case is submitted to have been wrongly decided : *vide* the Commentary, Vol. 1, (Edn. 2) page 478 [Note 9, F..N. 4]. The case is there cited as (1914) 1914 Oudh 233, but that is the same decision that is reported in 17 O C 207.[1]

On the other side the learned counsel for the respondent relied upon a case reported in 7 All 822,[8] for the proposition that upon the death of a Mahomedan intestate, who leaves unpaid debts, whether large or small with reference to the value of his estate, the ownership of such estate devolves immediately on his heirs, and such devolution is not contingent upon, and suspended till, payment of such debts. A decision in 23 O C 62[9] was also referred to by the learned counsel, but he admitted that it is not directly in point. Next he referred us to the definition of mesne profits contained in S. 2 (12), Civil P. C., and contended that profits received by lawful heirs do not come within that definition and that once such profits reach the hands of such heirs, they become their own property. He also referred us to a passage contained at pp. 588 and 589 of Vol. 1 of Krishnamachariar's "The law of Execution in British India", but the passage in question is merely a reproduction of the substance of the decision in 17 O C 207.[1] The learned counsel also referred us to a decision reported in 19 All 235,[10] in which it was said, to quote from the head-note :

> A Court executing a simple money decree obtained against a sonless separated Hindu was not competent to appoint a receiver of the rents, accruing since his decease, of the judgment-debtor's immovable property, then in the hands of his widow as her widow's estate, such rents not being assets of the deceased, but the personal moveable property of the widow, and this even if the decree-holder had not as in fact he had, agreed for consideration not to execute his decree against the moveable property of the widow.

The learned counsel contended that the view taken in 17 O C 207[1] is good law, and has never expressly been dissented from in Oudh. With reference to the cases cited by the learned counsel for the appellant, the learned counsel for the respondent contended that the case in 1 I A 268[4] is not decisive upon the point at issue. The case in 15 W R 285,[5] he urged, uses the expression "mesne profits," which, he says, were in earlier Codes not defined in the same way as they are in the present Code. The case reported in 47 Mad 411,[2] he contended, is distinguishable, because there a receiver had been appointed. The case of this Court reported in 4 O W N 98,[7] he pointed out, was based upon the cases in 1 I A 268[4] and 47 Mad 411.[2] As to the case in 30 M L J 391,[6] he urged that the general principles of Mahomedan law as to the vesting of property in heirs were not considered in that case, and the case he contended does not fully support the contention raised on behalf of the appellant. He also referred to a case of the Madras High Court reported in 79 I C 894,[11] in which the effect of the decision in 30 M L J 391[6] and other decisions was considered. There does not appear however to be anything in this last-mentioned decision that is particularly helpful in deciding the precise point that is before us.

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[6] Rajah of Kalahasti v. Prayag Dossjee Varu, (1917) 4 A I R Mad 586=35 I C 224=30 M L J 391.

[7] Sharaf Jahan Begam v. Mohammad Sadiq Ali Khan, (1928) 15 A I R Oudh 40=99 I C 897 =2 Luck 408=4 O W N 98.

[8] Jafri Begam v. Amir Muhammad Khan, (1885) 7 All 822=1885 A W N 248 (F B).

[9] Mohammad Ahmad v. Ansar Mohammad, (1920) 7 A I R Oudh 173=56 I C 304=23 O C 62=7 O L J 158.

[10] Rani Kanno Dai v. B. J. Lacy, (1897) 19 All 235=1897 A W N 38.

In his reply, the learned counsel for the appellant contended that the learned counsel on the other side had not been able to rebut the general principle that profits arising after the death of the last owner form part of the property of the deceased. Property, he argued, consists of the corpus plus the usufruct. The principle laid down in the decision in 7 All 822,[8] he submitted, is not against the appellant, and she is not concerned to dispute it. Lastly, he argued that the decision in 17 O C 207[1] cannot be reconciled with the decision in 4 O W N 98,[7] and this last-mentioned decision fully supports the appellant. In my opinion, the contention of the learned counsel for the appellant must be accepted. It is true that the decision in 17 O C 207[1] does not stand quite alone but derives support from the decision in 19 All 235,[10] upon which, in fact, it is based. The decisions in 1 I A 268[4] at p. 315, 47 Mad 411[3] and 4 O W N 98,[7] do not relate to mesne profits as that term is defined in S. 2 (12), Civil P. C., so that I can see no force in the contention of the learned counsel for the respondent in that respect. The first two of the above-mentioned three decisions both speak quite generally of the "income" from landed property, and the third case speaks equally generally of "rents and profits". The distinction sought to be drawn by the learned counsel for the respondent between income from property that has actually reached the hands of the heirs of a deceased owner, and income that has not so reached them, as for example in cases where a receiver has been appointed, seems to me to derive no support from the above decisions, but to be based upon the principles enunciated in the case reported in 17 O C 207.[1] I agree with the learned counsel for the appellant that that decision cannot be reconciled with the decision reported in 4 O W N 98,[7] which follows the other two cases above-mentioned.

The result is that in my opinion the learned Subordinate Judge was wrong in the view he took on the preliminary point. There were a number of other points raised in the respondent's objection before the learned Subordinate Judge, including questions as to the amount of the profits realised during the period concerned, and as to limitation. Those points have not been considered at all as yet, and I would accordingly send the case back to the learned Court below for the disposal of the remaining points. The costs of the appellant in this present appeal before us should, in my opinion, be borne by the respondent; other costs to abide the result.

**Zia-ul-Hasan J.** — Although the argument of the learned counsel for the appellant seemed to me to logically lead to the proposition that a dead person is capable of owning property, yet in view of the consensus of authority on the question and especially of the decision of their Lordships of the Privy Council in 1 I A 268[4], I agree with my learned brother Smith J. that the present appeal should be decreed and the case sent back to the Court below for a decision of the other points raised in the respondent's objection.

D.S./R.K. *Case remanded.*

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## A. I. R. 1938 Oudh 48

ZIAUL HASAN AND MADELEY JJ.

*Norah Alexandrina Margaret Moore* — Appellant.

v.

*Arthur Reginald Moore* — Respondent.

Misc. First Appeal No. 42 of 1936, Decided on 26th July 1937, against order of Nanavutty J., D/- 11th January 1935.

**(a) Civil P. C. (1908), O. 21, R. 34—Applicability — Absolute divorce decree ordering payment of amount by husband to wife and also directing him to execute proper instrument to secure that payment — O. 21, R. 34 applies to such case.**

Where the absolute divorce decree directs that the husband should pay a certain amount to the wife for the maintenance of herself and her children and the decree further directs that he should execute a proper instrument to secure that payment, O. 21, R. 34 applies to such a case as the decree provides for the execution of a document by the husband judgment-debtor. If the husband fails to execute a proper instrument as directed, the wife can proceed under O. 21, R. 34 to get a document executed by the Court on her husband's behalf. [P 49 C 2]

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[11] Angavalathammal v. Janaki Ammal, (1924) 11 A I R Mad 466=79 I C 894.

**(b) Provident Funds Act (1925), S. 3 (1)—Words "incurred by subscriber" imply incurring of debt by subscriber voluntarily—Wife obtaining divorce decree for payment of certain amount and for execution of document by him to secure that payment—On husband's failure, wife praying for special power of attorney, authorizing her to withdraw amount in credit to husband in Railway Provident Fund—Execution of such document does not contravene S. 3 (1).**

The words "incurred by the subscriber" in S. 3 (1) imply that the prohibition is against the realization of money in respect of a debt or liability incurred by the subscriber voluntarily. [P 50 C 1]

Where therefore a divorce decree directs the husband to execute a proper instrument to secure the payment of the amount decreed in the wife's favour and on the failure of the husband to pay or execute such document, the wife applies to the Court under O. 21, R. 34, Civil P. C., for the execution of a special power of attorney by the Court on her husband's behalf authorizing her to withdraw the amount standing to her husband's credit in the Railway Provident Fund, the execution of such a document for the realization of the amount decreed, whether by the husband himself or by the Court on his behalf does not contravene the provisions of S. 3 (1) of the Act, inasmuch as the amount decreed against the husband is not in respect of a debt or liability 'incurred by the subscriber' nor the manner in which it is sought to be recovered is an assignment, charge or attachment as stated in S. 3 (1). [P 49 C 2]

Haresh Chandra — *for Appellant.*

**Judgment.**—This is an appeal against an order of a learned Judge of this Court dismissing an application of the applicant, Mrs. Norah Alexandrina Moore. A decree nisi for divorce was passed in favour of the applicant against her husband Arthur Reginald Moore on 10th August 1932, and it was made absolute on 1st May 1933. On 24th February 1934, the applicant put in an application for execution of the decree in which she prayed that as Mr. Moore had failed to provide her with Rs. 3000 for her and her children's maintenance according to the terms of the decree absolute, this Court may, under O. 21, R. 34, Civil P. C., execute the necessary instrument on behalf of Mr. Moore for securing the said sum to the applicant. The learned Judge of this Court held that O. 21, R. 34, Civil P. C., could not be made applicable to the case. The respondent has not appeared before us. After hearing the learned counsel for the appellant and considering the terms of the decree absolute, we have come to the conclusion that the appeal should be allowed. The learned Judge in his judgment says:

> All that Mrs. Moore has got in her favour is a decree absolute for divorce. There is no decree in favour of the applicant for the execution by the judgment-debtor of any document or for the endorsement by him of a negotiable instrument. . .

We regret we cannot subscribe to this view. The learned Judge of this Court who made the decree absolute has clearly said in his judgment:

> I think it suitable to direct that the respondent, Mr. Moore, shall secure to his wife a gross sum of Rs. 3000 and that he execute a proper instrument securing that payment.

And the decree also provides :

> . . . . and the respondent be and is hereby directed that he (Mr. Moore) shall secure to the applicant a gross sum of Rs. 3000 and that he shall execute a proper instrument securing that payment.

It is not therefore correct to say that the decree in favour of the applicant does not provide for the execution by the judgment-debtor of any document. As a copy of the order contained in the decree absolute was served on the respondent, but he has not yet taken any steps to comply with it, it is only under O. 21, R. 34, Civil P. C., that the applicant can now proceed. The question is what kind of document this Court should get executed on behalf of the judgment-debtor. The applicant suggests that the document should take the form of a special power of attorney in favour of the applicant authorizing her on behalf of the judgment-debtor to withdraw a sum of Rs. 3000 out of the provident fund of the judgment-debtor in the railway company in which he was employed. The learned Judge against whose order the present appeal has been filed objected to the special power of attorney on the ground that it appeared to be "a substantial attempt to avoid S. 3 (1), Provident Funds Act of 1925".

We cannot with respect agree with this view. S. 3 (1), Provident Funds Act, runs thus :

> A compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act 1920 shall be entitled to, or have any claim on, any such compulsory deposit.

In the first place the manner in which the money is sought to be recovered by the applicant is neither an assignment nor a charge nor an attachment. In the second place the amount decreed against the judgment-debtor cannot also be said to have been decreed in respect of any debt or liability "incurred by the subscriber". The words "incurred by the subscriber" appear to us to show that the prohibition is against realization of money in respect of any debt or liability that the subscriber himself incurred voluntarily, but in the present case the liability of the judgment-debtor to pay Rs. 3000 to the applicant was imposed on him by this Court's decree and was not incurred by him voluntarily. We are therefore of opinion that the execution of a special power of attorney by the judgment-debtor or by this Court on his behalf does not contravene the provisions of S. 3 (1), Provident Funds Act, and it will undoubtedly enable the decree-holder-applicant to recover the money decreed in her favour, that is to say it will secure to her a sum of Rs. 3000 as directed in the decree.

We therefore allow this appeal, restore the applicant's application for execution and direct that the Registrar will execute a special power of attorney on behalf of the judgment-debtor in favour of the applicant after submitting a draft of it to the Court for sanction. Ex parte costs of this appeal will be allowed to the applicant.

A.L./R.K. *Appeal allowed.*

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## A. I. R. 1938 Oudh 50

SRIVASTAVA C. J. AND HAMILTON J.

*Ambika Prasad* — Applicant.

v.

*Ajodhia Prasad* — Opposite Party.

Civil Revn. Appln. No. 132 of 1935, Decided on 1st November 1937, from order of Munsif, Purwa at Unao, D/- 19th November 1935.

**U. P. Temporary Regulation of Execution Act (24 of 1934), S. 7 — Period of 30 days is to be reckoned from date of order and not from date of application — Under S. 148, Civil P. C., and under its inherent power, Court can enlarge period fixed by it but not exceeding 30 days.**

Under S. 7 the maximum period of 30 days which can be allowed by the Court for payment of the 25 per cent. of the amount due under the decree means 30 days from the date of the order, and not 30 days from the date of the application under S. 6. Under S. 148, Civil P. C. and also in the exercise of its inherent powers, the Court had jurisdiction to enlarge the period fixed by it by its order, but the enlargement cannot extend beyond 30 days. [P 50 C 2 ; P 51 C 1]

S. C. Das for S. N. Roy — *for Applicant.*

K. P. Misra and S. P. Asthana — *for Opposite Party.*

**Order.**—This is an application in revision against an order dated 19th November 1935, of the learned Munsif of Purwa at Unao. The facts which have given rise to this application are that on 12th October 1935 one Mt. Moona made an application under S. 6, U. P. Temporary Regulation of Execution Act (24 of 1934). On 14th October 1935 the Munsif ordered Mt. Moona to deposit 25 per cent. of the decretal amount within 25 days from that day, and the application was ordered to be put up on 12th November 1935. The Court being closed on 12th November on account of Shab-i-barat, the case was taken up on 13th November at about 11 A. M. in the absence of Mt. Moona. The application under S. 6 was dismissed, as the decretal amount had not been deposited, and consequently the sale was confirmed. About ten minutes after the passing of the said order, Mt. Moona came to Court with the money but nothing more appears to have been done that day. Thereafter Mt. Moona made an application on 14th November and three more applications on 18th November 1935. The main object of these applications was to have the confirmation of sale set aside and the time for depositing money under S. 6, Act 24 of 1934, extended. The learned Munsif dismissed all the four applications by his order dated 19th November 1935. Mt. Moona being dead, the present application for revision has been made by her reversioner against the last mentioned order of the Munsif. S. 7 of Act 24 of 1934 is as follows :

> Any person making an application under S. 6 shall pay into Court to the credit of the decree-holder either on the date of the application or on some other date within a period to be fixed by the Court and not exceeding 30 days a sum equivalent to 25 per cent. of the amount due under the decree if the decree is for payment of money or under the preliminary decree, if the decree is a final decree for sale.

We are clearly of opinion that the maximum period of 30 days which can be allowed by the Court for payment of the 25 per cent. of the amount due under the decree means 30 days from the date of the order, and not 30 days from the date of the application. It is conceivable that the application itself may not be put up before the Court and no order under S. 7 might be passed until after the expiry of 30 days from the date of the application. Even ordinarily it can seldom be possible for an order under S. 7 to be passed on the very day on which the application is filed. Therefore if the period of 30 days is calculated from the date of the application, it would ordinarily be impossible to allow the maximum period in any case in which the order is not passed on the date of the making of the application. The context in which the words "not exceeding 30 days" have been used also supports the same interpretation. Thus we have no doubt that the learned Munsif had in this case jurisdiction to allow the judgment-debtor Mt. Moona to pay the one-fourth amount of the decree within a period not exceeding 30 days from 14th October 1935, on which date the order was passed. This period of 30 days was to elapse on 13th November 1935, but as a matter of fact he allowed her a period of only 25 days which expired on 8th November.

We are further of opinion that under S. 148, Civil P. C. and also in the exercise of its inherent powers, the Court had jurisdiction to enlarge the period of 25 days fixed by it by its order of 14th October, but the enlargement could not extend beyond 13th November. The learned Munsif has remarked that he took up the case on 13th November at 11 A. M. as the decree-holder said that he was suffering from fever. He has also observed that it appeared to him afterwards that the decree-holder deceived him by telling a lie. There is nothing in his order to show the grounds on which he formed this opinion. In another part of his order he has also remarked that the application of the judgment-debtor would have been dismissed on 13th November 1935, even if she had been present on that day, because the money had not been deposited by her as ordered. This remark may be based either on the ground that he had no jurisdiction to extend the time from 8th November to 13th November or on the ground that even though he had jurisdiction he would not have been prepared to exercise his discretion in favour of enlarging the time. It is well possible, as contended by the applicant, that the learned Munsif laboured under the impression that no extension could be granted. The learned counsel for the decree-holder opposite party has also contended that no question of extension did arise, as no application for enlargement of time was made by Mt. Moona on 13th November 1935 when she appeared in Court with the money. Taking all the circumstances of the case into consideration, we think that in the interests of justice it would be proper for the matter to be decided afresh by the learned Munsif.

We accordingly set aside the order of the lower Court and send the case back to that Court for being decided afresh in the light of the remarks made by us above. Costs here and hitherto will abide the result.

S.C./R.K. *Case remanded.*

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## * A. I. R. 1938 Oudh 51

ZIAUL HASAN AND HAMILTON JJ.

*Naziruddin and others—Plaintiffs—* Appellants.

v.

*Khairat Ali—Defendant*—Respondent.

Second Appeal No. 378 of 1935, decided on 10th November 1937, against order of Addl. Sub-Judge, Sultanpur, D/- 15th August 1935.

*** (a) Mahomedan Law — Bequest of life-estate or of usufruct of property for limited period is valid.**

The provision of the Mahomedan law that a condition repugnant to the grant is invalid applies to gifts only and not to wills. A bequest for a limited period or the bequest of a life-estate or of the usufruct of property for a fixed period is valid and such a bequest does not operate as an absolute bequest. [P 53 C 1]

**(b) Mahomedan Law—Will—Construction—Legatee given life-estate without power of alienation—Mere use of word 'malik' does not indicate absolute proprietorship.**

The deed must be read as a whole. Where the deed clearly shows that the testator's intention was only to give a life-estate to the legatee without power of transfer, the mere use of the word 'malik' or 'qaim muqam' cannot be held to indicate that absolute proprietorship in the property was intended to be given by the testator to the legatee. [P 53 C 2]

**(c) Mahomedan Law—Gift—Gift of usufruct of property for life time of donee is valid as areeat.**

The contention that a life-interest is unknown to Mahomedan law is not well-founded. The rule of Mahomedan law stated in the texts (namely that a condition repugnant to a gift is void) is restricted to cases where the subject matter of the gift is the entire physical property, and is inapplicable to a case where it is a limited interest in the property and should not be extended to the latter class of cases. Areeat under the Mahomedan law for a fixed period being valid, it follows that the gift of the usufruct of property for the lifetime of the donees is valid as areeat, though it would not be included in the term hiba. [P 53 C 2; P 54 C 1]

**H. Husain and H. H. Zaidi —** *for Appellants.*

**M. Wasim —** *for Respondent.*

**Ziaul Hasan J.**—This is a plaintiffs' second appeal against a decree of the learned Additional Civil Judge of Sultanpur in a suit brought for possession of some plots of land situated in village Belahri. The property in suit originally belonged to one Ali Husain who was possessed of shares in several villages. He had four wives with two of whom, who died in his lifetime, we are not concerned. His third wife was Mt. Sitaran, who at the time of marrying Ali Husain was the widow of Muhammad Zaki, brother's son of Ali Husain and father of plaintiffs 1 and 2. The fourth wife was Mt. Chahita. On 12th September 1910 Ali Husain made a gift of most of his immovable property in favour of his wife Mt. Sitaran and her two sons by her former husband, namely, Naziruddin plaintiff 1 and Zahiruddin plaintiff 2. With this gift too we are not concerned in this appeal. On 3rd June 1915 Ali Husain executed a deed in favour of his fourth wife Mt. Chahita by which he devised the plots in suit to her for life and on her death the plots were to revert to his own legal heirs. It was also expressly provided by this deed that Mt. Chahita would have no power of alienation with respect to the devised land.

Ali Husain, who was admittedly a Sunni Mussalman, died on 14th April 1918, leaving five heirs, namely, his wives Mt. Sitaran and Mt. Chahita, his sister Mt. Ali Bandi and his nephews Naziruddin and Zahiruddin. Mt. Chahita came into possession of the land in dispute in pursuance of the deed of 3rd June 1915 and remained so in possession till her death on 29th October 1927. On her death the property in suit was somehow or other taken possession of by the defendant Khairat Ali. Naziruddin and Zahiruddin plaintiffs, after selling a moiety of their interest in the property in suit to Zamin Ali plaintiff 3, brought the suit from which this appeal has arisen for recovery of possession of the land on the allegation that by the deed of 3rd June 1915 Mt. Chahita was given the usufruct of the property for her life only and that after her the property devolved on plaintiffs 1 and 2 as surviving legal heirs of Ali Husain, Mt. Sitaran and Mt. Ali Bandi having died in the lifetime of Mt. Chahita. The defendant raised various pleas in defence including the allegations that Ali Husain had made an oral gift of the property to Mt. Chahita, that Mt. Chahita became a Shia after Ali Husain's death and that she took him (defendant) as her second husband.

All the above pleas were decided by the Courts below against the defendant. The suit of the plaintiffs was however dismissed by both the Courts on the grounds that the condition in the deed of 3rd June 1915 that Mt. Chahita was to remain in possession for her life was invalid and that therefore the bequest in her favour was absolute and was assented to by the other heirs of Ali Husain after his death so that the plaintiffs being no heirs of Mt. Chahita had no interest in the property. The plaintiffs therefore bring this second appeal against the decree of the learned Additional Civil Judge who concurred with the trial Court in dismissing their suit. After giving my best consideration to the case, I have come to the conclusion that this appeal must be allowed. The material portion of the deed in question runs as follows :

*Ba zarie tahrir haza elan karta hoon ki ta hayat khud is jaedad par main malikana tarike se qabiz rahoonga aur bad momat mere Mt. Chahita aurat naumuslim qaum thakur ki jo ek arse daraz tak meri bivi mankooha mutwaffia ki khidmat guzar thi . . . apne aqd men ba ewaz kabain zare mahasil araziat munderja unwan laya hoon aur woh abtak meri zaujiat men hai . . . . Mt. Chahita mazkoor ko apna qaim muqam wa malik ba in shart qarar deta hoon ki minjumla hasilat arazi ke ta hayat khud 30 yaum ramzanul mubarak men wa am sal baroz panjshamba bagharaz sawab rasani waldain muqir ek khurak khana muhtaji wa miskin ko dekar baqia kul munafa bila akhtiar intiqal apne tasarruf men laya kare bad wafat Mt. Chahita mazkoora ke mera waris sharai uska malik aur qaim mukam inhin sharton ke sath rahega.*

By this writing I declare that for my life I shall remain in possession of this property as proprietor and after my death Mt. Chahita the neo-Muslim woman caste Thakur who had been in the service of my deceased wife for a long time . . . . whom I have married in lieu of the profits of the land mentioned above as dower and who is still in my wedlock . . . I declare the said Mt. Chahita my successor and proprietor on this condition that during her life out of the profits of the land she should, for the purpose of the spiritual benefit of my parents, give a meal on all the thirty days of the month of Ramzan and in the rest of the year every week on Thursdays to a needy person and should appropriate to herself the rest of the profits without the power of transfer. After the death of the said Mt. Chahita my legal heirs will remain malik and successor on these very terms.

There can be no doubt that as contended by the learned counsel for the defendant, the deed is a testamentary one. The words "for my life I shall remain in possession of this property as proprietor" clearly show this. It is however contended by the learned counsel for the defendant-respondent that the condition of the legatee Mt. Chabita remaining in possession for her life only is void under the Mahomedan law, and that therefore the bequest was absolute in favour of Mt. Chabita. I am not prepared to accept this argument. The provision of the Mahomedan law that a condition repugnant to the grant is invalid applies to gifts only and not to wills. It appears to me that a bequest for a limited period is perfectly valid under the Mahomedan law. I find the following in the Hedaya :

> *Tajoozal vameeyat bahadatt apadha wa sakanedara saneen maloo mata wa tajooz hojalik apdan laanal munafa eseeya tamlikah fi haltahal java babadal fakanda baada malmat.*

> If a person made a will of the services of his slave or of the right of residence in his house for a definite period or for ever in favour of another, such a will is valid, as the giving of the proprietorship of the usufruct either for consideration or without it in the lifetime of the testator is valid, and similarly it will be valid after his death.

The Hedaya also says :

> When the profits of a house are the subject of a bequest, the legatee has no right of residence but under the Shafai law the legatee gets the house absolutely : *vide* Hedaya, p. 693.

Similarly, we find the following in Baillie's Digest of Mahomedan law :

> It should be known that a bequest of the service of a slave, or the occupation of a mansion, or the produce (ghullut) of both, or of lands and gardens, is lawful. And it is lawful for a time or in perpetuity ; for, as the profits of a thing may be transferred by a person during his lifetime, with or without a consideration, so they may, in like manner be transferred after his death : *vide* Baillie's Digest of Mahomedan Law, p. 653.

In fact the book has a separate chapter on "Usufructuary Wills". The author of the Durrul Mukhtar also writes :

> *Sahetul vameeyat bakhadmat abada wa sakanedara madat monmata wa abdan.*

> It is valid to bequeath the services of one's slave and the right of residence in one's house for a fixed period and for ever.

In the face of these texts of the Mahomedan law, it is impossible to hold that the bequest of a life-estate or of the usufruct of property for a fixed period is invalid or that such a bequest operates as an absolute bequest. Now, the bequest of the usufruct in favour of Mt. Chabita, to which, according to the findings of the lower Courts, the other heirs of Ali Husain consented after his death, operated only for her lifetime and the property should after her death revert to the other heirs of Ali Husain, namely plaintiffs 1 and 2. The learned counsel for the respondents laid great stress on the words "*apna qaim muqam wa malik*" occurring in the deed in question ; but the deed must in my opinion be read as a whole, and read as such, it clearly shows that the testator's intention was only to give a life-estate to Mt. Chabita. Having regard to the condition that she was to receive the profits of the property up to her death and without power of transfer, it cannot be contended with reason that there was an absolute bequest of the land in her favour. In 49 I A 1[1] their Lordships of the Judicial Committee referring to the use of the word "malik" remarked :

> It is not that the word is a "term of art"; it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be.

The mere use of the word 'malik' or 'qaim muqam' cannot therefore in view of the circumstances mentioned above, be held to indicate that absolute proprietorship in the property was intended to be given by the testator to the legatee. Owing to the view of the transaction in question taken by me above, it is not necessary to refer to the cases in 2 O W N 83,[2] 56 I A 213,[3] A I R 1936 Cal 465,[4] 57 Bom 737[5] and A I R 1936 Bom 330[6] which were relied on by the learned counsel for the appellants.

I may however remark that I fully agree, if I may respectfully say so, with the observations of Wazir Hasan A. J. C. in 2 O W N 83[2] that the contention that a life-interest is unknown to Mahomedan law is not well founded, and that the rule of Mahomedan law stated in the texts (namely that a condition repugnant to a gift is void) is restricted to cases where the subject matter of the gift is the entire physical property, and is inapplicable to a

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1. Bhaidas Shivdas v. Bai Gulab, (1922) 9 A I R P C 193=65 I C 974=46 Bom 153=49 I A 1 (P C).
2. Amjad Khan v. Ashraf Khan (1925) 12 A I R Oudh 568 = 87 I C 445 = 28 O C 265 = 2 O W N 83.
3. Amjad Khan v. Ashraf Khan, (1929) 16 A I R P C 149=116 I C 405=4 Luck 305 = 56 I A 213 (P C).
4. Abdul Khaleque Mondal v. Bipin Behari Bose, (1936) 23 A I R Cal 465=168 I C 310.
5. Rasoolbibi v. Usuf Ajam, (1933) 20 A I R Bom 324=148 I C 82=57 Bom 737=35 Bom L R 643.
6. Saroobai v. Hussein Somji, (1936) 23 A I R Bom 330=165 I C 84=I L R (1937) Bom 18 =38 Bom L R 903 (F B).

case where it is a limited interest in the property and should not be extended to the latter class of cases. This is supported by the definitions of hiba and areeat given in the text books of Mahomedan law. These terms have been very clearly defined by the author of the Durrul Mukhtar. Hiba (gift) is defined as "*tamlikanain majana lee bilaaivaj*", that is the giving of ownership in the corpus without any consideration ; while areeat means "*tamlikal munafa majana*" that is making another the owner of the usufruct without any consideration. Areeat under the Mahomedan law for a fixed period being valid, it follows that the gift of the usufruct of property for the lifetime of the donees is valid as areeat, though it would not be included in the term hiba, which, as noted above, is the gift of the corpus and not of the usufruct. The provision about the invalidity of a condition repugnant to a gift is perfectly intelligible when we consider the definition of hiba under the Mahomedan law. Hiba being a transfer of the corpus, no condition inconsistent with such a transfer can therefore be allowed to stand. In 3 O W N 447,[7] Wazir Hasan and Gokaran Nath Misra JJ. held that where a maintenance grant is a transfer of the right to the usufruct of property, it is a transaction of areeat and not of a gift under Mahomedan law.

In either view of the case, namely whether the transfer in favour of Mt. Chabita be deemed a bequest or an areeat, her interest ended with her lifetime and the property or, under the terms of the deed the usufruct of it must revert to the surviving heirs of Ali Husain, namely plaintiffs 1 and 2. It was also contended by the learned counsel for the respondent that if the transfer in favour of Mt. Chabita was invalid as a transfer of a life-interest only, she and after her the present respondent have been in possession of the property adversely to the appellants and have thus perfected their title. I have however shown that the transfer was perfectly valid under the Mahomedan law and as found by the Courts below the bequest was assented to by plaintiffs 1 and 2. In these circumstances Mt. Chabita cannot be said to have held the property adversely to the appellants and the respondent's possession does not extend to more than ten years. I would therefore allow the appeal of the plaintiffs and decree their suit with costs.

**Hamilton J.**—I agree.

D.S./R.K. *Appeals allowed.*

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## A. I. R. 1938 Oudh 54

ZIAUL HASAN J.

*Mahabal Khan and another — Defendants* — Appellants.

v.

*Raja Mohammad Ahmad Ali Khan — Plaintiff* — Respondent.

Second Rent Appeal No. 54 of 1935, Decided on 17th November 1937, against decree of Dist. Judge, Fyzabad, D/- 31st July 1935.

**Res judicata—Suit by proprietor under S. 127, Oudh Rent Act, against *A*—Suit dismissed on technical ground that plaintiff not being sole proprietor could not sue alone—Subsequent suit for arrears of rent against *A* treating him as statutory tenant—Decision in former suit is not res judicata in subsequent suit.**

In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been one on the merits. Hence it cannot be said of a matter that it was "heard and finally decided" if the former suit was dismissed on the ground of non-joinder of parties or mis-joinder of parties or multifariousness or on the ground that the suit was badly framed or on the ground of a technical mistake. Moreover, in judging whether or not a previous decision is a bar to a subsequent one, one must look to the matters directly and substantially in issue in both the suits and not to what was incidentally decided in the previous suit [P 56 C 1]

A proprietor brought a suit under S. 127, Oudh Rent Act, against *A* who denied that the plaintiff was purchaser of the entire 16 annas of the under-proprietary rights and set up a plea that the plaintiff not being the sole proprietor could not alone bring the suit. This question was decided against the plaintiff and the suit was dismissed on the ground that the plaintiff was not entitled to bring the suit alone. In a subsequent suit by the proprietor for arrears of rent, the question directly in issue was whether *A* was the statutory tenant of the plaintiff :

*Held* that the matter in the subsequent suit was not directly and substantially in issue in the former suit and it was not finally heard or decided. Even if the matter in dispute in the subsequent suit had been in dispute in previous suit, the decision of the previous suit could not have operated as res judicata in the subsequent suit as the previous suit was disposed of on a preliminary point. [P 56 C 1, 2]

H. Husain and H. H. Zaidi — *for Appellants.*

Sir Wazir Hasan, Ali Zaheer and Bhagwati Nath Srivastava — *for Respondent.*

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[7] Mohammad Siddique Khan v. Risladar Khan, (1926) 13 A I R Oudh 360 = 95 I C 220 = 2 Luck 216=3 O W N 447.

**Judgment.**—These four appeals against decrees of the learned District Judge of Fyzabad arise out of four suits for arrears of rent filed by the plaintiff-respondent Raja Mohammad Ahmad Ali Khan, talukdar of Hasanpur against the various defendants who have filed these appeals. It is an admitted fact that the plaintiff and his predecessors-in-interest have been superior proprietors of the village of Bajethi in which the land in dispute in the four suits is situate. It is also common ground between the parties that between the first and second settlements, the ancestors of the defendants who belong to the same family, were holders of under-proprietary rights in the entire village of Bajethi. The suits were filed against the various defendants treating them as statutory tenants. The defendant or defendants in each case contended that they were in possession of the land in suit as proprietors, that the question of the defendants possessing at least under-proprietary rights in the village has been decided by the Courts between them and the plaintiff so that the suit is barred by res judicata. A further plea was raised that the plaintiff is not the sole proprietor of the land in dispute and cannot sue alone and that this question is also res judicata between the parties.

The learned Assistant Collector, who tried the suits, held in all the suits that the defendants have no under-proprietary rights in the village, those rights having been purchased by the plaintiff and his predecessors and having become merged in the superior proprietary rights. He however dismissed three of the suits holding that as it has been decided in suits between the plaintiff and the defendant to those three suits that the plaintiff could not sue for rent alone, the matter is res judicata. The fourth suit, the defendants to which were not defendants to any of the previous suits, was decreed. In the three suits in which the plaintiff's claim had been dismissed, appeals were filed by the plaintiff in the Court of the District Judge and in the fourth suit (No. 92/83 of 1932) in which the plaintiff's claim was decreed, the defendants filed an appeal. The learned District Judge reversed the finding of the trial Court on the question of res judicata and decreed all the four suits of the plaintiff respondent. The decrees of the learned Judge in the four suits have thus led to the institution of the present four appeals by the defendants.

The learned counsel for the appellants tried to show that in view of certain documents relied on by him, the finding of the Courts below that the plaintiff and his predecessors purchased under-proprietary rights in the entire 16 annas of the village was not correct. The finding is however a finding of fact, and there being no ground on which it can be challenged in second appeal it is binding on this Court. It appears that the sale of the 16 annas of the under-proprietary rights in the village of Bajethi was held on three different dates in execution of three different decrees against three sets of judgment-debtors, who included the present defendants or their ancestors. On the first occasion an eight annas share was sold on 20th July 1892; on 25th September 1894, another four annas share was sold; and lastly the remaining four annas share was sold on 2nd January 1901. It is admitted that all the three sales were purchased by the plaintiff or his predecessors. The sale certificates relating to those sales, Exs. 4, 28 and 33, show the extent of the shares of under-proprietary rights sold as stated above, and they fully corroborate the finding of the Courts below.

The only argument in favour of the appellants is that the area of the shares sold on all the three occasions, as given in the sale statements filed by the appellants, does not come up to the entire area of the village as shown by the khewat of the first settlement. This no doubt is not easy to explain; but the sale certificates are equally clear in showing that all the 16 annas have been sold out. Moreover in view of the fact that in answer to a suit brought in the Munsif's Court by the plaintiff's predecessor for possession of a portion of the land now in suit against one of the predecessors of the defendants, the latter admitted the plaintiff's allegation that he was the purchaser of the entire 16 annas of the under-proprietary rights in the village, it is idle, indeed dishonest, on the part of the defendants to contend that they still hold some under-proprietary rights in the village. The concurrent finding of the Courts below on this point is therefore fully justified by evidence.

Now remains the question of res judicata. The learned District Judge was in my opinion perfectly correct in holding that the suits are not barred by res judicata. S. 11, Civil P. C., provides that:

> No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties .... and has been heard and finally decided by a competent Court.

To apply this section, it is necessary to see what is the matter directly and substantially in issue in the present suits. Undoubtedly it is whether or not the defendants are the statutory tenants of the plaintiff superior proprietor, but this question was never directly and substantially in issue in any of the three former suits relied on by the defendants, much less was this question heard and finally decided in those suits. Those suits were brought by the plaintiff under S. 127, Oudh Rent Act, and the defendants who denied that the plaintiff was purchaser of the entire 16 annas of the under-proprietary rights set up a plea that he could not alone bring the suit. This question was decided against the plaintiff and the suits were dismissed on the ground that the plaintiff was not entitled to bring the suits alone. It seems absurd to say that the matter which is directly and substantially in issue in the present suits was directly and substantially in issue in the previous suits or that it was heard and finally decided. Further, even if the matter which is now in dispute had been in dispute in the previous suits, the decision of those suits could not have operated as res judicata in the present suits as the previous suits were disposed of on a preliminary point. Sir D. F. Mulla in his valuable commentary on the Civil Procedure Code under the notes to S. 11 says:

> In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been one on the merits. Hence it could not be said of a matter that it was 'heard and finally decided' if the former suit was dismissed . . . . . . . . . . . . . . . . .
> on the ground of non-joinder of parties or misjoinder of parties or multifariousness or on the ground that the suit was badly framed or on the ground of a technical mistake ....: Mulla's Civil Procedure Code, Edn. 10, p. 79.

At another place he remarks:

> The essence of the doctrine of res judicata is that where a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the status of one of them in relation to the other or as to a right or title claimed by either of them against the other, it cannot again be tried in another suit between them: Edn. 10, p. 45.

It was argued that the question of the plaintiff's status as purchaser of under-proprietary rights was also decided in the previous suits incidentally, as the finding that he could not bring the suit alone was based on the decision of that question, but in the first place the real question for decision in the present suit, namely whether the relation of landlord and tenant existed between the parties, was not at all affected by any decision in the previous suits, and in the second, in judging whether or not a previous decision is a bar to a subsequent one, we must look to the matters "directly" and "substantially" in issue in both the suits and not to what was incidentally decided in the previous suits. In my judgment the decision of the learned District Judge is perfectly correct in all the appeals and I dismiss all the four appeals with costs.

D.S./R.K. *Appeals dismissed.*

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## A. I. R. 1938 Oudh 56

THOMAS C. J.

*Emperor*

v.

*Chhotey Lal* — Accused.

Criminal Ref. No. 37 of 1937, Decided on 2nd December 1937, made by Sess. Judge, Bara Banki.

**Sugarcane Act (1934), S. 7, Rules under — U. P. Sugarcane Rules, R. 13 (1) (i) — Words "to make available at purchasing centre"— Meaning.**

Sub-r. (1) (i) of R. 13 of the Rules under S. 7 has to be read with R. 11 (7). Sub-r. (1) (i) distinctly lays down the words "as required by R. 11 (7)". Under R. 11 (7) registers and records shall be kept at the purchasing centre. What sub-r. (1) (i) of R. 13 means is that all the registers and records as required by R. 11 (7) shall be kept at the purchasing centre and shall be "made available", which means shall be produced for inspection when asked for by the Inspector. [P 57 C 1, 2]

Asst. Govt. Advocate — *for the Crown.*

Kanhaiya Lal Shukla — *for Accused.*

**Order.** — This is a reference by the learned Sessions Judge of Bara Banki recommending that the conviction and sentence of the accused be set aside. Chhotey Lal accused has been convicted under R. 13 (1) (i), Sugarcane Rules, (Act 15 of 1934), and sentenced to pay a fine of Rs. 25, or in default to undergo two weeks' simple imprisonment. Rule (13) (1) (i) is as follows:

> If a manager or, if no manager has been appointed, an occupier or other person acting on his behalf or a licensed purchasing agent or any person acting on his behalf fails to make available at a purchasing centre the registers, records and copies or counterfoils of parchas for inspection

as required by R. 11 (7) . . . . shall be punishable with fine which may extend to Rs. 500 . . . .

Rule 11 (7) is as follows :

> The registers and records maintained and copies or counterfoils of parchas issued including the copies or counterfoils of the parchas containing the receipts of the payees shall be kept at the purchasing centre until it is finally closed for the year. They shall be open to inspection and check by an inspector, or such other public servant as may be appointed by him for the purpose in this behalf.

Chhotey Lal is a purchasing agent of sugarcane for the Bara Banki purchasing centre of Burhwal mills. The case for the prosecution is that Mr. Chakrawarti, the Sugarcane Inspector, inspected the Bara Banki centre on 19th March 1937, at about 5-30 P. M. He did not find the paid parchas and other papers but only a register as is clear from the report of the Inspector, Ex. 1. The trial of the case was summary and there are no notes of the statement of witnesses on the record, therefore it is difficult to check some of the statements which have been made by the learned counsel on behalf of the accused. I have not the slightest doubt that the Inspector in the beginning was himself very reluctant to prosecute the case, and I take it that this was due to the fact that under the circumstances of the case he must have been of the opinion that the offence was a technical one. It appears that the accused wanted to put up a structure at the centre which is within the railway yard, but the railway authorities did not give him the necessary permission. It is further clear that the house of the accused is about two furlongs from the "centre". It is admitted by the Inspector that as soon as he reached the hut of the accused at the centre, the accused at once sent a servant to his house to bring the necessary parchas and other connected papers. The learned Judge evidently seems to believe that the man who was sent to bring the papers got pain in his stomach and went to ease himself and thus lost some time, but it is admitted that within half an hour all the necessary papers were produced before the Inspector. There is no suggestion that there were any irregularities in keeping the register.

The whole question turns upon the construction to be placed on sub-r. (1) (i) of R. 13. The contention of the learned counsel on behalf of the accused is that the words "fails to make available at a purchasing centre" does not mean that the register and other necessary papers should be kept at the purchasing centre. I regret I am unable to agree with this contention. Sub-r. (1) (i) of R. 13 has to be read with R. 11 (7). Sub-r. (1) (i) distinctly lays down the words "as required by R. 11 (7)." Under R. 11 (7) registers and records shall be kept at the purchasing centre. What sub-r. (1) (i) of R. 13 means is that all the registers and records as required by R. 11 (7) shall be kept at the purchasing centre and shall be "made available" which in my opinion means shall be produced for inspection when asked for by the Inspector. In my opinion the conviction of the accused is correct, but under the circumstances of the case, I think, as this is the first offence of the accused, and there were no irregularities in keeping the registers, etc., by way of warning, a nominal fine will meet the ends of justice. I accordingly accept the reference to this extent that I reduce the fine from Rs. 25 to Rs. 5.

D.S./R.K. *Reference accepted.*

## A. I. R. 1938 Oudh 57

SRIVASTAVA C. J. AND HAMILTON J.

*Dr. Syed Fazal Ahmad — Plaintiff —* Appellant.

v.

*Maulvi Afaqul Rahman and others — Defendants —* Respondents.

Second Appeal No. 189 of 1935, Decided on 15th November 1937, against order of Dist. Judge, Unao, D/- 6th April 1935.

**Transfer of Property Act (1882), S. 58 (c)—Transaction whether mortgage by conditional sale or sale with condition of repurchase—Test—Deed of ostensible sale containing condition for retransfer — Absence of bargaining as to price—Deed quickly followed by another which was mortgage by conditional sale—Former deed held mortgage by conditional sale and not sale with condition of repurchase.**

As under S. 58 (c), the transaction is ostensibly a sale and as the parties to it are referred to as "the buyer" and "the seller" the use in a deed of expressions usually found in a deed of absolute sale in itself cannot be a valuable guide in considering whether the transaction is a sale with a condition of repurchase or a mortgage by conditional sale. The distinction between a sale deed with a condition of repurchase and a mortgage by conditional sale is one of intention to be gathered from the deed itself and the extrinsic evidence of surrounding circumstances. [P 58 C 2; P 59 C 2]

Where a deed of ostensible sale contained a condition for retransfer and there was no bargaining as to the price for the ostensible sale and the deed was quickly followed by another which was regarded as a mortgage by conditional sale:

*Held* that the former deed was a mortgage by conditional sale and not a sale with condition of repurchase : *Case law discussed.* [P 60 C 2; P 61 C 1]

Ali Zaheer — *for Appellant.*

Ghulam Hasan and Iftikhar Husain — *for Respondents 1 and 2.*

**Judgment.**—This is an appeal by the plaintiff against a decision of the District Judge of Unao which set aside the decision of the Munsif of Safipur which decreed the suit of the plaintiff. Mt. Ikraman Bibi defendant 3, on 23rd December 1932 executed a deed in favour of the plaintiff which the plaintiff in his plaint alleges to be a mortgage by conditional sale. On 5th September 1932 Mt. Ikraman Bibi had executed a very similar deed in favour of Moulvi Afaqul Rahman defendant 1, and Moulvi Waliul Rahman defendant 2, affecting the same property but for Rupees 200 while the consideration in the other deed was Rs. 500. Part of this consideration of Rs. 500 was a sum of Rs. 200 left with the plaintiff to be paid to defendants 1 and 2 and the plaintiff therefore deposited Rs. 200 in Court under S. 83, Act 4 of 1882, thus treating defendants 1 and 2 as mortgagees by conditional sale as he himself claimed to be. As defendants 1 and 2 refused to accept the money on the ground that they were absolute purchasers of the property and not mortgagees, and the plaintiff was directed to file a regular suit, it became necessary for the plaintiff to file this suit. Mt. Ikraman Bibi though duly served put in no appearance. Defendants 1 and 2 on the other hand contended that there was a sale in their favour with a condition of repurchase in favour of Mt. Ikraman Bibi which could not be transferred and so the suit should be dismissed.

Counsel for the plaintiff has contended in argument that even if that deed in favour of defendants 1 and 2 be held to constitute a sale with a condition of repurchase and not a mortgage by conditional sale, he stands in the shoes of Mt. Ikraman Bibi and is entitled to retransfer. The plaintiff finally sued for mesne profits also. The learned Munsif decreed the suit holding that the deed was a mortgage by conditional sale and found Rs. 60 to be the sum payable as mesne profits, while the Appellate Court found that the deed was a sale and not a mortgage but also decided that in any case mesne profits would only be Rs. 42. The learned District Judge did not consider the question whether if the deed was a sale and not a mortgage the plaintiff was entitled to a retransfer, while on this point the learned Munsif had framed an issue as follows :

> 4. Was the right of redemption or of reconveyance under the deed, dated 5th September 1932, a personal right of defendant 3? If so, its effect?

He held that as he found the deed to be a mortgage by conditional sale, the issue fell to the ground automatically and so he decided it in the negative. Presumably he really meant that he left it undecided. Before examining the authorities which have been quoted to us, we think it advisable to quote S. 58 (c), T. P. Act, which defines a mortgage by conditional sale :

> Where the mortgagor ostensibly sells the mortgaged property, on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee, a mortgagee by conditional sale.

The deed in suit is so worded, in non-legal language, that it would be taken for an absolute sale deed but for the following provision :

> If I (the executant) pay the sale price to the vendees within a period of 8 years, the vendees shall without any excuse return the property sold and after 8 years I shall have no right left for the return of the property.

As under S. 58 (c), T. P. Act, the transaction is ostensibly a sale and as the parties to it are referred to as "the buyer" and "the seller", we do not think that the use in a deed of expressions usually found in a deed of absolute sale in itself can be a valuable guide in considering whether the transaction is a sale with a condition of repurchase or a mortgage by conditional sale. Indeed in 51 I A 305[1] their Lordships of the Privy Council observed :

> Their Lordships do not conceal from themselves the fact that the transaction as phrased in these documents is ostensibly a sale, with a right of repurchase in the vendor. This appearance indeed is laboriously maintained. The words of conveyance needlessly iterate the description of an absolute interest and the rights of repurchase bear the appearance of rights in relation to the exercise of which time is of the essence. But a closer exami-

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[1] Narsingerji Gyanagerji v. Parthasaradhi. (1924) 11 A I R P C 226=82 I C 993=47 Mad 729=51 I A 305 (P C).

nation of the documents discloses their real character.

Again in A I R 1933 All 443,[2] a two Judge case, Kisch J. observed :

> The learned counsel for the appellants has laid much stress on the wording of the sale deed which purports to convey an absolute interest in the most unambiguous terms.

The learned Judge referred to the Privy Council case[6] from which we have just quoted, and though there were two documents and not one as in the present case, they were held to constitute a mortgage by conditional sale. In the present case it is difficult to say that there is anything in the wording of the deed which would enable one to say that it is on one side or the other of the thin line which separates a sale with a condition from a mortgage by conditional sale but so much can be said that there is nothing in it which takes it out from the definition of a mortgage by conditional sale as defined in S. 58, T. P. Act. It is worth mention, however, that this deed was executed after the amendment of S. 58, which runs :

> Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

The condition would of course be the provision about retransfer. One may therefore say that if the parties to the deed intended it to be a sale and not a mortgage, they had a very simple means of attaining their object, namely putting the condition of retransfer in a separate document, but they did not do so. In this connexion we would refer to A I R 1929 All 619[3] and A I R 1931 All 548.[4] It is true that these were cases in which a would-be pre-emptor urged that certain transactions were sales and not mortgages by conditional sale and as plaintiff he had to prove his case. Nevertheless we think the following observations relevant which were made in the earlier case :

> It cannot be stated broadly that in every case where there is an ostensible sale subject to the condition of repurchase, the transaction cannot be a sale but must always be a mortgage by conditional sale. It seems to us that it is always open to a pre-emptor who is no party to the transaction to show by evidence, direct or circumstantial, that although the transaction was clothed in that particular garb it was in reality and substance a sale transaction. But where there are no special circumstances, and we have only a transfer of the property subject to the condition of resale, it seems to us that the case would fall within the definition of a mortgage by conditional sale as laid down in S. 58 (c).

The distinction between a sale deed with a condition of repurchase and a mortgage by conditional sale is one of intention to be gathered from the deed itself and the extrinsic evidence of surrounding circumstances, and we shall now consider what evidence has been held relevant in such decisions as have been cited to us.

The following are those cited by the appellant : A I R 1931 All 196[5]: This decision was apparently based on the existence of a prior debt and the fact that the vendees allowed a "release" (wa guzasht) if paid within three years and on the consideration of the document as a whole. It was also however pointed out that the transaction fell within the language of S. 58 (c), T. P. Act. 10 I C 630[6]: The document purported to be a deed of sale, but it contained a clause to the effect that if within six years from the date of the transaction the amount secured was paid back the sale became void. It was pointed out there that the document exactly fulfilled the requirements of S. 58 (c), as does the one in this suit. 51 I A 305[1]: We have already referred to this decision of their Lordships of the Privy Council in one connexion, but there are other points to be noted. Their Lordships pointed out that there was no bargaining as to the amount of consideration and the price was absurdly inadequate. The learned District Judge here has pointed out that these considerations weighed heavily with the Munsif and he gave his own views on them. As regards the adequacy of consideration he has said :

> I am therefore of opinion that the sale consideration of the deed Ex 1 is not so inadequate as to suggest that the deed must be a mortgage with conditional sale.

On his own calculation however, at 15 years purchase, the value of the property would be Rs. 420 and purchase prices are more often at 20 than 15 years rate. It is true that he then thinks that a cosharer could not collect the full rental and that in 1932 there was a slump and purchasers would be difficult to find, but these are speculations and are not based on evidence. As plaintiff gave Rs. 500 for this property, the estimate of Rs. 420 worked out by the District Judge himself seems rather low, and to say that this amount was not so inadequate (i. e. was somewhat inadequate) is the least that could be said. Again, the finding of the learned Munsif that there had been no discussion as to price was, at any rate, based on the statement of the husband of Mt. Ikraman Bibi.

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[2] Mt. Gomti v. Meghraj Singh, (1933) 20 A I R All 443=145 I C 147=1933 A L J 907.

[3] Man Singh v. Guman Singh, (1929) 16 A I R All 619=119 I C 108=1929 A L J 887.

[4] Ram Dhani Ram v. Ram Rikh Singh, (1931) 18 A I R All 548=131 I C 594=53 All 607=1931 A L J 1060.

[5] Mt. Mumtaz Begam v. Mt. Lachhmi, (1931) 18 A I R All 196=130 I C 15=1930 A L J 1485.

[6] Balbhadar Rai v. Brijraj Rai, (1911) 10 I C 630

Whether the learned Judge did accept this statement or not is not clear, for, he says this does not exclude the possibility of discussion some time before execution of the deed. He says this criterion for determining the nature of the deed is of no great help but it was at any rate held worthy of consideration by their Lordships of the Privy Council. It appears therefore that as regards absence of bargaining the evidence is at least more in favour of the deed being a mortgage and not a sale than vice versa.

49 All 405[7]: This generally supports the appellant, but there are points of dissimilarity and we do not depend on it. On the other hand, counsel for respondent has relied largely on two decisions by their Lordships of the Privy Council reported in 17 I A 98[8] and 43 I A 284.[9] In the former case, there were two documents executed as long ago as 1835 and the suit was brought in 1884, nearly 50 years later. The vendee "as a matter of favour, mercy and kindness" gave the right of repurchase by a separate document so the right was not by the sale, and the long period which had elapsed, though the money was to be paid in ten years, make this case a very different one from the present one. The latter case is a similar one, the power to repurchase being given by the vendees by a separate deed of their own free will because they were willing to help and treat with kindness the vendors. These deeds were executed in 1852 the one giving power to repurchase actually being a week after the deed of sale, and the suit was not brought till 1907. The circumstances were very different from those in the present case. 36 I C 991[10] is a case where there were two deeds, one of sale the other about repurchase which contained a condition that the money to be repaid was to come out of the vendor's own pocket, it was not to be raised on loan or by making any hypothecation or transfer of the property. This condition was one of the reasons why it was held that the transaction was a sale and it was remarked that each case of this kind must be decided on its own facts. 6 O W N 1073,[11] decided by a Bench of this Court, is also distinguishable. To some extent, that decision was based on the two Privy Council decisions to which we have referred in that it held them to be authorities for the proposition that prima facie an absolute conveyance in which there is nothing to show that the relation of debtor and creditor should exist between the parties does not cease to be a conveyance so as to be converted into a mortgage merely because there is a right to repurchase the property.

These decisions were therefore considered only as laying down a general proposition, not with regard to facts. Reference was made to the fact that the property in suit had already been mortgaged and there was no sufficient reason for entering into a different form of mortgage and it was also stated that an additional sum of Rs. 48 was to be paid which could not have been interest but must have been consideration for the return of the property. The decision was reached after careful examination of the deed and the surrounding circumstances, and it appears to us indisputable that there was considerable difference between the circumstances in that and in the present case. We would point out that in the present case there was no lapse of a number of years during which the vendees dealt with the property as if it was theirs by absolute sale and the vendor acquiesced, but the deed in favour of defendants 1 and 2 was quickly followed by one in favour of the plaintiff which was regarded as a mortgage by conditional sale.

In view of the fact that the deed in suit, in our opinion, fulfils the requirements of S. 58, T. P. Act, and considering also the surrounding circumstances, we are of opinion that the deed is a mortgage by conditional sale and the appeal must be allowed and the decision of the original Court restored except as to mesne profits. The learned District Judge held that mesne profits should be Rs. 42 instead of Rs. 60 as granted by the original Court and though there is a ground about mesne profits in the appeal to this Court it has not been argued. We therefore set aside the decision of the lower Appellate Court and restore that of the original Court with the modification that mesne profits are reduced to Rs. 42. The appellant will get his costs in all the three Courts from defendants-respondents 1 and 2.

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[7] Mathura Kurmi v. Jagdeo Singh, (1927) 14 A I R All 321=104 I C 504=49 All 405 = 25 A L J 261.

[8] Bhagwan Sahai v. Bhagwan Din, (1890) 12 All 387=17 I A 98=5 Sar 551 (P C).

[9] Jhanda Singh v. Wahid-ud-Din, (1916) 3 A I R P C 49=36 I C 38=38 All 570=43 I A 284 (P C).

[10] Kishen Dayal v. Chander Deo, (1916) 3 A I R All 305=36 I C 991.

[11] Mohammad Zaki Beg v. Abdul Ghani Beg, (1930) 17 A I R Oudh 6 = 120 I C 817 = 6 O W N 1073.

In view of our finding that the deed is one of mortgage the other point argued which we have stated in the beginning of our judgment, does not arise and we therefore do not decide it.

D.S./R.K. *Appeal allowed.*

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## * A. I. R. 1938 Oudh 61

SMITH J.

*Ram Singh and another* — *Plaintiffs* — Applicants.

v.

*Radha Krishna* — *Defendant* — Opposite Party.

Civil Revn. Appln. No. 122 of 1936, Decided on 30th November 1937, from order of Munsif, Biswan at Sitapur, D/- 24th September 1936.

*** Promissory Note—Joint promisees—Suit by one — Other promisee joined after period of limitation—Suit is time barred.**

Where a suit on a promissory note is filed by one promisee alone within period of limitation but the other promisee is joined as party only after period of limitation the suit is time barred : *36 Mad 544 ; A I R 1917 Mad 269 and A I R 1915 Cal 528, Ref.* [P 62 C 1]

**B. K. Dhaon** — *for Applicants.*

**K. N. Tandon** — *for Opposite Party.*

**Order.** — This is an application under S. 25, Provincial Small Cause Courts Act. The suit was one upon a promissory note for Rs. 140 executed on 16th June 1933, by one Radha Krishna in favour of one Ram Singh, and Ram Singh's son, Bhagat Singh. The suit was instituted on 1st July 1936, that being the first open day after the long vacation of the Subordinate Civil Courts. The suit was instituted however only by Ram Singh. His son, Bhagat Singh, was only added as a plaintiff on 24th September 1936. Having regard to the provisions of S. 22 (1), Lim. Act, the learned Judge of the Court below took the view that the suit was beyond time as far as plaintiff 2, Bhagat Singh, was concerned, and he went on to say that Ram Singh and Bhagat Singh being joint promisees, there could be no suit by one of the plaintiffs only. He was also of opinion that there could not be a valid discharge granted by only one of the plaintiffs. The result was that the suit was dismissed and the plaintiffs have preferred this present application.

The learned counsel for the applicants makes reference to Ss. 8 and 78, Negotiable Instruments Act, but these sections do not seem to me to be of assistance in deciding the points at issue. The learned counsel for the applicants relies on a Full Bench decision of the Madras High Court reported in 36 Mad 544,[1] in which it was held (the Chief Justice dissenting), that one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees. The correctness of this decision appears to have been doubted by a Bench of the Madras High Court in 32 I C 173,[2] although of course the Bench recognized that they were bound by the decision of the Full Bench of their own Court. It appears that the Calcutta view is different from the view taken by the Full Bench of the Madras High Court in in the case above cited : vide for example the case in 29 I C 956.[3] In any case, even if a valid discharge can be given by one of several promisees, it does not seem to me to follow that one such promisee can sue without joining the other promisees, either as plaintiffs or defendants. This distinction was pointed out in 36 Mad 544[1] at p. 549, where it was said by Sankaran Nair J. :

> It has also to be remembered that while the English law, as laid down in (1840) 7 M & W 264,[4] allowed one creditor to give a valid dis-

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[1] Annapurnamma v. Akkayya, (1913) 36 Mad 544=19 I C 12=24 M L J 333 (F B).

[2] Ponnusamy Pillai v. Thyagaraja Pillai, (1917) 4 A I R Mad 269=32 I C 173.

[3] Umes Chandra Banerjee v. Dinabandhu Mahanti, (1915) 2 A I R Cal 528=29 I C 956=21 C L J 570.

[4] Wallace v. Kelsall, (1840) 7 M & W 264=8 D P C 841=10 L J Ex 12=4 Jur 1064.

charge, it did not generally allow him to sue alone.

It also seems to me to follow from the provisions of S. 45, Contract Act, that the present suit could not be brought by Ram Singh alone. In view of the fact that the other promisee was only made a party after limitation had expired, I am of opinion that there was no proper suit brought within limitation, and that the suit was rightly dismissed by the learned Court below. The result is that this application is dismissed with costs.

D.S./R.K. *Application dismissed.*

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## ✻ A. I. R. 1938 Oudh 62

THOMAS AND ZIAUL HASAN JJ.

*Lala Ram Chandra and another — Plaintiffs* — Appellants.

v.

*Makhdum Singh and others — Defendants* — Respondents.

First Appeal No. 115 of 1935, Decided on 11th November 1937, against order of Sub-Judge, Sitapur, D/- 23rd July 1935.

✻ **(a) Appeal – Abatement – Order setting aside sale held in execution of mortgage decree — Suit by mortgagee for declaration that order was void — Suit dismissed against mortgagor and puisne mortgagee of fraction of mortgaged property—During pendency of appeal puisne mortgagee dying — His legal representative not brought on record—Entire appeal does not abate.**

An order setting aside a sale held in execution of a mortgage decree was passed. The mortgagee thereupon brought a suit for declaration that the order setting aside the sale was void. The suit was dismissed and a joint decree was passed in favour of the mortgagor and the person who was impleaded in the mortgage suit as a puisne mortgagee of a fraction of mortgaged property. During the pendency of the appeal by the mortgagee against the decree dismissing his suit, the puisne mortgagee died and his legal representative was not brought on record :

*Held* that as the interest of puisne mortgagee was quite distinct from that of other respondents, the abatement of the appeal against him did not make it impossible to proceed with the appeal against other respondents. Hence the entire appeal did not abate : *A I R 1935 Oudh 36* ; *A I R 1925 Lah 124* ; *A I R 1936 Oudh 209 and A I R 1935 Oudh 329, Disting.* [P 63 C 2]

**(b) Civil P. C. (1908), Ss. 9 and 70 — Rules under S. 70 — U. P. Manual of Revenue Department Vol. 1, Rr. 998 and 1011—Commissioner setting aside sale on grounds not provided for in R. 998 — Civil Court has jurisdiction to entertain suit against such order.**

The Collector or the Commissioner in appeal have no jurisdiction to set aside a sale except under the terms of Rule 998 of Vol. 1, U. P. Manual of Revenue Department. Where therefore a Commissioner in appeal sets aside a sale on the grounds which are not provided for in R. 998, his order is without jurisdiction and is subject to adjudication by the Civil Court under the general provisions of S. 9, Civil P. C. Civil Court's cognizance of a suit against such order is not barred by Cl. (3) of R. 998 as that clause does not forbid a suit by which it is sought to set aside an order not made under R. 998 : *A I R 1932 Oudh 273 and 170 I C 639, Disting.* [P 64 C 1,2]

Radhakrishna and Jagdish Chandra — *for Appellants.*

M. Wasim and K. P. Misra — *for Respondent 1.*

**Judgment.**—The plaintiffs Lala Ram Chandra and Jagannath Prasad in Suit No. 30 of 1935 of the Court of the learned Civil Judge of Sitapur bring this first appeal against the dismissal of their suit in which they prayed for a declaration that the order of the Commissioner of the Lucknow Division dated 14th February 1934, setting aside a sale held by the Revenue Court in execution of a decree of theirs against the defendants was void and ineffectual and that the sale was valid and proper and that the plaintiffs as legal purchasers were owners of the property sold.

The facts are that Makhdum Singh, defendant-respondent 1, mortgaged his zamindari villages to the plaintiffs under various deeds. The plaintiffs obtained a decree for sale of the mortgaged property and it was made final on 17th May 1930. A portion of the mortgaged property was sold by the Civil Court but after that there was a partition between Makhdum Singh and his cosharers by which the properties mortgaged to the plaintiffs were allotted to the other co-sharers while some other properties fell to the share of Makhdum Singh. The plaintiffs-decreeholders applied for execution against the substituted property and as this property was ancestral, execution was transferred to the Collector under S. 68, Civil P. C. Several dates were fixed for sale of the property but the sale had to be postponed owing to Makhdum Singh's wife instituting a suit in respect of a portion of the property. Finally after her suit was dismissed by this Court, 3rd August 1933 was fixed for sale. A day before this date, an application was put in for postponement of the sale but it was disallowed by the sale officer and the sale held on 3rd

August 1933. The property was purchased by the plaintiffs themselves. The judgment-debtor filed objections to the sale under Rr. 997 and 998 of the Revenue Manual but the objections were disallowed by the Deputy Commissioner and the sale confirmed. The judgment-debtor then filed an appeal before the Commissioner against this order and the learned Commissioner by his order dated 14th February 1934, set aside the sale on the ground that as a Bill for the relief of agriculturists was before the Legislative Council, "the only safe plan is to quash the present sale and to allow the sale to take place afresh on the removal of the present embargo". It is this order of the Commissioner about which the plaintiffs want the declaration mentioned above.

The suit was dismissed by the learned Civil Judge on the ground that it was not maintainable and that the Civil Court had no jurisdiction to try the suit. The plaintiffs bring this appeal and challenge these findings. The learned counsel for the respondents (who include all the persons who were defendants to the plaintiffs' suit on the mortgage) raises a preliminary objection to the hearing of the appeal. This objection is based on the fact that Jagannath Prasad, respondent 6, died during the pendency of this appeal and his legal representatives were not brought on the record within time. The argument of the learned counsel is that as the decree of the lower Court dismissing the plaintiffs' suit was a joint decree in favour of Jagannath Prasad as well as the other defendants-respondents, the abatement of the appeal against Jagannath Prasad has the effect of the abatement of the entire appeal. The learned counsel relies on the cases in 11 O W N 1487,[1] 5 Lah 429,[2] 1935 O W N 297[3] and 1935 O W N 401.[4] We are of opinion however that the principle on which these cases proceed is not applicable to the present case. The decree was no doubt common among all the defendants against whom the suit was dismissed, but it is not denied that Jagannath Prasad was impleaded in the suit on the mortgage as a puisne mortgagee of only a fraction of the mortgaged property so that his interest was quite distinct and separate from that of the other defendants. This being so, it cannot be said that owing to the abatement of the appeal against Jagannath Prasad it is impossible to proceed with the appeal against the others. Nor is there any possibility in this case of two contradictory decrees coming into existence. The only effect of the abatement of the appeal against Jagannath Prasad will be that Jagannath Prasad's heirs will not be bound by any decree that may be passed in favour of the plaintiffs by this Court. In other words the sale held on 3rd August 1933 will remain cancelled as against the heirs of Jagannath Prasad even if we decree the appeal of the plaintiffs and grant them the declaration sought for. The decree of this Court, if the plaintiffs' appeal be allowed, will not in any manner conflict with the decree of the lower Court which has been passed in favour of Jagannath Prasad. We may also note that none of the defendants except Makhdum Singh was a party to the objection case in the Revenue Court and that none of them except Makhdum Singh tried to get the sale set aside. We are therefore of opinion that the preliminary objection has no force and we would overrule it.

On the merits, the question for decision is whether the suit as brought by the plaintiffs was cognizable by the Civil Court. The learned counsel for the parties addressed very elaborate arguments to us and after a careful consideration of all the circumstances of the case and the authorities cited, we have come to the conclusion that the question must be answered in the affirmative. S. 68, Civil P. C., provides for the transfer of decrees for execution to the Collector and S. 70 empowers the Local Government to make rules conferring upon the Collector or any gazetted subordinate of his, all or any of the powers which the Civil Court might exercise in execution of decrees, laying down the procedure to be followed in cases of transfers of decrees to the Collector and providing for appeals against orders passed by the Collector or any gazetted subordinate of his. Rules under S. 70. Civil P. C., have been made and they are in Ch. 40 of the Manual of the Revenue Department, U. P. Vol. I, from R. 967 to R. 1012. R. 998 runs as follows:

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[1] Fazl Muhammad Khan v. Ali Muhammad Khan, (1935) 22 A I R Oudh 86 = 153 I C 54=10 Luck 387=11 O W N 1487.

[2] Wali Mohammad v. Barkhurdar, (1925) 12 A I R Lah 124=86 I C 592=5 Lah 429.

[3] Ram Jas Tewari v. Ram Lal Tewari, (1936) 23 A I R Oudh 209 = 165 I C 45 = 1935 O W N 297.

[4] Mohammad Faruq v. Azizul Hasan, (1935) 22 A I R Oudh 329=154 I C 897 = 11 Luck 5= 1935 O W N 401.

> (1) Where no application is made under para. 996 or para. 997 or where such application is made and disallowed, the Collector shall make an order confirming the sale, and thereupon the sale shall become absolute:
>
> Provided that, if in any case in which the sale has been conducted by an Assistant Collector under para. 1010, the Collector after giving notice to all persons affected and hearing their objections, if any, considers the price offered inadequate, he may refuse to confirm the sale and the property shall thereupon be put up again to auction:
>
> (2) Where such application is made and allowed, and where, in the case of an application under para. 996 the deposit required by that paragraph is made within 30 days from the date of sale, the Collector shall make an order setting aside the sale:
>
> Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.
>
> (3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

This Rule corresponds to O. 21, R. 92, Civil P. C. and it clearly shows that when a sale is held in execution of a decree, the sale must either be set aside on the deposit of the decretal amount by the judgment-debtor or on the ground of material irregularity or fraud in publishing or conducting it or the sale must be confirmed if the deposit was not made and if no material irregularity or fraud in publishing or conducting the sale is alleged or proved. R. 1011 prescribes the cases in which orders passed by the Collector are appealable to the Commissioner of the Division and among other cases Cl. 8 of that Rule provides for an appeal by a decree-holder or judgment-debtor or a person whose immovable property has been sold under the rules from an order confirming or setting aside a sale. It is thus clear that the jurisdiction of the Collector and the Commissioner are restricted by Rr. 998 and 1011. This means that they have no jurisdiction to confirm or set aside a sale except under the terms of R. 998. In the present case the judgment-debtor's objection was under R. 997, that is to say he prayed for the sale being set aside on the ground of material irregularity or fraud in publishing or conducting it. The Collector considered the objection and disallowed it. The learned Commissioner however in appeal did not confine himself to the provisions of R. 998 but set aside the sale on a ground which is not provided for by any of the rules. This, it appears to us, he had no jurisdiction to do. The order being without jurisdiction is subject to adjudication by the Civil Court under the general provisions of S. 9, Civil P. C. It was however contended that the present suit was beyond the ambit of S. 9 as the Civil Court's cognizance of it was barred by Cl. 3 of R. 998 of the Manual of the Revenue Department. That clause however forbids a suit by which it is sought to set aside an order made under R. 998 and we have already shown that the order of the learned Commissioner was not under that Rule. This being so the cognizance of the suit by the Civil Court does not appear to us barred by Clause 3 of R. 998.

It was also argued by the learned counsel for the respondents that so long as the Commissioner purported to act under R. 998, he had jurisdiction to pass any order that he thought fit but in the present case the learned Commissioner did not even purport to pass an order under R. 998. Reliance was placed by the learned counsel for the respondents on the cases in 9 O W N 610[5] and 1937 O W N 886[6] but in both those cases it was held that the jurisdiction of the Civil Court to question the correctness or validity of the order of the Revenue Court is barred only when the order was within the jurisdiction of the Revenue Court. In the present case we have shown that the order of the learned Commissioner was entirely beyond his jurisdiction. We are therefore of opinion that the lower Court was wrong in dismissing the plaintiffs' suit on the ground that it had no jurisdiction to try the suit and we would consequently allow the appeal and remand the case to the trial Court for trial on the merits. The costs will abide the result.

D.S./R.K. *Case remanded.*

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[5] Jageshwar Singh v. Rameshar Bakhsh Singh, (1932) 19 A I R Oudh 273 = 139 I C 498 = 9 O W N 610.

[6] Rustom Singh v. Ahmadunnissa, (1937) 170 I C 639=1937 O W N 886.

## * A. I. R. 1938 Oudh 65

ZIAUL HASAN AND SMITH JJ.

*B. Sundar Lal—Plaintiff*—Appellant.

v.

*B. Gur Saran Lal and others — Defendants*—Respondents.

First Appeal No. 51 of 1935, Decided on 30th November 1937, against decree of Civil Judge, Malihabad, Lucknow, D/- 22nd December 1934.

**(a) Transfer of Property Act (1882), S. 53—Relinquishment by one co-parcener in favour of another is not "transfer" under S. 53.**

Relinquishment of his right by a co-parcener in favour of another co-parcener cannot be strictly said to be a transfer within the meaning of S. 53. [P 67 C 2]

**(b) Transfer of Property Act (1882), S. 53—Son profligate—Transfer to grandson to save property is not fraudulent.**

Transfer of property by a Hindu ancestor to his grandchild in order to save the property from the profligate habits of his son cannot be defeated as being fraudulent : *6 All 560 (P C), Rel. on.* [P 67 C 2 ; P 68 C 1]

**(c) Guardian and Ward — Decree against ward on admission by guardian—Admission adverse to ward—Decree is not binding on ward.**

Decree obtained against a ward on the admissions of his guardian which were made due to intense love of the guardian towards another and which were adverse to the interests of the ward will not be binding on the ward. [P 68 C 2]

*** (d) Jurisdiction —Appeal—Property in *L* and *C*—Suit filed in Court at *L*—Suit dismissed — Appeal in Court at *L* so far as property in *C* was concerned—Appellate Court at *L* held had jurisdiction.**

In a suit, property under dispute lay partly in Lucknow and partly in Cawnpore district. The suit was brought in Courts in Lucknow district. After the decree in the lower Court dismissing the suit, plaintiff submitted to the decree so far as property in Lucknow district was concerned but went up in appeal to the Oudh Chief Court so far as the decision on Cawnpore property. It was contended that as the subject matter under appeal was not within the jurisdiction of Oudh Chief Court, the appeal could not be heard by it :

*Held* that as the suit as filed was proper the only Court that could hear the appeal was the Oudh Chief Court and none else. [P 69 C 1]

**Kashi Prasad Srivastava and Raj Kumar Srivastava—*for Appellant.***

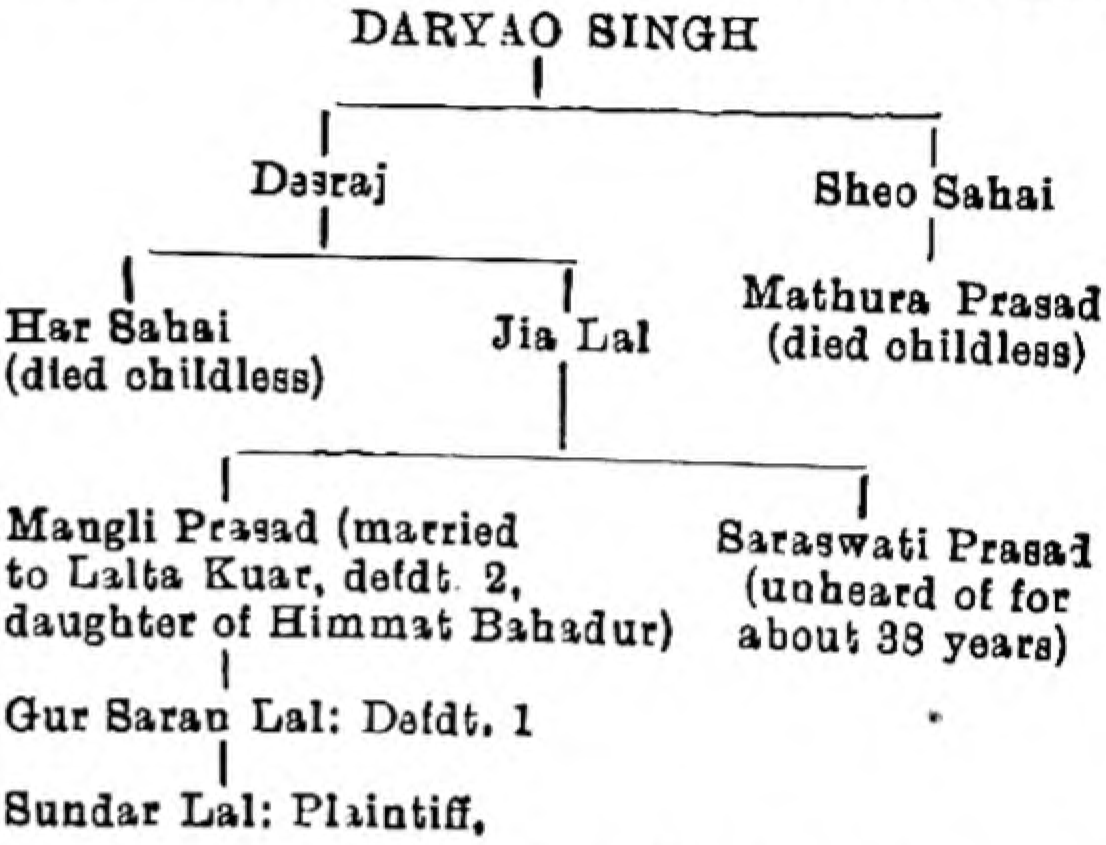
**Bhagwati Nath Srivastava — *for Respondents 3, 4 and 5.***

**R. N. Shukla — *for Respondents 3, 5 and 7.***

**Rameshwari Dayal—*for Repondent 1.***

**Respondent 4 in person with Bhagwati Nath Srivastava.**

**Judgment.**—This is a first appeal against a decree of the learned Civil Judge of Malihabad, Lucknow, who dismissed the plaintiff-appellant's suit for possession of a house situate in Purwa Chheda Khawas, Lucknow City, and of an 11 annas odd share in patti Sundar Lal in village Bahrai, District Cawnpore. The following pedigree which is not disputed, will be of use in understanding the facts of the case:


DARYAO SINGH
Desraj
Sheo Sahai
Har Sahai (died childless)
Jia Lal
Mathura Prasad (died childless)
Mangli Prasad (married to Lalta Kuar, defdt. 2, daughter of Himmat Bahadur)
Saraswati Prasad (unheard of for about 38 years)
Gur Saran Lal: Defdt. 1
Sundar Lal: Plaintiff.

According to the plaintiff, the house and the share in dispute in village Bahrai, belonged to his ancestors. Saraswati Prasad disappeared about thirty-eight years ago, and Jia Lal died in 1905. On Jia Lal's death, though his son Mangli Prasad was living, the family property was mutated in the name of the latter's son, Gur Saran Lal, father of the present appellant. It appears that Gur Saran Lal, when he came of age about 1912, began to squander and borrow money by his extravagance and immoral habits. In 1916 Mangli Prasad, his father, also disappeared, and does not appear to have been heard of since. In 1917 some well-wishers of the family put their heads together to devise means by which the family property might be protected, and they at last prevailed upon Gur Saran Lal, defendant 1, to execute a deed of relinquishment in favour of his minor son, Sunder Lal, the present plaintiff-appellant. Accordingly on 5th September 1917, Gur Saran Lal executed such a deed, (Ex. 5), by which he relinquished his own rights in respect of the share of village Bahrai in dispute in favour of his minor son, the plaintiff, under the guardianship of his (defendant 1's) mother, Mt. Lalta Kuar, defendant 2. The lady applied to the District Judge of Cawnpore for her appointment as guardian of the plaintiff, and she was so appointed on 9th July 1920. Subsequently she applied to the District Judge, Cawnpore, for permission to sell a two annas share of village Bahrai in order to pay off debts left by Mangli Prasad, grandfather of the minor. Permission was granted to her, and accordingly defendant 2 on 30th July 1923 executed a sale deed (Ex. 7) in respect of a two annas share of Bahrai in favour of a certain Mangli Prasad and others. This sale was pre-empted by Pandit Har Das, Ajudhiya Prasad and Jamna Prasad, defendants 4 to 6, in whose favour a decree was passed so that the share in suit passed from the vendees to defendants 4 to 6 (respondents 3 to 5).

On 7th July 1924, Gur Saran Lal filed a suit against the present plaintiff in the Court of the Munsif, South Lucknow for cancellation of the deed of relinquishment, Ex. 5. The suit was brought against him under the guardianship of the present defendant 2, his grandmother. On 4th August 1924 this suit was decreed on the admission of claim made by the guardian "ad litem" of the present plaintiff. After this Gur Saran Lal made the following transfers, some in favour of defendants 4 to 6 (now respondents 3 to 5), and some in favour of defendants 7 and 8, now represented by respondent 7 alone:

(1). A mortgage deed for Rs. 1500 dated 23rd December 1925 in favour of Basdeo, predecessor of defendants 7 and 8, and Gajadhar.

(2). A deed of usufructuary mortgage dated 24th February 1926, for Rs. 3300 in favour of defendant 7.

(3). Two "thekanamas" dated 24th February 1926 and 26th July 1927, in favour of Basdeo, predecessor of respondent 7.

(4). A sale deed dated 12th January 1928, of a 4 annas 9 pies odd share in villags Bahrai and two groves and a "dera" in the "abadi" of the village in favour of defendants 4 to 6.

The plaintiff claimed to have attained majority on 19th December 1930, and the present suit was brought on 18th December 1933 by which he claimed possession of the house and the share in village Bahrai on the allegations that after executing the deed of relinquishment, Ex. 5, his father Gur Saran Lal had no right to make any transfers of the property, the subject of the relinquishment, and that the decree passed in favour of Gur Saran Lal in 1924 was obtained by him in collusion with the plaintiff's guardian "ad litem" Mt. Lalta Kuar. The suit was contested by defendants 3 to 8 on various grounds which will appear from the issues framed by the Court below, which are as follows :

(1) (a) Did Jia Lal execute a will in favour of defendant 1 as alleged ? (b) If so, is the property self acquired property in the hands of defendant 1 on account of this will or by adverse possession ? (c) Is the property in suit ancestral in the hands of defendant 1 ? (2) Is the deed of relinquishment valid and genuine and was it acted upon ? (b) Is it invalid on account of failure of consideration as alleged ? (3) Does the deed of relinquishment amount to a deed of family settlement as alleged ? If so, its effect? (4). Was the deed of relinquishment fictitious and executed to defraud the creditors ? (5). Is the deed of relinquishment in suit, being in favour of a minor, enforceable ? (6) Whether the transfers in favour of defendants 3 to 8 were for antecedent debts and legal necessity as alleged ? (b) If so, its effect ? (c) If not, do they bind the share of defendant 1 ? (7) Does the deed of relinquishment not operate as a transfer of property ? (8) Did Mt. Lalta Kuer (defendant 2, obtain any permission from the District Judge, Cawnpore, for sale of 2 annas share ? (b) If so, is the permission not operative in respect of sale to Mangal Kurmi ? (c) Was there any final permission of the District Judge, if not, its effect? (9) Was the decree dated 4th August 1924 in the Court of Munsif South obtained by collusion and fraud as alleged and does it not bind plaintiff. (10). Are defendants 3 to 8 bona fide transferees for value and are they protected by S. 41, Transfer of Property Act ? (11) Is the claim within time? (12) Is the suit bad for multifariousness ? (13) Is the suit not maintainable in this Court ? (14) To what relief and mesne profits, if any, is plaintiff entitled and on payment of what amount, if any ?

The suit was eventually dismissed by the trial Court mainly on findings on issues 2 to 5 and 9; hence the present appeal by the plaintiff. The chief point argued before us was whether the deed of relinquishment, Ex. 5, was valid or not. On this point the learned Civil Judge appears to have been confused in his mind and has given conflicting findings. At one place he says :

> All this shows that this deed of relinquishment was held out to be a genuine transaction and was acted upon.

He then goes on to refer to evidence showing that the transaction was acted upon. At another place he remarks

> Defendant 1's subsequent transactions show that he treated this relinquishment as a waste paper and never acted upon it ;

and again remarks :

> The deed of relinquishment was not treated as genuine,

and finally :

> Although apparently the deed of relinquishment was held out to be a genuine transaction, its main object and effect was to defraud the creditors.

On these grounds the learned Civil Judge has held the relinquishment to be invalid.

We entirely disagree with the learned Judge if he meant to hold that the relinquishment was not intended to be acted upon, but was to remain a paper transaction. It is not denied that mutation was effected in favour of the plaintiff in pursuance of the relinquishment. Ex. 25, dated 30th April 1918, is a "mukhtarnama" that defendant 2 executed soon after the execution of Ex. 5 in favour of certain persons in order to manage the property on behalf of her ward, the present plaintiff. That Lalta Kuar made an application to the District Judge (Ex. 22) for being appointed as guardian of Sundar Lal, minor, and that this application of hers was granted by the District Judge (*vide* Exs. 6 and D.9), are facts that clearly go to show that Lalta Kuar really intended to manage the minor's property. Then Exs. 20 and 21 show that in 1920 partition of the share, the subject of relinquishment, was applied for in the Revenue Court, and was effected by a separate "patti" being named after Sundar Lal, plaintiff. Ex. 23 is Lalta Kuar's application to the District Judge dated 31st May 1921, asking for permission to sell a portion of the minor's property to pay off the debts left by his grandfather, and Ex. 7 is the deed of sale executed by her in pursuance of the permission granted to her, in favour of Mangli Prasad and others. Ex. 24 is a decree for profits dated 28th March 1922, obtained by Lalta Kuar as guardian of the minor plaintiff against co-sharers of the village. Ex. 26 is a receipt dated 24th July 1923, which shows payment of Gur Saran's debts by Sundar Lal. Then, there is oral evidence also to prove that the deed of relinquishment was acted upon. P. W. 2 states that he paid rent of his house, which belonged to the family, first to Gur Saran Lal, but after the execution of the deed of relinquishment by him, to Lalta Kuar. P. W. 8, who is a zemindar, and was one of the mukhtars appointed by Lalta Kuar, proves the possession of Lalta Kuar. P. W. 9 also states that Lalta Kuar came into possession of the property after the deed of relinquishment was executed by Gur Saran Lal. We are therefore of opinion that it is totally wrong to say that the relinquishment was never intended to be given effect to, or was never acted upon.

The next question is whether it was made to defraud the creditors, and is therefore invalid. In the first place, there is no evidence on the record to show who were the creditors whom Gur Saran Lal intended to defraud by executing Ex. 5. In the second place, the stipulation in the relinquishment that Gur Saran Lal's debts would be paid by Sundar Lal by itself shows that there was no intention on the part of the executant to defraud his creditors. In the third place, the relinquishment of his rights by a co-parcener in favour of another co-parcener cannot in our opinion be strictly said to be a transfer within the meaning of S. 53, T. P. Act. In the fourth place, there is evidence to show that two houses were left intact even after the relinquishment of the share in village Bahrai in favour of the plaintiff. The learned counsel for the respondents argues that there was no documentary evidence in proof of the fact that the family owned any house besides the share in suit, but the evidence not only of the plaintiff's witnesses but also of D. W. 2 and D. W. 8 leads us to believe that two houses, the value of which according to the evidence was Rs. 15,000 and Rs. 20,000 respectively, remained in the family after the execution of the relinquishment by Gur Saran Lal. In all these circumstances, we are not prepared to hold that the relinquishment was executed for the purpose of defrauding any creditors.

It was argued on behalf of the respondents that evidence of the plaintiff's own witnesses shows that it was with a view to protect the property from the creditors that Gur Saran Lal was prevailed upon to execute Ex. 5, but even so, it cannot be held that the relinquishment was executed to defraud any creditors. In 11 I A 164,[1] in which the head of a joint family, Mata Dayal, made a gift of his property in favour of Satrujit, son of his only son Udey Narain, in order to save the property from being wasted by Udey Narain, who had been living a profligate life, their Lordships of the Judicial Committee, in a suit brought by the creditors to set aside the gift on the ground that it was made merely to defeat the rights of the creditors, and was only a paper and fraudulent proceeding, quoted with approval the following remark of the High Court :

> We see no reason to doubt that the gift was intended to take effect, and that it did as a matter of fact take effect. The proper and necessary mutation of names in the revenue registers was at once effected, in the name of Satrujit Narain

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[1] Rai Bishen Chand v. Mt. Asmaida Koer, (1884) 6 All 560=11 I A 164=4 Sar 512 (P C).

> Singh; and Mt. Asmaida asserted her position as guardian and manager for the minor Satrujit Narain Singh, obtaining a certificate under Act 27 of 1860, and she dealt with the estate in his name and at his death she succeeded him as heir, and had mutation of names made in her favour, and dealt with the property in her own right.

and themselves remarked :

> The second point made at the bar was that which forms the main discussion below, viz. that the transaction was a fraud upon creditors. On this point, their Lordships concur with the High Court. That it was intended to save the ancestral property from being wasted by the vices and extravagance of Udey Narain is openly avowed on the face of the deed. But such an intention is not fraudulent. It may be carried into effect by honest means. And people who mean to effect such a design by fraud are not likely to put it in the forefront of an instrument which must be registered, which may easily be discovered by persons interested to inquire about the property, and to which attention is likely to be drawn by the consequent mutation of names after public notice and a change of management.

These remarks fully apply to the case before us, and we see no reason in this case to hold that the relinquishment in question was fraudulent or invalid. We therefore decide the question in favour of the appellant, and in view of this finding it is unnecessary to consider the argument that Ex. 5 evidenced a family settlement also. The next question is what is the effect of the decree of 4th August 1924, obtained by Gur Saran Lal on the admission of the plaintiff's guardian "ad litem" Lalta Kuar. Issue 9 in the case was as follows :

> Was the decree dated 4th August 1924, in the Court of the Munsif South obtained by collusion and fraud as alleged and does it not bind the plaintiff ?

The learned Civil Judge purports to decide this issue in the negative, but it is impossible to answer both parts of this issue either in the negative or in the affirmative, for if there was fraud or collusion the decree cannot, of course, bind the plaintiff. Probably the learned Judge meant to decide the first portion of the issue in the negative, and the latter portion in the affirmative, though he does not say so; but there can be no doubt, to our minds, that the decree in question was not obtained by Gur Saran Lal fairly and honestly. We are not prepared to believe the evidence produced on behalf of the plaintiff to prove that Gur Saran Lal practised fraud on his old mother and got an admission of the claim signed by her without her knowledge, but at the same time it appears clear to us that the old lady could not have admitted the claim of defendant 1 to the detriment of her own ward unless her maternal feelings towards her son got the better of her. We are perfectly convinced that her affection for her son Gur Saran Lal coupled with the latter's importunities, prevailed upon the old lady to sacrifice the interests of her grandson to the desires of her own son, and that this being so, the decree dated 4th August 1924 should not be allowed to prejudice the plaintiff's rights under the deed of relinquishment, Ex. 5. We decide this point also in favour of the appellant.

The next important question is whether the two annas share was sold by Lalta Kuar to Mangli Prasad and others under any valid permission of the District Judge. Various technical objections were raised to the order of permission passed by the District Judge, and to the sale deed executed in pursuance thereof, but we are of opinion that the sale in question must be deemed to have been made with the permission of the District Judge as required by law. It was said that the learned District Judge made no inquiry as to whether or not a sale of the minor's property was necessary, but S. 31, Guardians and Wards Act, does not make the holding of any inquiry essential. It is also true that while in her application for permission Lalta Kuar mentioned one debt, the sale deed purports to have been executed to pay off totally different debts, and it is also true that while the proposal was to sell the property for a sum of Rs. 1193 the sale was actually made for Rs. 4800; but none of these facts shows that the interests of the minor were prejudiced in any manner by the sale. We decide this point against the appellant.

The question of limitation was also raised before us by the learned counsel for respondent 7, and it was said that the suit was barred by time. We do not however agree with him. The argument is that the evidence produced by the plaintiff in proof of his age is so conflicting that no reliance can be placed on any piece of that evidence, and that as the suit was brought on the last day of limitation, namely just within three years after the plaintiff attained his majority, the suit should be held time-barred. No doubt the horoscope filed by the plaintiff does not appear to have been proved and the copy of the school register and of the guardianship certificate conflict with each other as to the date of the plaintiff's birth, but we agree with the learned Civil Judge in holding that there is sufficient oral evidence to prove that the plaintiff was born so as to come of age on 19th December 1930.

We may here dispose of another objection raised by the learned counsel for respondents 3 to 5, which was in fact in the nature of a preliminary objection. It appears that though the plaintiff's suit was dismissed by the Court below not only in respect of the share of village Bahrai, but also about the house of Purwa Chheda Khawas, Lucknow, the plaintiff has brought this appeal about the share of the village only, and has submitted to the lower Court's decree about the house. The village of Bahrai is in the Cawnpore district, and it was on account of the suit being both in respect of a share of that village and of a house situate in Lucknow that the suit was filed in the Court of the Civil Judge, Malihabad. The learned counsel for the respondents argues that owing to the abandonment of his claim about the house by the plaintiff, the present appeal relates to property which does not lie within the jurisdiction of this Court, and that therefore this Court has no jurisdiction to hear the appeal. No doubt the village in question lies beyond the jurisdiction of this Court, but as the suit was rightly filed under the law in the Court of the Civil Judge, Malihabad, an appeal against his decree in the suit can only be heard by this Court, and not by any other Court, so that the relinquishment of his claim about the house by the plaintiff does not in our opinion affect the jurisdiction of this Court to hear the appeal.

The appeal is therefore partly allowed, and the plaintiff's suit decreed in respect of the property in suit, together with mesne profits, excepting the house situate in Purwa Chheda Khawas in Lucknow, and the share of village Bahrai obtained by respondents 3 to 5 by means of the pre-emption decree against the vendees of Lalta Kuar. The lower Court's decree is modified to this extent. Parties will pay and receive costs in proportion of their failure and success in both the Courts. The mesne profits due to the plaintiff will be determined in the execution department.

**B.D./R.K.** *Order accordingly.*

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## * A. I. R. 1938 Oudh 69

ZIAUL HASAN AND HAMILTON JJ.

*L. Sri Ram and others—Defendants—* Appellants.

v.

*Mohd. Abdul Rahim Khan and another, Plaintiffs and another, Defendants* — Respondents.

First Appeals Nos. 56 and 60 of 1935, Decided on 10th December 1937, against order of Sub-Judge, Hardoi, D/. 31st January 1935.

**(a) Evidence Act (1872), S. 76—Officer not proved to be authorized to use seal—Absence of seal in copy does not make it uncertified if other formalities are duly carried out.**

Unless it is proved that the officer having custody of a public document is proved to have been authorized to make use of a seal, the absence of a seal on the certified copy does not make it uncertified when the other necessary formalities have been duly carried out. [P 71 C 2]

**(b) Will—Execution — Admission of execution and of fulfilment of formalities recorded in registration endorsement is proof of execution.**

The original of a will was not forthcoming but a certified copy of the copy made on the register of the Registration Office was produced. The admission of the execution and of fulfilment of all formalities was recorded in the registration endorsement :

*Held* that excluding S. 90, Evidence Act, the will was validly executed : *A I R 1929 Oudh 193 and A I R 1917 Oudh 248, Rel. on* ; *A I R 1935 P C 132, Expl.*; *A I R 1936 Oudh 87, Ref.* [P 72 C 1]

**(c) Will—Construction—Life-estate or absolute estate—Wife and daughter declared as rightful heirs—Terms giving wife absolute estate followed by same terms applied to daughter with addition of generation after generation—Wife held given only life-estate and daughter absolute estate.**

In his will the testator referred to his wife and to his daughter as rightful heirs entitled to the estate and concerned with it before and after the death of the testator. Later, terms were applied to the wife which by themselves would denote an absolute interest but after that the same terms were applied to the daughter with the addition of "generation after generation":

*Held* that though the terms used about the wife if taken by themselves might well denote the grant of an absolute interest, the word "malik" and similar expressions cannot always be taken to indicate an absolute interest. The whole document must be considered and not only that, but the surrounding circumstances when one finds the same terms used in the case of more than one legatee. Hence it would not be said that two successive absolute estates were conferred and the second was void on the ground of repugnancy. The wife was given only a life-interest and absolute interest was given to the daughter: *A I R 1931 Oudh 358, Rel. on.* [P 72 C 2 ; P 73 C 1]

**(d) Oudh Estates Act (1 of 1869), S. 8, List 2—Holders of primogeniture sanad included in List 2—Effect.**

Where the holders of primogeniture sanads issued before Act of 1869 have elected to be included in List 2, they must be deemed to have rejected the rule of succession by primogeniture : *A I R 1916 Oudh 50, Foll.* [P 73 C 2]

**☆ (e) Mahomedan Law—Succession—Hanafi law—Impartible estate — Mother as sharer takes whole estate to exclusion of collaterals.**

The mother is a sharer under the Hanafi law. Collaterals who are residuaries do not get anything which may be left till after the mother as sharer has had her share ; and if the estate is impartible, her share under Mahomedan law is increased to the whole by the impartibility of the estate. [P 74 C 2]

**(f) Will—Construction—*L* to be owner in possession and manager but with no power to sell or mortgage—In absence of *L's* issue, *K* to be owner and in proprietary possession generation after generation with same limitations as *L* — Death of *L* without issue in lifetime of testator—Codicil—*K* to obtain possession and be manager and enjoy profits with no power to sell or mortgage—*K* and his heirs to make certain payments mentioned in will —In absence of descendants of *K*, Government to take management of estate—*K's* sons held did not get absolute estate.**

Under a will, *L* was to be an owner in possession and manager of the estate but her powers were to be limited as she was not to have power to sell, mortgage or transfer the estate, and if she did not manage the estate properly, the Government was to take it under the Court of Wards and only give *L* sufficient maintenance. *L's* child, if any, was to be an owner in possession with similar limitations. In the absence of such issue, *K* was to become the owner and be in proprietary possession generation after generation with the same limitations. He should continue to benefit from the profits like a proprietor but in his case too, Government was to interfere in case of mismanagement and give him sufficient maintenance and this arrangement was to continue generation after generation. Certain payments of a religious nature were to be made generation after generation. On account of the death of *L* during the lifetime of testator, a codicil was added to the will. Under it *K* was to obtain possession of the estate and be its manager and besides the estate he was to be owner of all the other property of the testator. By managing the estate excellently, he should continue to enjoy its profits for his lifetime. In dealing with the estate he was to have no power to make a transfer of it by sale or mortgage; *K* and his heirs were to make certain payments as mentioned in the will. As long as any of the descendants of *K* survived (*nasl se koi baqi rahe*) the above arrangement should continue, otherwise the Government should take the estate under its own management :

*Held* that the sons of *K* did not get an absolute estate under the will and codicil and as such they could not question a mortgage by their father or any sale resulting from that mortgage. [P 77 C 1]

**(g) Mahomedan Law—Waqf—Profits to go to holy places and poor in absence of persons entitled to same—No valid waqf.**

Where the words used in the will expressed that if there was no one entitled to the profits, the poor and the holy places might just as well get the profits as anyone else :

*Held* that this might have been a pious wish on the part of the testatrix but it did not constitute a valid waqf : *22 Cal 619 (P C), Rel. on.* [P 77 C 1]

**(h) Mahomedan Law — Life Estate — Validity.**

A life-estate can be validly created under Mahomedan law when such an estate is immediately followed by an absolute estate : *A I R 1938 Oudh 51, Foll.* [P 77 C 1]

Pearey Lal Banerji and K. N. Tandon— *for Appellants.*

H. H. Zaidi and Naimullah — *for Respondents 1 and 2.*

**Judgment** —This judgment disposes of two appeals No. 56 of 1935 by the defendants and No. 60 of 1935 by the plaintiffs both being against the decision of the Civil Judge, Hardoi, in Suit No. 47 of 1933 decided on 31st January 1935. The plaintiffs, Mohammad Abdul Rahim Khan and Mohammad Abdul Halim Khan, are the sons of Nawab Abdul Karim Khan, defendant 11, and the other defendants are decree-holders, defendant 11 being their judgment - debtor. The plaintiffs have claimed a declaration to the effect that the defendants-decree-holders have no right to get certain villages including Mankapur Baneyari, Newada and Paperia in district Hardoi sold in execution of a decree on a mortgage executed by defendant 11. The suit succeeded as regards the villages named above, but not others with which we are not concerned in this appeal, though not to the extent claimed because the sale was not held binding on the plaintiffs only after the death of their father.

There are numerous points involved in this appeal with which we shall deal in due course, but to make the main point clear we may here state that the case of the plaintiffs is that Mt. Amanat Fatima had an absolute title to the estate which included these villages and by a will modified by a codicil she left the corpus of the property to the plaintiffs although during his lifetime their father was made owner and manager of the property without the right to transfer, mortgage or sell it. They allege in the alternative that she created a waqf of the property. Hence whichever view be held they contend that these three villages cannot be sold in execution of the mortgage executed by their father. The contesting defendants deny the waqf and allege that even if Mt. Amanat Fatima had an absolute title, which they do not admit, by that will and codicil she made the father of the plaintiffs full owner and not the plaintiffs or she tried to create a succession of life-estates and in either case the plaintiffs cannot question the transfer and subsequent sale. Although presuming for the moment that no waqf has been created, this point is most important because if the plaintiffs fail here on a construction and interpretation of the will everything that chronologically precedes that will becomes immaterial, we think it preferable to proceed in chronological order. In 1869 this estate which is known as Basitnagar was a Taluqdari estate in the possession of Nawab Dost Ali and was entered in lists 1 and 2 under S. 8, Oudh Estates Act, that is to say it was an impartible estate but this did not mean that the holder must be a male. The defendants however allege that it was held under a primogeniture sanad and they still do so though the decision of the learned Civil Judge on this point was against them. Counsel for the plaintiffs having stated that he was not aware if any primogeniture sanad had been given, the contesting defendants called upon defendant 11, father of the plaintiffs, to produce it. On this, the original sanad was produced and it was said that no primogeniture sanad could be found.

Consequently the defendants (we omit the word "contesting" here and subsequently) were entitled to produce other evidence and did so. There are Exs. B.92 to B.96 in the printed book of rejected documents which show that all possible efforts were made to find a copy of an amended sanad and all that was found was Ex. B.93, an extract from a list of sanads issued by the Chief Commissioner to Taluqdars in Oudh and a copy of the original sanad. Ex. B.93 shows that the original sanad was dated 11th October 1860 and the revised sanad was dated 14th November 1861. There is a column showing the difference between the original and the revised sanad to the effect that in case of intestacy, the estate shall descend to the nearest male heir according to the rule of primogeniture and the exact words used are those to be found in the primogeniture sanad. The remarks column contains an entry that this clause has in every case been added with the consent of the Taluqdar. This document has been rejected by the learned Civil Judge who has also held presumably because he rejected this exhibit, that there was not the least evidence that the Taluqdar gave his consent to the proposed revision of the original sanad. The reason given by the learned Civil Judge for rejecting Ex. B.93 is that it is an uncertified copy but unfortunately he has not stated on what ground he found it to be uncertified. We have asked counsel for the plaintiffs if he could throw any light on this and he suggests (but it is only a guess) that it may be because there is no seal on the copy. Undoubtedly under S. 76, Evidence Act, such a copy to be certified "shall be sealed whenever such officer is authorized by law to make use of a seal", but there is no evidence to the effect that the keeper of the records of the Government of India is so authorized and we do not think that we can make such a presumption when other necessary formalities have been duly carried out. We therefore cannot agree with the learned Civil Judge that the copy is uncertified and we admit it in evidence. Once this document is admitted, we can see no justification for the view that the primogeniture sanad was not accepted by Nawab Dost Ali Khan, the then Taluqdar of the estate.

In 1870 the Taluqdar of this estate was Husain Ali Khan who died in the following year leaving a widow, Mt. Amanat Fatima, and a daughter, Latif-un-nissa. On 25th December 1870 he executed a will, Ex. 6, which was registered two days later and the plaintiffs say that this will gave an absolute estate to Mt. Amanat Fatima while the defendants say that this will is not proved, and secondly that it gave only a life-estate to Amanat Fatima and a vested interest to the daughter Latif-un-nissa. The original of the will is not forthcoming, but there is a copy made on the register of the Registration Office of which a certified copy has been produced in this suit. The objection of the defendants is that in the absence of the original, the presumption of the genuineness of the original under S. 90, Evidence Act, does not arise and no evidence has been adduced to prove the execution of that will by the alleged executant. 1935 O W N 759[1] is authority for this legal point but this applies only to the will and not to the certificate by the Sub-Registrar. It has been held in 1935 O W N 1376[2] that a Court can make presumption of fact in such a case when such presumption is justified by the proved facts and circumstances of the case. As regards the value to be attached to the contents of the certificate we may refer to 6 O W N 169[3] where stress was laid on the certificate which was to the effect that the executant, a pardanashin lady, had heard and understood the document word for word and admitted it in a loud voice. In 20 O C 18[4] it was held that the admission of execution by the executant recorded in the registration endorsement can be accepted as proof of execution. The endorsement on Ex. 6 is to the effect that Nawab Muhammad Husain Khan having heard the contents word for word verified it and two of the attesting witnesses identified the executant and witnessed the deed and the executant himself as well as these attesting witnesses were personally known to the Registering Officer.

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[1] **Basant Singh v. Brij Raj Saran Singh, (1935) 22 A I R P C 132=156 I C 864=62 I A 180=57 All 494=1935 O W N 759 (P C).**

Thus before the Registering Officer, there was not merely admission of execution but of the fulfilment of the formalities required to make this will valid. Apart from this, there is the fact that in the will of Amanat Fatima Ex. 7 and its codicil Ex. 8, the will Ex. 6 is mentioned, and it was produced at the mutation proceedings which took place on the death of Amanat Fatima as is shown by Ex. 15 and also in a suit in 1908. The documents filed about this suit are Exs. 23, 22, B-89, B-90, B-19, B-20, 26, B-21, 25, that is to say, some have been filed by the plaintiffs and some by the defendants of the present suit. That suit was filed by persons who, it is argued by counsel for the defendants-appellants, were members of the family with a good claim to be heirs of Mt. Latifunnissa, daughter of Muhammad Husain Khan. We consider on this evidence, excluding S. 90, Evidence Act, that the will of which Ex. 6 is a copy was validly executed by Muhammad Husain Khan and we will now consider what interest it conferred on Mt. Amanat Fatima. The relevant parts of this will, in the order in which they appear in it are that Amanat Fatima, the wife, and Latifunnissa the daughter, are the rightful heirs concerned with the estate and with moveable and immovable property, etc. during the life and after the death of the testator, that after the death of the testator, and even in his lifetime in case he ceases to be in possession of his senses (for he suffered from epilepsy) the wife should have proprietary possession over all the property and enter into proprietary possession and she should be entitled to and be owner of all the property and take the same care for the payment of debts of the estate as the testator. If a son should be born to the testator from his wife he should be entitled to the estate on attaining majority, and until that majority, the wife should supervise and manage the estate and remain in possession "bataur-e-malikana," as a proprietor would. Should no son be born, Latifunnissa was to be owner of and entitled to the whole estate, etc. generation after generation, after her mother. The terms used about Mt. Amanat Fatima if taken by themselves might well denote, as is urged by the plaintiffs, the grant of an absolute interest, but the word 'malik' and similar expressions cannot always be taken to indicate an absolute interest, and we would refer in this connexion to 8 O W N 566[5] where at pp. 572-ff other authorities have been referred to. The whole document must be considered and not only that but the surrounding circumstances when one finds the same terms used in the case of more than one legatee.

The first relevant passage in this will is where the testator refers to his wife and to his daughter as entitled to the estate and concerned with it before and after the death of the testator, and here both the wife and the daughter are placed on exactly the same level. Later, terms are applied to the wife which by themselves would denote an absolute interest but after that the same terms are applied to the daughter with the addition of 'generation after generation.' Had the intention of the testator been to give everything to his wife absolutely, it was unnecessary to mention the daughter at all while the terms used in the case of his wife may have been made strong to safeguard the estate for both wife and daughter against the claim of some remote male member of the family. At the time the will was executed, the daughter was about 14 and unmarried and at the very beginning of the will she was recognized as an heir, consequently the obvious way of safeguarding her without causing prejudice to the wife was to give the wife a life-tenure only and a vested remainder to the daughter and we do not see any other, or at least any better, way of treating both wife and daughter as heirs, a consideration so important in the eyes of the testator that he placed it in the forefront of the will. If a son was born the position would be very different, and it is natural that not even a life-estate should be given to the widow and to this we can attribute the terms applied to the wife in this case without coming to the conclusion that the stronger words used in the absence of a son were meant to confer an absolute estate on the widow. We are therefore unable to agree with the learned Civil Judge that two successive absolute estates were conferred and the second is void on the ground of repugnancy and we hold that Mt. Amanat Fatima was given only a life-interest and absolute interest was given to the daughter Latifunnissa.

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[2] Shamsunnissa Bibi v. Ali Asgar, (1936) 23 A I R Oudh 87=159 I C 760=1935 O W N 1376.

[3] Hanuman Sahu v. Abbas Bandi Bibi, (1929) 16 A I R Oudh 193=120 I C 387=4 Luck 452=6 O W N 169.

[4] Ajudhia Prasad v. Jagannath Bakhsh Singh, (1917) 4 A I R Oudh 248=38 I C 605=20 O C 18.

[5] Swami Dayal v. Ramadhar, (1931) 18 A I R Oudh 358=134 I C 865=8 O W N 566=6 Luck 715.

Mt. Latifunnissa died childless and intestate before Mt. Amanat Fatima and we have next to decide to whom her interest passed and with what limitations. Under S. 21, Oudh Estates Amending Act 1910, S. 7 of the Amending Act is made retrospective. There is a proviso in S. 21 which however we need not consider immediately. S. 7 gives to any person mentioned in Cls. (1) and (2) of S. 13-A, Oudh Estates Act, who is a legatee, the same rights and powers in regard to the estate as a testator and such legatee holds the estate subject to the same conditions and to the same rules of succession as the testator. Mt. Latifunnissa would then have to be under S. 13-A (1) a daughter who would have succeeded to the estate under the provisions of the Act had Muhammad Husain Khan died intestate or under S. 13-A (2) a person who might in the absence of other heirs have succeeded to the estate. Actually as daughter she comes under S. 13-A (1). If the acceptance of the primogeniture rule which acceptance took place in 1861 still held good in 1869 then Latifunnissa was not the heir had Muhammad Husain died intestate, but it was held in 18 O C 289[6] that such a sanad was superseded by the Oudh Estates Act of 1869. It was stated there:

> We find in list 2 the names of many Taluqdars to whom primogeniture sanads had been issued and who, if their choice had been fettered by the terms of their sanads would necessarily have been entered in list 3.
>
> In such cases it appears to us that the holders of primogeniture sanads who elected for inclusion in list 2 must be deemed to have rejected, as they were entitled to do, the rule of succession laid down in their sanads in favour of the rule of succession which characterizes estates included in list 2.

The position therefore is that when Muhammad Husain died, the estate was impartible and in the absence of any custom excluding females Latifunnissa was a possible heir although her mother as widow would have come before her had Muhammad Husain died intestate. Consequently Latifunnissa held the estate on the same terms as Muhammad Husain and on her dying intestate Amanat Fatima if the next heir also held the estate on the same terms and her power to bequeath was limited only by the Oudh Estates Act and not by Mahomedan law. Here the Proviso to S. 21 of the Amending Act has to be considered. But for the retrospective effect of S. 7, Latifunnissa not being the immediate heir of her father when his widow was still alive the estate would have gone out of the Act, but thanks to it, it remained in the Act, provided that the rights possessed by the heir Amanat Fatima in 1910 which he would have been entitled to retain but for the passing of the Amending Act were not affected by the will and codicil executed by Amanat Fatima. This heir, by name Abdussamad, assented to the will and codicil under which in 1906 Abdul Karim Khan, defendant 11, got possession and therefore in 1910 he had no rights which he was entitled to retain. Consequently, the power of bequest of Amanat Fatima was limited only by the Oudh Estates Act and not by any other rule of Mahomedan law. If therefore Amanat Fatima was the heir of Latifunnissa under the Act the way is clear for the plaintiffs up to the next question for decision which is whether by the will and codicil they were given an absolute estate.

We will therefore consider next who was the heir of Latifunnissa. There are three possible classes of heirs to Latifunnissa: (a) her husband if any, (b) her mother, (c) collaterals on her father's side;

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[6] Ghisa Singh v. Gajraj Singh, (1916) 3 A I R Oudh 50=33 IC 371=18 OC 289=3 OLJ 45.

and we shall consider first (a). Mt. Latifunnissa married, was divorced and married again one Mirza Suraya Jah, so we are only concerned with the second marriage. (After considering the evidence, His Lordship came to the conclusion that the validity of this marriage was not proved and proceeded.) We are then left with the choice between the mother and kindred of the father. Admittedly they exist in the shape of at least one descendant of one Chand Khan—*see* P. W. 13—but it is disputed whether there is another branch namely Inayat Ali and Hidayat Ali who according to the defendants are grandsons of one Khadim, brother of the grandfather of Muhammad Husain Khan, father of Latifunnissa.

On behalf of the appellants our attention has been called to Exs. B.32, B.18 and others which show that the claim of Inayat and Hidayat to be members of the family was accepted by the Taluqdars' Association and authorities. On the other hand, counsel for the plaintiffs has laid stress on Ex. P W 4/1, a tamiknama executed by Himayat Ali Khan where he describes himself as son of Khadim Ali Khan son of Ghulam Ahmad Khan of Shahjahanpur and Khadim Ali Khan is referred to as "foster brother" of Bande Ali Khan who is given in the pedigree at p. 25, Vol. 1, of the printed book as grandfather of Dost Ali Khan, the taluqdar in 1869. Inayat Ali Khan is mentioned there as son of Mt. Husain Bibi whom Himayat Ali Khan proposed to marry, while in the pedigree on p. 25 Inayat Ali Khan and Hidayat Ali appear as brother sons of Himayat Ali Khan. We are not called upon to decide the relative distance from Latifunnissa of various collaterals of her father, but only whether her mother or someone among such collaterals is her heir if the rule of primogeniture does not apply and so we do not propose to decide whether the descendants of Khadim Ali Khan are members of the family or not. No custom has been proved to exist excluding females in this family. Counsel for the plaintiffs has brought to our notice 11 I A 51,[7] 20 I A 77[8] and 32 I A 113[9] to establish his contention that a husband is excluded and that degree prevails over line and where degrees are equal the line has to be looked to. These cases are all about the Birwa Mehnon taluqa and on the facts the husband did not come into consideration as such. The question of line and degree was between collaterals and we do not think it can be a guide in the present case. We consider that no particular custom having been proved we have to go back to Mahomedan law bearing in mind the fact that the estate is impartible.

Collaterals come in as residuaries and residuaries take what is left if anything is left and if the estate is impartible nothing is left, for he who takes takes all. The mother is a sharer under the Hanafi law which governs this family and residuaries do not get anything which may be left till after the mother as sharer has had her share, but the estate being impartible, we think that the necessary result is that her share under Mahomedan law is increased to the whole by the impartibility of the estate. We therefore find that should the rule of primogeniture be held not to apply, Mt. Amanat Fatima was the heir of Latifunnissa to the whole estate. We have therefore come to the last point, namely the title conferred by the will Ex. 7, read with Ex. 8, which is a codicil. The will, Ex. 7 was executed on 27th March 1896 when Latifunnissa was still alive and in it Amanat Fatima describes herself as an absolute owner and in our opinion incorrectly.

Latifunnissa is to be an owner in possession and manager of the estate, but her powers are to be limited as she is not to have power to sell, mortgage or transfer the estate, and if she does not manage the estate properly, the Government is to take it under the Court of Wards and only give Latifunnissa sufficient maintenance but she is to have some minor dues and possession over groves. Latifunnissa's child, if any, is to be an owner in possession with similar limitations. In the absence of such issue defendant 11 shall become the owner and be in proprietary possession generation after generation with the same limitations. He shall continue to benefit from the profits like a proprietor but in his case too Government is to interfere in case of mismanagement and give him sufficient maintenance and this arrangement is to continue generation after generation.

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[7] Achal Ram v. Udai Partab Addiya Dat Singh, (1884) 10 Cal 511 = 11 I A 51 = 4 Sar 507 (P C).

[8] Narindar Bahadur Singh v. Achal Ram, (1893) 20 Cal 649=20 I A 77 (P C).

[9] Lal Achal Ram v. Raja Kazim Husain Khan, (1905) 27 All 271=32 I A 113=8 O C 155=8 Sar 772 (P C).

Certain payments of a religious nature are to be made generation after generation. If the estate is taken over by the Court of Wards, one third of the profits is to go to charity and from the remaining two-thirds a certain spiritual preceptor of the testatrix is to get Rs. 300 a year and the person in possession of the estate is to get maintenance and the balance shall be used to purchase a property. This arrangement is to continue so long as there are descendants of Abdul Karim Khan, defendant 11. (In the translation the word "rule" occurs but as the original word is "karrawai" a better translation is "arrangement" or "procedure".) Otherwise, after deducting usual expenses and the allowance to the spiritual preceptor, one-third of the profits is to be sent to Mecca, one-third to Medina and one-third is to be given in charity to the people of Oudh, the distribution to be made under the supervision of Government. All that we have to say about this will before considering also the provisions of the codicil is that the lady had rather unusual ideas as to what duties a Government should undertake at the request of a private individual and consequently her ideas as to what interests she might create might well be equally unorthodox. Counsel for the plaintiffs asks us to construe this will as conferring a life-interest on Latifunnissa and should no child be born to her, an absolute interest on Abdul Karim Khan with repugnant limitations which therefore would be invalid.

Exhibit 8 is the codicil dated 2nd June 1897. First the need for a codicil is explained, namely that the arrangement in the previous will has been partially upset by the death without issue of Latifunnissa. Abdul Karim is then to obtain possession of the estate and be its manager and besides the estate he is to be owner of all the other property of the testatrix. The word translated "besides" is "alawa" in the original which could be used to mean "in addition to" or to make a difference between the estate and other property. It is next stated that by managing the estate excellently, Abdul Karim should continue to enjoy its profits for his lifetime. In dealing with the estate he was to have no power to make a transfer of it by sale or mortgage. The payment of Rs. 300 yearly to the spiritual preceptor is repeated and is to be made not merely by Abdul Karim but also by his executors and representatives. If any of the above make defaults in payment then the spiritual preceptor for the time being shall have the power to realize the amount through Government.

Abdul Karim Khan and his heirs are to pay Rs. 50 a year for certain religious ceremonies, a provision which also occurs in the earlier will. As long as any of the descendants of Abdul Karim survives (nasl se koi baqi rahe) the above arrangement should continue, otherwise the Government should take the estate under its own management and after making those payments of Rs. 300 and Rs. 50 a year should pay one-third of the profits to Mecca, one-third to Medina and one-third to poor Mahomedans of Oudh.

Learned counsel for the plaintiffs asks us to construe this codicil as putting Abdul Karim in the place held by Latifunnissa in the will and the heir of Abdul Karim in the place of Abdul Karim, that is to say as giving a life-interest to Abdul Karim and an absolute interest to his immediate heir because repugnant limitations would be invalid.

This presumes that in the will itself Abdul Karim is intended to be an absolute owner so that limitations are to be rejected as invalid. Apart possibly from the use of the words "generation after generation" it is difficult if not impossible to find that the testatrix intended to give him a greater interest than she intended to give to Latifunnissa and in the case of Latifunnissa the birth of a child would bring in the same "generation after generation" which appears in the case of Abdul Karim Khan.

Further in the case of Abdul Karim it does not appear that the testatrix stopped there and did not look beyond but merely wanted to fetter him with certain conditions. She seems to have considered him merely as the first of a long series of persons who were to have just the same powers as he, no more and no less, with even less than a life-estate for, in case of mismanagement Government was to step in and give the possessor for the time being maintenance which was to be sufficient and no more.

When we come to the codicil we find the intentions of the testatrix even more difficult to undertsand. Abdul Karim apparently, at any rate as regards the estate, is created manager and not owner and is given no power to transfer by sale or mortgage while in the will Latif-unnissa and he were to be owners in possession but without power to sell, mortgage or transfer. The classes of forbidden transfers are apparently cut down in the codicil and this does not appear to be merely an accidental omission, for, we find the words "executors and representatives", liable to pay the Rs. 300 to the Sajjada Nashins or spiritual preceptors. This payment is to be made out of the profits of the estate and not of other property so that the testatrix envisaged a bequest and possibly even a gift of the estate by Abdul Karim. If the intention of the testatrix was to give an absolute estate to the immediate successor of Abdul Karim by inheritance we would expect to find some mention of this heir. The word "heirs" does, it is true, appear in one place but it obviously means the descendants of Abdul Karim so long as there are any. It is used in connexion with the payment of Rs. 50 yearly for fatihas which presumably was to continue. Besides, the word "heirs" is in the plural and this was an impartible estate and the testatrix meant it to continue to be so for we find in the will that, in case of mismanagement, Government out of two-thirds of the profits was to pay maintenance to the person in possession (in the singular). We can find no difference in the intention of the testatrix as regards Abdul Karim, his immediate successor, and subsequent successors as long as his line continues. We therefore come to the conclusion that the will and codicil created a series of life estates in perpetuity, a disposition of property which is invalid under S. 12, Oudh Estates Act, as well as under S. 14, T. P. Act. If so, after the life-tenure of Abdul Karim Khan the estate would revert to the heir of Amanat Fatima, a person other than the plaintiffs, and this is fatal to their case. The only other way in which we can construe the will and codicil is that the interest of Abdul Karim becomes absolute by the invalidity of the conditions fixed by the testatrix and this is equally fatal to the case of the plaintiffs.

The third possibility on which alone the plaintiffs can succeed, namely that a life-estate was conferred on Abdul Karim with a vested interest to the plaintiffs (or to the elder of them) is in our opinion negatived by the terms of the will and codicil. This would dispose of the whole matter were it not for the appeal of the plaintiffs that Mt. Amanat Fatima by the will and codicil created a waqf, a contention which was not accepted by the learned Civil Judge. The plaint in this suit was filed on 26th May 1933, and the plaintiffs took their stand on absolute interest as conferred on them by the will and codicil of Mt. Amanat Fatima and the creation of a waqf was not put forward as an alternative. The printed record does not disclose when and how this allegation of waqf came to be made. Defendants 1 to 8 on 10th October 1933, put in a written answer to the plaint denying a waqf, and defendants 9 and 10 on the same date did the same.

Whether between May and October the plaintiffs alleged that a waqf had been created or whether the defendants thought that a waqf had been alleged in the original plaint, it is clear that the waqf was an afterthought which had occurred after the plaint. The payments of Rs. 300 to the spiritual preceptor and that of Rs. 50 for fatihas at the most may be a charge on the estate but they cannot be construed as a waqf. The nearest approach to the waqf is the provision for ultimate division of the profits into thirds, one for Mecca another for Medina and the last for poor Mahomedans of Oudh, and even then the corpus of the estate is not dealt with. Until that time neither Abdul Karim nor any of his successors was created a mutawalli and indeed that provision for the holy places and for the poor was contingent on there being no one of the descendants of Abdul Karim left to utilize the profits of the estate for purely personal and temporal purposes. The Mussalman Wakf Validating Act of 1913 had no retrospective effect and it was only by the later Act of 1930 that it was made to apply to waqfs created before 1913 and then only if any right, title, obligation or liability already existing was not affected. The mortgage which has led to this suit was before 1930 and so cannot be affected by these Acts and we have to see whether there was anything which would constitute a waqf according to the law as it then was. Their Lordships of the Privy Council in 22 Cal 619[10] held that a gift to the poor might be illusory from the smallness of the amount or from its uncertainty or remoteness and that the period was so uncertain and probably so remote that the gift was illusory and according to Mahomedan law no waqf was created. In that case the poor were not entitled to receive a rupee till after the total extinction of the family, and in this particular, that case and the present one are alike but the present case is even weaker in that there it was said that a waqf was created and mutawallis were appointed, but in this case we cannot put it higher than this, that the testatrix thought that if there was no one entitled to the profits the poor and the holy places might just as well get the profits as anyone else.

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[10] **Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhri, (1895) 22 Cal 619=22 I A 76=6 Sar 572 (P C).**

This may have been a pious wish on the part of the testatrix but we find it impossible to hold that it constitutes a valid waqf. The remaining part of the appeal of the plaintiffs is about the form of the relief and that has only to be considered if the appeal of the defendants fails, so, as we allow their appeal, it does not arise. The first point in the appeal of the plaintiffs that Latifunnissa was a Shia and not a Sunni has been abandoned. The result therefore is that we find that Mt. Amanat Fatima did not give an absolute estate to the plaintiffs after a life estate to their father and consequently they cannot question the mortgage by their father to the other defendants nor any sale resulting from that mortgage.

There was one argument of the learned counsel for the appellants to which we must refer lest it should be thought that it was not pressed and that was that under Mahomedan law no mere life-estate can be created and if one purports to be created, then the limitations are to be rejected and the life-estate becomes in law an absolute estate. We have ourselves held in Second Appeal No. 378 of 1935[11] that such an estate can be created when immediately followed by an absolute estate and we have given our reasons there. As we have not changed our opinion, we think it unnecessary to repeat what we have stated in that judgment or to mention the decisions to which the learned counsel has called our attention. In view of our decision, we allow the defendants' appeal and dismiss the suit with costs in both Courts. The plaintiff's appeal is dismissed with costs.

K.S./R.K. *Order accordingly.*

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[11] **Nasiruddin v. Khairat Ali, *Reported in* (1938) 25 A I R Oudh 51=172 I C 884.**

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## A. I. R. 1938 Oudh 77

ZIAUL HASAN AND HAMILTON JJ.

*Qadir Bakhsh — Plaintiff —*
Appellant.

v.

*Saddullah and others — Defendants*
— Respondents.

Second Appeal No. 198 of 1935, Decided on 6th January 1938, against order of Addl. Civil Judge, Hardoi, D/- 30-4-1935.

**Easement — Right to bury — Graveyard existing from time immemorial or for a long time — There is presumption of lost grant—Land used as graveyard for more than 30 years and for no other purpose — Such plot of land is graveyard even though it is not entered as graveyard in village papers.**

The question whether a plot of land is a graveyard or not is primarily a question of fact. In the case of a plot covered by recent graves the burden is undoubtedly on the person who alleges that it is a graveyard to establish how the grant was made. But in cases where a graveyard has existed from time immemorial or for a very long time, there can be a presumption of a lost grant. A considerable number of years, when there is no evidence that prior to that number of years the plot of land was not used as a graveyard would be sufficient to justify a presumption of dedication or a lost grant. [P 79 C 2]

Where a large number of persons have been buried on a plot of land for more than 30 years and there has never been any attempt by anyone to use this land for any purpose than that of a graveyard, the land can be taken as a graveyard, even though it has not been entered as a graveyard in any of the village papers: *Case law reviewed.* [P 79 C 2]

H. Husain — *for Appellant.*

T. N. Kaul — *for Respondents.*

**Judgment.** — This is a second appeal from a decision by the learned Additional Civil Judge of Hardoi allowing an appeal from a decision of the Munsif of North Hardoi. This appeal first came up before a single Judge of this Court since deceased who has referred it to a Bench on the ground that a matter of importance was involved which was not free from difficulty and therefore it had better be decided by a Bench of two Judges. The point for consideration is whether the plot of land in suit which contains graves should be considered to be a graveyard as held by the original Court or not as was held by the first Appellate Court. The reason for the reference to a Bench was that there was a decision of a single Judge of this Court reported in 11 O W N 428[1] which might be held to be in conflict with other decisions on which the present appellant relied in the lower Courts. The findings of fact of both Courts are that in the plot in question the area of which is 3 bighas 12 biswas, there were 123 kachcha graves and 4 pucca graves and in addition there were some caves in places which appeared to be the remains of graves, and also certain platforms which however were not dug up so that it cannot definitely be said that they are graves. The original Court found that the existence of these graves taken with the evidence of certain witnesses which proved that from the time they had reached years of discretion they had seen graves there, was sufficient to prove that the plot of land was a graveyard. Consequently it decreed the suit which asked for the relief that the defendants should remove a building which they had erected in part of this land and also for an injunction against the construction of any other building in this plot of land. The lower Appellate Court came to the conclusion that there was no evidence to show how old the pucca graves were and the graves might have been recent, and in the absence of any proof of dedication, the evidence was insufficient to show that this was a graveyard.

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[1] **Baqar Khan v. Raghvindra Pratap Sahi, (1934) 21 A I R Oudh 263=148 I C 433=9 Luck 568=11 O W N 428.**

We note that the first report of the Commissioner who inspected the locality was apparently accepted as correct by both the Courts, and he pointed out that this plot of land was a very old graveyard in appearance, that the pucca graves were very old, that there were traces of collapsed graves besides 123 kachcha and 4 pucca graves and there were platforms which might be graves. This piece of land was next to the graveyard of the neighbouring village and there is no evidence to show that it was ever used for any purpose other than that of a graveyard. We think therefore that the platforms found in existence there could not have been there for any purpose other than that of burial. A number of cases have been cited by counsel for both parties, but none of them is exactly on all fours with the present case. 4 O W N 320[2] was about a house with graves studded in it, an Imambara and the residence of a Quran Khuwan there. The Court held that this was wakf property, but it was not a graveyard. 8 O W N 579[3] referred to a graveyard but the graveyard was treated as such by public authorities and entered in public documents as a graveyard, while admittedly the present piece of land has not been entered in papers as a graveyard. 7 O W N 382[4] referred to land which was recorded as a graveyard and which as such had been closed by the District Board some 40 years previously. 7 O W N 1159[5] was about land described as a takia since the year 1875 and used for many years as a place for burial. There were more than 30 graves there most of them being pucca and it was held that there was a waqf by user and the land therefore could not be sold. A I R 1936 Lah 87[6] referred to a graveyard which was a private one only used by the owner for themselves and they themselves had ceased to use it for 30 years. Consequently it was not held to be a graveyard.

In 1934 A L J 809[7] it was held that a certain plot of land was a graveyard and the fact that burial had taken place there for more than 30 years was considered to be sufficient justification for a presumption that dedication had taken place. 11 O W N 428[1] was a case in which there was a plot of land where members of a family had been buried in 1 bigha 9 biswas of land, there being there 11 kachcha graves the oldest of which was 40 years old. The owner of that land had been selling the fruit from trees growing there and also had been permitting his riyaya to take the wood of other trees. A learned Judge of this Court held that the land was not a graveyard and pointed out that the owner sold fruit and others were permitted by him to take the wood of other trees. There is no evidence in the present case that the proprietor of the village who is a Hindu exercised any actual possession on the land, for there is no evidence that any use was made of the land by anyone other than the use of it for burying deceased Mahomedans. Instead of 11 kachcha

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2. Sajjad Ali Khan v. Jagmohan Das, (1927) 14 A I R Oudh 534=101 I C 563=4 O W N 320.

3. Noor Mohammad v. Ballabh Das, (1931) 18 A I R Oudh 293=134 I C 870=7 Luck 198=8 O W N 579.

4. Abdul Ghafoor v. Rahmat Ali, (1930) 17 A I R Oudh 245=122 I C 326=7 O W N 382.

5. Chhutkao v. Gambhir Mal, (1931) 18 A I R Oudh 45=130 I C 117=6 Luck 452=7 O W N 1159.

6. Raushan Din v. Mohammad Sharif, (1936) 23 A I R Lah 87=161 I C 650.

7. Sheoraj Chamar v. Mudeer Khan, (1934) 21 A I R All 868=149 I C 797=1934 A L J 809.

graves we have 123 kachcha graves, 4 old pucca ones and sunken graves and chabutras which make it quite clear that a large number of persons had been buried there and they could not all be members of one family as was the case in 11 O W N 428.[1] The respondents have pointed out that at the first settlement, that is to say, more than 70 years ago there was a cemetery in No. 652, 13 bighas 4 biswas and asks us to presume that this graveyard is still in existence and therefore there was no need of the plot of land in dispute as a burial ground for the Mahomedans generally. Because a certain piece of land was used more than 70 years ago for burial ground is no proof that that piece of ground can still be so used at the present time. For all we know, there might be no more room for graves there and therefore there is no evidence on the record to show that there is in the village another place which is used as a general burial ground for Mahomedans of the village.

The number of graves found on an inspection may in itself be no proof of whether a place is or is not a graveyard because a comparatively small number of graves in a village might constitute a graveyard while the same number of graves in a large town might not be held to constitute a graveyard. We do not know how large this village Bandipur is, but it certainly is not a town and the number of graves found at the place in dispute is we consider sufficiently large for one to hold that the plot of land was used as a graveyard for a large number of years. This therefore corroborates the evidence of the witnesses for the plaintiff that since they reached years of discretion they have seen the place as a graveyard. Against their evidence the learned Civil Judge has pointed out that one of them namely, P. W. 7, says that 10, 20 or 50 persons must have been buried there since the institution of the suit, that is to say, since 1934. He does not say that so many persons "were" actually buried there but "must" have been buried there, that is to say, he is merely guessing and the worthlessness of his guess is shown by the very fact that he puts the possible number as being from 10 or 50. We cannot place any reliance on such a statement. The most reliable evidence is that of the Commissioner who actually saw the locality, and from the fact that 4 pucca graves appeared very old, that the whole graveyard was very old in appearance, that a number of kachcha graves had sunk in and the fact that these 127 graves according to the map were scattered all over these 3 bighas 12 biswas one must conclude that this plot of land must have been used as a graveyard for a very considerable number of years and makes the evidence of the witnesses of the plaintiff fully credible. Considering that a large number of persons have been buried there for a considerable number of years which must certainly be more than 30 years and there has never been any attempt by anyone to use this land for any purpose than that of a graveyard, we consider that the original Court was justified in coming to the conclusion that this was a graveyard and one may legitimately infer that there is a presumption of dedication or of a lost grant. In 1934 A L J 809,[7] Sulaiman C. J. wrote :

> The question whether a plot of land is a graveyard or not is primarily a question of fact. In the case of a plot covered by recent graves the burden is undoubtedly on the person who alleges that it is a graveyard, to establish how the grant was made. But in cases where a graveyard has existed from time immemorial or for a very long time, there can be a presumption of a lost grant. It is open to a Court to infer from circumstances that a plot of land covered by graves, which has been used as a graveyard, is in fact a graveyard and had been set apart as such by the original owners and made a consecrated ground even though a registered document is not now forthcoming.

The learned Additional Civil Judge has in his judgment laid rather too much stress on the words "time immemorial." We consider this need not be taken to mean hundreds of years, and though we would not ourselves fix any definite number of years as time immemorial, we consider that a considerable number of years, when there is no evidence that prior to that number of years the plot of land was not used as a graveyard, would be sufficient to justify a presumption of dedication or a lost grant. The number of years would be gathered partly from the evidence of witnesses themselves who say that they have always remembered it as a graveyard and the corroboration of their evidence by the discovery of a considerable number of old graves. We have both classes of evidence here and we have no contrary evidence produced by the respondents to show that this plot was not used as a burial ground within the memory of the present generation or was used for another purpose during the same period.

All that they have produced as rebutting evidence is the fact that this plot of land has not been entered as a graveyard in any of the village papers. We do not think this evidence is sufficient to outweigh the evidence tendered by the plaintiff and the appearance of the place itself.

We find therefore that this is a graveyard as to which one may presume dedication or a lost grant and we therefore allow the appeal and setting aside the decision of the lower Appellate Court we restore that of the original Court and grant the appellant his costs in all Courts. We allow one month for removal of the house.

K.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Oudh 80

ZIAUL HASAN AND SMITH JJ.

*Emperor*

v.

*Ram Sarup — Complainant —* Respondent.

Criminal Appeals Nos. 165 and 166 of 1937, Decided on 22nd November 1937, against order of Sess. Judge, Bara Banki, D/- 1st April 1937.

**Criminal P. C. (1898), Ss. 45 and 87—"Proclaimed offender" — Person in respect of whom proclamation is made under S. 87 is proclaimed offender — Persons aware of his presence but failing to give information to police are liable under S. 176, I. P. C.**

The term "proclaimed offender," as used in S. 45, must be taken not in any technical sense but in its obvious general meaning. If a proclamation has been made in respect of an accused person under S. 87, it is sufficient to constitute him a proclaimed offender under S. 45 of the Code. And the fact that the proclamation was not made strictly in accordance with the terms of S. 87 does not render such person a proclaimed offender any the less: *(1901) A W N 10 and 7 Mad 436, Rel. on.* [P 81 C 1, 2]

Persons who are aware of the presence of such proclaimed offender but fail to give the required information to the police are liable under S. 176, I. P. C. [P 81 C 2]

Asst. Govt. Advocate — *for the Crown.*

B. N. Roy — *for Accused.*

**Ziaul Hasan J.**—These appeals on behalf of the Local Government against an appellate judgment of the learned Sessions Judge of Bara Banki arise out of the following circumstances: In August 1935, a report was lodged with the Ramsanehighat police about a theft said to have been committed by two persons, namely Ram Asre and Ramphal. The police took up the matter and as Ramphal was absconding they made a report for action being taken against him under Ss. 87 and 88, Criminal P. C. Accordingly a proclamation and a warrant of attachment of property were issued against him by the Court. The proclamation was made on 3rd October 1935, in the village of Balhapurwa, where Ramphal resided. When the warrant of attachment, which bears the same date as the proclamation under S. 87, was received by the Ramsanehighat police, they reported that Ramphal had no residence in the village of Balhapurwa, but that he was reported to have gone to live with his relation Ajudhiya Chaukidar, (respondent in one of these appeals). On this report the warrant for attachment was sent to the Sub-Inspector of Kothi police station to which the village in which Ajudhiya lived appertained. The attachment was made on 13th October 1935, by the second officer of Kothi police station in the presence of Mahadeo Prasad, village patwari, and Ram Sarup, village mukhia (respondent in the other appeal), and the attached property was given in the custody of Ajudhiya Chaukidar, respondent in Appeal No. 166. At the time of making the attachment, the Sub-Inspector asked Ajudhiya to bring Ramphal to the thana as soon as he could do so, but he did nothing of the kind. Ramphal was arrested some months later, but as against the present respondents and Mahadeo Prasad patwari cases were started under S. 176, I. P. C., on the ground that they as village chaukidar, village headman and village patwari were bound under S. 45 (1) (b), Criminal P. C., to give the police information which they possessed respecting the visit of Ramphal, a proclaimed offender, to the village.

These three cases were tried by a Magistrate of the First Class, who convicted all the three men under S. 176, I. P. C. While the village patwari Mahadeo Prasad was given a sentence of Rs. 20 fine, the respondents to these appeals were fined Rs. 51 each. Ram Sarup and Ajudhiya, respondents, filed appeals in the Court of the learned Sessions Judge, and Mahadeo Prasad applied to him in revision. The learned Judge, setting aside the conviction of the present respondents, acquitted them, and made a reference to this Court in respect of Mahadeo Prasad recommending that his conviction be set aside. This reference came up before me on 17th May 1937, but I was of opinion that all the three persons were rightly convicted by the learned Magistrate, and that the view of the learned Sessions Judge, that as Ramphal was not proved to be a proclaimed offender the accused were not guilty was incorrect. I therefore refused to accept the reference made by the learned Judge, and maintained the conviction and sentence of Mahadeo Prasad. These appeals have been brought by the Local Government against the order of the learned Sessions Judge acquitting the chaukidar and the mukhia.

I am of opinion that these appeals should be allowed. As pointed out by me in my order on the reference in Mahadeo Prasad's case, the term "proclaimed offender" as used in S. 45, Criminal P. C. must be taken not in any technical sense but in its obvious general meaning. I find that the same view was taken of this expression in 1901 by Knox J. of the Allahabad High Court in 1901 A W N 10.[1] The learned Judge says:

> It would appear from the latter part of his (the Sessions Judge's) judgment that he came to the conclusion that the Explanation attached to S. 45, Criminal P. C., was an exhaustive definition of the word 'proclaimed offender'. It is rather difficult to understand how he could have fallen into this error. The words contained in that part of the section are 'the expression proclaimed offender includes any person proclaimed as an offender, etc'. The use of the word 'includes' should at once have pointed out to the learned Judge that the persons included in the expression are persons over and above those to whom the words in their ordinary signification applied, and who might but for this Explanation, have escaped out of the category of 'proclaimed offenders'. When a definition is intended to be exhaustive, the Legislature, as a rule uses the word 'means' and not the word 'includes'.

If a proclamation has been made in respect of an accused person under S. 87, Criminal P. C. it is sufficient to constitute him a proclaimed offender under S. 45 of the Code. This view is supported by the decision of the Madras High Court in 7 Mad 436.[2] At p. 438 it was remarked:

> And in the present case it would have been easy to prove, and it was on the prosecution to prove, that proclamation was made (if this was so) in the manner required by S. 87.

In the present case it has been proved by the evidence on the record that a proclamation under S. 87, Criminal P. C. was made in respect of Ramphal. Therefore in order to find whether or not Ajudhiya and Ram Sarup were guilty under S. 176, I. P. C., read with S. 45 (1) (b), Criminal P. C., it is necessary to see whether they possessed any information respecting Ramphal's passage through or visit to their village. Both the accused in their statements stated that after the attachment of Ramphal's property, Ramphal did come to the village, but both claimed to have sent or taken him to the thana. The latter portion of the accused's statement was disbelieved by the trial Court, and I think rightly. The result is that it appears from the accused's own statements that they became aware of Ramphal's visit to the village, but failed to give the required information to the police. They were both thus liable under S. 176, I. P. C., and the learned trying Magistrate was in my opinion right in convicting both of them. The fact that the proclamation was not made strictly in accordance with the terms of S. 87, Criminal P. C., does not in my opinion render Ramphal a proclaimed offender any the less.

I would therefore allow these appeals, set aside the order of acquittal passed by the Sessions Judge in favour of the respondents, and restore the order of the trial Court.

**Smith J.**—I agree.

K.S./R.K. *Convictions restored.*

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## ✻ A. I. R. 1938 Oudh 81

ZIAUL HASAN J.

*Raghubar Dayal* — Applicant.

v.

*Emperor.*

Criminal Revn. No. 85 of 1937, Decided on 9th December 1937, from order of Sess. Judge, Lucknow, D/- 17th June 1937.

**✻ Criminal P. C. (1898), S. 500—Accused handed over to Mahila Ashram on bail bond being furnished—Accused is not 'released' and surety is not responsible under bond.**

When a Court orders the release of an accused under S. 500, it has no right or power to put any restrictions on the accused's movements. Where therefore a Magistrate after taking bail from the accused, orders her to be kept in the Mahila Ashram, the order relieves the surety of his responsibility under the bond as the accused is not actually 'released'. [P 82 C 2

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[1] Queen-Empress v. Narpat Singh, (1901) A W N 10.

[2] In the matter of the petition of Pandya Nayak, (1884) 7 Mad 436=1 Weir 102.

Ram Prasad Varma — *for Applicant.*
Govt. Advocate — *for the Crown.*

**Order.**—This is an application in revision against an order of the learned Sessions Judge of Lucknow dismissing the applicant's application for revision against an order forfeiting a sum of Rs. 200 out of Rs. 1000 for which he stood surety for one Mt. Uma Devi who was being prosecuted before a learned Magistrate of the First Class under S. 380, I. P. C. It appears that the case against Uma Devi was started in the Court of the special Magistrate on 13th August 1936. One Badri Prasad stood surety for her on 11th August 1936. Subsequently, Badri Prasad applied to be relieved of suretyship, and on 24th November 1936, the present applicant filed a surety bond for a sum of Rs. 1000, and this bond was accepted after inquiry as to its sufficiency on 23rd December 1936, and 9th January 1937, was fixed for the appearance of Uma Devi. On that day, she was absent but on 15th January 1937 she appeared and explained her absence on 9th January by alleging that she had gone to Cawnpore to arrange for her defence. A notice was issued to the applicant to show cause why the amount of the bond should not be forfeited. On 19th January 1937, he put in an application containing an explanation why he was unable to secure Uma Devi's attendance in Court on 9th January 1937. His explanation was not accepted, and the learned special Magistrate ordered that a sum of Rs. 200 out of the amount of the bond be forfeited. The applicant appealed against this order to the District Magistrate, but his appeal was dismissed. He applied in revision to the learned Sessions Judge but the learned Judge also dismissed his application. Hence the present application.

The learned counsel has argued that the order of forfeiture of the security was illegal on the following grounds: (1) That the bond was not taken on the proper form, namely on Form No. 3 of Sch. 5, Criminal P. C., but was taken on Form No. 42 of the said Schedule which is meant to be used in a case triable by the Court of Session. (2) That as no bond was taken from Uma Devi herself along with the applicant, the bond executed by the latter was illegal. (3) That the provisions of S. 514, Criminal P. C., were not complied with. (4) That no information of the acceptance of the bond was given to the applicant. (5) That no date and time were specified in the bond for the appearance of the accused. (6) That the accused was not actually released by the Court, but was given in the custody of the Manager of the Mahila Ashram.

Grounds 1 to 5 do not appear to me to have much force, but as I am of opinion that the order of forfeiture must be set aside on the last ground, it is not necessary to discuss them. In the present case, in spite of the fact that the learned trying Magistrate took bail from the accused, he ordered her to be sent to the Mahila Ashram. It seems to me that when a Court orders the release of an accused under S. 500, Criminal P. C., it has no right or power to put any restrictions on the accused's movements, and obviously when an accused person is released on the suretyship of another, the intention is that the surety should have control over his movements. Otherwise, there is no sense in making the surety responsible for the attendance of the accused in Court. In my opinion the order of the learned Magistrate that the accused in this case should be kept in the Mahila Ashram relieved the surety of his responsibility under the bond as the accused was not actually 'released'. The learned Assistant Government Advocate, who argued against the present application, conceded that the order of the learned Magistrate sending the accused to the Mahila Ashram was wrong; but if it was wrong, it is extremely unfair that the surety should suffer for an error of the Court. So long as the accused lived in the Mahila Ashram under the order of the Court, she was virtually in the custody of Court. That is to say, she was not released within the meaning of S. 500, Criminal P. C., and this being so, the surety was not bound by the terms of his bond.

The application is allowed and the order of forfeiture passed by the learned trying Magistrate set aside. The money, if paid, shall be refunded.

V.B.B./R.K. *Order set aside.*

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## A. I. R. 1938 Oudh 83

ZIAUL HASAN AND HAMILTON JJ.

*Raja Pirthipal Singh — Plaintiff —* Appellant.

v.

*Bishunath Singh and others — Defendants* — Respondents.

Second Rent Appeals Nos. 50 and 51 of 1935, Decided on 22nd December 1937, against order of Dist. Judge, Bara Banki, D/- 20th July 1935.

**U. P. Land Revenue Act (3 of 1901), S. 138 — Suit for rent against under-proprietors jointly—Liability originally joint but rent recorded separately at last settlement—Suit is not bad in law.**

Where the liability of under-proprietors for payment of rent to the taluqdar was joint originally, a Revenue Court cannot split up this joint and several liability without the consent of the landlord proprietor, and the fact that at the last settlement rent was separately recorded about the different khatas does not affect it. Thus a suit for arrears of rent against such under-proprietors jointly is not bad in law : *A I R 1917 Oudh 316 and A I R 1923 Oudh 216, Rel. on.* [P 84 C 1]

Radha Krishna — *for Appellant.*

M. Wasim and Akhtar Husain — *for Respondents.*

**Judgment.** — These are two appeals against the decrees of the learned District Judge of Bara Banki in two suits brought by the appellant, Raja Pirthipal Singh, against two sets of defendants for recovery of arrears of under proprietary rent. Appeal No. 50 arises in the suit for rent relating to village Dundupur and Appeal No. 51 arises in the suit relating to village Bilya. In each suit the plaintiff had sued all the under-proprietors jointly.

The main defence in both the suits was that there being different khatas in the village, and the defendants being separately in possession of those khatas, a joint suit against all the under-proprietors was bad in law. This plea was overruled by the trial Court which decreed both the suits, though not to the extent claimed by the plaintiff. The defendants in each case appealed to the District Judge and the learned Judge, coming to the conclusion that the under-proprietors were not jointly liable for the rent, accepted the appeals and remanded the cases to the trial Court for the claims being tried against the holders of the different khatas separately. It is against this order that the present appeals have been filed.

It is alleged on behalf of the appellant that when under-proprietary rights were created in favour of the predecessors of the defendants in the two villages by decrees of a settlement Court, the liability of all the cosharers was joint and that though the under-proprietary khewat was subsequently divided into separate khatas it did not affect the joint liability of the cosharers to pay rent to the landlord. The respondents do not admit that originally the liability of the cosharers was joint and contend that it was for the plaintiff to prove the jointness of the liability by producing copies of the settlement Court decrees. It is unfortunate that the plaintiff has not filed the settlement Court decrees, but we are of opinion that under-proprietary rights could not but have been joint originally. In para. 10 of their written statement, the defendants in each case themselves say :

> During the recent settlement, the settlement officer separated the pukhtadari rent of each khata of their village and entries have been made in the khewat accordingly.

This we consider can mean nothing but that previous to the last settlement there was no separation of rent of the under-proprietors. Further it is not denied that even now, while there are some khatas which are joint among the shareholders of particular khatas, there is one khata which is joint among the under-proprietors of the entire village. This clearly shows that originally the under-proprietors held the village jointly. In 20 O C 104,[1] it was held that there is nothing in Ch. 7, Land Revenue Act, which would justify the conclusion that a Revenue Court can split up the joint and several liability of lessees holding as joint tenants without the consent of the superior proprietor. This case was followed in 26 O C 118[2] in which on a suit being brought for arrears of rent claiming a decree jointly and severally against the defendants on the basis of a decree from 'the settlement Court giving the predecessors of the defendants perpetual lease rights and subsequently a perfect partition had been effected between the various lessees, it was held that S. 138, sub-ss. 3 and 4, Land Revenue Act, referred to the responsibility for revenue to the Government and did not refer to the responsibility inter se of the lessees for rent to the taluqdar.

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[1] **Rudra Partab Singh v. Sikandar Khan, (1917) 4 A I R Oudh 316=39 I C 598=20 O C 104.**

[2] **Jugnu Khan v. Rudra Partab Singh, (1923) 10 A I R Oudh 216=74 I C 429=26 O C 118.**

As we have held that originally the liability of the under-proprietors for payment of rent to the taluqdar was joint, the principle of these cases applies and the fact that at the last settlement rent was separately recorded about the different khatas does not affect the defendants' joint and several liability for rent to the plaintiff. We therefore allow these appeals with costs and setting aside the decrees of the learned District Judge restore those of the trial Court.

V.B.B./R.K. *Decree set aside.*

## A. I. R. 1938 Oudh 84

ZIAUL HASAN AND HAMILTON JJ.

*Har Narain and another* — Appellants.

v.

*Bank of Upper India through Mr. H. Hunter* — Respondent.

Second Appeals Nos. 389 and 390 of 1935, Decided on 21st December 1937, against order of Civil Judge, Hardoi, D/- 25th September 1935.

**(a) Charge—Equitable charge—Decree of settlement Court granting nankar rights in lieu of zamindari rights—Nankar rights are under-proprietary rights and in equity create charge on village—Charge not expressly mentioned in decree but entered regularly in khewats—It is good evidence that nankar constituted charge from first settlement.**

Cash nankar granted by a decree of a settlement Court in lieu of the surrender of zamindari rights is an under-proprietary right and it is in equity charged on the zamindari rights so surrendered. And the fact that the cash nankar has been entered regularly in the under-proprietary khewats, though the decree of the settlement Court did not expressly state that it was to be a charge on the village, is good evidence that from the first settlement it was understood that this nankar did constitute a charge : *1 O C 163, Rel. on* ; *S A No. 258 of 1930, Foll.* ; *A I R 1916 Oudh 176 and A I R 1916 Oudh 129, Disting.* [P 85 C 1, 2]

**(b) Transfer of Property Act (1882), S. 100 —Taluqdari estate, subject to charge of nankar and entered as such in khewats and wajib-ul-arz, sold in execution — Decree-holder himself auction-purchaser—Auction-purchaser must be presumed to have constructive notice of charge—Charge is binding on him.**

Where talqudari estate, subject to charge of cash nankar right, which has been entered throughout in the under-proprietary khewats and wajib-ul-arz, is purchased in execution by the mortgagee decree-holder himself, the auction-purchaser in all probability did examine the khewats and the wajib-ul-arz and in any case should have done so, so that he had constructive notice of the charge and is binding on him. [P 85 C 2]

**(c) Execution sale—Rights of auction-purchaser — Auction-purchaser cannot assume position of bona fide transferee without notice.**

While in private sales, there is an implied warranty of title, there is none in the auction sale. An auction-purchaser therefore cannot assume the position of bona fide transferee without notice. An auction-purchaser gets property subject to the same restrictions which the judgment-debtor himself was subject to, and if the property is subject to any valid encumbrance the purchaser gets it subject to the same : *A I R 1935 All 470 and A I R 1925 Cal 485, Rel. on.* [P 86 C 1]

**(d) Transfer of Property Act (1882), S. 5—Transfer—Purchase in execution sale is not transfer.**

A purchase by an auction-purchaser in execution sale is not a transfer to which the Transfer of Property Act applies. [P 86 C 2]

Radha Krishna, Hargovind Dayal and Raghubar Dayal Bajpei — *for Appellants.*

Ram Bharose Lal and Murli Manohar — *for Respondent.*

**Judgment.** — These are two appeals against a decision of the Civil Judge, Hardoi, who decided two appeals, Nos. 18 and 19 of 1935, against the decision of the Munsif, South Hardoi, in two suits, Nos. 174 and 175 of 1934, which were tried together. The suits were instituted by the plaintiffs-appellants as mortgagees of cash nankar against the defendant-respondent, who is an auction-purchaser of village Nirmalpur. The appellants claimed that they were the mortgagees of nankar rights and these nankar rights constituted a charge of the village Nirmalpur and consequently they were entitled to arrears of the said nankar from the defendant auction-purchaser. The original Court decreed the suit, but the learned Civil Judge allowed the appeal on the ground that there was no charge in any case, and even if there was a charge, the appellant there, who is respondent here, was a bona fide transferee without notice and therefore was not liable to pay the nankar arrears. The points urged before us for decision are whether the nankar is a charge on Nirmalpur which was bought at an auction sale by the respondent, and if so, whether the respondent was or was not a bona fide transferee without notice and, if he had no notice, whether he can avoid the liability of payment of those arrears by virtue of S. 100, T. P. Act.

The learned Civil Judge has himself found that the nankar was in the nature of an under-proprietary right and was heritable as well as transferable. He however went on to find that the decree of the settlement Court which made the nankar payable did not create any charge on Nirmalpur village or on the rents and profits thereof. At the time of the first settlement, the predecessor-in-interest of the plaintiffs had claimed sub-settlement as ancient proprietor. An enquiry was held by the Extra Assistant Commissioner and was submitted to the Court of the Settlement Officer, who decreed payment of the cash nankar in accordance with the khewat prepared by the Extra Assistant Commissioner with the aid of arbitrators. This decree was passed in the year 1864 and was entered in the khewat of that year and in the khewats of subsequent years, as is shown by the copies of khewats of 1882, 1895 and 1930, which have been filed in this case. The decree did not state that this nankar was to be a charge on the village, and it is for this reason that the learned Civil Judge has come to the conclusion that no charge was created. He refers to three decisions, 1 O C 163,[1] 18 O C 380[2] and 19 O C 49[3] which were quoted before him by the plaintiffs-respondents. The latter two cases differ from the present one as there it was clearly stated that a charge was created. On the other hand the only difference between the first of those cases and the present one is that there was no decree in that case while in the present one we have a decree of the Settlement Court. In 1 O C 163,[1] which is a Bench decision, it was held that cash nankar granted in lieu of the surrender of zamindari rights is an under-proprietary right and that it is in equity charged on the zamindari rights so surrendered. This will therefore apply to the circumstances in the present case unless it be held that the silence in the decree as to the creation of a charge was deliberate and implied refusal of the constitution of a charge. No reason has been shown to us why there should have been such refusal in this case, and we think therefore that the omission of the mention of any charge in the decree was not intended to negative the creation of a charge. It was in fact we think an accidental omission to mention the charge. In Second Appeal No. 258 of 1930, which is an unreported decision of a single Judge of this Court, it was held that nankar in similar circumstances as those of the present case was a charge. We have already mentioned that this cash nankar has been entered regularly in the under-proprietary khewats, and in our opinion this is good evidence to establish that from the first settlement it was understood that this nankar did constitute a charge. Had this nankar been independent of the village land, which would have been the case if no charge had been created, it should not have been mentioned in the khewats, for khewats deal exclusively with rights in the land of a village. We are therefore in agreement with the decision in Second Appeal No. 258 of 1930, and we find that there is a charge as urged by the plaintiffs-appellants.

The second point that we have to consider is whether the respondent had notice of this charge. It is admitted that the notice, if any, was constructive and no more. The auction-purchaser was the decree-holder and we presume that when he became the mortgagee of the village he endeavoured to find out the value of the property mortgaged to him. As the property was a taluqdari estate in Oudh, it was obviously of the utmost importance for him to see to the names of the under-proprietors and their shares as the profits accruing to the superior proprietor would be considerably affected by the existence of under-proprietors. We think therefore that he must have examined the khewats and the wajib-ul-arz of this village. We have already shown that this cash nankar has been entered throughout in the khewats and we find it entered also in the wajib-ul-arz of the village, which is Ex. 5. The learned Civil Judge has apparently held that there was no constructive notice because these documents contain nothing to indicate that the decreed nankar was a charge. As we have found that the nankar was a charge on the village, the argument of the learned Civil Judge is no longer tenable. We hold that the respondent in all probability did examine the khewats and the wajib-ul-arz, and in any case should have done so, so that he had constructive notice of the charge. Consequently he cannot at all be a bona fide transferee without notice. Finally, even if we hold that he had no notice, we think he is nevertheless bound by this charge.

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[1] Rudra Pratab Sahi v. Sheo Charan, (1899) 1 O C 163.

[2] Ramjiban v. Jadunath, (1916) 3 A I R Oudh 176=33 I C 555=18 O C 380=3 O L J 20.

[3] Deputy Commissioner, Fyzabad v. Jagjiwan Baksh Singh, (1916) 3 A I R Oudh 129=33 I C 461=19 O C 49.

It has been repeatedly held that an auction-purchaser gets property subject to the same restrictions which the judgment-debtor himself was subject to, and if the property is subject to any valid encumbrance the purchaser gets it subject to the same. The doctrine of equity does not here apply, because while in private sales there is an implied warranty of title, there is none in an auction sale. In this connexion we may refer to 1935 A L J 261[4] and to A I R 1925 Cal 485.[5] There are many other cases, but we do not think it necessary to refer to any more. An auction-purchaser cannot therefore assume the position of a bona fide transferee without notice.

Apart from that however, there is the question whether an auction-purchaser is a transferee in good faith for consideration without notice. In 32 A L J 1260,[6] which is a Bench decision, it was held that it may be very doubtful whether the word 'transferee' in the proviso to S. 43, T. P. Act, would expressly cover an auction-purchaser. There was no decision on this point as it was not necessary to express any final opinion on it, but it was pointed out that the Preamble to the Transfer of Property Act suggests that it was to define and amend certain parts of the law relating to transfer of property by act of parties. The Transfer of Property Act starts as follows :

> An Act to define and amend the law relating to the transfer of property by act of parties.
>
> *Preamble.* Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties. . . .

Transfer is defined in S. 5 of the Act as follows :

> In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, . . . ; and 'to transfer property' is to perform such act . . . In this section 'living person' includes a company or association or body of individuals, whether incorporated or not . . . .

Dr. Gour in his Transfer of Property Act in the Notes on S. 5 on the meaning of transfer writes :

> An alienation by will, or in execution of a decree, or on insolvency would, really speaking, be as much a transfer as those dealt with in the Act, but these have been designedly excluded from its consideration. The term must therefore be read in the Act in the narrow and artificial sense conferred on it by the section.

The learned counsel for the respondent has been asked by us to state who, according to him, was the transferor in accordance with S. 5, T. P. Act, and he has suggested that it was the judgment-debtor. We find ourselves quite unable to accept this contention. This sale was not a sale by the judgment-debtor to his decree-holder but a sale by the Court in execution of a decree and it is impossible to hold that the Court was a living person or a 'party' under meaning of S. 5, T. P. Act. We do not see either how could it be urged that the decree-holder was a transferor. This being so, we are driven to the conclusion that a purchase by an auction-purchaser is not a transfer to which the Transfer of Property Act applies. As the Transfer of Property Act does not apply to him, the proviso to S. 100 of the Act does not apply to him and consequently he can get no benefit under it.

We find therefore that the nankar is a charge, that the respondent cannot plead that he was a transferee, and even if he was, he had constructive notice and as an auction-purchaser he takes the property of the judgment-debtor subject to the charge on that property. We therefore allow the appeals, restore the decision of the original Court and grant the appellants their costs in all the Courts.

V.B.B./R.K. *Appeals allowed.*

## A. I. R. 1938 Oudh 86

ZIAUL HASAN AND HAMILTON JJ.

*Thakur Jagat Jit Singh*—Appellant.

v.

*Mt. Munnoo Bibi* — Respondent.

First Appeal No. 67 of 1937, Decided on 23rd December 1937, against order of Special Judge, First Grade, Hardoi, D/- 20th April 1937.

**U. P. Encumbered Estates Act (25 of 1934), S. 14 (7) — "Money decree shall be passed in respect of amount found due" — Such order is decree and not merely order.**

An order of a special Judge under S. 14 (7) that a money decree shall be passed in respect of amount found due is a decree and not a mere order. Therefore court-fee for an appeal from such a decision must be paid as on appeal from a decree. [P 87 C 1]

Radha Krishna — *for Appellant.*

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[4] Mangal Sen v. Mathura Prasad, (1935) 22 A I R All 470=157 I C 33=57 All 690=1935 A L J 261.

[5] J. C. Galstaun v. Sonatan Pal, (1925) 12 A I R Cal 485=78 I C 668.

[6] Puran Mal v. Shiva Pal, (1935) 22 A I R All 234=155 I C 86=(1934) 32 A L J 1260.

**Order.** — This is an office report to the effect that the court-fee paid by the appellant in this case is deficient by a sum of Rs. 933. The appeal is against a decision of a special Judge, First Grade, under the U. P. Encumbered Estates Act. The operative portion of the lower Court's order is as follows :

> A money decree shall be passed in favour of creditor No. 1 in respect of the amount found due.

We understand that a Commissioner has been appointed to find out the exact amount due by the appellant to the opposite party. It is contended by the learned counsel for the appellant that what he is appealing against is only an order and not a decree. He concedes however that the claim of the opposite party against his client in the present proceedings is a suit. Having regard to the definition of "decree" contained in the Code of Civil Procedure and to the provisions of S. 14 (7), U. P. Encumbered Estates Act, we have no doubt whatever that the decision appealed against is a decree. S. 14 (7) provides that if the Special Judge finds that any amount is due to the claimant he shall pass a simple money decree for such amount, and that is what in our opinion the lower Court has done. The only thing that remains is to fix the amount that may be due to the opposite party by the appellant. We therefore accept the office report and give three months' time to the appellant at his counsel's request to make up the deficiency in court-fee.

K.S./R.K. *Report accepted.*

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## A. I. R. 1938 Oudh 87

ZIAUL HASAN AND HAMILTON JJ.

*Lalmohan Trivedi and others* — Applicants.

v.

*Ram Chandra Awasthey and another* — Opposite Party.

Civil Misc. Appln. No. 808 of 1937, in Misc. Appeal No. 79 of 1937, Decided on 10th January 1938.

**(a) Civil P. C. (1908), O. 39, R. 7 (a)—Order staying sale of property in execution is not for its preservation.**

An order staying sale of property in execution of a decree is not an order for "preservation" of that property within the meaning of O. 39, R. 7 (a). [P 88 C 1]

**(b) Civil P. C. (1908), O. 39, R. 7—R. 7 has no application where subject matter is debt.**

Order 39, R. 7 has no application to a suit which does not relate to any property but to a debt owing by the applicant to the opposite party. [P 88 C 1]

**(c) Execution—Stay of —Application for stay of execution proceedings in Court situated in different province by party residing outside jurisdiction—Stay is not justified.**

A Court is not justified in staying proceedings in a Court not situated in its province or to issue an injunction against a party residing outside the jurisdiction of the Court not to execute his decree in a Court in different province. [P 88 C 1]

L. S. Misra — *for Applicants.*

Radha Krishna — *for Opposite Party No. 2.*

**Order.**—This is an application asking this Court to stay proceedings in execution case No. 319 of 1937 pending in the Court of the Munsif, Purelia District Manbhum, Bihar. The facts are that the applicants applied to the Collector under S. 4, U. P. Encumbered Estates Act and the application was in due course forwarded to the special Judge for disposal. One of the creditors of the applicant named in his application was the Chota Nagpur Banking Association, Purelia, Bihar, which held some decrees against the applicants. As the said Banking Association (henceforward to be called the opposite party) was proceeding in execution against some property of the applicants situated in the province of Bihar, the applicants applied to the special Judge, Unao, for the issue of an injunction prohibiting the opposite party from executing its decree in the Court of the Munsif of Purelia. The special Judge passed an interim order of stay but on objections raised by the opposite party he withdrew that order. The applicants have filed an appeal against this order of the special Judge in this Court and by the present application they pray that proceedings in the Purelia Court be stayed pending decision of their appeal by this Court.

We have heard the learned counsel for the applicants at length but are not prepared to grant the prayer contained in this application or to issue an injunction, as orally requested by the learned counsel, against the opposite party, prohibiting him from executing his decree in the Purelia Court. It was conceded by the learned counsel that so far as the provisions of the U. P. Encumbered Estates Act go they do not help him. In fact S. 6 of the Act provides for stay of proceedings in Civil and Revenue Courts in the United Provinces only on an order made by the Collector under S. 6 and the Preamble of the Act also shows that the Act was passed to provide for the relief of encumbered estates in the United Provinces. The learned counsel however placed reliance on O. 39, R. 7, Civil P. C. and argued that as the provisions of the Code of Civil Procedure have, by rules framed under the U. P. Encumbered Estates Act, been made applicable to proceedings under the Act, an order may be passed under R. 7 (a), for "preservation" of the applicants' property. We do not think that an order staying sale of property in execution of a decree is an order for "preservation" of that property. Moreover, under O. 39, Rule 7 (a), the property sought to be preserved must be the subject matter of a suit but the suit between the applicants and the opposite party in the Court of the special Judge does not relate to any property but to a debt owing by the applicants to the opposite party. O. 39, R. 7, Civil P. C., has therefore no application to the facts of the present case. Apart from the law invoked on behalf of the applicants, we do not think we will be justified in staying proceedings in a Court not situated in this province or to issue an injunction against a party residing outside the jurisdiction of this Court not to execute his decree in a Court in Bihar. The application is therefore dismissed with costs.

V.B.B./R.K. *Application dismissed.*

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## A. I. R. 1938 Oudh 88

ZIAUL HASAN J.

*Dildar Khan and another*
Appellants.
v.
*Emperor.*

Criminal Appeal No. 267 of 1937, Decided on 20th January 1938, against order of Sess. Judge, Fyzabad, D/- 18th August 1937.

**(a) Criminal Trial—Evidence — Witnesses not independent and not named in first information report—Their evidence, if corroborated, should be believed.**

If oral evidence of witnesses is corroborated by medical or other reliable evidence, there is no reason why it should not be believed even though the witnesses were not named in the first information report or are not totally independent. [P 89 C 2]

**(b) Penal Code (1860), Ss. 300 and 304—Person inflicting incised wounds with edge of spear on head of deceased can be shown to have knowledge that such wounds were likely to cause death.**

It is not only an intention to kill that constitutes an offence of murder or of culpable homicide. If a person does an act with the knowledge that his act is likely to cause death or such bodily injury as is likely to cause death, he can be guilty of culpable homicide or even of murder in that case also. Where a person or persons inflict incised wounds with the edge of a spear on the head of the deceased they would be deemed to have known that the injuries that they were inflicting were likely to cause his death and hence they cannot escape liability at least under S. 304. [P 89 C 2; P 90 C 1]

R. F. Bahadurji — *for Appellants.*

Asst. Govt. Advocate — *for the Crown.*

**Judgment.** — Six persons, namely Najib Khan, his father Dildar Khan, Zainullah Khan, his cousin Sharif Khan, Mohammad Ali Khan and Ram Samujh Chamar, all residents of village Masuran, police station Dostpur, District Sultanpur, stood their trial before the learned Sessions Judge of Sultanpur on charges under Ss. 147, 324 and 302/149, I. P. C. for injuries caused to one Asghar Khan and for the death of Shah Mohammad Khan. Of these persons, Najib Khan, Zainullah Khan, Mohammad Ali Khan and Ram Samujh Chamar were acquitted of all the charges by the learned Sessions Judge, but Dildar Khan and Sharif Khan were convicted under S. 326, I. P. C. for causing grievous hurt to Shah Mohammad Khan deceased and were acquitted of the other charges. They bring this appeal against their conviction and sentence. It appears that one Zahur Khan owned some mahua, jamun, and mango trees in the village. In 1931 his widow Mt. Zainab transferred these trees by gift to Shah Mohammad deceased. In 1935 however Sharif Khan appellant got the very same trees by gift from Zahur Khan's daughter Mt. Rasulan. There was thus a dispute about the trees between Shah Mohammad and Sharif Khan. On 6th April 1937, about an hour after sunrise, some boys and girls of Sharif Khan's family were picking the fruit of the mahua tree when Shah Mohammad protested and prevented them from picking the fruit. On this there was admittedly an altercation between Shah Mohammad deceased on one side and Sharif Khan and Dildar Khan appellants on the other. According to the prosecution case, all the six accused came up armed with lathis, spears and a catapult and attacked Shah Mohammad with the result that he fell down. His brother

Asghar came up and remonstrated and he was also beaten. The defence story on the other hand was that when Shah Mohammad drove away the boys and girls who were picking the mahua fruit, Sharif Khan and Dildar Khan appellants remonstrated with him and thereupon Shah Mohammad, Asghar and four others attacked them. They also used their lathis in self-defence. The other accused denied their presence at the time of the occurrence.

A report of the occurrence was made at the Dostpur thana at 2 P. M. by Asghar Khan, brother of the deceased, and in this report all the accused were named. About the same time another report was made at the thana by Sharif Khan, appellant, in which the story of the defence as mentioned above was given. Shah Mohammad was taken to the thana by Asghar Khan but he died there at about 3.30 P. M. On post mortem examination, he was found to have four incised wounds, three on the head and one on the upper part of the right buttock. There were also found six fractures of the bones of the skull and death was due to those fractures caused by the injuries to the head. The medical officer was of opinion that the external injuries on the head were probably caused by the edge of a spear, the spear being used as a lathi.

Asghar Khan's injuries were also medically examined on 14th April 1937, and he was found to have 10 simple injuries, but the nature of the weapon could not be stated as the injuries were old and suppurated. The learned counsel for the appellants has vigorously challenged the learned Judge's finding in holding his clients responsible for the injuries of Shah Mohammad deceased and has invited my attention to the fact that all the prosecution witnesses have unanimously stated that the present appellants were only armed with lathis. He argues that as not a single injury that could be caused by a lathi was found on the deceased's body, the appellants could not be convicted for the injuries to Shah Mohammad. There can be no doubt that the learned Judge did not deal with this case in a very careful manner. He disbelieved all the prosecution witnesses because none of them was mentioned in the first information report made by Asghar Khan and because most of them were not independent and made some statements which were contrary to what was stated before the committing Magistrate or the police. None of these factors is always sufficient to totally discard the evidence of witnesses though they are sufficient to raise a suspicion against the truthfulness of the witnesses and to lead the trying Judge to scrutinize the evidence with caution. If oral evidence of witnesses is corroborated by medical or other reliable evidence, there is no reason why it should not be believed even though the witnesses were not named in the first information report or are not totally independent.

In the present case all the witnesses definitely stated that out of the accused, Dildar Khan, Sharif Khan and Ram Samujh were armed with lathis, Mohammad Ali Khan and Zainullah Khan with spears and Najib Khan with a catapult in which dry mud balls were used. The medical evidence, as noted above, disclosed that Shah Mohammad died of incised wounds caused by the edge of a spear or spears. The learned Judge also held, and I think rightly, that Shah Mohammad was in possession of the trees and that the prosecution case that the accused were the aggressors was true. Yet, inspite of all these circumstances, he acquitted Mohammad Ali and Zainullah who alone could have caused the injuries on the head of the deceased. In convicting the present appellants "for causing grievous hurt with a spear to Shah Mohammad deceased", he has quite forgotten what the prosecution case was as to the persons who were armed with spears. I am also at a loss to understand how the learned Judge came to the conclusion that an offence under S. 326, I. P. C., only was committed in the present case. He says:

> . . . . I am of opinion that in this case there is nothing on the record to show that the accused intended to cause any more than grievous hurt and cannot certainly have intended to have caused the death of the deceased.

The learned Judge ought to have known that it is not only an intention to kill that constitutes an offence of murder or of culpable homicide. If a person does an act with the knowledge that his act is likely to cause death or such bodily injury as is likely to cause death, he can be guilty of culpable homicide or even of murder in that case also. In this case can it be said that the person or persons who inflicted incised wounds with the edge of a spear on the head of Shah Mohammad deceased could not have known that the injuries that they were inflicting were likely to cause his death, and if not, can they escape liability at least under S. 304, I. P. C.?

The result of the peculiar view taken by the learned Judge in this case is that the conviction of the appellants cannot stand. No doubt, both the appellants stated before the committing Magistrate that they used their lathis in self-defence, but though the learned Judge was right in holding that the plea of self-defence was not open to the appellants, they cannot even be convicted under S. 323, I. P. C., as they have already been acquitted of causing hurt to Asghar Khan and as no lathi wound was found on the body of the deceased. The appeal is therefore allowed and the conviction and sentences of the appellants set aside. Let a copy of this judgment be sent to the learned Judge personally.

D.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Oudh 90

ZIAUL HASAN AND HAMILTON JJ.

*Pitambar Das—Defendant*—Appellant.

v.

*Durga Bakhsh Singh and others* — Respondents.

Second Appeal No. 228 of 1935, Decided on 11th January 1938, against order of Dist. Judge, Rae Bareli, D/- 26th April 1935.

**Mortgage—Subrogation—Mortgagee taking another mortgage in lieu of prior mortgage—He is entitled to use his prior mortgage as shield against claim for priority by intermediate mortgagee—Principle of subrogation applies.**

Although S. 92, T. P. Act, which deals with subrogation, does not in terms apply to the case of a prior mortgagee taking a subsequent mortgage, the Courts have consistently applied the principle of subrogation to such cases. [P 90 C 2; P 91 C 1]

Where a mortgagee takes another mortgage in lieu of his prior mortgage, although the case is not strictly covered by the provisions of the Transfer of Property Act the mortgagee can claim the benefit of the doctrine of subrogation and can use his earlier mortgage as a shield against any claim for priority by an intermediate mortgagee. He should be presumed to have intended what was to his benefit and ought to be deemed to have intended to have kept alive his earlier mortgage to be used as a shield against the intermediate mortgagee: *15 O C 211 and A I R 1933 Oudh 9, Foll.* [P 91 C 1, 2]

Hyder Husain and H. H. Zaidi — *for Appellant.*

Radha Krishna — *for Respondent 1.*

**Judgment.**—This is a defendant's appeal against a decree of the learned District Judge of Rae Bareli who affirmed a decree of the learned Civil Judge of Partabgarh, by which the suit of the plaintiff-respondent Durga Bakhsh Singh for sale on the basis of three mortgages was decreed. The facts are that Balbhaddar Prasad, father of defendant 1, Bhagwat Prasad, owned a two annas eight pies share in village Pura Bhagwat. He executed three mortgages in favour of Durga Bakhsh Singh. The first (Ex. 5) was made on 2nd January 1917, the second (Ex. 2) on 24th June 1921, and the third (Ex. 4) on 12th June 1922. By all these deeds a one anna four pies share was mortgaged. In January and May 1923, the entire two annas eight pies share was mortgaged to Ghanshiam Das defendant, who is now represented by his son Pitambar Das. On 17th November 1923, Balbhaddar Prasad made a fourth mortgage in favour of Durga Bakhsh Singh. This mortgage was usufructuary and related to an eight pies share only and the consideration for this mortgage was made up of the amounts due under the three previous mortgages and some money obtained in cash. Ghanshiam Das brought a suit on his two mortgages of 1923 and impleaded Durga Bakhsh Singh in that suit. Durga Bakhsh Singh set up his three previous mortgages which were admitted by Ghanshiam Das but the question of priority was left undecided by the Court at the request of the parties. Ghanshiam Das's suit was decreed and the property sold in execution of the decree and was purchased by Ghanshiam Das himself.

The suit which has given rise to this appeal was brought by Durga Bakhsh Singh on his first three mortgages and Ghanshiam Das pleaded that those mortgages were extinguished by the later mortgage of 17th November 1923. The plaintiff Durga Bakhsh Singh on the other hand contended that he was entitled to sue on those mortgages and to claim priority as against Ghanshiam Das. Both the Courts below have overruled the plea raised by Ghanshiam Das and decreed the plaintiff's suit. Hence this second appeal filed by Ghanshiam Das and now continued by his son Pitambar Das. We have heard the learned counsel for the parties and have no doubt whatever that the Courts below came to a right conclusion in the case. Although S. 92, T. P. Act, which deals with subrogation, does not in terms apply to a case like the present, Courts have consistently applied the principle of subrogation to a prior mortgagee who takes a subsequent mortgage. Sir D. F. Mulla in his commentary on the Transfer of Property Act at p. 559, Edn. 2 says :

> Under the doctrine of subrogation, a third mortgagee redeeming a first mortgage acquires the rights of the first mortgagee and has priority over the second mortgage only as regards the first mortgage but not as regards the third mortgage. Conversely, a first mortgagee making a fresh advance after a second mortgage, on a renewed mortgage, even if that fresh advance is to pay off the first mortgage, retains priority over the second mortgagee as regards the first mortgage but not as to the fresh advance in respect of which he is in the position of third mortgagee.

In 15 O C 211[1] it was held that where a mortgagor being unable to repay a loan an account is taken of the money due to the mortgagee and a fresh bond is executed, the priority of the original mortgage is not affected although any fresh advance made under the subsequent deed will not have any effect as against an intermediate encumbrancer. Similarly in 9 O W N 387[2] it was held that where a mortgagee takes another mortgage in lieu of his prior mortgage and the case is not strictly covered by the provisions of the Transfer of Property Act, the mortgagee can claim the benefit of the doctrine of subrogation and he can use his earlier mortgage as a shield against any claim for priority of an intermediate mortgagee. It was further said that the original mortgagee should be presumed to have intended what was to his benefit and he ought to be deemed to have intended to keep alive the earlier mortgage to be used as a shield against the intermediate mortgagees. In the present case the fact that Durga Bakhsh Singh did not return the first three mortgage deeds to Balbhaddar Prasad when he executed the fourth mortgage deed of 17th November 1923, but kept them himself, is also an indication of the fact that he intended to keep alive the first three mortgages. The circumstances relied on by the learned counsel for the appellant, namely that while a one anna four pies share was mortgaged by the first three deeds, only an eight pies share was mortgaged by the fourth deed, that the last mortgage was usufructuary while the first three were simple and that no mention was made in the last mortgage deed of an intention to keep alive the first three mortgages, do not in our opinion show that Durga Bakhsh Singh did not intend to keep alive those mortgages. On the other hand as already pointed out, the fact of his keeping those mortgage deeds himself is a strong indication of his intention to keep alive those mortgages.

There is still another circumstance which goes against the appellant's contention. In his own suit Ghanshiam Das admitted the first three mortgages in favour of Durga Bakhsh Singh but asked the Court not to decide the question of priority in that suit. It does not therefore lie in his mouth or in that of his successor to question the priority of Durga Bakhsh Singh's first three mortgages. The appeal has, in our opinion, no force and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Oudh 91

ZIAUL HASAN J.

*Iqbal Husain* — Appellant.

v.

*Kesho Dayal and others*—Respondents.

Second Appeal No. 388 of 1935, Decided on 14th January 1938.

**(a) Wajib-ul-arz—Wajib-ul-arz intended to describe tenures and privileges of grove-holders—It is binding on grove-holder, even if it does not contain his signatures.**

Where a wajib-ul-arz is intended to contain a list of groves with description of tenures and conditions under which planting and cutting groves is to be exercised, it is untenable for the grove-holders to contend that the wajib-ul-arz is not binding on them, simply because their signatures are not taken on it. [P 92 C 2]

**(b) Landlord and Tenant — Grove—Sale by grove-holder though prohibited — Sale amounts to abandonment — Taluqdar is entitled to possession of grove.**

Where the grove-holder, who has no right to sell the trees under the wajib-ul-arz sells them, the sale amounts to abandonment. The purchaser gets nothing by an invalid purchase and the taluqdar is entitled to get possession of grove : *A I R 1925 Oudh 319, Rel. on.* [P 93 C 1]

**(c) Landlord and Tenant — Grove — Grove originally consisting of 31 trees reduced to 5 scattered trees—Grove held lost its character —Trees planted subsequently did not matter.**

Where the grove originally consisting of 31 trees was reduced to 5 trees consisting of nim, banyan, mango and guava and standing here and there on the land :

*Held* that the grove had lost its character and the trees planted subsequently did dot make any difference. [P 93 C 2]

M. Wasim — *for Appellant.*

**Judgment.**—The suit which has given rise to this second appeal against a decree of the learned Civil Judge of Bara Banki, who confirmed a decree of the learned Munsif of that place, was brought by the plaintiff-appellant, the proprietor of the taluqa of Suhailpur, for possession of plot No. 958, (corresponding to No. 1124 of the second settlement and No. 676 of the first settlement), situated in village Safdarganj, the area of which is 1 bigha 15 biswas which the defendants 1 to 3 and 5 to 7 held as grove-holders. The share of defendants 1 to 3 was 11/20ths and that of defendants 5 to 7 9/20ths. By a sale deed dated 24th July 1931, defendants 1 to 3 sold their share of the grove to defendant 4. The plaintiff-appellant claimed possession of the land on two grounds, namely (1) as against the vendee of the defendants 1 to 3 on the ground of the transfer which according to his case was unauthorized and (2) against all the defendants on the ground that the grove had lost its character as such. The trial Court dismissed the plaintiff's suit holding that the wajib-ul-arz relied on by the plaintiff was not applicable and that the grove had not lost its character as a grove. The plaintiff appealed against this decision but the learned Civil Judge who heard the appeal concurred with the findings of the learned Munsif and dismissed the appeal. The first question in the case is whether or not the grove in question is governed by the provisions of the wajib-ul-arz relied on by the plaintiff. That wajib-ul-arz (Ex. 2) is the wajib-ul-arz of the Suhailpur taluqa but Ex. 3, which is designated as "Fard Jakar wajib-ul-arz mauza Safdarganj" shows that the wajib-ul-arz of the Suhailpur taluka governs the village of Safdarganj also, as is provided in Para. 5 of Settlement Circular No. 20 of 1863. Cl. 6 of this wajib-ul-arz runs as follows:

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[1] Ram Kumar v. Dwarka Prasad, (1912) 15 O C 211=15 I C 5.

[2] Kanhaiya Lal v. Gulab Singh, (1933) 20 A I R Oudh 9=138 I C 206=7 Luck 655=9 O W N 387.

> All the groves of the village whether belonging to the taluqdar or the riyayas have already been entered in the hissa kashi baghat which has been prepared separately. Those groves of the riyayas which were cultivated at the time of the survey have been assessed with suitable rent by the taluqdar and the riyayas groves have been gifted by the taluqdar. As regards uncultivated groves of the riyayas, the riyayas are authorised to enjoy the fruits thereof with the permission of the taluqdar. Without the taluqdar's permission, the riyayas are not at liberty to cut or sell trees. On the other hand the taluqdar often gets trees cut for his own need. Without the taluqdar's permission, no new grove can be planted. If a raiyat who had planted a grove leaves the village or dies, the taluqdar takes possession of the grove and then he may if he so chooses, give it to the raiyats heir. The heir cannot get it without the taluqdar's consent.

It is this clause of the wajib-ul-arz that the plaintiff relies on. The defendants on the other hand rely on Ex. D.1, the fard hissa kashi baghat, referred to in the wajib-ul-arz. This document contains entries relating to eighteen groves of village Safdarganj. As against four of these groves there is an entry in Col. 7 that the grove-holder has no power to cut trees without the lambardar's permission. As there is no such entry relating to the grove in question, it is argued that the holders of the grove in suit have an absolute right to cut or sell the trees and as this document purports to have been signed not only by the taluqdar's agent but also by the grove holders, while the wajib-ul-arz is not signed by the grove holders, it is contended that the terms of the wajib-ul-arz do not apply to the grove in suit. I cannot accept this argument. Settlement Circular No. 20 of 1863 lays down what a wajib-ul-arz was intended to record and para. 3 (vi) of the Circular relating to grove says:

> Under this heading a list of the groves existing at the time should be given, and their tenures fully described and under what conditions the privilege of planting and cutting groves is to be exercised in future.

In the face of this provision it is untenable to contend that the terms of the wajib-ul-arz are not binding on the grove-holders simply because their signatures were not taken to the wajib-ul-arz. The learned counsel for the respondents relies on Settlement Circular No. 63 of 1863 and argues that as this Circular relates particularly to groves, the fard hissa kashi baghat which also deals exclusively with groves, should be accepted in preference to the wajib-ul-arz. This argument too does not appeal to me. In the first place Circular No. 63 of 1863 does not even mention the document designated as fard hissa kashi baghat and in the second place para. 3 (iii) of this Circular referring to a grove-holder itself says:

> His right or property in the trees will be maintained according to the local custom, whatever that may be found to be,

and there is absolutely nothing to show that the fard hissa kashi baghat was intended to be a record of the local custom referred to. On the other hand it cannot be disputed that it is the wajib-ul-arz which records such customs. Further there is no inconsistency between the wajib-ul-arz and the fard hissa kashi baghat so that it may be necessary to accept one in preference to the other. It is difficult to say how it was that in the fard hissa kashi baghat the provision against the grove-holder cutting trees was entered in respect of only four of the groves and not in respect of others; but in any case the mere absence of such an entry relating to the grove in question does not by any logic lead to the conclusion that no such restrictions exist with regard to this grove, when manifestly the grove in suit is, like the rest of the groves in the village, governed by para. 6 of the wajib-ul-arz. The learned counsel for the respondents also relied on Ex. D-2 which is the report of the Naib Sadar Munsarim relating to the groves situated in Safdarganj and Ex. D-3 which is an order presumably of the Settlement Officer dated 19th April 1866, accepting the Naib Sadar Munsarim's report. After saying that there are eleven groves of riyayas in this village the report says:

> A decree of the property in groves be passed in respect of eleven groves, excluding the land, in favour of the riyayas in possession according to Cols. 5 and 6 of the fard hissa kashi and here it may be pointed out that the entries about the want of the grove-holders' power to cut trees are in Col. 7 of the fard hissa kashi baghat and not in either Cols. 5 or 6, and this fact to my mind still further reduces the value of those entries with regard to some of the groves and of the absence of them with regard to the others. I am therefore of opinion that it cannot be held for a moment on the strength of Ex. D-1 that the terms of the wajib-ul-arz do not apply to the grove in suit.

**Exhibit 16 is a copy of the judgment of the learned Judicial Commissioner of Oudh in a case relating to a grove situated in another village of the same taluqa and on the basis of wajib-ul-arz of the taluqa, quoted in the judgment it was held that the only right which the grove-holders have, is to enjoy the fruits and that every other incident of property in the trees belong to the taluqdar. I therefore hold that defendants 1 to 3 had no right to sell the trees to defendant 4 and as the sale amounted to abandonment, *vide* 28 O C 133[1] and as the purchaser got nothing by an invalid purchase, the plaintiff-appellant is entitled to get possession of the 11/20 the share of the grove that belonged to defendants 1 to 3. On the question whether or not the grove in question lost its character as such, I fail to understand how the learned Judges of the Courts** below came to a contrary conclusion. Exs. 4 and 6 show that while at the time of the first settlement the grove consisted of thirty one trees, Exts. 5 and 7 show that in 1300 F and 1331 F the number of trees in this grove was 16 and 4 respectively. The Commissioner appointed by the trial Court has reported and shown in the map prepared by him that there are only five old trees in the grove out of which two are nim trees, one is a banyan tree the other two being mango and jamun trees. Moreover, while one of the nim trees is on the eastern end of the grove, the other nim tree and the banyan tree are in the middle of the plot. In view of the nature, number and situation of the old trees it seems to me impossible to hold that the grove did not lose its character as such in 1331 F, and the trees planted subsequently cannot help the defendants as once the plot ceased to be a grove it reverted to the taluqdar.

It was also argued on behalf of the respondents that as the plot in suit contains some groves, a chabutra and a sort of a place for worship, it was waqf as contended by the defendants in their written statement and that the plaintiff should not in any case be awarded possession of the plot. It appears from the proceedings in the trial Court however that on the plaintiff's counsel stating that the plaintiff did not seek in the suit to destroy any right which the defendants or the public might have in the land in suit, the defendants withdrew their plea of waqf and so no decision was given on this point. The defendants therefore cannot be allowed now to again raise the plea of waqf. The learned counsel for the respondents relied on some documents showing transfer of their rights by some grove-holders but in the first place we do not know the circumstances in which those transfers were made (they might have been made with the permission of the taluqdar) and in the second, as no general custom of grove-holders being absolutely entitled to transfer their groves has been set up, the instances of other groves cannot help the respondents. The appeal is therefore allowed and the decrees of the lower Courts set aside. The plaintiff-appellant will get a decree as prayed with costs in all the Courts.

V.B.B./R.K. *Appeal allowed.*

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[1] Mahabir Prasad v. Uman Shankar, (1925) 12 A I R Oudh 319=85 I C 527=28 O C 133=2 O W N 22.

## A. I. R. 1938 Oudh 94

ZIAUL HASAN AND HAMILTON JJ.

*Ahmad Hasan Khan and others Plaintiffs* — Appellants.

v.

*Ram Singh and others—Defendants*— Respondents.

Second Appeal No. 293 of 1935, Decided on 11th January 1938.

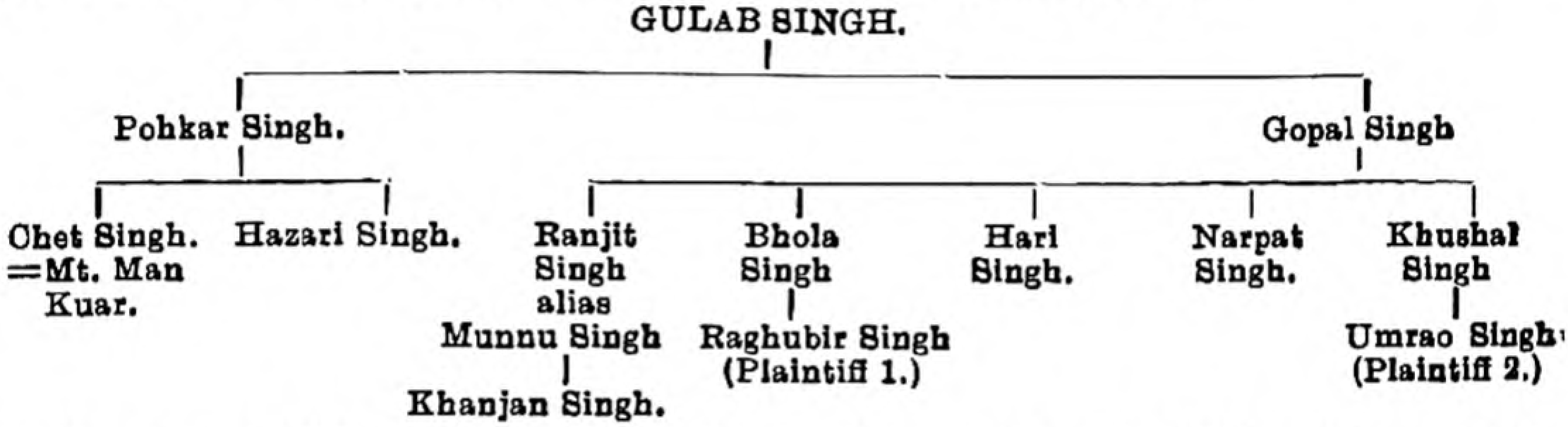
**Hindu Law—Widow — Relinquishment of claim to property in possession of widow, by only some reversioners is void under S. 6, T. P. Act — Reversioners are not estopped from claiming property on her death by challenging alienation made by her.**

Relinquishment of claim to property in possession of a Hindu widow, by only some of the reversioners made during her lifetime is void under S. 6. T. P. Act, and is not binding on any of the reversioners, so as to estop them from claiming the property on the death of the widow by challenging alienations made by her as being without necessity: *A I R 1923 P C 189, Rel. on; A I R 1927 P C 227 and A I R 1918 P C 196, Disting.* [P 95 C 1, 2]

Ali Zaheer and M. Wasim — *for Appellants.*

Radha Krishna and Jagdish Chandra— *for Respondents Nos. 1 to 3.*

**Judgment.** — One Chet Singh, whose pedigree is given below, died possessed of a two annas eight pies share in village Muradnagar and was succeeded by his widow Mt. Man Kuar.


GULAB SINGH.
Pohkar Singh.
Gopal Singh
Chet Singh. =Mt. Man Kuar.
Hazari Singh.
Ranjit Singh alias Munnu Singh
Khanjan Singh.
Bhola Singh
Raghubir Singh (Plaintiff 1.)
Hari Singh.
Narpat Singh.
Khushal Singh
Umrao Singh (Plaintiff 2.)

On 5th August 1892, Man Kuar mortgaged by conditional sale a one anna four pies share to Raghubar Singh (Ex. K-2) and on 1st March 1897, she sold the remaining one anna four pies share to one Zalim Khan (Ex. E-1). This sale was pre-empted by one Tahawwar Khan in whose favour a decree was passed on 28th June 1898. On 28th August 1900, Man Kuar sold the one anna four pies share mortgaged to Raghubar Singh to Tahawwar Khan for a sum of Rs. 1200 and out of the sale consideration, she left a sum of Rs. 1100 for expenses of redemption of the property. On the same date, Bhola Singh and Khushal Singh reversioners of Chet Singh, executed a deed of relinquishment (Ex. E-8) in respect of the entire two annas eight pies share left by Chet Singh in favour of Tahawwar Khan. Subsequently Man Kuar got the mortgage made in favour of Raghubar Singh (K-2) and the sale of 28th August 1900 made in favour of Tahawwar Khan set aside by suit and the one anna four pies share that she thus recovered was mortgaged by her to Zalim Khan. It will thus be seen that finally while a one anna four pies share came into the possession of Tahawwar Khan by the pre-emption suit, the remaining one anna four pies share was under mortgage to Zalim Khan. Defendants 1 to 8 are the representatives-in-interest of Tahawwar Khan and defendants 10 to 12 are the successors of Zalim Khan. Mt. Man Kuar died on 22nd February 1932.

The suit from which this appeal arises was brought on 14th July 1933 by Raghubar Singh and Umrao Singh along with Chhote Singh, to whom the other two plaintiffs had sold one half of their interest, for possession of the entire two annas eight pies share and for Rs. 300 mesne profits, on the allegation that the aforesaid transfers were without legal necessity and that the plaintiffs were not bound by them. Various pleas were raised by the defendants to the suit but the only plea which has survived was that the plaintiffs were estopped from claiming the property by reason of the relinquishment (Ex. E-8) executed by Bhola Singh and Khushal Singh, fathers of Raghubar Singh and Umrao Singh, plaintiffs respectively, at least so far as the share purchased by Tahawwar Khan was concerned. This plea was overruled by the trial Court, the learned Munsif of Sitapur, who gave the plaintiffs a decree conditional on payment of Rs. 200 to defendants 1 to 8 and Rs. 306 to defendants 10 to 12. The plaintiffs appealed to the learned District Judge but he affirmed the decree of the trial Court.

We are of opinion that the Courts below were right in holding that the deed of relinquishment (Ex. E.8) did not estop the plaintiffs from claiming the property. In the first place, there was absolutely no consideration for the relinquishment. In the second, it is not denied that Ranjit Singh was one of the reversioners of Chet Singh along with Bhola Singh and Khushal Singh but he was no party to the relinquishment. His interest devolved on his son Khanjan Singh who executed a deed of gift in favour of plaintiffs, 1 and 2. In the third place on the principle of S. 6, T. P. Act, Bhola Singh and Khushal Singh were not competent to make the relinquishment in question. In 50 I A 239[1] it was held by their Lordships of the Judicial Committee that a contract by a Hindu to sell immovable property to which he is the then nearest reversionary heir, expectant upon the death of a widow in possession, and to transfer it upon possession accruing to him, is void and it was remarked that S. 6 (a), T. P. Act, would be futile if a contract of the above character was enforceable.

The learned counsel for the appellants relies on 54 I A 396[2] but the facts of that case were entirely different. There the widow had alienated the property by three different deeds simultaneously executed and registered. By the first deed she gave some property to her brother, by the second she sold half of another property to the reversionary heir and by the third she sold the other half of that property to her son-in-law. The signature of each of the deeds was attested by the other two alienees. On a suit brought by the son and grandsons of the reversionary heir after his death, it was held that the three deeds were to be regarded as forming one transaction entered into by all the persons interested in the properties and that the reversionary heir and consequently the plaintiffs were precluded from disputing the two alienations sought to be set aside. It is thus clear that there is no parallel between the present case and the case of 54 I A 396.[2] The learned counsel for the appellants also relied on 46 I A 72[3] but the principle laid down in that case also is quite inapplicable to the case before us. At p. 86 their Lordships say:

> An alienation by a widow is not a void contract, it is only voidable . . . . . . . Now, in all cases of voidable contracts there is a general equitable doctrine common to all systems, that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If therefore a reversioner, after he became entitled to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good, he would lose his right of complaint.

In the present case the alleged relinquishment was made not when Bhola Singh and Khushal Singh became entitled to the property but in the lifetime of the widow Man Kuar. This case therefore also does not help the appellants. The result is that we dismiss this appeal and confirm the decree of the Court below.

R.M./R.K. *Appeal dismissed.*

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[1] Ananda Mohan Roy v. Gour Mohan Mullick' (1923) 10 A I R P C 189=74 I C 499=50 I A 239=50 Cal 929 (P C).

[2] Ramgouda Annagouda v. Bhausaheb, (1927) 14 A I R P C 227 = 105 I C 708=54 I A 396 = 52 Bom 1 (P C).

[3] Rangasami Gounden v. Nachiappa Gounden, (1918) 5 A I R P C 196=50 I C 498=46 I A 72=42 Mad 523 (P C).

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## A. I. R. 1938 Oudh 95

ZIAUL HASAN J.

*Manni Lal and others*
*Accused* — Applicants.
v.
*Emperor.*

Criminal Revn. No. 112 of 1937, Decided on 20th January 1938.

**(a) Criminal P. C. (1898), S. 106—Conviction under Ss. 149 and 325, Penal Code—Order under S. 106 not valid — Conviction under Ss. 323 and 147, Penal Code — Order under S. 106 is valid.**

Even though an order under S. 106, Criminal P. C., could not have been passed owing to the accused's conviction under S. 325 read with S. 149, Penal Code, yet such an order could properly be made if their conviction is under Ss. 147 and 323, which both involve breach of peace. [P 96 C 2]

**(b) Penal Code (1860), Ss. 323, 325, 147—S. 147 makes substantive offence—Charge under three sections simultaneously is possible.**

An offence under S. 147 has been made a substantive offence by the Indian Penal Code. There is no illegality in an accused being charged under that section in addition to charges under Ss. 323 and 325. [P 96 C 2]

Dr. J. N. Misra — *for Applicants.*

Asst. Government Advocate — *for the Crown.*

**Order.** — This is an application in revision against an order of the learned Sessions Judge of Lucknow dismissing the appeal of the present eight applicants against their convictions and sentences under Ss. 147/323 and 325, I. P. C. All the eight applicants were charged by the learned Magistrate who tried them under S. 147/323 and S. 325 read with S. 149. Manni Lal, applicant, was sentenced to pay a fine of Rs. 25 under each of the Ss. 147 and 323 and to imprisonment till the rising of the Court and Rs. 50 fine under S. 325. The rest of the accused were also fined Rs. 25 under each of the Ss. 147 and 323, and sentenced to imprisonment till the rising of the Court under S. 325, I. P. C. All of them were also bound over under S. 106, Criminal P. C., and required to execute personal bonds for Rs. 200 with one surety in like amount to keep the peace for one year. The learned counsel for the applicants has reiterated the argument put up before the learned Sessions Judge that the prosecution have failed to produce some witnesses mentioned in the first information report, but I am not prepared to entertain this plea in revision especially when it was put forward before the learned Judge in appeal and was rightly rejected by him.

The next point urged is that the applicants having been convicted by virtue of S. 149, I. P. C., an order for security under S. 106, Criminal P. C., against them was bad. For this contention reliance is placed on the case in 11 O W N 992[1] in which it was held that where a person is made constructively liable for an offence by calling in the aid of the provisions of S. 149, I. P. C., it is not proper to take action against him under S. 106, Criminal P. C. The learned Assistant Government Advocate on the other hand argues that the judgment of the learned trying Magistrate shows that the accused were not convicted under S. 149, I. P. C. and in support of this argument he relies on the operative portion of the judgment. No doubt S. 149 is not mentioned by the learned Magistrate in the operative portion of his judgment but in the course of his judgment he has clearly said:

> The principle of law is that when more than five men join together with the common object of assaulting some person as the accused had joined in this case, then they are all members of an unlawful assembly and each of them is responsible for the injuries caused by their members in the same way as if they had been caused by themselves.

I have already noted that the charge under S. 325, I. P. C. against all the accused was coupled with S. 149. In these circumstances it is impossible to hold that the accused were convicted without reference to S. 149, I. P. C., but though the accused were convicted under S. 325, I. P. C. read with S. 149, nevertheless I am of opinion that the order under S. 106, Criminal P. C. in the present case, was not bad. That section as amended by Act 18 of 1923 no doubt excludes S. 149 as well as some other sections of Ch. 8, I. P. C, from its operation, but it not only does not exclude S. 147 but is applicable to "other offences involving a breach of the peace". The accused were in the present case also convicted under Ss. 147 and 323, I. P. C. both of which involve a a breach of the peace. Therefore even though an order under S. 106, Criminal P. C. could not have been passed owing to the applicants' conviction under S. 325 read with S. 149, I. P. C. yet such an order could properly be made owing to their conviction under Ss. 147 and 323. In the case relied on by the learned counsel for the applicants, originally there was a conviction under S. 147 but it was set aside by the learned Sessions Judge so that the only conviction of the accused in that case remained under S. 325 read with S. 149, I. P. C. and it was held that they could not be bound over under S. 106, Criminal P. C.

It was contended by the learned counsel for the applicants that in view of the applicants' conviction under Ss. 323 and 325, it was not necessary to charge or convict them under S. 147. There is however no question of that charge or conviction being necessary or not. The point is that an offence under S. 147, I. P. C. has been made a substantive offence by the Penal Code and there is no illegality in the accused being charged under that section in addition to charges under Ss. 323 and 325, I. P. C. Lastly it was prayed that the sentences of the applicants might be reduced, but I do not think that the sentences passed by the learned Magistrate are at all severe. In fact the sentence of a day's imprisonment is the least that could be inflicted under S. 325, I. P. C. The application is dismissed.

B.D./R.K. *Application dismissed.*

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[1] Saun Pande v. Emperor, (1934) 21 A I R Oudh 279=1934 Cr C 775=150 I C 945=35 Cr L J 1159=11 O W N 992.

## A. I. R. 1938 Oudh 97

ZIAUL HASAN J.

*Wajid Ali — Plaintiff —* Appellant.

v.

*Ganga Din — Defendant —*
Respondent.

Second Appeal No. 307 of 1936, Decided on 3rd February 1938, against order of Civil Judge, Malihabad, Lucknow, D/- 31st July 1936.

**Family arrangement—One party admittedly sole owner of property — There can be no family settlement about it between him and other parties — Relinquishment of property by such party in favour of others — Relinquishment amounts to transfer by gift and must be registered.**

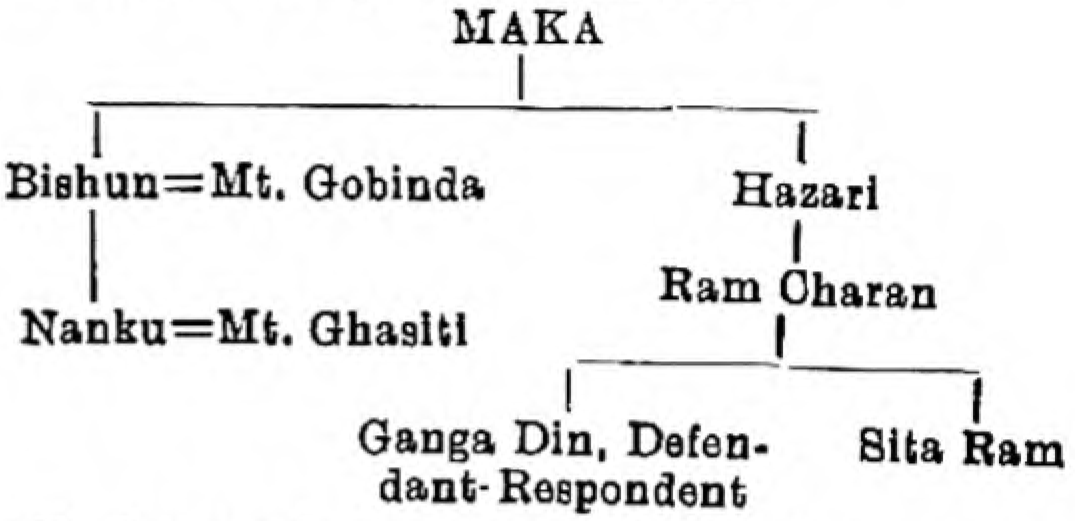
The essence of a family arrangement is a mutual recognition of a pre-existing right of the parties to the settlement. [P 98 C 1]

Where one party is admittedly the sole owner of property, there can be no family settlement about it between him and other parties. If he relinquishes his rights in such property to other parties the arrangement amounts to transfer by gift and must be registered according to S. 123, T. P. Act. [P 97 C 2; P 98 C 1]

Naziruddin — *for Appellant.*

S. Muhammad Husain —
*for Respondent.*

**Judgment.**—This is a plaintiff's appeal against a decree of the learned Civil Judge of Malihabad dismissing his appeal against a decree of the learned Munsif of Haveli, Lucknow, by which his suit for sale on two mortgages was dismissed in respect to a portion of the mortgaged property. The plaintiff-appellant brought his suit on foot of two simple mortgages executed in his favour by one Ram Charan on 15th August and 23rd September 1932. The suit was brought against the two sons of Ram Charan, namely Ganga Din, the present respondent, and Sita Ram who appears to have been subsequently discharged as Ganga Din purchased his share from him. The main defence in the suit was that Ram Charan had no authority to mortgage the property in suit as by a family settlement arrived at between him and his sons, Ganga Din and Sita Ram, he had relinquished his rights in the family property which was divided half and half between Ganga Din and Sita Ram. The learned trial Court held that the alleged family settlement had not been proved in respect of the property in suit other than plot No. 1076. It therefore gave the plaintiff-appellant a decree against that property but dismissed the suit in respect of plot No. 1076. This decree was confirmed on appeal by the learned Civil Judge against whose decree the present appeal has been filed. The admitted pedigree of Ram Charan's family is as follows:



So far as the plot in question is concerned, the admitted facts are as follows: The plot in suit originally belonged to Nanku. On 26th June 1900, Nanku made a gift of this plot and of another plot to his mother Mt. Gobinda for her life in lieu of her maintenance. It was specifically provided in the deed that after Mt. Gobinda's death the property would revert to Nanku. Nanku died in the life-time of Gobinda and his widow Mt. Ghasiti also died in Gobinda's life-time. On 12th March 1919, Gobinda executed a deed of gift in respect of the plot in suit in favour of Ram Charan's son Sita Ram but no mutation of names was effected in pursuance of this deed in Gobinda's life-time. In 1927 Gobinda died and it is not denied that on her death the person entitled to the property gifted to her by Nanku was Ram Charan but it appears that on 17th August 1927, the Revenue Court ordered mutation of names in respect of the plot in question in favour of Ganga Din and Sita Ram. It may also be mentioned that on 28th March 1928, Ram Charan purported to sell the plot in question to one Sita Ram Bakkal in order to raise money for financing a suit which he contemplated to bring against his son Sita Ram to claim the family property, but this deed of sale does not appear to have been given effect to and no suit was filed by Ram Charan or his vendee.

It is on the basis of the plot in suit being recorded in the revenue papers in the names of Ganga Din and Sita Ram that it is alleged that Ram Charan entered into a family settlement with his sons and gave up his rights in the plot in their favour and this plea has been accepted by both the lower Courts. The learned counsel for the appellant however argues that Ram Charan being admittedly the owner of the plot, there could be no family settlement about it between him and his sons and that if he wanted to transfer the plot to his sons, it ought to have been done by a deed of gift duly executed and registered under S. 123, T. P. Act. I am of opinion that the contention of the learned counsel for the appellant is sound. It appears to me that the essence of a family settlement is a mutual recognition of a pre-existing right of the parties to the settlement but in the present case Sita Ram and Ganga Din had admittedly not the shadow of a right to the plot in question as against Ram Charan. In 51 All 79[1] their Lordships of the Allahabad High Court after referring to the decisions of their Lordships of the Judicial Committee in 1 I A 157[2] and 33 All 356[3] and others said :

> These pronouncements of their Lordships of the Privy Council are sufficiently clear to put it beyond doubt that in the usual type of family arrangement in which there is no question of any property, the admitted title to which rests in one of the parties, being transferred to one of the other parties, there is no transfer of ownership such as is necessary to bring the transaction within the definition of 'exchange' in S. 118, T. P. Act.

It will be observed that in this passage the learned Judges specifically exclude from the definition of a family arrangement a transaction by which some property the admitted title to which rests in one of the parties is transferred to one of the other parties and at p. 83 also they say :

> Where any property, in regard to which there was no doubt as between the parties that its ownership rested in one of the parties, is brought within the scope of the family arrangement and is allotted to one of the other parties, it may be that qua that property there would be a transfer of ownership.

This remark fully applies to the present case in which title to the plot in question admittedly rested with Ram Charan alone who by his entering into the alleged family arrangement cannot but be said to have transferred it to his sons Ganga Din and Sita Ram. The learned counsel for the respondent relies on S. 9, T. P. Act, which provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law; but S. 123 of the Act provides that a gift of immovable property to be valid must be effected by a registered and duly signed and attested instrument only. Admittedly there was no such instrument in the present case. The title to the plot in suit therefore did not pass from Ram Charan to Sita Ram or Ganga Din and Ram Charan's mortgage of it must be given effect to against Sita Ram and Ganga Din. The appeal is allowed with costs and the decree of the trial Court modified so as to decree the plaintiff's suit in respect of plot No. 1076 also.

D.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Oudh 98

ZIAUL HASAN J.

*Bishwa Nath Saran Singh—Plaintiff* — Appellant.

v.

*Sri Narain Singh and another — Defendants* — Respondents.

Second Rent Appeal No. 55 of 1936, Decided on 3rd February 1938, against order of Dist. Judge, Rae Bareli, D/- 30th July 1936.

**Oudh Rent Act (22 of 1886), S. 127 — Suit for arrears of rent and for ejectment of persons in possession — Persons in possession failing to prove to be heirs of deceased occupancy tenant — Legal heir found to be some one else—Suit is maintainable.**

In a suit under S. 127 by zamindar for arrears of rent and for ejectment of persons in possession, the persons in possession failed to prove that they were heirs of the deceased occupancy tenant. The legal heir of the deceased occupancy tenant was found to be some one else :

*Held* that the suit was maintainable and the question whether or not the legal heir of the deceased occupancy tenant had actually surrendered the holding in favour of the zamindar was immaterial. [P 99 C 1]

S. N. Roy — *for Appellant.*

P. N. Chaudhry—*for Respondent No. 1.*

**Judgment.**— This is a plaintiff's appeal against a decision of the learned District Judge of Rae Bareli by which he reversed the decree of a learned Assistant Collector of the first class passed in favour of the plaintiff-appellant in a suit under S. 127, Oudh Rent Act. The plaintiff appellant is admittedly the zamindar of the land in dispute. He sued for arrears of rent and for ejectment of the defendants-respondents, treating them as trespassers, under S. 127, Oudh Rent Act. Both the defendants claimed to be heirs of Ram Adhin Singh in whose occupancy tenancy the land admittedly formerly was and who died in the year 1933. The learned trial Court held that the respondents were not the heirs of Ram Adhin Singh and decreed the plaintiff's suit. In appeal the learned District Judge reversed his decree and dismissed the suit. It seems to me very strange that though the learned Judge disbelieved the evidence produced by the defendants to prove their relationship with Ram Adhin Singh and thus confirmed the finding of the trial Court that the defendants had failed to prove that they were the heirs of Ram Adhin Singh, he has yet thought fit to dismiss the plaintiffs suit. It is not disputed that the plaintiff's witness Bhawani Bhik Singh is heir of Ram Adhin Singh under the law and whether or not Bhawani Bhik Singh has actually surrendered the holding in favour of the plaintiff is wholly immaterial in this case. Bhawani Bhik Singh having been found to be the legal heir of Ram Adhin Singh, the defendants respondents had absolutely no title to possession of the land in suit and a suit under S. 127, Oudh Rent Act, could very properly be brought against them by the landlord and the learned trial Court was, in my opinion, perfectly right in decreeing the plaintiff's suit.

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[1] Ram Gopal v. Tulshi Ram, (1928) 15 A I R All 641=116 I C 861=51 All 79=26 A L J 952 (F B).

[2] Rani Mewa Kuwar v. Rani Hulas Kuwar, (1874) 1 I A 157=13 Beng L R 312=3 Sar 354 (P C).

[3] Khunni v. Kunwar Gobind Krishna Narain, (1911) 33 All 356=10 I C 477=8 A L J 552 (P C).

The learned counsel for the respondents has not been able to refer to any provision of the Oudh Rent Act under which they could claim possession of the land in suit and I, cannot for a moment, accept the argument that the plaintiff has no cause of action against them or that the fact of their being related to the deceased occupancy tenant gives them any right in the land in suit when the legal heir is in existence. The appeal is, therefore, decreed with costs, the decree of the lower Appellate Court set aside and that of the trial Court restored.

D.S./R.K. *Appeal decreed.*

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## A. I. R. 1938 Oudh 99

THOMAS C. J.

*Bhagwandin* — *Complainant* — Applicant.

v.

*Jagdat and others* — Opposite Party.

Criminal Ref. No. 30 of 1937, Decided on 3rd February 1938, made by Sessions Judge, Gonda.

**Criminal P. C. (1898), S. 250—Order for compensation passed without recording reasons for passing it is illegal.**

An order for compensation passed without recording reasons for passing it, is illegal owing to non-compliance with the provisions of S. 250. The recording of reasons is a condition precedent to the proper exercise of the power under the section. The object of the Legislature in requiring Magistrates to record their reasons in such a case is that the power given under the section should not be used carelessly or indiscriminately and in order to enable a Court of Appeal or revision to judge the sufficiency of the grounds on which the order is based. Merely to say that the case is false or that the explanation is not satisfactory is not enough. [P 99 C 2; P 100 C 1]

**Order.** — This is a criminal reference by the learned Sessions Judge of Gonda, recommending that the order of awarding compensation to the opposite parties be set aside. Bhagwandin, applicant, filed a complaint against the opposite parties under Ss. 323, 342, 426 and 506, I. P. C. which was eventually dismissed by the Sub-Divisional Magistrate (Mr. H. A. Ansari) of Gonda on 14th May 1937. The learned Magistrate on the same date ordered the complainant to pay Rs. 35 as compensation to the opposite parties as in his opinion the case was false and frivolous. I have perused the explanation of the learned Magistrate in which he admits his mistake. He writes as follows :

> I confess that I committed an error in interpreting the law and omitted to notice that the amended S. 250, Criminal P. C., required separate proceedings being taken for considering whether the complaint besides not being proved was also frivolous and vexatious and that the order should not have been passed without the explanation being considered separately. I can only add that I shall be more careful in future.

After the above explanation I do not wish to say very much in my order. The order of the Magistrate is clearly illegal. It appears from his judgment that the learned Magistrate had already made up his mind to award compensation before he called upon the applicant to show cause. The recording of reasons is essential and an omission to do so vitiates the whole proceeding. It is the duty of the Magistrate ordering compensation to be paid to the accused under S. 250, Criminal P. C., to record his reasons for passing such an order. The recording of the reasons is a condition precedent to the proper exercise of the power under the section. The object of the Legislature in requiring Magistrates to record their reasons in such a case is that the power given under the section should not be used carelessly or indiscriminately and in order to enable a Court of appeal or revision to judge the sufficiency of the grounds on which the order is based. An order for compensation passed without recording reasons for passing it is illegal owing to non-compliance with the provisions of S. 250 of the Code and should be set aside in revision. The order of the learned Magistrate is as follows :

> The cause is not sufficient. Bhagwandin will either pay compensation as ordered or undergo simple imprisonment for 15 days.

The learned Magistrate should have explained in his order why he did not consider the explanation satisfactory. Merely to say that the case is false or that the explanation is not satisfactory does not give the revisional Court sufficient grounds for finding whether there are good grounds for the order of compensation or not. I therefore accept the reference and set aside the order of the learned Magistrate. The amount of compensation, if paid, will be returned to Bhagwandin.

D.S./R.K. *Reference accepted.*

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## A. I. R. 1938 Oudh 100

THOMAS C. J. AND ZIAL HASAN J.

*Jagdeo Prasad and another — Judgment-debtors* — Appellants.

v.

*Pearey Lal — Decree-holder —* Respondent.

Exn. of Decree Appeal No. 33 of 1936, Decided on 26th January 1938, against order of Dist. Judge, Hardoi, D/- 17th April 1936.

**(a) Limitation Act (1908), S. 14 — Whether proceeding has been prosecuted in good faith is question of fact (*Obiter*).**

The question whether a proceeding has been prosecuted in good faith under S. 14 is a question of fact : *A I R 1927 Lah 909 and A I R 1932 Lah 531, Rel. on.* [P 101 C 1]

**(b) Limitation Act (1908), S. 14—Discretion exercised not improperly under S. 14 by lower Court should not be interfered with.**

Once a discretion has been exercised in the matter under S. 14 by the lower Court, High Court should not interfere, unless discretion has been improperly exercised. [P 101 C 1]

Where the decree-holder on the advice of his counsel filed an application for execution by attachment of decree in wrong Court, possessing concurrent jurisdiction with the Court in which it ought to have been filed, and the lower Court found that he was doing so in good faith and entitled to deduction under S. 14 :

*Held* that the lower Court had not improperly exercised its discretion and High Court could not interfere with it : *A I R 1936 Lah 200, Rel. on.* [P 101 C 1, 2]

K. N. Tandon — *for Appellants.*

S. C. Das — *for Respondent.*

**Judgment.**—This appeal against a decision of the learned District Judge of Hardoi was referred for decision by a Bench by the late Smith J. The facts are that on 8th June 1930 the decree-holder-respondent obtained a decree for land revenue paid by him on behalf of the defendants-appellants from the Court of Babu Mohan Lal, an Honorary Assistant Collector of the First Class. On 19th December 1930, he put in an application for execution of the decree in the same Court but the application proved infructuous. On 5th February 1932 a second application for execution was made to the same Court, but eventually it was also consigned to records. The third application for execution, which has given rise to this appeal, was made by the decree-holder on 4th February 1935, but it was made to the Court of Babu Jalpa Baksh, another Honorary Assistant Collector exercising jurisdiction in the same subdivision as Babu Mohan Lal. By this application the decree-holder wanted to attach a decree passed by Babu Jalpa Baksh in favour of the present judgment-debtors appellants. The office of the Court of Babu Jalpa Baksh made a report that the application was wrongly filed in that Court but should have been filed in the Court of Babu Mohan Lal. On this report Babu Jalpa Baksh passed an order on 20th February 1935, to the effect that the application be sent to the Court of Babu Mohan Lal through the Deputy Commissioner of Hardoi. On the next day, the Deputy Commissioner of Hardoi passed an order for the transmission of the application to the Court of Babu Mohan Lal and it was received in that Court on 26th February 1935. The judgment-debtors objected on the ground that the application for execution was beyond time and Babu Mohan Lal upheld this objection, holding that as the application was wrongly filed in the Court of Babu Jalpa Baksh, the decree-holder was not entitled to the benefit of S. 14, Lim. Act. Against this order, the decree-holder appealed to the District Judge and the learned Judge reversed the learned Assistant Collector's order and sent back the case to him with directions to restore the execution application to its original number and to proceed according to law. He was of opinion that in the circumstances of the case the decree-holder was entitled to the benefit of S. 14, Lim. Act. It is against this order that the present appeal was filed by the judgment-debtors.

The learned counsel for the respondent argues that the question whether or not he was prosecuting his application in good faith in the Court of Babu Jalpa Baksh is a question of fact and that it having been decided in his favour by the lower Appellate Court, this Court has no jurisdiction to interfere with the finding of that Court. He relies on the cases in A I R 1927 Lah 909[1] and 14 Lah 106.[2] On the other hand the learned counsel for the appellants contends that the question is not a pure question of fact but is at least a mixed question of fact and law. He relies on 36 I C 702[3] and A I R 1927 Pat 256.[4] We consider that it is not necessary for the purposes of this appeal, to decide whether the question of good faith under S. 14, Lim. Act, is a question of fact or law, though we are inclined to the view contended for by the learned counsel for the respondent. The learned District Judge on a consideration of the facts of the case, namely that the Court of Babu Jalpa Baksh had concurrent jurisdiction with that of Babu Mohan Lal, that the decree-holder was probably advised by counsel as the application for execution bears the signatures of and was put in by a counsel and that execution was sought by attachment of a decree of the Court of Babu Jalpa Baksh, came to the conclusion that the decree-holder was prosecuting his application in the Court of Babu Jalpa Bakhsh in good faith and we agree, if we may respectfully say so, with the view taken by their Lordships of the Lahore High Court in A I R 1936 Lah 200[5] in which it was held that once a discretion has been exercised in the matter under S. 5, Lim. Act, by the lower Appellate Court, the High Court should not interfere. The same principle should, in our opinion, apply to a discretion exercised under S. 14 of the Act and we do not think the learned District Judge exercised his discretion improperly in the present case. We therefore dismiss the appeal with costs and concur with the order of the District Judge.

V.B.B./R.K. *Appeal dismissed.*

## A. I. R. 1938 Oudh 101

YORKE J.

*Messrs. Sagarmal-Hanoman Prasad* — Appellant.

v.

*B. Abdul Rahman and another* — Respondents.

Miscellaneous Appeal No. 61 of 1936, Decided on 1st February 1938, against order of Dist. Judge, Fyzabad, D/. 20th May 1936.

**(a) Provincial Insolvency Act (1920), S. 75(3) —Admission of appeal is tantamount to grant of leave under S. 75 (3)—Absence of leave is no bar provided there is substantial question for consideration.**

The admission of an appeal is tantamount to the grant of leave contemplated by S. 75 (3) and the absence of application for leave is no bar to the hearing of the appeal. The only real question in such a case is whether there is a substantial point for consideration. [P 102 C 2]

**(b) Provincial Insolvency Act (1920), S. 16— Petitioning creditor arriving at some arrangement with debtor and declining to prosecute application—S. 16 applies—Order of substitution should be made.**

Where a petitioning creditor, who is a representative of the whole body of creditors comes to an arrangement with the debtor and seeks not to prosecute his application any further, he cannot be said to be proceeding with due diligence; his actions on the contrary amount to a failure to proceed with due diligence in the highest degree. S. 16 therefore applies in such a case and it is a case in which an order of substitution should be made. [P 102 C 2]

H. D. Chandra — *for Appellant.*

M. Naimullah — *for Respondents.*

**Judgment.**—Messrs. Sagarmal Hanoman Prasad through Sagarmal appeals from an order of the District Judge of Fyzabad, in an insolvency case refusing to make an order of substitution under S. 16, Provincial Insolvency Act. The appeal arises out of the following facts: On 10th August 1935 one of the two respondents Abdul Rahman executed a deed of gift of the whole of his estate in favour of his wife. On 13th August 1935, the other respondent Tabarak Ullah similarly executed a deed of gift of the whole of his estate in favour of his wife. On 9th November 1935, Damodar Dass made an application for the adjudi-

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1. **Ganga Ram Bishen Das v. Hari Ram Ram Lal, (1927) 14 A I R Lah 909=102 I C 628.**
2. **Kala Singh v. Gahna Singh, (1932) 19 A I R Lah 531 = 138 I C 646 = 14 Lah 106 = 33 P L R 740.**
3. **Ram Jag Pandey v. Bhagwan Dat, (1916) 3 A I R Oudh 139=36 I C 702=19 O C 367.**
4. **Fazlul Jamil v. Helaluddin, (1927) 14 A I R Pat 256=101 I C 674=8 P L T 561.**
5. **Rura Mal v. Ram Chand, (1936) 23 A I R Lah 200=159 I C 178=37 P L R 784.**

cation of these two persons as insolvents, alleging as acts of insolvency these two transfers. The present appellant was included in the array of creditors in these proceedings in respect of a debt amounting to Rs. 800, the date of which was 14th October 1935, subsequent, of course, to the transfers made by the debtors, but prior to the date of the application. On 16th January 1936, the present appellant, coming to know that there was a probability of the proceedings being dropped by Damodar Dass because of a settlement between him and the debtors, put in an application under S. 16 of the Act for substitution of his name as petitioning creditor. On the following day a compromise was put in whereby Damodar Dass withdrew his application or sought to withdraw it alleging that a settlement had been arrived at between him and the debtors.

The learned District Judge permitted Damodar Dass to withdraw his application, and rejected the application of Sagarmal to be substituted for Damodar Dass for reasons which are given by him in his judgment. He says that the principal acts of insolvency alleged by Damodar Dass could not be acts of insolvency which might be relied upon by Sagarmal as they were of dates previous to even Sagarmal's own debt. He went on to say that the general ground of debtors concealing themselves would be available to Sagarmal, and Sagarmal might make a fresh application against the debtors to get them adjudged as insolvents. It is against this order rejecting the application for substitution that the present appeal has been filed.

A preliminary objection is raised on behalf of the respondents debtors that the appeal as framed is incompetent because no leave has been taken under sub-s. (3) of S. 75 of the Act either from the District Court or from this Court. It is pointed out that Sagarmal has never applied for permission to either Court and has not even mentioned the matter of permission in his grounds of appeal to this Court. It is further urged that permission should not be given because S. 16 only gives a discretion, and in the present case that discretion has been exercised in a judicial manner. The discretion further, it is said, did not deprive the creditor of the right to file a fresh application against the debtors and there would be no question of any bar of limitation in view of the new S. 78 of the Act. On behalf of the appellant it is urged that the most modern view on this subject is that the admission of an appeal is tantamount to the grant of leave contemplated by S. 75 (3), and I need hardly refer to the rulings which have been quoted as they are all mentioned in Ghosh's Commentary on the Provincial Insolvency Act (Edn. 9, 1933, p. 591). It is obvious from what is said in the rulings, much of which has been reproduced in the Commentary, that the absence of application for leave is no bar and that the only real question in such a case is whether there is a substantial point for consideration. In the present case both conditions are present. First the appeal has already been admitted by a learned Judge of this Court and secondly there is clearly a substantial point for consideration. I find no force therefore in the preliminary objection.

Coming now to the merits of the appeal, the question is first whether the present circumstances do or do not induce the application of S. 16, and secondly whether in the present case the lower Court had made a proper exercise of the judicial discretion given to it by that section. Learned counsel for the respondents contends that this is not a case in which it can be said that the petitioner is not proceeding with due diligence on his petition. It seems to me on the contrary that there can be no stronger case than the present one, and that where a petitioning creditor, who is a representative of the whole body of creditors, comes to an arrangement with the debtor and seeks not to prosecute his application any further, it cannot possibly be said that he is still proceeding with due diligence. On the contrary there seems to be a failure to proceed with due diligence in the highest degree. I am therefore clearly of opinion that S. 16 does apply in such a case, and that in the ordinary way it is a case where an order of substitution should be made.

The second consideration here is that there is an allegation of fraud. It may or may not turn out to be well founded, but prima facie it does look as if there was something not entirely above board about the proceedings of the debtors in the present case. It is not clear how after the transfers by the debtors of the whole of their estate to their wives, they could have been in a position to make an arrangement for payments to the petitioning creditors. The main point urged on behalf of the respondents that in view of S. 78 the appellant will not be in any way injured by the order of the learned District Judge, it being contended that no question of limitation can possibly arise. It is very easy to say that at this stage, but there can be no doubt that if the appellant is left to file a fresh application for the adjudication of the respondents, he will be met with every plea available to them, and the ultimate result of that litigation cannot be foreseen at this stage. It seems to me therefore that it is a case where the law provides for substitution and the conditions precedent are clearly present. The District Judge would have made a more proper use of his discretion, had he ordered substitution under the provisions of S. 16 of the Act.

On this view of the case I allow this appeal, set aside the order of the learned District Judge and direct him to substitute the appellant for the petitioning creditor, Damodar Das, and to proceed with the application according to law. The appellant will get his costs of this appeal.

R.M./R.K. *Appeal allowed.*

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## A. I. R. 1938 Oudh 103

ZIAUL HASAN AND HAMILTON JJ.

*Sri Krishen — Plaintiff* — Appellant.

v.

*Jamna Narain and others — Defendants* — Respondents.

First Appeal No. 8 of 1936, and Exn. of Decree Appeal No. 77 of 1935, Decided on 17th February 1938, against decree of Civil Judge, Mohanlalganj, Lucknow, D/- 12th October 1935.

**(a) Decree — Variation of — Compromise decree—Preliminary decree on compromise—No mention of mesne profits — Subsequent application for mesne profits by parties—Appointment of Commissioner to determine mesne profits held proper — Successor of Judge who passed above order held not entitled to go behind it – Provision for payment of mesne profits held matter relating to suit.**

The preliminary decree passed on the basis of a compromise made no provision for payment of any mesne profits by one party to the other. But subsequently, the parties applied for mesne profits and it was only when they could not come to an agreement on the point that the Court appointed a Commissioner to determine the amount of mesne profits :

*Held* that a decree could be varied by consent of parties and though the original decree made no mention of mesne profits and though the parties did not come to an agreement on that question, still the applications and the proceedings of the Court referred to above clearly showed that the intention of both the parties was that mesne profits should be paid to each other, and this being so, the Court was perfectly justified in appointing a Commissioner to deal with the question of mesne profits. [P 105 C 1]

*Held further* that apart from the propriety of the order of the appointment of the Commissioner the Civil Judge ought not to have sat in judgment on an order of his predecessor-in-office and to have held that order to be ultra vires. [P 105 C 1]

*Held also* that the provision for payment of mesne profits in the compromise was matter relating to suit within the meaning of O. 23, R. 3, Civil P. C.: *A I R 1931 Bom 295, Rel. on.* [P 105 C 1, 2]

**(b) Execution—Partition suit—Preliminary decree giving widow maintenance — Subsequent compromise between parties that widow to receive maintenance from certain date—Widow though no party to such compromise held could execute compromise decree.**

Under a preliminary decree in a partition suit to which a widow was a party, the widow was given some maintenance. Under a subsequent compromise between the parties, the widow was to get maintenance from a certain date and a decree was passed on the basis of the compromise. The widow sought to execute the decree as regards her maintenance :

*Held* that a decree may be partly preliminary and partly final and though the amount of mesne profits was to be finally determined as between the principal contesting parties the decree so far as it related to the payment of maintenance allowance to the widow was quite final and that she could execute the decree from that date even though she was not a party to the compromise. [P 105 C 2 ; P 106 C 1]

Naziruddin — *for Appellant.*

Kanhaiya Lal — *for Respondents.*

**Judgment.** — First Civil Appeal No. 8 of 1936 against an order of the learned Civil Judge of Mohanlalganj, Lucknow, and the Execution of Decree Appeal No. 77 of 1935, against an order of the learned Additional Civil Judge of Lucknow, are connected together and arise out of the same suit. Lachhmi Narain, plaintiff 1, and Jamna Narain, defendant 1, are brothers. They had a third brother, Sheo Narain, who is dead, and whose widow, Mt. Jasoda, is defendant 4. The suit brought by Lachhmi Narain and his minor son Sri Krishna, plaintiff 2, was for partition of a half share in the family property, both moveable and immovable. It was brought against Jamna Narain, his son Basdeo Singh, defendant 2, the latter's minor son Vidya Prakash, defendant 3, and Mt. Jasoda, defendant 4. The suit was filed on 14th March 1932 and on 2nd February 1933 a compromise was filed by the parties. The terms of the compromise were as follows:

(1). That the entire moveable property mentioned in list B excepting items Nos. 72, 73, 74 and 166 be partitioned and half of the property be given to the plaintiffs and the other half to defendants 1 to 3. (2). That two houses mentioned in the written statement of the defendants and situate in Jangliganj, Lucknow, be included in the immovable properties mentioned in list A. This entire property be partitioned and one half of it be given to the plaintiffs and the other half to defendants 1 to 3. (3). That a sum of Rs. 1000 per annum be fixed as the maintenance for defendant 4, the plaintiffs being liable to pay the half of it, Rs. 500, while defendants 1 to 3 be liable to pay the other half and the respective shares of the plaintiffs and defendants 1 to 3 be made chargeable with the maintenance in favour of defendant 4. That the maintenance would be payable in two instalments at the time of the Rabi and the Kharif crops every year. (4). That the parties shall bear their own costs.

On 17th August 1933 the plaintiffs and defendants 1 to 3 filed a joint application stating that the parties have partitioned the houses in suit between themselves, and that only the partition of moveable property and the villages was left and the question of mesne profits remained to be decided. As regards mesne profits, it was said that it had been agreed upon between the parties that each party will be entitled to get mesne profits from the other, according to the accounting to be done shortly afterwards, from 1st November 1930, and that Mt. Jasoda Kuar will also be entitled to get her maintenance allowance of Rs. 1000 a year from 1st November 1930. On 25th August 1933, another application was filed by the parties other than Mt. Jasoda saying that it had been settled between the parties that the defendants should pay Rs. 700 to the plaintiff for the ornaments of the mother of Lachhmi Narain and that no dispute existed relating to list C attached to the plaint, and praying that the remaining articles be partitioned according to the list prepared by the Commissioner. On 23rd September 1933, another joint application was put in by the plaintiff and defendants 1 to 3 intimating to the Court that moveables have been divided by the parties between themselves, that defendants shall pay Rs. 85 more to the plaintiffs and praying that three months' time be granted to the parties to settle the amount of mesne profits. We find however from the Court's proceedings of 6th January 1934 that the amount of mesne profits was not settled up to that date and that the parties wanted a month's time more for the purpose. Lastly, on 10th February 1934, the learned Civil Judge passed the following order:

> As the parties are unable to agree, I appoint Mr. Qureshi, Commissioner, to determine the mesne profits. The parties shall produce before him documentary and oral evidence which they deem to be necessary. Put up for report on 10th March 1934. Parties to pay process fee at once.

The Commissioner accordingly determined the amount of mesne profits and submitted his report on 3rd September 1934. To this report, the defendant objected on the ground that as the preliminary decree passed on the compromise of 2nd February 1933, made no provision for payment or ascertainment of any mesne profits, the proceedings relating to mesne profits were ultra vires. The learned Civil Judge who passed the decree on 2nd February 1933, appears to have been transferred in the meantime and his successor upheld the defendant's objection by his order dated 12th October 1935. It is against this order that First Civil Appeal No. 8 of 1936 has been brought by the surviving plaintiff Sri Krishna, plaintiff 1 having in the meantime died. The execution of decree appeal arises out of an application for execution dated 14th November 1933, put in by Mt. Jasoda against Lachhmi Narain for recovery of half of her maintenance allowance under the terms of the compromise referred to above from 1st November 1930 to 31st October 1934. Lachhmi Narain objected to execution mainly on the grounds that the decree of 2nd February 1933 not being final is not capable of execution, that Mt. Jasoda was not a party to the compromise of 17th August 1933, and could not therefore apply for execution of its terms and that she was entitled to get maintenance from the date when the decree should be made final. This objection was disallowed by the learned Additional Civil Judge who held that Jasoda was entitled to execute the decree and to claim maintenance from 1st November 1930. It is against this order that Lachhmi Narain preferred appeal No. 77 of 1935.

We first take up plaintiff's appeal No. 8 of 1936. On the question whether the inquiry into the amount of mesne profits was proper or not, it is contended by the respondents that the preliminary decree passed on the compromise of 2nd February 1933, made no provision for payment of any mesne profits by one party to the other. This is no doubt so, but we have already referred to the applications of 25th August and 23rd September 1933, which clearly show that parties were contemplating payment of mesne profits to each other, and were asking for time to settle the amount of mesne profits. Even so late as 6th January 1934, they asked for further time for the purpose and it was only when they could not come to an agreement on the point that the Court appointed a Commissioner to determine the amount of mesne profits. It cannot be denied that a decree can be varied by consent of parties and though the original decree of 2nd February 1933, made no mention of mesne profits and though the parties did not come to an agreement on that question, still the applications and the proceedings of the Court referred to above clearly show that the intention of both the parties was that mesne profits should be paid to each other, and this being so, the Court was, in our opinion, perfectly justified in appointing a Commissioner to deal with the question of mesne profits. Apart from the propriety of the order of the appointment of the Commissioner, we are of opinion that the learned Civil Judge, who allowed the defendants' objection ought not to have sat in judgment on an order of his predecessor-in-office and to have held that order to be ultra vires. We consider that as the presiding officer of the same Court which passed the order of 10th February 1934, the learned Civil Judge could not and should not have gone behind that order.

It was contended on behalf of the respondent that as no past mesne profits were claimed by the plaintiffs in their suit, the provision in the compromise of 17th August 1933, for payment of mesne profits from 1st November 1930, could not be a matter "relating to the suit" and could not therefore be given effect to under O. 23, R. 3, Civil P. C. We see no force in this argument. In A I R 1931 Bom 295[1] it was said :

> On the authorities as they stand, the law not merely entitles the parties but compels the Court to record a compromise in accordance with the terms 'so far as it relates to the suit.' Where it is not so and is plainly outside the suit and cannot be said to 'relate to it,' the Court may refuse to incorporate it . . . But where it is a consideration of the compromise and therefore intimately connected with it, the words 'that relate to the suit' are sufficiently wide to embrace such a term of the compromise, as, for instance, the consideration for the compromise, even though this consideration may be entirely outside the scope of the suit and relate to property which was never in question in the suit itself.

In the present case in view of the facts that Mt. Jasoda was a party to the suit, that she was claiming a share in the property or at least maintenance and that she was held by mutual agreement entitled to maintenance from 1st November 1930, it cannot, in our opinion, be said that the question of the time from which the parties were entitled to receive mesne profits from each other did not 'relate to the suit'. We are therefore of opinion that the defendants' objection to the ascertainment of mesne profits had no force and ought not to have been allowed. The plaintiff's appeal is accordingly decreed with costs and the lower Court's order set aside. The case will go back to the Court below for passing a final decree after hearing the parties' objections, if any, to the Commissioner's report about mesne profits.

We now come to the plaintiff's appeal against the order of the learned Additional Civil Judge dismissing his objections to the execution of the decree by Mt. Jasoda. We are of opinion that the order of the learned Judge is perfectly right and must be upheld. The argument that the decree not having yet been made final, Mt. Jasoda cannot execute it to recover her maintenance allowance is, in our judgment, absolutely without force. Decree may be partly preliminary and partly final, and though the amount of mesne profits is to be finally determined as between the principal contesting parties, the decree so far as it relates to the payment of maintenance allowance to Mt. Jasoda is quite final. The argument that as Mt. Jasoda was no party to the application of 17th August 1933, which fixed 1st November 1930 as the date from which she was entitled to get maintenance, she cannot execute the decree does not also appeal to us. Mt. Jasoda was a party to the suit and to the decree originally passed in the suit and the mere fact that she did not sign the application of 17th August 1933, does not, in our opinion, disentitle her to avail herself of the agreement come to between the parties after the passing of the preliminary decree. Moreover, from her own evidence and from that of her witnesses, one of whom is an advocate, it appears that she, in fact, was a party to the compromise of 17th August 1933, though the application presented in Court did not bear her signature.

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[1] Bajirao Narhar v. Sakharam Balvant, (1931) 18 A I R Bom 295=132 I C 434=33 Bom L R 463.

The plea, that Mt. Jasoda is entitled to get maintenance allowance from the date on which the decree should be made final, cannot also be accepted in view of the clear contents of the application of 17th August 1933. We therefore dismiss this appeal with costs and uphold the order of the learned Civil Judge.

K.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Oudh 106

ZIAUL HASAN AND HAMILTON JJ.

*Thr. Sheo Darshan Singh* — Appellant.

v.

*Thr. Rajendra Singh and another* — Respondents.

Execution Decree Appeal No. 41 of 1935, Decided on 17th February 1938, against order of Sub-Judge, Mohanlalganj, Lucknow, D/- 19th January 1935.

**Civil P. C. (1908), O. 21, Rr. 2, 16, S. 11—Sale of decree to *R*—Substitution of his name under O. 21, R. 16—In execution by *R* objection by judgment-debtor that *R* was benamidar of one judgment-debtor — O. 21, R. 2 held had no application—Judgment-debtor objector not aware of benami nature of transaction at time of substitution —Rule of res judicata held did not apply.**

A decree-holder sold the decree to one *R*. *R* applied under O. 21, R. 16 for substitution of his name. The application was allowed. Subsequently in execution by *R*, the judgment-debtor filed an objection stating that *R* was only a benamidar for one of the judgment-debtors and so the decree could not be executed under Proviso 2 to O. 21, R. 16. The application was not allowed on the ground that no adjustment of the decree was certified under O. 21, R. 2 within time :

*Held* that no question of adjustment under O. 21, R. 2 arose in the case. [P 106 C 2]

*Held also* that if the applicant was not aware at the time of notice for substitution under O. 21, R. 16, that *R* was a benamidar, his failure to raise such plea then was not res judicata. [P 106 C 2]

Bhagwati Nath — *for Appellant.*

B. P. Misra — *for Respondent 1.*

**Judgment.**—This is a judgment-debtor's appeal against an order of the learned Civil Judge of Mohanlalganj, Lucknow, rejecting an application of his put in under S. 47, Civil P. C. On 10th September 1929, one Girdhari Lal obtained a decree against the appellant as well as against two others. On 26th May 1932, Girdhari Lal executed a sale deed in respect of the decree in favour of the present respondent Rajendra Singh. The latter applied under O. 21, R. 16, Civil P. C., for substitution of his name in the decree in place of Girdhari Lal. This application was allowed and the name of the respondent substituted on 4th February 1933, and the case was transferred for execution to Sitapur. On 5th November 1934, the appellant filed an application stating that Rajendra Singh was not the real purchaser of the decree but was only a benamidar for Maheshwar Singh, one of the judgment-debtors and that according to Proviso 2 to O. 21, R. 16, the decree could not be executed against him. This objection was thrown out by the learned Civil Judge on the ground that adjustment of the decree was not certified to Court under O. 21, R. 2, Civil P. C., within time and that the application was therefore barred by time. It is against this order that the present appeal has been brought.

We are clearly of opinion that the lower Court's order cannot be allowed to stand. In view of the facts of the case as given above, no question of an adjustment under O. 21, R. 2, Civil P. C., arises and the learned counsel for the respondent himself did not support the lower Court's order on this ground. He however contended that the objection of the appellant was barred by res judicata on the ground that notice of the respondent's application for substitution of his name was served on the appellant on 14th September 1932, but he failed to raise any objection to the substitution applied for. On behalf of the appellant, it is said that the appellant was not aware of the fact that the respondent was a benamidar for Maheshwar Singh when he received notice of the application and if this is so, the rule of res judicata will not, in our opinion, apply ; but this matter will have to be gone into by the Court below after recording evidence that the appellant may produce in support of his case. In any case the order of the learned Civil Judge dismissing the appellant's objection for failure of the appellant to comply with O. 21, R. 2 was misconceived. Perhaps the learned Civil Judge relied on the following sentence in the appellant's application:

In these circumstances the decree has been paid off and does not subsist ;

but this sentence must be read with the rest of the application. The objection was clearly one under Proviso 2 to O. 21, R. 16, and should have been treated as such. We therefore allow this appeal with costs, set aside the order of the lower Court and send back the case to that Court for disposal of the appellant's objection on the merits.

V.B.B./R.K. *Case remanded.*

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## A. I. R. 1938 Oudh 107

THOMAS C. J. AND ZIAUL HASAN J.

*Thakur Raghuraj Singh* — Applicant.

v.

*Rai Bahadur Lala Hari Kishen Lal and another* — Opposite Party.

Privy Council Appeal No. 21 of 1935, Civil Misc. Appeal No. 75 of 1938, Appln. No. 30 and Civil Misc. Appeal No. 471 of 1936, Decided on 15th February 1938.

**(a) Civil P. C. (1908), S. 115 — Amendment of decree to make it conform with judgment can be allowed — Decree based on compromise going beyond its terms — Provisions beyond terms of compromise should be deleted.**

The Chief Court of Oudh has power under its revisional jurisdiction to amend the decree so as to make it conform with the judgment and it is neither necessary nor convenient to send back the case to the lower Court for amendment of the decree. [P 108 C 2]

Where a decree, though ordered to be prepared on the terms of a compromise in a suit, incorporates certain provisions which are no part of it, the application for amendment of the decree should be allowed and those provisions, which are no part of the compromise should be deleted. [P 108 C 2]

**(b) U. P. Agriculturists' Relief Act (27 of 1934), S. 5 — Order under S. 5, if passed beyond jurisdiction is revisable.**

There is no bar to an application for revision being entertained against an order of the original Court under S. 5 if the Court has exercised a jurisdiction which was not vested in it by law : *A I R 1937 All 449, Rel. on.* [P 109 C 1]

**(c) U. P. Agriculturists' Relief Act, (27 of 1934), Ss. 5, 30 — S. 5 applies to decrees directing payment of money — Decree based on compromise containing no provision for payment of interest providing satisfaction of decree by judgment-debtor executing sale of part of mortgaged property—Ss. 5 and 30 do not apply.**

Section 5 is meant to apply to such decrees as contain a direction for payment of money. Where the decree based on a compromise, the operative portion of which makes no provision for payment of any interest, merely provides for satisfaction of the decree by the judgment-debtor executing a sale deed of portion of the mortgaged property in favour of the decree-holder, neither S. 5 nor S. 30 applies: *A I R 1937 All 449, Disting.* [P 109 C 2 ; P 110 C 1]

**(d) U. P. Agriculturists' Relief Act (27 of 1934), S. 5—Discretion to apply S. 5.**

In certain cases the Court has discretion not to apply the provisions of S. 5. [P 110 C 1]

**(e) Civil P. C. (1908), S. 109—Order dismissing appeal as premature is no final order.**

An order dismissing appeal as premature cannot be said to be a final order within the meaning of S. 109. [P 110 C 1]

Radha Krishna — *for Applicant.*

Niamat Ullah, M. Wasim, Ali Hasan and B. N. Khanna — *for Opposite Party.*

**Judgment.** — These four applications, the first of which is an application for amendment of a decree of the learned Civil Judge of Sitapur, the second is an application for revision of an order of the learned Civil Judge of Sitapur amending the decree under Ss. 5 and 30, Agriculturists' Relief Act, the third is an application for leave to appeal to His Majesty in Council against an order of a Bench of this Court, dated 18th October 1935, and the fourth is an application for transfer of the execution case pending in the Court of the Civil Judge of Sitapur arise out of an application for execution of a decree in the following circumstances: On 17th February 1928, Thakur Raghuraj Singh (hereafter to be called the judgment-debtor) executed a deed of simple mortgage for Rs. 1,45,000 in favour of Rai Bahadur Hari Kishen Das (hereafter to be called the decree-holder). On 25th October 1931, he executed another deed of mortgage for a sum of Rs. 1,53,000 in favour of the decree-holder. The first mortgage carried compound interest at 10 per cent. per annum with six monthly rests and the second mortgage at Rs. 12 per cent. per annum with six monthly rests. The decree-holder brought a suit on foot of both these mortgages against the judgment-debtor as well as Thakur Sheo Ganga Bakhsh Singh, who was a subsequent transferee. This suit was compromised between the parties on 4th July 1933. By this compromise, it was declared that the amount due to the decree-holder up to 4th July 1933, was Rs. 3,88,300-2.6 for principal, Rs. 9648.11-11 on account of interest and Rs. 5523 for costs and that future interest on the total amount of Rs. 4,03,471.14.5 would run from 5th July 1933 till payment at annas 8 per cent. per mensem. It was however provided that the judgment-debtor would execute in favour of the decree-holder within one week a sale deed in lieu of the decretal amount transferring such villages out of those mortgaged as may be selected by the decree-holder and which may be free from all transfers and attachment and be of sufficient value to satisfy the decree. Defendant 2, namely Thakur Sheo Ganga Bakhsh Singh, was to execute a deed of relinquishment in respect of the villages to be sold to the decree-holder. It was further provided that the sale deed to be executed shall be absolute but that the decree-holder shall have no objection to re-transferring the villages sold to him and executing a sale deed in favour of the judgment-debtor after the expiry of five years if in any month of Jeth the judgment-debtor should pay the whole or a portion of the decretal amount. As to the price of the property, it was stipulated that it would be calculated at the rate of annas 6 per cent. per mensem on the net profits for the year 1339 Fasli, that is to say, if the net profits amount to Rs. 4-8-0 a year, the price will be Rs. 100. After the execution of the sale deed in favour of the decree holder, the compromise goes on to say, the rest of the mortgaged property shall be free from encumbrance.

On 25th May 1934, the decree-holder made an application for execution of the decree by enforcement of the compromise. To this application, the judgment-debtor objected on the ground inter alia that the decree was a declaratory one and that if the decree-holder wanted to enforce the terms of the compromise, his remedy was by a separate suit. Various issues were framed by the learned Civil Judge for decision of the judgment-debtor's objections but before proceeding to determine them, he decided two issues, with only one of which we are at present concerned, namely whether the decree was a declaratory one or was capable of execution. The learned Civil Judge held that the decree was partly declaratory and partly capable of execution. He, however, simply made a note of this decision of his in order to proceed with the other objections of the judgment-debtor and deferred giving reasons for his decision till the final disposal of the objections. Against this order, the judgment-debtor filed an appeal in this Court but a Bench of this Court was of opinion that the appeal was premature as the learned Civil Judge had not finally decided the judgment-debtor's objections. The appeal was accordingly dismissed and the Privy Council Appeal No. 21 of 1935 has been brought by the judgment-debtor against the order of this Court. On 24th July 1935, the judgment-debtor applied to the learned Civil Judge of Sitapur for amendment of the decree under Ss. 5 and 30, Agriculturists' Relief Act and on 11th January 1936, this application was allowed and the decree amended. The application under S. 115, Civil P. C. (No. 30 of 1936) has been brought by the decree-holder against this order of the Court below.

We have decided to dispose of all these applications together as they are closely connected with each other. First of all we take up the decree-holder's application No. 75 of 1938 for amendment of the decree. It is contended that Cl. 2 (1) of the decree prepared by the office of the lower Court is against the terms of the compromise on which the decree was passed and it is not denied by the learned counsel for the judgment-debtor that it is so. In fact, the variance in the decree from the terms of the compromise is manifest since Cl. 2 of the decree gives the decree-holder a right of sale of the property, whereas there is no such provision in the compromise. It is contended, however, that the decree can be amended by the Court which passed it or by this Court if it had come before this Court in appeal. We are of opinion, however, that this Court has power under its revisional jurisdiction to amend the decree so as to make it conform with the judgment and that it is neither necessary nor convenient to send back the case to the lower Court for amendment of the decree. On the compromise being filed on 4th July 1933, the order of the Court naturally was that a decree be prepared in terms of the compromise but though the compromise was made a part of the decree, the office of the Court below added some provisions in the decree which were no part of the compromise. We, therefore, allow this application for amendment of the decree and order that the provisions of the decree which go beyond the terms of the compromise be deleted. Next we come to the decree-holder's application for revision of the learned Civil Judge's order amending the decree under Ss. 5 and 30, Agriculturists' Relief Act. A preliminary objection was taken by the learned counsel for the judgment-debtor that no revision lies against an order amending a decree under S. 5, Agriculturists' Relief Act. No doubt it has been held by this Court that no revision lies against an order passed by the Appellate Court under S. 5 (2), Agriculturists' Relief Act but the present application is not against such an order. The learned counsel relied on 1937 O W N 1153[1] decided by one of us but in that case also the application for revision, though brought by the creditor, was against an appellate order passed under sub-s. (2) of S. 5 and not against the original order amending a decree under that section. We consider that there is no bar to an application for revision being entertained against an order of the original Court under S. 5 if that Court has exercised a jurisdiction which was not vested in it by law. Such a revision was entertained in 1937 A L J 370[2] relied on by the learned counsel himself. We therefore overrule the preliminary objection.

On behalf of the decree-holder applicant it is contended that the decree in question is not one to which the provisions of the Agriculturists' Relief Act could be made applicable and after hearing the arguments of the learned counsel of both sides at length, we have come to the conclusion that there is much force in this contention. S. 5, Agriculturists' Relief Act, runs as follows:

> (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908, the Court shall, unless for reasons to be recorded it directs otherwise, at any time, on the application of the judgment-debtor and after notice to the decree-holder, direct that any decree for money or preliminary decree for sale or foreclosure passed by it or by any Court whose business has been transferred to it against an agriculturist, whether before or after this Act comes into force, shall be converted into a decree for payment by instalments drawn up in such terms as it thinks fit in accordance with the provisions of S. 3:
>
> Provided that any final decree for sale which has not been fully satisfied, passed before this Act comes into force shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, be revisable in the same manner and to the same extent as the preliminary decree for sale of foreclosure passed against an agriculturist.
>
> (2) If on the application of the judgment-debtor, the Court refuses to grant instalments, or grants a number or period of instalments which the judgment-debtor, considers inadequate, its order shall be appealable to the Court to which the Court passing the order is immediately subordinate, and the decision of the Appellate Court shall be final.

It will be seen that this section applies to the following decrees only—(*a*) A decree for money, (*b*) a preliminary decree for sale, (*c*) a preliminary decree for foreclosure, and (*d*) a final decree for sale which has not been fully satisfied.

A common feature of all these decrees is that the decree provides for payment of money by the judgment-debtor to the decree-holder but there is no such provision in the decree in the present case. After carefully considering the terms of S. 5, Agriculturists' Relief Act, we are definitely of opinion that the section is meant to apply to such decrees as contain a direction for payment of money. As noted above, the terms of the decree based on the compromise provide for satisfaction of the decree by the judgment-debtor executing a sale-deed of a portion of the mortgaged property in favour of the decree-holder and there is absolutely no provision for payment of any money by the judgment-debtor.

The learned counsel for the judgment-debtor lays great stress on the opening words of the compromise, namely *Digri nilam matluba qatai* and argues that these words showed that the decree was a final decree for sale. We are unable to accept this argument. The words quoted above, in our judgment, were only used to describe the nature of the suit and did not occur in the operative portion of the compromise. Moreover, the decree cannot, in our opinion, be said to be a decree for sale when the compromise which is the basis of the decree gives no power of sale at all to the decree-holder. In any case the decree in question not being one which can in any sense be said to be a decree for payment of money, the provisions of S. 5 do not apply to it.

The learned counsel for the judgment-debtor relies on some cases of this Court and of the Allahabad High Court in which it was held that a decree which provided for instalments could be amended under S. 5, Agriculturists' Relief Act and also on 1937 A L J 370[2] in which it was held that a decree passed on a compromise can also be similarly amended. The point however is not that S. 5 of the Act does not apply to instalment decrees or to decrees passed on compromises but that it does not apply to those decrees, whether passed on a compromise or otherwise, which do not provide for payment of money by the judgment-debtor to the decree-holder, so that the cases relied on by the learned counsel do not help him.

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[1] Girdhari Lal v. Mohamad Ishrat Ali, (1937) O W N 1153.

[2] Man Mohan Das v. Izhar Husain, (1937) 24 A I R All 449=168 I C 191=I L R (1937) All 586=1937 A L J 370.

Even if it be supposed that the decree in question is one to which S. 5 of the Act applies, the words "unless for reasons to be recorded it directs otherwise" clearly show that in certain cases the Court has discretion not to apply the provisions of S. 5 to a decree and this we think is a case to which S. 5 should not be applied, the reason being that the judgment-debtor agreed to pay off the decretal amount by executing a deed of sale in favour of the decree-holder and it would not, we consider, be just to allow him to resile from that agreement. So far as S. 30, Agriculturists Relief Act is concerned, the remarks made by us above as to the applicability of S. 5 apply with still greater force to S. 30. S. 30 regulates the rate of interest payable on a loan and the intention obviously was to regulate the amount of interest which is to be paid by a debtor to a creditor. In the present case however though in the opening paragraph of the compromise a rate of future interest is specified, the operative portion of the compromise does not contain any provision for payment of any interest. Nor could there be any such provision seeing that the decretal amount was to be satisfied by the execution of a deed of sale by the judgment-debtor.

We are therefore of opinion that the decree in question could not be dealt with under Ss. 5 and 30, Agriculturists' Relief Act. We accordingly allow the present application for revision with costs and set aside the order of the Court below amending the decree under the aforesaid sections. We now come to the judgment-debtor's application for leave to appeal to His Majesty in Council against the order of this Court, dated 18th October 1935. That order dismissed the applicant's appeal as premature and cannot, in our opinion, be said to be a final order within the meaning of S. 109, Civil P. C. Moreover if the order of this Court be deemed to have affirmed the lower Court's order, we do not find that any substantial question of law is involved in the case. We therefore dismiss the application for leave to appeal with costs. Now remains the decree-holder's application praying that the execution case be transferred to the Court of Mr. P. Kaul at present Civil Judge of Mohanlalganj at Lucknow, on the ground that the preliminary issues arising from the judgment-debtor's objections were decided by him. The learned counsel for the judgment-debtor has no objection to the execution case being transferred to that officer and we think that it is advisable that the case be transferred to him especially as it was he who decided the judgment-debtor's objection in part. We therefore order that the case be transferred from the Court of the Civil Judge, Sitapur to that of Mr. P. Kaul, Civil Judge of Mohanlalganj, at Lucknow.

V.B.B./R.K. *Order accordingly.*

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## A. I. R. 1938 Oudh 110

ZIAUL HASAN J.

*Jagat Narain Singh* — Appellant.

v.

*Salik Ram Singh* and *others* — Respondents.

Second Appeal No. 341 of 1936, Decided on 21st February 1938, against decree of Civil Judge, Sultanpur, D/. 7th July 1936.

**(a) Hindu Law — Family arrangement — Family not joint—One of brothers cannot enter into family arrangement binding on others.**

One of the brothers of a Hindu family, which is not joint, has no authority to enter into a family arrangement binding on other brothers: *12 O C 288 (PC), Rel. on*; *A I R 1927 Oudh 97, Expl.* [P 111 C 2]

**(b) Evidence Act (1872), S. 115—Wrong belief on point of law cannot act as estoppel —Member entitled to one-fourth share under Hindu Law recognized as entitled to one-half—Member so recognizing is not estopped from claiming his legal share.**

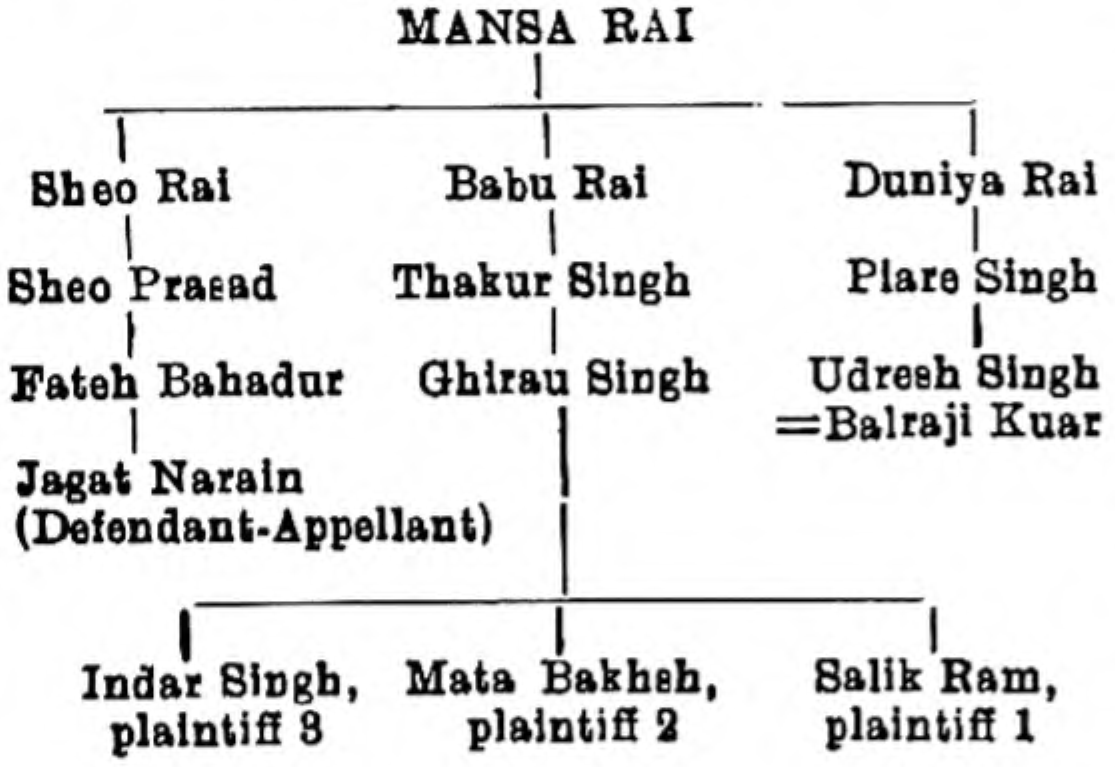
Everybody is supposed to know the law or at least to have as much opportunity of knowing the law as another, so that a wrong belief on a point of law cannot strictly be said to be caused by a misrepresentation on the part of another within the meaning of S. 115. [P 112 C 1]

Where therefore a person, who is entitled to one-fourth share in the property under Hindu law, is recognised as entitled to one half by another member, the latter is not estopped from claiming his legal share subsequently. [P 112 C 1]

Ghulam Imam — *for Appellant.*

B. K. Dhaon — *for Respondents.*

**Judgment.**—This is a defendant's appeal against a decree of the learned Civil Judge of Sultanpur, who confirmed a decree of the learned Munsif of that place by which the plaintiffs-respondents' suit for a share in some properties was partly decreed. The following pedigree will make the facts of the case clear :



The property in suit belonged to Udresh Singh whose widow Balraji Kuar died on 25th February 1926 and the parties to the suit were entitled as reversioners to the property left by her. On 17th April 1926, the defendant and Indar Singh, plaintiff 3, put in joint applications in the Revenue Court in respect of all the villages praying that mutation be made in favour of plaintiffs and the defendant half and half. On this application all the properties were mutated half in the name of the defendant and half in those of the plaintiffs. The suit from which this appeal arises was brought by the plaintiffs for possession of a one-fourth share in all the properties on the ground that on Balraji's death, the defendant and the plaintiffs were entitled to the property left by her per capita and not per stirpes so that each of the four reversioners was entitled to a one fourth share and that the defendant was wrongly in possession of a moiety share. The defendant contended that there was a family arrangement by which he was allowed to get one-half of the property, that the plaintiffs are bound by that arrangement and that in any case Indar Singh, plaintiff 3, was estopped from claiming any more share. Both the Courts below overruled the defendant's pleas and decreed the plaintiffs' suit. Hence this second appeal by the defendant.

The first question is whether there was any family settlement between the parties. I am of opinion that there was not. The learned Judge of the Court below was to my mind perfectly right in relying on the decision of their Lordships of the Privy Council in 12 O C 288.[1] In that case the brother and two nephews of a deceased Hindu filed a document in the Revenue Court in which it was stated that the brother was in possession of half of the property and the nephews of the other half and prayed that mutation in respect of the deceased's share in all the villages should be effected accordingly. Subsequently the brother of the deceased, who under the Hindu law was exclusively entitled to the property, brought a suit for possession and it was held by their Lordships of the Judicial Committee that the document put in the Revenue Court was no bar to the suit. Moreover, in the present case it has been found as a fact by both the Courts below that the plaintiffs did not form a joint Hindu family so that plaintiff 3 was not authorized to enter into any arrangement with the defendant on behalf of his brothers. The learned counsel for the appellant however contends that in spite of the fact, that plaintiff 3 was not a member of a joint family with plaintiffs 1 and 2 and in spite of the fact that plaintiffs 1 and 2 were no parties to the applications filed in the Revenue Court, plaintiffs 1 and 2 are as much bound as plaintiff 3. In support of this argument he relies on 3 O W N 993,[2] in which the following passage occurs at p. 998 :

> . . . . . it is not, in my opinion, necessary that in order to make a valid and binding family arrangement, all the members of the family must be parties to it. I do not see any force in this last contention. If some members of the family settle their disputes by arriving at a settlement among themselves, there is no reason why that settlement should not be considered to partake of the nature of family arrangement.

This, to my mind, only means that even though some members of a family should not join a family arrangement, the arrangement will still be a family arrangement and will be binding on those who joined it and not that those members of the family who did not join it will also be bound by the arrangement. I therefore agree with the Courts below in holding that there was no family arrangement between the parties. The next question is whether Indar Singh, plaintiff 3, is estopped from claiming his legal share in the property by reason of his joining with the defendant in making the aforesaid applications to the

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[1] **Chokhey Singh v. Jote Singh,** (1909) 12 O C 288=36 I A 38=1 I C 166=31 All 73 (P C).

[2] **Tej Bahadur Khan v. Nakko Khan,** (1927) 14 A I R Oudh 97=99 I C 472=3 O W N 993.

Revenue Court. It is argued on behalf of the appellant that Indar Singh is in any case estopped ; but I cannot accept this argument also. S. 115, Evidence Act provides :

> When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit, or proceeding between himself and such person or his representative, to deny the truth of that thing.

Woodroffe and Ameer Ali in their Commentary on the Evidence Act say :

> A proposition of law is not 'a thing' within the meaning of Section (115) and this expression refers to a belief in a fact . . . . . . the representation in order to work an estoppel must be a material statement of fact.

The reason for this appears to be that everybody is supposed to know the law or at least to have as much opportunity of knowing the law as another, so that a wrong belief on a point of law cannot strictly be said to be caused by a misrepresentation on the part of another. In the present case, the fact that the defendant was entitled to a one-fourth share of the property and the three plaintiffs together to three-fourths was a question of Hindu law and therefore Indar Singh, plaintiff 3, cannot be said to have caused the defendant to believe a thing which was not true. Indar Singh therefore is not estopped from claiming his legal share of the property. The appeal has, in my opinion, no force, and is dismissed with costs.

V.B.B./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Oudh 112

HAMILTON AND YORKE JJ.

*Ram Dutta and another—Plaintiffs*—Appellants.

v.

*Mahpal Singh and others—Defendants*—Respondents.

Second Appeal No. 54 of 1936, Decided on 18th February 1938, against order of Dist. Judge, Unao, D/- 13th November 1935.

**(a) Limitation Act (1908), S. 14 — Case of gross negligence of counsel—Benefit of S. 14 cannot be given.**

**Speaking generally, negligence on the part of counsel cannot be relied upon by the litigant in order to support a plea that he was prosecuting an application in good faith though in a wrong Court: *A I R 1933 Oudh 523, Rel. on.* [P 114 C 2]**

And where the party files an application in the wrong Court owing to a mistake caused by gross negligence, the fact that the Court does not point out the mistake to the applicant will not help him. [P 114 C 2]

*** (b) Limitation Act (1908), Art. 181—Preliminary decree on basis of compromise—Amount payable in instalments—On default of any one instalment, whole unpaid amount becoming payable and decree-holder entitled to obtain final decree—Decree-holder held entitled to apply for final decree on any default and not necessarily on the first default.**

Under a preliminary decree based on a compromise the amount was to be paid in certain instalments. It was provided that on default of any one instalment, the whole amount unpaid shall become payable and the decree-holders were given the option to obtain a final decree. There was default in the first instalment and owing to some other infructuous proceedings in a wrong Court the time of which was not deducted, the decree-holder applied for a final decree more than three years after the first default. It was contended that it was barred by time as the right to apply accrued only once i. e., on the first default :

*Held* that the right to apply was not limited to the first default but would arise not only on the first but also on subsequent breaches of the covenant and that the application was not barred : *Case law discussed.* [P 117 C 2; P 118 C 2]

L. S. Misra and R. N. Shukla — *for Appellants.*

Radha Krishna—*for Respondent No. 1.*

**Judgment.** — This is a second appeal from the appellate order of Mr. Raghubar Dayal, District Judge of Unao, whereby he set aside the order of the Additional Subordinate Judge of Unao on an application for final decree under O. 34, R. 3, Civil P. C. The facts, out of which this appeal has arisen, are as follows : The plaintiffs appellants, obtained a preliminary decree against the defendants-respondents on the basis of a compromise. The decree was for a sum of Rs. 4000 with costs, and was in the nature of a foreclosure decree. It was directed by the decree that the judgment-debtors would pay off the amount of Rs. 4000 in four instalments of Rs. 1000 each, which were made payable on the last day of Aghan of 1987, 1988, 1989 and 1990 Sambat, corresponding approximately to 23rd December 1930, 1931, 1932 and 1933. It was further provided that the costs of the suit were to be paid in the month of Jeth of 1930 A. D., and if they were not paid then, they would be paid along with the first instalment. There was a provision in regard to interest, and it was further provided that :

> In case of failure to pay any one kist, the whole amount unpaid shall become payable, and the

plaintiffs shall have the option to obtain a final decree over the whole of the mortgaged property in consideration of the whole amount mentioned earlier.

It will be observed that this decree differs in principle from an ordinary decree for instalments of money because the decree does not give the decree-holders, as such decrees do, two rights, namely (1) the right to realize the whole of the outstanding amount in default, and (2) the right to realize the instalments which have fallen due and not become time-barred. Subsequent to this compromise decree which was passed by the Additional Subordinate Judge of Unao, it appears that there was litigation in the Court of the Subordinate Judge of Unao, wherein the judgment-debtors sued to set aside the compromise decree on the ground that it had been obtained by fraud. This suit was unsuccessful, but it may be that it was the fact that it was in the Court of the Subordinate Judge which was partly responsible for a mistake which was made at a later stage. The date of the preliminary decree is 24th October 1929. On 28th October 1933 the decree-holders filed an application for the preparation of a final decree. This application was made in the Court of the Subordinate Judge of Unao, and not in the Court of the Additional Subordinate Judge, as it really should have been. The matter remained pending in the Court of the Subordinate Judge up to 25th September 1934, on which date the plaintiffs-appellants took back the application, and on the following day, i. e. 26th September 1934, presented it in the proper Court of the Additional Subordinate Judge. The judgment-debtors thereupon took the objection that the application was time-barred, to which the plaintiffs-appellants replied, first by relying on the proceedings in the Court of the Subordinate Judge and claiming the application of S. 14, Lim. Act, and secondly, by contending that even if the application was time-barred in respect of the default of payment of the instalment due on 23rd December 1930, it was in time reckoning from the next default. They did, in fact, put in an application on 26th January 1935 to that very effect. In para. 10 of the application of that date, they said that the decree was for instalments, and the plaintiffs had an option to give up the time-barred instalments, and have the decree made absolute for the remaining instalments, and if therefore the Court holds that any instalment is time-barred and the plaintiffs are not entitled to extension, then the decree be made absolute for the remaining instalments, that is on the basis of the default in the remaining instalments. In this connexion we should note that it is common ground that no payment whatever has been made by the judgment-debtors under the decree.

The learned Subordinate Judge by his order of 2nd April 1935, held that there was no force whatever in the claim put forward by the plaintiffs to get the benefit of Ss. 5 and 14, Limitation Act. He held that it could not be said that the plaintiffs had been prosecuting with due diligence another civil proceeding founded upon the same cause of action which proceeding was being prosecuted in good faith in a Court which, from defect of jurisdiction, was unable to entertain it. He relied in this connexion on certain rulings of this Court, namely 9 O W N 430,[1] 11 O W N 653[2] and 11 O W N 1530.[3] We may note here that it is not contended before us that S. 5, Lim. Act, has any application, this being a case of an application, and not of an appeal, though doubtless the principles applicable have a very close similarity. On the other point he held that the application was not time-barred for getting the decree made final in lieu of the instalments which were in time on the date of filing the application in his Court, the claim to those which had become barred by that time having been waived by the applicants. This point is not put quite in that form before us, the contention of waiver being dropped because the only Article of the Limitation Act, which covers cases of waiver is Art. 75, which is clearly not applicable to the present case. The point is put before us in a different form, namely that there is a recurring right to apply in respect of subsequent defaults, and that right is not lost by failure to apply in respect of the first default. He held and that point is not disputed before us, that the application was governed, so far as limitation is concerned, by Art. 181 of Lim. Act, which provides a period of three years' limitation from the date when the right to apply accrues.

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[1] Jagmohan Tewari v. Mahadeo Prasad, (1932) 19 A I R Oudh 220=138 I C 149=9 O W N 430.

[2] Rajendra Bahadur Singh v. Rajeshwar Bali, (1934) 21 A I R Oudh 360=149 I C 239=11 O W N 653.

[3] Bhagwan Din v. Badri Prasad, (1935) 22 A I R Oudh 108=153 I C 161=11 O W N 1530.

The learned District Judge in appeal agreed with the view of the Subordinate Judge on the point of the application of S. 14 (2), Lim. Act. On the other point however he held that the right to apply for the preparation of the final decree accrued in favour of the decree-holders on 23rd December 1930, and that therefore the application for the preparation of the final decree on 26th September 1934, was time-barred as having been presented more than three years from the date on which the right to apply accrued. This is the main point in dispute before us in this appeal. It will be convenient to dispose of the question of the application of S. 14, Lim. Act first. This is a comparatively simple point and one in which, in our opinion, the case is concluded by rulings of this Court some of which we have already quoted. The question for consideration is whether it can be said in the present case that the plaintiffs-appellants were prosecuting with due diligence another civil proceeding against the same party for the same relief in good faith in a Court which, from defect of jurisdiction, is unable to entertain it. The term "good faith" is defined in S. 2 (7), Lim. Act, in this manner, namely that nothing shall be deemed to be done in good faith which is not done with due care and attention. In this case we have it that the plaintiffs had a decree passed by the Additional Subordinate Judge of Unao, and necessarily showing that fact on the very face of it; nevertheless the plaintiffs on the advice of their counsel, as they say, filed this application in the Court of the Subordinate Judge, another Court of co-ordinate jurisdiction. It may have been that this mistake was partly due to the fact that the declaratory suit had been filed in that Court, but that would certainly not be an adequate excuse. It was sought to urge that the reason for this being done was that on 28th October 1933, the Court of Additional Subordinate Judge was not in existence. The learned Subordinate Judge found that this was not a fact, and we have referred to the Oudh Civil Justice Reports, and find from these Reports that an Additional Subordinate Judge was working in Unao for part of 1930, the whole of 1931, part of 1932, the whole of 1933 and the whole of 1934. The Court was therefore in existence throughout the whole of the period during which this application for final decree was pending in the Court of the Subordinate Judge. The only plea on which the appellants can fall back is that this is not a case of absence of due care and attention on the part of the appellants, but is due to mistake on the part of their counsel. We think it is clear and established by rulings that speaking generally negligence on the part of counsel cannot be relied upon by the litigant in order to support a plea that he was prosecuting an application in good faith though in a wrong Court. There is, no doubt, a case which has been referred to, in which a mistake on the part of counsel was allowed to benefit the litigant concerned, but that was a case in which the Court was able to hold that there was room for a counsel acting with due care and attention nonetheless to make a mistake. In this connexion we may refer to the Full Bench ruling reported in 10 O W N 1154[4]; learned counsel for the appellants has referred to the ruling reported in 12 O W N 1045[5] at p. 1047 particularly because of the fact that there the mistake was considered to be more on the part of the Court and hence it was held that the lower Court was right in extending the benefit of the Limitation Act to the plaintiffs. We would not in any case be prepared to hold that in the present case the fact that the Court did not point out the mistake to the appellants could help them where they had begun with a mistake caused by gross negligence. It will be sufficient to say about the rulings quoted to the opposite effect, namely 1937 O W N 771[6] and 44 I A 218,[7] that those were special cases to which it was held that the general principles in regard to negligence did not apply. In our opinion the two lower Courts have rightly held that this was a case of gross negligence and that therefore the plaintiffs-appellants were not entitled to the benefit of S. 14, Limitation Act.

Coming now to the question of limitation, it is conceded that the Article of the

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[4] Mithoo Lal v. Jamna Prasad, (1933) 20 A I R Oudh 523 = 146 I C 127 = 9 Luck 193 = 10 O W N 1154 (F B).

[5] Gappoo Singh v. Har Charan, (1935) 22 A I R Oudh 501 = 158 I C 267 = (1935) 12 O W N 1045.

[6] Rajendra Bahadur Singh Kunwar v. Rajeshwar Bali, (1937) 24 A I R P C 276 = 169 I C 769=31 S L R 672 = 1937 O W N 771 (P C).

[7] Brij Indar Singh v. Kanshi Ram, (1917) 4 A I R P C 156 = 42 I C 43=44 I A 218=104 P R 1917=45 Cal 94 (P C).

Limitation Act applicable to the present case is Art. 181. That Article provides a period of three years from the time when the right to apply accrues. Admittedly once the question of S. 14 has gone out, the present application, if reckoned from the default of 23rd December 1930, was beyond time. The question is whether the plaintiffs-appellants have a fresh starting point from the default which took place in 1931 and subsequent defaults. Learned counsel for the appellants has begun his arguments by basing his whole case on a ruling of their Lordships of the Privy Council in 54 I A 272[8] which he suggests to be the only case which is really, as nearly as may be, on all fours with the present case. It is true that it was a case of execution and not of an application for a final decree, but we are of opinion that there is no real distinction arising out of that fact. That was a case in which the plaintiff had obtained a decree against the appellant, her husband, in terms of an award. By the terms of the decree, the defendant was to retain possession of certain properties, but was to pay annually to the plaintiff in a certain month the sum of Rs. 2000 ; in default of payment of the same, the said properties were to be made over to the plaintiff, that is to say, the plaintiff had a right of foreclosure, and the defendant would not have any subsequent right to recover the property. In that case it seems that no payments had been made or were proved to have been made from the date of the decree, that is the year 1916 right up to the date of application. An application was made in 1924 in respect of the payments of 1923 and 1924, and for delivery of possession of the properties on the default so made. The plea put forward in reply was that the applicant could not rely on the earlier payments even if made and that the decree could not be read as a series of decrees operating in each successive year. The first default in payment gave rise to the right to possession given by the decree, and therefore this claim was time-barred. It was held by their Lordships in this case:

> That upon the true construction of the decree, each instalment, as it became due, was a claim originating under the decree from the date when such claim arose and that the provisions of Cl. 7 of Art. 182, Sch. 1, Lim. Act, therefore applied.

Their Lordships went on to say :

> It was contended however on behalf of the appellant at the hearing before their Lordships that even if a decree could be made for the annual payments due in 1923 and 1924, nevertheless the respondent was not entitled in default of each payment (we understand this to mean any or 'every' payment) to have the property mentioned in the decree made over to the respondent, the argument being that, as no claim was made to the possession of the property on default of payment during the early years after the decree, time commenced to run from the date of the earliest default, and the claim to the land was therefore time-barred.
>
> Their Lordships cannot agree with this contention. They are of opinion that upon the construction of the decree itself, on the occasion of a default in each payment the right of the respondent to have the said property made over to her arose, and therefore the claim to the lands was not time-barred.

This was not, of course, a mortgage suit, but the terms of the decree in the present case are more closely akin to those of that case than to the terms of instalment decrees in many cases which have formed the basis of most of the subsequent rulings. The real question, in fact, is whether the wording of Art. 181 precludes the possibility of a right to apply accruing more than once in the case of decrees which contain a default clause. The general proposition put forward on behalf of the appellants is that in all such decrees the default clause gives the decree-holder an option to apply for a final decree, but it does not compel him to apply. This was held in terms in the ruling of the Bombay High Court reported in A I R 1936 Bom 268.[9] That judgment however really only dealt with one side of the matter and did not decide the ultimate fate of the default clause. It was held that where a decree for money is made payable by instalments, and in default of the payment of one or more instalments, the whole of the decree becomes payable at once, it is open to the decree-holder to apply even after three years from the date of the default to recover such of the instalments as have become due within three years of the date of the application. The default clause is for the benefit of judgment-creditor, and his failure to avail himself of it should not deprive him of the remedy he would have had apart from the clause. In this ruling it was not decided whether there would be a second opportunity to avail of the default clause in respect of the instalment which had not yet fallen due, that is whether the default clause had, by the decree-holder's failure to avail himself of it when it first accrued, come to an end altogether. Learned counsel on both sides have referred to the same rulings of the Allahabad High Court in their arguments, but learned counsel for the appellants particularly relied on the Full Bench ruling reported in 51 All 237,[10] where a number of questions were put to the Full Bench and answered one by one in the final order of the Court at pp. 265 to 267. The fifth question was re-drafted by the Full Bench in the following form :

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[8] Maung Sin v. Ma Tok, (1927) 14 AIR PC 146 =101 I C 736=54 I A 272=5 Rang 422 (PC).

[9] Bomatu Bhadu v. Govardhandas Nanabhai, (1936) 23 A I R Bom 268=163 I C 937=38 Bom L R 492.

> Where a compromise decree—
>
> (*a*) directs payment by instalments on named dates, and
>
> (*b*) further directs the judgment-debtor to pay the entire balance due if he makes default as to any two successive instalments, what are the 'such dates' within the meaning of Art. 182 (7), the dates fixed for the payment of the instalments or the date of the default ?

The answer given by the Full Bench (Mukerji J. dissenting) was as follows :

> (*a*) If the application is one for the payment of instalments under the first part of the decree, it will be governed by Art. 182 (7) and the date from which limitation will run as regards each instalment will be the date on which that instalment was due.
>
> (*b*) If the application is one for the remaining unpaid balance of the decretal amount under the second part of the decree, it is not governed by Art. 182 at all, but by Art. 181 and limitation will run from the date of the last of any two successive defaults the decree-holder being entitled to an order for the whole balance, due less the amount of any individual instalments, which regarded as individual instalments, are already barred by limitation.

We are not concerned with (*c*). In the course of his judgment in this case, Sulaiman J., as he then was, discussed the ruling reported in 54 I A 272[8] at foot of page 249 following, and expressed the opinion that their Lordships of the Privy Council in their decision in that case had in mind the provisions of Art. 181 under which having regard to the construction of the decree, the right to apply accrued each time that a default was made. Learned counsel for the appellants in this case relied particularly on the discussion in the judgment of Boys J. on pages 263 and 264 where he remarks:

> The second part of the decree makes the liability of the judgment-debtor arise upon default in payment of any two successive instalments. There is nothing whatever in this phrase to limit it to the first two successive defaults and such a restriction would, moreover, be ordinarily to the prejudice of the judgment-debtor by forcing the decree-holder to take action. This last is only a question of expediency but apart altogether from such expediency, I can see no justification for forcing such a construction upon the words 'any two'.

It will be noted that by the answer given to question No. 5, Sulaiman J. accepted as correct the view of his learned brother and that therefore became the order of a Court. The effect of this ruling, as we understand it, is that the Court held that the right to apply, under Art. 181 in this particular case, and therefore necessarily in similar cases was not limited to the first default but would arise not only on the first but also on subsequent breaches of the covenant. We were next referred to the ruling reported in 1935 O W N 837.[11] This ruling is not particularly helpful, but merely brings out the fact that the difficulty in the case-law relates only to the option of realising the whole decretal amount. It is important, we think, to remember in the present case that that is not the question. The question is not of realising the whole decretal amount, but of exercising the option to get a final decree for foreclosure. It was pointed out in this ruling that the point as to the option of realising the whole decretal amount did not arise in that case but it was further pointed out that that provision was for the benefit of the judgment-creditor in the same way as the provision of the instalments was for the benefit of the judgment-debtor, a point which we think it is necessary to bear in mind in the present case. Learned counsel for the appellants next drew our attention to the Allahabad ruling reported in 1934 A L J 772=56 All 921.[12] In that case Sulaiman C. J. and Mukerji J. held that the decree-holder had two distinct rights, viz. (1) to receive instalments as and when they fell due, (2) to enforce the payment of all the instalments that might remain unpaid in the event of two successive instalments remaining unpaid. In the present case the second right was time-barred as the present application was made more than three years after the right to apply first accrued on default of the first two instalments, Art. 181, Lim. Act being applicable. But if the second right is time-barred, it would not follow that the first right is also time-barred. In the course of his judgment in this case, the learned Chief Justice discussed the Full Bench case in 51 All 237[10] to which we have referred already, and he remarked at the foot of page 775 that:

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[10] Joti Prasad v. Sri Chand, (1928) 15 A I R All 629=112 I C 73=51 All 237=26 A L J 966 (F B).

[11] Ajodhia Prasad v. Bansi Lal, (1935) 22 A I R Oudh 465=156 I C 764=1935 O W N 837=11 Luck 276 (F B).

[12] Ram Prasad Ram v. Jadunandan Upadhia, (1934) 21 A I R All 534=149 I C 598=56 All 921=1934 A L J 772.

> Boys J. seems to have held at p. 989 that Art. 181 would apply to an application for execution in respect of the future instalments, but further added that the right to apply would accrue on the first date of default and again on the occurrence of each default in respect of that and the previous default.

He went on to say:

> In the separate judgments that were delivered, only one Judge had expressed the opinion that there would be successive accruals of the right to apply; the other two did not express any opinion at all. In the opinion of the Court which was expressed at the end of the judgment and which was the opinion of the only Judge who had expressed it, it was accordingly mentioned that if the application is one for the remaining unpaid balance of the decretal amount under the second part of the decree (default clause), it is not governed by Art. 182 at all but by Art. 181, and limitation will run from the date of any two successive defaults the decree-holder being entitled to a decree for the whole of the balance due less, etc.

The learned Chief Justice went on to discuss the question as to whether it is open to a creditor to waive his right to recover the whole amount where an option is given to him in case of default and pointed out that there was a considerable difference of opinion. He further remarked that so far as the right to sue for the recovery of the mortgage money was concerned, it was now governed by the pronouncement of their Lordships of the Privy Council in 1932 A L J 913=59 I A 376.[13] He went on to quote from that judgment and to argue from it that there would be no successive accruals of the right to sue on the default clause. He relies on the following passage in *Lasa Din's case*[13] where it was said:

> If in the Indian cases the question were when did the mortgagee's cause of action arise, i.e. when he first became entitled to sue for the relief claimed by his suit, their Lordships think there might be much to be said in support of the Allahabad decision.

That is those in the previous mortgage cases where time was held to run from the date of the first default in the payment of interest and not from the due date. He went on to say that he thought the expression "right to apply accrued" to be even more emphatic than the expression "cause of action arises" and he drew the inference that if the date when the cause of action arises is to be considered to be the first date when one becomes entitled to sue for the relief claimed by him, then the date when he becomes entitled to apply is certainly the date when the right to apply by way of enforcing the default clause accrued to the mortgagee when on the first occasion there was a default in the payment of two successive instalments, namely in the year 1926. He accordingly held that it was no longer open to the decree-holder to claim the recovery of future instalments, (that is to act upon the default clause as a whole) merely because in some future years there has again been a default in the payment of two successive instalments. Mukerji J., who delivered a separate judgment, agreed with the learned Chief Justice. If the view taken in this case is strictly applicable to the circumstances of the present case, then there can be no doubt that the learned District Judge was right in holding the application of the plaintiffs-appellants to be time-barred. We feel, however, that there is some difficulty in following this case, if only for this reason that the decision in 51 All 237[10] was a Full Bench decision, and it is not apparent how the learned Chief Justice and Mukerji J. felt themselves able in this case to override the definite decision by the Full Bench, even though it was only actually to be found in the decision of one Judge that successive rights to enforce the default clause in so far as it continued to be enforceable arose not only on the first occasion but also on subsequent occasions.

Some reference has been made before us on behalf of the respondents to 1932 A L J 913,[13] a case of this Court which went up to the Privy Council, and there gave rise to the ruling reported in 59 I A 376.[13] That was, however, a case under Art. 132, Lim. Act, and the argument is only applicable by analogy, and we do not think it furnishes much guidance in the present connexion, particularly for the reason that it excludes the discussion of the question of recurring right which is the essential point in the present case. Learned counsel for the respondents also referred to the ruling reported in A I R 1929 Cal 292,[14] in which case there was some discussion of the Privy Council ruling in 54 I A 272,[8] but it appears to us that that case was decided on different considerations because the plaintiff there sought to escape limitation in respect of instalments more than three years old by reliance on a plea of payment of interest which failed.

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[13] Lasa Din v. Gulab Kunwar, (1932) 19 A I R P C 207=138 I C 779=59 I A 376=7 Luck 442=1932 A L J 913 (P C).

[14] Sarat Lakshi Dassaya v. Narendra Singha, (1929) 16 A I R Cal 292=121 I C 565=33 C W N 250.

Similarly the ruling reported in 1934 A L J 1035[15] (although it contains some remarks of interest) is not directly applicable as that was undisputedly a case of waiver falling under Art. 75, Lim. Act, and special considerations arose by reason of that fact; as the learned Chief Justice remarked at page 1044 time began to run against the creditor from the moment when the whole amount became due; and if he chose to wait till after the expiry of the period prescribed by Art. 75, his remedy was barred and he could not turn round and say that he had made a wrong choice and would prefer to bring a suit for recovery of a few instalments only, unless, of course, he could establish waiver. Whereas in fact the plaintiff did not even rest his case on waiver.

The gist of the case for the respondents is that the appellants in the present case actually chose to rely on the first default and cannot now fall back on the second or subsequent defaults. They further contend that in the terms of the compromise and the decree, the right to apply for final decree accrues on the first default which sets limitation running, and that there can be no question of a waiver in cases of this kind to which Art. 75 does not apply. In our opinion on the line of arguments adopted by the Division Bench of the Allahabad High Court in 1934 A L J 1035,[15] which follows a previously existing current of opinion of wider application, it would be easy to hold in the present case that the right to apply accrues once and once only, but we are not satisfied that this would be a correct view. Learned counsel for the respondents put the case on general grounds at one stage by arguing that it would be inequitable to allow foreclosure under the compromise when the debt has by expiry of limitation in respect of earlier instalments become reduced, but it is clear that there is no force whatever in this general contention. In the light of the fact that even if the judgment-debtors had paid the first three instalments in full and defaulted on the 4th, the plaintiffs-appellants would have had a right to get their preliminary decree made final. On general grounds, it seems to us that the equities are all in favour of the decree-holders-appellants and that unless the trend of rulings involves that conclusion, it is not equitable to enforce against the decree-holders an optional clause which was intended to be favourable to them: *cf.* the decision in 1932 A L J 913.[13] The present case is not quite on the same footing as the cases of instalment decrees with a default clause, and even if we considered the analogy to be very close, we do not see any reason for dissenting from the view expressed in the decision of the Full Bench in 51 All 237.[10] We are supported in this conclusion by the decision of their Lordships of the Privy Council reported in 54 I A 272[8] which we consider to be the one of all the rulings quoted most closely applicable to the present case, and one out of the ambit of which we find it impossible to remove the present case.

When all is said and done, the ultimate question in the present case is really one of the construction of the decree, that is in present case of the compromise. According to the compromise the option of the plaintiffs-appellants arose on default in respect of kisi yek kist, that is, any one kist. In the words of Boys J. in his judgment in the Full Bench case, there seems to be nothing in this phrase to limit it to the first default, and we are not prepared to import into this phrase a meaning which appears to us to be strained, merely because in cases of a somewhat different nature some Courts have shown something of a determination to hold that a right to apply to which Art. 181 applies can accrue once and once only. Considering as we do that the ruling reported in 54 I A 272[8] is of direct application, whereas the principles laid down in the other rulings quoted before us are the subject of dispute, we are satisfied that in the present case, we must apply the principles of that ruling and allow the plaintiffs' appeal. We accordingly allow this appeal, set aside the order of the lower Appellate Court, and restore the order of the trial Court. Plaintiffs-appellants will get their costs throughout.

K.S./R.K. *Appeal allowed.*

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**[15] Jawahar Lal v. Mathura Prasad, (1934) 21 A I R All 661=151 I C 585=1934 A L J 1035 (F B).**

## A. I. R. 1938 Oudh 119

YORKE J.

*Jafar Ali Khan—Defendant* — Appellant.

v.

*Mt. Qamarunnissa—Plaintiff* — Respondent.

Second Appeal No. 299 of 1936, Decided on 7th March 1938, against order of Civil Judge, Malihabad, Lucknow, D/- 31st July 1936.

**(a) Registration Act (1908), Ss. 17, 49—'Declare' in S. 17 implies definite change of legal relation to property by expression of will—Sale of land—Acknowledgment by executant subsequently that he purchased it benami and real purchaser is in possession does not create title and so is admissible in evidence though not registered.**

The word 'declare' in S. 17 is to be taken in the same sense as the words 'create' 'assign' etc., used in the same section, that is, as implying a definite change of legal relation to the property by an expression of will embodied in the document referred to. It implies a declaration of will, not a mere statement of fact. [P 121 C 1]

Where after a sale deed of certain property, the executant acknowledges in a document that the executant never did have any title, that the purchase was benami, and has been followed by the actual possession of the real purchaser, and the exercise by him of the rights of a full owner, the document does not create a title but comes within the description of a document which amounts merely to an admission of a pre-existing state of affairs, and is therefore admissible in evidence even though not registered : *5 Bom 232, Rel. on; Case law referred.* [P 121 C 2]

**(b) Possession—Suit for—Plaintiffs' claim to extent of 13 annas odd established, though possession of whole property obtained and exercised after purchase — Defendant unable to prove any title — No partition of property—Plaintiff held should continue in possession of whole property till partition was sought by person having title to two annas odd share.**

In a suit for possession and declaration of title, it was found that the plaintiff had established her title to 18 annas odd share, though at the time of sale of 18 annas odd share, possession had been obtained and exercised over the whole area. Her possession was interfered with and she had been dispossessed to some extent by the defendant who had not title of any kind and all of whose suggestions in regard to title had been negatived. There had never been any partition of the plots in suit :

*Held* that the plaintiff's possession extended to the whole of those plots and he was entitled to continue to retain possession of the whole of these plots, unless and until partition was sought by some person having valid title to the remaining 2 annas odd share : *A I R 1929 Oudh 337, Rel. on.* [P 122 C 1]

**M. Wasim and Naziruddin** — *for Appellant.*

**Mohammad Ayub** — *for Respondent.*

**Judgment.**—This is a second appeal by one Jafar Ali Khan, defendant, against whom plaintiff-respondent's suit for possession of the land in suit and certain damages were decreed by the trial Court whose decree has been maintained by the Civil Judge of Malihabad, Lucknow.

Mohammad Ali Khan, whose widow Mt. Qamarunnissa, is the plaintiff-respondent, Abid Ali Khan, who died in 1935, and the defendant-appellant Jafar Ali Khan were three brothers. On 6th November 1902, a sale deed of a 8 annas 7 pies odd share in the three plots in suit was executed by Nawab Sher Afgan and his wife for Rs. 75 in favour of Abid Ali Khan. Subsequently on 28th August 1904 a sale deed of a 4 annas 9 pies odd share in the same plots was executed in favour of the same Abid Ali Khan for a sum of Rs. 40 by one Mehdi Ali Khan. By these two purchases Abid Ali Khan prima facie became the owner of a 13 annas odd share in these plots. It was the plaintiff's case that this purchase was a benami purchase by Mohammad Ali Khan who subsequent to the purchase was in actual possession of the property, and who after making an oral gift to her in lieu of dower in 1911, further on 27th January 1914 executed a registered deed of gift of this property in her favour. Since then she claims to have been in possession of it and to have made certain constructions on it. The plaintiff's case was that on some date not specified, the defendant-appellant took some portion of these plots on rent, but he had paid no rent for two years and had made constructions on the land, and she therefore sought possession over the whole of these plots by demolition of the constructions and she also claimed arrears of rent. The defence put forward by Jafar Ali Khan, appellant was that the purchase was not benami, and that Abid Ali Khan was the real owner of the property, and he, Jafar Ali Khan, had in 1935 succeeded to the property as heir of his brother. He further said that he was in permissive possession prior to his brother's death and had been building on these plots with his brother's permission. In this way he denied tenancy and he further pleaded limitation and adverse possession.

The trial Court came to the conclusion that the plaintiff had failed to prove by positive evidence that the price of these plots had been paid by Mohammad Ali Khan, but it held that as Abid Ali Khan had acknowledged that the property only stood in his name benami, hence the purchase by Muhammad Ali Khan was proved. It further held that the obtaining of possession by the defendant as a tenant was not proved and that the defendant was not in adverse possession for more than 12 years and therefore no question of limitation arose. As regards the remaining share of two annas odd which was not covered by the sale deeds of 1902 and 1904, the Court held that the plaintiff's title was not proved, but the plaintiff, being a co-sharer of the 13 annas odd share was entitled to a decree for possession over the whole of the plots against Jafar Ali Khan, considering him as a trespasser, that is the trial Court apparently regarded the plaintiff as entitled to sue in a representative capacity and to recover possession over the whole of the plots despite the fact that by her title deeds she had acquired only a 13 annas odd share. In the lower Appellate Court the conclusions followed much the same lines. It was held that the purchase by Abid Ali Khan was benami on behalf of his brother, Mohammad Ali Khan, and that this was proved by the document, Ex. 4, dated 5th May 1916, whereby Abid Ali Khan had given what has been called a declaration to that effect. The lower Appellate Court confirmed the trial Court's decision on the question of tenancy and in regard to the remaining share of two annas odd, it upheld the Munsif's decision apparently on the same grounds. The decision is put in this way:

> The possession of the respondent is over the whole 16 annas share and the deed of gift (Ex. 3) in her favour also relates to the whole. Appellant should have shown 12 years' adverse possession over the three annas share which as I have held above has not been established. Thus the appellant has no case even for three annas. It appears that although Exs. 1 and 2 transferred 13 annas share only, possession was given over the whole.

There are two main questions in appeal. The first is as to the admissibility of this document, Ex. 4, executed by Abid Ali Khan on 5th May 1916 and the second is in regard to the remaining share of two annas odd not covered by the plaintiff's title deeds. The document Ex. 4 may be described roughly as a declaration that the executant Abid Ali Khan has no title in the plots transferred to him by the two sale deeds and that the title rests with his brother, Mohammad Ali Khan, on whose behalf the purchases were made benami and who has since been in proprietary possession of them. The relevant portion of the document runs more or less as follows:

> Three plots standing in my name under two deeds dated 6th November 1902 and 28th August 1904, were purchased by Mohammad Ali Khan with his own money on which he had been in possession as proprietor from the date of the purchase and the sale deeds are in his possession and he has got the compensation in a land acquisition proceeding regarding a portion thereof, and has built houses on some portions, and these have fallen down and he wants to borrow money from the Municipal Board for rebuilding them. I therefore hereby declare for the satisfaction of the Municipal Board and for establishing Mohammad Ali Khan's title that he was the purchaser of the property, and I had no right or title in them, and he has the complete rights of an owner.

Prima facie this document would seem to come within the mischief of S. 17 (1) (b), Registration Act, which provides that among the documents compulsorily registerable are included:

> (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards to or in immovable property.

The lower Appellate Court was of opinion that this document came within the contemplation of the section in so far as it purported to declare the title of Mohammad Ali Khan, but it was admissible as an admission of Abid Ali Khan presumably because Abid Ali Khan was on the defendant's own admission his predecessor-in-title. Learned counsel for the defendant-appellant contends that the document is inadmissible altogether by reason of the provisions of S. 17, read with S. 49, Registration Act, which provides that:

> No document required by S. 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall (a) affect any immovable property comprised therein or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

He further contends that the Proviso to this section added by the Amended Act of 1929 has no application. In this connexion he relies on two rulings reported in A I R 1934 Lah 604 = 149 I C 154[1] and 51 I C 391.[2] In the former of these two cases it was held that:

> A document which purports to record a payment to certain persons of money described as having been spent by them in rebuilding a house and also

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[1] 1. Abdul Rahman v. Gurdit Singh, (1934) 21 A I R Lah 604=149 I C 154=35 P L R 570.

[2] 2. Kishen Chand v. Municipal Committee of Amritsar, (1919) 6 A I R Lah 222 = 51 I C 391=39 P R 1919=80 P L R 1919.

> purports to declare that the executants held no title in the house and had relinquished their connexion with it, requires registration and if unregistered cannot be admitted in evidence.

In this ruling a reference was made to the other ruling which similarly laid down that "a document which contains a declaration by a person that he holds no title in immovable property of Rs. 100 in value requires registration, and if it is unregistered, it cannot be received as evidence of any transaction affecting such property." It is, I think, important to note that in both these cases the document amounted to a transaction affecting property, that is to say, effecting some change in the legal relationship of the parties to the property described. With these two rulings it is however necessary to read a very well-known ruling on the question "what is meant by the word declare in S. 17, Registration Act ?" It was laid down in 5 Bom 232[3] that

> the word "declare" in S. 17, Registration Act, is to be taken in the same sense as the words 'create, assign' &c. used in the same section that is, as implying a definite change of legal relation to the property by an expression of will embodied in the document referred to. It implies a declaration of will, not a mere statement of fact and thus a deed of partition which causes a change of legal relation to the property divided amongst all the parties to it is a declaration in the intended sense, but the letter containing admission, direct or inferential, that a partition once took place does not 'declare' a right within the meaning of the section. It is not the expression or declaration of will by which the right is constituted.

This exposition of the law on the subject has been approved by their Lordships of the Privy Council in 59 I A 130[4] at p. 137. Speaking of this judgment of the Bombay High Court, their Lordships said :

> Though the word 'declare' might be given a wider meaning, they are satisfied that the view originally taken by West J. is right. The distinction is between mere recital of a fact and something which in itself creates a title.

I think it would be difficult to hold that this document, Ex. 4, is a document which creates a title. What it really does is to acknowledge that the executant never did have any title, that the purchase was benami and has been followed by the actual possession of the real purchaser and the exercise by him of the rights of a full owner. Learned counsel for the respondent also referred to two cases of this Court, namely 19 O C 75,[5] in which a reference was made to the above mentioned ruling in 5 Bom 232,[3] which was adopted as a guide and 10 O W N 624[6] at p. 627. Another case of this Court in which the view taken in 19 O C 75[5] was followed is reported in 11 O W N 1071.[7] To my mind the document in question in the present case does not really present any serious difficulty. It clearly comes within the description of a document which amounts merely to an admission of a pre-existing state of affairs and does not operate to create title and it was therefore admissible in evidence. Relying on this document the two lower Courts have rightly held that the purchase of this property in the name of Abid Ali Khan was really a purchase by Muhammad Ali Khan. The plaintiff's title was therefore clearly established. I do not think it is necessary in these circumstances to go into the question whether the proviso to S. 49 could have any application.

As regards the question of the two annas odd share which is not covered by the sale deeds in the name of Abid Ali Khan, it is contended on behalf of the appellant that the plaintiff was not entitled to get possession by ejectment of the defendant-appellant. It is to be borne in mind that the plaintiff's case of tenancy has failed, but so also has the defence case that the appellant succeeded to this property as the heir of Abid Ali Khan. Abid Ali Khan clearly had no title whatsoever to any share in these plots. There is the further point to be considered that it was a part of the defence case that the defendant's possession began as permissive possession based on permission given by Abid Ali Khan. That case clearly falls to the ground when it is shown that Abid Ali Khan had no status whatever with regard to these plots except that of a benamidar. On behalf of the appellant it is contended that as the plaintiff is unable to prove title over this remaining portion of two annas odd share and the defendant also is unable to prove title, but the defendant is in actual possession, the plaintiff was not entitled to get a decree for possession over the whole of the plot. Learned counsel referred to the ruling reported in 11 I A 51[8] at p. 57 for the proposition that

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[3] **Sakharam Krishnaji v. Madan Krishnaji, (1880) 5 Bom 232.**

[4] **Bageshwari Charan Singh v. Jagarnath Kuari, (1932) 19 A I R P C 55=136 I C 798=59 I A 130=11 Pat 272 (P C).**

[5] **Satrohan Lal v. Nageshwar Prasad, (1916) 3 A I R Oudh 339=35 I C 770=19 O C 75.**

[6] **Sitla Bakhsh Singh v. Jang Bahadur Singh, (1933) 20 A I R Oudh 347=145 I C 805=8 Luck 694=10 O W N 624.**

[7] **Bhagat v. Madho Prasad, (1934) 21 A I R Oudh 462=151 I C 452=11 O W N 1071=10 Luck 203.**

> the plaintiff, seeking to recover possession of an estate against a person who is in possession must recover upon the strength of his own title and not upon the weakness of his adversary's title.

He has also referred to the ruling reported in 20 I A 99.[9] In that case their Lordships held that the position in the case before them was that there was a person in possession of this property for six years past without any title, and this person was being wilfully, improperly and illegally interfered with by a person who had no title himself. They held that the possession of the plaintiff was sufficient evidence of title as owner against the defendant. After referring to S. 9, Specific Relief Act (Act 1 of 1877) they held that it was certainly right and just that the plaintiff should be able, against a person who has no title and is a mere wrong-doer, to obtain a declaration of title as owner and an injunction to restrain the wrong-doer from interfering with his possession. Learned counsel only relies on this ruling for the proposition that mere possession is sufficient to defeat a plaintiff who has no title, but it is clear that for anything other than the general proposition this ruling is not very helpful because the facts are of an entirely different nature. Here we have the plaintiff a person who not only has possession over these plots but has also a clear title and her possession is being interfered with and she has been dispossessed to some extent by the defendant, a person who has not title of any kind, and all of whose suggestions in regard to title have been negatived. It is, of course, a fact that the plaintiff's purchases do not cover the whole 16 annas share in these plots, but it is equally clear that by these purchases of the 13 annas odd share, possession has been obtained and exercised over the whole area. There has never been any partition of these plots, and therefore the possession of the plaintiff clearly extends to the whole of these plots and she is entitled to continue to retain possession of the whole of these plots unless and until partition is sought by some person having a title to the remaining two annas odd share. Learned counsel for the respondent has referred to a ruling reported in 6 O W N 536.[10] On p. 543 I find it stated:

> It is a well-settled rule of law that one cosharer can maintain a suit for ejectment in respect of the entire property against a trespasser. The mere fact that a cosharer brings such a suit can therefore be no evidence that he denied the title of the other cosharers.

That, of course, was a suit of an entirely different nature, but it seems to me that the underlying principle is applicable to the present case and has rightly been held applicable by the two lower Courts, who held that the defendant being only a trespasser was liable to be ejected by any co-sharer of the property. The plaintiff's suit was rightly decreed by the lower Court and the defendant's appeal was rightly dismissed. I find no force in this appeal and dismiss it accordingly with costs.

V.B.B./R.K. *Appeal dismissed.*

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## * * A. I. R. 1938 Oudh 122

## FULL BENCH

THOMAS C. J., ZIAUL HASAN AND YORKE JJ.

*Sh. Fazal Azim* — Appellant.

v.

*Rana Umanath Bux Singh and others* — Respondents.

Civil Misc. Appeal No. 61 of 1935, Decided on 21st February 1938, against order of Dist. Judge, Rae Bareli, D/- 15th July 1935.

*** * Provincial Insolvency Act (1920), Ss. 43 and 27 — Expiry of time for discharge — Annulment does not automatically take place — Court can extend time for discharge before order of annulment is passed :** *4 O W N 993 = A I R 1927 Oudh 506 = 105 I C 912 and 5 O W N 686 = A I R 1928 Oudh 376 = 111 I C 903, Overruled.*

Though the provisions of S. 43 are mandatory, still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court; in other words, it does not operate as an automatic annulment on the failure of the debtor to apply for a discharge. Hence a Court has jurisdiction to extend the time originally fixed under S. 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43 : *4 O W N 993 = A I R 1927 Oudh 506 = 105 I C 912 and 5 O W N 686 = A I R 1928 Oudh 376 = 111 I C 903,* **Overruled;** *A I R 1925 Pat 355, held overruled by A I R 1928 Pat 338 ; A I R 1928 Mad 265, held dissented in A I R 1930 Mad 389, Case law reviewed.* [P 124 C 2; P 125 C 1]

I. A. Abbasi — *for Appellant.*

P. N. Chandra — *for Respondent 1.*

## OPINION

**Thomas C. J.** — It is not necessary to give the facts of the case as only an abstract question of law has been referred to a Full Bench by a Divisional Bench which is as follows :

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[8] Achal Ram v. Udai Partab Addiya Dat Singh, (1884) 10 Cal 511 = 11 I A 51 (P C).

[9] Ismail Ariff v. Muhammad Ghouse, (1893) 20 Cal 834 = 20 I A 99 = 6 Sar 305 (P C).

[10] Bashir Ahmad v. Parshotam, (1929) 16 A I R Oudh 337 = 115 I C 440 = 6 O W N 536.

> Whether a Court has jurisdiction to extend the time originally fixed under S. 27, Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43, Provincial Insolvency Act ?

The contention on behalf of the learned counsel for the applicant appellant is that the Court has jurisdiction to extend the time originally fixed under S. 27, Provincial Insolvency Act for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43. This reference is made necessary because of the view taken by this Court in 4 O W N 993[1] and 5 O W N 686[2] in opposition to the opinion of the other High Courts. The learned counsel for the appellant relies on the following cases : A I R 1930 Mad 389,[3] A I R 1928 Pat 338,[4] 51 Cal 337,[5] A I R 1925 Lah 416,[6] A I R 1929 Lah 399,[7] A I R 1932 Nag 22,[8] A I R 1927 Rang 136,[9] A I R 1933 Rang 133,[10] A I R 1926 Sind 94[11] and A I R 1933 All 230.[12]

The contention of the learned counsel for the respondents is that the provisions of S. 43, Provincial Insolvency Act are mandatory and the debtor must apply for discharge within the period specified by the Court. In support of this contention the learned counsel has relied on the two decisions of this Court as noted above, viz. 4 O W N 993[1] and 5 O W N 686,[2] and also a case of the Patna High Court reported in 4 Pat 51,[13] and a case of the Madras High Court reported in 51 Mad 839.[14]

Section 27, Provincial Insolvency Act is as follows :

> 27. (1) If the Court does not dismiss the petition it shall make an order of adjudication and shall specify in such order the period within which the debtor shall apply for his discharge.
>
> (2) The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit.

Clause 2 of this section clearly gives the Court a discretion to extend the period within which the debtor shall apply for his discharge if he shows sufficient cause. I shall first deal with the cases relied on by the learned counsel for the appellant.

The first case of the Madras High Court reported in A I R 1930 Mad 389[3] undoubtedly supports the view urged by the learned counsel for the appellant. It was held in this case that a Court has jurisdiction to extend the time originally fixed under S. 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43 either under S. 5, Insolvency Act taken with S. 148, Civil P. C. or under S. 27 (2) of the Act. It was further held that S. 43 of the Act does not operate as an automatic annulment on the failure of the debtor to apply for a discharge. In this case the application was presented beyond the period fixed for presenting the application under S. 27 of the Act.

In the second case of the Patna High Court reported in A I R 1928 Pat 338,[4] it was held that the annulment of adjudication does not ipso facto come into operation by the expiry of the period fixed under S. 27 (1) of the Act but has to be determined and until it is so determined, the Court has the seisin of the case and has power to extend the time under S. 27, regardless of the expiry of the period originally fixed and of the failure of the insolvent to apply for extension thereof before the expiry of the period originally fixed. In this case, 4 Pat 51,[13] on which the

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1. Amjad Ali v. Muhammad Ali, (1927) 14 A I R Oudh 506 = 105 I C 912 = 2 Luck 757 = 4 O W N 993.
2. Girja Charan v. Sheoraj Singh, (1928) 15 A I R Oudh 376 =111 I C 903 = 4 Luck 22=5 O W N 686.
3. Palani Goundan v. Official Receiver of Coimbatore, (1930) 17 A I R Mad 389=124 I C 61 =53 Mad 288=58 M L J 369 (F B).
4. Gopal Ram v. Magni Ram, (1928) 15 A I R Pat 338=107 I C 830 = 7 Pat 375=9 P L T 329 (F B).
5. A. J. E. Abraham v. H. B. Sookias, (1924) 11 A I R Cal 777=81 I C 584=51 Cal 337.
6. Laki v. Molar, (1925) 12 A I R Lah 416 = 86 I C 115=26 P L R 126.
7. Sohna Ram Ishar Das v. Tara Chand, (1929) 16 A I R Lah 399=117 I C 87.
8. Laduram v. Sakharam, (1932) 19 A I R Nag 22=136 I C 873=27 N L R 374.
9. K. K. S. A. R. A. Chettiar v. Maung Myat Tha, (1927) 14 A I R Rang 136=100 I C 921.
10. Wally Muhammad Cassim v. Haji Ayoob Haji Abba and Co., (1933) 20 A I R Rang 133=144 I C 869.
11. Saligram v. Official Receiver, (1926) 13 A I R Sind 94=91 I C 467.
12. Madho Prasad Vyas v. Madho Prasad, (1933) 20 A I R All 230=145 I C 668=55 All 241= 1933 A L J 117.
13. Ex parte Ram Krishna Misra, (1925) 12 A I R Pat 355=88 I C 70=4 Pat 51=6 P L T 776.
14. Chinnappa Reddi v. Thomasu Reddy, (1928) 15 A I R Mad 265=109 I C 581=51 Mad 839= 54 M L J 344.

learned counsel for the respondents relies was considered and it was stated that in that case Cl. (2) of S. 27 did not seem to have been considered nor the other provisions of the Act such as contained in S. 5 (1) and S. 10 (2). The case was not followed. In the third case reported in 51 Cal 337,[5] it was held that

> the Court has the power, under S. 27, Cl. (2), Provincial Insolvency Act of 1920, to extend the time to apply for discharge even after the expiry of the period of the order for discharge.

In the fourth case reported in A I R 1925 Lah 416,[6] it was held that the extension for good reasons, of the period fixed by the adjudication order for an application for discharge is contemplated by S. 27 (2) of the Act. It is not a fatal defect that the application for extension is made after expiry of the fixed date. S. 148, Civil P. C. establishes this principle and there is nothing repugnant to it in the provisions of the Insolvency Act.

In the fifth case reported in A I R 1929 Lah 399,[7] it was held that a Court can extend the time for applying for discharge even when the time originally fixed by the Court for this purpose has expired. The decisions reported in A I R 1925 Lah 416[6] and A I R 1928 Pat 338[4] were referred to with approval. The view taken by the Madras High Court and Oudh Chief Court was considered and not followed.

In the sixth case reported in A I R 1932 Nag 22,[8] it was held that S. 27 (2), authorizes a Court to extend the time for an application for discharging an adjudicated insolvent even if an application for extension of time is made after the period specified for the application for the order of discharge has expired. The cases reported in A I R 1928 Pat 338[4] and A I R 1930 Mad 389[3] were followed.

In the seventh case reported in A I R 1927 Rang 136,[9] it was held that an application to extend time for discharge after the expiry of the period fixed is maintainable even at the instance of a creditor. In the eighth case reported in A I R 1933 Rang 133,[10] it was held that a Court has power to extend the time and that though the provisions of S. 43 of the Act are mandatory, still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court. In the ninth case reported in A I R 1926 Sind 94,[11] it was held that

> the words 'shall be annulled' in S. 43 are to be construed as directory and discretionary and not mandatory or peremptory. So the Court in its discretion in the circumstances of a particular case, where the debtor has failed to apply for his discharge within the time originally fixed, has power to extend the time within which the debtor must apply for his discharge.

In the tenth case reported in A I R 1933 All 230,[12] it was held that S. 43 read with S. 27 makes it clear that there is no automatic annulment of the order of adjudication; and hence it is open to the Insolvency Court to extend the time for applying for a discharge even after the expiry of the period originally fixed.

It is thus clear that the view taken by the Madras, Patna, Calcutta, Lahore, Rangoon, Sind and Allahabad High Courts is that a Court has jurisdiction to extend the time originally fixed under S. 27 for an application by a debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43 of the Act. The learned counsel for the respondents, as stated above, has relied on 51 839,[14] 4 O W N 993,[1] 5 O W N 686[2] and 4 Pat 51.[13]

In Madras case reported in 51 Mad 839,[14] it was held that the provisions of S. 43 of the Provincial Insolvency Act were mandatory and the Court had no power to extend the time for an application by the insolvent for his discharge, after the period specified in the order of adjudication for such an application had expired. It is not necessary for me to discuss this case at length because this view was not accepted in a later case reported in A I R 1930 Mad 389=53 Mad 288.[3]

The Hon'ble Judges who decided the case reported in 4 O W N 993,[1] based their decision on the view taken in the Patna case 4 Pat 51.[13] There is no discussion or mention of S. 27, Provincial Insolvency Act. The case reported in 4 Pat 51[13] has been overruled in A I R 1928 Pat 338.[4] The decision reported in 5 O W N 686[2] is based on the view taken in 4 O W N 993[1] and 4 Pat 51.[13] There is no discussion of S. 27 of the Act in this judgment also.

In my opinion though the provisions of S. 43, Provincial Insolvency Act are mandatory, still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court; in other words, it does not operate as an automatic annulment on the failure of the debtor to apply for a discharge. My reply to the reference is that a Court has jurisdiction to extend the time originally fixed under S. 27, Provincial Insolvency Act for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43, Provincial Insolvency Act.

**Zia-ul-Hasan J.**—I agree.

**Yorke J.**—I agree.

**By the Court.**—Our reply to the reference is that a Court has jurisdiction to extend the time originally fixed under S. 27, Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43, Provincial Insolvency Act.

K.S./R.K. *Reference answered.*

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## A. I. R. 1938 Oudh 125

THOMAS C. J. AND ZIAUL HASSAN J.

*Beni Datt and others — Defendants —* Appellants.

v.

*Baijnath — Plaintiff —* Respondent.

Mis. Appeal No. 46 of 1936, Decided on 7th March 1938, against order of Sub-Judge, Partabgarh, D/- 10th February 1936.

**(a) Arbitration — Award — Death of one party to reference whether revokes reference depends on intention of parties — Whole enquiry finished during lifetime of deceased party — Award delivered after death without bringing representative of deceased on record —Award is not invalid.**

The question whether a submission to arbitration is revoked by the death of one of the parties to it depends on the intention of the parties. If the intention is that not merely themselves but their representatives-in-interest should be bound by the decision of the arbitrators, the reference plainly does not stand revoked by the death of one of the parties. [P 126 C 1]

Where certain partners agreed to submit to arbitration their dispute as to the share of loss in the business that each should bear, it must be presumed that the representatives-in-interest will be bound by it, though there is no express provision to that effect in the reference, as the matter in dispute is not personal to the parties, and the dispute cannot end with the life of any one member. [P 126 C 1]

Further the fact that the award is delivered after the death of a partner, without his son being brought on record, does not invalidate the award, if the whole enquiry is finished during the lifetime of the deceased : *13 I C 161 ; A I R 1922 Cal 226 and 14 C W N 759, Rel. on.* [P 126 C 1, 2]

**(b) Arbitration—Award—Substantial justice done—Defect in procedure is no ground for setting it aside — Failure of one of arbitrators to sign does not render award invalid.**

An award made on a proper reference ought not to be set aside on the ground of an alleged defect in procedure not affecting the merits, where substantial justice has been done : *A I R 1922 Cal 226, Foll.* [P 127 C 1]

Where an award is arrived at by all the arbitrators and represents their decision, the failure of an arbitrator to sign does not render it invalid : *A I R 1918 All 426 and A I R 1930 Oudh 389 Foll.; A I R 1918 All 274 and 7 All 523, Disting.* [P 127 C 1]

Radha Krishna and C. P. Lal — *for Appellants.*

Ali Zaheer — *for Respondent.*

**Judgment.**—This is an appeal against an order of the learned Civil Judge of Partabgarh filing an award and passing a decree thereon on the application of Baij Nath, respondent. It appears that four persons, namely Baij Nath, respondent, Beni Dutt and Ram Sewak, appellants 1 and 2, and Jamna Dass, father of Paras Nath, appellant 3, entered into a partnership for carrying on some business. The business resulted in a loss and disputes arose as to the proportion in which the partners were liable to bear that loss. On 7th December 1933, all the four persons entered into an agreement to refer the matter in dispute to the arbitration of Sirah Mal, Ganga Prasad, Ghanshiam Dass and Debi Dayal, arbitrators, and Babu Lal, umpire. The arbitrators gave their award on 15th June 1935, and on 30th August 1935, Baij Nath, respondent, applied to have the award filed in Court. The present appellants raised various objections to the filing of the award, but the learned Civil Judge overruled their objections, and holding that the award was valid ordered the award to be filed and a decree to be passed in pursuance of it. It is against this order that this appeal has been brought by the defendants to the suit registered under Rule 20 (2), Sch. 2 to the Code of Civil Procedure.

The learned counsel for the appellants has raised two points before us in this appeal. The first is that one of the parties to the reference, namely Jamna Dass, died before the arbitrators delivered their award, and his son, Paras Nath, appellant 3, was not made party to the proceeding by the arbitrators. The second is that all the arbitrators did not join in making the award. On the first point the learned counsel for the appellants argues in the first place that the death of Jamna Dass had the effect of revoking the reference, as he says, the agreement does not contain a provision that the reference would bind the successors-in-interest of the parties also. In support of this argument he relies on D. C. Banerji's Law of Arbitration in India, (Edn. 1932), p. 195, where it is said :

> If the submission provides either in express terms or by necessary implication that it shall bind the legal personal representative of the parties thereto, then they are bound, but if it contains no such provision, the ordinary rule of law that the death of the principal revokes the authority of his agent takes effect, and the legal personal representatives are not bound.

This remark however is based on an English case; but in 13 I C 161[1] it was held by a Bench of the Calcutta High Court that the rule of the English Common law that a submission to arbitration stands revoked by the death of one of the parties is not applicable to this country. The learned Judges say :

> The test to be applied is, what is the true nature of the submission ? Were the matters in difference personal questions in respect whereof it was not intended that the succession in interest of the parties should be affected by the decision of the arbitrators ? If the intention of parties was that not merely themselves but their representatives-in-interest should be bound by the decision of the arbitrators, the reference plainly does not stand revoked merely by the death of one of the parties.

In the present case the matter in dispute among the parties to the reference was not a matter personal to the parties themselves, and though there is no express provision in the agreement that the representatives-in-interest of the parties will be bound by the reference, it must, in our opinion, be presumed that that was the intention of the parties, as the dispute referred to the arbitrators could not end with the life of any of the parties. There is thus no force in the contention that the reference in the present case came to an end on the death of Jamna Dass.

The second argument put forward on behalf of the appellants on this point is that as the award was delivered after Jamna Dass' death without his son, Paras Nath, being brought on the record, the award was invalid. This argument, too, does not appear to us to have any force. It is true that the order of Paras Nath being made a party is contained in the award itself, but as the arbitrators had finished the inquiry into the case in the life-time of Jamna Dass, and as nothing remained for them to do except to make the award, we are of opinion that the award cannot be said to be invalid merely because it was given after the death of Jamna Dass. In the case of the Calcutta High Court referred to above, the facts were similar and the learned Judges said :

> If the hearing had not been completed, it would have been necessary to bring the representatives of the deceased party on the record and to make them parties to the submission. Here however the hearing had terminated and nothing remained for the arbitrators to do but to believe their award. We are of opinion that the award so delivered is binding upon the parties and their reprseentatives-in-interest.

In A I R 1922 Cal 226,[2] a Bench of the Calcutta High Court held that where an agreement was made to refer a dispute about property to arbitration by some of the parties on their own behalf and on behalf of minors and the investigation had been finished and documents produced before the arbitrators while they were alive, there is no rule of procedure by which the arbitrators could substitute the representatives or appoint guardian ad litem for infants. Similarly in 14 C W N 759[3] it was held that where an agreement to refer having been filed in Court, the Court appointed an arbitrator who, after finishing his enquiries and hearing the arguments of the pleaders of the parties, reserved this report and award, and then one of the parties died, the death of the party did not make the award void, and that the doctrine of *nunc pro tunc* was applicable as in the case of a judgment of Court. We are therefore of opinion that the award in the present case was not invalid because it was made after the death of Jamna Dass.

The second point urged on behalf of the appellants is that the award is invalid, because at no sitting of the arbitrators all of them were present. The agreement, (Ex. 2), provides that the award of the arbitrators should be either unanimous or of the majority, and it is contended that as at least Ganga Prasad arbitrator, whom the appellants examined in the Court below did not join any sitting of the arbitrators, the award cannot be said to be even that of the majority. In this connexion the learned counsel for the appellants relies on

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[1] Manindra Nath v. Mohanunda Roy, (1912) 15 C L J 360=13 I C 161.

[2] Binayakdas Acharjee v. Sashi Bhushan, (1922) 9 A I R Cal 226=70 I C 459=26 C W N 804.

[3] Hara Krishna v. Ram Gopal, (1910) 14 C W N 759=6 I C 170.

16 A L J 307[4] and 7 All 523,[5] but in both these cases one of the arbitrators refused to act and withdrew from the arbitration. In the present case none of the arbitrators did so. In fact according to the evidence of Babu Lal, umpire, which was believed by the learned Court below, and which we also see no reason not to believe, the award was given "under the joint consultation" of all the arbitrators including Ganga Prasad. He further says that though Ganga Prasad did not sign the award, yet the award had his concurrence. It cannot therefore be said that the award in question was not a unanimous award. It has been held by the various Courts in India that where an award is arrived at by all the arbitrators and represents their decision, the failure of an arbitrator to sign does not render it invalid: *vide* 43 I C 154[6] and 7 O W N 541.[7] The learned counsel for the appellants lays much stress on the statement of Babu Lal, umpire, that at every meeting of the arbitrators one or another of the arbitrators was always absent, but, in the first place, none of the defendants ever took any objection to the meeting of the arbitrators being held in the absence of one or other of them, and in the second, we are in perfect agreement, if we may respectfully say so, with what the learned Judges of the Calcutta High Court said in A I R 1922 Cal 226,[2] namely that an award made on proper reference ought not to be set aside on the ground of an alleged defect in procedure not affecting the merits where substantial justice has been done.

We agree with the learned Judge of Court below that none of the grounds mentioned in Rr. 14 and 15, Sch. 2, Civil P. C. has been made out, and therefore we dismiss this appeal with costs.

V.B.B./R.K. *Appeal dismissed.*

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## ✻ A. I. R. 1938 Oudh 127

### FULL BENCH

THOMAS C. J., ZIAUL HASAN AND HAMILTON JJ.

*Babu Kundanlal — Defendant —* Appellant.

v.

*Haji Sheikh Faqir Bakhsh — Plaintiff* — Respondent.

Second Appeal No. 194 of 1935, Decided on 28th March 1938, against decree of First Addl. Judge, Small C. C., Lucknow, D/- 9th April 1935.

✻ **(a) Transfer of Property Act (1882 as amended in 1929), S. 92—S. 92 is retrospective, except in regard to acts done before 1st April 1930 in any proceeding pending in any Court on that date.** (Per *Full Bench.)*

The general rule of law is that an Act has no retrospective effect unless it is so specifically provided but there are certain exceptions; for instance, declaratory statutes passed to remedy defects in form have retrospective effect. Whenever the intention is clear that the Act should have a retrospective operation it must unquestionably be so construed, even though the consequences may appear unjust and hard. So far as the provisions of S. 63, Amending Act are concerned, all the sections which have not been specifically mentioned stand on the same footing. The words "such right, title, obligation or liability" in Clause (d) refer to the right, title, obligation or liability mentioned in Clause (c), namely any right, title, obligation or liability already acquired, accrued, or incurred before 1st April 1930. Part 2 of Cl. (d) is independent of the rest of S. 63 and deals only with the provisions of the Amending Act other than those specified in the section. Part 3 of Cl. (d) does not refer to part 2. The word 'herein' means part 1 of Cl. (d) and does not refer to part 2 of that clause or to the Act itself and that "any such remedy and any such proceeding as is herein referred to" means the remedy or proceeding in respect of the right, title, obligation or liability as is mentioned in Cl. (c). The sections not specified in S. 63 of the Amending Act have retrospective effect. Therefore the provisions of the amended S. 92 have retrospective effect, except in regard to acts done before 1st April 1930 in any proceeding pending in any Court on that date: *A I R 1936 Oudh 102, Not foll.* [P 128 C 1, 2; P 129 C 1, 2]

**(b) Transfer of Property Act (1882), S. 92, Para. 1 (as amended in 1929)—Certain co-sharers mortgaging property and selling portion of it to *M*—*M* out of sale consideration left with him redeeming mortgage—Suit by transferees of other co-sharers for redemption of their respective shares—Case held fell within Para. 1, S. 92—Suit for redemption held governed by Art. 148, Lim. Act.** (Per *Division Bench).*

**Certain co-sharers who had mortgaged the property sold a portion of the property to *M* and out of the consideration for the sale a sum was left with *M* for payment of the decree of the mortgagee. *M* deposited this amount in the Court and redeem-**

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[4] **Kali Charan Pande v. Gupta Nath Misra, (1918) 5 A I R All 274=45 I C 34=16 A L J 307.**

[5] **Nand Ram v. Fakir Chand, (1885) 7 All 523=1885 A W N 139.**

[6] **Manphool v. Sahi Ram, (1918) 5 A I R All 426=43 I C 154.**

[7] **Bhoj Nath v. Shiv Nandan, (1930) 17 A I R Oudh 389=127 I C 254=7 O W N 541.**

ed the mortgage. Subsequently the transferees from other co-sharers brought a suit for redemption of the shares of their transferors on payment of proportionate amounts due against those shares:

*Held* that *M* who had purchased a portion of the property was clearly in a position of a co-mortgagor with other co-sharers. His case fell within para. 1 of S. 92 and therefore by his redemption of the mortgage he became subrogated to the rights of the original mortgagee. The suit by the transferees from other co-sharers for redemption was therefore clearly governed by Art. 148, Lim. Act : *A I R 1934 Oudh 129 and A I R 1934 Oudh 213, Disting.*; *A I R 1929 All 943, Rel. on.* [P 133 C 2; P 134 C 1, 2]

Radha Krishna, L. S. Misra and K. L. Varma — *for Appellant.*

Haider Husain, H. H. Zaidi and Rameshwar Dayal — *for Respondent.*

## OPINION

**Thomas C. J.** — The following abstract question of law has been referred by a Division Bench to a Full Bench :

"Have the provisions of the amended S. 92, T. P. Act, retrospective effect or not?"

The general rule of law is that an Act has no retrospective effect unless it is so specifically provided but there are certain exceptions; for instance, declaratory statutes passed to remedy defects in form have retrospective effect. Whenever the intention is clear that the Act should have a restrospective operation, it must unquestionably be so construed, even though the consequences may appear unjust and hard. The answer to the question, which has been referred to the Full Bench depends on the interpretation to be put on S. 63, T. P. (Amendment) Act (20 of 1929). The whole trouble has arisen on account of the obscure language of Cl. (d) of S. 63 of the Amending Act. The section runs as follows:

> Nothing in any of the following provisions of this Act, namely Ss. 3, 4, 9, 10, 15, 18, 19, 27, 30 Cl. I(c) of S. 31, Ss. 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect:
>
> (a) the terms or incidents of any transfer of property made or effected before 1st April 1930 ;
>
> (b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,
>
> (c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or,
>
> (d) any remedy or proceeding in respect of such right, title, obligation or liability; and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before 1st April 1930, in any proceeding pending in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued as the case may be as if this Act had not been passed.

This section deals with the question whether the provisions of the Act have or have not the retrospective effect and certain sections of the Act have been mentioned as not having retrospective effect. Cl. (a) of S. 63 refers to the interpretation. Cl. (b) to the right, Cl. (c) to the liability and obligation, Cl. (d) to remedy or proceeding. S. 47, which has introduced S. 92 into the Transfer of Property Act, has not been mentioned in S. 63. In my opinion so far as the provisions of S. 63 of the Amending Act are concerned, all the sections which have not been specifically mentioned stand on the same footing. So far as the sections specified in S. 63 are concerned, Cls. (a), (b), (c) and the first part of Cl. (d) show that the provisions contained in those sections have no retrospective effect. The real question is with regard to those sections of the Amending Act which are not specified in S. 63, and there is a conflict of opinion on the point with regard to those sections among the various High Courts. This conflict of opinion is due to the fact that the language of the latter portion of Clause (d) of S. 63 is obscure, and in my opinion the clause has been misplaced.

The learned counsel for the appellant has contended that S. 92 of the Act has no retrospective effect and does not govern the present suit. He relies on the decision of a Bench of this Court reported in 1935 O W N 1238[1] in which it was held that S. 53-A, T. P. Act which is also a section not specified in S. 63 of the Amending Act, had no retrospective effect and had no application to leases executed before 1st April 1930. The main reasoning on which this conclusion was based was that the language of Cl. (d) of S. 63, Amending Act (20 of 1929) was so obscure that it was not possible to say that the intention of making any provisions of the Act retrospective was expressed even by implication, and in my opinion if this reasoning is accepted and applied to the present case, it would necessarily follow that S. 92, T. P. Act, also had no retrospective effect. The result will be that none of the provisions of the Amending Act will have any retrospective effect. With due respect to the Honourable Judges, who decided *Janki's case*[1] I beg to differ with their conclusion. In my opinion the decision is not sound.

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[1] Janki v. Kanhaiya Lal, (1936) 23 A I R Oudh 102 = 159 I C 316 = 1935 O W N 1238.

My learned brother Ziaul Hasan J. who was a member of that Bench, after further considering the wording of 63, of the Amending Act has now come to a contrary conclusion. In my opinion there can be no doubt that the words "such right, title, obligation or liability" in Clause (d) refer to the right, title, obligation or liability mentioned in Cl. (c), namely, any right, title, obligation or liability already acquired, accrued, or incurred before 1st April 1930.

The difficulty in interpreting S. 63 arises from the fact that part 3, Cl. (d) follows part 2 from which it is concluded that it refers to part 2 also. In my opinion part 2 of Cl. (d) is independent of the rest of S. 63 and deals only with the provisions of the Amending Act other than those specified in the section. That part 3 of Cl. (d) does not refer to part 2 is borne out by the fact that mention is made therein of "any such remedy and any such proceeding as is herein referred to", but no remedy or proceeding has been referred to in part 2 of Cl. (d). The word 'herein' means part 1 of Cl. (d) and does not refer to part 2 of that clause or to the Act itself and that "any such remedy and any such proceeding as is herein referred to" means the remedy or proceeding in respect of the right, title, obligation or liability as is mentioned in Clause (c). The learned counsel for the appellant also relied on the following cases : 10 Rang 465,[2] 14 Rang 494,[3] A I R 1932 Mad 734,[4] A I R 1934 All 701,[5] 13 Pat 111[6] and A I R 1935 Bom 91.[7]

A careful reading of the cases Nos. 2 to 6 will show that they were not decided on a consideration of S. 63 of the Amending Act. In the case reported in 10 Rang 465[2] it was conceded that the argument that the fact that certain sections are definitely made not retrospective implies that the remaining sections must be regarded as having retrospective effect, has force; the question whether or not S. 101 has retrospective effect was decided mainly on the general principle that no retrospective effect should be given to an enactment unless there appears a clear intention that it should have retrospective effect. But as I have shown above the language of S. 63 does show an intention that sections not specified in it were meant to have retrospective effect. The second case reported in 14 Rang 494[3] simply follows the first case. It does not contain any discussion either of S. 63 or the interpretation to be put upon it. The considered opinion of the five Judges of the Allahabad High Court is that the sections not specified in S. 63, T. P. Act, have retrospective effect : *vide* I L R 1937 All 880.[8]

Therefore my answer to the question referred to the Full Bench is that the provisions of the amended S. 92, T. P. Act, have retrospective effect, except in regard to acts done before 1st April 1930, in any proceeding pending in any Court on that date.

**Ziaul Hasan J.** — This is a reference by a Division Bench of this Court to a Full Bench and as the question referred is an abstract question of law, it is not necessary to mention the facts of the case which has given rise to the reference. The question referred to us is as follows :

"Have the provisions of the amended S. 92, T. P. Act retrospective effect or not?"

The answer to this question depends on the interpretation to be put on S. 63, T. P. (Amendment) Act 20 of 1929. That section runs as follows :

> Nothing in any of the following provisions of this Act, namely Ss. 3, 4, 9, 10, 15, 18, 19, 27, 30, Cl. (c) of S. 31, Ss. 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect,
>
> (a) the terms or incidents of any transfer of property made or effected before 1st April 1930,
>
> (b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,
>
> (c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or,
>
> (d) any remedy or proceeding in respect of such right, title, obligation or liability; and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before

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[2] Ko Po Kun v. C. A. M. A. L. Firm, (1932) 19 A I R Rang 197=140 I C 156=10 Rang 465.

[3] Bank of Chettinad Ltd. v. Ma Ba Lo, (1936) 23 A I R Rang 152=163 I C 645=14 Rang 494.

[4] Kanji & Moolji Brothers v. Shunmugan Pillai, (1932) 19 A I R Mad 734=139 I C 870=56 Mad 169=63 M L J 587.

[5] Gauri Shankar v. Gopal Das, (1934) 21 A I R All 701=151 I C 388.

[6] Jagdeo Sahu v. Mahabir Prasad, (1934) 21 A I R Pat 127=153 I C 602=13 Pat 111=15 P L T 73.

[7] Cooverjee H. Plumber v. Vasant Theosophical Co-operative Housing Society Ltd., (1935) 22 A I R Bom 91=154 I C 583=36 Bom L R 1245.

[8] Hira Singh v. Jai Singh, (1937) 24 A I R All 588=171 I C 153=I L R 1937 All 880=1937 A L J 840 (F B).

1st April 1930, in any proceeding pending in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued as the case may be, as if this Act had not been passed.

It will be noted that this section deals with the question whether the provisions of the Act have or have not retrospective effect and that certain sections of the Act have been specified as not having retrospective effect. The other sections of the Act have not been mentioned in S. 63 and among them is S. 47, which has introduced S. 92, as it now stands, into the Transfer of Property Act. It may be conceded that so far as the provisions of S. 63 of the Amending Act are concerned, all those sections which have not been specifically mentioned in that section stand on the same footing. Now although I was a party to the decision in 1935 O W N 1238[1] in which it was held that S. 53-A, T. P. Act (which is also a section not specified in S. 63 of the Amending Act) has no retrospective effect, I must confess that after further considering the wording of S. 63 of the Amending Act I have come to a contrary conclusion.

So far as the sections specified in S. 63 are concerned, there can be no doubt that Cls. (a), (b), (c) and the first part of Cl. (d) clearly show that the provisions contained in those sections have no retrospective effect at all. The question arises only with regard to those sections of the Amending Act which have not been specified in S. 63 and there is a sharp conflict of opinion on the point with regard to those sections among the various High Courts. It seems to me that this conflict of opinion is due to the fact that the last portion of Cl. (d) of S. 63 has been somewhat misplaced. For the sake of easy reference, I would divide Cl. (d) into three parts, each separated from the other by a semicolon, and would call them parts Nos. 1, 2 and 3 of Cl. (d), respectively. If we place part 3 of this clause beginning from the word "and" and ending with the word "passed" in place of the second part beginning with "and" ending with "date" and the second part in place of the third, the difficulty in the interpretation of Cl. (d) to my mind entirely disappears. I would read the clause thus:

> Any remedy or proceeding in respect of such right, title, obligation or liability; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before 1st April 1930, in any proceeding pending in a Court on that date.

There can be no doubt that the words "such right, title obligation or liability," in Cl. (d) refer to the right, title, obligation or liability mentioned in Cl. (c), namely a right, title, obligation or liability already acquired, accrued, or incurred before 1st April 1930. If, therefore, we place the third part of Cl. (d) just after the first part, there can be no difficulty in the interpretation of that part, for in that case the entire part 3 of Cl. (d) will refer to Cl. (c) and the first part of Cl. (d) that is to say, to remedies and proceedings in respect of rights, title, obligations or liabilities acquired, accrued or incurred before 1st April 1930. After this will follow the second part of Cl. (d) which deals with sections of the Amending Act not specifically mentioned in S. 63 and all that that part of Cl. (d) provides is that the said sections of the Act will have no operation in those cases only in which a proceeding was pending in a Court on 1st April 1930, and in those proceedings also to those Acts only which had been done before 1st April 1930. In other cases they will have full effect. S. 47 of the Amending Act is one of the unspecified sections and, therefore, it will have, in my opinion, full effect except on an act done before 1st April 1930, in any proceeding pending in any Court on that date.

The difficulty in the interpretation of S. 63 arises from the fact that part 3 of Cl. (d) follows part 2 and from this it is naturally concluded that it refers to part 2 also. In 1935 O W N 1238,[1] referring to part 3 of Cl. (d) it was said :

> This passage cannot we think be held to relate only to proceedings pending in a Court on 1st April 1930. The word 'instituted' shows that the proceeding can be not merely continued but that it may be instituted as if the Act had not been passed.

This shows that the third part of Cl. (d) was in that case considered to refer to the second part and the use of the word 'instituted' in my opinion shows that the third part was not intended to refer to the second part. The second part of Cl (d) appears to me to be totally independent of and unconnected with the rest of S. 63 and it deals only with the provisions of the Amending Act, other than those specified in the section. That part 3 of Cl. (d) does not refer to part 2 is also apparent from the fact that mention is made therein of "any such remedy and any such proceeding as is herein referred to," but no remedy or proceeding has been referred to in the second part of Cl. (d). To my mind the word "herein" means the first part of Cl. (d) only and does not refer to the second part of that clause or to the Act itself, so that "any such remedy and any such proceeding as herein referred to" means the remedy or proceeding in respect of the right, title, obligation or liability as is mentioned in Cl. (c). The interpretation put upon part 3 of Cl. (d) by the learned counsel for the appellant leads to the conclusion that no provision of the Amending Act was intended to have retrospective effect and in that case it was entirely purposeless to specify some provisions of the Act in S. 63 and omit the others. This anomaly was noticed by us in 1935 O W N 1238,[1] where it was stated :

> If this is the correct interpretation, then it is no doubt difficult to see why certain sections have been expressly mentioned as not having retrospective effect because the result of this interpretation should seem to be that none of the sections would have retrospective effect.

It was however thought that the language of S. 63 is by no means clear on the point whether the new S. 53-A of the Transfer of Property Act has or has not retrospective effect and in view of their Lordships of the Judicial Committee's pronouncement in (1898) A C 469,[9] that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language, it was held that S. 53-A could not be said to have been given retrospective effect. If however Cl. (d) of S. 63 is read as I have mentioned above, S. 63 does not show by necessary implication that sections other than those specifically mentioned in it were meant to have retrospective effect.

The learned counsel for the appellant has referred us to the following cases: 10 Rang 465,[2] 14 Rang 494,[3] A I R 1932 Mad 734,[4] A I R 1934 All 701,[5] 13 Pat 111,[6] A I R 1935 Bom 91[7] and 1935 O W N 1238.[1] In the first case though it was conceded that the argument, that the fact that certain sections are definitely made not retrospective implies that the remaining sections must be regarded as having retrospective effect, has force, the question whether or not S. 101 has retrospective effect was decided mainly on the general principle that no retrospective effect should be given to an enactment unless there appears a clear intention that it should have retrospective effect. The learned Judge who decided this case said :

> In my opinion S. 101 is a section which affects existing rights and therefore despite S. 63 of Act 20 of 1929 I must hold that the new S. 101 has no retrospective effect.

This goes to show that in the learned Judge's opinion S. 63 of the Amending Act gives S. 101 retrospective effect. The second case simply follows the first and contains no discussion either of S. 63 or the interpretation to be put upon it. In the third case it was said :

> Their Lordships of the Judicial Committee in (1898) A C 469,[9] have stated that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. Judged by that test Act 20 in our opinion fails to disclose an intention that S. 53-A was to have a retrospective effect;

but as I have shown above, the language of S. 63 does show an intention that sections not specified in it were meant to have retrospective effect. In the fourth case, the learned Judge who decided that case contented himself with following the case in A I R 1932 Mad 734,[4] and the following passage is all that we find in his judgment on the point :

> As regards the second point it has been held in A I R 1932 Mad 734,[4] that S. 53-A has no retrospective effect. I take the same view as in that case.

In the fifth case it was simply assumed that S. 92, T. P. Act was not applicable to the case as it came into force in 1930, while "all such rights as the defendant had were already vested before that date." S. 63 of the Amending Act was not at all considered in this case. The above remark applies to the sixth case also in which Murphy and Sen JJ. respectively dealt with the question with the following remarks only :

> It has been pointed out by the other side that S. 53-A, T. P. Act, as now amended, came into force in 1930, and can have no application to the present appeals, the facts of which happened before that date. It also has no retrospective effect,

and

> it has also been pointed out by Mr. Jayakar that the receipts in the case show that the amounts were paid by the appellants between the years 1924 and 1927, while the new S. 53-A, T. P. Act came into operation on 1st April 1930, so that the alleged part performance took place before the section came into operation.

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[9] **Young v. Adams, (1898) A C 469=67 L J P C 75=78 L T 506=14 T L R 373.**

The last case is the case of our own Court to which I have already referred. It will be seen therefore that none of the cases relied on by the learned counsel for the appellant, except the case of our own Court, was decided on a consideration of S. 63 of the Amending Act and I have already stated the reasons for the decision in 1935 O W N 1238.[1] Owing to the view I take of S. 63 of the Amending Act, it is not necessary to refer to the decisions of the various High Courts relied on by the learned counsel for the respondent in which it has been held that sections not specified in S. 63 have retrospective effect, but I may mention that that is the considered and concurrent opinion of five Judges of the Allahabad High Court : *vide* I L R 1937 All 880.[8] I would therefore answer the question referred to the Full Bench as follows: The provisions of the amended S. 92, T. P. Act have retrospective effect, except in regard to acts done before 1st April 1930, in any proceeding pending in any Court on that date.

**Hamilton J.**—I have had the advantage of seeing the judgments of my learned brothers and I agree with their answer to the question referred. It appears to me that when S. 63 of the Amendment Act states that the sections of which the numbers are given shall not be deemed to affect what is contained in (a), (b), (c) and in (d) "any remedy or proceeding in respect of such right, title, obligation or liability" [i. e. what is contained in (c)] the Legislature meant it to be understood that what is not specified in (a), (b), (c) and that part of (d) which I have quoted is affected. Similarly when in the middle part of (d) it is stated that :

> Nothing in any other provisions of this Act shall render invalid or in any way affect anything already done before 1st April 1930, in any proceeding pending in Court on that date.

The Legislature meant it to be understood that anything which is not a thing already done before 1st April 1930, in any proceeding pending in a Court on that date is rendered invalid or is affected. The last part of Cl. (d) then appears to me explanatory of what will happen when any section is by virtue of this S. 63 deprived of retrospective effect, namely the whole of the Amendment Act will be regarded as non-existent as regards any remedy or proceeding which would have been affected but for the provisions of S. 63. As my learned brothers have pointed out the wording of the last part of (d) is such that it would appear as if it referred to the first and not the middle part of (d) and was misplaced. Supposing however it applies also to the middle part, then, in my opinion, the meaning is that when a section of the Amendment Act other than one of those of which the number has been given in the first part of S. 63 does not render invalid or affect something because that thing is a thing already done before 1st April 1930, in a proceeding pending in a Court on that date then the whole of the Amendment Act must be considered as non-existent.

**By the Court.**—Our answer to the question referred to the Full Bench is that the provisions of the amended S. 92, T. P. Act have retrospective effect, except in regard to acts done before 1st April 1930, in any proceeding pending in any Court on that date.

### Final Judgment.

**Thomas C. J. and Ziaul Hasan J.** — These appeals against decrees of the learned Civil Judge of Lucknow dated 9th April 1935, have been brought by a common defendant to two suits for redemption filed by Shaikh Faqir Bakhsh and Shaikh Muhammad Abdulla respectively. Some properties comprising houses, shops, land and trees known as Amlak Rahimganj situate in Mohalla Ganeshganj, Lucknow, originally belonged to one Khuda Bakhsh. Khuda Bakhsh died leaving a widow, Mt. Mariam Begum, three sons Karim Bakhsh, Rahim Bakhsh and Nabi Bakhsh and ten daughters. Seven out of ten daughters relinquished their rights in the property left by their father in favour of their mother and brothers. Mt. Mariam Begum died in 1905 but before that, namely on 12th February 1904, she and her sons had mortgaged the entire property for Rupees 20,000 with possession to the then Maharaja of Balrampur. The Balrampur Estate obtained a decree on foot of this mortgage on 9th December 1919. On 21st September 1920, Rahim Bakhsh, Karim Bakhsh and Nabi Bakhsh, the three sons of Khuda Bakhsh sold a portion of the property to Murlidhar (defendant 29) and out of the consideration for the sale, left a sum of Rs. 20,885 for payment of the decree of the Balrampur Estate. Murlidhar deposited this amount in Court and redeemed the mortgage. After that possession of the property was delivered by Court to Rahim Bakhsh and Murlidhar on 28th December

1920. Murlidhar had himself mortgaged a portion of the property purchased by him to Babu Kundan Lal (defendant 24), the present appellant. Kundan Lal put his mortgage in suit and in execution of his decree for sale sold the property and purchased it himself in February 1932. Among the daughters of Khuda Bakhsh who had not relinquished their shares in favour of their mother and brothers, were Mt. Zainab and Sakina. Mt. Zainab's share in the property was sold in execution of a decree and was purchased by Faqir Bakhsh, plaintiff-respondent in Appeal No. 194. Shaikh Abdulla, the respondent in Appeal No. 195, is the transferee of Mt. Sakina's share from her successors-in-interest.

The suits which have given rise to these appeals were brought by Faqir Bakhsh and Shaikh Abdulla for redemption of the shares of Mt. Zainab and Mt. Sakina, respectively, on payment of the proportionate amounts due against those shares. The suits were contested by some of the defendants including the present appellant. The latter raised various pleas but most of them were overruled by the trial Court, the learned Munsif, South Lucknow. The suits were however dismissed by the trial Court as time-barred and on the plea of adverse possession raised by the present appellant. The plaintiffs appealed and the learned Civil Judge who heard the appeals reversed the findings of the trial Court and holding that the suits were governed by Art. 148, Lim. Act, decreed both the suits, that of Shaikh Faqir Bakhsh for redemption of a 5362/14080th share on payment of Rs. 436 and of Shaikh Abdulla for redemption of a 5362/14080th share on payment of Rs. 270-5-4. Kundan Lal, defendant 24, therefore brings these appeals against the learned Additional Civil Judge's decrees. The appeals were set down for hearing before a single Judge but one of us before whom they were put up directed that they be laid for hearing before a Bench. They were accordingly put up before a Bench and the Bench referred the following question for decision by a Full Bench:

"Have the provisions of the amended S. 92, T. P. Act, retrospective effect or not?"

The question was thereupon argued at length before a Full Bench of which both of us were members and the Full Bench unanimously gave the following answer to the question referred to them:

> Our answer to the question referred to the Full Bench is that the provisions of the amended S. 92, T. P. Act, have retrospective effect except in regard to acts done before 1st April 1930, in any proceeding pending in any Court on that date.

It will thus be seen that the Full Bench upheld the view of the learned Additional Civil Judge that S. 92, T. P. Act, as amended by Act 20 of 1929 has retrospective effect and is therefore applicable to the present cases, so that the appellant as the representative-in-interest of Murlidhar must be deemed to have been subrogated to the position of the original mortgagee, namely the Balrampur Estate, and therefore the cases were governed by Art. 148 and not by Art. 144, Lim. Act. The learned counsel for the appellant however argues that though S. 92, T. P. Act, as it stands at present, is applicable to these cases, it is para. 3 of that section which governs these cases and that as Murlidhar had not obtained a registered agreement from the mortgagor to the effect that he will be subrogated neither Murlidhar nor the present appellant can be deemed to have been subrogated to the position of the Balrampur Estate. Para. 3 of S. 92 runs as follows:

> A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated.

We are of opinion however that the case of Murlidhar clearly comes under para. 1 of the section which is as follows:

> Any of the persons referred to in S. 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have so far as regards redemption, foreclosure, or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

It is not denied that Mt. Zainab and Sakina had shares in the property in question. It is also undisputed that Murlidhar was purchaser of a portion of the property from Khuda Bakhsh's sons. Therefore he was in the position of a co-mortgagor of the property with Mt. Zainab and Sakina. It is also beyond doubt that by its order dated 18th December 1920, (Ex. B-14) the Court allowed Murlidhar to redeem the property which he did by payment of the amount of the decree in favour of the Balrampur Estate. Thus Murlidhar was clearly a co-mortgagor who had redeemed the property which was subject to the mortgage of the Balrampur Estate. He was thus according to Para. 2 of S. 92 subrogated to the rights of the Balrampur Estate, the original mortgagee, and as the present appellant is the representative-in-interest of Murlidhar, he also stands in the same position as against the present plaintiffs. The learned counsel for the appellant relies on 11 O W N 139[10] and 11 O W N 619.[11] Neither of those cases, in our opinion help him as the facts of both the cases were totally different from those of the cases before us. In both those cases the persons who claimed subrogation were the purchasers of the equity of redemption from the sole mortgagors, so that the provisions of para. 1 of S. 92 relating to the rights of a co-mortgagor who has redeemed the property could not be applied to them. In the present case, however, as we have noted above, Murlidhar's case clearly falls under that paragraph. In the first of the cases mentioned above, the learned Judge who decided it relied on the following passages occurring in Sir Dinshaw Mulla's Commentary on the Transfer of Property Act :

> The rule against the subrogation of a mortgagor is extended to any purchaser of the equity of redemption or encumbrancer who discharges the prior encumbrance which he is by contract, express or implied, bound to discharge. A person cannot claim subrogation; he simply performs his own obligation or covenant.

This must obviously refer to the purchaser of a sole mortgagor as the case of a co-mortgagor in governed by Para. 1 of S. 92. In the latter case referred to, there was further this distinction that the money with which the mortgage was redeemed was not paid to the mortgagee by the purchaser himself. The whole of the purchase money was paid in the registration office to the mortgagor who himself redeemed the mortgage. Indeed some of the passages in 11 O W N 619,[11] so far from helping the present appellant support the case of the plaintiffs-respondents. At page 625, referring to the case in 11 I A 126,[12] the learned Judges say:

> It would therefore appear that that was a case where the payment had been made by a subsequent purchaser in order to protect his own interest and so that case cannot help the respondents.

Again at p. 627, it is said:

> In the case of legal subrogation, the third encumbrancer redeems the first mortgage in order to protect his own interest. Similarly a man who purchases the equity of redemption of the mortgagor and who redeems the first mortgage does so in order to protect his own interest. Their cases are governed by the first clause of S. 92, T. P. Act, which enacts. . . .

This clearly shows that in view of the learned Judges who decided *Mohammad Raza's case*,[11] the case of a purchaser who redeems the first mortgage falls under Para. 1 of S. 92, for this reason also that he is a person "interested" in the property within the meaning of S. 91. Further, the learned Judges give with approval the following quotation from the judgment of Sulaiman J. in 52 All 139[13]:

> If the mortgagee intended to keep it alive one would have expected him to take care to have a clear statement recorded to that effect. We also have the fact that the amount was taken by the mortgagors in cash and paid by them directly and not left in the hands of the mortgagee for the discharge of the prior debt. It would never have been the intention of the parties that the previous mortgage debt would be kept alive for the benefit of the subsequent mortgagee as against the mortgagors. In the absence of any direct evidence or of any circumstances indicating why there should have been a reason for entertaining the intention to keep the previous mortgage debt alive, it is impossible to hold that the previous mortgage debt was not extinguished by the payment but was kept alive for the benefit of the subsequent mortgagee.

This remark of Sulaiman J. fully supports the view that we have taken above, namely that the cases before us are distinguishable from 11 O W N 619,[11] inasmuch as in the latter case, the mortgage was redeemed by the mortgagor himself and not by the purchaser. For all the above reasons, we are of opinion that the learned Additional Civil Judge was perfectly right in holding that the suits are governed by Art. 148, Limitation Act and that there is no force in the contention that Para. 3 of S. 92, T. P. Act is applicable to the present cases. The learned counsel for the appellant tried to show that Murlidhar was in possession of the property adversely to Mt. Zainab and Mt. Sakina but in view of the finding that we have arrived at as to the applicability of S. 92, T. P. Act, no question of adverse possession arises. The result is that the appeals have no force and are dismissed with costs.

D.S./R.K. *Appeals dismissed.*

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[10] Jaidevi Kuar v. Sripal Singh, (1934) 21 A I R Oudh 129=147 I C 628=11 O W N 139.

[11] Mohammad Raza v. Bilqis Jehan Begam, (1934) 21 A I R Oudh 213=149 I C 84=9 Luck 717=11 O W N 619.

[12] Gokuldas Gopaldas v. Rambux Sheochand, (1885) 1 O C 1035=11 I A 126=4 Sar 543 (P C).

[13] Shafiq Ullah Khan v. Sami-Ullah Khan, (1929) 16 A I R All 943=123 I C 101=52 All 139=1930 A L J 57.

## A. I. R. 1938 Oudh 135

ZIAUL HASAN J.

*Hirday Narain and another — Defendants* — Appellants.

v.

*Madan Gopal, Plaintiff and another, Defendants* — Respondents.

Second Appeal No. 107 of 1936, Decided on 1st March 1938, against order of Sub-Judge, Malihabad at Lucknow, D/- 13th December 1935.

**Civil P. C. (1908), O. 41, R. 27 — Issue of commission by trial Court — Party failing to avail himself of it — Appellate Court has no jurisdiction in appeal by such party to issue commission and admit additional evidence.**

Where a commission is issued by the trial Court but the party refuses to comply with it by saying that he does not want the execution of the commission, the Appellate Court, in appeal by such party, has no jurisdiction to issue a commission and to admit further evidence in order to supply the lacuna in the evidence. The report of the commissioner and the additional evidence admitted by the Appellate Court must therefore be discarded altogether : *Case law referred.*

[P 135 C 2; P 136 C 1; P 137 C 1]

Radha Krishna and D. P. Khare — *for Appellants.*

Makund Behari Lal and G. N. Mukerji — *for Respondent 1.*

**Judgment.**—This is a defendant's second appeal against a decree of the learned Civil Judge of Malihabad, Lucknow, decreeing plaintiff-respondent 1's suit for a declaration. Plot No. 357 measuring 19 biswas of village Bhillawan was allotted to the defendants-appellants' father Parshotam Narain, by partition of 1902. On 15th May 1926, Parshotam Narain's widow, Mt. Binda Dei, the certificated guardian of her minor sons (the present appellants), sold 14 biswas out of the plot to Lachhman Prasad, respondent 2, who built a house on the land after his purchase. On 23rd July 1928, Lachhman Prasad executed a deed of gift in favour of his sons in respect of the house, and on 15th November 1928 he applied to the Insolvency Court for being adjudged an insolvent. He was declared an insolvent on 15th November 1929, and on 20th August 1931, a receiver was appointed to take charge of his property. On 11th July 1932, the present appellants brought a suit against Lachhman Prasad and his sons for possession of the remaining 5 biswas of the plot by demolition of their house on the allegation that while building the house Lachhman Prasad had encroached upon the 5 biswas of land which were not sold to him. This suit was decreed on 14th December 1932 on the finding that Lachhman Prasad's house partly stood on 5 biswas of plot No. 357 which were excluded from the sale to him. In the meantime, that is on 5th October 1932, the receiver sold the house of Lachhman Prasad to plaintiff-respondent 1. When the present appellants wanted to recover possession of the land in execution of their decree against Lachhman Prasad and his sons, the plaintiff-respondent brought an objection under O. 21, R. 97, Civil P. C. This objection was however dismissed. Thereupon the present suit was brought by respondent 1 for a declaration that he was owner of the property, the subject-matter of the suit.

It appears that on the date of issues the trial Court ordered a commission to be issued to a pleader to prepare a map and locate the two portions of plot No. 357, and report whether the house purchased by the plaintiff-respondent stood on the 14 biswas purchased by Lachhman Prasad or whether it covered any portion of the remaining 5 biswas of the plot. When the commissioner wanted to go to the locality to execute the commission, the agent of the plaintiff informed him that he did not want the execution of the commission. The trial Court after recording the evidence adduced by parties came to the conclusion that the plaintiff had failed to prove that the house purchased by him stood exclusively on the 14 biswas purchased by Lachhman Prasad and dismissed the suit. The plaintiff appealed and the learned Civil Judge who heard the appeal was of opinion that the case could not be decided with certainty without a map showing the extent of 14 biswas of land sold to Lachhman Prasad. He therefore by his order, dated 19th October 1935, appointed a pleader as commissioner and directed him to prepare a plan of the locality showing the extent of the 14 biswas of land sold to Lachhman Prasad and to take into consideration not only the documents on the record but also any other papers that he may deem necessary. The commissioner submitted his report and the learned Civil Judge after hearing arguments in the appeal decreed the plaintiff's suit. Hence this appeal by defendants 1 and 2.

The learned counsel for the appellants takes very strong objection to the procedure adopted by the lower Appellate Court in this case and contends that the learned Civil Judge had no jurisdiction to issue a commission and admit further evidence, in order to supply the lacuna that there was in the evidence for the plaintiff, particularly when the plaintiff had failed to comply with the trial Court's order in respect of the issue of commission for the location of the land in question. The learned counsel relies on O. 41, R. 27, Civil P. C., and the following cases, A I R 1934 Pat 284,[1] 58 I A 254,[2] 8 O W N 936,[3] 8 O W N 627[4] and 9 O W N 379.[5] In the first of these cases a learned Judge of the Patna High Court held that the mere fact that the plaintiff might have been better advised to apply for a commission at the trial of the suit would not in itself warrant the issuing of the commission by the Appellate Court, far less could it be held to justify the Appellate Court in issuing a general order for the admission of such additional evidence as either of the parties might wish to produce. In the second case their Lordships of the Privy Council held that the power under O. 41, R. 27 (b), Civil P. C., should be exercised very sparingly and only when the additional evidence has a direct and important bearing on the issues. In the third case, which was also decided by their Lordships of the Privy Council on an appeal from the Allahabad High Court, and in which a witness had been examined by the High Court suo motu, their Lordships held that where the examination of a witness in the High Court takes place with complete disregard of the provisions of O. 41, Rr. 27 and 29, Civil P. C., such incompetent testimony must be entirely disregarded. In the fourth case in which the first Appellate Court got a disputed document examined by an expert and acting on his report and uncross-examined evidence reversed the decision of the trial Court, a Bench of this Court made very strong remarks against the procedure adopted by the first Appellate Court. They said:

> It is noticeable that in the case before us the judgment-debtors had been given ample opportunity of having the signatures in question subjected to expert examination but had failed to avail themselves of it. Though they failed to avail themselves of the opportunity in the trial Court, the course adopted by the learned Judge has enabled them to improve their case by that very evidence which they failed to produce in the trial Court at the proper time. When a party could have applied to the lower Court for an adjournment to call further evidence, but does not do so, and takes the chance of a judgment in his favour on the evidence then at his disposal, he will not be allowed to call it in the Appellate Court.

These remarks appear to me to apply with full force to the case now before me. In the fifth case another Bench of this Court followed the decision of their Lordships of the Judicial Committee in 58 I A 254[2] and held that the power given by S. 107 and O. 41, R. 27, Civil P. C. should be exercised very sparingly and grave caution should be exercised in admitting new evidence. The learned counsel for the plaintiff-respondent argues that as the lower Appellate Court has exercised a discretion in the matter by issuing a commission and admitting further evidence, this Court should not interfere with that discretion. He relies on 26 O C 66,[6] 42 Mad 737[7] and 1938 O W N 257.[8] No doubt in the first of these cases the learned Additional Judicial Commissioner of Oudh held that where the Court of first appeal has exercised its discretion in one way regarding the admission of additional evidence, it is not open to a Court of second appeal to interfere with that discretion but with due respect to the learned Judge I very much doubt if it is a case of discretion and not of jurisdiction. In any case this view cannot be accepted as against the pronouncements of their Lordships of the Privy Council in the cases referred to above. The Madras case does not also help the respondent as it was a converse case in which it was held that when a lower Appellate Court refuses to admit a certain document as additional evidence under O. 41, R. 27, the High Court cannot interfere and hold that such additional evidence ought to have been dismissed. The third case of this Court has no application to the

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1. Gorakh Prasad Srivastava v. Jhari Shankar Sardar, (1934) 21 A I R Pat 284=148 I C 962 =15 P L T 142.
2. Parsotim Thakur v. Lal Mohar Thakur, (1931) 18 A I R P C 143=132 I C 721=58 I A 254= 10 Pat 654 (P C).
3. Monmohan Das v. Mt. Ramdei, (1931) 18 A I R P C 175=134 I C 669=8 O W N 936 (P C).
4. Kazim Husain v. Shambhoo Nath, (1931) 18 A I R Oudh 298=132 I C 259=8 O W N 627.
5. Ram Naresh Singh v. Chirkut, (1932) 19 A I R Oudh 227=138 I C 513=8 Luck 18=9 O W N 379.
6. Badri Prasad v. Mukandi, (1923) 10 A I R Oudh 109=75 I C 331=26 O C 66=9 O L J 505.
7. Vaithinatha Pillai v. Kuppa Thevar, (1919) 6 A I R Mad 1166=53 I C 274=42 Mad 737= 37 M L J 125 (FB).
8. Jagadeo Prasad v. Pearey Lal, (1938) 25 A I R Oudh 100=173 I C 648=1938 O W N 257.

present appeal as it deals with the discretion exercised under S. 14, Lim. Act.

The learned counsel for the respondents tried to distinguish the cases relied on by the learned counsel for the appellants by saying that they were all cases in which additional evidence had been admitted by the first Appellate Court not of its own motion but on the application of a party; but this is not correct at least so far as the cases in 8 O W N 627[4] and 8 O W N 936[3] are concerned. While in the latter case it is clearly said at page 939.:

> When the case came before the High Court on appeal, the High Court apparently on their own initiative, called Mr. Dube as a witness for the Court........

In the former also, the last paragraph on p. 629 would show that the disputed document was ordered by the District Judge to be sent to the Government Examiner of Questioned Documents of his own motion. I am of opinion that the appeal must be accepted and the report of the Commissioner and the documentary evidence admitted by him must be discarded altogether. It is not shown that the decree of the trial Court was wrong on the evidence that was before it. In fact, the last portion of the judgment of the learned Civil Judge shows that even after taking into consideration the report of the Commissioner he could only make an inference in favour of the plaintiff. The appeal is decreed with costs, the decree of the lower Appellate Court set aside, and that of the trial Court restored.

D.S./R.K. *Appeal decreed.*

## A. I. R. 1938 Oudh 137

YORKE J.

*Saiduddin — Plaintiff* — Appellant.

v.

*Ganga Prasad and another* — Respondents.

**Second Appeal No. 102 of 1936, Decided on 4th April 1938, against Judgment of Addl. Sub-Judge, Unao, D/- 18th December 1935.**

**Wajib-ul-arz — Construction — Custom in wajib-ul-arz cannot be enlarged by probable inferences — Wajib-ul-arz providing that riaya building house at his own cost has right to sell materials of house or to give it to some other person to live — Two rights given are separate, not combinable so as to produce a third right of sale of right of occupation.**

**Where a Court is to read a wajib-ul-arz as establishing custom, it is not entitled to put on** the terms of that wajib-ul-arz any inferential construction. The terms of the custom cannot be considered in the ordinary way to go beyond what is actually stated in the wajib-ul-arz. Thus, where a wajib-ul-arz provides that in the case of a riaya who has built a house at his own cost, the riaya has a right to sell the materials of the house or he may give it to some other person to live, the custom laid down is that the riaya (and of course his successor) has only two rights: (1) right to sell the materials, and (2) the right to make the gift of the right of occupation. These are two separate rights which are not combinable so as to produce a third right of sale of the right of occupation. [P 139 C 1]

M. Hafeez — *for Appellant.*

Hakim Uddin — *for Respondent 1.*

**Judgment.**—This is a second appeal by one Saiduddin plaintiff, zamindar of Serai, a hamlet of village Patauli. One Sita Ram was the riaya in occupation of a house situated in plot No. 538 of which the plaintiff was the zamindar. The plaintiff's predecessors had allowed the ancestors of the said Sita Ram to build a house. On the death of Sita Ram, his widow Mt. Chandan Kuar succeeded to him in occupation of the house and in January 1932, this lady sold the house describing it as the house situated in plot No. 538 to the respondent Ganga Prasad. This was a sale outright of the house with the right of occupation thereof. The plaintiff zamindar Saiduddin thereupon instituted a suit for possession and ejectment of the vendee relying on custom as stated in the wajib-ul-arz of the village. The defence also relied upon custom as stated in the wajib-ul-arz interpreting the custom therein stated as giving an unrestricted right of transfer both of the materials and of the right of residence. The learned Munsif decreed the plaintiff's suit, but the lower Appellate Court has come to a different interpretation of the wajib-ul-arz and has held that the respondent by his purchase has got a right not only in the materials of the house in question but also a right to live in that house under the custom recorded in the wajib-ul-arz by virtue of his having purchased this house as a house, and which respondent 2 was fully competent to transfer.

The essential question in the present case then is one of interpretation of the wajib-ul-arz of the village. There was also before the trial Court some oral evidence, but this evidence, as it appears, really amounted to evidence that there were no instances of the exercise of the right claimed by the vendee and the lower Appellate Court has not considered that evidence at all and no reliance has been placed upon it here as indeed in second appeal is natural. As regards this wajib-ul-arz, the terms of it are for practical purposes free from dispute. The wajib-ul-arz provides that if the landlord contributes towards the construction of a house by a riaya in the shape of materials, such a riaya has no right to sell the materials in the house or to allow any other person to live in it. The present case was not one in which the house was said to have been constructed with the help of the zamindar. On the other hand, the wajib-ul-arz further provided that if any riaya builds a house from his own money, he has a right to sell the materials thereof and can give it to any one for living in it. This provision runs as follows in Urdu: *us ko ikhtiar farokht amla makan ka hai aur dusare shakas ko waste rahne ko de sekta hai.* It appears to me that what this wajib-ul-arz does is to give the riaya, who has constructed a house at his own expense, first a right to sell the materials, and secondly, a right to give the house to a second person for the purpose of living in it. These are two separate rights and the presence of the word "or" does not mean that these two rights can be combined.

To facilitate the interpretation of this wajib-ul-arz, copies of three judgments of the Court of the Judicial Commissioner were produced either in the trial Court or in the lower Appellate Court and copies of the wajib-ul-arz, on which each of these judgments was founded, were also filed. The lower Appellate Court has sought for distinctions between the provisions of those wajib-ul-arzes, but we may take it that for practical purposes the relevant provisions of the three wajib-ul-arzes are identical. The first of these cases was decided by Mr. Chamier as Judicial Commissioner in 1908. The relevant portion of the judgment runs as follows:

> The wajib-ul-arz contains several provisions regarding the rights of persons who build houses in this village. The provision relevant to this case is to the effect that a tenant who builds a house with the consent of the landlord at his own expense may, besides living in it himself, sell the materials of the house or allow any one else to live in it. If such a tenant, (I understand this to mean a tenant who has built a house at his own expense) runs away from the village or goes away, the landlord becomes the owner of the house. It is quite clear that according to this provision which is admittedly binding upon the parties, defendant 1 was not entitled to sell the house to defendant 2 at all. Both the Courts below are agreed upon another question (with which I am not concerned in the present case.)

Learned counsel for the respondent points out that the judgment in this case did not involve any decision on the interpretation of this particular part of the wajib-ul-arz because it was evidently not in dispute before the learned Judicial Commissioner. That is certainly so, but at worst this is a clear instance of how a wajib-ul-arz in almost identical terms with the present wajib-ul-arz has been interpreted by the then highest Court in Oudh on a former occasion. The second case on which reliance is placed is a judgment of Pandit Kanhaiya Lal, Second Additional Judicial Commissioner, dated 11th February 1920. There also the condition was that if a tenant builds a house at his own costs, he can sell the materials or, if he likes, allow another to occupy it in his place. The learned Additional Judicial Commissioner interpreted this wajib-ul-arz in this manner that he said: "The wajib-ul-arz practically gives an option to the riaya either to vacate the land by selling the materials or to make over the house to another person for residence on the same terms on which he himself had occupied it". It appears that the learned Additional Judicial Commissioner interpreted this as giving to the riaya an unrestricted right of transfer of the house, although he has not stated that inference in words. The inference is more clearly stated in the third judgment, a judgment which is headed: "In the Court of the Judicial Commissioner of Oudh," but described as decided by Mr. Wazir Hasan as Hasan J.; presumably therefore it was decided after this Court was instituted. The judgment in this case was founded on the wajib-ul-arz, Ex. B, which is in markedly similar terms as the wajib-ul-arz in the present case. It provides that in the case of a tenant who has built a house at his own cost, *us ko ikhtiar hai ki chahe amla makan farokht kare chahe dusre shakas ko waste rahne ko de*, that is the raiya has right to sell the materials of the house or he may give it to some other to live. The learned Judge remarked that

> the sale in that case (as also the sale in the present case) does not purport to be a sale of the materials only. It is a sale of the house.

He goes on to say that:

> According to the wajib-ul-arz of the village, a tenant of the class to which Mt. Kunsilla was agreed to belong has not only the right to sell the materials of the house but is also given the additional right of substituting another person in his

place in occupation of the house. This amounts to a right of transfer of the enjoyment of the house in other words of the occupation of it, and if this right could be transferred gratuitously, I see no reason why it cannot be transferred for consideration. The sale made by Mt. Kunsilla in favour of the defendant therefore amounts to the transfer of the mere right of occupation of the house in favour of the defendant, and as stated above, she had a right to make such a transfer.

With the greatest respect, it appears to me that there is room for doubt about the soundness of this view. What the learned Judge has said is that from the existence of rights (a) and (b) given by the wajib-ul-arz, we are entitled to infer a third right which is an unrestricted right of transfer of the right of occupation of a house by the riaya to a third person. On behalf of the appellant the main contention in the present case is that this is not a proper method of interpretation of a wajib-ul-arz and it certainly appears to me that where we are to read a wajib-ul-arz as establishing custom, we are not entitled to put on the terms of that wajib-ul-arz any inferential construction. The terms of the custom cannot be considered in the ordinary way to go beyond what is actually stated in the wajib-ul-arz. This point has not come up before this Court in connexion with a case of the present kind before, but we find that for example with reference to the exclusion of daughters and widows from rights of succession, the question of the interpretation of wajib-ul-arz has often come up, and the view taken in recent cases has, I think, been that a custom as it appears in a wajib-ul-arz is not to be enlarged by means of probable inferences. To my mind, the custom laid down in the present wajib-ul-arz is that the riaya who has constructed a house at his own expense (and of course his successor (has only two rights : (1) right to sell the materials, and (2) the right to make a gift of the right of occupation. These are two separate rights which are not combinable so as to produce a third right of sale of the right of occupation. Had it been intended by this wajib-ul-arz that the custom of sale of the right of occupation existed, there was no need, so far as I am able to see, for the distinction between *ikhtiar farokht amla makan ka* on the one hand, and the provision that the tenant can "give" to another person the right of occupation on the other. In my opinion therefore, the interpretation put upon the wajib-ul-arz by the lower Appellate Court is incorrect. The plaintiff's suit was rightly decreed by the trial Court and the trial Court's decree must be restored. I allow this appeal with costs, accordingly set aside the decree of the lower Appellate Court and restore the decree of the trial Court. The appellant will get his costs of the lower Appellate Court also.

V.B.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Oudh 139

YORKE J.

*Bhulai and another — Plaintiffs —* Appellants.

v.

*Gaya Din and another — Defendants* — Respondents

Second Appeal No. 264 of 1937, Decided on 2nd March 1938, against order of Addl. Civil Judge, Gonda, D/- 12th March 1937.

**Court-fees Act (1870), S. 7 (v) (d), Oudh Civil Rules, Rr. 1 (d) and 4 — Suit by tenant for possession from trespasser.**

Where a suit is a suit by a tenant to recover possession from a trespasser, but the object of the suit is precisely the same as in the case of a suit between rival tenants, S. 7 (v) (d), Court-fees Act and R. 4 of the Oudh Civil Rules apply. And the market value should be calculated at either 10 times or 20 times the annual rent as stated in the Rule. [P 139 C 2]

S. N. Roy — *for Appellant.*

**Judgment.** — I have heard the learned counsel, and the stamp reporter has shown the ground of his assessment. The latter would bring the case under S. 7 (v) (d), Court-fees Act, and doubtless to that extent he is correct. He further refers to Rule 269-A of the Oudh Civil Rules. Under these Rules he seeks to bring the case under Rule 1 (d), but it appears to me to be clear that the Rule applicable is R. 4, which provides that :

> In suits for possession of land between rival tenants the value of the land should be calculated at 10 times the annual rent payable for the land in the case of statutory and non-occupancy tenants and 20 times the annual rent payable for the land in case of tenants having right of occupancy.

It is true that the present suit was a suit by a tenant to recover possession from a trespasser, but the object of the suit is precisely the same as in the case of a suit between rival tenants, and in my opinion on the analogy of R. 4, the market value should be calculated at either 10 times or 20 times the annual rent as stated in the Rule. In the present case, it is stated that the appellants are statutory tenants and the basis of taxation should therefore be 10 times the annual rent payable for the land. On this view the amount of court-fee paid already in the lower Courts and in this Court is correct, and no further amount, in my opinion, is taxable.

K.S./R.K. *Order accordingly.*

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## A. I. R. 1938 Oudh 140

### FULL BENCH

THOMAS C. J., ZIAUL HASAN AND HAMILTON JJ.

*Mt. Raghurai — Plaintiff* — Appellant.

v.

*Bindra Prasad and others — Defendants* — Respondents.

Second Appeal No. 316 of 1935, Decided on 7th April 1938, against decree of Civil Judge, Sitapur, D/- 15th August 1935.

**(a) Deed—Construction—Each case must be determined on its own circumstances—Language of one document is not much useful in construing another.**

The language of one document does not afford much assistance in the construction of another. Each case must be determined on its own circumstances, and each document must be construed according to the words which are contained in it. [P 145 C 2]

**(b) Deed—Construction—Same word in one document may be interpreted in different sense on good reasons.**

No doubt the ordinary rule is that the same words used in one and the same document should be given the same meaning, but this cannot be an invariable rule and if there are reasons for attaching a different meaning, there is no reason why it should not be taken in that sense. [P 145 C 2]

**(c) Custom—Proof of—Custom in derogation of law—It should be established by clear and unambiguous evidence and should be construed strictly.**

A custom to be a rule having the force of law must be ancient, certain, continuous and reasonable and it must be established by clear and unambiguous evidence and being in derogation of the general rules of law must be construed strictly before it can be given effect to. [P 146 C 1]

**(d) Wajib-ul-arz—Construction—Clause that 'Lawalad widow shall not be entitled to inherit' —Lawalad held meant childless and not sonless:** (Per *Full Bench*; *Hamilton J.* contra).

A widow of a separated Hindu who had a daughter to look after, sued for her husband's inheritance. A clause in a wajib-ul-arz which ran: 'A lawalad widow shall not be entitled to inherit the property of her husband. She is only entitled to maintenance' was pleaded in defence on the ground that lawalad meant sonless and so she was entitled only to maintenance:

*Held* that it would not be safe to deprive her of the inheritance by giving the word 'lawalad' the meaning of sonless. The word meant only childless and so the plaintiff was entitled to decree. [P 144 C 1, 2; P 146 C 1]

Radha Krishna and S. C. Das — *for Appellant.*

Ghulam Hasan for M. Wasim and Jagdish Chandra — *for Respondents.*

### Judgment of the Division Bench

**Ziaul Hasan J.** — This second appeal against an appellate judgment of the learned Civil Judge of Sitapur came on for hearing before a learned Judge of this Court and he being of opinion that the appeal involved a question on which there were conflicting decisions, referred the case to a Bench. The suit was brought by Mt. Raghurai, widow of Sheo Darshan Prasad, against the sons and grandsons of her husband's cousin Jaskaran Lal for a half share in the residential house of the family. The defence was that Sheo Darshan Prasad was a member of a joint family with the defendants so that the plaintiff was not entitled to succeed her husband and that in any case she was excluded from inheritance by virtue of a special custom. The trial Court, the Munsif of Sitapur, held that Sheo Darshan Prasad was separate from the defendants but that Mt. Raghurai, plaintiff, was not entitled to a share in the house but only to maintenance according to the custom applicable to the family. This decision was based on the following clause contained in the wajib-ul-arz. A lawalad widow shall not be entitled to inherit the property of her husband. She is only entitled to get maintenance. The learned Munsif translated the word lawalad as 'childless' and his attention apparently not being called to the fact that the plaintiff has a daughter, he dismissed the suit. The plaintiff appealed and the learned Civil Judge who heard the appeal came to the conclusion that inspite of the fact that the plaintiff has a daughter, she was not entitled to succeed as he interpreted the word lawalad as meaning sonless. The plaintiff, therefore, brings this appeal against the dismissal of her suit, and the only question for determination is whether the word lawalad in the clause of wajib-ul-arz referred to above means childless or sonless.

It seems to me that there is no good reason to take the word lawalad occurring in the clause referred to as meaning sonless. It is conceded on behalf of the respondents that the word walad is common to both the masculine and the feminine gende and that therefore the literal meaning of the word lawalad is childless or issueless. This being so, it was to my mind for the respondents to satisfy this Court that the word was not used in its literal sense in the sentence quoted above and the reasons given by the learned counsel for the respondents have not satisfied me at least. In the first place the learned counsel argues that because the word aulad has been used in other places in clause 4 of the wajib-ul-arz as meaning sons, it must be presumed that the word lawalad was used in the sentence in question as meaning sonless. To appreciate this argument, it is necessary to reproduce the entire clause 4 of the wajib-ul-arz. It is as follows:

> In our family except a male offspring daughters and daughters' children are excluded from inheritance. The share is divided according to the number of wives and not according to the number of aulad. If out of the brothers born of the same mother, any one dies lawalad then only the uterine brothers will be entitled to the share of the deceased and not an alati (consanguine) brother. A lawalad widow shall not be entitled to inherit the property of her husband. She is only entitled to get maintenance. There is a custom of adoption in our family but the condition is that in the presence of a boy of near family another of a remote and different class cannot be adopted. If after adoption a male issue is born, then the adopted child and the natural child shall be entitled to inherit the property in equal shares and the adopted son will be debarred from inheriting the share of his own father. An unwedded lady and her aulad are not entitled to inheritance. Provided she be of good conduct and obedient to the heirs of the deceased, she can get food and raiment. There is no custom of jethansi rights (right of primogeniture).

No doubt in the sentence which refers to the mode of division and in the next following sentence the words aulad and lawalad must be taken to mean sons and sonless respectively but this interpretation is necessitated by the provision contained in the very first sentence of the clause, namely, that only a male offspring and not daughters or their children are entitled to inheritance. No such consideration, however, arises with regard to the lawalad used in the sentence under consideration and there seems to me to be no reason why the word lawalad should be translated in that sentence as sonless. In the sentence relating to an unwedded mistress, the word aulad may mean either sons or children. The learned Civil Judge says:

> **The word childless or lawalad used in the wajib-ul-arz means without male issue because the case of a female issue has been provided in clear terms in the earlier sentence of the document.**

This to my mind is no reason at all since the sentence in question relates not to inheritance of the female issue but to that of the widow. Moreover, if the sentence in question be read as meaning that a sonless widow will not be entitled to her husband's inheritance, the use of the word lawalad would be meaningless, because the widow would be excluded in any case, that is whether a son is in existence or not and in that case it would have been quite sufficient to say that a widow is not in any case entitled to her husband's inheritance. The very use of the word lawalad shows that the widow is entitled to inherit in some cases and that case can only be when she has no son but has a daughter or daughters. No doubt the ordinary rule is that the same word used in one and the same document should be taken in the same sense but this to my mind cannot be an invariable rule, and if there exist good reasons for taking it in another sense at another place, I do not see why it should not be taken in that sense. It must also be noted that according to the respondents' interpretation of the clause in question a widow who has daughters to bring up and marry will be left without any resources whatever, but this could not have been intended by the family, which verified the custom recorded in the wajib-ul-arz, as binding on them. It was argued on behalf of the respondents that the daughters would be maintained and their marriages provided for under the ordinary Hindu law by the person who comes into possession of the inheritance; but the person coming into possession of the property can very well argue that the family is not governed by the ordinary Hindu law but by a special custom recorded in the village wajib-ul-arz and that that custom does not make any provision about daughters.

Further, it is a well-established rule of law that a custom in derogation of the ordinary law must be proved by very strong and cogent evidence before it can be given effect to and it would not, in my opinion, be safe to deprive the widow of a separated Hindu, who has daughters to look after but no son, of her husband's inheritance by giving the word lawalad in the clause in question a meaning which it admittedly does not literally possess. The learned counsel for the respondents also argued that the word lawalad used in wajib-ul-arzes has been interpreted in several cases as meaning sonless and the case in 3 O L J

327[1] was cited as an example. This to my mind is no argument for holding that the word has been used in the same sense in the sentence in question in the wajib-ul-arz now before us. The words used in a document must be interpreted with regard to the context and intention of that document and not of any other. Lastly, it was argued that in the pedigree given in the plaint, the plaintiff has herself described her husband Sheo Darshan Prasad as issueless; but I do not think she can be held responsible for the drafting of the plaint nor is it likely that the terms of the wajib-ul-arz were in the mind of whosoever drafted the plaint at the time of drafting it. Reference was also made to Ex. A-7, a judgment by which the suit of Mt. Jasoda, widow of the plaintiff's husband's uncle Badri, for a share in her husband's property was dismissed; but there is nothing to show that Mt. Jasoda had any daughter or daughters. On the other hand the judgment shows that she was without any issue so that the dismissal of her suit cannot affect the present plaintiff's claim. For reasons given above, I would allow the appeal and decree the plaintiff's suit with costs.

**Hamilton J.**—I have had the advantage of seeing the judgment of my learned brother but I regret that I cannot come to the same conclusion as to the meaning of the word lawalad as applied to a widow in the wajib-ul-arz in question. I will first refer to such Oudh cases as have come to my notice where the word lawalad has been interpreted. 12 O C 63.[2] The point for decision was whether when the custom of exclusion of daughters existed among certain Thakurs this implied also the exclusion of daughter's sons. Ex. B-9 was an extract from the wajib-ul-arz of Alampur village and as translated it read as follows :

> After the death of a sonless (lawalad) owner his widow, if chaste, shall be his heir . . . . A sonless widow can adopt only from the family of her husband's ancestors.

What was the word translated as "sonless" in the case of the widow was not given but presumably it was the word lawalad. However that may be, the Urdu word has been given in the case of the male owner. 3 O L J 327.[1] The word lawalad was held by Lindsay J. to mean sonless and apparently the same view had been taken by Chamier J. in another case about the same wajib-ul-arz. 8 O W N 288.[3] There were two wajib-ul-araiz to be interpreted which contained the expressions 'aulad bewalad and mahrumia aulad.' In the scheme of succession laid down, a daughter found no place. It was held that in the light of the entire context the word lawalad must be taken as meaning sonless. 8 Luck 354.[4] This was a case where two members of a Bench disagreed and it was referred to a third Judge. The word lawalad appeared three times in the wajib-ul-arz and the expression 'madar mahruma aulad' once. In the first place lawalad was used followed by the words *ya sirf dukhtar rakhti ho*, so that it could only mean issueless. In the second place one Judge held that the context did not enable it to be definitely said whether the word lawalad ought to be translated issueless or sonless while the other held it meant sonless. As regards the expression 'mahruma aulad', the Judge who as regards the second lawalad said it could not be definitely said whether it meant issueless, or sonless, held that the expression, while in itself ambiguous, appeared to mean in the context in which it occurred "sonless." The other Judge did not consider the point but in view of how he translated lawalad in the second place it is clear that he regarded it as meaning sonless. As to lawalad in the third case there was difference of opinion. The third Judge to whom the appeal was referred held the lawalad in every case and 'mahruma aulad' also meant childless.

It will thus be seen that in the above cases lawalad has been held to mean "sonless" more often than not but of course this is no guide to what meaning should be given to the word 'lawalad' in any particular case. What appears to me of greater importance is to consider what was the position of widows and daughters in the cases to which I have referred. In 12 O C 63,[2] the wajib-ul-arz laid down that :

> After the death of a sonless (lawalad) owner his widow, if chaste, shall be his heir . . . . To marry the daughter and to maintain the widow shall be obligatory on the heir in possession.

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[1] Suraj Bali v. Tilok Chand, (1916) 3 A I R Oudh 95=36 I C 66=3 O L J 327.

[2] Sheomangal Singh v. Jagpal Singh, (1909) 12 O C 63=2 I C 253.

[3] Mt. Lachhman Dei v. Behari Lal, (1931) 18 A I R Oudh 322=131 I C 897=6 Luck 651 =8 O W N 288.

[4] Dwarka v. Mt. Raghubansa, (1933) 20 A I R Oudh 182=142 I C 872=8 Luck 354=10 O W N 69.

The parties agreed that the daughter of a sonless member of the family was excluded. It is clear that on the wajib-ul-arz as construed the sonless widow and the childless widow were on a par. In 3 O L J 327,[1] the judgment states :

> Turning to the clause which deals with matters of inheritance we find first of all a general provision laying down that women who are without issue (aulad) are permitted to hold the shares of their husbands with any power of transfer. A further provision is to the effect that after the decease of childless widows the property devolves upon the uncles and nephews of their deceased husbands and thereafter upon the more remote collateral male relations. Finally we have the following statement which is reproduced in original : *agar koi hissadar ya aurat hissadar bawajeh na hone aulad ke dukhtar ya aulad dukhtari ko hin hayat apne men hissa apna dekar qubza kara dewe to pa sakta hai.*

It is clear therefore from the Urdu sentence that the childless widow and the widow with only female issue were on a par. The point for decision was whether by implication daughters were excluded from inheritance and it was found that they were not. In 8 O W N 288[3] there were two points for decision, whether by family custom a widow succeeded to the estate of her husband as full owner with powers of alienation and whether daughters were excluded. It was held that daughters were excluded and the other question was not decided. There were two wajib-ul-araiz and the relevant portions are as follows :

*Wajib-ul-arz of Kapurjote (Ex. A-9).*

> Para 4. The custom of division of inheritance and devolution of assets with regard to aulad is as follows :
>
> On the death of a co-sharer, all the sons (larka) get equal shares. If there be two legally married widows and one has got aulad and the other is lawalad, then the inheritance would go to the sons (larkon) alone. The issueless widow would get maintenance for her life from the aulad of the other widow. If both of them were lawalad, then they would succeed in equal shares and after their deaths, the inheritance would devolve on the near relations of their husband's family (khandan qaribi shauhar se). If any co-sharer is joint in mess with his brother and nephew and dies leaving a lawalad widow or even an unmarried daughter, then the widow would remain in possession without power of alienation and the responsibility for the marriage of the unmarried daughter would rest on the brothers and nephews. But if the share of the deceased be separate, then the widow would remain in possession of the share with powers of sale and mortgage. The widow has got the power of making adoption from the family (khandan) of her husband.

*Wajib-ul-arz of Ram Bhari (Ex. 10).*

> **Para. 4. The custom of inheritance and division of assets in our family is as follows :—**
>
> If any co-sharer dies leaving two legally married widows and they have got aulad mukhtalif, then inheritance would go to the sons (larkon) in equal shares after deducting jethansi right at Biswandh to the first born son (farzandi-i-auwal). There is no custom of stribhag in our family. If one widow has got aulad and the other has got no aulad pisri and has only a daughter, she would get no share and the aulad and the other widow would get the inheritance and would be responsible for the maintenance of the sonless (mahruma aulad) stepmother and the expenses of the marriage of the unmarried daughter. If both of the widows have no aulad, they would be in possession of the estate in equal shares. A widow whose husband dies in jointness with his brother and nephew, would get the inheritance without power of alienation but if the share of the deceased was divided in his lifetime, then his widow would be in possession with powers of an owner (baikhtiyar malikana). If the widow made no adoption then after her death the inheritance would go to the near relations of her husband (qaribi shauhar).

In my opinion, the sonless and the childless widow were on a par. In 8 Luck 354,[4] the question for decision was whether daughters were excluded by custom and the final decision was that they were not. There were three relevant passages as to widows : In the first passage it was laid down that if a widow had a son and another was childless or had only a daughter, the male issue got the property. Consequently the childless and the sonless widow were on a par. In the second passage it was stated that if two brothers held property jointly and one died leaving a lawalad widow, the widow was entitled to get maintenance only. One of the Judges forming the Bench held lawalad to mean sonless and, therefore, put the sonless and the childless widow on a par. The other left the question open as he held that it could not be definitely said whether the word lawalad ought to be translated 'issueless' or 'sonless'. If it is translated 'issueless' it leaves the difficulty that the position of the sonless widow is not settled. The learned Judge to whom the appeal was referred held that the word 'lawalad' meant childless in every case dealt with this difficulty in the following words :

> I am not prepared to construe that word as meaning sonless in the second clause, simply because that meaning would have the effect of not providing for the maintenance of a widow who has a daughter. The question of maintenance is a different question. If the wajib-ul-arz is silent on that point the Hindu law will apply.

The third passage in the wajib-ul-arz ran as follows :

> **A lawalad widow in ordinary circumstances shall remain in possession of a share without power of transfer. After her death the nearest heir of her husband will get possession of the property.**

One Judge in the Bench holding that lawalad meant sonless put the sonless and the childless widow on a par, while the other Judge and the Judge to whom the appeal was referred held that it meant childless and they were, therefore, faced with the difficulty that the wajib-ul-arz did not provide for the sonless widow and so they went back to Hindu law. From the above cases it appears to me that when the wajib-ul-arz was clear on the point, the sonless widow and the childless widow were put on a par and whenever lawalad was taken to mean 'sonless,' the same result ensued. In only one of the above cases was it definitely stated in the wajib-ul-arz that the daughter was excluded and where she was found to be excluded the childless and the sonless widow were on a par. In the present case the wajib-ul-arz, a translation of which appears in the judgment of my learned brother, excludes the daughter in the clearest terms. For the purposes of inheritance therefore, she is non-existent and all that we may presume about her is that she may be entitled to get maintenance to live and to have the expenses of her marriage met. These duties can be carried out by a male proprietor no less than by the mother. I do not see therefore why a sonless widow, mother of a female child, who according to the custom of the family is little if anything better than if she was non-existent, should, in the eyes of that family, be regarded as deserving more favourable treatment than a widow who was childless. When the family considered a daughter and a childless woman only entitled to maintenance, I think it would treat a childless and a sonless widow as being on a par. When we come to the wajib-ul-arz in this case, I see no place where the word walad whether in the plural or in the negative adjective lawalad cannot be translated as male issue, when it is standing alone. I think indeed that it should be translated as "son" without any doubt, except in the disputed passage

> a lawalad widow shall not be entitled to inherit the property of her husband. She is only entitled to get maintenance.

To translate the word lawalad in this passage as sonless is to keep the same meaning as in the rest of the document and as I have said it seems to me more suitable when the daughter is excluded from inheritance and finally it provides for all classes of widows without having to go outside the wajib-ul-arz. There is yet one consideration which appears to me important. The plaintiff herself in the pedigree in the plaint described herself as lawalad though she has a daughter. It does not appear to me probable that she said that she had a daughter and the writer of the plaint described her as lawalad, and if she did describe herself as lawalad, it shows the meaning which a member of the family attached to the word lawalad. This is not all however. It was never argued in the original Court that a difference should be made between a childless widow and a sonless widow and if the description of the plaintiff in the plaint as lawalad was so to speak, a slip of the pen, one would expect to have had an argument in the original Court that the plaintiff was not lawalad within the meaning of the wajib-ul-arz. I find however that para. 15 in the written statement "according to the custom of the family a widow is entitled to maintenance only" was added as an amendment and the only answer made by counsel for the plaintiff was that the question of custom did not arise because in either case his client was entitled to partition of the property of which she was in possession. For the above reasons I am unable to agree with the opinion of my learned colleague and I consider that the decisions of the Courts below should be upheld and the appeal be dismissed.

**By the Court.** — *(Ziaul Hasan and Hamilton JJ.)*—As there is a difference of opinion between us as to the interpretation of the word lawalad occurring in the wajib-ul-arz on which rests the decision of the appeal, we refer the case for the decision of a Full Bench under S. 13 (i) (b), Oudh Courts Act.

## JUDGMENT OF THE FULL BENCH

**Thomas C. J.**—This is a second appeal from a decision by the learned Civil Judge of Sitapur, by which he dismissed an appeal from the decision of the learned Munsif of that place. The appeal first came up for hearing before a single Judge of this Court, who under the provisions of S. 14 (2), Oudh Courts Act, referred it to a Bench. As there was a difference of opinion between the Hon'ble Judges of the Bench, the appeal was referred for decision of a Full Bench under S. 13 (i) (b), Oudh Courts Act. The plaintiff, Mt. Raghurai, is the widow of one Sheo Darshan Prasad, who had a cousin Jaskaran Lal. The sons and grandsons of Jaskaran Lal are the defendants in the suit. Mt. Raghurai brought the present suit for partition of a residential house claiming a half-share in it. The defendants resisted the claim on the ground that Sheo Darshan Prasad was a member of a joint family and that in any case Mt. Raghurai was excluded from inheritance to her husband's property by virtue of a special custom. The learned Munsif held that Sheo Darshan Prasad was separate from the other members of the family but he held that Mt. Raghurai was, nevertheless, entitled only to maintenance. He based this decision on a provision in the wajib-ul-arz (Ex. A.3) on the ground that the word 'lawalad' in it meant childless. It appears that his attention was not directed to the fact that Mt. Raghurai had a daughter. In the end he dismissed the suit.

The learned Civil Judge, who heard the appeal, came to the conclusion, that in spite of the fact that the plaintiff had a daughter, she was not entitled to succeed as he interpreted the word 'lawalad' as meaning without male issue. He dismissed the appeal. Mt. Raghurai has now preferred this second appeal and the sole point involved in the appeal relates to the meaning of the word lawalad. The contention of the learned counsel for the appellant is that the word 'lawalad' must in this case be interpreted as meaning issueless, while the contention of the learned counsel for the respondents is that the word 'lawalad' must be interpreted as meaning sonless and not issueless. I have had the advantage of reading the judgments of my learned brothers Ziaul Hasan and Hamilton JJ. In order to appreciate the arguments of the learned counsel for the parties, it is necessary to reproduce cl. (4) of the wajib-ul-arz which is as follows: (I have taken this translation from the judgment of my learned brother Ziaul Hasan J.)

> In our family except a male offspring daughters and daughter's children are excluded from inheritance. The share is divided according to the number of wives and not according to the number of aulad. If out of the brothers born of the same mother, any one dies lawalad, then only the uterine brothers will be entitled to the share of the deceased and not an alati (consanguine) brother. A lawalad widow shall not be entitled to inherit the property of her husband. She is only entitled to get maintenance. There is a custom of adoption in our family but the condition is that in the presence of a boy of near family another of a remote and different class cannot be adopted. If after adoption a male issue is born, then the adopted child and the natural child shall be entitled to inherit the property in equal shares, and the adopted son will be debarred from inheriting the share of his own father. An unwedded lady and her aulad are not entitled to inheritance. Provided she be of good conduct and obedient to the heirs of the deceased, she can get food and raiment. There is no custom of jethansi rights (right of primogeniture).

In order to construe the word 'lawalad' the learned counsel for the respondents relied on certain cases which are mentioned in the judgment of my learned brother, Hamilton J. but in my opinion the language of one document does not afford much assistance in the construction of another. Each case must be determined on its own circumstances, and each document must be construed according to the words which are contained in it. I shall now proceed to construe the wajib-ul-arz in question. The word lawalad occurs at two places in the wajib-ul-arz. The first portion of the wajib-ul-arz beginning from "In our family . . . . . . . uterine brothers will be entitled to share of the deceased and not an alati (consanguine) brother" relates to the exclusion of daughter and the Urdu word for male offspring is aulad 'narina'. I have no doubt in my mind that the word 'lawalad' here means sonless. The question is what meaning is to be attached to the word 'lawalad' used in the second paragraph beginning with "A lawalad widow shall be not be entitled to inherit the property of her husband . . . . ." The contention of the learned counsel for the respondents is that the same meaning as given to the first word 'lawalad' should also be given to it. No doubt the ordinary rule is that the same words used in one and the same document should be given the same meaning but this in my opinion, cannot be an invariable rule and if there are reasons for attaching a different meaning, I do not see why it should not be taken in that sense. There can be no doubt that in the first portion of the wajib-ul-arz which refers to the mode of division, the words 'aulad' and 'lawalad' must be taken to mean sons and sonless, respectively, but this interpretation is put by the use of the word aulad narina used in the very first sentence, which says that "in our family except a male offspring, daughters and daughters' children are excluded from inheritance." In my opinion no such consideration arises with regard to the word 'lawalad' used in the second paragraph beginning with the words "A lawalad widow shall not be entitled . . . . . " This paragraph stands by itself, and there seems to me no reason why the word 'lawalad' should mean sonless. In the sentence "an unwedded lady and her aulad are not entitled to inheritance" the word 'aulad' may mean either sons or children. I agree with the view of my learned brother Ziaul Hasan J. that :

> If the sentence in question be read as meaning that a sonless widow will not be entitled to her husband's inheritance, the use of the word lawalad would be meaningless, because the widow would be excluded in any case, that is, whether a son is in existence or not, and in that case it would have been quite sufficient to say that a widow is not in any case entitled to her husband's inheritance. The very use of the word 'lawalad' shows that the widow is entitled to inherit in some case and that case can only be when she has no son but has a daughter or daughters.

A custom to be a rule having the force of law must be ancient, certain, continuous and reasonable and it must be established by clear and unambiguous evidence and being in derogation of the general rules of law must be construed strictly before it can be given effect to, and in my opinion, it would not be safe to deprive the widow of a separated Hindu who has a daughter to look after of her husband's inheritance by giving the word lawalad the meaning which is suggested by the learned counsel for the respondents. It was further argued by the learned counsel for the respondents that the plaintiff has herself in paragraph one of the plaint stated that her husband Sheo Darshan Prasad died issueless, *lawalad faut ho gaya*, but I do not think that there is any force in this argument. She cannot be held responsible for the use of the words in the plaint. For the above reasons, I allow the appeal, set aside the decree of the lower Appellate Court and decree the plaintiff's suit with costs.

**Zia-ul Hasan J.** —I have already given judgment in this case on 12th January 1938, and would allow the appeal and decree the plaintiff's suit with costs.

**Hamilton J.** —I have nothing to add to the opinion I expressed in my judgment dated 18th January 1938.

V.B.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Oudh 146

HAMILTON AND YORKE JJ.

*Durga Prasad—Defendant—*Applicant.

v.

*Gur Dularey and others, Defendants* — Opposite Party.

Civil Revision Appln. No. 129 of 1937, Decided on 21st April 1938, from order of the Addl. Civil Judge, Bara Banki, D/- 25th October 1937.

**(a) Civil P. C. (1908), O. 33, Rr. 7 (3), 8, S. 115 — Application to sue in forma pauperis granted — Revision lies from such order.**

There is really no fundamental distinction between cases where an application to sue in forma pauperis has been granted and cases where it has been refused. In a sense neither order can be said to be final because in the one case where the application is granted, the application is taken to be the plaint, and in the other case where the application is rejected, the matter does not end there because the plaintiff can be and usually is given time to deposit the amount of court-fees. It is more reasonable to hold that proceedings on an application for permission to sue as a pauper really constitute a separate case. Such proceedings are registered separately as applications. In case of refusal of the application, there may or may not be by reason of subsequent payment of court-fees, a suit registered. If payment of court-fees is made, a suit will be registered. In the same way, on the grant of permission to sue as a pauper, the application comes to an end and the petition is registered as a plaint in the suit. Such proceedings are proceedings before the commencement of a suit. In either case they are therefore not interlocutory proceedings and an application in revision will lie from the final decision in such proceedings : *Case law discussed.* [P 148 C 1; P 149 C 1]

**(b) Civil P. C. (1908), O. 33, R. 5 (d) — Court cannot rely on evidence other than that of applicant for decision of question under R. 5 (d) — Lower Court availing itself of statement of defendant — Material on record other than defendant's statement justifying Court's conclusion — Irregularity of lower Court not sufficient ground for setting aside order.**

It is open to the Court to consider not only the statement made in the plaint but also the statements made in his examination by the applicant before determining whether his allegations disclose a cause of action as laid down in Cl. (d) of R. 5 of O. 33. But the Court cannot examine other witnesses for deciding the question of limitation or any other question than the pauperism of the applicant. Thus a lower Court commits an irregularity in availing itself of a statement made by the defendant and in fact in permitting him to be cross-examined with the object of eliciting such an admission but that would not be a sufficient ground for setting aside the order of the lower Court if there was material justifying it in coming to the conclusion that the plaintiffs' allegations did show a cause of action without his falling back on the statement of the defendant : *A I R 1919 Cal 385; A I R 1928 Sind 118 and A I R 1932 Bom 584, Rel. on.* [P 151 C 1, 2]

B. K. Dhaon — *for Applicant.*

D. P. Khare and Nasir Ullah Beg — *for Opposite Party.*

**Order.**— This is an application in revision under S. 115, Civil P. C., by one Durga Prasad defendant against the order of the Additional Civil Judge of Bara Banki, dated 26th October 1937, holding the opposite parties plaintiffs to be paupers and directing under the provisions of O. 33, Rules 7 (3) and (8), Civil P. C. that their application be registered as a plaint in forma pauperis.

A preliminary objection is taken on behalf of the opposite parties plaintiffs that no application in revision lies from the order of the lower Court. The basis of this objection is the contention that in a case where an application for permission to sue in forma pauperis is granted, the order does not come within the scope of the words "any case which has been decided by any subordinate Court" which are found in S. 115 of the Code. The argument rests on the footing that where such an application is granted, the application itself is deemed to be the plaint and is numbered and registered, and the suit proceeds in all other respects as a suit instituted in the ordinary manner. Hence, the order of the Court is to be regarded as in the nature of an interlocutory order, and therefore not subject to revision. Learned counsel for the opposite parties rests his contention on the authority of the ruling reported in 32 All 623[1] with some support from the ruling of the Judicial Commissioner of Sind reported in A I R 1933 Sind 82.[2] As has been pointed out in Chitaley's discussion of this matter in his Notes to S. 115 at pages 924 and 925 of Vol. I, Edn. 2 of his Civil P. C., the Allahabad view originally depended on a distinction between cases in which the application had been rejected and cases where it had been accepted. The point has come up for consideration since from different points of view : *see* for example 48 All 493;[3] but the view still taken by the Allahabad High Court is that no application in revision lies from an order granting an application for leave to sue in forma pauperis, and the ruling quoted 32 All 623[1] has been followed in A I R 1931 All 659.[4] In the latter case it was expressly remarked that a revision cannot be entertained where an application to sue as a pauper is accepted because the order accepting such an application is not a case decided, but is more or less in the nature of an interlocutory order.

It is conceded in argument that all the other High Courts have dissented from this view of the Allahabad High Court, and we have been referred to a number of rulings of which the Lahore ruling reported in A I R 1934 Lah 231[5], is a good example. In that case it was held in clear terms that proceedings in an application for permission to sue in forma pauperis are distinct from and antecedent to the suit itself and can be looked upon as a "case" within the meaning of S. 115. Hence, revision is competent from a final order granting permission to sue in forma pauperis. Another case in which this point was discussed and the Allahabad view dissented from is reported in A I R 1931 Rang 318[6] where a single Judge of the Rangoon High Court held that an order either rejecting or granting an application for leave to sue in forma pauperis, amounts to a case decided and if the order falls within the purview of Cls. (a), (b) or (c) of S. 115, an application in revision is competent. In that ruling the learned Judge remarked that he was in entire agreement with the learned Judges who decided 48 All 493[3] that the fine distinction drawn in 32 All 623[1] quoted above cannot be justified. He went on to say "with all due respect, I must dissent from their view that an application in revision will not lie in any case," and he went on to hold as stated above and to refer to rulings of the Calcutta and Madras High Courts supporting his view. So far as this Court is concerned, it is conceded that there is no decision on the question whether an application lies from an order granting permission to sue in forma pauperis. There is a decision on the question whether an application lies in the case of rejection reported in 11 O W N 1356[7] where it was held that a revision lies under S. 115, Civil P. C., against an order of a Court rejecting an application for permission to sue as pauper, inasmuch as such an order constitutes a complete decision of the case so far as that Court is concerned. The learned Judges who decided this case had to deal with a preliminary objection similar to the one which has been raised in the present case, it being urged that there was no case which had been decided by the lower Court within the meaning of S. 115, Civil P. C. They went on to remark:

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[1] **Mohammad Ayub v. Mohammad Mahmud, (1910) 32 All 623=6 I C 831=7 A L J 741.**

[2] **Chandumal v. Tejulbai, (1933) 20 A I R Sind 82=142 I C 379=26 S L R 491.**

[3] **Shankar Ban v. Ram Deo, (1926) 13 A I R All 446=94 I C 484=48 All 493=24 A L J 557.**

[4] **B. B. & C. I. Railway Co. v. Mitthu, (1931) 18 A I R All 659=133 I C 465=1931 A L J 727.**

[5] **Hari Krishna Dutta v. K. R. Khosla, (1934) 21 A I R Lah 231=141 I C 570=34 P L R 557.**

[6] **Ma Ma Gale v. Ma Mi, (1931) 18 A I R Rang 318=135 I C 331.**

[7] **Asa Ram v. Mt. Genda, (1935) 22 A I R Oudh 20=152 I C 417=10 Luck 265=11 O W N 1356.**

> In a case like this no suit comes into existence until the application for leave to sue as a pauper has been accepted and the petition registered as a plaint. The result of the dismissal of the application was that no suit ever came to be instituted and the only matter before the lower Court was the proceeding for the determination of the question of pauperism. The result of the dismissal of the application was to put an end to this proceeding. In the circumstances, these proceedings themselves constituted a case and the order of the lower Court rejecting the application constituted a complete decision of the case so far as the lower Court was concerned.

This reasoning seems to depend in the main on what actually happened in that particular case, namely that because of the decision of the pauper application, no suit came to be instituted and therefore that was said to be a case decided. As a matter of principle, it appears to us that there is really no fundamental distinction between cases where an application has been granted and cases where it has been refused. In a sense neither order could be said to be final because in the one case where the application is granted, the application is taken to be the plaint, and in the other case where the application is rejected, the matter does not end there because the plaintiff can be and usually is given time to deposit the amount of court-fees. The real question at issue is whether an application under O. 33, R. 1 is a proceeding 'in the case', that is an interlocutory proceeding or something prior to the case. In this connexion we may refer to the Full Bench ruling of this Court reported in 12 O W N 1158.[8] In that case the Full Bench held that no revision of an interlocutory order lies, firstly on the ground that no 'case' has been decided within the meaning of S. 115 by the mere decision of a preliminary point regarding court-fees, etc., etc. Srivastava J. further remarked in that case:

> The words used in S. 115 do not contemplate the invoking of the revisional jurisdiction of the High Court in the case of interlocutory orders passed during the trial of a pending suit. In other words, my opinion is that in the case of a suit it is the suit itself and not any branch of it which can be regarded as a 'case' within the meaning of S. 115. On the correct legal interpretation of the term all interlocutory orders passed during the trial of a pending suit must be excluded from the application of the section.

He further remarked at page 1172:

> I should, however, make it clear that proceedings before the commencement of a suit as well as proceedings after a suit has come to an end, being proceedings independent of the suit, must stand on a different footing.

The question for our decision then really is limited to the question whether proceedings on an application for permission to sue in forma pauperis are proceedings before the commencement of a suit or proceedings in a suit. As we have noted already, the consensus of opinion of High Courts other than the High Court at Allahabad and the Sind Court is in favour of the former view. While it is true that there is no case of this Court precisely bearing on the point in question, there are two cases of the Court of the Judicial Commissioner of Oudh which follow the view taken by the majority of the High Courts. These cases are reported in 12 O C 381[9] and A I R 1923 Oudh 118.[10] In the former case Sundar Lal J. C. held that an application for permission to sue as a pauper is in itself a case within the meaning of that term as used in S. 115 of Act 5 of 1908. He held further that orders under Chap. 26 of Act 14 of 1882, are open to revision under S. 622, and also that interlocutory orders are not liable to revision under S. 115 of Act 5 of 1908. In his judgment in this case the learned Judicial Commissioner examined and discussed the Allahabad cases and he pointed out that in the case of 23 All 364,[11] two Judges of the Allahabad High Court held that where an application to sue in forma pauperis had been allowed and the case proceeded to trial and decision it was not open to the defendant in appeal to question the propriety of the first Court's order permitting the plaintiff to sue as a pauper, and he remarked that he thought that this was the correct view of the situation. He went on to remark:

> The defendants will not be entitled to raise this point in their appeal from the final decree. The decision of the application to sue as paupers is a final decision of that case, one way or the other, and as far as the case then before the Court, namely the application for leave to sue as a pauper is concerned, the matter has been finally decided.

In the latter case of the Court of the Judicial Commissioner, Ashworth J. C. held, following the above mentioned decision that an application for permission to sue as a pauper is in itself a case within the meaning of that term as used in S. 115. It appears to us that as was held by a Bench of the Allahabad High Court itself in 48 All 493,[3] the subtle distinction which was drawn in 32 All 623,[1] between an order 'granting' and an order 'refusing' an application for permission to sue as a pauper cannot be justified. As we have already indicated, such orders are in one sense final and in another sense not final, but it appears to us that in the light of the views entertained by the Judicial Commissioners and the other High Courts, it is more reasonable to hold that proceedings on an application for permission to sue as a pauper really constitute a separate case. Such proceedings are registered separately as applications. In case of refusal of the application, there may or may not be, by reason of subsequent payment of court-fees, a suit registered. If payment of court-fees is made, a suit will be registered. In the same way, on the grant of permission to sue as a pauper, the application comes to an end and the petition is registered as a plaint in the suit. We are of opinion that, to use the words of Srivastava J. in 12 O W N 1158,[8] such proceedings are proceedings before the commencement of a suit. In either case, they are therefore not interlocutory proceedings, and as has been held in most of the High Courts, an application in revision will lie from the final decision in such proceedings. The preliminary objection therefore fails.

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[8] Paras Nath v. Ran Bahadur, (1936) 23 A I R Oudh 22=158 I C 949=11 Luck 529=1935 O W N 1158 (F B).

[9] Shamin-ud-din v. Amir Husain, (1909) 12 O C 381=4 I C 777.

[10] Sheo Narayan Lal v. Mt. Munaqqa, (1923) 10 A I R Oudh 118=74 I C 344.

[11] Mumtazan v. Rasulan, (1901) 23 All 364.

Before we leave this point we would remark that learned counsel for the opposite parties sought to rely in support of the preliminary objection on an unreported decision of a Bench of this Court in S. 115, Application No. 57 of 1934 the judgment of which was put before us. That however was a case of an application under O. 33, R. 9, for dispaupering the plaintiff. The learned Judges held that the application was admittedly made during the pendency of the suit and the order rejecting the application was clearly an interlocutory one. They were therefore unable to say that there was any case decided within the meaning of S. 115, Civil P. C. and dismissed the application. It seems to us that there is a clear distinction between the proceedings prior to the commencement of the suit on an application under O. 33, R. 1, and the proceedings during the pendency of the suit on an application for dispaupering of the plaintiffs under the provisions of O. 33, R. 9.

Coming now to the merits of the present application the main points taken are two: (1) that the order of the lower Court was without jurisdiction because the opposite parties had failed to prove that they were not possessed of sufficient means to defray the court-fees, and that in this connexion the Court had acted with material irregularity by omitting to take into consideration the value of the equity of redemption passed by the opposite parties, and (2) that the Court had no jurisdiction to allow this application because the plaintiffs' allegations did not show a cause of action, while in support of this point, it was argued that the lower Court acted with material irregularity because in deciding this question, it relied not only upon the allegations stated in the plaint and the statement of the plaintiff in examination and cross-examination, but also on a statement of the defendant-applicant Durga Prasad taken in the course of proceedings under O. 33, R. 7, which statement should have been limited entirely to the question of sufficient means. Learned counsel has exhaustively discussed the procedure on an application for permission to sue in forma pauperis under O. 33, Civil P. C. He points out that after the presentation of the application under R. 3, the Court has authority under R. 4 to examine itself or on commission the applicant or his agent regarding the merits of the claim and the property of the applicant. Thereafter by R. 5, it is provided that "the Court shall reject an application for permission to sue as a pauper" in certain cases falling under Clauses (a) to (e); learned counsel was inclined to suggest that there was no examination of the plaintiffs under R. 4, and that the order under R. 6, was passed without any proper consideration of the duty of the Court under R. 5. We find no force in this contention. The record of the lower Court shows that on 6th July 1937, the learned Civil Judge examined plaintiff applicant 1, and thereafter passed the following order:

> Register the application and issue notice to the other parties and to Government Pleader for 31st July 1937.

When the case actually came up for hearing on 25th September a statement by a pleader representing the defendant-applicant was recorded, in which he stated:

> The application as it stands now is not maintainable. The applicants have not shown their immovable property in the list annexed to the application.

On 23rd October, the lower Court took the statement of Gur Dularey, plaintiff applicant 1 and Durga Prasad defendant. This would be under the provisions of R. 7, Para. (1). The Court then proceeded to hear arguments under Para. 2 of the same Rule and passed the order which is the subject of the present application.

So far as the question of sufficient means is concerned, the only point which is urged is that on the face of the plaint, the applicants were entitled as mortgagors to the equity of redemption of three mortgages, and counsel for the defendant-applicant has by calculation of his own contended that these items of property must be worth in the neighbourhood of Rs. 3000. There is no sign that the lower Court took these items of property into consideration at all and it is contended that thereby the Court acted with material irregularity, and further that by granting permission in the absence of proof that the plaintiffs were not possessed of sufficient means to defray the court-fee, the Court acted without jurisdiction. The important point, as we see it, in this connection is that this matter was not raised in the lower Court. Gur Dularey plaintiff-opposite party put himself forward as a witness and submitted himself to cross-examination, and no questions were put to Gur Dularey on this subject. It must be further conceded that the value of the equity of redemption of these properties must be a matter of considerable doubt and it would be difficult to say that the lower Court acted with material irregularity in omitting to make an inquiry into this point itself when the defendant having full opportunity to do so made no attempt to indicate the existence of this alleged valuable property by cross-examination of the plaintiff. In these circumstances, the lower Court was clearly entitled to come to a conclusion on the evidence that the plaintiffs-applicants were not possessed of sufficient means to pay the court-fee. We would not further be prepared to hold, bearing in mind the nature of these assets, that the lower Court was deprived of jurisdiction, or acted with material irregularity in coming to its conclusion by reason of the fact that the plaintiffs-applicants had failed to mention those dubious items of property in the application for leave to sue in forma pauperis.

A more important and in some way more difficult question is that which has been argued before us based on Cl. (d) of R. 5 of O. 33, and the connected question in regard to the basing of the lower Court's conclusions, at any rate in part, on the statement of the present applicant. Learned counsel for the applicant relies on the provision in Rule 7 (2) of O. 33 that the Court shall also hear any argument which the parties may desire to offer on the question whether on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in R. 5. It is contended on behalf of the applicant that when the plaint and statement of Gur Dularey are taken together, it is quite plain that the application should have been rejected because the allegations of the plaintiffs-opposite parties did not show a cause of action. The plaintiffs' suit was a suit to recover possession over certain properties on the allegation that plaintiffs' father Gur Bakhsh Rai, with whom they had been members of a joint Hindu family, had alienated the said property, being joint Hindu family property, without legal necessity and for immoral purposes. The necessary foundation for such a suit was that the property in suit must have been joint family property and that the plaintiffs must have been members of a joint family with their father Gur Bakhsh Rai. Gur Dularey, however, in the course of his statement said among other things :

> We are separate from Gur Bakhsh Rai for the last four or five months . . . . All the property in fact belongs to our father. We only dine with him.

It is contended that Dularey did not even give prima facie proof that the property in suit was ancestral because he said: "I do not know from where my father got all this property." We are not inclined to attach much value to the statement of Gur Dularey who was admittedly a young man, aged only about 21. He was not in a position in the main to depose from his own personal knowledge as to how his father came to be in possession of the property in suit. His statement, therefore, that he did not know where that property came from, and that in fact, it belonged to his father was not a statement of any real value. It did of course belong to his father also as a member of the joint Hindu family and Gur Dularey never said that this property was exclusively the property of his father. On the statements in the plaint coupled with other oral statements made by Gur

Dularey, as for instance where he said that all moveable and immovable property of their father and themselves was joint, it was quite competent for the Court to come to the conclusion that the plaintiffs' allegations did show a cause of action, and it would be impossible to hold that the lower Court acted illegally or without jurisdiction in coming to the conclusion which it actually did. The lower Court, however, based its conclusions not only on the statements in the plaint and those made by the plaintiff Gur Dularey himself, but it further remarked that

> at the fag end of his cross-examination, Lala Durga Prasad himself admitted that the applicants as sons were interested in the property in possession of their father.

What Durga Prasad actually stated was that "in all this property the applicants as sons of Gur Bakhsh have got a share and are interested." Durga Prasad was cousin of Gur Bakhsh Rai and he was in a position to make that statement intelligently, and if the Court was entitled to rely on it at all, it was a good ground for the Court to hold that the allegations in the plaint did show a cause of action. Learned counsel for the applicant has, however, contended at considerable length and relying on a number of rulings that the evidence on which a Court may rely for decision of the question which arises under Cl. (d) to R. 5 of O. 33, does not include any evidence other than the statement of the applicant. The applicant is not entitled to call evidence on that point and even the statement of the defendant opposing the application cannot be taken into consideration in that connection. He relies on the ruling reported in 46 Cal 651,[12] in which it was laid down that in an inquiry under O. 33, Civil P. C., the Court cannot take evidence (except the evidence of the applicant himself) on the merits of the claim. Rule 4 expressly gives power to the Court to examine the applicant regarding the merits of the claim and the property of the applicant so that there is no doubt that the applicant himself can be examined not only with reference to the question of his pauperism but also with reference to the merits of his claim.

**It is open to the Court to consider not only the statement made in the plaint but also the statements made in his examination by the applicant before determining** whether his allegations disclose a cause of action as laid down in Cl. (d) of R. 5 of O. 33. But the Court cannot examine other witnesses for deciding the question of limitation or any other question than the pauperism of the applicant. This ruling was quoted and followed in another ruling relied upon in this connection in A I R 1928 Sind 118.[13] The same proposition is to be found in A I R 1932 Bom 584,[14] in which it was held that the proper materials on which to base a decision as to the applicability for example of the prohibitions contained in Cl. (d) of R. 5, consist only of the application and the statement of the applicant himself taken under R. 4 or R. 7 (or both), and there is nothing in O. 33, which authorises a Court to take evidence on the merits of the claim at this stage other than the evidence led under R. 4, read with Rr. 5 and 7. In our opinion, it may be the case that the lower Court did commit an irregularity in availing itself of a statement made by the defendant-applicant and in fact in permitting the applicant to be cross-examined with the object of eliciting such an admission, but we are not prepared to hold in the circumstances of the present case that that would be a sufficient ground for setting aside the order of the lower Court for the reason that there was, in our view, material justifying it in coming to the conclusion that the plaintiffs' allegations did show a cause of action without his falling back on the statement of the applicant. In this connection we might refer to the ruling reported in A I R 1927 Mad 441,[15] where it was remarked that the non-existence of a cause of action should appear clearly on the face of the application itself, which alone would justify the Court in rejecting the application. It could certainly not be said in the present case that the allegations contained in the plaint did not show a cause of action.

Taking all the facts of the present case into consideration, we are not prepared to hold that the lower Court has acted in the exercise of its jurisdiction illegally or with material irregularity. We accordingly dismiss this application with costs.

V.B.B./R.K. *Application dismissed.*

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[12] **Jogendra Narayan v. Durga Charan, (1919) 6 A I R Cal 385=52 I C 610=46 Cal 651.**

[13] **Vasanbai v. Radhibai, (1928) 15 A I R Sind 118=108 I C 657=22 S L R 441.**

[14] **Bai Chandan v. Chhotalal Jekisondas, (1932) 19 A I R Bom 584=140 I C 381=56 Bom 585 =34 Bom L R 1273.**

[15] **Ramchandra Raju v. D. Venkiah, (1927) 14 A I R Mad 441=101 I C 18=52 M L J 330.**

## A. I. R. 1938 Oudh 152

YORKE J.

*Mt. Mahadei — Plaintiff* — Appellant.
v.
*Ishwari and another — Defendants* — Respondents.

Second Rent Appeal No. 27 of 1936, Decided on 4th April 1938, against order of Dist. Judge, Barabanki, D/- 21st December 1935.

**Deed—Validity—Onus—Document executed by illiterate woman conducting her own business—Woman admitting execution but alleging it to be through misrepresentation—Burden is on her to prove it.**

A woman not being a pardanashin lady but an illiterate woman in the habit of conducting her own business admitted the execution of a document but alleged that she put her thumb impression on the document through misrepresentation. She admitted that she was negligent in not having the document read out to her :

*Held* that in these circumstances the burden of proof was on her to show that the document was executed under fraud or misrepresentation: *Case law referred.* [P 153 C 2]

M. H. Kidwai and R. S. A. Kidwai — *for Appellant.*

Shankar Sahai Srivastava — *for Respondents.*

**Judgment.** — This is a second appeal by Mt. Mahadei from a judgment of Mr. R. F. S. Baylis, District Judge of Bara Banki allowing the defendants' appeal and setting aside the judgment and order of the trial Court decreeing the plaintiff's claim. Mt. Mahadei had on 21st January 1935, instituted a suit for arrears of rent claiming a sum of Rs. 108. On 4th April 1935, at the time of framing issues, the defendants produced a receipt Ex. 45, wherein it was stated that there had been a panchayat and that after a settlement between the parties (bahmi faisla) the defendants had paid Rs. 45 for which this receipt was written, and it was further stated that nothing further was due from the defendants. It does not appear that there was any denial of this receipt other than an oral statement by counsel, but there must have been some oral statement because an issue was framed in the following terms :

> Was there any panchayat between the parties about the rent of the plots and was receipt written with consent of the plaintiff ?

From the manner in which this issue is framed, it is clear that the burden of proof was placed in the first instance on the defendants. The learned Assistant Collector has not given any separate decision on this issue. He has said that the plaintiff had denied the contents of the receipt and said that she was paid Rs. 45 and told that the balance would be paid on another date. He went on to remark :

> The only point that was to decide is whether there was any panchayat and it was explained to the plaintiff. About this she says, she is an illiterate old woman. She admits that she affixed her thumb impression. No reliable witnesses have been produced on behalf of the defendants who made the panchayat.

He goes on to say that of Gaya Prasad and Asa Ram who have been produced, Gaya Prasad's character is most suspicious and he does not believe that witness' statement that the contents of the receipt were written with the consent of the plaintiff and he does not believe Asa Ram also. He therefore proceeded to decree the whole claim less the sum of Rs. 45 which was admitted to have been paid. In the lower Appellate Court a number of points were put forward but the really crucial point was whether this receipt was a receipt for Rs. 45 only and nothing more, or whether it was also an acknowledgment by the plaintiff that nothing further was due from the defendants. The learned District Judge held that the burden of proof had been wrongly placed by the trial Court on the defendants. He took the view that where the Court had before it a receipt which was partially admitted by the plaintiff herself, it lay upon the plaintiff to satisfy the Court that this receipt was executed by her under misapprehension.

Learned counsel for the plaintiff-appellant contends that the decision of the lower Appellate Court which has been arrived at by changing the onus of proof in this manner must be set aside on the view that the burden of proof really did lie upon the defendants, and as the trial Court has held in clear terms that they failed to discharge that burden of proof, the trial Court rightly decreed the suit for the full amount claimed, subject, of course, to the possibility that in the lower Appellate Court any other points raised but not decided by the learned District Judge could affect the ultimate decision of the case. Learned counsel in this connexion relied on the ruling reported in 52 I A 342[1] wherein a number of propositions were laid down in regard to what must be proved in the case of a document executed by a Mahomedan woman who was illiterate and pardanashin. It was there held that the defendant mutawallis had not discharged the onus upon them which was to prove that the actual import of the wakfnama admittedly executed by the lady had been brought home to the mind of the grantor, and that, therefore it was not binding upon her. Reliance was also placed on a judgment of this Court reported in 5 O W N 677.[2] That was a case of a pardanashin lady, but at p. 684 the case of an illiterate person was considered at some length, that is the case in connexion with the requirements of the law in regard to proof of execution of a document, and it was remarked :

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[1] **Mt. Farid-un-Nisa v. Mukhtar Ahmad, (1925) 12 A I R P C 204=89 I C 649=47 All 703=28 O C 338=52 I A 342 (P C).**

> In the case of an illiterate person it has always been held that something more is required than proof that the executant made a mark on the document, and that knowledge of the contents of the document cannot be inferred from the fact that he marked the document.

In that case a passage was quoted from the case in (1869) 4 C P 704,[3] which runs as follows :

> It seems plain on principle and on authority, that if a blind man or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then at least if there be no negligence, the signature so obtained is of no force.
>
> And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature, in other words, that he never intended to sign and therefore in contemplation of law never did sign the contract to which his name is appended.

In a subsequent case reported in 11 O W N 1081,[4] their Lordships of the Privy Council held that in the case of a document executed by a pardanashin woman, it is not sufficient to show that the document was read over to her; it must further be proved that she understood its nature and effect. The quantum of evidence required to discharge the onus must depend upon the circumstances of each case. On behalf of the respondent it is contended that the plaintiff-appellant is not a pardanashin lady and it was never until now suggested that she was. On the contrary the trial Court says merely that she is an illiterate old woman and in fact she came and gave evidence in open Court and by admission she went to the house of Gaya Prasad at the instance of the defendants in connexion with the writing of the receipt. Learned counsel has relied on a ruling of the Lahore High Court reported in A I R 1926 Lah 692,[5] where it was held that where the execution of a document is admitted, the onus is on the executant to prove that he did not understand its terms, even if he is an illiterate person. That is the gist of the ruling as stated in the headnote and is indeed the proposition on which the decision is based although it is not so stated in terms. Learned counsel further referred to a ruling of the Patna High Court reported in 9 Pat 417[6] where the same proposition that the quantum of evidence required in cases of execution of documents by pardanashin ladies varies, was supported and it was in effect held that the proposition laid down in 52 I A 342[1] was not applicable word for word. The learned Judges remarked that obviously each case must depend upon its own circumstances.

The position which I have to consider in the present case then is that the plaintiff-appellant though illiterate, is a woman who was in the habit of conducting her own business. She comes to Court and gives evidence in open Court and in regard to this particular receipt she does not say that she was deceived by its being read out to her falsely, that is by the concealment of the clause stating that nothing remained due from the defendants, but she says that although she was in the habit of doing her own business and she knew what she was doing, she put her thumb impression on this document on the mere statement of some one that it was nothing but a receipt for Rs. 45. She in fact admitted that she herself had been negligent to the extent of not having had it read over. It seems to me that in these circumstances wherever the burden of proof was placed under the issue, it really lay on the plaintiff herself to establish by evidence that what she had alleged was correct. There was prima facie evidence before the lower Appellate Court although it had been disbelieved by the trial Court which was sufficient to discharge any onus that lay upon the defendants, and in these circumstances, I am not prepared to hold that the lower Appellate Court wrongly held that in the circumstances of the case the burden lay on the plaintiff to show that the document was executed under fraud or misrepresentation. It was admitted that there were other witnesses who could have proved that fact. The lower Appellate Court therefore rightly allowed the appeal and dismissed the plaintiff's suit. I find no force in this second appeal and dismiss it accordingly with costs.

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[2] Mt. Hubraji v. Chandra Bali, (1928) 15 A I R Oudh 386=111 I C 829=5 O W N 677.

[3] Foster v. Mackinnon, (1869) 4 C P 704=38 L J C P 310=20 L T 887=17 W R 1105.

[4] Kalyan Mal v. Ahmad-uddin Khan, (1934) 21 A I R P C 208=151 I C 45=11 O W N 1081 (P C).

[5] Chandu Mal v. Mahmud Hassan, (1926) 13 A I R Lah 692=97 I C 71=27 P L R 641.

[6] Muhammad Sadik Khan v. Masihan Bibi, (1930) 17 A I R Pat 452=125 I C 158=9 Pat 417=11 P L T 489.

D.S./R.K. *Appeal dismissed.*

## A. I. R. 1938 Oudh 154

HAMILTON AND YORKE JJ.

*Mt. Ghafooran — Defendant —* Appellant.

v.

*Abdul Hamid, Plaintiff and another, Defendant —* Respondents.

First Appeal No. 79 of 1936, Decided on 31st March 1938, against decree of Sub-Judge, Lucknow, D/- 2nd May 1936.

**Civil P. C. (1908), Sch. 2, Para. 1 — Party remaining ex parte at trial not joining reference to arbitration made by remaining parties — Award is invalid and decree thereon is appealable.**

If a person is ex parte in a suit, he does not thereby cease to be a party interested in the reference. Hence if such person has not joined the reference to arbitration made by the remaining parties, the reference to arbitration is invalid and the award is wholly void. The reference being invalid the decree passed in accordance with the award is appealable: *A I R 1929 Lah 477 ; A I R 1933 Oudh 384 and A I R 1931 Cal 211, Rel. on.* [P 155 C 2 ; P 156 C 1]

A. P. Singh — *for Appellant.*

S. C. Das — *for Respondent 1.*

**Judgment.** — This is a first appeal by one Mt. Ghafooran from the judgment of the Civil Judge of Lucknow ordering that the plaintiff's claim be decreed in the terms of the award of an arbitration. There is a connected application in revision under S. 115, Civil P. C., by Haji Abdul Ghafoor, another defendant, against the same decree of the trial Court. This appeal and the application arise out of the following circumstances :

One Najib Ullah had three sons, Haji Abdul Aziz, Abdul Hamid, plaintiff, Abdul Ghaffoor, applicant in revision, and one daughter, Mt. Ghafooran, appellant. We are not concerned with Najib Ullah. Haji Abdul Aziz died on 13th May 1935, leaving certain property including hotel at Charbagh, East Indian Railway Station. Abdul Hamid instituted regular Suit No. 74 of 1935 for partition of the properties of his deceased brother, Abdul Aziz. It was common ground between the parties that the shares in the estate of the deceased were 2.5th for each brother and 1.5th for the sister, Mt. Ghafooran. The suit was contested by Abdul Ghafoor who contended among other things that the hotel in dispute had been jointly owned by him and the late Haji Abdul Aziz, and that after Abdul Aziz's death, he was its sole owner. Mt. Ghafooran put in no defence and the case proceeded against her ex parte. In due course issues were framed and a date fixed for evidence, but ultimately after some talk of compromise the case was referred to arbitration. To this reference however Mt. Ghafooran was never a party. We find from the English order sheet of the case printed at p. 10 of the typed book that on 4th February 1936, the 14th February was fixed for the signature and verification by defendant 2, Mt. Ghafooran, of the submission to arbitration. On 14th February it is noted that :

> Defendant 2 is absent. The counsel for the plaintiff states that defendant 2 will appear before the arbitrator.

The learned Civil Judge thereupon granted the joint application of the plaintiff and defendant 1, Abdul Ghafoor, for submission of the case to the arbitrators and directed that the arbitrators should file the award on 17th March. Ultimately the award was filed on 15th April 1936. Thereafter objections were filed by defendant 1 of which objection No. 12 is that defendant 2 did not at all join the arbitration proceedings. The Civil Judge dismissed all the other objections and those do not call for any consideration in this appeal. As regards objection No. 12, he said : 'The fact that defendant 2 did not join in the arbitration does not render the award invalid." See 39 All 489[1] and 32 All 657.[2] He accordingly disallowed the objections and directed that a decree be framed in the terms of the award. It is against this order that the present appeal of Mt. Ghafooran and application in revision of Abdul Ghafoor have been filed. On behalf of Mt. Ghafooran it is contended that as she was not a party to the reference, she is not bound by the award and the Court has erred in passing a decree against the appellant on the basis of the award which award is bad in law. Learned counsel has referred to Para. 1 of Sch. 2, Civil P. C., which provides as follows:

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[1] Ajudhia Prasad v. Badar-ul-Husain, (1917) 4 A I R All 183=41 I C 357 = 39 All 489=15 A L J 427.

[2] Ishar Das v. Keshab Deo, (1910) 32 All 657=7 I C 68=7 A L J 807.

> (1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference. (2) Every such application shall be in writing and shall state the matter sought to be referred.

It is quite clear in the present case that there was no agreement on the part of Mt. Ghafooran and no application in writing by her that the matter in difference between the parties should be referred to arbitration. Prima facie it follows that the very foundation of a reference to arbitration was absent in the present case. On behalf of plaintiff-respondent Abdul Hamid it is contended that inasmuch as Mt. Ghafooran never put in an appearance and proceedings against her were ex parte, she should be considered not to be a party interested, and hence the reference to arbitration in so far as it affects the matter in dispute between her and Abdul Hamid should not be set aside. The decision on the basis of the award should be treated as an ex parte decree against her. In this connexion reliance was placed on a ruling of the Madras High Court reported in 31 I C 206,[3] in which it was held that the appellant was not a 'party interested' within the meaning of Para. 1, Sch. 2, Civil P. C., and had no right to appeal, and that he did not even have any equitable claim to set aside the decree, for by remaining ex parte he left the conduct of the suit in the hands of the Court and it was immaterial to him how the suit was decreed. It is noteworthy that one of the two Judges who were parties to this decision held that an appeal does lie from a decree passed in accordance with an award purporting to bind a person who never submitted to arbitration or where there has been no agreement to refer at all. On behalf of the appellant reference has been made to several rulings. One of these is reported in 58 Cal 628[4] where it was held that:

> An appeal lies where there is no valid submission, for in that case there is no award on which the Court can make a decree, and such a decree, if made, is based on something which is not an award and is, therefore, appealable.

It is clear that the root point for decision in the present case is whether there was or was not a valid submission to arbitration. As we have pointed out already, prima facie there was not, because this was a case of partition in which all the three parties, that is the plaintiff and the two defendants could not but be interested parties. It was held by a single Judge of the Lahore High Court in the ruling reported in A I R 1929 Lah 477,[5] that in making a reference to arbitration, if the parties against whom proceedings have been taken ex parte or who did not appear at the trial have not joined, the reference to arbitration is invalid and the award is wholly void. That view has been adopted by a Bench of this Court in the ruling reported in 10 O W N 790[6] where it was held that if all the parties interested have not agreed that the matter be referred to arbitration, any award that may have been given is invalid. The learned Judges there remarked:

> It is true that Auser Khan and Dost Muhammad Khan, defendants 2 and 3, did not appear, and proceedings were ex parte against them, but it is clear from the pleadings that they were highly interested parties, and in no sense merely parties pro forma (the same is true of the present case). In this connexion there is a long chain of authorities of which we may cite only two, namely those reported in 8 A L J 645[7] and 42 Mad 632[8] in support of the proposition that where all the parties interested did not agree that the matter be referred to arbitration, any award that may have been given is invalid.

The learned Judges went on to quote at some length from the two authorities mentioned. In the second case quoted, namely that reported in 42 Mad 632,[8] it was specifically held that "if a person is ex parte in a suit, he does not thereby cease to be a party interested in the reference". In our opinion, bearing in mind the circumstances of the present case, it would by no stretch of imagination be possible to hold that Mt. Ghafooran was not a party interested within the meaning of Para. 1 of Sch. 2,

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[3] Vythinatha Aiyar v. Vaithilinga Mudaliar, (1916) 3 A I R Mad 660=31 I C 206.

[4] Golnur Bibi v. Abdus Samad, (1931) 18 A I R Cal 211=130 I C 209=58 Cal 628=52 C L J 298=35 C W N 238.

[5] Karam Bibi v. Muhammad Alam Khan, (1929) 16 A I R Lah 477=119 I C 235.

[6] Imtiaz Khan v. Dost Mohammad Khan, (1933) 20 A I R Oudh 384=147 I C 189=9 Luck 73 =10 O W N 790.

[7] Haswa v. Mahbub, (1911) 8 A L J 645=10 I C 559.

[8] Potita Pavana Panda v. Narasinga Panda, (1920) 17 A I R Mad 852=51 I C 155=42 Mad 632=31 M L J 538.

Civil P. C. It follows that the reference was certainly invalid and the award which followed thereon was not a valid award. In this connexion we note that the learned Civil Judge relied on the ruling reported in 39 All 489,[1] but he evidently failed to take note of the passage at page 495 near the end of the judgment where Piggott J. remarked :

> More particularly I think that the point which was taken in the present case should always be carefully considered before a Court comes to the conclusion that the reference to arbitration was invalid, namely whether in the circumstances of the particular case the reference to arbitration may not have involved a virtual, if not an express abandonment by the plaintiff of his claim as against any defendant or defendants who had not joined in the order of reference.

In the present case it is of course clear that no such abandonment was possible by the plaintiff, the suit being one for partition. We do not think it necessary in view of the previous decision of this Court to discuss at any length the subsidiary question which was suggested by the learned counsel for the respondent, namely that in view of the fact that the decree ultimately passed was on the basis of an award, no appeal would lie. It was held clearly in the Calcutta case[4] to which we have referred that no appeal lies against such a decree where there has been a valid submission to arbitration, but on the other hand it was held that where there was not a valid submission, there was no award on which the Court could make a decree and such a decree if made, is passed on something which is not an award and is therefore appealable. That decision appears to us to dispose finally of that argument, and learned counsel has not found any case to rely on in support of the contention except the much older Madras case and part of the argument in the ruling reported in 39 All 489,[1] to which we have referred above. In our view therefore the appeal of Mt. Ghafooran must succeed and the decree of the lower Court be set aside, and the suit remanded for disposal according to law. We accordingly allow this appeal with costs of this Court and direct accordingly. The costs of the trial Court will abide the result.

As regards the application in revision by Haji Abdul Ghafoor, it is clear that as in the appeal, which we have just disposed of, the decree of the trial Court has been set aside and the case remanded for disposal according to law, the application in revision is in effect disposed of by that order, that is to say, the order of the lower Court passed on the award comes to an end, the application itself really calls for no decision. We accordingly direct that the application be dismissed but we make no order as to costs of this application.

D.S./R.K. *Order accordingly.*

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## A. I. R. 1938 Oudh 156

THOMAS C. J. AND ZIAUL HASAN J.

*Lala Ram Narain — Defendant —* Appellant.

v.

*Thakur Chandrika Prasad and others — Plaintiffs —* Respondents.

First Appeals Nos. 59, 60, 61, 65, 75 and 88 of 1935, Decided on 11th April 1938, against the decree of Addl. Sub-Judge, Sitapur, D/- 29th February 1936.

**(a) U. P. Agriculturists' Relief Act (27 of 1934), S. 33 — Sub-s. (2) should be read with sub-s. (1) — S. 33 applies to mortgages.**

Sub-s. (2) of S. 33 should be read subject to sub-s. (1) and not vice versa. [P 158 C 2]

It is the ordinary jurisdiction which deals with matters under the Agriculturists' Relief Act. This being so, there is no bar to an ordinary Civil Court, in which a suit under S. 33 has been filed by a mortgagor, giving the defendant mortgagee a decree for sale or foreclosure if he so desires and if money is payable to the mortgagee, which are conditions precedent to the passing of a decree in favour of the defendant under sub-s. (2) of S. 33 : *A I R 1938 All 1, Rel. on ; 5 Bom 614 ; 20 Bom 469, Disting.* [P 158 C 1]

**(b) Usurious Loans Act (1918, as amended by U. P. Act 23 of 1934), S. 3 — Cases arising after passing of Local Amendments—Excessiveness or otherwise should be decided on principles contained in Local Amendment.**

The Legislature has laid down specific principles on which excessiveness or otherwise of the interest is to be judged and those principles are contained in the amendments made by the local Legislature in the Usurious Loans Act of 1918. Cases coming up before Courts after the passing of the Local Amending Act must of necessity be decided on the principles laid down by that Act. [P 159 C 1]

**(c) Interest—Rate—Larger the amount, lesser should be the rate.**

The larger is the amount of loan, the lesser should be the rate of interest. [P 159 C 2]

**(d) U. P. Agriculturists' Relief Act (27 of 1934), Ss. 2 (8), 30 — Mortgagee executing lease in favour of mortgagor — Rent reserved is interest and can be dealt with under S. 30.**

Where a usufructuary mortgagee in possession executes a lease to the mortgagor, the rent he is entitled to is no more than the return to be made to the mortgagee over and above what was actually lent by him and that being so, comes within the definition of 'interest' in S. 2 (8), which has been made comprehensive enough to include it by the use of the word 'otherwise' in it. Thus such rent can be dealt with under S. 30 : *First Appeal No. 84 of 1936, Rel. on.* [P 160 C 1, 2]

**(e) U. P. Agriculturists' Relief Act (27 of 1934), S. 33—Suit filed purely for accounts by mortgagor under S. 33—Mortgagee not exercising his right under S. 33 (2) — All points in defence decided against him—Mortgagee is not entitled to costs.**

Where the mortgagors filed a pure suit for accounts under S. 33, U. P. Agriculturists' Relief Act and all the points raised by the mortgagees in defence are decided against them, the latter are not entitled to costs. If the mortgagees had exercised their rights under S. 33 (2) of the Act and prayed for decrees in their favour, then perhaps the suits could have been regarded as suits coming under O. 34, R. 10, Civil P. C., and mortgagees entitled to costs. [P 160 C 2]

M. Wasim, R. N. Harkauli and Ali Hasan — *for Appellant.*

Radha Krishna and S. N. Srivastava — *for Respondents.*

**Judgment.**—These six connected appeals arise out of five suits brought for accounts under S. 33, Agriculturists' Relief Act by two sets of plaintiffs against three sets of defendants. Four of these suits were decided by the learned Additional Civil Judge of Sitapur who decreed the plaintiffs' suits and the remaining fifth suit, the subject of Appeal No. 61 of 1936, was decided by the Civil Judge of Sitapur who upheld the pleas of the defendants and decreed the suit only in part. All the appeals have been heard together, as the points raised in Appeals Nos. 59 and 60 which may be considered the main appeals, cover the other appeals also. We first take up Appeals Nos. 59 and 60 of 1936. In both these cases the plaintiffs were three brothers, namely Thakur Chandrika Prasad, Raj Rajeshuri Prasad alias Gopalji and Maheshuri Prasad, and while the defendant to the suit in Appeal No. 59 was Lala Ram Narain, the defendants to the other suit were Lala Gobind Prasad and seven others (appellants in Appeal No. 60). Both these suits were tried together by the learned Additional Civil Judge.

It appears that on 30th August 1937, the plaintiffs mortgaged half of their shares in the villages of Ashrafpur, Narsohi, Amkhera, Bahadurpur and Arhwal Khurd to Lala Ram Narain for a sum of Rs. 60,000 and the other half of their shares to Lala Gobind Prasad and others, the appellants in Appeal No. 60, for a similar amount. Both the mortgages were at their inception simple and the interest stipulated for in both the deeds was at 10 per cent. per annum compound yearly. It was, however, provided that if default was made in the payment of interest, the mortgagees would be entitled to get possession of the mortgaged property. The mortgagors paid interest on both the mortgages for about two years in the beginning but began to make default afterwards. In 1933, however, the mortgagees in both the cases were put in possession of the mortgaged property by mutual agreement and at the same time both the sets of mortgagees gave the properties in theka to the mortgagors, separate pattas and qabuliats being executed in respect of the shares in each of the villages. The thekas were for two years, 1341 and 1342 F., and it was provided that if the mortgagors lessees failed to pay the theka money, the mortgagees would be entitled to eject them. This provision was however, enforced in respect of the Ashrafpur property only from which the mortgagors were ejected through the Revenue Court (vide Ex. A.31). In the other villages the mortgagors still continue in possession.

The plaintiffs' case was that they were agriculturists, that the interest stipulated for by the mortgages was usurious, that it was reduced to 6 per cent. per annum by the mortgagees themselves when they gave the properties in theka to them and that the thekas were fictitious. The defence of both the sets of the defendants was that the thekas were quite genuine, that the plaintiffs were estopped from questioning the genuineness of the thekas, that suits for accounts under S. 33, U. P. Agriculturists' Relief Act could not be brought against mortgagees of immovable property, that the rate of interest is not usurious, that the lease money could not be reduced under S, 30, Agriculturists' Relief Act and that the Court had no jurisdiction to reduce it. The mortgagees defendants in Appeal No. 60 also contested the plaintiffs' claim to be agriculturists. On these pleas nine issues were framed by the learned Judge of the Court below for disposal of the two suits and with the exception of the issue on the question of the leases in favour of the mortgagors being genuine or fictitious, almost all the other points were decided in favour of the plaintiffs. As a result the stipulated rate of interest was reduced to 8 per cent. per annum simple and it was ordered that from 1st January 1930 till 7th May 1935, interest will be calculated at Rs. 5-8-0 per cent. compound and from 8th May 1935, till the date of suit at Rs. 4-8-0 per cent. compound. It was further ordered that whatever may have been realized by the defendants mortgagees in each case will be deducted according to the dates on which the payments were made and that the rest of the interest and principal in each case was declared in that case to be due against the plaintiffs. The parties were ordered to bear their own costs.

The defendants-appellants in both these suits have raised the following points before us. (1) That S. 33, U. P. Agriculturists' Relief Act does not apply to the mortgages. (2) That stipulated rate of interest should not have been reduced under the Usurious Loans Act. (3) S. 30, Agriculturists' Relief Act, is not applicable to usufructuary mortgages. (4) The Court below had no jurisdiction to interfere with the rent fixed by the leases given to the mortgagors-plaintiffs. (5) That the defendants mortgagees are entitled to their costs of the suit. In Appeal No. 60 a further ground was taken that the plaintiffs were not agriculturists but this plea was not pressed before us. We take up these points in order.

(1) It is argued that though it may be conceded that the terms of sub-s. (1) of S. 33, Agriculturists' Relief Act, are wide enough to cover secured loans, yet sub-s. (2) shows that S. 33 was not intended to apply to mortgages. Much stress is laid on the concluding words of sub-s. (2), namely, "pass a decree in favour of the defendant."

It is argued that a Court acting under the Agriculturists' Relief Act cannot pass a decree for sale or foreclosure of a mortgage, which decree, it is contended, can only be passed under O. 34, Civil P. C. We are unable to accept this argument. The Act does not provide for the creation of any special Courts as does the Encumbered Estates Act and S. 2 (5) defines "Court" as a Civil Court so that it is the ordinary jurisdiction which deals with matters under the Agriculturists' Relief Act. This being so, we fail to see any bar to an ordinary Civil Court, in which a suit under S. 33 has been filed by a mortgagor, giving the defendant mortgagee a decree for sale or foreclosure if he so desires and if money is payable to the mortgagee, which are conditions precedent to the passing of a decree in favour of the defendant under sub-s. (2) of S. 33. In our view there is nothing in sub-s. (2) to prevent a Court from giving the defendant-mortgagee a decree to which he may be entitled under the law, though the decree would not be in a suit brought under O. 34, Civil P. C. We cannot also accept the argument of the learned counsel for the appellants that sub-s. (1) of S. 33 should be deemed to have been modified by sub-s. (2), as it is sub-s. (1) which lays down the substantive law, sub-s. (2) merely prescribing the procedure to be followed. Therefore, if anything, sub-s. (2) should, we think, be read subject to the provisions of sub-s. (1) and not vice versa. Moreover, as we have already said we find nothing in sub-s. (2) which may be said to be in conflict with the provisions of sub-s. (1) or to show that S. 33 was not intended to apply to mortgages. On the other hand that sub-section clearly lays down that in suits under sub-s. (1) "the Court shall follow the provisions of Chap. 4 of this Act". Now Chap. 4 contains Ss. 28 and 30, besides others, and it cannot be denied that both these sections are applicable to mortgages as well as to unsecured debts. Further we find that forms A and C, prescribed under R. 4 framed under the Agriculturists' Relief Act both of which refer to secured debts also, show that Chap. 5 of the Act relating to maintenance of accounts, which includes S. 33 also, is applicable both to secured and unsecured debts.

The learned counsel for the appellants placed great reliance on S. 16, Deccan Agriculturists' Relief Act, (17 of 1879), the wording of which is almost the same as that of sub-s. (1) of S. 33 of the U. P. Agriculturists' Relief Act and it was pointed out that in 5 Bom 614,[1] it was held that S. 16, Deccan Agriculturists' Relief Act did not apply to mortgages. We may however note that it was owing to this decision of the Bombay High Court that the Deccan Agriculturists' Relief Act was amended so as to make a clear provision entitling a mortgagor to sue for accounts only (*vide* 20 Bom 469[2]) so that it is clear that the intention of the Legislature in Bombay also originally was to give the benefit of a suit for accounts to a mortgagor as well. The decision in 5 Bom 614[1] is no ground for supposing that the intention of the framers of the U. P. Agriculturists' Relief Act was that mortgage debts should be exempt from the operation of S. 33 and as we have said above, we are clearly of opinion that no such inference can be drawn from the wording of either sub-s. (1) or sub-s. (2) of S. 33 of the Act. We are in full agreement, if we may say so with respect, with their Lordships of the Allahabad High Court in (1937) A L J 882,[3] in which it was held that S. 33 (1) applies to every agriculturist debtor who is entitled to sue for account under a written engagement whether the written engagement amounts to a mere promissory note, a simple bond, a simple mortgage deed, a usufructuary mortgage deed or a mortgage by way of conditional sale. We therefore decide this point against the appellants and hold that the learned Judge of the Court below was perfectly right in holding that the plaintiffs were entitled to bring the suits under S. 33, U. P. Agriculturists' Relief Act.

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[1] **Hari v. Lakshman, (1880) 5 Bom 614.**

[2] **Laluchand v. Girijappa, (1896) 20 Bom 469.**

(2) It is contended on behalf of the defendants-appellants that the stipulated rate of interest which was 10 per cent. per annum compound yearly should not have been interfered with as being excessive not only because much higher rates than this have been held by Courts to be not excessive but also because the excessiveness or otherwise of the interest should have been judged with regard to the circumstances prevailing at the time the mortgages were made and not to the present circumstances. In support of the first of these grounds, the learned counsel relies on 56 Cal 960[4] and 3 O W N Sup 222[5] and in support of the latter proposition on 22 I A 153[6] and 27 Mad 131.[7] The authorities relied on by the learned counsel do not however apply to the present cases, as the Legislature has laid down specific principles on which excessiveness or otherwise of the interest is to be judged and those principles are contained in the amendments made by the local Legislature in the Usurious Loans Act of 1918. Cases coming up before Courts after the passing of the local amending Act must of necessity be decided on the principles laid down by that Act. The first important amendment made by the local Act in S. 3 of the original Act is that the Court can now relieve the debtor of liability in respect of excessive interest not only when the interest is excessive and the transaction was substantially unfair but also where either the interest is excessive or the transaction was substantially unfair. Another amendment of far-reaching effect is that the amending Act has laid down the limits between which interest should or should not be held excessive. According to the first proviso enacted by the amending Act interest is to be deemed excessive in the case of a first mortgage (like the present ones) if (1) the rate exceeds 12 per cent. per annum, or (2) the amount of interest that might become due at any time exceeds the amount that would become due at that time if the rate were 12 per cent. per annum and the interval between the rests were six months. As the stipulated rate of interest in the present case was 10 per cent. per annum compound with yearly rests, it is clear that it comes under neither of these two provisions and cannot be held to be positively excessive.

Under Proviso (4) interest is to be deemed to be not excessive if (1) the rate does does not exceed 7 per cent. per annum and (2) the amount of interest that may become due at any time does not exceed the amount that would become due at that time if the rate were 7 per cent. per annum and the interval between rests were six months. The present rate does exceed 7 per cent. per annum and it also exceeds 7 per cent. per annum with six-monthly rests. Therefore it cannot also be said to be not excessive, so that the learned Judge has remarked, it is neither necessarily excessive nor necessarily not excessive. The learned Judge has however reduced it to 8 per cent. per annum in view of the circumstances of the case and we agree with him on this point also.

In the first place, the amount borrowed was very large and according to the well recognised rule, the larger is the amount of the loan the lesser should be the rate of interest. In the second place, we find that the security in each of the two cases before us was ample. Exs. 15 to 24 in Appeal No. 60 show that the total annual demand for rent of all the five properties comes to Rs. 19,732 and Exs. 7 to 12 in Appeal No. 60 show that the total amount of land revenue is Rs. 2519-6-0. The net profits thus amount to Rs. 17,213. If we multiply this amount by thirty, it comes to more than five lakhs of rupees and even if we take 20 times the profits, the value comes to about three lakhs. The total amount borrowed under the two mortgages was Rs. 1,20,000. Thus the security was ample for both the mortgages. In the third place, there is evidence on the record to show that the mortgagors possessed other property than that mortgaged by the two mortgage deeds in question : vide Exs. 25 to 28 in Appeal No. 60 and Ex. 12 in Appeal No. 65. In the fourth place, we must note that when the mortgagees gave leases of the property to the mortgagor, they themselves agreed to accept as lease money a sum which works out to an interest of about 6 per cent. per annum on the amount that was due to them on the date of the leases and that the leases also provided for renewal on the same terms. The learned Judge of the Court below has very carefully considered the circumstances of the case and come to a just conclusion in our opinion. We therefore decide this point also against the appellant.

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[3] Dharam Singh v. Bishan Sarup, (1938) 25 A I R All 1=173 I C 676=I L R 1938 All 29 =1937 A L J 882.

[4] Ram Krishna Kulasi v. Heramba Chandra Ray, (1930) 17 A I R Cal 207=119 I C 207= 56 Cal 960=28 C W N 388.

[5] Uman Shankar v. Ram Nath, (1927) 14 A I R Oudh 36=98 I C 789=3 O W N Sup 222.

[6] Ganga Bakhsh v. Jagat Bahadur Singh, (1896) 23 Cal 15=22 I A 153=5 Sar 643 (P C).

[7] Abdul Aziz Khan v. Appayasami Naicker, (1904) 27 Mad 131=31 I A 1=8 Sar 568 (P C).

3. The contention that S. 30, Agriculturists' Relief Act was not applicable to usufructuary mortgages was not pressed by the learned counsel for the appellants in view of a recent decision of ours in First Appeal No. 84 of 1936.[8] This point is connected with points Nos. 2 and 3. It was contended that the rent reserved by the pattas and qabuliats was rent under the Oudh Rent Act and that therefore it was not within the jurisdiction of the Civil Court to reduce it. S. 2 (8), Agriculturists' Relief Act however lays down that 'interest' includes return to be made over and above what was actually lent whether the same is charged or sought to be recovered specifically by way of interest or in the form of service or otherwise. The word 'otherwise' makes this provision comprehensive enough to cover what is called rent in the cases before us. It is manifest that the mortgagee defendants executed the leases and were entitled to this 'rent' only by virtue of the mortgages in their favour so that this 'rent' was no more than the return to be made to the mortgagees over and above what was actually lent by them and this being so, it comes within the definition of interest and interest is undoubtedly to be dealt with according to the provisions of S. 30, Agriculturists' Relief Act. Section 30 (4) of the Act provides:

> Any amount already received by the creditor on account of interest in excess of that due under this section shall be credited towards the principal : but nothing in this section shall be deemed to entitle a debtor to claim refund of any part of interest already paid by him.

Thus whatever may have been realised by the mortgagees by way of interest is amenable to the provisions of this sub-section and the learned Judge of the Court below was perfectly right in holding that if anything has been realised by the mortgagees in excess of the interest due to them, it should be credited towards the principal. This decision cannot, in any way, affect the appellants' rights to recover the lease money by suit in the Revenue Court in the usual course nor will mere decrees obtained by them from the Revenue Court be deemed to constitute money 'realised' by them as has very rightly and carefully been laid down by the learned Additional Civil Judge. We therefore see no reason whatever for interference with the learned Judge's decisions on this point also.

The argument of the learned counsel for the appellants is that as these suits were in effect suits on mortgages, the provisions of O. 34, R. 10, Civil P. C., must be applied and the mortgagees-appellants should be awarded their costs. We are unable to accept this argument also. The suits were purely suits for accounts under S. 33, Agriculturists' Relief Act and we cannot for a moment consider the mortgagees-appellants entitled to their costs when we find that almost all the points raised in defence by them were held against them. If they had exercised their rights under S. 33 (2), Agriculturists' Relief Act and prayed for decrees in their favour, then perhaps the suits could have been regarded as suits coming under O. 34, Civil P. C. As they did not do so, the suits remained purely suits under S. 36 and as we have already said, it is idle on their part to claim costs when they have lost all their points. The result is that we confirm the decrees of the learned Additional Civil Judge and dismiss these appeals with costs.

### *Appeal No. 61 of 1936.*

The suit in this case was brought by the other set of plaintiffs, namely Chaudhri Narain Prasad and Chaudhri Gobind Prasad who are father and son, against Lala

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[8] Deputy Commissioner, Sitapur v. Chhotey Singh, First Appeal No. 84 of 1936.

Ram Narain. The following were the six mortgage deeds standing in favour of the defendant. (1). A deed of Rs. 3000 dated 12th February 1924, providing for interest at Re. 1 per cent. per mensem compound. (2). A deed dated 16th May 1924, for Rs. 3500 fixing interest at Re. 1 per cent. per mensem compound with six-monthly rests. (3). Deed dated 22nd January 1925, for Rs. 1900 stipulating interest at Re. 1 per cent. per mensem compound with six-monthly rests. (4). A deed dated 18th June 1925, for Rs. 5000 with interest at the above rate. (5). A deed dated 13th October 1927, for Rs. 20,000 providing for interest at 0-12-0 per cent. per mensem compound with six-monthly rests. (6). A deed dated 26th September 1932, executed for Rupees 16,000 in lieu of Rs. 10,000 of which possession was given to the mortgagee and the balance of Rs. 6000 carried interest at 0-10-0 per cent. per mensem compound with six-monthly rests.

This suit was decided by the learned Civil Judge of Sitapur who upheld the pleas raised by the defendant and holding that though S. 33, Agriculturists' Relief Act, applied to mortgages, it could not be applied in the present case as the mortgagee gave the property in theka to the mortgagors and that S. 30 of the Act cannot be applied to rent reserved by the theka given by the mortgagees to the mortgagors, dismissed the plaintiffs' suit except with regard to a portion of the transaction of 26th September 1932. He accordingly reduced the contractual rate of interest on Rs. 6000 to 6 per cent. compound with yearly rests from 1st January 1930 to 7th May 1935, and thereafter to 5 per cent. compound. As we have held above in Appeals Nos. 59 and 60 of 1936 that Ss. 33 and 30, Agriculturists' Relief Act are applicable to usufructuary mortgages, the decree of the learned Judge cannot be allowed to stand. We therefore decree this appeal with costs and setting aside the decree of the Court below, send back the case to that Court for decision in the light of our remarks in Appeals Nos. 59 and 60 of 1936.

### *Appeals Nos. 65 and 75 of 1936.*

These are cross-appeals in a suit brought by Thakur Chandrika Prasad, Thakur Raj Rajeshuri Prasad and Thakur Maheshuri Prasad, against two defendants, namely Lala Ram Narain and Lala Lachmi Narain. Appeal No. 65 has been brought by the plaintiffs against the defendants and Appeal No. 75 has been brought by Lala Ram Narain against the plaintiffs making his co-mortgagee Lala Lachmi Narain a respondent. The mortgage deed (Ex. 1) in this suit was a simple mortgage deed executed by the plaintiffs on 8th April 1925 in favour of Lala Ram Narain and Lala Lachmi Narain for a sum of Rs. 90,000. The stipulated rate of interest was 10 per cent. per annum compoundable yearly. On the pleas raised by the defendants to the suit, the only issue framed by the learned Additional Civil Judge of Sitapur who decided the suit, was whether or not interest from 1st January 1930 was usurious and deciding this issue in the affirmative, he reduced it to 10 per cent. per annum simple. The defendant-appellant in his appeal challenges the reduction of the rate of interest and also prays that costs of the suit should have been awarded to him. The plaintiffs on the other hand in their Appeal No. 65 of 1936 complain that interest has not been sufficiently reduced in this case.

The learned counsel for the defendant-appellant urges that interest prior to 1st January 1930 should not have been reduced as usurious. He relies on the same arguments which he put forward in Appeals Nos. 59 and 60 which were against the same set of plaintiffs. For reasons already given in those appeals, we hold that the learned Additional Civil Judge was right in reducing the contractual rate of interest. As regards costs, the remarks made in the aforementioned two appeals apply to this case also. The result is that we dismiss the defendant-mortgagee's appeal with costs. The learned counsel for the plaintiffs-appellants has pleaded for reduction of the interest to 8 per cent. per annum, as in Appeals Nos. 59 and 60 of 1936, and for this purpose he has given us figures showing that the value of the mortgaged property according to 2, 3, 4, 5, 8, 9 and 10 comes to about Rs. 2,47,000 at thirty times the profits and to Rs. 1,65,000 at twenty times the profits. The security in this case was not so ample as in Appeals Nos. 59 and 60 and we do not think that there is any good reason for interfering with the trial Court's discretion in fixing the rate of interest. We therefore dismiss the plaintiffs' appeal also with costs.

### *Appeal No. 88 of 1936.*

This appeal has also been filed by Lala Ram Narain, defendant-mortgagee, in a suit brought by Thakur Chandrika Prasad and his two brothers against him and Lala Bhagat Ram, respondent 4. In this case the plaintiffs mortgaged two villages with possession to the defendants on 23rd September 1929, for a sum of Rs. 25,000. The mortgage was for a term of seven years and as possession was given to the mortgagees, no rate of interest was specified. On the very date of the mortgage however, the mortgagees leased out the villages to the mortgagors at an annual rent of Rupees 2,589-4-0 including Rs. 704-4-0 land revenue. A special feature of the lease was that neither were the lessors liable to ejectment during the term of the lease nor were they at liberty to relinquish the lease within the terms and it was provided that the theka would continue up to redemption of the mortgage. The points raised in the grounds of appeal are that S. 33, Agriculturists' Relief Act, does not apply to mortgages, that the Court below was in error in considering the rent reserved by the lease to be interest, that the Civil Court cannot reduce the amount of rent under S. 30 or S. 33, Agriculturists' Relief Act, and that the rent decreed in favour of the defendants-mortgagees by the Revenue Court cannot be interfered with. It will be seen that all these points were raised in Appeals Nos. 59 and 60 of 1936 and have been dealt with above and overruled. With regard to the decrees of the Revenue Court obtained by the defendants mortgagees, the learned Judge of the Court below has clearly said as follows :

> Of course the rent Court decrees for the arrears of lease money would remain unaffected ; unless the decretal debts are paid, they would not be taken into consideration in accounting as payments.

The mortgagees therefore need not be under the apprehension that the amounts of the decrees obtained by them will be reduced. As the learned Judge has not in his judgment fixed the rate of interest but has left it to the office to calculate it according to Sch. 3, Agriculturists' Relief Act, and as the decree of his Court fixed it at Rs. 5-8-0 per cent. per annum compound, the appellant's objection is that this rate should be at Rupees 6-8-0 simple and not Rs. 5-8-0 compound. He relies on the fact that no rate of interest has been specified in the mortgage deed. No doubt the rate of interest is not specified in the mortgage deed but if we take the rent reserved by the lease into account, it works out to a rate of compound interest at 7½ per cent. We may also mention that in the other mortgage deeds executed by the same plaintiffs which are the subject-matter of Appeals Nos. 59 and 60, the interest provided for was also compound. We therefore find no ground for interfering with the lower Court's decree and this appeal is also dismissed with costs.

V.B.B./R.K. *Appeals dismissed.*

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## A. I. R. 1938 Oudh 162

YORKE J.

*Ashiq Ali* — Applicant.

v.

*Abdus Sayeed Khan* — Opposite Party.

Civil Revision Appln. No. 183 of 1936, Decided on 29th March 1938, from order of Munsif, Kheri, D/- 3rd October 1936.

**U. P. Encumbered Estates Act (25 of 1934), S. 45 (2)—Application under S. 4—Applicant making default in paying charges for issue of notice under S. 11 — Special Judge dismissing application and further refusing to restore it—Appeal lies to District Judge under S. 45 (2)—Revision under S. 115, Civil P. C., does not lie.**

Sub-clause 2 of S. 45 should not be interpreted in this way that the right of the appeal is only against decisions, decrees or orders which fall specifically under the Act in the sense that they are such orders as can be passed under one of the sections of the Act itself. Moreover to say for example that the right of appeal against orders in cases under the Encumbered Estates Act is governed by the provisions of Order 43, Civil P. C. would be clearly inconsistent with the provisions of Cls. 1 and 2 of S. 45, Encumbered Estates Act which provide for an appeal against any decision, decree or order of a special Judge of the second grade. [P 164 C 1, 2]

Hence where the Special Judge dismisses an application under S. 4 owing to default of payment of charges for issuing notice under S. 11 and further refuses to restore it, an appeal lies to the District Judge under S. 45 (2). A revision under S. 115, Civil P. C., does not lie. [P 165 C 1]

Rauf Ahmad — *for Applicant.*

Naimullah — *for Opposite Party.*

**Order.** — This is an application in revision under S. 115, Civil P. C., by one Ashiq Ali against apparently two orders of the Special Judge, Second Grade of Kheri, dated 24th July 1936 and 3rd October 1936. The circumstances out of which this application has arisen are as follows :

The applicant Ashiq Ali filed an application under S. 4, Encumbered Estates Act, in the Court of the Deputy Commissioner of Kheri as Collector within the meaning of the Act. In due course the Collector passed the necessary orders on this application and sent it to the Special Judge, Second Grade, against whose subsequent orders the present application is filed. Thereafter the applicant filed his written statement under S. 8 of the Act and was ordered to deposit costs for the issue of notice under S. 9 of the Act. These costs were deposited on 22nd January 1936 and 2nd July 1936 was fixed for the next stage in the proceedings. Subsequently on 13th July the applicant was given 10 days to deposit Rs. 53 that being the amount of costs for the issue of the second notice under S. 11 of the Act. 24th July 1936 was then fixed for the next hearing. The applicant Ashiq Ali failed to make the required payment within 10 days. On 24th July he made an application for the grant of further time supporting it by an affidavit. That affidavit however was not properly verified and was rejected and the Court passed an order purporting to be an order under O. 9, R. 2, Civil P. C., dismissing the whole proceedings in consequence of the failure of the applicant to pay the necessary fees. Possibly in the strictest sense this was not an order under O. 9, R. 2, but the applicant has accepted it to be an order under that Rule and on 21st August 1936, he made an application under O. 9, R. 4, for an order to set the dismissal aside. This application he supported by an affidavit and the presumption is that by the affidavit he intended to show that there was sufficient cause for his not paying the court-fee, etc., required within the time fixed by the Court. The learned Special Judge was not satisfied that the applicant had established sufficient cause and he accordingly on 3rd October 1936, rejected the application with costs. In this order the learned Special Judge says:

> The applicant has failed to furnish the publication charges as directed. He applied for extension of time before but that application too was rejected for the reasons noted in my order dated 24th July. I have found that litigants here are in the habit of procrastination to the greatest degree. The applicant knew full well that he had to pay certain charges under the Act and he failed to do so in spite of the fact that sufficient time was granted to him. He has still some time to put in a fresh application and the expenses incurred so far would be sufficient penalty for his negligence and waste of public time. I therefore reject this application with costs.

It is against this order that the present application is really filed and the ground of the application is a ground which falls within the scope of S. 115, Civil P. C., the first point taken being that the Court below wrongly refused and failed to exercise a jurisdiction vested in it by law. It was further urged in this application that O. 9, R. 2 did not apply to the case and the order dismissing the suit was unjustified and that the Court acted with material irregularity in the exercise of its jurisdiction in dismissing the suit and refusing to restore it on the ground that fresh application could be made. I need not say anything about the merits at this stage, though it seems to me at any rate clear that a Special Judge dealing with a case under the Encumbered Estates Act is certainly entitled to dismiss the application in case of any default in payment of the publication charges within the time fixed by the Court. In these cases the applicant must be conceived to know all along that he has to deposit certain charges at different stages. In the present case the applicant must have known as far back as January that when the case came up again in July, he would have to deposit a fresh amount of charges for the issue of notice under S. 11 and he can hardly be considered to have been taken by surprise if, when the time came in July, he was not given a very long time for the deposit of those charges.

A preliminary point has been taken on behalf of the opposite party that no application in revision under S. 115, Civil P. C. lies to this Court. Learned counsel for the opposite party argues that the Encumbered Estates Act, 1934, is a self-contained Act containing its own provisions in regard to appeals and revisions and that we are not therefore to look to the application of the Civil Procedure Code for any matter relating to appeals and revisions. These provisions relating to appeals and revisions of this Act are found in Chap. 6, Ss. 45 and 46. I take the latter first. The revisional power is given by S. 46 and states that:

> Any Court empowered under S. 45 to hear an appeal under this Act may of its own motion, or on the application of any person concerned, call for the record of proceedings in any case under this Act pending in a Court from which appeals lie to such Court (that is empowered under S. 45 to hear an appeal under the Act) and after giving due notice to the parties concerned pass such order thereon consistent with the provisions herein contained as it thinks fit and such order shall be final.

It is I think important to note that this power of calling for a record in revision relates only to proceedings in a case under the Act pending in a Court, that is to say, the Act does not provide a power of revision such as is provided by S. 115, Civil P. C. which specifically provides that the High Court may call for the record of any case which has been decided by any Court subordinate thereto, etc. Coming now to S. 45, that section provides by sub-cl. (2) that :

> An appeal against any decision, decree or order of a Special Judge of the second grade under this Act shall lie to the District Judge. The period of limitation for appeals under this sub-section shall be thirty days.

If therefore any appeal lay against the original order of dismissal, that appeal was long time-barred by the time the present application was filed. On the other hand the application was clearly within time if it was an appeal from the order refusing to restore the case if such appeal there could be. On behalf of the applicant it has been contended in the first place that S. 45 provides only for the form of appeals, and in the second place, it is only a provision in regard to appeals against decisions, etc., "under this Act." The suggestion is that the provisions of the Civil Procedure Code apply generally subject to this modification that where the decision, decree or order is one specifically under this Act, the appeal will lie in the case of a Special Judge of the second grade to the District Judge. The question then is what is the proper interpretation of sub-cl. (2) of S. 45 of the Act. It certainly appears to me that the interpretation proposed is a very narrow interpretation and contrary to the general scheme of the Act. Another view which has been taken and is stated in Mr. Agnihotri's book is that all orders, decrees and decisions have without any exception, been made appealable, no order being non-appealable (as under the Civil Procedure Code). On the other hand all appellate orders are final and no second appeal lies in any case: vide sub-s. 5 of S. 45 of the Act. The result of this, of course, may be that in the earlier stages of the application of this Act, District Judges may come to conclusions different from those to which a High Court dealing with the cases in appeal from a Special Judge of the 1st grade will come, but it is obvious that it is only a matter of time before the District Courts will have available to them decisions of the High Court or Chief Court to serve as a guide. To my mind it is very difficult to apply the proposed limitation suggested by learned counsel for the applicant and to hold that the sub-clause of S. 45 should be interpreted in this way that the right of appeal is only against decisions, decrees or orders which fall specifically under the Act in the sense that they are such orders as can be passed under one of these sections of the Act itself. That would lead to considerable complications and difficulties in interpretation.

It is further to be remembered that the application of the Civil Procedure Code to cases under this Act is only in a modified form. S. 53 of the Act gives the Special Judge powers conferred on a Civil Court by the Code of Civil Procedure, 1908, for the purpose of compelling the presence of witnesses and the production of documents and of awarding costs. For the rest the application of the Code of Civil Procedure is only the result of the application of the rule-making power given to the Local Government by S. 54 of the Act. The Local Government has used that rule-making power and made a series of rules which were published under Notification No. 618, Revenue, dated 10th August 1935. By R. 6 the proceedings in the Court of the Special Judge will be governed by the following provisions of the Code of Civil Procedure of 1908 so far as they are applicable and not inconsistent with the provisions of the Act and these rules. Thereafter follows the list of sections and orders. That rule has been subsequently modified by the notification of 4th December 1936, published in the United Provinces Gazette dated 12th December 1936, and for R. 6 the following rule has been substituted :

> Proceedings under this Act shall be governed by the provisions of the Code of Civil Procedure of 1908 for the time being in force so far as they are applicable and not inconsistent with the provisions of the Act and of these rules.

Prima facie it appears to me that to say for example that the right of appeal against orders in cases under the Encumbered Estates Act is governed by the provisions of O. 43, Civil P. C. would be clearly inconsistent with the provisions of Cls. 1 and 2 of S. 45, Encumbered Estates Act which provide for an appeal against any decision, decree or order of a Special Judge of the second grade. There is some incidental support for this view in the fact that R. 6, as it appeared in the original notification, did not include among the provisions of the Civil Procedure Code made applicable to the proceedings in a Court of the Special Judge the provisions of O. 43 relating to appeals from orders.

Presumably it was felt at a later date that in view of the plain inconsistency of the limitation in O. 43 with the provisions of S. 45 of the Act, there was no need in terms to make O. 43 inapplicable to the proceedings in the Court of the Special Judge. In my opinion, taking all the facts which have been put before me into consideration, it is clear that in the present case an appeal would have lain to the District Judge against the order of 24th July 1936, dismissing the application for default of payment of publication charges, and on the face of things, an appeal would lie to the District Judge against the order purporting to be an order under O. 9, R. 4, dated 3rd October 1936, refusing to restore the applicant's application to the file. In these circumstances, there is no force in the present application to this Court under S. 115, Civil P. C. which accordingly fails and is dismissed with costs. The applicant may, if he is so advised, pursue the matter in the Court of the District Judge.

D.S./R.K. *Application dismissed.*

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## ✲ A. I. R. 1938 Oudh 165

THOMAS C. J. AND YORKE J.

*Mt. Askari Begam* — *Defendant* — Appellant.

v.

*Ballabh Das and another, Plaintiffs and others, Defendants* — Respondents.

Second Appeal No. 267 of 1936, Decided on 4th May 1938, against order of Dist. Judge, Lucknow, D./ 15th April 1936.

**(a) Transfer of Property Act (1882), S. 53 —Transfer—Two debtors allowing wife of one of them to apply for mutation on false allegation of oral gift of their property and to allege possession under it—They themselves acquiescing in such mutation — Such act amounts to transfer.**

Where two debtors allowed the wife of one of them to apply for mutation on a false allegation of an oral gift of their property and to allege possession under that gift, and themselves acquiesced in the passing of an order for mutation by stating that they had no objection :

*Held* that such an act came within the description of an act by which a living person conveys property and thus being a transfer was voidable under S. 53. [P 167 C 1, 2]

**✲ (b) Specific Relief Act (1877), S. 42 — Judgment-debtors transferring certain share in property to which they were entitled to wife of one of them — Suit by decree-holder for declaration that share transferred belonged to judgment-debtors and was attachable in execution of his decree—Declaration falls under S. 42 and can be granted.**

Two judgment-debtors allowed the wife of one of them to take mutation on a false allegation of an oral gift of certain share to which they were entitled and to allege possession under it. The judgment-debtors were to acquiesce in the mutation. The decree-holder brought a suit for a declaration that the share transferred belonged to the judgment-debtors and was attachable and saleable in execution of his decree :

*Held* that the declaration was covered by S. 42 and was one which could be properly granted : *Case law discussed.* [P 168 C 2]

Habib Ali Khan — *for Appellant.*

R. K. Srivastava — *for Respondents 1 and 2.*

**Judgment.**—This is a second appeal by Mt. Askari Begam, defendant, from the judgment of the District Judge of Lucknow dismissing her appeal from the judgment of the Civil Judge of Mohanlalganj, Lucknow. The plaintiffs-respondents Ballabh Das and Madan Murari are the sons of one Gobardhan Das who held a money decree under O. 34, R. 6, Civil P. C. against defendants-respondents 3 and 4, Bunyad Husain and Naushad Ali, for Rs. 8,196 odd dated the 14th May 1927, which decree remains still unsatisfied. Respondents 3 and 4 elsewhere described as defendants 2 and 3 were the sons of one Mt. Wajib-un-nisa who was the owner of a one anna six pies share in village Madharmau Kalan. Mt. Wajib-un-nisa died on 11th June 1934, leaving defendants 2 and 3, her sons, and her daughter Mt. Azmat-un-nisa as her heirs. On 21st July 1934 an application for mutation in respect of this share in village Madharmau Kalan was made by Mt. Askari Begam, wife of Bunyad Husain, who alleged possession under an oral gift said to have been made by Mt. Wajib-un-nisa two days before her death on 9th June 1934. Defendants 2 and 3 were called in the mutation Court, and there made statements that they had no objection to mutation being effected in favour of the present appellant, and it was so effected.

On 24th November 1934 the plaintiffs-respondents instituted a suit for declaration that defendants 2 and 3 were the owners of this one anna six pies share and that that share is liable to be attached and sold in execution of the decree for Rs. 8000 odd, and they alleged that the entry in the khewat was fictitious. The reply put forward on behalf of the defendant-appellant was that this share had been gifted to her in lieu of her services. It was further pleaded orally that the suit was not maintainable under S. 53, T. P. Act and was barred by S. 42, Specific Relief Act. The learned Civil Judge framed three issues :

(1) Did Mt. Wajib-un-nisa gift the property in suit to defendant 1 on 9th June 1934, as alleged ?

(2) If so, is that gift fictitious and fraudulent and not binding on the plaintiffs ?

(3) Is the suit not maintainable having regard to S. 53, T. P. Act, and S. 42, Specific Relief Act?

The trial Court decided Issue 1 in the negative, and found as a fact after a very full discussion of the evidence that the gift in favour of Mt. Askari Begam had not been proved. That view has also found favour with the learned District Judge, and this is a finding of fact which cannot be disputed in second appeal. In the trial Court it is noted in regard to Issue 2 that the learned counsel for the plaintiffs gave up the plea covered by this issue. It appears however that this issue as framed was more or less meaningless, and it is hard to say what the trial Court's finding really meant. On Issue 3 the learned Civil Judge held that S. 53, T. P. Act, was not applicable to the case. He was of opinion that the suit was maintainable under S. 42, Specific Relief Act, and decreed it accordingly in respect of a 4/5th share in the property in suit. On these two points the finding of the learned District Judge is not perhaps as clearly stated as it might have been. He says at the conclusion of his judgment :

> The circumstances of the case together with the attempt of defendant 1 to prove the oral gift by this evidence which both the lower Court and this Court have found to be false clearly show that the intention of the colourable transfer made by the fictitious entry in the khewat was for the purpose of defeating the creditors.

It appears to be the view of the District Judge that S. 53, T. P. Act was applicable to the case. He had held earlier on the question of the maintainability of the suit under S. 42, Specific Relief Act in these terms. He says at one place :

> It is argued for the appellant that Ex. 2 shows that the execution case against Bunyad Husain and Naushad Ali had been consigned to records on 20th November 1934. There is no allegation in the plaint that there has been any attachment. But A I R 1926 Rang 124[1] and A I R 1926 Lah 348[2] say that unless there is an attachment no declaration can be granted under S. 42, Specific Relief Act. This property was never attached.

Later on he says :

> This was certainly not a case in which any attempt had been made to attach the property. In face of the entry in the khewat, in favour of the appellant it is difficult to see how plaintiffs could have attached the property.

We understand the District Judge to mean that as this was not a case in which attachment was possible, there was no bar to the maintainability of the suit under S. 42, Specific Relief Act. In this Court four points were taken, but two of these were subsequently dropped. It was first argued that there was no evidence on the record that the plaintiffs were creditors. This point was dropped. It was also said that the suit was not properly framed as representative suit under S. 53, T. P. Act. This point has also been dropped in view of the wording of para. 6 of the plaint in which it was stated in terms that the suit was being filed for the benefit of all the creditors, while the record further showed that the provisions of O. 1, R. 8, Civil P. C. were properly complied with, an application was made on 22nd February 1935, and a notice published on 13th March 1935 which the Court held to have been sufficiently served. The other two points raised were first that there was no transfer by defendants 2 and 3 to defendant 1 appellant and therefore the suit could not lie under S. 53, T. P. Act, and secondly, that the present suit was not maintainable under S. 42, Specific Relief Act, because there had been no attachment of the property. On the first of these two points learned counsel for the appellant has adopted the argument of the trial Court which held that

> the act of defendants 2 and 3 in allowing the mutation of names to be effected in favour of defendant 1 can at best be considered relinquishment though the relinquishment was surely a sham transaction. Any way, a relinquishment is not a transfer and so the section does not apply.

This argument rests on the footing that whereas under S. 53 (1), T. P. Act, every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed, it cannot be said that in the present case there was any transfer of property within the meaning of S. 5, T. P. Act. S. 5 provides :

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[1] K. R. M. A. Firm v. Mg Po Thein, (1926) 13 A I R Rang 124=95 I C 98=4 Rang 22.

[2] Mulkh Raj v. Firm Ralla Ram Rao Mal, (1926) 13 A I R Lah 348=93 I C 997=7 Lah 235=27 P L R 408.

In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

What happened in the present case has been explained above. There was no positive act of transfer either by oral gift or by means of any document. What defendants 2 and 3 did was to put up the defendant-appellant, Mt. Askari Begam, who is the wife of defendant 2, Bunyad Husain, to apply for mutation on a false allegation of an oral gift and to allege possession under that gift, and themselves to acquiesce in the passing of an order for mutation by stating that they had no objection. It is argued that such an act does not come within the description of an act by which a living person conveys property, in present or in future, to another person. On behalf of the respondents it is contended that the act of respondents 3 and 4 in making statements in the mutation Court amounts to a relinquishment, release or surrender or might be treated as an oral gift followed by delivery of possession, and however looked at really amounts to a transfer, and therefore as this was clearly a transfer made with intent to defeat or delay the creditors of the transferor, S. 53, T. P. Act applies. In this connexion reliance has been placed on the ruling reported in A I R 1936 Nag 166,[3] in which it was held that

the word "transfer" in S. 53 is wide enough to cover a surrender by a widow of her widow's interest. Hence a surrender deed of a widow's estate, if made with intent to defraud or delay the claims of her creditor, is voidable under S. 53.

This is, of course, by no means a parallel case, but in principle it appears to us that the device adopted by the defendants 2 and 3 in the present case of allowing the wife of one of them to obtain mutation by the method described above does come within the description of an act by which a living person conveys property to another person. Defendants 2 and 3 must have known perfectly well that the oral gift by Mt. Wajib-un-nisa was a pure fiction and in its absence they were the heirs to four-fifths of Wajib-un-nisa's estate. By giving possession to Mt. Askari Begam appellant or allowing her to hold possession (if indeed this possession was itself anything more than a fiction) and then agreeing to mutation, they did in effect transfer their shares in the property to Mt. Askari Begam, appellant, and this transfer appears to us to be one which was voidable under the provisions of S. 53, T. P. Act. The second contention put forward on behalf of the appellant is that in view of the fact that the plaintiffs had not actually proceeded against the property in suit, they were not entitled to maintain a suit under S. 42, Specific Relief Act for a declaration that the property in suit belongs to their judgment-debtors. For the appellants reliance was placed on the rulings reported in A I R 1926 Rang 124[1] in which it was held that:

Where there has been no attachment, the decree-holder ought not to be allowed to sue for a declaration under S. 42, Specific Relief Act. Relief by way of a declaratory decree is a creation of statute and ought not to be arbitrarily extended. There is an essential difference between the position of a person who is claiming a declaration of his own right, and that of a decree-holder who claims a declaration of the right of his judgment-debtor.

A suit under O. 21, R. 63, is intended to be sole remedy of a decree-holder whose claim to attach property has been disputed, and S. 42 ought not to be interpreted so as to cover such a case, since the decree-holder does not claim any right of his own in the property and so far as he claims any rights as to the property, provision has to be made for his establishing that right by the procedure provided in O. 21 so that it would be a wrong exercise of discretion to allow him to claim a declaration under S. 42.

The same view was taken in A I R 1926 Lah 348,[2] where it was held that:

It is not open to a decree-holder to withdraw the attachment himself and then to bring a suit under O. 21, R. 63, but a suit under R. 63 for declaration lies only when an attachment has been objected to and the objector's claim has either been accepted or disallowed by the execution Court. R. 63 precludes all suits but the one under the rule itself, and therefore no suit under any other provisions of law is competent.

On behalf of the respondent reliance has been placed on a number of rulings. In A I R 1934 Lah 460,[4] it was held that

Where a wife obtains a consent decree against her husband on the basis of a collusive award and in execution of the decree obtains his property, and he is adjudged insolvent subsequently on his own application, a suit by the creditors for a declaration that the decree obtained by the wife was ineffectual as against their rights is not barred by the proviso to S. 42, Specific Relief Act.

Similarly, in 7 Rang 477[5] it was held that:

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[3] Nilkanth Laxman Naik v. Muktabai, (1936) 23 A I R Nag 166=65 I C 944=I L R 1936 Nag 69.

[4] Chattru Mal v. Mt. Majidan, (1934) 21 A I R Lah 460=150 I C 888=15 Lah 849=35 P L R 402.

[5] Ma Sein v. P. L. S. K. Firm, (1930) 17 A I R Rang 27=120 I C 228=7 Rang 477.

> Where under the provisions of S. 42, Specific Relief Act the creditors of a judgment-debtor choose to file a suit against him and the transferee of his property for a bare declaration that such transfer was void and ineffective as against them and that they were entitled to proceed in execution or otherwise against the property, such a suit would lie without the necessity of asking for the consequential relief of setting aside the deed of transfer.

Learned counsel for the respondents has relied also on the ruling of the Lower Burma Chief Court reported in 33 I C 124[6] where it was held that:

> Where an attaching creditor withdraws the attachment, though he cannot file a suit under O. 21, R. 63, he can file a suit under S. 42, Specific Relief Act for a declaration that the property sought to be attached belonged to his judgment-debtor.

He has also relied on the ruling reported in 60 Bom 226.[7] In that case it was contended that O. 21, R. 63 precluded all suits but one under the Rule itself and therefore no suit could lie under S. 42, Specific Relief Act for a declaration that the house in dispute, though purchased in the name of *J*, was really owned by the judgment-debtor and was liable to attachment and sale in execution of the plaintiff's decree against him. It was held that the suit under S. 42, Specific Relief Act was competent as the plaintiff claimed a right to attach the house and the right to attach particular property was a right "as to" that property within the meaning of that section. S. 42, Specific Relief Act provides that:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person, denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
>
> Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

In the present case we are not concerned with the proviso, and the sole contention is that because the plaintiffs have not proceeded against the property in dispute by an application in execution and an attachment of the property, followed presumably by proceedings under O. 21, R. 58 and an order under R. 63, they were not entitled to institute a suit under S. 42, Specific Relief Act. The two cases on which reliance is placed were cases in which there had been an attachment and the Court proceeded to hold that a suit could not be filed under the provisions of O. 21, R. 63 in the absence of an adverse order under that Rule. That is not the case here. Secondly it appears to be more than doubtful whether that view any longer holds the field and to us it appears that the view taken by the Bombay High Court in 60 Bom 226[7] is the view which commends itself to us. The learned Chief Justice in that case pointed out:

> The question is whether the plaintiff has any right "as to" the property. The right which the plaintiff claims is a right to attach the property and it seems to me that a right to attach particular property is a right "as to" that property.

Later on he said:

> I entirely agree that the Court ought not to encourage the filing of suits where the relief claimed can be sought expeditiously and cheaply in attachment; and if I thought that the plaintiff in this case could have obtained the relief, which he seeks, in attachment, I should not be prepared to make any declaration in his favour. But it is apparent from the judgment of the trial Court that the question whether the purchase in the name of defendant 2 was benami for defendant 1 was a somewhat complicated one, and I doubt very much whether a Court would deal with the question in execution.

He went on to say:

> It seems to me that what the plaintiff in substance is claiming is a declaration of his right as to this property. I think the proper form of declaration to make is this: The Court being of opinion that the purchase of the suit property in the name of defendant 2 was benami for defendant 1, it is declared that the plaintiff in execution of his decree against defendant 1 is entitled to attach the property. That seems to me to be a declaration which falls within S. 42, Specific Relief Act.

Similarly in the present case it appears to us clear that the declaration sought by the plaintiffs in the present suit was a declaration covered by S. 42, Specific Relief Act and one which could properly be granted. The two lower Courts have therefore rightly decreed the plaintiffs' suit. This appeal accordingly fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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[6] Chan Tat Thai v. Ma Lat, (1916) 3 A I R L B 25=33 I C 124.

[7] Jamnabai v. Dattatraya Ramchandra Gujrathi, (1936) 23 A I R Bom 160=162 I C 260 =60 Bom 226=38 Bom L R 251.

## A. I. R. 1938 Oudh 169

THOMAS C. J. AND ZIA-UL-HASAN J.

*Badri Dass and others* — Appellants.

v.

*Raja Birendra Bikram Singh* — Respondent.

Exn. of Decree Appeals Nos. 50, 53 and 54 of 1936, Decided on 7th April 1938, against order of Civil Judge, Gonda, D/- 14th September 1936.

**(a) Civil P. C. (1908), S. 144 — 'Parties' in S. 144 include representatives—Representative includes representative-in-interest.**

Sections 47 and 144, must be read together and the word 'parties' in Sec. 144 must be taken to include their representatives and representative does not mean only a party's legal representative but it means his representative-in-interest : *A I R 1918 Pat 306 and 33 Cal 857, Rel. on*; *16 O C 225, Not foll.* [P 170 C 2]

**(b) Civil P. C. (1908), S. 144—Duty of Court to restore parties to their former position is inherent in general jurisdiction of Court to act rightly and fairly.**

It is the duty of the Court under S. 144 to "place the parties in the position which they would have occupied but for such decree or for such part thereof as has been varied or reversed." Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved : *A I R 1922 P C 269, Foll.* [P 170 C 2]

**(c) U. P. Encumbered Estates Act (25 of 1934), S. 7 — Word 'debt' does not connote contract — Debt includes costs payable and mesne profits awarded after determination of their amount.**

The word 'debt' in S. 7 does not connote a contract; on the other hand, S. 2 (a) lays down that 'debt' includes any pecuniary liability except a liability for unliquidated damages. The words 'any pecuniary liability' are wide enough to include not only costs payable by the decree but also mesne profits claimed and awarded. [P 171 C 1]

**(d) Civil P. C. (1908), O. 21, R. 19 — R. 19 does not cover case in which creditors of one of the parties are also concerned.**

Order 21, R. 19 deals with a case in which only two parties are entitled to recover sums of money from each other. It does not cover a case in which the creditors of one of the parties are also concerned. [P 171 C 1]

Radha Krishna, Suraj Narain, Bishambhar Nath Srivastava and Bhagwati Nath — *for Appellants.*

Ishri Prasad and Girja Shankar Srivastava — *for Respondent.*

**Judgment.** — These three connected appeals arise out of orders passed by the learned Civil Judge of Gonda in two execution cases. In 1928 two suits for pre-emption, Nos. 86 and 89 were instituted by Basdeo and others and Brij Mohan, respectively, against Raja Birendra Bikram Singh of Payagpur in respect of properties in two villages. Both the suits were dismissed by the trial Court, the learned Subordinate Judge of Gonda, but later on were decreed by this Court. The plaintiffs in Suit No. 86 deposited a sum of Rs. 25,736 and the plaintiff in Suit No. 89 deposited Rupees 10,542-8 in Court and both the sets of plaintiffs obtained delivery of possession of the pre-empted properties. The Raja did not withdraw these sums of money but filed appeals against this Court's decrees to His Majesty in Council. On 30th April 1934, their Lordships of the Privy Council recommended that the decrees should be reversed and these recommendations were accepted by His Majesty the King-Emperor on 14th May 1934. The order-in-council was handed over to the Raja's counsel about the end of July 1934. Thereupon an application was made to this Court by the Raja under O. 45, R. 15, Civil P. C., for transmission of the aforesaid order to the lower Court. On 21st September 1934, the order together with the memorandum of costs prepared in the office of this Court was transmitted to the Subordinate Judge of Gonda who received it on 25th September 1934.

It appears that both the sets of pre-emptors had deposited the money by borrowing parts of it. Basdeo and others had borrowed Rs. 14,500 from Badri Das and others (appellants in Appeal No. 50 and respondents in Appeal No. 54) and Brij Mohan had similarly borrowed money from Pyare Lal (respondent in Appeal No. 53). On 7th May 1934, Badri Das and others (whom we shall henceforth call the 'first appellants') filed a suit against Basdeo and others for recovery of their debt and on 13th July 1934 a decree was passed in their favour for a sum of Rs. 23,469-7-3. Similarly Pyare Lal from whom Brij Mohan had borrowed Rs. 5000 brought a suit against Brij Mohan on 2nd May 1934 and on the next day he applied for attachment of the money deposited by Brij Mohan in Court. On 16th May 1934, Pyare Lal's suit was decreed for Rs. 9500. Out of the deposit made by Basdeo and others, the first appellants withdrew two sums of Rs. 18,762-12-0 and Rs. 4943-4-4 under the orders of the Subordinate Judge dated 17th and 23rd July 1934, respectively. In the same manner on 5th July 1934, Pyare

Lal withdrew a sum of Rs. 8286-2-0 out of the deposit made by Brij Mohan. Against these orders of payment passed by the learned Subordinate Judge, the Raja (whom we shall call 'appellant 2') filed application in revision in this Court. These applications were allowed by this Court on 29th January 1936, and the orders made by the learned Subordinate Judge permitting the first appellants and Pyare Lal to withdraw the money were set aside: *vide* 1936 O W N 262.[1]

Applications for execution from which these appeals have arisen were brought by appellant 2 for restitution under Ss. 144 and 151, Civil P. C., praying that as the orders of payment have been held to be illegal by this Court, the creditors of the pre-emptors who have withdrawn amounts deposited in Court be ordered to refund them and that the costs of all the three Courts due to him be paid to him out of those amounts. These applications of appellant 2 were opposed by the first appellants and Pyare Lal mainly on the ground that appellant 2 was not entitled to the benefit of Ss. 144 and 151, Civil P. C. Pyare Lal also pleaded that proceedings against him should be stayed as he has made an application under S. 4, U. P. Encumbered Estates Act. The learned Civil Judge held that S. 7, U. P. Encumbered Estates Act applied to the proceedings so far as Pyare Lal was concerned and ordered that Execution Case No. 13 against Pyare Lal be consigned to records and that the applicant should lay his claim against Pyare Lal in the Court of the Special Judge if he so chooses. In the other Execution Case No. 12 against the first appellants, he ordered restitution to appellant 2 and laid down the details of how restitution was to be made. Appeal No. 50 has been brought by the first appellants against appellant 2. Appeal No. 53 has been brought by appellant 2 against Pyare Lal and Appeal No. 54 has also been brought by appellant 2 against the first appellants.

The plea raised on behalf of the first appellants is that as they were no parties to the pre-emption suits, the decree in which is sought to be executed by appellant 2, no restitution can be claimed against them under S. 144, Civil P. C. It is argued that the words 'party' and 'parties' in Section 144 mean party and parties to the decree which has been reversed by the Appellate Court and reliance is placed in this connexion on the case in 16 O C 225.[2] This case no doubt helps the first appellants but in 46 I C 465[3] it was held by their Lordships of the Patna High Court that Ss. 47 and 144, Civil P. C., must be read together and the word 'parties' in S. 144 must be taken to include their representatives and further that representative does not mean only a party's legal representative but it means his representative-in-interest. Similarly in 33 Cal 857[4] the Calcutta High Court held that the assignee of the decree of the Appellate Court which reversed the decree appealed against, is entitled to obtain restitution by applying for execution of the appellate decree. There is also another aspect of the case and it is this: that the first appellants were parties to the orders for payment passed by the lower Court and as those orders were reversed by this Court, they are in justice and equity liable to make restitution and refund the amount withdrawn by them. In 49 I A 351[5] their Lordships of the Judicial Committee say:

> It is the duty of the Court under S. 144, Civil P. C., to 'place the parties in the position which they would have occupied but for such decree or for such part thereof as has been varied or reversed'. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.

We are therefore of opinion, that the learned Judge of the Court below was right in ordering the first appellants to refund the money withdrawn by them. This disposes of Appeal No. 50 of 1936.

Coming now to appellant 2's appeals (Nos. 53 and 54) in the former of which he challenges the lower Court's finding that S. 7, Encumbered Estates Act applies to the case and in both of which he objects to the lower Court's order to the moneys being rateably distributed amongst the pre-emptors' creditors, we have come to the conclusion that neither of these appeals has any force. The learned counsel for appellant 2 argues that the word "debt" in S. 7, Encumbered Estates Act connotes a contract but we are unable to find any justification for this proposition either in S. 7 or anywhere in the Act. On the other hand, S. 2 (a) lays down that 'debt' includes any pecuniary liability except a liability for unliquidated damages. The words 'any pecuniary liability' are wide enough in our opinion to include not only costs payable to appellant 2 by the decree but also mesne profits claimed by and awarded to him. Those profits cannot, in our judgment, be said to be 'unliquidated damages' as their amount was fixed after inquiry by Court. We therefore hold that the learned Judge properly stopped proceedings against Pyare Lal under the provisions of S. 7 of the U. P. Encumbered Estates Act.

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[1] Birendra Bikram Singh v. Basdeo, (1936) 23 A I R Oudh 185=160 I C 814=1936 O W N 262=12 Luck 52.

[2] Nuzhat-ud-Daula Abbas Husain Khan v. Dilband Begum, (1913) 16 O C 225=21 I C 570.

[3] Kamaruddin Mondal v. Raja Thakur Berham, (1918) 5 A I R Pat 306=46 I C 465.

[4] Jamini Nath Roy v. Dharma Das, (1906) 33 Cal 857=4 C L J 192.

[5] Jai Berham v. Kedar Nath Marwari, (1922) 9 A I R P C 269=69 I C 278=49 I A 351=2 Pat 10 (P C).

The next plea of appellant 2 that out of the money which was deposited by the creditors' pre-emptors he is entitled to recover the entire amount due to him to the exclusion of the other creditors, does not also appeal to us as no good ground has been advanced for this proposition. O. 21, R. 19, Civil P. C., relied on by the learned counsel for appellant 2 is of little help to him as it deals with a case in which only two parties are entitled to recover sums of money from each other. It does not, in our opinion, cover a case like the present in which the creditors of one of the parties are also concerned. The result is that we dismiss all the three appeals before us and confirm the orders of the learned Civil Judge. Parties will bear their own costs of these appeals.

D.S./R.K. *Appeals dismissed.*

## * A. I. R. 1938 Oudh 171

YORKE J.

*Mrs. Quieros* — Petitioner.

v.

*Mr. Quieros* — Respondent.

Civil Misc. Applns. Nos. 53, 205 and 257 of 1938, Decided on 5th April 1938.

**(a) Divorce Act (1869), S. 37, Paras. 3 and 4 — Order once made under Para. 4 — Fresh application for change of that order—Payment can be ordered under Para. 3.**

On a fresh application under S. 37 for further decree, a Court has power to substitute an order that it made under Para. 4 for payment of annual or monthly alimony into an order under Para. 3 for payment of a lump sum towards alimony: *A I R 1930 Mad 154, Rel. on.* [P 173 C 1]

*** (b) Divorce Act (1869), S. 37, Para. 3 — Payment of gross sum towards alimony—Such sum enures to wife absolutely.**

An order for payment of gross sum under Para. 3 secures that sum to the wife absolutely and not for her lifetime only: *A I R 1915 Bom 50, Rel. on*; *(1903) L R P 82, Not foll.*; *A I R 1931 P C 234, Expl.* [P 174 C 2]

R. Bahadurji and M. L. Saksena — *for Petitioner.*

R. B. Lal and Murli Manohar Lal — *for Respondent.*

**Order.** *(In 53 of 1938)*—On 27th April 1931, a learned Judge of this Court granted the petitioner Mrs. Janet Leonora Quieros a decree for judicial separation and fixed her permanent alimony at Rs. 118 per mensem. In that case the petitioner had asked for half the net income of the respondent by way of alimony, but the learned Judge after referring to the proposition that a Court will not, as a general rule, give the wife more than one-third of the husband's income, no matter how gross his misconduct may have been, and after remarking that the amount which was already being paid came to one third of the respondent's net income, fixed that amount which was already being paid as the permanent allowance.

The present Application No. 53 of 1938 arises out of a change in the circumstances of the parties. It appears that towards the end of 1937, the respondent H. P. Quieros fell ill and he has now with effect from 1st February 1938, retired from the service of the East Indian Railway in which he was working as a store-keeper. He has therefore ceased to earn any monthly income but he had, as an asset, a sum which is slightly in doubt, but appears to amount to Rs. 21,483 in his Provident Fund, and he was also entitled to a gratuity which is shown by papers on the record to amount to Rs. 4050. In view of this fact the petitioner Mrs. Quieros on 20th January 1938 put in a petition in this Court under S. 37, Divorce Act, praying that in view of the circumstances she be given a gross sum in place of the existing order for monthly payments and as a gross sum she asks for one-third of what the respondent gets from the railway in the shape of provident fund and gratuity. In support of this prayer the applicant points out that both before and after the decree for judicial separation the respondent has been living with a Miss Maud Johnson by whom he had a child at the time of the suit and had since had other children. She further points out that there is a probability that after obtaining his provident fund and gratuity the respondent will remove himself from the jurisdiction of this Court with a view to avoid payment of alimony, and in that case, the petitioner will be left absolutely destitute.

On the same day on which she presented this application, the applicant applied by Application No. 54 of 1938 for an injunction restraining the Agent of the East Indian Railway from paying any money to the respondent out of this provident fund and gratuity until the matter was disposed of. This application was accepted and an interim order of injunction was issued in the terms prayed for. In connexion with this injunction an Application No. 114 of 1938 was subsequently made to the Court by the respondent asking for a modification of the order, and on 15th February the injunction was modified so that it should hold good to the extent of only half of the amount mentioned. The injunction is therefore still in force to that extent only.

In reply to the Application No. 53 the respondent on 18th March 1938, put in Application No. 205 of 1938 in which he gave a history of the circumstances which had led to his retirement and put forward certain pleas in support of the view that he was in very reduced circumstances. He stated in para. 12 that he was willing to make any arrangement that might appear proper to this Court to secure the payment of the monthly amount that might be at any time payable to the petitioner. As regards the application for a lump sum, he pleaded in para. 13 that the petitioner was not entitled in law to a lump sum and that particularly in view of the special circumstances of the case, she was not so entitled. He further suggested that as the petitioner was eight years older than him, she should not, in case the Court accepted the principle of granting her a lump sum, be held entitled to more than one-tenth of the amounts due to the respondent after deducting from them certain amounts of debts stated earlier. He summed up this application as a prayer in the first place for the dismissal of the petition, and in the second place for an order that the lump sum should be assessed at not more than one-tenth as aforesaid instead of one-third.

In answer to this application the petitioner has put in a further application, No. 257 of 1938 dated 30th March 1938, which is mainly by way of argument. It contains the allegations that there is nothing to prevent the respondent himself from taking up work in future and nothing to prevent the lady with whom he has associated himself from working and earning her living. It is further contended that the respondent is clearly not entitled to any consideration by reason of the size of his illegitimate family, and that the petitioner should not be in any way a sufferer by reason of debts incurred by the respondent in the past after the date of the decree. Further, stress has been laid on the danger to the petitioner in case an order for payment of a lump sum by way of permanent alimony is not made, and it is contended that the petitioner is entitled to receive at least one-third, if not one-half, in the amount of the provident fund and gratuity. In support presumably of the claim of a larger sum, it is pointed out that the interest obtainable on one-third of the total amount so claimed by the respondent will hardly be sufficient to keep body and soul together.

Two main questions have been argued before me in connexion with this petition. The first is whether at this stage on an application under S. 37, Divorce Act, this Court has jurisdiction to substitute for the order of payment of monthly alimony, which is an order under Para. 4 of S. 37, an order under Para. 3 of that section to the husband to secure to the wife a gross sum of money. S. 37, Divorce Act does make it absolutely clear what the powers of the Court are in the matter. It provides that the High Court may, if it thinks fit, on any decree of judicial separation obtained by the wife (Para. 1) order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any) to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties (Para. 3). In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: (para. 4). It is clear that what this Court did in 1931 was to apply the provisions of para. 4. It appears to me clear that the provisions of para. 3 and the provisions of para. 4 are alternatives at the discretion of the Court, providing (1) for a gross sum of money, (2) for an annual sum of money, and (3) for payment of monthly or weekly sums. These are merely alternative methods of protecting the successful petitioner, that is the wife. There is a further proviso to this section that:

> If the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

This proviso in terms relates only to the provisions in para. 4 for monthly or weekly payments, and it does not in terms provide for any increase in the amount of the payments. It has however been held in A I R 1930 Mad 154[1] that the section gives power to a Court to enhance the alimony which the Court has ordered a husband to pay to a wife judicially separated from him. This decision was based on the view that when the wife applies for additional alimony, she does not in effect want the original order to be touched; she wants a further decree for additional alimony. The Court has thus held that a fresh application even could be made under S. 37 for a further decree, and I would infer that if such a fresh application can be made with respect to an order falling under para. 4, there is nothing which deprives the Court of power on such an application to pass an order within the terms of para. 3. This point was not pressed with much force, and in my opinion, there can be no room for doubt that this Court has, on a fresh application by the wife, power to pass an order falling within the provisions of para. 3 of S. 37, Divorce Act. The second point which has been argued before me at considerable length is whether this Court can, applying the provisions of S. 37 of the Act, direct payment of a lump sum to the petitioner. I have already quoted the terms of para. 3 of this section. The section as it stands, contains punctuation, and according to the punctuation of this paragraph, there is no room for doubt that the words "for any term not exceeding her own life" are to be read with the words "such annual sum of money" and cannot be read with the words "such gross sum of money". It follows that this paragraph provides that:

> The Court may order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money . . . as . . . . it thinks reasonable and for that purpose may cause a proper instrument to be executed by all necessary parties.

It is contended for the applicant that this provision is wide enough to include a direction for payment to the wife of his gross sum of money, while for the opposite party, it is contended that it provides only for the securing to the wife of a gross sum of money which gross sum of money she is not permitted to touch, but which must be invested and only the interest thereof be available to the petitioner. Learned counsel for the petitioner relies on the Bombay ruling reported in 39 Bom 182,[2] wherein the interpretation of these provisions of S. 37 were carefully considered, and it was held that:

> In a suit for divorce brought by the wife, the District Judge had, under S. 37, power to make the order for payment of a lump sum for the permanent maintenance of the wife, (Headnote of 39 Bom)

and it was further stated in the judgment of one of the two members of the Bench that:

> The plain meaning of the words of S. 37 of the Divorce Act is that the gross sum of money should be paid absolutely to the wife and that the annual sum of money should be limited for the period of her life. (As given in Headnote).

On behalf of the respondent reliance is placed, first of all on S. 7, Divorce Act, which provides that:

> Subject to the provisions contained in this Act, the High Court and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

In this connexion reliance was placed on the ruling reported in A I R 1931 P C 234.[3] The learned counsel further relied on the case in (1903) L R P 82,[4] wherein learned President of the Divorce Court, after referring to the cases in 31 L J P & M 33,[5]

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[1] Iswarayya v. Iswarayya, (1930) 17 A I R Mad 154=124 I C 140=58 M L J 29.

[2] Miss Blanche Somerset Taylor v. Charles George Bleach, (1915) 2 A I R Bom 50 = 27 I C 494=39 Bom 182=17 Bom L R 56.

[3] Iswarayya v. Swarnam Iswarayya, (1931) 18 A I R P C 234=133 I C 716=58 I A 350=54 Mad 775 (P C).

[4] Twentyman v. Twentyman, (1903) L R P 82 =72 L J P 36=88 L T 571=51 W R 575.

[5] Morris v. Morris, (1861) 31 L J P & M 33.

(1902) L R P 145[6] and (1898) L R P 227,[7] decided that the Court has no power to order a lump sum to be paid over to the petitioner by way of permanent maintenance. This ruling was based on the provisions of S. 32, Matrimonial Causes Act of 1857 which is for practical purposes identical with S. 37, Divorce Act. The learned Judge pointed out that in the two previous cases quoted by him, the point in dispute did not appear to have been raised by counsel for the respondent, and in one case at least, the order for a lump sum was made by consent. He went on to say:

> But, notwithstanding those decisions, having regard to the plain words of the Act and to the fact that the point has now been definitely raised and argued for the first time, I cannot say that I have power to make the order asked although I should have been glad if I could have seen my way to do so.

Earlier in the judgment he had remarked:

> It was contended that the words in S. 32, 'such gross sum of money' are not governed by the subsequent words 'not exceeding her own life' and that these words apply only to the security.

He went on to say:

> I cannot so read the section; and I am led to the view I now hold by the observation that that applies both to the gross and to the annual sum of money mentioned in the section. With regard to the annual sum of money, it must be clearly a securing by settlement in the ordinary way; and when a gross sum is ordered, that must also be secured, and not paid over to the petitioner; and it can only be secured for some period not exceeding the lifetime of the petitioner.

It is important to note that the construction of this paragraph of S. 32, Matrimonial Causes Act is one which ultimately is based on the absence of punctuation in the section. The learned counsel for the respondent points out that a Full Bench of the Allahabad High Court in 22 All 270,[8] reprehended the action of the Judges in certain other cases in venturing to look at the stops, that is the punctuation. On the other hand one of the members of the Bench of the Bombay High Court remarked in 39 Bom 182[2] that:

> With due deference to that Bench, there would however appear to me no sufficient ground ..... for refusing the assistance of the punctuation where the sense might otherwise be doubtful in Acts of the regularly constituted Legislatures of India.

For the contrary view that it is an error to rely on punctuation, reliance was placed on the Privy Council ruling reported in 14 Cal 365[9] at p. 372, a case otherwise of an entirely different nature, in which their Lordships remarked that "they think that it is an error to rely on punctuation in construing Acts of the Legislature." For myself it would, I think, be almost sufficient to say that I do not find any sufficient reason for differing from the view taken by the Bombay High Court in the ruling reported in 39 Bom 182[2] to which I have referred above. But I am inclined to take the matter a little further because, with the greatest possible respect, I find it difficult to accept the view put forward by the learned President in the case in (1903) L R P 82.[4] For the purpose of argument, let the internal punctuation of Para. 3 of this section be entirely omitted; we then have it that prima facie the paragraph gives the Court power to direct that:

> The husband shall secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as it thinks reasonable.

It is plain, I think, that any annual sum of money which is to be secured to the wife is at her disposal entirely. Prima facie therefore any gross sum of money which is to be secured to the wife should also be at her disposal entirely. The section does not make it necessary that an instrument should be executed but only gives power to cause an instrument to be executed, and therefore I should suppose that in the case of the securing of a gross sum of money, the Court may compel the husband to secure it to the lady either by the execution of an instrument or by direct payment in the form of cash. Looking at the matter from another point of view, if we are to suppose that by the words "secure to the wife a gross sum of money" what is really meant is not that the wife shall get the gross sum of money as she gets the annual sum of money, but that she is only to get the interest from gross sum of money, we have to import into the section by implication a whole series of provisions which are not found there, and which could, as I should suppose, only be imported by some words, for example in brackets, providing that the gross sum of money is not to be available to the wife as such but only in the form of interest. (I disregard for the moment the view expressed by some Judges in English cases that brackets are highly objectionable.) To my mind then on a reasonable reading of this Para. 3 of S. 37, the correct interpretation is that the husband is to secure to the wife a gross sum of money which is to be at her disposal in the same way as the annual sum of money and the reading of the words "for any term not exceeding her own life," with the words "gross sum of money" entails such limitations on the words "gross sum of money" as render it impossible for the former words to be read with the latter. I would therefore have no hesitation in holding that in the present case the section does give a power to direct a money payment as was held by the Bombay High Court in the case to which I have referred earlier. It is noteworthy that the conclusion of the Bombay High Court was reached after a careful consideration of the English cases including (1903) L R P 82,[4] and I am not satisfied that by reason of the Privy Council ruling referred to on behalf of the respondent, any different approach to the matter has become necessary.

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[6] Kirk v. Kirk, (1902) L R P 145=71 L J P 78 =87 L T 148.

[7] Stanley v. Stanley, (1898) L R P 227=79 L T 104=47 W R 272=68 L J P 7.

[8] Edward Caston v. L. H. Caston, (1900) 22 All 270=1900 A W N 59 (F B).

[9] Maharani of Burdwan v. Krishna Kamini Dasi, (1887) 14 Cal 365=14 I A 30=4 Sar 772 (P C).

There remains only the question what amount should the Court order to be paid to the petitioner out of the amounts which are due to the respondent by way of provident fund and gratuity. The amount claimed by the petitioner is one-third of the total amount free of all deductions. For the respondent the suggestion put forward is that the maximum amount which should be given is one-tenth and that this one-tenth should be calculated on the net amount coming to the respondent after payment of outstanding bills. The gross amount due to the respondent appears to be Rs. 25,533 and the amounts which the respondent asks me to deduct are Rs. 3300 due to various creditors including the Oudh Rohilkhand Railway European Co-operative Society whose dues amount to Rupees 1902-8-0, Rs. 500 which has been ordered to be paid to the petitioner under the order dated 30th March 1938, Rs. 600 due to counsel (*vide* the certificates on the record) and some other small items making up a sum of Rs. 4439, in all, and leaving as a balance available for investment a sum of Rs. 21,094. It is difficult to apply any principle in this matter. It is contended of course for the petitioner that those debts are due to the extravagance of the respondent, and that she should not be a sufferer thereby. It is remarked that the respondent ought to have cut his coat according to his cloth and that for example the amount paid to counsel by way of fees is a very large sum for a man who is in the situation of the respondent. With that contention I am bound to agree. I further agree that the respondent cannot possibly be held entitled to any consideration by reason of the increase of his illegitimate family. In the cases quoted in argument which came before the Courts in England, those Courts refused to take into consideration even the existence of a family by a former marriage. I think that the most reasonable method of disposing of the present application will be to fix a round sum. After a full consideration of the circumstances, I direct the respondent to pay to the petitioner a sum of Rs. 7500 out of the amount which comes into his hands. This will not include the amount of Rs. 500 which has been ordered to be paid under the previous order.

I make no order as to costs because in that sum of Rs. 500 a sufficient provision has been made to enable the petitioner to pay the necessary court-fees for these applications and some amount towards the fees of her counsel. For the purpose of the decree only the counsel's fee is fixed at Rs. 250 under Para. 11, Ch. 19 of the Chief Court Rules.

B.D./R.K. *Order accordingly.*

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## A. I. R. 1938 Oudh 175

HAMILTON AND YORKE JJ.

*Raza Husain Khan and others — Defendants* — Appellants.

v.

*Saiyid Mohammad, Plaintiff and another — Defendants* — Respondents.

First Appeal No. 77 of 1936, Decided on 4th March 1938, against decree of Sub-Judge, Malihabad, Lucknow, D/- 31st May 1936.

**(a) Grant—Grant by Government of certain buildings in favour of taluqdars — Grant being general and made before Oudh Estates Act came into force—Grant prohibiting transfer to anyone not taluqdar or his heir — Meaning of words taluqdar and transfer explained.**

A grant was made by the Government of certain palace in favour of taluqdars for their accommodation. The grant was general and was made before Oudh Estates Act of 1869 came into force. The grant was subject to the condition that no taluqdar should transfer his share in the buildings and appurtenances thereto to anyone not a taluqdar or the heir to a taluq. If the then or future taluqdars were unmindful of this and other obligations, the grant would be resumed by the Government:

*Held* that as the general grant was issued before the Oudh Estates Act of 1869 came into being, the word 'taluqdar' should not be given the restricted meaning of a person entered in one of the lists prepared under Sec. 8, Oudh Estates Act. In the years prior to 1869 it could only have been used in the general sense, namely the owner of a taluqa. Before 1869 'taluqa' must have been an estate which had been forfeited by the Government and which was given back to land owners at the settlement. Therefore the condition contained in the general grant was that transfer could only be made by the grantee in favour of another person similarly situated as himself or in favour of his own heir apparent or the heir apparent of such other person: [P 178 C 2]

*Held further* that the prohibition of transfer could be taken as including prohibition of a bequest, as the word 'transfer' should be taken in a more general sense than that given to it either by the Oudh Estates Act of 1869 or the Transfer of Property Act : [P 179 C 1, 2]

*Held also* that the real object was that taluqdars should hold the house and not other members of taluqdar families ; in other words, these houses were to go with a taluqa as an appurtenance thereto. It did not follow that such houses became an integral part of the taluqdari estate to which the Oudh Estates Act applied. [P 180 C 1, 2]

**(b) Grant— Crown grant subject to condition prohibiting transfer by grantee and providing for resumption of grant in case of transfer — Transfer in contravention of term of grant — Government alone is entitled to sue — S. 3, Crown Grants Act makes no difference.**

Where a Crown grant is made subject to a condition prohibiting transfer by grantee and providing for resumption of grant in case of transfer, the person entitled to sue in case of transfer in contravention of the terms of the grant is only Government. Section 3, Crown Grants Act makes no difference because the section means that the Crown is entitled to put such conditions in a grant which a private individual could not, but the only advantage to the grantee is that the grant to him is not invalid if given by the Crown when it might be invalid if given by an individual. The section does not confer on a grantee the right to sue if he had no such right had the grant in his favour been made by an individual : *2 O C 252 ; 14 O C 144 and A I R 1936 Oudh 76, Expl.* [P 181 C 1; P 182 C 1]

M. Wasim, Habib Ali Khan, M. H. Kidwai and Ayub — *for Appellants.*

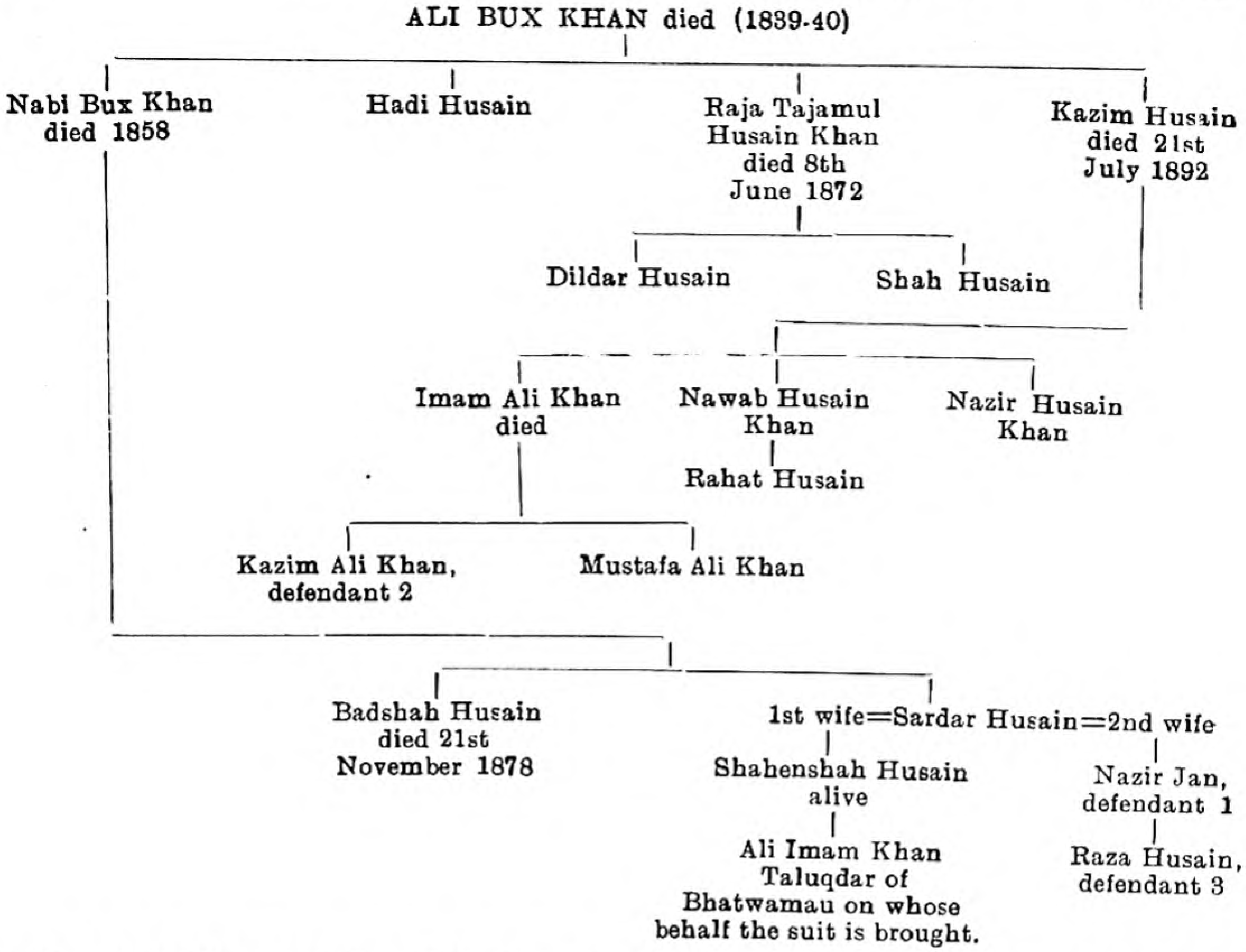
H. Hasan and Ali Zaheer — *for Respondent 1.*

**Judgment.** — This is an appeal by five defendants against a decision of the Civil Judge of Malihabad, Lucknow, decreeing the suit of the plaintiff Syed Mohammad Husain. Shahenshah Husain Khan who was defendant in the lower Court has been made a respondent in this appeal. He is the father of the plaintiff. Defendants 1 to 3 are members of the family to which Raja Sardar Husain Khan, deceased, also belonged (in the case of defendant 1 by marriage). The subject-matter of the suit is a house in Kaiser Bagh, Lucknow, and Kazim Ali Khan, defendant 2, sold half the house to defendant 4 who sold it to defendant 5. The pedigree here given is that of the family of Sardar Husain and will show how the parties other than defendants 4 and 5 are related.

*(For pedigree see p. 177.)*

The case of the plaintiff in its main features is as follows : (1) The house in suit was the subject of a Crown grant in favour of Badshah Husain, Taluqdar of Bhatwamau, either by an individual sanad or by a general sanad in favour of the Taluqdars of Oudh and on the death of Badshah Husain the house passed to his brother Sardar Husain. (2) Sardar Husain bequeathed the house to the plaintiff by a valid will Ex. 1, dated 24th March 1920. (3) Though Sardar Husain revoked the will as regards the house and by a codicil bequeathed half to Kazim Ali Khan and half to Mt. Nazir Jan, the codicil was in this respect invalid, (a) as contravening the conditions of the grant, and (b) as contravening the provisions of the Oudh Estates Act. (4) The plaintiff as Taluqdar of Bhatwamau is under para. 8 of the codicil entitled to the house in preference to the defendants.

The main features of the answers of the appellants are as follows : (1) No grant is proved, if any is to be presumed, it is in favour of Raja Tajamul Husain Khan ; (2) the prohibition in the grant, if any grant be established against transfer, does not extend to a bequest ; (3) the Oudh Estates Act does not apply to this house, but even if it does, the codicil nevertheless operates in favour of the defendants ; (4) the plaintiff himself not being a taluqdar or the heir of a taluqdar is in no better position than the defendants and cannot challenge the bequest in their favour contained in the codicil ; (5) in any case Government alone, in view of the conditions of the grant, if any, can question the bequest in favour of the defendants, but if any individual can do so, it is the father himself, and


ALI BUX KHAN died (1839-40)
Nabi Bux Khan died 1858
Hadi Husain
Raja Tajamul Husain Khan died 8th June 1872
Kazim Husain died 21st July 1892
Dildar Husain
Shah Husain
Imam Ali Khan died
Nawab Husain Khan
Nazir Husain Khan
Rahat Husain
Kazim Ali Khan, defendant 2
Mustafa Ali Khan
Badshah Husain died 21st November 1878
1st wife=Sardar Husain=2nd wife
Shahenshah Husain alive
Nazir Jan, defendant 1
Ali Imam Khan Taluqdar of Bhatwamau on whose behalf the suit is brought.
Raza Husain, defendant 3

(6) the plaintiff not being Taluqdar of Bhatwamau gets nothing under the codicil.

The word "taluqdar" is used by the plaintiff-respondent in the general sense of owner of a taluqa while the appellants would use it in its strict and correct legal sense, namely a person entered in Lists Nos. 1 and 2 prepared in accordance with Sec. 8 of Act 1 of 1869, Oudh Estates Act. The taluqdar would then be Badshah Husain Khan and no other. The history of the house in suit is as follows : This house like the Mahewa house which was the subject of a decision of their Lordships of the Privy Council reported in 45 I A 134[1] at p. 146 formed part of the Kaiser Bagh palace which was forfeited by the British Government on the annexation of Oudh. The Calcutta Gazette of July to December 1861 at page 3389 contains a speech of the Viceroy and Governor-General in answer to an address of the taluqdars, and in that speech there is a paragraph about this Kaiser Bagh palace which runs as follows :

> It is very desirable that intercourse between the Taluqdars of Oudh and the Local Government should be facilitated; you will derive benefit from the wise and friendly Councils of the Chief Commissioner, and he will have advantage in frequent communication with you. I have therefore authorized Mr. Yule to make over to you, for your accommodation in visiting the Capital, the palace of the Kaiser Bagh, if you should desire to avail yourself of it.

We may therefore say that the object of the Viceroy was to turn the Kaiser Bagh palace into town-houses for the aristocracy of Oudh. Ex. 12/P. W. 1, copy of an extract from the Government N. W. P. and Oudh Public Works Department proceedings for February 1899, contains a copy of what we may call a general sanad in favour of the taluqdars. It is to the effect that as His Excellency the Viceroy and Governor-General in a Darbar on 5th November 1861, that is to say, the occasion of the speech from which we have quoted, was pleased to bestow the Kaiser Bagh palace to the Taluqdars of Oudh, the Chief Commissioner of Oudh granted this sanad conferring on the taluqdars and the heirs and successors to their taluqas the Kaiser Bagh palace on certain conditions including the one which is relevant in this case which runs as follows :

> It is also a condition of the gift that no taluqdar shall transfer his share in the buildings and appurtenances thereto to any one not a taluqdar or the heir to a taluqa.

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[1] Rajindra Bahadur Singh v. Rani Raghubans Kunwar, (1918) 5 A I R P C 25=48 I C 213 =40 All 470=45 I A 134=21 O C 106 (P C).

If the present or future taluqdars were unmindful of this and other obligations, the gift would be resumed by the Government. There is no direct evidence of the issue of this sanad, but we find it referred to in later documents filed in this record as having been issued. Plaintiff's Ex. 34, copy of a letter of the Chief Secretary to the Government to the Commissioner of the Lucknow Division dated 18th July 1903, states that in 1861 these historical buildings (Kaiser Bagh) were bestowed upon taluqdars. Defendants' Ex. C-9, order dated 14th July 1890, passed by the Commissioner, Lucknow Division, regarding the Kaiser Bagh buildings, has the following sentence :

> The permission to occupy quarters in the Kaiser Bagh is a personal indulgence granted by the Government and the right cannot be transferred by sale, gift, lease, or otherwise without the special permission of Government being first obtained.

This, however may refer to individual sanads and not to the general sanad. Plaintiff's Ex. 33 is a copy of a letter from the Honorary Life Secretary of the British Indian Association, that is to say, the taluqdari body, to the Commissioner of Lucknow which contains the following sentence :

> The Kaiser Bagh is a Crown grant and the sanad contains a clause to the effect that no taluqdar shall transfer his share in the building and appurtenances thereto to any one not a taluqdar or the heir to a taluqdar.

Individual grants to which we shall refer later only prohibit transfer to any one not a taluqdar, and the reference in this letter to the prohibition of transfer to a person who is not heir of a taluqdar must therefore refer to the general sanad and not to any individual sanad. There is then plaintiff's Ex. 13/P. W. 1, copy of a draft of a proposed new form of individual sanad which contains the following sentences :

> Whereas in the year 1861 all houses situate in the Kaiser Bagh palace in the city of Lucknow were granted by the Government to the various Taluqdars of Oudh by means of a general sanad issued by the Chief Commissioner of Oudh on the conditions . . . . that no taluqdar should transfer any share in the building and appurtenances thereto to any one not a taluqdar or the heir to a taluqa, and that in case of breach of any of the above conditions, the grant should be resumed.
>
> And whereas under this grant the Taluqdars of Oudh took and occupied separately the various houses in the said palace of Kaiser Bagh and they and their successor-in-title have been holding the said houses on the said conditions, but individual sanads were not issued to all of them and it is not known which of the taluqdars had actually obtained individual sanads and which not . . . . . .

It is clear from this that those who were in the best position to know whether a general sanad had been issued, namely Government Officials on the one side and the British Indian Association on the other were agreed that this general sanad was issued. We find therefore that this general sanad was issued and we are not able to accept the contention of the learned counsel for the appellants that it is not proved that there was any grant by Government of the house in suit.

There are on the record three copies of individual sanads, plaintiff's Exs. 35, 36 and 37 of which the first in favour of the Maharaja of Kapurthala, his heirs and successors to his taluqa has been printed. The only important difference between this individual sanad and the general sanad is that no taluqdar is allowed to transfer his share to any one not a taluqdar and the words "or heir to a taluqa" are not included. There is no evidence that any individual sanad was issued as regards the house in suit. It may be that one was issued, but in view of what is stated in Ex. 13/P. W. 1 that individual sanads were not issued to all the taluqdars, it is not certain. Once however the issue of a general sanad is proved, it matters little whether an individual sanad was also issued or not because neither the plaintiff nor the defendants Raza Husain Khan, Mt. Nazir Jan nor Kazim Ali can, in our opinion, be called "the heir to a taluqa" within the meaning of the sanad. In our opinion, as used in the sanad, the expression "heir to a taluqa" means the heir apparent to such person as was then regarded as taluqdar. In this connexion we may say that the general and the individual sanads were issued before the Oudh Estates Act of 1869 came into being and therefore the word "taluqdar" should not be given the restricted meaning of a person entered in one of the lists prepared under S. 8, Oudh Estates Act. In the years prior to 1869, it can only have been used in the general sense in which it is still commonly used today, namely the owner of a taluqa. Before 1869, "taluqa" must have been an estate which had been forfeited by the Government and which was given back to landowners at the settlement. In our opinion therefore the condition contained in the general grant was that transfer could only be made by the grantee in favour of another person similarly situated as himself or in favour of his own heir apparent or the heir apparent of such other person.

The learned counsel for the appellants has urged that we should presume that if any grant was made as regards the house in suit, it was made in favour of Raja Tajamul Husain. Who Raja Tajamul Husain was can best be seen from the plaintiff's Ex. 7, a decision of the Judicial Commissioner of Oudh. It is sufficient for us to say that though the taluqdar was Badshah Husain, as regards the management of his estate he remained in the background and Raja Tajamul Husain, his uncle, was in the lime light. The learned counsel has suggested that therefore the Government must have made a mistake and have given this house by a grant to Raja Tajamul Husain instead of to Badshah Husain. By the general grant it was Badshah Husain and not Raja Tajamul Husain who could have got this house, and as we have said no individual grant about this house is forthcoming. The authorities cannot but have known that it was Badshah Husain who got the sanad which affected the landed estate as opposed to the house and we think therefore that any mistake as to who should get the individual sanad to the house was so unlikely that we can say it is impossible that it should have occurred. The mere fact that Tajamul Husain was created a Raja shows nothing, for he may have got the title because of any personal service which he may have rendered. Defendants' Ex. C-11 is a map of the Kaiser Bagh without any date and in the part of the Kaiser Bagh which forms this house appear the words "Tajamul Husain Khan of Bhatwamau" and the same words appear on the map Ex. C-10 about the same house. We see no reason for presuming from this evidence that any grant was made to Raja Tajamul Husain. The person who prepared this map in all probability went to the house, saw Tajamul Husain there and put his name as if he was the real owner and not the manager of the Bhatwamau estate.

The learned counsel for the appellants has urged that this prohibition of transfer must not be taken as including prohibition of a bequest. The general and the individual sanads are not statutes and were drawn up as long ago as 1861 and 1865 when Oudh was governed more by rules than by codified law, and the meaning attached to them we have already shown from the letter by the Commissioner of Lucknow, namely that all alienation to a non-taluqdar, be it by gift or otherwise, was forbidden without the sanction of the Government. We think we should take the word "transfer" in a more general sense than that given to it either by the Oudh Estates Act of 1869 or the Transfer of Property Act. After the death of Badshah Husain Khan, his brother, Sardar Husain Khan had to bring a suit about all the taluqdari estate of Bhatwamau and also this house and the decision of the Judicial Commissioner of Oudh is Ex. 7. The defendant in that suit was Kazim Husain Khan and, after his death, Imam Ali Khan who were respectively grandfather and father of defendant 2. The suit of the plaintiff was successful and he got this house as appertaining to the taluqa. The written answer to that suit is not on the record so we do not know what was alleged by the then defendant, but there is nothing to indicate that a defence was then set up that Raja Tajamul Husain Khan had obtained the house from a grant by the Government.

On 24th March 1920, Sardar Husain who had by now obtained this house as an appurtenance to the taluqa executed a will Ex. 1 by which he left his entire property, taluqdari and non-taluqdari, to the plaintiff, Ali Imam Khan because Shahenshah Husain, father of Ali Imam Khan, and son of the testator, had been convicted of forgery. On 25th April 1923, Sardar Husain executed a codicil Ex. C-12 and the part of it which referred to the house is as follows:

> Para. 3. That Kazim Ali Khan is at present residing at Kaiser Bagh in the house of me the declarant, therefore I give half portion of this house at Kaiser Bagh to Kazim Ali Khan aforementioned and the remaining half to my last wedded wife Mt. Nazir Jan, mother of Raza Hussain Khan, which after her (Mt. Nazir Jan's) death shall devolve upon Raza Hussain Khan without the co-parcenership of anyone else. Each of the two portions shall devolve on the lines of Kazim Ali Khan and Raza Husain Khan generation after generation and my other heirs shall have no right of any kind, at any time, to the said house.
>
> Para. 8. That if, on account of any legal defect or on account of any other reason, the paras in favour of Kazim Ali Khan and Mustafa Ali Khan and Rahmat Husain Khan and Mt. Nazir Jan, wife of the declarant, be held to be unenforceable by a competent Court then in that case my younger son, Raza Husain Khan, shall become the owner of all the properties, namely Mauzas Sandupur, Bhadewan, Katuri Khurd and the house at Kaiser Bagh and that on account of any legal defect, Kazim Ali Khan and Raza Husain Khan may not get the house at Kaiser Bagh; then after me the Taluqdar of Bhatwamau shall get the said property.

On 11th May 1923, Sardar Husain died and Kazim Ali Khan and Mt. Nazir Jan defendant 1, together with Raza Husain, defendant 3, took possession of the house. As we have stated, on 12th February 1930, Kazim Ali Khan sold his half to defendant 4 who on 15th February 1933, sold that same half to defendant 5. We must now refer to that decision of their Lordships of the Privy Council in 45 I A 134[1] at p. 146 about the Mahewa house which is as follows:

> The house in the Kaiser Bagh at Lucknow. The right to the possession of this house does not depend upon the sanad of 1861, which was granted to Girwar Singh upon surrender by him to the Government of the sanad of 1859 which had been granted to Gajraj Singh. The house in the Kaiser Bagh was not included in the sanad of 1861. It is common ground that a house in the Kaiser Bagh was allotted by the Government to Girwar Singh in 1864 or 1865 for his use as the Taluqdar of Taluqa Mahewa. That house was demolished when the Canning College was built, and in place of it another house, the house now in dispute, was allotted by the Government to Balbhaddar Singh for his use as the Taluqdar of the Taluqa Mahewa. No sanad relating to the house has been produced, nor has it been proved that any sanad relating to the house was granted. But it may be inferred from the fact that the house was allotted to Balbhaddar Singh for his use as Taluqdar of Mahewa that such right to possession of it as had passed not to his widow but to his successor in the taluqdari of Mahewa.

In following this decision of their Lordships of the Privy Council we must guard against the danger of following it so blindly that in reality instead of following it we misapply it. We note that their Lordships decided that such right to possession of it as Girwar Singh had in 1864 or 1865 passed to his successor in the taluqdari of Mahewa because the house had been granted to Girwar Singh for his use as Taluqdar of Taluqa Mahewa. This appears to us to mean no more than that the house followed the taluqdari landed estate. As no sanad was produced in that case, the effect of any conditions contained in the sanad could not be considered. We think therefore that that decision will only guide us as regards the house in suit here in so far as there is nothing in the sanad against it. We have already shown that the object of Government was to provide town-houses for the various Taluqdars of Oudh and though, by individual sanad, houses were given to particular individuals as taluqdars, it was more or less immaterial to Government which particular family held the house, the real object being that taluqdars should hold them and not other members to taluqdar families, in other words, these houses were to go with a taluqa as an appurtenance thereto. It does not follow, in our opinion, that such Kaiser Bagh houses became an integral part of the taluqdari estate to which the Oudh Estates Act applies. That estate is defined in S. 2, Oudh Estates Act, and is composed of the taluqa or immovable property acquired or held by a taluqdar or grantee in the manner mentioned in Ss. 3, 4, or 5, and the other immovable property in respect of which a taluqdar or grantee or his heir or legatee or a transferee referred to in S. 14 has a separate, permanent, heritable and transferable right, and in respect of which he has made a declaration in accordance with the provisions of S. 32-A of this Act. This house was not acquired in the manner mentioned in Ss. 3, 4 or 5 nor has any declaration been made in accordance with the provisions of S. 32-A, Oudh Estates Act. Further, the Act contains provisions as to the power of transfer of an "estate" within the meaning of the Act which would be in conflict with the limitations contained in the general sanad issued about these Kaiser Bagh houses, and the whole purpose of the grant would be defeated if transfers could be made of these houses as can be made of the taluqdari estate.

The learned counsel for the respondents has urged that to apply the provisions of the Oudh Estates Act to this house would be the logical result once this house was found to be an appurtenance to the taluqa but, in our opinion, it would not. We think that under the general sanad this house followed the taluqa and any transfer or bequest of this house which would have the result of putting the taluqa and the house into different hands, would be violation of the limitations on the power of transfer which formed an essential part of the grant.

Coming then to the will of Sardar Husain in favour of the plaintiff of the whole taluqdari and non-taluqdari property of the testator, it may be urged that the bequest of the house was in a way contrary to the limitations of the grant in that it was to a person who at the time was not a taluqdar nor even the heir-apparent of a taluqdar seeing that Shahenshah Husain was still alive. On the other hand the bequest of the taluqdari estate made Ali Imam Khan taluqdar after Sardar Husain, using of course the word taluqdar in the sense used, in our opinion, in the sanad and not in the strictly legal sense defined by the Oudh Estates Act. Ali Imam Khan having obtained the taluqdari property, he was entitled to this house because the practical effect of the will was to carry out the terms of the grant but even if it be held that the bequest of the house by the will was against the conditions of the grant, he obtained the house by virtue of the terms of the grant as soon as he obtained the taluqdari estate. Having reached this point, the case of the plaintiff proceeds on an alternative (a) the codicil about the house in favour of defendants 1 to 3 was invalid as being contrary to the terms of the grant, and also because the codicil was not valid under the provisions of the Oudh Estates Act and therefore the plaintiff is entitled to a decree whether he is entitled to the house by virtue of the will or because the will gave him the taluqdari estate. In the alternative (b) the codicil as regards the house in favour of defendants 1 to 3 being invalid as contravening the terms of the grant under para. 8 the plaintiff is entitled to the house.

The learned Civil Judge has held that the codicil in favour of defendants 1 to 3 was invalid because it contravened the provisions of the Oudh Estates Act: (a) because the executant died within three months of its execution; (b) because it is not in favour of a privileged class within the meaning of S. 13-A, Oudh Estates Act, and also (c) because the house is not transferred in favour of a taluqdar or the heir to a taluqa; (d) because the Kaiser Bagh property is the subject-matter of a grant by Government and goes with the taluqa and the conditions of the sanad are broken.

We do not think it necessary to decide what meaning should be attached to the expression "a younger son" in S. 13-A, Oudh Estates Act as we have held that the terms of the grant govern the powers of a testator as regards this house and not the provisions of the Oudh Estates Act. We agree with the learned Civil Judge as regards his findings (c) and (d), namely that the bequest in favour of defendants 1 to 3 was invalid under the grant. None of defendants 1 to 3 are persons to whom the terms taluqdar or the heir to a taluqa as contained in the general sanad can be said to apply. We must here consider the contention of the appellants that the plaintiff has no locus standi because only the Government can take advantage of any remedy that is open for breach of the conditions of the grant or at most if anyone besides the Government has a right, Shahenshah Husain, father of the plaintiff, is that person. The learned counsel for the appellants has called our attention to 2 O C 252,[2] 14 O C 144[3] and 1935 O W N 1134.[4]

In the first case certain members of the zamindari body had a heritable but not a transferable right in a village and were to pay to the taluqdar Government revenue and a portion of the proceeds by virtue of a decree passed on a compromise. The plaintiff's father who was one of the decree-holders sold a certain share of his holding to the defendant and the plaintiff brought a suit for possession of the share alleging that his father was not authorized to transfer the share as it was not transferable. It was held that it was not open to the plaintiff to question the transfer because the restriction on the right of transfer was intended for the benefit of the taluqdar and his heirs and not of the decree-holders and their heirs. The second case was one where the plaintiff held certain lands under a decree of the Settlement Court granting 'kabzadari' without the right of transfer, but he mortgaged them with possession to the defendant and he subsequently brought a suit to recover possession on the ground that the mortgage being of an occupancy holding was invalid. It was held that the condition forbidding transfer was only for the benefit of the superior proprietor and also that the plaintiff was not entitled to the assistance of the Court in undoing his own act.

The last case was one where the interest of a grantee under a heritable non-transferable grant for maintenance was attached and sold in execution of a money decree against him. It was held that the restriction against alienation was intended for the benefit of the grantor and a transfer by the grantee was not therefore absolutely void but was only voidable at the option of the grantor. The difference between such cases and the present one is only the grantor was the Crown and not a private individual, but learned counsel for the respondents argues that the existence of S. 3, Crown Grants Act, makes all the difference. That section reads as follows :

> All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid as take effect

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[2] Rampher Singh v. Ram Khelawan Singh, (1899) 2 O C 252.

[3] Hirday Behari v. Parag Tiwari, (1911) 14 O C 144=11 I C 527.

[4] Mt. Bagwati v. Raghubar Dayal, (1936) 23 A I R Oudh 76=158 I C 710=1935 O W N 1134.

according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.

In our opinion, this means that the Crown is entitled to put such conditions in a grant which a private individual could not, but the only advantage to the grantee is that the grant to him is not invalid if given by the Crown when it might be invalid if given by an individual. We do not think this section confers on a grantee the right to sue if he had no such right had the grant in his favour been made by an individual. Had this grant been made by an individual, we consider that neither the plaintiff nor even his father could sue in view of the decisions of this Court to which we have referred. We consider however that if any private individual could sue, it would be the plaintiff and not his father because by virtue of the grant this house follows the taluqdari estate of which the plaintiff and not his father has become the owner. Were it not therefore for para. 8 of the codicil we think that the remedy open to the plaintiff would be to call the attention of the Government to the contravention of the terms of the grant and to move the Government to forfeit the house and then to apply for its restitution to him. As regards the case of the plaintiff as based on para. 8 of the codicil, it is really a claim for a declaration that on a correct construction of para. 8 of the codicil the bequest takes effect in his favour and not in favour of defendants 1 to 3 and for consequential relief in the form of possession against all the defendants. The meaning of para. 8, is, in our opinion, quite clear, namely after ejecting those persons who because of legal defect or on account of any other reason are held not to be entitled to the house by a competent Court, the legatee shall be the first person who is not so rejected. Kazim Ali Khan, Mt. Nazir Jan and Raza Husain Khan, too, are not entitled to this house because they are not taluqdars or heirs to a taluqa in the meaning to be attached to those words in the general sanad. There is then left the taluqdar of Bhatwamau who is not under the same disability.

The learned counsel for the appellants has not put forward any argument as regards this para. 8 of the codicil beyond saying that the plaintiff is not the taluqdar of Bhatwamau. We agree that if taluqdar is to be taken to mean taluqdar in the sense in which the word is used in the Oudh Estates Act, he is not the taluqdar for the one and only taluqdar of Bhatwamau was Badshah Husain Khan whose name appears in Lists Nos. 1 and 2. After his death there was not and could not be a second taluqdar of Bhatwamau. We have however already stated that this definition of taluqdar dates from 1869 when the Oudh Estates Act was passed and in construing the sanad, we must construe it in the sense in which taluqdar could and must have been used before 1869. We think it was used as it is commonly used now in the sense of the proprietor of the Bhatwamau estate. That estate is still in existence and the owner of it is the plaintiff by virtue of the will executed in his favour by Sardar Husain. Consequently the person who is entitled to the house by virtue of para. 8 of the codicil is the plaintiff and he is entitled against the defendants to possession of this house. As that part of para. 8 of the codicil which takes effect is the bequest of this house to the taluqdar of Bhatwamau, namely the plaintiff, the question of forfeiture by Government does not really come into the case at all. For these reasons therefore we uphold the decision of the learned Civil Judge and we dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Oudh 182

THOMAS C. J.

*Mt. Shakura and others* — Applicants.

v.

*Mt. Nasira* — Opposite Party.

Criminal Revn. No. 63 of 1938, Decided on 5th May 1938, from order of Sessions Judge, Fyzabad, D/- 21st April 1938.

**Criminal P. C. (1898), S. 539-B—Failure to make memorandum of local inspection does not vitiate trial.**

Non-compliance with the direction in S. 539-B to make a memorandum of local inspection does not vitiate the trial; such an omission is an irregularity, unless it was proved that the accused was prejudiced. [P 183 C 1]

H. H. Zaidi — *for Applicants.*

**Order.** — This is an application in revision against the order of the learned Sessions Judge of Fyzabad dated 21st April 1938, upholding the order of the learned Magistrate of Sultanpur dated 9th April 1938, convicting the applicants. The case has been very carefully tried by the learned

Magistrate. He convicted the three applicants and fined one Rs. 20 and the other two Rs. 10 each. He made a local inspection, but unfortunately did not record a memorandum of his inspection as required under S. 539-B, Criminal P. C., and this is the main ground of objection argued before me in this application. The learned counsel for the applicant relies on the case in 110 I C 463,[1] which to some extent supports the contention of the learned counsel. In my opinion, this case is no authority for the proposition that a conviction must be set aside in a case like the present one where the local inspection was not made the basis for conviction. The learned counsel has conceded before me that the conviction of the applicants is not based on the local inspection. In my opinion noncompliance with the direction in S. 539-B to make a memorandum of local inspection does not vitiate the trial, such an omission is an irregularity, unless it was proved that the accused was prejudiced. I am clearly of opinion that the accused was not prejudiced in this case. It was further argued that no damage has been proved. In the present case the learned Magistrate has accepted the complainant's story that she found the buffalo grazing in her field, and I should have thought that this necessarily involved damage. The applicants had no right of private defence of property. In my opinion there is no substance in this application and I summarily reject it.

D.S./R.K. *Application rejected.*

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[1] Jawala Singh v. Emperor, (1928) 15 A I R Lah 479=110 I C 463=10 Lah 138=29 Cr L J 719.

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## A. I. R. 1938 Oudh 183

THOMAS C. J. AND YORKE J.

*Mehdi Husain — Accused*
Applicant.
v.
*Emperor.*

Criminal Revn. No. 73 of 1937, Decided on 3rd May 1938, from order of Sessions Judge, Gonda, D/- 30th March 1937.

**(a) Cattle Trespass Act (1871), Ss. 20 and 22—Complaint under S. 22 filed within ten days from date of seizure to Panchayat Court—Panchayat Court being incompetent to entertain it, sending it to Subdivisional Magistrate more than 10 days after date of seizure—Complaint cannot be said to be filed in proper Court within 10 days.**

A Panchayat Court has no jurisdiction to entertain complaint under S. 22. Where such complaint is filed to such Court within 10 days from date of seizure and such Court being incompetent to entertain it sends it to Subdivisional Magistrate more than 10 days after the date of seizure the complaint cannot be said to be filed in proper Court within 10 days from the date of seizure as laid down by S. 20. The defect is not cured by S. 537, Criminal P. C. : *A I R 1927 Mad 396, Disting.* [P 184 C 1]

**(b) Criminal P. C. (1898), Ss. 529 and 530—Do not apply to village panchayat.**

The provisions of Ss. 529 and 530 do not apply to the village panchayat. [P 184 C 1]

S. N. Roy — *for Applicant.*

Asst. Govt. Advocate — *for the Crown.*

Kanhaiya Lal Nigam — *for Complainant.*

**Order.**—This is an application for revision against the order of the learned Sessions Judge of Gonda, dated 30th March 1937, affirming the order of the District Magistrate dated 18th December 1936, which order affirmed the order of a Special Magistrate of Second Class dated 19th June 1936, ordering the accused to pay compensation of Rs. 25 to Paragi. The facts are shortly these: On 7th March 1936 Paragi filed a complaint before the Birpur Kotra Panchayat under Ss. 323 and 504 I. P. C., and S. 22, Cattle Trespass Act, alleging that the accused unlawfully seized his sheep and sent them to the pound. On 13th March 1936 an objection was raised before the panchas that they had no jurisdiction to entertain the complaint. On 31st May 1936, the Court evidently entertained the objection and sent the file to the Sub-Divisional Officer. On 3rd July 1936, the Sub-Divisional Officer transferred the case to an Honorary Magistrate, who awarded Rs. 25 as compensation to the complainant under S. 22, Cattle Trespass Act. The main point argued by the learned counsel for the applicant in this revision is that the complaint was not filed in the proper Court within the period laid down in S. 20, Cattle Trespass Act. S. 20, Cattle Trespass Act runs as follows:

> Any person whose cattle have been seized . . . . may, at any time within ten days from the date of the seizure, make a complaint to the Magistrate of the District or any Magistrate authorized to receive and try charges without reference by the Magistrate of the District.

The contention of the learned counsel for the applicant is that the complaint should have been filed within ten days in the Court of the Magistrate of the District or any Magistrate authorized to receive and try charges without reference by the

Magistrate of the District. It is conceded by the learned Assistant Government Advocate that the Panchayat Court was not competent to take cognizance of the complaint under S. 22, Cattle Trespass Act, but his contention is that there were allegations in the complaint which brought the case under Ss. 323 and 504, I. P C., which the Panchayat Court was competent to try, and therefore the complaint was rightly filed in the Panchayat Court. We are unable to agree with this contention. Taking the complaint as a whole it appears that Ss. 323 and 504 were casually mentioned in the complaint. The substantive complaint was under S. 22, Cattle Trespass Act, and there can be no doubt that under S. 17, U. P. Village Panchayat Act, (6 of 1920) that Court had no jurisdiction to entertain the complaint, and it was not cognizable by that Court. The learned Sessions Judge was of opinion that :

> The complaint was made within time and when it was sent over to the Sub-Divisional Magistrate it was within the jurisdiction of a competent Magistrate. If there was any defect it was curable under S. 537, Criminal P. C.

We regret we are unable to agree with this view. In our opinion S. 537 Criminal P. C. does not cure the defect. The learned Assistant Government Advocate relied on the case in 50 Mad 841.[1] In our opinion the case is clearly distinguishable. It was held in this case that :

> S. 20, Cattle Trespass Act empowers any 'Magistrate' authorised under the Criminal Procedure Code by the District Magistrate to take cognizance of offences . . .

There are certain observations in this case which really help the applicant. It is stated in the judgment that :

> So far as sub-s. (2) (of S. 29) is concerned, it is argued that, as the offence is not punishable with imprisonment or fine as such, it has no place in the eighth column of the second schedule and therefore that schedule does not apply. I am inclined to agree with the second contention. . . . .

We are of opinion that the provisions of Ss. 529 and 530, Criminal P. C., do not apply to the village Panchayat. S. 21, Cattle Trespass Act is to the effect that :

> The complaint shall be made by the complainant in person, (and not through the Panchayat Court), or by an agent personally acquainted with the circumstances. If it be verbal, the substance of it shall be taken down in writing by the Magistrate.

We therefore hold that the complaint was not made within ten days from the date of the seizure to the Magistrate of the District or any Magistrate authorised to receive and try charges without reference by the Magistrate of the District. We accordingly allow the application and set aside the orders of the lower Courts. The amount of compensation, if paid, will be refunded.

D.S./R.K. *Application allowed.*

## A. I. R. 1938 Oudh 184

THOMAS C. J. AND ZIAUL HASAN J.

*Dwarka Prasad — Decree-holder* — Applicant.

v.

*Mohd. Taqi Husain — Judgment-debtor* — Opposite Party.

Civil Revn. Appln. No. 32 of 1936, Decided on 11th April 1938, from order of Judge, Small Cause Court, Lucknow, D/- 1st February 1936.

**(a) U. P. Agriculturists' Relief Act (27 of 1934), S. 2 (2) — Mutwalli can be agriculturist —Waqf made before or after borrowing is immaterial.**

Trustees can be regarded as agriculturists within the meaning of the definition of the term as given in S. 2 (2) of the Act and there is no difference in principle between a trustee and a mutwalli. A mutwalli therefore can be an agriculturist within the meaning of the Agriculturists' Relief Act. The fact whether the waqf was made before or after borrowing money does not affect the definition of 'agriculturist' contained in the Act : *A I R 1937 Oudh 369 and A I R 1937 All 344, Rel. on.* [P 185 C 1,2]

**(b) U. P. Agriculturists' Relief Act (27 of 1934), Ss. 5, 30—Act does not authorize Court to reduce costs allowed under original decree.**

The Agriculturists' Relief Act does not authorize a Court to make any reduction in the amount of costs allowed under the original decree : *A I R 1937 Oudh 266, Foll.* [P 185 C 2]

**(c) U. P. Agriculturists' Relief Act (27 of 1934), Ss. 30, 4 and Sch. 3 — Future interest on decree passed before Act.**

Future interest on decrees passed before the passing of the Act is governed by S. 30 and Sch. 3 of the Act and not by Sec. 4 of the Act : *A I R 1937 Oudh 312 (F B), Rel. on.* [P 186 C 1]

Gaya Prasad Srivastava — *for Applicant.*

B. N. Sharga — *for Opposite Party.*

**Order.** — This is an application for revision of an order of the learned Judge, Small Cause Court, Lucknow, amending a decree of his Court under Ss. 5 and 30, U. P. Agriculturists' Relief Act. The decree in favour of the plaintiff-applicant was passed on 3rd October 1933, for recovery of Rs. 750 with costs and future interest at 6 per cent. per annum on a suit on a bond of Rs. 400. On the opposite party's application under the Agriculturists' Relief Act, the learned Judge amended the decree on 1st February 1936 in this manner that the contractual rate of interest which had been reduced from 37½ per cent. per annum by the trial Judge to 24 per cent. per annum was further reduced to 10 per cent. per annum, the debt having been borrowed on 2nd February 1930. He also made the costs recoverable by the plaintiff-applicant proportionate to the amount decreed. Future interest was ordered to run at 3 per cent. per annum from the date of the order and the decretal amount was made payable in 12 equal instalments falling due on 3rd October 1937, and on the same date in the succeeding 11 years. It may be mentioned that the opposite party after borrowing money from the plaintiff-applicant executed a deed of wakf alalaulad and he is now recorded in the revenue papers as being in possession as mutwalli. The plaintiff decree-holder objects to the order of the lower Court on several grounds. The first is that as the opposite party pays land revenue not in his personal capacity but as mutwalli of a wakf, he is not an agriculturist within the meaning of the Agriculturists' Relief Act. We do not agree with this contention. In 1937 O W N 740,[1] which was decided by a Full Bench, the question before the Full Bench was whether trustees can be regarded as agriculturists within the meaning of the definition of the term as given in S. 2 (2) of the Act, and the Judges unanimously answered this question in the affirmative. It was conceded before us that there was no difference in principle between a trustee and a mutwalli. A mutwalli therefore can be an agriculturist within the meaning of the Agriculturists' Relief Act. The point was decided in the same manner by the Allahabad High Court in 1937 A L J 178[2] in which it was held that if the mutwalli of a wakf has beneficial interest under the wakf then his payment of land revenue brings him under the definition of agriculturist. In the present case it has been found that the opposite party is one of the beneficiaries under the wakf.

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[1] Deenadayalu Naidu v. Ratna Padayachi, (1927) 14 A I R Mad 396=100 I C 381 = 28 Cr L J 301 = 50 Mad 841 = 52 M L J 251.

The learned counsel for the applicant contended that as the opposite party made a wakf of his property after borrowing money from the applicant, he should not get the benefit of the Agriculturists' Relief Act. We fail to see any force in this argument. In the Allahabad case also, the facts were similar in that the mortgage was made in 1920 and it was after making the mortgage that the judgment-debtor executed a wakf alalaulad of his property. Moreover the fact whether the wakf was made before or after borrowing money does not affect the definition of "agriculturist" contained in the Agriculturists' Relief Act. We therefore overrule the plea raised on this point on behalf of the applicant and hold that the learned Judge of the Court below was right in applying the provisions of the Agriculturists' Relief Act to the opposite party. The next objection of the learned counsel for the applicant is as to the rate of interest fixed by the Court below. He is in our opinion right in contending that the rate should be governed by S. 30 and Sch. 3 of the Act, but he is not right in saying that that rate should be 14 per cent. per annum simple. The value of X was reduced by Government from 4½ to 3½ with effect from 8th May 1935 and still further to 3¼ per cent. from 15th January 1936. As the decree was amended by the Court below on 1st February 1936, the value of X at that time was 3¼ per cent. As the debt was under Rs. 500 and was unsecured, the rate of interest according to Sch. 3 comes to X plus 9½, that is 12¾. We therefore hold that interest will run from the date of the debt to that of suit not at 10 per cent. per annum but at 12¾ per cent. per annum.

The next objection of the applicant is to the costs of the suit being made proportionate. This objection must also be accepted. It has been held in several cases, e. g. 1937 O W N 130,[3] that the Agriculturist's Relief Act does not authorize a Court to make any reduction in the amount of costs allowed under the original decree. We therefore set aside the order of the Court below making the costs of suit proportionate to the amount decreed.

The learned counsel for the applicant also objects to future interest on the decree being reduced from 6 per cent. to 3 per cent. per annum. In view of the Full Bench decision of this Court in 1937 O W N 550[4] future interest on decrees passed before the passing of the Act is governed by S. 30 and Sch. 3, Agriculturists' Relief Act, and not by S. 4 of the Act. In the present case the rate of future interest will remain as it was fixed in the original decree, namely 6 per cent. per annum. The last point urged was that the Court below should not have made the decretal amount payable in so large a number of instalments as twelve and that the date of the first instalment was unduly postponed by the Court below. With the first of these contentions we do not agree. It is not contended before us that Ch. 3 of the Act applies to the opposite party. Therefore under Proviso (1) to S. 3 (1), Agriculturists' Relief Act, instalments in the present case could have been fixed so as to extend up to fifteen years from the date of the decree and the learned Judge of the Court below was not wrong in making them extend over twelve years. We however think that the order fixing 3rd October 1937 as the date on which the first instalment was to be made was not just and proper. We make the first instalment due on 7th October 1938. The application is therefore partly allowed and the order of the Court below amending the decree modified in the light of the findings recorded above. In view of the success and failure of the parties we order them to bear their own costs.

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[1] Bhawani Shankar v. Mt. Khurshed Jahan, (1937) 24 A I R Oudh 369 = 170 I C 742 = 1937 O W N 740 (F B).

[2] Mohammad Mosa Khan v. Thakur Gopiji Maharaj, (1937) 24 A I R All 344 = 168 I C 955= I L R (1937) All 509=1937 A L J 178.

[3] Gauri Shankar v. Ganga Bakhsh Singh, (1937) 24 A I R Oudh 266=166 I C 288=1937 O W N 130=13 Luck 86.

K.S./R.K. *Application partly allowed.*

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[4] Jhamman Lal v. Surat Singh, (1937) 24 A I R Oudh 312=168 I C 318=1937 O W N 550 (F B).

## A. I. R. 1938 Oudh 186

ZIAUL HASAN AND YORKE JJ.

*Ram Dass — Defendant —* Appellant.
v.
*Chhedi Lal and others —*
*Plaintiffs —* Respondents.

Appeal No. 12 of 1937, Decided on 27th July 1938, against order of Nanavutty J., D/- 5th February 1937.

**(a) Civil P. C. (1908), S. 100—Question of fact—High Court has no jurisdiction to reverse lower Appellate Court's finding on question of ownership of property.**

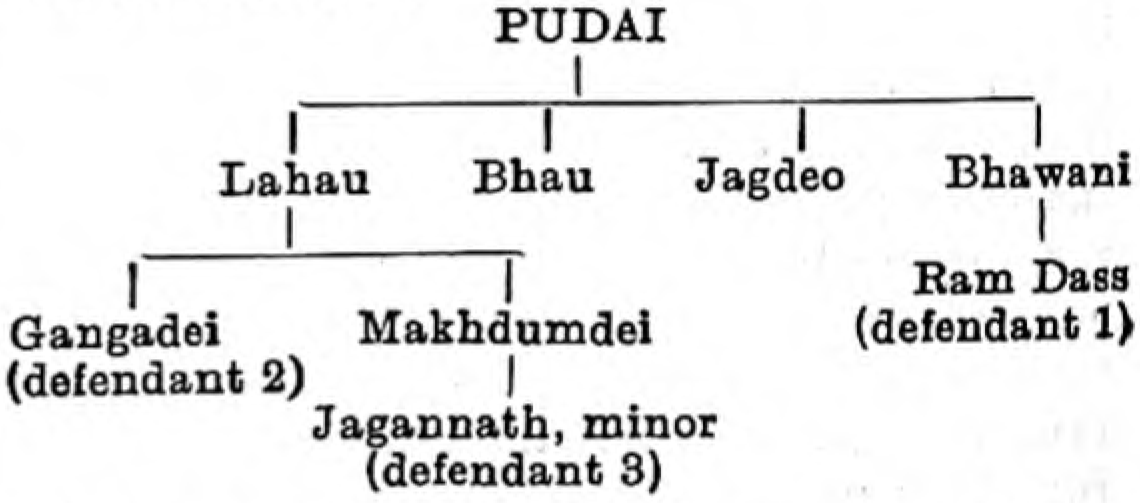
The question whether a house belongs to a certain person is a pure question of fact and as such it is not within the jurisdiction of the Judge hearing the second appeal to reverse the first Appellate Court's finding on that point, even if the finding is incorrect : *A I R 1930 P C 91 and A I R 1934 P C 112, Rel. on.* [P 187 C 2]

**(b) Oudh Courts Act (4 of 1925), S. 12 (2)—S. 4 of Limitation Act applies to application under S. 12 (2).**

The provisions of S. 4, Limitation Act, are quite general and apply to an application under Sec. 12 (2), Oudh Courts Act : *A I R 1928 Oudh 108, Disting.* [P 188 C 2]

H. Husain — *for Appellant.*

**Judgment.**—This is an appeal under S. 12 (2), Oudh Courts Act, against a decision of a Judge of this Court sitting singly. The suit of the plaintiff, who is respondent 1 before us, was for possession of a certain house on the allegation that he had purchased the house from Mt. Gangadei and Jagannath to whom the house had been gifted by the previous owner Lahau. The following pedigree will make the facts of the case clear :



The plaintiff claims to have purchased the house from Mt. Gangadei and Jagannath, who were defendants 2 and 3 respectively to the suit, on 11th September 1933, and Lahau was said to have made the gift of the house on 24th July 1926. The defence of defendant 1, who is the appellant before us, was that the house did not belong to Lahau but belongs to his father Pudai, that it was sold by auction by Court and was purchased by one Madan Chand who in his turn sold it to Beni, maternal uncle of the defendant.

The main questions for determination in the suit were whether the house originally belonged to Lahau or to Pudai and whether the plaintiff was owner of the house by virtue of his purchase. The trial Court held that the house belonged originally to Lahau and that the plaintiff was entitled to a decree on account of his purchase of the house from defendants 2 and 3 in whose favour the house had been gifted by Lahau. In appeal by defendant 1, the learned Civil Judge of Sultanpur reversed the trial Court's findings on all these points and held that the house belonged to Pudai, that the plaintiff failed to prove the sale deed in his favour and that the deed of gift said to have been executed by Lahau in favour of defendants 2 and 3 had not also been proved. In consequence of these findings the appeal was allowed by the learned Civil Judge and the plaintiff's suit dismissed.

The plaintiff filed a second appeal in this Court and a learned Judge of this Court by his judgment dated 5th February 1937, restored the findings of the trial Court and decreed the suit. Hence this appeal by defendant 1. It is argued before us that all the three findings of the first Appellate Court, namely that the deed of gift in favour of the plaintiff's vendors was not proved, that the sale set up by the plaintiff was also not proved and that the house belonged to Pudai and not to Lahau were findings of fact and that the learned Judge of the second Appellate Court had no jurisdiction to reverse those findings.

The finding of the first Appellate Court that the deed of gift, Ex. 2, was not proved was based on the grounds that, in the first place, neither was the original deed of gift produced nor its loss sufficiently made out so that no secondary evidence of the deed was admissible and, in the second place, that the deed was not properly attested as required by S. 123, T. P. Act. The plaintiff summoned the deed from Mt. Makhdumdei, guardian of Jagannath minor, one of the vendors, but she stated in Court that to her knowledge no deed of gift had been executed by Lahau. In these circumstances, the trial Court was of opinion that the plaintiff was entitled to produce a certified copy of the deed. In appeal the learned Civil Judge was however of opinion that the plaintiff should have summoned the deed from the other vendor before he could be entitled to produce secondary evidence of it. The learned Judge of this Court agreed with the view taken by the first Court and held that the certified copy of the deed produced by the plaintiff was legally admissible. The second ground of the learned Judge of the first Appellate Court was based on the facts that one of the attesting witnesses Fateh Mohammad did not appear either to have signed the deed of gift or to have put a mark on it by way of attestation, and that he did not state either that the deed was executed by Lahau in his presence or that Lahau acknowledged its execution before him. The learned Judge of this Court agreed with the view of the trial Court that the evidence of Fateh Mohammad and the other attesting witness Shambu Nath was sufficient to prove the deed of gift in question. As to the execution of the deed of sale in favour of the plaintiff one Jan Mohammad, a marginal witness of the deed, stated that the deed was executed by the ladies in his presence for a sum of Rs. 100 and that he signed the deed as a witness. The finding of the learned Judge of the first Appellate Court was based on the fact that the record of Jan Mohammad's evidence did not show that the deed in question was shown to him at the time that he deposed about it. On this point also, the learned Judge of this Court agreed with the Munsif that Jan Mohammad's evidence was sufficient to prove the sale deed.

We are not prepared to accept the contention of the learned counsel for the appellant that in the circumstances narrated above, the findings that the deeds of gift and sale had not been proved were questions of fact; but it appears to us that the finding on the third question, namely whether the house belonged to Lahau or his father Pudai was a pure question of fact and as such it was not within the jurisdiction of the learned Judge who heard the second appeal to reverse the first Appellate Court's finding on that point. It was held by their Lordships of the Judicial Committee in 57 I A 86[1] that there is no jurisdiction to entertain a second appeal on the ground of erroneous findings of fact however gross the error may seem to be. This decision was confirmed by their Lordships in 61 I A 163.[2] Both the lower Courts gave their reasons for their findings on the question whether the house belonged to Lahau or to Pudai, the first Court having relied mainly on the khasra numbers and the first Appellate Court on the boundaries of the house in suit. It cannot therefore in the circumstances be said that the finding of the first Appellate Court on the question of ownership of the house was incorrect but even if it was incorrect, this Court had no jurisdiction according to the pronouncements of their Lordships of the Judicial Committee just referred to, to reverse that finding. We therefore allow this appeal with costs, set aside the decree of the learned Judge of this Court and restore that of the first Appellate Court.

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[1] **Wali Mohammad v. Mohammad Bakhsh, (1930) 17 A I R P C 91=122 I C 316=11 Lah 199=57 I A 86 (P C).**

[2] **Secretary of State v. Rameshwaram Devasthanam, (1934) 21 A I R P C 112=148 I C 778=57 Mad 652=61 I A 163 (P C).**

**Further Judgment.** — This appeal was heard on 25th July and judgment pronounced on the same date. The typed copy of the judgment was ready yesterday, but before it was signed by us, the learned counsel for the respondent asked us to give him time to show that the application under Sec. 12 (2), Oudh Courts Act, was time-barred. We allowed his prayer and heard him and the learned counsel for the appellant on the question of limitation.

The facts are that the judgment appealed from was pronounced by the learned Judge of this Court on 5th February 1937. Under Ch. 12, R. 7 of the Rules of this Court, an application under S. 12, sub-s. 2 has to be presented to the Registrar within 30 days from the date of the judgment unless the Judge in his discretion, on good cause shown, grants further time for its presentation. In the present case limitation under this rule expired on 7th March 1937, but that day was a Sunday. The application was presented to the Registrar on 8th March 1937 and it appears to have been put up before the learned Judge concerned on the next day. On that date the application was granted. The learned counsel for the respondent argues that the application was presented a day beyond time but we are of opinion that having regard to the provisions of S. 4, Limitation Act, the application could be presented on 8th March 1937 as 7th March was a Sunday. In fact, the office made a report that the application was within time up to 8th March 1937, and this report appears to us to have been based on the provisions of S. 4, Limitation Act. The learned counsel for the respondent argues that the provisions of the Limitation Act do not apply to the present case and relies on the case in 4 O W N 1173,[3] but we find nothing in that decision to support the contention of the learned counsel. All that was decided in that case was that the limitation prescribed by Ch. 12, R. 7 of the Chief Court Rules must be complied with. The decision does not consider whether or not the provisions of S. 4, Limitation Act, are applicable to an application under Sec. 12 (2), Oudh Courts Act. Sec. 4 lays down that where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens. It will therefore be seen that the provisions of this Section are quite general and we see no reason why they should not apply to an application like the present one.

The learned Judge against whose judgment the present appeal was filed is no longer a Judge of this Court, but considering the circumstances in which the application was presented a day beyond time, it seems to us that if he were in the Court, he would have exercised his discretion under Rule 7 referred to above in favour of the appellant. We therefore overrule the objection of the learned counsel for the respondent and hold that the appellant's application under Sec. 12 (2), Oudh Courts Act, was within time.

N.S.D./R.K. *Appeal allowed.*

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## * A. I. R. 1938 Oudh 188

THOMAS C. J. AND ZIAUL HASAN J.

*Radha Rawan Prasad* — Appellant.

v.

*Rajendra Prasad and others* — Respondents.

Execution of Decree Appeal No. 38 of 1935, Decided on 8th August 1938, against order of Sub-Judge, Gonda, D/- 25th March 1935.

**(a) Civil P. C. (1908), S. 47 — Fraud — Whether Court sale is vitiated by fraud is question falling under S. 47.**

The question whether a sale in execution of a decree is brought about by fraud is a question relating to execution, discharge or satisfaction of a decree within the meaning of S. 47 : *19 Cal 683 (P C) ; A I R 1931 All 320 and 27 All 702, Rel. on.* [P 189 C 2 : P 190 C 1]

*** (b) Minor—Suit against—Fraud — Attainment of majority during suit or execution proceedings — Minor must notify that to Court —Plaintiff or decree-holder not bound to do so — Failure on their part does not constitute fraud.**

The minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If however he does not do so and allows the case to proceed as though he was still a minor without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time. It is absurd to say that the plaintiff in a suit or the Court should give notice to him that he had become major, a fact which he must know. It is for the minor to inform the Court that he has come of age, and the failure of the plaintiffs or decree-holders to notify the fact to the Court does not constitute fraud on their part : *A I R 1928 Mad 294; A I R 1917 Mad 318 and A I R 1928 Lah 371, Rel. on.* [P 190 C 1]

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[3] Mt. Braj Rani v. Sibta Din, (1928) 15 A I R Oudh 108=106 I C 496=3 Luck 145=4 O W N 1173.

Haider Husain and Bhawani Shankar— *for Appellant.*

Kashi Prasad Srivastava — *for Respondents 1, 2, 10 and 12.*

*Respondent 11* in person.

**Judgment.** — This is an execution of decree appeal against an order of the learned Civil Judge of Gonda rejecting the appellant's objections brought under S. 47, Civil P. C. It appears that the appellant's father Lachman Prasad executed a bond in favour of Natha Mal, predecessor-in-interest of respondent 12, on 28th May 1912 and died in 1914 leaving the appellant as his heir. On 27th July 1918, Natha Mal obtained a money decree against the appellant on foot of that bond. The appellant was admittedly a minor at the time of the suit and owing to the refusal of the proposed guardian to act, the central nazir of of the Gonda Judgeship was eventually appointed the guardian ad litem of the minor defendant. Various applications for execution were put in by the decree-holder before the present application was filed on 1st February 1930. In this application also, the appellant was shown a minor under the guardianship of the central nazir. As the property sought to be sold in execution of the decree was ancestral, the decree was transferred to the Collector on 14th April 1931. The property was sold on 25th March 1933 but owing to various circumstances, including a declaratory suit by the son of the appellant, the sale could not be confirmed till 3rd February 1935. On 15th January 1935, the appellant brought the objections which were disposed of by the lower Court by its order dated 25th March 1935, namely the order under appeal before us. That order is very short and is as follows:

> This is an objection by the judgment-debtor. The objections in paras. 5 to 9 relate to irregularities about sale which were admittedly made by the sale officer to whom the decree was transferred. The objections clearly do not lie to this Court, which has no jurisdiction to make or confirm the sale.
>
> I reject these objections mentioned in paras. 5 to 9. The objection in para. 10 is also frivolous and absolutely untenable. There is no other objection. The application is rejected as absolutely misconceived and not maintainable with costs of the other side.

It is contended on behalf of the appellant that the learned Civil Judge was in error in throwing out the appellant's objections on the ground that he had no jurisdiction in the matter or that the objections were not maintainable. The petition of objections is a rather lengthy document. Paras. 1 to 4 deal with the history of the case and the rest allege some irregularities in conducting and publishing the sale and also attribute fraud to the decree-holders. It is conceded before us that so far as the objections related to irregularities in conducting and publishing the sale they were cognizable by the Collector only. It is contended however that the question of fraud should have been gone into and decided by the Court below. The learned counsel for the respondent on the other hand argues that once a decree is transferred to the Collector, the Civil Court which transferred the decree has no jurisdiction left in it in the case. We are of opinion that the contention put forward on behalf of the appellant is well-founded. In 27 All 702,[1] it was held that an application to set aside on the ground of fraud a sale held in execution of a decree could be made under S. 244 (corresponding to present S. 47), Civil P. C., and that it could be brought even after the sale had been confirmed. Similarly in 1931 A L J 166[2] it was held at page 170:

> Section 68, Civil P. C., does not use language which supports this allegation of the appellant; that Section merely states that the execution of the decree shall be transferred to the Collector. It does not state that the Collector shall become the Court executing the decree. We consider that the Court executing the decree remains the Court which sends the decree for execution to the Collector and that the powers conferred by the Civil Procedure Code on the Court executing the decree remain with that Court and do not pass to the Collector.

In 19 I A 166[3] a suit had been brought for setting aside a sale on the ground that the sale was brought about by fraud and collusion on the part of the other co-sharers, the judgment-creditor and the auction-purchasers, and their Lordships of the Judicial Committee upheld the finding of the Indian Courts that the suit was expressly barred by S. 244, Civil P. C. This means that the question that a sale in execution of a decree was brought about by fraud was considered to be a question relating to execution, discharge or satisfaction of a decree within the meaning of S. 244 of the old Civil Procedure Code, corresponding to S. 47 of the present Code. We are therefore of opinion that the learned Judge of the Court below was wrong in thinking that he had no jurisdiction to entertain the appellant's objections. On this finding we would have remanded the case to the Court below for trial, but for the fact that we do not think that any fraud was made out by the appellant. The allegations in regard to fraud are contained in para. 7 of the appellant's objections which is as follows :

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[1] Wahid-un-Nissa v. Girdhari, (1905) 27 All 702 =2 A L J 469=1905 A W N 162.

[2] Marahmat Husain v. Oudh Commercial Bank Ltd., (1931) 18 A I R All 320=133 I C 609 = 1931 A L J 166.

[3] Prosunno Coomar Sanyal v. Kasi Das Sanyal, (1892) 19 Cal 683=19 I A 166=6 Sar 209 (P C).

> That the applicant had attained majority during the execution proceedings and the execution proceedings were going on and the auction-sale had not taken place. But the decree-holders on account of cunningness concealed this fact of the attainment of majority of the applicant from the Court. The applicant had been living at Bombay for a long time and the decree-holders knew of it, but the decree-holders did not allow to reach any information to the applicant about the execution as well as of the execution proceedings, nor did the applicant come to know of the fraudulent proceedings of the opposite parties and at last opposite party 2, who is the brother of opposite party 1, purchased the property entered in the list for Rs. 17,000 in the name of opposite party 1, but the sale has not been confirmed yet.

It all comes to this, that though the appellant-judgment-debtor attained majority in the course of execution proceedings, the decree-holders took no steps to inform the Court that he had become a major and continued to prosecute their application for execution against him as a minor. The appellant no doubt appears to have attained majority in the year 1932, but we consider that it was for him to inform the Court that he had come of age, and the failure of the decree-holders to notify the fact to the Court does not constitute fraud on their part. In 51 Mad 763[4] their Lordships of the Madras High Court referring to an earlier case of their Court, namely 39 Mad 1031,[5] remarked :

> In that case the learned Judges have clearly pointed out that there are no provisions in the Civil Procedure Code relating to suits by and against minors obliging a plaintiff to apply for discharge of the guardian ad litem of a defendant who had ceased to be a minor. There are provisions in the Procedure Code for a minor plaintiff on attaining majority electing to go on or not to go on with a litigation. That is obviously in view of the fact that the plaintiff is in a position to elect either to go on or not to go on with a litigation to which he is a party because he is *dominus litis*. No such consideration is available in respect of the defendant. A defendant having been made a party defendant to the action may no doubt confess judgment but has no such right to election as the plaintiff has. That is probably the reason why no provisions have been made in the Procedure Code in respect of a minor defendant attaining majority. Apparently therefore we must take it, as found by the learned Judge in that case, that the minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If however he does not do so and allows the case to proceed as though he was still a minor without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time.

Similarly in A I R 1928 Lah 371[6] it was observed :

> Rules 12 and 13, Order 32, Civil P. C., lay down the course that a plaintiff may follow on attaining majority, but there is no corresponding rule relating to a defendant who should become major during the pendency of a suit. The reason for this omission obviously is that while a plaintiff on becoming major can put an end to the litigation, a defendant on attaining majority cannot do so and the case must proceed. He has notice of the case already and so no further notice of it need be given to him. It is absurd to say that the plaintiff or the Court should give notice to him that he had become major, a fact which he must know. If he should fail to take any action on attaining majority, the presumption is that he chose to allow the case to be conducted by his quondam guardian or by the counsel that was engaged by that guardian. It cannot in these circumstances be said that the Court had no jurisdiction to proceed with the case or that the decree passed by it was a nullity.

Owing to the view that we take on the question of fraud, it would be useless to send back the case to the Court below. We therefore dismiss the appeal with costs.

B.D./R.K. *Appeal dismissed.*

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[4] Sanyasi v. Lakshman Naidu, (1928) 15 A I R Mad 294 = 118 I C 294 = 51 Mad 763 = 55 M L J 374.

[5] Seshagiri Rao v. Hanumantha Rao, (1917) 4 A I R Mad 318=32 I C 391=39 Mad 1031.

[6] Umra v. Barkat Ali, (1928) 15 A I R Lah 371 =110 I C 725.

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## A. I. R. 1938 Oudh 190

ZIAUL HASAN AND YORKE JJ.

*Chhatarpal Singh* — *Defendant* — Appellant.

v.

*Sant Bakhsh Singh and others* — *Plaintiffs*—Respondents.

Second Appeal No. 34 of 1936, Decided on 29th July 1938, against order of Dist. Judge, Gonda, D/- 19th December 1935.

**Hindu Law — Family settlement — Compromise for benefit of all and to avoid litigation —**

**Compromise held binding on all parties and did not offend against S. 6 (a), T. P. Act.**

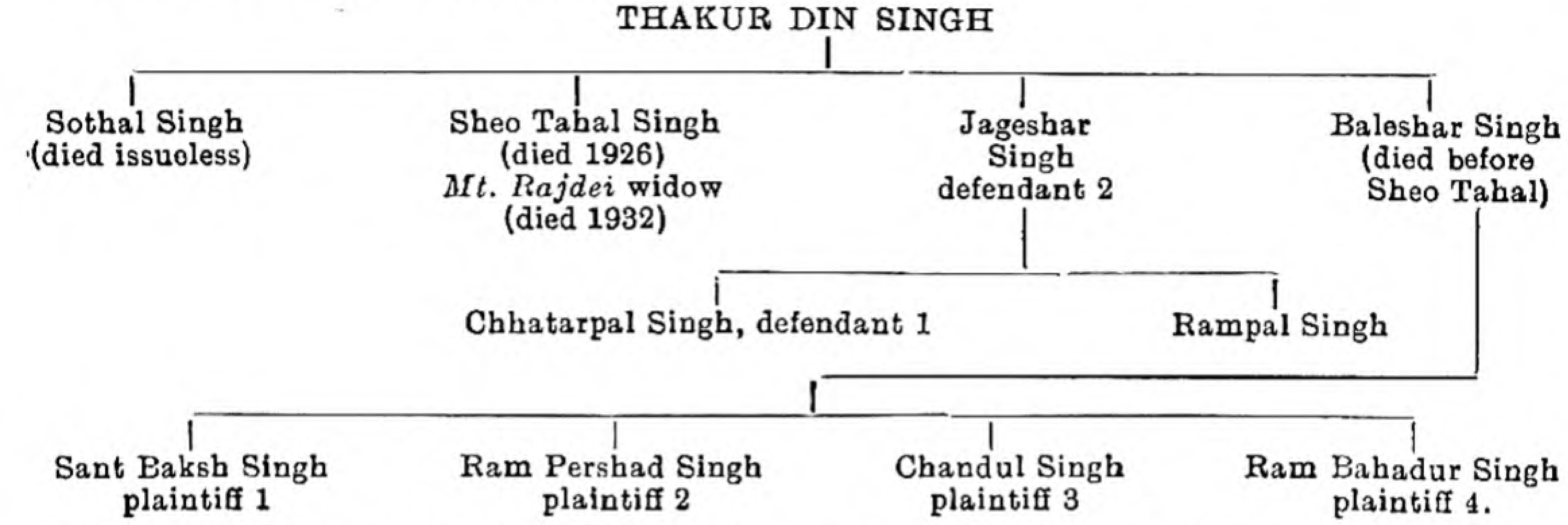
A compromise between members of a joint family was for the benefit of all the parties thereto and was meant to put a stop to further litigation between the family :

*Held* the compromise was valid as a family settlement and did not attract the operation of Sec. 6 (a), T. P. Act : *A I R 1919 All 371 ; 31 Mad 474 and A I R 1921 Oudh 105, Rel. on.* [P 192 C 2]

H. Husain — *for Appellant.*

Bishna Prasad—*for Respondents 1 to 4.*

**Judgment.** — These are two appeals against decisions of the learned District Judge of Gonda in cross-appeals by the parties against a judgment and decree of the learned Civil Judge of that place. The suit which has given rise to these appeals was brought by the plaintiffs-respondents for possession of property left by Sheo Tahal Singh whose relationship with the parties will appear from the following pedigree :



Sheo Tahal Singh died in 1926 leaving his widow Mt. Rajdei, a brother Jageshar Singh, defendant 2, and another brother's sons, plaintiffs 1 to 4. On 4th January 1928, Mt. Rajdei made a will in favour of the present plaintiffs in respect of the property left by her husband. On 15th February 1928 Jageshar Singh brought a suit for possession of the property against Mt. Rajdei and the present plaintiffs alleging that Sheo Tahal Singh was a member of a joint family with him and the present plaintiffs and that therefore he and defendants 2 to 5 (the present plaintiffs) were entitled to possession of the property as survivors against Mt. Rajdei. The present plaintiffs denied that Sheo Tahal Singh was a member of a joint family with Jageshar Singh and themselves and alleged that he was separate. On 12th February 1929 the parties to this suit entered into a compromise (which is Ex. 1 on the record) by which Mt. Rajdei's possession of the property was maintained for her life and it was agreed that after her death a ten-annas share of the property would be taken by Jageshar Singh and the remaining six-annas would go to the present plaintiff. Jageshar Singh was also given immediate possession over thirty bighas of land. The Court passed a decree in terms of this compromise. Mt. Rajdei died in 1932 and there was litigation in the Revenue Courts in regard to mutation. The present defendant-appellant, Chhatarpal Singh, son of Jageshar Singh, claimed the property alleging himself to be the adopted son of Sheo Tahal Singh and mutation was ordered in his favour on the basis of possession. On 13th October 1934, the plaintiffs-respondents brought the present suit for possession of a six-annas share in pursuance of the compromise of 1929. Jageshar Singh, defendant 2, did not contest the suit but the present appellant, Chhatarpal Singh, contested it on grounds on which the following issues were framed by the trial Court :

1. Is defendant 1 the adopted son of Sheo Tahal Singh as alleged by him?

2. Was Sheo Tahal Singh owner of the properties in suit?

3. Are the plaintiffs owners of six-annas share in the property in dispute under the compromise Ex. 1? Is the compromise valid and binding on defendant 1.

4. Was there any family settlement in respect of the property in dispute between the plaintiffs or defendant 1 as alleged in para. 19 of their written statement? If so, its effect?

The learned Civil Judge held that the adoption of Chhatarpal Singh by Sheo Tahal Singh was not proved and that the compromise of 1929 was a family settlement and was binding on Chhatarpal Singh. On these findings, the suit of the plaintiffs was decreed for possession of a six-annas share in items 1 to 5, 7, 9, 10 and 11 of the list attached to the plaint. The rest of the claim was dismissed. Against this decree both parties appealed to the District Judge who dismissed the defendants' appeal (Number 85 of 1935) and partly decreed the plaintiffs' appeal (No. 98 of 1935) about the dismissed portion of the suit. The present Appeal No. 34 of 1936 has been brought against the dismissal of the defendants first appeal and Appeal No. 35 against the decision partly decreeing the plaintiffs' Appeal No. 98. At the outset of his arguments the learned counsel for the appellant stated that he did not want to press his Appeal No. 35 of 1936, and that though the memorandum of Appeal No. 34 of 1936 included a ground challenging the lower Court's finding on the question of Chhatarpal Singh's adoption, he could not attack that finding also as it was a finding of fact. The only question therefore that remains to be decided in Appeal No. 34 is whether the compromise of 1929 was a family settlement and the plaintiffs-respondents are entitled to the share claimed on the strength of that compromise. We are of opinion that the learned District Judge was perfectly right in holding that the compromise was of the nature of a family settlement and as such binding on Chhatarpal Singh. In Halsbury's Laws of England, Vol. 15, p. 2 a family arrangement is defined as

> a transaction between the members of the same family which is for the benefit of the family generally as for example one which tends to the preservation of the family property to the peace or security of the family and the avoiding of family disputes and litigation or to the saving of the honour of the family.

We have seen that the plaintiffs-respondents had obtained a will in their favour in respect of the entire property from Mt. Rajdei. Jageshar Singh was trying to oust the widow Rajdei and to obtain the property for himself and the present plaintiffs by alleging that Sheo Tahal Singh was a member of a joint Hindu family with him and the plaintiffs. The plaintiffs were supporting the widow in the allegation that Sheo Tahal Singh was a separated Hindu. In these circumstances, it is clear that there was almost a certainty of protracted litigation ensuing among the members of the family and it was with a view to avoid future litigation that the compromise of 1929 was entered into by which each of the three parties to it, namely the widow Mt. Rajdei, Jageshar Singh and the plaintiffs, were benefited. The widow remained in possession of the property for her life, Jageshar Singh obtained immediate possession of thirty bighas of *sir* land and plaintiffs became entitled to a six-annas share in the property in which they could have no share in the presence of Jageshar Singh if, as was their own case, Sheo Tahal Singh had died as a separated Hindu. The compromise was thus to the benefit of all the parties thereto and was meant to put a stop to further litigation. It was argued by the learned counsel for the appellant that the compromise in question was invalid as it offended against the provisions of S. 6 (a), T. P. Act, but as we have held that the compromise in question was a family arrangement, S. 6 (a), T. P. Act, has no application. In 41 All 611[1] Walsh J., referring with approval to the Madras case in 31 Mad 474,[2] remarked at page 617 of the report :

> It was there held that a compromise cannot be impeached between the parties to it on the sole ground that the party whose right is admitted by the compromise had in fact no such right; that a compromise for valuable consideration cannot be repudiated unless it is shown to be illegal or void; and that an admission does not affect a transfer or fall within S. 6 (a), T. P. Act, as a transfer of mere spes successionis. As was said in an old English case, 2 Sc. & Lf. 68[3], it only amounts to this : I give you so much for not seeking to disturb me.

In this province also a similar family arrangement was upheld in 24 O C 151[4] and it was said :

> And such agreement is valid and binding not as an assignment or relinquishment of the rights in expectancy but as a settlement by which the parties defined their respective interests, for the sake of avoiding future trouble and dispute.

The appeal in our opinion has no force and both the appeals are dismissed with costs.

B.D./R.K. *Appeals dismissed.*

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1. Chabli v. Parmal, (1919) 6 A I R All 371=51 I C 919=41 All 611=17 A L J 822.
2. Olati Pulliah Chhetti v. Varadarajulu Chetti, (1908) 31 Mad 474=18 M L J 469.
3. Underwood v. Lord Courtown, 2 Sc. & Lf. 68.
4. Wazan Singh v. Ratan Singh, (1921) 8 A I R Oudh 105=61 I C 940=24 O C 151.

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## A. I. R. 1938 Oudh 192

HAMILTON AND YORKE JJ.

*Nisar Khan — Defendant* — Applicant.

v.

*Abdul Hameed Khan and others — Plaintiffs* — Opposite Party.

Civil Revn. Appln. No. 11 of 1937, Decided on 19th July 1938, from order of Munsif, Lucknow, D/- 27th November 1936.

**U. P. Encumbered Estates Act (25 of 1934), S. 7 (1) (a)—Suit for declaration of ownership of certain property or for declaration that certain document is not binding—Suit held not in respect of public or private debt.**

A suit for a declaration in regard to the ownership of certain property or for a declaration that a certain document has no effect and does not affect the rights of the person suing in respect of that property, is not a suit in respect of any public or private debt: *A I R 1937 All 303 and A I R 1938 All 165, Disting.; A I R 1938 All 8 and A I R 1937 Oudh 25, Ref.* [P 193 C 2; P 195 C 2]

Radha Krishna and Ganesh Pershad — *for Applicant.*

D. K. Seth — *for Opposite Party.*

**Order.** — This is an application in revision under S. 115, Civil P. C., from an order of the Munsif of Lucknow refusing to stay a suit under the provisions of S. 7, Encumbered Estates Act, on the view that the proceedings are not in respect of any public or private debt and therefore that Section has no application. On 1st August 1931, Sikandar Khan, father of the defendant-applicant Nisar Khan, executed a pronote in favour of one Abdul Hamid for Rs. 430. A decree was passed on foot of the pronote on 19th April 1933, and on 15th December 1933, after this decree had been transferred to the Court of the Munsif Havali, an application was made for its execution. In the year 1935, while this execution proceeding was pending, Sikandar Khan died, and the executing Court ordered the proceedings to be consigned to records. Thereafter on 10th February 1936, Nisar Khan executed a deed of gift of certain property in favour of defendants 2 to 5, of whom defendant 2 is his own wife. On 9th May 1936, the decree-holders got the name of Nisar Khan substituted for that of Sikandar Khan as judgment-debtor. This they followed up by instituting, on 23rd July 1936, the suit which the learned Munsif has declined to stay under the provisions of S. 7, Encumbered Estates Act. This is a suit purporting to be a representative suit under S. 53, T. P. Act, in which Nisar Khan, the present applicant, and the donees were defendants, for a declaration that the deed of gift dated 10th February 1936 executed by Nisar Khan is "fictitious and showy and is void and ineffective".

After the institution of this suit, Nisar Khan made on 29th October 1936 an application to the Collector under S. 4, Encumbered Estates Act, and on 2nd November 1936 the Collector passed an order under S. 6 of the said Act transmitting the application to the Special Judge for disposal. Thereafter the defendants' counsel filed before the Munsif the certificate obtained by Nisar Khan under S. 6, and prayed that the proceedings in the suit should be stayed. That prayer was opposed and it was contended that the proceedings in the case were not in respect of any public or private debt. The learned Munsif on 27th November 1936 accepted that contention and declined to stay the proceedings. On the matter coming up in due course before this Court, the learned Chief Judge noted on 14th September 1937:

> I am not free from doubt as regards the application of S. 7 to the case. I think that the question whether a suit under S. 53, T. P. Act, can be regarded as a proceeding in respect of a public or private debt within the meaning of S. 7 (1) (a), U. P. Encumbered Estates Act, is sufficiently important to be decided by a Bench of two Judges.

This application in revision has therefore now come before us for consideration of this question. Learned counsel for the applicant has taken us through the provisions of Ss. 7 to 14, Encumbered Estates Act, and has sought to establish two propositions, first that the provision in S. 7 (1) (a) is strictly applicable to a case of this kind, and secondly that even if not apparently so applicable, it must by reading it with Ss. 10, 11 and 12 be interpreted as applicable. The relevant portion of S. 7 runs as follows:

> When the Collector has passed an order under S. 6 the following consequences shall ensue: (a) all proceedings pending at the date of the said order in any Civil or Revenue Court in the United Provinces in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered . . . . shall be stayed.

Prima facie, of course, a suit for a declaration in regard to the ownership of certain property, in this case for a declaration that a certain document has no effect and does not affect the rights of the plaintiffs in respect of that property, is not a suit in respect of any public or private debt. The suit, if decreed in favour of the plaintiffs, will have a material effect on the property available to meet a private debt, but that stage has not been reached yet and will not be reached for a considerable time to come.

The second line of argument is based on the provisions of Ss. 10, 11 and 12 of the Act. Ch. 4 relates to proof of debts and procedure of the Special Judge. Under S. 8

he calls for a written statement from the applicant under the Act. Under S. 9 he publishes certain notices calling upon creditors to make claims. S. 10 requires every claimant to give full particulars of his claim and (what is more important so far as the present case is concerned) to state so far as they are known to or can be ascertained by him, the nature and extent of the landlord's (that is the applicant's) proprietary rights in land and the nature and extent, if any, of the landlord's property other than proprietary rights in land. S. 11 provides for publication of a notice specifying the property mentioned by the applicant under S. 8 or by any claimant under S. 10. It further provides that any person having any claim to the property mentioned in the notice shall, within a period of three months from the date of the publication of the notice in the Gazette, make an application to the Special Judge stating his claim and the Special Judge shall determine whether the property specified in the claim, or any part thereof, is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. The Special Judge is to determine all claims made under this Section before he proceeds to determine the amount due to any creditor under S. 14 and shall not pass any decree under the latter Section until the expiry of a period of one month after the last day on which he determines a claim under this Section. Sec. 12, which contains provisions analogous to those of S. 53, Provincial Insolvency Act, provides that :

> Any transfer of property made by a landlord or other person on his behalf between the day on which Ch. 1 of this Act comes into force and the day on which he applies under S. 4, not being a transfer made before and in consideration of marriage or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration, may be annulled at the instance of any creditor, if the Special Judge finds that such transfer was made with a view to deprive the landlord's creditors of their rights under this Act.

It will be seen from the above references to the specific Sections that the Encumbered Estates Act provides not only for an investigation of the debts due by the landlord applicant under the Act but also for an investigation of the property available to meet the debts of the said applicant and even provides for the annulment by the Special Judge of a transfer strictly comparable to the transfer which is attacked by the plaintiffs in the present suit. The effect is that the Special Judge would have concurrent jurisdiction with the Munsif for the decision of this particular question as between the creditors and the debtor Nisar Khan. In these circumstances it is contended that if this suit is allowed to go on and S. 7 is not held to be applicable, there may be a clash between the decree in this suit and the decision which the Special Judge is expressly given the power to arrive at. It is further contended that the Special Judge has special and exclusive jurisdiction and that this Court should not permit the present suit to go on at the risk of a clash such as is suggested above.

Now as regards this second contention we are of opinion that this is a point which can yet be raised in the Court of the Munsif and that we should not forestall the decision of the Munsif on that point. The only question which we have really to decide is whether these proceedings are or are not proceedings in respect of any public or private debt. The contention for the applicant is that because this is a proceeding relating to property sought to be made available to satisfy a debt, it is therefore a proceeding in respect of a debt, and in support of this contention it is urged that the suit itself rests on the foundation that the plaintiffs are creditors, and therefore it is ultimately a suit in respect of a debt. Learned counsel has not been able to refer to any very apposite rulings. He has quoted a ruling reported in 1937 R D 114[1] relating to some apparent conflict between the Encumbered Estates Act and the Provincial Insolvency Act, but that has clearly no bearing on the present case. It was a case relating to S. 48, Encumbered Estates Act, and not to Sec. 7. He has also referred to another Allahabad ruling reported in I L R 1938 All 246.[2] In that case it was held that a suit for ejectment on the ground that a forfeiture had been incurred by reason of the non-payment of the house rent so that the lessor had become entitled to eject his lessee in spite of the fact that the term fixed for the tenancy had not yet expired, was a suit "in respect of" the arrears of rent which must be held to be within the meaning of the word "debt" as defined in the Act. We think it would be stretching the language of the Section a very long way indeed to hold that a suit for declaration that a certain document was void and ineffective was at all on all fours with a suit for ejectment on the ground of non-payment of rent. The only other ruling which we have been able to trace having any bearing on this point is the case in 1937 A L J 945,[3] where it was held that :

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[1] Brij Kishore v. Purshotam Das, (1937) 24 A I R All 303=169 I C 220=I L R (1937) All 505=1937 A L J 158=1937 R D 114.

[2] Mukat Bihari Lal v. Manmohan Lal, (1938) 25 A I R All 165=174 I C 304=I L R (1938) All 246=1938 A L J 103.

> Section 7 (1) (b), Encumbered Estates Act, (which provides that no fresh suit or other proceedings other than an appeal or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided, be instituted in any Civil or Revenue Court in the United Provinces in respect of any debts incurred before the passing of the said order) is confined in its operation to suits 'in respect of any debts incurred before the passing of the order by the Collector under S. 6 of the said Act,' and has no application to suits for possession of immovable property.

On behalf of the opposite party, some reliance was placed on a case reported in 1936 O W N 877[4] where it was held by a Bench of this Court that :

> Proceedings pending before a District Registrar for the compulsory registration of a sale-deed of his entire property executed by a person, who refuses to get the sale-deed registered, cannot be regarded as a proceeding in respect of any public or private debt to which the transferor is subject, or with which his immovable property is encumbered, even though the sale-deed purports to have been executed for the payment of certain debts. Consequently, if the transferor soon after the alleged execution of the sale-deed institutes proceedings under the U. P. Encumbered Estates Act, he is not entitled to obtain an order under Sec. 7 (1) (a), U. P. Encumbered Estates Act, for stay of proceedings for compulsory registration of the sale-deed.

In that case it was argued that the sale deed in question purported to have been executed for payment of certain debts, and it was said that

> even so, we do not think that the proceedings for the registration of the sale-deed can be regarded as a proceeding in respect of a debt such as is contemplated by Section 7.

The learned Judges went on to say :

> Of course, the creditors of the applicant can have the sale-deed annulled if the conditions laid down in Sec. 12 of the Act are satisfied.

They went on to point out that the provisions of S. 12 related to annulment only at the instance of the creditor, whereas the application before them was at the instance of the transferor debtor. In our opinion it would involve stretching the language of S. 7 considerably further than is justifiable and might lead to unforeseen complications to hold that the words "proceedings pending in any Civil or Revenue Court in respect of any public or private debt" mean and include all proceedings which can have any ultimate bearing not merely on any public or private debt but on the property to be available to meet the same. We would accordingly hold that the learned Munsif has rightly declined to stay the proceedings before him by the application of that Section. The present application therefore fails and is dismissed with costs.

It may be that the suit for declaration instituted by the plaintiffs is open to objections on other grounds and that the declaration, even if granted by the Court, may turn out to be of no use to the plaintiffs, but those are questions into which it is not necessary for us to enter at this stage.

B.D./R.K. *Application dismissed.*

## * A. I. R. 1938 Oudh 195

HAMILTON J.

*Abdul Sattar and others*—Applicants.

v.

*Emperor.*

Criminal Revn. No. 31 of 1938, Decided on 11th May 1938, from order of Sessions Judge, Fyzabad, D/- 7th December 1937.

**(a) Criminal Trial—Security bond — Forfeiture of—Accused bound over to keep peace committing offence under S. 323, Penal Code —Bond held could be forfeited.**

Offence under S. 323, Penal Code, is a breach of the peace and entitles the Magistrate to forfeit the bonds and the sureties if the accused were bound over to keep peace and security bonds were executed. [P 196 C 2]

*** (b) Criminal P. C. (1898), S. 120—Appeal against order requiring security — Time runs from date of appellate order.**

Where persons, against whom the order to give security is passed, for their own advantage make an application that the order for bonds and sureties be stayed until the decision of the appeal, the time from which the period runs is the date of the order of the Appellate Court : *A I R 1934 All 845, Applied.* [P 197 C 1]

**(c) Criminal Trial—Security bond—Liability of surety is similar to civil liability.**

The liabilities of the sureties under the Code of Criminal Procedure are not different from those of sureties under the civil law : *36 Cal 562, Dissent.* [P 197 C 2]

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[3] Champa Devi v. Asa Devi, (1938) 25 A I R All 8=172 I C 956=I L R (1938) All 71= 1937 A L J 945.

[4] Sitla Bakhsh Singh v. Balchand, (1937) 24 A I R Oudh 25=165 I C 129=12 Luck 655= 1936 O W N 877.

**(d) Criminal Trial—Security bond — Forfeiture of—Principal or any surety is liable only to the extent of bond and not more.**

In forfeiting a security, the principal can be called upon to pay the sum for which he is bound over and any one of the sureties can also be called upon to pay the same amount, but if any one is called upon to pay the whole amount any other on that bond, be he principal or surety, cannot be ordered to pay anything more: *32 Bom 449, Dissent.* [P 198 C 2]

**(e) Criminal Trial—Security bond — Forfeiture—Liability of surety—Accused bound over to keep peace committing offence under Sec. 323, Penal Code—Surety not being able to prevent such offence—Entire bond should not be forfeited.**

Accused were bound over to keep peace. Security bonds for Rs. 200 were also executed by them and their sureties. Afterwards, however, the accused committed a breach of peace by committing a petty offence under S. 323, Penal Code, making the bonds liable to forfeiture. In trying to forfeit the bonds the sureties pleaded that the entire money should not be forfeited:

*Held* the position of a surety was not that of a principal in this respect. The principal could make himself keep the peace but the surety could only do his best to make the principal keep the peace and it is difficult to see how any of the sureties could have succeeded in preventing the principals from committing the offence. Therefore the sureties ought not to be made to lose the full amount for which they have made themselves liable. [P 199 C 1]

J. A. Abbasi — *for Applicant.*

Asst. Govt. Advocate—*for the Crown.*

**Order.**—This is an application in revision in the following circumstances: According to the judgment of the original Court, three persons, Mohammad Ali, Nurey and Balli, were ordered to execute bonds of Rs. 200 with two sureties each, each in a sum of Rs. 100, to keep the peace for a period of one year, Abdul Sattar standing surety for all three principals, Sirajuddin for two and Hashmat Shah for one. The sureties are the applicants in revision, but on an examination of the bonds, I find that the learned Magistrate has made a mistake. I have found on the record three surety bonds, Exs. 1, 2 and 3, and I find that Sirajuddin and Abdul Sattar were sureties in each, while Hashmat Shah was in none of them. He did put in an application to stand surety for Balli and it was sent to the Tahsildar for verification and then the Magistrate passed an order that was accepted but no surety bond was executed by Hashmat Shah. There being no bond executed by him, I find that he cannot be made to pay anything. The principals committed an offence under S. 323, Penal Code, and therefore the Magistrate ordered them to forfeit their bonds of Rs. 200 and Abdul Sattar, Sirajuddin and Hashmat Shah as sureties were ordered to pay Rs. 300, 200 and Rs. 100 respectively, that is to say, the whole sum which the Magistrate thought was payable by the principals and sureties was ordered to be paid up. An appeal was filed in the Court of the District Magistrate and revision in the Court of the Sessions Judge and both failed.

It is now argued in this application in revision that the offence under S. 323 committed by the principals did not entitle the Magistrate to forfeit the bonds and sureties, secondly that the offence was not committed within the period of one year for which the bonds were taken and thirdly that not more than Rs. 200 could be forfeited as regards each bond though it was admitted that that amount could be realized from the principals or either of the sureties. As regards the first point raised I think that the offence under S. 323 was a breach of the peace and entitled the Magistrate to forfeit the bonds and the sureties. As regards the second point, the facts are that the Magistrate's order for the bonds and sureties was dated 31st March 1935, and under S. 120 (2), Criminal P. C., in the absence of any order to the contrary the starting time was that day. An appeal was lodged together with an application for stay of the order for furnishing the bonds and sureties and on 8th April 1935, the Appellate Court suspended the order pending the hearing of the appeal. That appeal was dismissed on 31st October 1935, and the bonds were executed on 6th November 1935. The offence under S. 323, I. P. C., was committed on 5th October 1936, that is to say, not within one year from the original order of the Magistrate which was dated 31st March 1935.

It has been held in A I R 1934 All 845[1] that in such proceedings when an order of imprisonment was passed under S. 120, Criminal P. C., and the Appellate Court released on bail, the period during which the person to whom bail was granted was on bail must be excluded from the period of imprisonment. It was held that on the analogy of S. 426, Criminal P. C., or by the application of S. 498, Criminal P. C., and anyhow in view of the general principles of criminal law, the period during which bail was granted was to be excluded from the period of imprisonment for failing to give security. On somewhat similar principles I think in the present case it should be held that the persons against whom the order to give security was passed for their own advantage made an application that the order for bonds and sureties be stayed until the decision of the appeal and, therefore the time from which the period ran was the date of the order of the Appellate Court dated 31st October 1935, possibly after deduction of the time between the original order of the Magistrate and the order of the Appellate Court which was about eight days. On this view then the offence under S. 323 was committed within one year and the bonds and sureties could be forfeited. What the learned counsel for the appellants really depends on however, and that is therefore the most important part of his application in revision, is whether as each principal executed a bond for Rs. 200 with two sureties of Rs. 200 each a greater sum than Rs. 200 in the case of each bond can be forfeited.

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[1] Darsu v. Emperor, (1934) 21 A I R All 845 = 1934 Cr C 1031=152 I C 785=36 Cr L J 177.

The Punjab view is that it cannot, but the learned Sessions Judge has preferred the Calcutta case reported in 36 Cal 562.[2] With all due respect to the learned Judges who decided that case, I am unable to share their views. They admitted that prima facie a surety merely agrees to pay the creditor failing the debtor, and his liability is, as a rule, co-extensive with that of the principal. They have however differentiated bonds with sureties under the Criminal Procedure Code from those under civil law on the ground that the object of the provisions of the Criminal Procedure Code is to prevent crime and not to obtain money for the Crown. It cannot be doubted that the object of the Crown is to prevent a breach of the peace and not to secure any money. On the other hand under civil law, it is not difficult to visualize cases in which a person has promised to perform a contract but he and with him sureties have incurred a financial liability in case of non-fulfilment of the contract. A person in whose favour in such cases a bond with sureties has been executed has, I think, as his first object the performance of the contract in his favour and not the recovery of money on the bond and sureties. In such cases therefore, he appears to me to be in a similar position to that of the Crown. I do not think therefore that the fact that the real object of the Crown is to have the peace kept and not to obtain money necessarily leads to the conclusion that the liabilities of the sureties under the Criminal Procedure Code are different from those of sureties under the civil law.

It was further stated that because in S. 118, Criminal P. C., it is provided that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive, while in S. 106, it is expressly directed that the amount of the principal bond shall be proportionate to the means of the person bound down, it is obvious that the power to require sureties must have been given with some object other than that of ensuring the recovery of the amount of the bond; in other words, an additional security for the principal's keeping the peace, not a surety for his paying forfeit, is demandable. I think however that S. 118 is, as regards those provisions, really restrictive of S. 106 by which I mean that in all cases S. 106 provides that the amount of the principal bond shall be proportionate to the means of the person bound down and S. 118 further provides that in addition, the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive which I take to mean not excessive with due regard to the circumstances of the case; in other words although the maximum is fixed by S. 106, the circumstances of the case may be such as to make it unnecessary to take as great a bond as would be permissible under S. 106. Taking it for granted that the object of taking sureties is not to recover the amount of the principal bond but rather to ensure as far as possible that the peace shall be kept, this result, I think, can be obtained even if one holds that nothing further can be taken from the sureties than the amount of the principal's bond. Even if the sureties were only liable after an attempt has been made to recover the amount of the bond from the principal, they can still be afraid that the principal would not be able to pay the full amount of the bond and they would be liable and therefore they would have the incentive to make him keep the peace. For instance the financial state of the principal might deteriorate or he might purposely get rid of his property. There can however be no doubt that the Crown need not proceed first against the principal but can proceed against either or both of the sureties and it is therefore open to the Crown to collect the whole amount due under the bond from either surety. Each surety therefore knows that he may be called upon to pay up the whole amount due under the bond and has an incentive to make the principal keep the peace. The fact that if the whole amount is recovered from a surety there is nothing left to recover from another surety or from the principal does not alter matters, for, it is not the thought that some one else may or may not have something to pay but the fact that he himself may have to pay the whole amount that is likely to make the surety do all he can to persuade the principal to keep the peace. To hold the view that the principal was liable to pay the amount of the bond and that each surety was in addition to that liable to pay the amount which he agreed to pay as surety would, it seems to me, amount to this, that the principal and each surety executed an independent bond and there was no joint liability.

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[2] Saligram Singh v. Emperor, (1909) 36 Cal 562 = 2 I C 592 = 36 Cal 562 = 9 C L J 296 = 13 C W N 555.

If we consider however Form No. 11 of Sch. 5, we find that there is one bond by the principal followed after his signature by the undertaking of the sureties binding themselves jointly and severally. In the Form the amount in rupees is left blank, but presumably the sum to be entered would be the same both as regards the principal and the sureties and the blank is only left because the amount of the bond would vary according to the principal in various proceedings under S. 107. If the sureties bind themselves jointly and severally in say Rs. 200, I do not see how it can be held that each of them can be called upon to pay Rs. 200. If we consider S. 118, Proviso 3, we find that when the person in respect of whom the enquiry is made is a minor, the bond shall be executed only by his sureties. This appears to me to imply that when that person is not a minor that bond is executed by him and by his sureties, that is to say, there is a joint and several liability for the total amount of the bond and for no more.

Next, if we consider S. 513, we find that when any person is required to execute a bond, with or without sureties the Court may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government Promissory Notes to such amount as the Court or officer may fix, in lieu of executing such bond. It has been held in 32 Bom 449[3] that the deposit allowed under S. 513 is allowed in substitution only of the bond which the principal himself would otherwise execute, not in substitution of any bond which his surety executes. With all due respect to the learned Judges who decided that case I am unable to hold the same view and I may say that this view was only expressed as an obiter dictum. The words used there are that the Court may permit the deposit of a sum of money or Government Promissory Notes in lieu of executing such bond. If the bond is a bond with sureties, it seems to me that this deposit replaces the whole bond and not merely the bond of the principal. In the bond the principal and the sureties merely undertake to pay a certain sum of money and they do not hypothecate any property; in fact they merely sign the bond. Under S. 513 however, the principal would deposit a sum of money or Government Promissory Notes instead of merely affixing his signature to a bond, that is to say he would be deprived of the use of money or Government Promissory Notes so that the burden is more onerous than if he merely signed a bond without parting with any of his money or promissory notes. This being so, I do not think that the word 'permit' would be employed if sureties were still liable, as it suggests that the Court imposes a somewhat lesser burden. In the Code the expression always is "a bond with sureties" and I do not see why the liability of a surety under the Code of Criminal Procedure can, in view of what I have said above, be differentiated from that of a surety under the civil law.

I therefore hold that the principals can be called upon to pay Rs. 200 and any one of the sureties can also be called upon to pay the same amount, but if any one is called upon to pay the whole amount of Rs. 200, any other on that bond, be he principal or surety, cannot be ordered to pay anything more. As regards Hashmat Shah, as I have said, an examination of the record shows me that he does not appear as surety in any bond and therefore nothing can be taken from him. Finally, it has been argued that in the circumstances of this case, the Magistrate should not have called upon the sureties to pay as much as Rs. 200 each. An examination of S. 323 record shows that the principals beat a woman with their hands and there is no medical evidence to show that she had received any visible injury. The unimportant nature of the offence is shown by the fact that the sentences were only of Rs. 10 each. The Magistrate held that his experience in the district had been that sureties enter into their bonds with an utter disregard for the liabilities they assume from a monetary point of view and for what ought to be a very real responsibility for law and order. This may be so, but on the other hand the position of a surety is not that of a principal in this respect. The principal can make himself keep the peace but the surety can only do his best to make the principal keep the peace and it is difficult to see how any of the sureties in the present case could have succeeded in preventing the principals from slapping an old woman. In the circumstances therefore, I do not think that this is a case where the sureties ought to be made to lose the full amount for which they have made themselves liable. For this reason I reduce the amount to be paid by Abdul Sattar and Sirajuddin to Rs. 45 each.

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[3] **Laxmanlal v. Mulshankar, (1908) 32 Bom 449 =10 Bom L R 553.**

The principals have not approached this Court and I do not therefore interfere with the orders passed about them except that as two sureties have to pay Rs. 45 each a sum of Rs. 90 has to be deducted from the amount that can be realized from the bonds, that is to say Rs. 30 will have to be deducted from Rs. 200 which each of these three principals has been ordered to pay. The application in revision is therefore accepted by modification of the order of the original Court as stated above.

B.D./R.K. *Order accordingly.*

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## A. I. R. 1938 Oudh 199

ZIAUL HASAN J.

*Mt. Kausila — Accused —* Applicant.

v.

*Emperor.*

Criminal Revn. No. 123 of 1937, Decided on 15th August 1938, from order of Sess. Judge, Fyzabad, D/- 19th October 1937.

**(a) U. P. Municipalities Act (2 of 1916), Secs. 186 and 178—Order on notice under Sec. 178 is not necessary before notice under S. 186.**

Section 186 does not require that notice under that Section should be given only after orders have been passed on a notice under S. 178. S. 178 is quite general and applies to cases in which such a notice has been given to the Board as well as to those in which it has not been so given. [P 200 C 2]

**(b) U. P. Municipalities Act (2 of 1916), S. 302—Reasonable time.**

Three days time for demolition of a wall specified in a notice under S. 186 was held to be not a reasonable time. [P 200 C 2]

**(c) U. P. Municipalities Act (2 of 1916), Secs. 185 and 307 — Conviction under — Order for demolition of new construction held without jurisdiction.**

A Magistrate who convicted the applicant under Ss. 185 and 307 ordered him to demolish the new construction within a week :

*Held* that the order for demolition was entirely without jurisdiction. [P 200 C 2]

K. P. Misra — *for Applicant.*

H. K. Ghosh — *for Opposite Party.*

**Order.**—Mt. Kausila, the applicant in this case, was prosecuted under Ss. 185 and 307, U. P. Municipalities Act of 1916 by a Magistrate of the First Class and convicted and fined Rs. 50 and Rs. 60 respectively under the two charges. She appealed to the learned Sessions Judge of Fyzabad and the learned Judge while maintaining her convictions reduced the sentences of fine to Rs. 5 and Re. 1 respectively. She has now come up in revision to this Court. The facts are that in June 1937 the applicant began to build a wall of her house situated within the Municipality of Sultanpur. It is admitted that she gave no notice under Sec. 178, Municipalities Act, to the Municipal Board. On 18th June 1937, the Board sent a notice to her asking her to stop the unauthorized building at once and to show cause within three days why she should not be prosecuted for constructing the wall without the sanction of the Board. This notice, it appears from the report of the serving official, the applicant refused to take. Thereupon another notice to the same effect was issued on the same date and it was affixed to the applicant's house. In the evening of the same day, the applicant put in an application saying that she was only reconstructing a dilapidated wall inside her house thinking that no sanction of the Board was necessary for its construction but praying that sanction might be accorded if it be considered necessary. As this application was not accompanied by a plan, the applicant was directed to put in a plan of the construction. On the next day, that is 19th June 1937, another notice was served upon the applicant but this notice was in very vague terms. It only said :

> A copy of the order is being sent to you and you are informed by means of this notice that you should comply with the order, otherwise proper proceedings will be taken.

On 21st June 1937, the Chairman of the Board ordered that a notice for demolition of the wall be issued to the applicant under S. 186, Municipalities Act, and on the same day such a notice was issued and served upon the applicant (by which she was required to demolish the wall) within three days. On 26th June 1937, the Chairman of the Board ordered prosecution of the applicant for failure to comply with the notice dated 21st June 1937. On these facts the applicant was prosecuted under Ss. 185 and 307, Municipalities Act, and convicted as noted above. The learned trying Magistrate by his order of conviction also ordered the applicant to demolish the new construction within a week.

It is not contended before me that no notice under S. 178 was necessary either by reason of the wall not abutting on any public street or place or otherwise. I have also seen the bye-laws of the Sultanpur Municipality which make it incumbent to give notice under the aforesaid Section for all constructions within the municipal limits. It is also not denied that the applicant's conviction under Sec. 185 was good. What is contended is that the conviction under Sec. 307 was illegal and should not stand. That Section lays down that if a notice has been given under the provisions of the Municipalities Act or under a rule or bye-law to a person requiring him to execute a work in respect of any property, moveable or immovable, public or private, or to provide or do or refrain from doing anything within the time specified within the notice, and if such person fails to comply with such notice, then the said person shall be liable on conviction before a Magistrate to a fine which may extend to Rs. 500 and in case of a continuing breach to a further fine which may extend to Rs. 5 for every day after the day of the first conviction during which the offender is proved to have persisted in the offence. A notice under S. 186, Municipalities Act, was duly served upon the applicant asking her to demolish the unauthorized construction. It is contended that this notice was illegal as no orders had been passed on the applicant's application for sanction, but I do not think that there was any illegality in the notice on that account. S. 186 does not require that notice under that Section should be given only after orders have been passed on a notice under Sec. 178. That Section is quite general and applies to cases in which such a notice has been given to the Board as well as to those in which it has not been so given. It runs as follows :

> The Board may at any time by written notice direct the owner or occupier of any land to stop the erection, re-erection or alteration of a building or part of a building or the construction or enlargement of a well thereon in any case where the Board considers that such erection, re-erection, alteration, construction or enlargement is an offence under S. 185 and may, in like manner, direct the alteration or demolition as it deems necessary of the building, part of a building, or the well as the case may be.

The notice of 21st June 1937 was to my mind a perfectly valid notice and as the applicant failed to comply with that notice, she was liable to be prosecuted and fined under Sec. 307. Reliance was also placed on S. 302 which says that when any notice issued under any Section of the Act requires an act to be done for which no time has been fixed by such Section, the notice shall specify a reasonable time for doing the same and that it shall rest with the Court to determine whether the time so specified was a reasonable time within the meaning of this Section. I agree with the view of the learned Sessions Judge that the three days time given by the notice of 21st June 1937 was not reasonable and it is because of this that the learned Judge has already reduced the applicant's fine under Sec. 307 to a nominal sum. I see no reason to interfere with the order of the learned Sessions Judge and dismiss this application except in so far as to say that the order of the learned trying Magistrate for demolition of the wall within a week was entirely without jurisdiction.

K.S./R.K. *Order accordingly.*

## * A. I. R. 1938 Oudh 201

### FULL BENCH

THOMAS C. J., ZIAUL HASAN AND YORKE JJ.

*Bepin Singh* — Appellant.

v.

*Bhagwan Singh and others* — Respondents.

First Appeal No. 91 of 1936, Decided on 29th August 1938, against order of the Civil Judge, Fyzabad, D/- 27th May 1936.

*** Court-fees Act (1870), S. 7 (iv) (c) and Sch. 2, Art. 17 (iii) —Question whether decree sought by plaintiff is mere declaratory decree without consequential relief depends not on whether or not he was party to decree—Plaintiff not party to decree seeking declaration that he is not bound by that decree —Prayer comes under S. 7 (iv) (c).**

The question whether a decree sought by a plaintiff is a mere declaratory decree without any consequential relief coming under Art. 17 (iii) of Sch. 2, Court-fees Act, or whether it is a decree with consequential relief governed by Sec. 7 (iv) (c), Court-fees Act, depends not on whether or not the plaintiff was a party to the decree which he is seeking to avoid but on whether or not the relief claimed comes under S. 42, Specific Relief Act. Hence even when a plaintiff not a party to a decree seeks a declaration that he is not bound by that decree or that a decree-holder cannot proceed against certain property, he is seeking to obtain a declaratory decree where consequential relief is prayed within the meaning of Sec. 7 (iv) (c), Court-fees Act, and he is therefore bound to pay court-fees accordingly : *Case law discussed.* [P 203 C 2; P 204 C 1]

Radha Krishna and N. Banarji — *for Appellant.*

Durga Dayal—*for Respondents 4 and 5.*

Bhagwan Singh (Respondent 1) *in person.*

Govt. Advocate — *for the Crown.*

### OPINION.

**Ziaul Hasan J.** — In this first appeal the office made a report that the plaintiff-appellant who had paid court-fee on his memorandum of appeal under Art. 17 (iii) of Sch. 2, Court-fees Act, should pay ad valorem court-fee on the valuation of the appeal. This report was objected to by the learned counsel for the plaintiff-appellant and the matter came before a Division Bench of this Court of which I was a member. The learned counsel for the appellant relied on the Full Bench case in 1937 O W N 1186[1] in which it was said that when a person who is a party to a decree asks for a declaration about the decree being illegal and void, the grant of such a declaration in his favour necessarily has the effect of setting aside the decree and relieving him of the obligation under it, and that in such a case a consequential relief should therefore be deemed to be implied in the prayer for the declaration claimed and the plaint should accordingly bear ad valorem court-fee under S. 7 (iv) (c), Court-fees Act. On these remarks it was contended that the rule laid down in that case did not apply to the case of a person who, like the present plaintiff-appellant was not a party to the decree about which the declaration is sought. We were not however sure that the reasons underlying that decision turned on whether or not the plaintiff was a party to the decree which he was seeking to avoid. We therefore framed the following question for decision by a Full Bench :

> When a plaintiff not a party to a decree seeks a declaration that he is not bound by that decree or that a decree-holder cannot proceed against certain property, is he seeking to obtain a declaratory decree where consequential relief is prayed within the meaning of Sec. 7 (iv) (c), Court-fees Act, and is he therefore bound to pay court-fees accordingly ?

The Full Bench has now heard the arguments of the learned counsel for the plaintiff-appellant and of the learned Government Advocate to whom notice was issued by the Division Bench on the point. No doubt a large number of cases, specially of the Madras and Lahore High Courts, appear to favour the view contended for by the learned counsel for the appellant but there are decisions to the contrary also. On behalf of the appellant reliance is placed on the cases in 1 O W N 582,[2] 1937 O W N 1186,[1] 38 Mad 922,[3] 56 Mad 212,[4] A I R 1936 Mad 470,[5] A I R 1937 Mad 449,[6] A I R 1923 Lah 373,[7] A I R 1929 Lah 446[8] and A I R 1930 Lah 755.[9] On the other hand, the learned Government Advocate relies on the cases in 6 O W N

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[1] Mt. Roop Rani v. Bithal Das, (1938) 25 A I R Oudh 1=172 I C 81=1937 O W N 1186 (F B).

[2] Sri Ram v. Mathura Prasad, (1925) 12 A I R Oudh 500=85 I C 349=1 O W N 582.

[3] Arunachalam Chetty v. Rangaswamy Pillai, (1915) 2 A I R Mad 948=28 I C 79=38 Mad 922=28 M L J 118 (F B).

[4] Venkatasiva Rao v. Venkatanarasimha Satyanarayanamurty, (1932) 19 A I R Mad 605 = 139 I C 317=56 Mad 212=63 M L J 764.

[5] Abdullah v. Subramanyan Pattar, (1936) 23 A I R Mad 470=163 I C 203=71 M L J 383.

[6] Vallabhacharyulu v. Rangacharyulu, (1937) 24 A I R Mad 449=171 I C 889.

[7] Mt. Nihal Devi v. Rai Chunni Lal, (1923) 10 A I R Lah 373=73 I C 767.

[8] Sukh Dial v. Durga Das, (1929) 16 A I R Lah 446=113 I C 908.

[9] Karam Chand v. Uma Dutt-Hansraj, (1930) 17 A I R Lah 755=126 I C 753=31 P L R 383.

1105,[10] 11 O W N 488,[11] 11 O W N 1292,[12] 1 Pat 197,[13] A I R 1938 Nag 183,[14] 1938 A L J 578[15] and 39 Cal 704.[16]

The case in 1 O W N 582[2] was decided by a Bench of the Court of the Judicial Commissioner of Oudh. In that case a plaintiff who was no party to a mortgage decree sued for a declaration that the property belonged to him and was not liable to be sold in execution of the decree. It was held that the plaintiff being no party to the mortgage decree, the suit did not involve a consequential relief and the court-fee of Rs. 10 paid by him was sufficient. The decision in the Full Bench case in 1937 O W N 1186[1] has already been quoted by me, but it cannot, to my mind, be deemed to have laid down that a person who is not a party to a decree which he is seeking to avoid is not liable to pay ad valorem court-fee for the declaration sought by him. Because in that case the plaintiff was a party to the decree about which he was seeking a declaration and because it was there held that he should pay ad valorem court-fee, it cannot logically be argued that the rule laid down in that case is in every case inapplicable to that of a plaintiff who is not a party to the decree. To my mind the words "when a person who is a party to a decree" occurring in the judgment of the late Srivastava J., did not imply that a contrary rule will hold good in the case of a person who is not a party to the decree in question.

The Full Bench case in 38 Mad 922,[3] does not also help the appellant in my opinion. In that case also, the persons seeking the declaration were parties to the decree and no rule was laid down in that case about the court-fee on a suit brought by a person who was not a party to the decree, the subject of the suit. The learned counsel relies on the following remark occurring in the order of reference :

> The case might be different where a declaration is sought by a person who is not a party to the bond or the decree. In a case like that, the suit may properly be regarded as one for declaration . . . .

This was only an opinion expressed by the Judges referring the case to a Full Bench and the judgment of the Full Bench does not appear to have endorsed it, nor indeed was it necessary to do so as the case was that of a person seeking to avoid a decree to which he himself was a party. The case in 56 Mad 212[4] is not also in point, not only because the plaintiff in that case was, unlike the present appellant, a party to the decree but also because the decision in the case rested on a local Court-fees Act of the Madras Presidency. The decision in A I R 1936 Mad 470[5] is a single Judge decision and is based on the following remark of Ananthakrishna Ayyar J., in 56 Mad 212[4]:

> A decree will have full force and binding effect between the parties to it until it is set aside by the persons who were parties to it ; but persons who were not parties to it can only sue for a declaration in respect of their rights in relation to the decree.

But, in view of the fact that the plaintiff in the case in 56 Mad 212[4] was a party to the decree and of the decision in that case that the suit was a suit for cancellation of the previous decree falling within Section 7 (iv-A) (as amended by Madras Act 5 of 1922) of the Court-fees Act, it cannot be said that what Ananthakrishna Ayyar J. said is a general proposition of law. The case in A I R 1937 Mad 449[6] follows the case in 56 Mad 212,[4] and the same remark of Ananthakrishna Ayyar J. has been referred to with approval. In A I R 1923 Lah 373,[7] the suit was for a declaration that a mortgage decree obtained against certain property be declared void and inoperative and not liable to execution qua the property in suit on the ground that the property was dedicated property. It was no doubt held by a Bench of the Lahore High Court that a person not a party to a decree may sue to have it declared void without claiming any consequential relief and that such a suit is not governed by S. 7 (iv) (c). A similar view was taken in A I R 1929 Lah 446[8] and also in A I R 1930 Lah 755,[9] in which reliance was placed on the earlier case in A I R 1923 Lah 373.[7]

Coming now to the cases relied on by the learned Government Advocate, I find that the case in 6 O W N 1105[10] is not in point as in that case a Hindu son did not ask for a declaratory decree only but sued for possession also. In 11 O W N 488[11] a suit had been brought for a declaration that a simple money decree obtained by the defendant against the father of the plaintiffs was not binding and the joint family property in the hands of the plaintiffs was not attachable. It was held that ad valorem court-fee was payable because the obvious result of the decree asked for the plaintiffs would be to save them from payment of the decretal money and consequential relief is implicit in the declaration asked for. It appears to me that the present case is completely governed by this decision. In 11 O W N 1292[12] it was held that the question of court-fees must be decided on the allegations made in the plaint and the relief actually asked for therein and that it is the bounden duty of Courts to look into the substance of the relief claimed. In this case the plaintiff who was seeking the cancellation of a decree of wakf and a will was not a party to those documents.

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[10] Deoraj v. Kung Behari, (1930) 17 A I R Oudh 104=124 I C 420 = 5 Luck 474 = 6 O W N 1105.

[11] Lallo Prasad v. Sahebdin Singh, (1934) 21 A I R Oudh 212=150 I C 722=8 Luck 668=11 O W N 488.

[12] Mathura Prasad v. Ram Lal, (1934) 21 A I R Oudh 505=152 I C 312=11 O W N 1292.

[13] Surendra Narain Singh v. Shambehari Singh, (1922) 9 A I R Pat 404=1 Pat 197.

[14] Dattaji Parashramji Kunbi v. Bhagirathi, (1938) 25 A I R Nag 183=174 I C 891.

[15] Daroga Govind Rao v. Mohar Govind Rao, (1938) 25 A I R All 481=I L R (1938) All 470 =1938 A L J 578.

[16] Deokali Koer v. Kedar Nath, (1912) 39 Cal 704=15 I C 427=16 C W N 838.

In 1 Pat 197[13] the members of a joint Hindu family sought for a declaration that the sale of the property held in execution of a decree obtained on a handnote against two members of the family was null and void to the extent of the plaintiffs' shares in the property. It was held that the suit was in fact a suit for a declaration with consequential relief. In A I R 1938 Nag 183[14] a person who was a bona fide purchaser for value of lands which were found to be burdened with a charge of a maintenance decree, brought a suit for a declaration that the land was not liable for the maintenance charge and it was held that although the relief asked for a mere declaration, yet it involved a consequential relief of amendment of the maintenance decree and S. 7 (iv) (c), Court-fees Act, applied. In the case reported in 1938 A L J 578[15] also, the plaintiffs were no parties to the mortgage deed executed by defendants 2 and 3 nor to the decree based thereon. It was held by a Bench of the Allahabad High Court that according to the allegations contained in the plaint, the plaintiffs were in substance asking for the cancellation of the mortgage bond on the basis of which the decree was obtained and were under the circumstances liable to pay ad valorem court-fee. The case in 39 Cal 704[16] contains in my opinion the principle on which cases of the kind now before us should be decided. The plaint in that case contained three reliefs of which relief 1 was as follows :

> That it may be declared that the registered deed dated 1st June 1896, for Rs. 14,000 executed by defendant 9 in favour of the father and ancestors of defendants 1 to 8 is collusive, nominal, invalid, fraudulent and without consideration ; that the decree passed on the basis thereof which is pending execution in No. 83 of 1909 in the First Court of the Subordinate Judge at Arrah has been collusively and fraudulently obtained and it is ineffectual, inoperative and invalid and that for the satisfaction of the said decree, the mortgaged property in question mentioned in the said decree cannot be sold.

The learned Chief Justice, Sir Lawrence Jenkins remarked :

> It is in this Section (S. 42, Specific Relief Act) that the law as to merely declaratory decrees applicable in the circumstances of this case is now to be found. . . . . . . . We have to be guided by its provisions as they are expressed. The Section does not sanction every form of declaration but only a declaration that the plaintiff is 'entitled to any legal character or to any right as to any property;' it is the disregard of this that accounts for the multiform and, at times, eccentric declarations which find a place in Indian plaints.
>
> . . . . . . . .
>
> Now what are the declarations that are sought in this case? None relate to the plaintiff's legal character; so only those are permissible which relate to 'any right as to any property.' Of the declaration in the first prayer of the plaint, none as expressed, is a declaration of this character; it may be that the proposition at which the plaintiff aims is in some measure involved in those declarations, but that is not what is sanctioned by S. 42.

Applying this test, which if I may say so with respect, is the correct test in cases of this kind, to the case now before us, it seems to me clear that the suit of the plaintiff-appellant does not fall within the purview of S. 42, Specific Relief Act, and consequently it cannot be said to be a suit merely for a declaratory relief. I may add that the late Srivastava J. who wrote the leading judgment in the Full Bench case in 1937 O W N 1186[1] referred to above, applied the test laid down in 39 Cal 704[16] to the case before him and remarked :

> I might also point out that as was held in *Deokali Koer* v. *Kedar Nath*,[16] the declaration sought in this case does not relate either to the plaintiff's legal character or to any right as to any property, and is not therefore one contemplated by S. 42, Specific Relief Act. In this view of the matter also the present suit cannot be regarded as a suit to obtain a declaratory decree where no consequential relief is prayed.

To my mind the real test in cases of the kind now before us is not whether the plaintiff was or was not a party to the decree or document sought to be avoided by him, but whether or not the declaratory decree sought by him comes within the purview of S. 42, Specific Relief Act. I would therefore answer the question referred to the Full Bench as follows :

The question whether a decree sought by a plaintiff is a mere declaratory decree without any consequential relief coming under Art. 17 (iii), Sch. 2, Court-fees Act, or whether it is a decree with consequential relief governed by S. 7 (iv) (c), Court-fees Act, depends not on whether or not the plaintiff was a party to the decree which he is seeking to avoid, but on whether or not the relief claimed comes under S. 42, Specific Relief Act.

**Thomas C. J.** — I agree.

**Yorke J.** — I agree.

D.S./R.K. *Answer accordingly.*

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## A. I. R. 1938 Oudh 204

THOMAS C. J. AND ZIAUL HASAN J.

*Bindra Prasad — Defendant —* Appellant.

v.

*Raja Bahadur Suraj Bakhsh Singh — Plaintiff* — Respondent.

Second Rent Appeal No. 38 of 1936, Decided on 3rd August 1938, against decree of Dist. Judge, Sitapur, D/- 21-1-1936.

**(a) Oudh Rent Act (22 of 1886), S. 19-A— Oudh Government Revenue (B) Department Resolution No. 4308/I. B., dated 28th October 1932, Cl. (9) (f) — Cl. 9 (f) does not apply to ex-proprietary tenants whose rent is fixed by Court.**

Clause 9 (f) of the Revenue (B) Department Resolution of Local Government No. 4308/I. B. dated 28th October 1932 which deals with remissions of rent and revenue on account of slump in prices applies only to those tenants who obtained land from the zamindar in 1339 or 1340-F and agreed to pay a certain amount of rent, and does not apply to ex-proprietary tenants whose rent is fixed by Court : *11 O W N 1562, Rel. on.* [P 205 C 1]

**(b) Oudh Rent Act (22 of 1886), S. 19-A — Oudh Government Revenue (B) Department Resolution No. 4308/I. B., dated 28th October 1932, Cl. 9 (f)— Mortgage by proprietor of his share—Share sold and purchased by mortgagee in 1931 — Proprietor held became ex-proprietary tenant on that date and was entitled to remission prescribed by Resolution — Mortgagee's taking possession in 1341-F of share purchased held of no consequence.**

A share of a proprietor was mortgaged by him. The mortgagee obtained a decree in execution of which the mortgaged share was sold and purchased by the mortgagee himself on 21st September 1931. The mortgagee obtained possession of the share in 1341-F and in 1934 he applied to the Revenue Court for fixation of ex-proprietary rent:

*Held* that it was not correct to say that it was only in 1341-F when the mortgagee obtained possession of the share purchased by him that the proprietor became an ex-proprietary tenant. According to Sec. 7-A, Oudh Rent Act, a person becomes an ex-proprietary tenant as soon as his proprietary rights are transferred. The transfer of the proprietor's rights took place on 21st September 1931 when his share was sold and purchased by the mortgagee. The proprietor therefore became an ex-proprietary tenant of his *sir* on that date and it was of no consequence when the auction-purchaser obtained actual possession of the share purchased by him. Hence the proprietor was a tenant on the date of the Government Resolution and as such was entitled to the remission prescribed by that Resolution : *1935 O W N 1196, Rel. on.* [P 205 C 2]

Akhlaque Husain and K. N. Tan — *for Appellant.*

B. N. Shargha — *for Respondent.*

**Judgment.** — This second rent appeal against an appellate decree of the learned District Judge of Sitapur arises out of a suit for arrears of rent, brought by the plaintiff-respondent Raja Bahadur Suraj Bakhsh Singh against the defendant-appellant, Bindra Prasad. The claim was for recovery of Rs. 102-3-0 as rent for the whole of 1341-F and for Kharif 1342-F in respect of certain plots of village Sidhauli. The facts are that the defendant-appellant was proprietor of a 7/46th share of 1/5th of Mohal Raghubar Dayal in village Sidhauli. This share was mortgaged by him to the plaintiff-respondent. The latter put the mortgage in suit and obtained a decree in execution of which the mortgaged share was sold and purchased by the plaintiff-respondent himself on 21st September, 1931. The plaintiff-respondent obtained possession of the share in 1341-F and in 1934 he applied to the Revenue Court for fixation of ex-proprietary rent on the defendant-appellant's *sir*. On this application the following order, was passed by the Revenue Court.

> I think the tahsildar's suggestions are reasonable. The ex-proprietary tenant is certainly entitled to remissions of rent like other tenants of the mohal on account of natural calamities and slump in prices. This he will get in addition to the remission he is by right entitled to as an ex-proprietary tenant, that is to the extent of one-fourth of the rent payable by statutory tenants for similar plots. No permanent remission on account of calamities, etc. can be allowed in the rent itself. This remission will vary from year to year according to the remissions allowed by the Government. Rs. 74-5-0 is fixed as the annual ex-proprietary rent of the *sir* plots in suit.

This order was passed on 23rd August 1934 and the present suit for arrears of rent was filed on 4th March 1935. The defendant contended that the plaintiff was not entitled to rent for kharif 1341-F as the ex-proprietary rent was fixed after that and as the defendant's proprietary share was under the management of a receiver up to 23rd August 1934. He also claimed that he was entitled to remissions on account of slump in prices like statutory tenants. The trial Court accepted the first plea and held that the plaintiff was not entitled to rent for kharif 1341 but overruled the defendant's plea that he was entitled to any remission on account of slump in prices. The plaintiff-respondent submitted to this decree but the defendant appealed to the learned District Judge who agreed with the findings of the trial Court and dismissed the defendant's appeal. He has now come up in second appeal to this Court.

The only point urged on behalf of the appellant is that he is entitled to get a remission of rent on account of the slump in prices which statutory tenants have been getting by order of Government since 1339-F. To this the reply on behalf of the plaintiff-respondent is that the Revenue (B) Department Resolution of the Local Government No. 4308/I. B., dated 28th October 1932 which deals with remissions of rent and revenue on account of slump in prices is not applicable to the defendant-appellant and in support of this assertion reliance is placed on Clause 9 (f) of the said Resolution which runs as follows :

> That there should not be remission of rent in the case of new tenants who have taken up land in 1339 or for 1340.

It is argued that as the plaintiff-respondent obtained possession of the share purchased by him in auction only in 1341-F the defendant-appellant became an ex-proprietary tenant in that year and that he should be deemed to be a "new tenant who has taken up land in 1339 or for 1340-F." We are unable to accept this argument. In the first place, Cl. 9 (f) of the Resolution appears to us to apply only to those tenants who obtained land from the zamindar in 1339 or 1340-F and agreed to pay a certain amount of rent, and does not apply to ex-proprietary tenants whose rent is fixed by Court. We are supported in this conclusion by the following remark of the Board of Revenue in 11 O W N 1562.[1]

> The rent fixed by order of a Court in an enhancement suit on the basis of rates evolved on the basis of rentals obtaining in the pre-slump period is not the same thing as a rent agreed on between the landholder and tenant on a fresh admission after the slump began.

This was no doubt a suit for enhancement of rent but the remark just quoted is sufficient to show that Cl. 9 (f) of the Resolution referred to above applies only to agreements for rent newly entered into by the tenant and the landholder in 1339 or 1340-F. In the second place, it is not correct to say (and the learned District Judge was also in error in giving a finding to this effect) that it was only in 1341-F when the plaintiff-respondent obtained possession of the share purchased by him that the appellant became an ex-proprietary tenant. S. 7-A, Oudh Rent Act, clearly shows that a person becomes an ex-proprietary tenant as soon as his proprietary rights are transferred. The transfer of the appellant's proprietary rights in the present case took place on 21st September 1931, when his share was sold and purchased by the respondent. The appellant therefore became an ex-proprietary tenant of his *sir* on that date and it is of no consequence when the auction-purchaser obtained actual possession of the share purchased by him, so that he was a tenant on the date of the Government resolution mentioned above, and as such was entitled to the remissions prescribed by that Resolution. The case in 1935 O W N 1196[2] is a parallel case in which the Board of Revenue held that where ex-proprietary rent is fixed by order of the Court on the basis of rentals obtaining in the pre-slump period, the tenant will be entitled to claim temporary remissions of rent on account of fall in prices in the same way as other tenants get remissions. It is argued by the learned counsel for the respondent that this decision of the Board of Revenue applies to a case in which ex-proprietary rent has been fixed on the basis of pre-slump rates of rent and that in the present case there is nothing to show that the appellant's rent was so fixed. We think there is no force in this argument. The order of the learned Assistant Collector quoted above clearly shows on the face of it that the appellant's rent was fixed on the basis of pre-slump rates.

We are of opinion that the Courts below were wrong in holding that the appellant was not entitled to remissions on account of the fall in prices like statutory tenants. The appeal is therefore decreed with costs and as there is no material on the record to determine the amount of remission admissible to the appellant, we remand the case to the trial Court through the learned District Judge of Sitapur for determining the amount of remissions that the appellant is entitled to in the rent for Rabi 1341-F and

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[1] Uma Nath Bux Singh v. Chandrapal Singh, (1934) 11 O W N 1562.

[2] Gadadhar Prasad v. Sri Dhar, (1935) O W N 1196.

Kharif 1342-F and to pass a decree in favour of the respondent after allowing those remissions.

D.S./R.K. *Case remanded.*

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### ✲ A. I. R. 1938 Oudh 206
### FULL BENCH

THOMAS C. J., ZIAUL HASAN AND YORKE JJ.

*Raghuraj Singh* — Appellant.

v.

*Abdul Rahman and others* — Respondents.

Misc. Appeal No. 31 of 1935, Decided on 22nd August 1938, against order of District Judge, Sitapur, D/- 25th February 1935.

✲ **(a) Provincial Insolvency Act (1920), Ss. 14 and 16 — Application by creditors for withdrawal — Order 'file' made upon it does not mean allowed to withdraw — Other creditors can apply for substitution.**

Where the order passed on the application of creditors for withdrawal was merely "file," it cannot be said that those men were expressly allowed to withdraw. The word "file" does not mean withdrawal of an application. It simply means left on record and other creditors are entitled to be substituted as petitioners under S. 16: *(1888) 21 Q B D 21 and (1895) 1 Q B D 194, Disting.; A I R 1932 All 147 ; A I R 1928 Mad 608 and A I R 1932 Sind 161, Rel. on.* [P 207 C 1]

✲ **(b) Provincial Insolvency Act (1920), S. 16 — Express order of substitution is not necessary.**

An express order of substitution is not necessary under S. 16 and substitution can be inferred from the Court continuing proceedings of the application of the creditor applying to be substituted under that Section. [P 207 C 1; P 208 C 1]

✲ **(c) Provincial Insolvency Act (1920), S. 16 — Creditor substituted in place of original creditor can be substituted by another creditor.**

Substitution contemplated by Sec. 16 is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on. [P 208 C 1, 2]

Sir Wazir Hasan, Radha Krishna and H. D. Chandra — *for Appellant.*

M. Wasim, Makund Behari Lal and P. D. Rastogi — *for Respondents 2 and 3.*

Makund Behari Lal and D. P. Rastogi— *for Respondent 1 (b).*

## Opinion of the Full Bench

**Thomas C. J.** — This miscellaneous appeal, against an order of the learned District Judge of Sitapur, dated 25th February 1935, came up for hearing before a Bench of this Court, and the Bench has referred the following two questions to a Full Bench:

1. Is an express order of substitution necessary under S. 16, Provincial Insolvency Act, or whether substitution can be inferred from the Court continuing proceedings on the application of the creditor applying to be substituted under that Section?

2. Whether the substitution contemplated by S. 16 can only be in place of the original petitioner or whether a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on?

The facts briefly are that on 31st July 1933, Girdhari Lal and Damodar Dass presented a petition under Ss. 9 and 13, Provincial Insolvency Act, against Thakur Raghuraj Singh, the present appellant, who is the taluqdar of Sitarasoi in the district of Sitapur. Girdhari Lal and Damodar Dass were creditors of Thakur Raghuraj Singh, and they alleged that within three months before the filing of the petition Thakur Raghuraj Singh had committed various acts of insolvency. On 23rd November 1933, Gobardhan Dass, another creditor, presented a petition under Ss. 9, 13 and 16 of the Act. It appears from para. 3 of the petition that Gobardhan Dass apprehended that Girdhari Lal and Damodar Dass might withdraw their petition. On 22nd December 1933, Girdhari Lal and Damodar Doss actually made an application that they should be allowed to withdraw it, and on 27th January 1934, the following order was passed: "File. If he (they) does not desire to appear he (they) may (not) do so", and a date was fixed for the hearing of Gobardhan Dass's application. There were several adjournments in the case, and eventually issues were framed on 8th September 1934, and the Court fixed 3rd November 1934, for disposal of the case. In the meantime on 3rd October 1934, another creditor, Sita Ram, respondent, presented a petition under Ss. 7, 9, 13, 15 and 16 of the Act, and on 13th October 1934, yet other creditors, Baijnath and Dwarka Dass, the other two respondents, presented a petition under those same Sections. On 31st October 1934, Gobardhan Dass applied to be allowed to withdraw his petition, and by an order of that same date the learned District Judge allowed his petition to be withdrawn. When the case came up for hearing on 3rd November 1934, some more creditors appeared and presented a petition under S. 16 of the Act, but we are not concerned with that application in the present appeal. On the same date the present respondents applied to be substituted for the "original creditor," and this application of theirs was allowed by the learned District Judge by his order dated 25th February 1935. This is the order which is the subject of the present appeal. It is not necessary for me to discuss the first point under reference at any length because the learned counsel for both the parties have conceded that it is not necessary that an express order of substitution under S. 16, Provincial Insolvency Act should be passed. The contention of the learned counsel on behalf of the appellant is that there can be no application for substitution under S. 16 of the Act when the original application has been withdrawn under S. 14. I do not agree with this contention. S. 14, Provincial Insolvency Act, clearly lays down that

> no petition, whether presented by a debtor or by a creditor, shall be withdrawn without the leave of the Court.

Girdhari Lal and Damodar Dass in my opinion were not allowed to withdraw their petition. The order passed on their application was merely "File", and according to the order-sheet, it was directed that "if he (they) does not desire to appear he (they) may (not) do so". It cannot be said that those men were expressly allowed to withdraw. The word "File" does not mean withdrawal of an application. It simply means left on record. It therefore follows that the original application of Girdhari Lal and Damodar Dass was pending when the order under appeal was passed, and it never ceased to subsist, and the creditors are entitled to be substituted as petitioners, according to S. 16, Provincial Insolvency Act. A petition under the Insolvency Act is for the benefit of all the creditors and no fraud should be allowed to be practised. It is true that no definite order substituting Gobardhan Dass as a petitioner was ever made, but the proceedings were in fact continued on his application, and those proceedings were alive at any rate up to 31st October 1934, the date of Gobardhan Dass's withdrawal. He was thus impliedly allowed to carry on. The applications of Sita Ram, Baijnath and Dwarka Dass were made before that date, and there can be no bar to their substitution under S. 16 of the Act as petitioners. The learned counsel for the appellant has relied on two English decisions reported in (1888) 21 Q B D 21[1] and (1895) 1 Q B D 194,[2] while the learned counsel for the respondents has relied on the following decisions : 54 All 72,[3] 51 Mad 594[4] and 139 I C 851.[5] The two decisions relied on by the learned counsel for the appellant were considered and distinguished in the Allahabad case reported in 54 All 72.[3] It was held by a Bench of the Allahabad High Court that :

> In the wording of S. 16, Provincial Insolvency Act, the only condition laid down, as a requisite for the person to be substituted for the original petitioner who does not proceed with due diligence on his petition, is that such person must be a creditor to whom the debtor may be indebted in the amount required by the Act in the case of a petitioning creditor. It is not necessary that such creditor should have himself presented a petition for the adjudication within three months of the act of insolvency or that at the time of the substitution he should be entitled according to Sec. 9(1)(c), Provincial Insolvency Act, to present an insolvency petition.

This case undoubtedly is in favour of the respondents. In the case reported in 51 Mad 594[4] it was held that :

> Where a creditor applied to have his debtor adjudicated an insolvent but would not proceed with his petition, another creditor, whose debt was not barred by limitation on the date of the original petition, can be substituted as petitioner, under S. 16, Provincial Insolvency Act, (1920), and be allowed to continue the petition, even though his debt might be barred by limitation on the date of the substitution, provided he was otherwise qualified to be a petitioning creditor under the Act.

The case reported in 139 I C 851[5] is more or less on the same lines as the case reported in 51 Mad 594.[4] The facts of the present case are distinguishable from those in (1888) 21 Q B D 21[1] on the ground that the petition in the present case has not yet been dismissed while in (1888) 21 Q B D 21[1] the petition had been dismissed. In the case reported in (1895) 1 Q B D 194[2] it was held that

> the Court will not amend a bankruptcy petition by adding as petitioners, after three months have elapsed from the date of the act of bankruptcy upon which the petition is founded, creditors whose debts are other than those in respect of which the petition was presented,

though one of the learned Judges qualified this by saying that

> if within that period (three months) a debt has been made ground of the petition and it afterwards becomes desirable to add another party to the petition in respect of that debt, leave may be given to join that other party as a petitioner where it will not lead to any injustice.

In my opinion the object of S. 16, Provincial Insolvency Act, is to prevent other

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1. **In re Maugham, (1888) 21 Q B D 21 = 57 L J Q B 487 = 59 L T 253 = 36 W R 846 = 5 Morrell 152.**
2. **In re Maund, (1895) 1 Q B D 194 = 64 L J Q B 183 = 15 R 159 = 72 L T 58 = 43 WR 207.**
3. **Ganga Nath v. Zalim Singh, (1932) 19 A I R All 147 = 135 I C 250 = 54 All 72 = 1931 A L J 1089.**
4. **Venkata Hanumantha Rao v. Gangayya, (1928) 15 A I R Mad 608 = 110 I C 611 = 51 Mad 594 = 55 M L J 168.**
5. **Salamatmal Janimal v. Gobindram Dharam Das, (1932) 19 A I R Sind 161 = 139 I C 851 = 26 S L R 162.**

creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not diligently prosecute the petition. If it is to be regarded as a new petition, this object is frustrated, and there is no purpose of having a Section of the kind. If the original petition had proceeded up to the adjudication or if another creditor whose debt was not barred by the date of substitution had been substituted, and he had obtained an order of adjudication, the applicants' debt which was not barred by the date of the petition could be proved. The learned counsel for the appellant has not been able to cite a single case of any Indian High Court in support of his contention. In my opinion there is no need to have recourse to the view of the law that has been taken in the English Courts when the decisions of the Indian Courts are quite clear and consistent with the wording of the Section of the Provincial Insolvency Act.

It was next contended on behalf of the appellant that S. 16, Provincial Insolvency Act, allowed only one substitution and not ad infinitum. Stress was laid on the words "the petitioner," which according to the learned counsel, meant the original petitioner. I do not agree with this contention. In my opinion there can be any number of substitutions. The word "substitution" means removing or erasing the name of the original creditor. In the wording of S. 16, Provincial Insolvency Act, the Legislature have definitely laid down one condition for the substitution of a creditor and only one, viz. that his debt shall be not less than "the amount required by this Act." But the amount referred to is required not only by the Act, but by S. 9 of the Act, and it would be indeed remarkable if the Legislature had intended to prescribe all the conditions set forth in S. 9 and yet mentioned only this one. In my opinion the wording of this Section is definitely in favour of the respondents.

My answer therefore to the first question is that an express order of substitution is not necessary under S. 16, Provincial Insolvency Act, and that substitution can be inferred from the Court continuing proceedings of the application of the creditor applying to be substituted under that Section. My answer to the second question is that substitution contemplated by S. 16 is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on.

**Ziaul Hasan J.**—I agree.

**Yorke J.**—I agree.

D.S./R.K. *Answer accordingly.*

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## A. I. R. 1938 Oudh 208

THOMAS C. J. AND ZIAUL HASAN J.

*Dr. B. N. Vyas — Defendant —* Appellant.

v.

*Raja Barkhandi Mahesh Pratap Narain Singh — Plaintiff —* Respondent.

Second Appeal No. 254 of 1937, Decided on 16th August 1938, against decree and Judgment of Dist. Judge, Lucknow, D/- 22nd April 1937.

**(a) U. P. Agriculturists' Relief Act (27 of 1934), S. 2 (2) Provisos 1 and 2—Income-tax paid by a person not exceeding local rate payable by him—Proviso 2 does not prevent his being classed as agriculturist.**

It is not the payment of income-tax absolutely which takes away the effect of Proviso 1 to S. 2 (2), but in the case of a person belonging to class (a), only when the income-tax which he pays exceeds the local rate payable on the land which he holds. The Proviso clearly shows that it is not the payment of the income-tax irrespective of the amount that attracts the operation of the Proviso. It is not the actual payment of local rate but the amount of local rate payable by a person that has to be considered under the Proviso. [P 209 C 2; P 210 C 1]

Where therefore the income-tax paid by a person does not exceed the local rate payable by him, Proviso 2 to S. 2 (2) does not prevent his being classed as an agriculturist. [P 210 C 1]

**(b) Promissory note—Suit on—Creditor taking new promissory note at increased rate of interest to give time to debtor—Old debt cannot be said to be paid off by acceptance of new bill.**

Where a creditor has not been actually paid but he takes a renewed bill or promissory note for his debt in order to give time to the debtor and receives some consideration by way of increased interest or otherwise for his forbearance, it could hardly be said that the old debt had been paid off by the acceptance of the renewed bill : *A I R 1927 Cal 538, Foll.* [P 210 C 1]

**(c) U. P. Agriculturists' Relief Act (27 of 1934), S. 30 (1)—S. 30 covers case of old debt renewed subsequently.**

Section 30 is wide enough to cover the case of an old debt renewed subsequently. Sub-s. (1) of S. 30 authorises a Court to re-open an old debt which comes under that sub-section. [P 210 C 1, 2]

Ram Prasad Varma and S. S. Nigam — *for Appellant.*

Niamatullah and Akhlaque Husain — *for Respondent.*

**Judgment.**—This is a defendant's second appeal against a decree of the learned District Judge of Lucknow, who modified a decree of the learned Munsif, South

Lucknow, in a suit brought by the plaintiff-respondent under S. 33, U. P. Agriculturists' Relief Act. On 12th January 1932, the respondent borrowed a sum of Rs. 15,000 from the defendant-appellant and executed a promissory note for the debt. On 10th January 1935 the promissory note was renewed by the execution of another for a sum of Rs. 20,402 which sum included the principal amount and interest, a portion of the interest having been remitted by the creditor. A suit under S. 33, U. P. Agriculturists' Relief Act, was brought by the plaintiff praying that the defendant be ordered to render an account in respect of both the promissory notes and that the amount due be declared after regulating interest under the U. P. Agriculturists' Relief Act. The suit was contested by the present appellant who did not admit that the plaintiff was an agriculturist and contended that the debt of 1932 having been paid off by the execution of the second promissory note by the plaintiff, account can only be taken on the second promissory note.

The learned Munsif held that the plaintiff was an agriculturist and was as such entitled to reduction of interest under the provisions of the Agriculturists' Relief Act but he was of opinion that the previous debt of 1932 could not be reopened. As a result of his findings he gave the plaintiff a decree declaring that the amount due on the promissory note of 10th January 1935, upto the date of suit is Rs. 21,711-3-5. The defendant submitted to this decree but the plaintiff appealed and in appeal the learned District Judge, while upholding the trial Court's finding that the plaintiff was an agriculturist, came to the conclusion that the provisions of the Agriculturists' Relief Act required reopening of the original debt and accordingly passed a decree fixing the rates of interest according to S. 30, Agriculturists' Relief Act, and modifying the trial Court's decree.

The present appeal has been filed by the defendant against the learned District Judge's decree and it is also prayed that whatever sum be held to be due to the appellant, a decree for that amount be passed in his favour under S. 33 (2) of the Act. The first contention raised by the learned counsel for the appellant is that the respondent is not an agriculturist as defined in S. 2 (2), Agriculturists' Relief Act. A person who, in the districts not subject to the Benares Permanent Settlement Regulation, 1795, pays land revenue not exceeding Rs. 1000 per annum is an agriculturist under S. 2 (2) (a) and Proviso 1 to the Section lays down that for the purpose of certain Sections and Chapters of the Act including Chap. V, an agriculturist means also a person who would belong to a class of persons mentioned in parts (a) to (g) of this sub-section if the limits of land revenue, local rates, rent and area mentioned in these parts were omitted. Sec. 33 occurs in Chap. V of the Act and though the plaintiff-respondent pays more than Rs. 1000 as land revenue, he is to be deemed an agriculturist by virtue of this Proviso. The argument of the learned counsel for the appellant however is that though he is an agriculturist according to Proviso 1, yet as he pays income-tax also, he is again taken out of the category of agriculturists by Proviso 2 to S. 2 (2). That Proviso is as follows:

> Provided also that no person shall be deemed to be an agriculturist if he is assessed to income-tax, which if he belongs to any of the classes (a) to (e) above, exceeds the local rate payable on the land which he holds, or, if he belongs to class (f) above, exceeds 5 per cent. of his rent, or, if he belongs to class (g) above, exceeds Rs. 25.

We are unable to accept the argument of the learned counsel. It is not to our minds the payment of income-tax absolutely which takes away the effect of Proviso 1, but in the case of a person belonging to class (a), only when the income-tax which he pays exceeds the local rate payable on the land which he holds. The Proviso clearly shows that it is not the payment of income-tax irrespective of its amount that attracts the operation of that Proviso. That payment is qualified by the words "which, if he belongs to any of the classes (a) to (e) above, exceeds the local rate payable on the land which he holds," etc. etc.

Now let us see if the income-tax paid by the plaintiff-respondent does or does not exceed the local rate payable on the zamindari which he holds. Sec. 109, District Boards Act of 1922 repeals Sec. 3, U. P. Local Rate Act, 1914, and provides:

> (1) The District Board of any district may by notification in the Gazette, impose in any local area within the district not subject to the Benares Permanent Settlement Regulation, 1795, a rate to be levied in respect of each estate within such local area and to be assessed at a prescribed amount not exceeding 6½ per cent. upon the annual value of the estate.

"Annual value" is defined in S. 2, Local Rates Act of 1914 as double the amount of the land revenue for the time being assessed upon an estate where the settlement of the land revenue is liable to periodical revision. Notification No. 250/1-243 dated 29th January 1915, contained in the District Board Manual, Vol. I, p. 159 shows that in Oudh for the District of Lucknow the local rate was fixed at Rs. 4-12-0 per cent. per annum upon the annual value of the estate. So far as the khewats on the record show, the land revenue that the respondent pays comes to about Rs. 26,646. The annual value of his estate therefore comes to Rs. 53,292 and the local rate at Rs. 4-12-0 per cent. on this value is about Rs. 2531. As the amount of income-tax which the respondent pays is Rs. 1591-8-0 only, it is clear that the income-tax does not exceed the local rate payable by him, and Proviso 2 does not prevent his being classed as an agriculturist. It was argued that there was no evidence on the record to show the local rate which the respondent pays but Proviso 2 quoted above shows that it is not the actual payment of the local rate, but the amount of the local rate payable by a person that has to be considered under that Proviso. We are therefore of opinion that the Courts below were perfectly right in holding that the plaintiff-respondent is an agriculturist.

The next point urged on behalf of the appellant was that the original debt of 1932 was extinguished by the renewal of the promissory note in 1935 and that therefore it could not be taken into account in the present suit. We are unable to accept this argument also. It was held in A I R 1927 Cal 538[1] that where a creditor has not been actually paid but he takes a renewed bill or promissory note for his debt in order to give time to the debtor and receives some consideration by way of increased interest or otherwise for his forbearance, it could hardly be said that the old debt had been paid off by the acceptance of the renewed bill. Moreover, S. 30, Agriculturists' Relief Act, is wide enough to cover the case of an old debt renewed subsequently. Sub-s. (1) of that Section provides :

> Notwithstanding anything in any contract to the contrary no debtor shall be liable to pay interest on a loan taken before this Act comes into force at a rate higher than that specified in Sch. 3 for the period from 1st January 1930, till such date as may be fixed by the local Government in the Gazette in this behalf.

The loan of 1932 in question was taken before the Act came into force and there appears to us no reason why it should not be covered by S. 30 (1). Further, there is in our opinion much force in the remark of the learned District Judge that when sub-s. (2) of S. 30 authorizes a Court to re-open a debt which has culminated in a decree of Court, it is only reasonable to suppose that sub-s. (1) authorizes the re-opening of an old debt which comes under that sub-section. Both the grounds urged before us therefore fail and we dismiss this appeal with costs.

As the learned counsel for the appellant has asked us to pass a decree in the appellant's favour, we order that a decree for the amount due to the appellant be passed in his favour payable by the plaintiff-respondent in four equal six-monthly instalments to be due in November and May beginning from November 1938. In case of default about any two instalments the whole will at once be due. A charge over the plaintiff-respondent's immovable property will be declared in favour of the defendant-appellant. The appellant will get costs on the amount decreed in his favour, including the court-fee that he will pay under Act 9 of 1937. Defendants will get interest from date of suit up to this day at $6\frac{3}{4}$ per cent. and future interest at $3\frac{1}{4}$ per cent. per annum.

R.M./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Oudh 210

ZIAUL HASAN AND YORKE JJ.

*Mt. Mathura Devi — Defendant —* Appellant.

v.

*Mohan Lal — Plaintiff —* Respondent.

Second Appeal No. 285 of 1936, Decided on 12th August 1938.

* **(a) Transfer of Property Act (1882), S. 68 (1) (c)—Diminution of security and not its insufficiency should be considered—Fall in letting value of security is diminution — Diminution amounts to deprivation.**

Under Cl. (c) of S. 68 (1) no question of the security becoming insufficient within the meaning of S. 66 arises but whether the mortgagee has been deprived of the whole or part of the security by or in consequence of any wrongful act or default of the mortgagor or his representatives-in-interest. Mortgage security will be considered diminished in value within the meaning of S. 68 if its letting value is decreased. When the value of the security has diminished, it amounts to a deprivation of part of the security : *A I R 1923 All 584, Rel. on.* [P 211 C 2]

* **(b) Mortgage—Usufructuary — Diminution of security — Suit on mortgage — Only money decree can be obtained.**

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[1] Kshetra Nath Sikdar v. Harasukdas Balkissendas, (1927) 14 A I R Cal 538=102 I C 871=45 C L J 233=31 C W N 703.

A usufructuary mortgagee has no remedy either by foreclosure or sale of the mortgaged property if he is deprived of the whole or part of the security. He can only get a simple money decree for the mortgage money : *A I R 1918 Cal 797, Rel. on.* [P 211 C 2]

H. Husain — *for Appellant.*

M. Wasim — *for Respondent.*

**Judgment.**—This is a defendant's appeal against a decree of the learned Additional Civil Judge of Gonda affirming a decree of the learned Munsif of that place in a suit brought by the plaintiff-respondent for recovery of the mortgage money under Sec. 68, T. P. Act. On 2nd July 1921, one Dargahi and his wife Mt. Bhagmani, defendant 3, made a usufructuary mortgage of a house in favour of defendant 4, Nageshar. This mortgage was for a term of seven years and the mortgage consideration was Rs. 1200. Nageshar, mortgagee, transferred his mortgagee rights to one Ganga Din in 1923. On 28th March 1936 the mortgagors sold the equity of redemption to defendant 7, Kali Prasad, who is now represented by his widow, Mt. Mathura Devi. On 30th September 1931 Ganga Din transferred his mortgagee rights to the plaintiff-respondent Mohan Lal. The result of these transfers is that while the mortgagee rights now vest in the plaintiff-respondent, Mt. Mathura Devi, the widow of Kali Prasad, appellant, is the sole representative-in-interest of the mortgagors. Defendants 1 and 2 are the sons of Dargahi and defendants 5 and 6 are sons of Ganga Din, both of whom are now dead.

The present suit was brought for recovery of the mortgage money by the plaintiff on 28th August 1935, on the allegation that as the mortgagors and their representatives-in-interest made default in keeping the mortgaged house in repair as was stipulated in the mortgage deed, he has been deprived of at least part of the mortgage security and is thus entitled to recover the mortgage money under S. 68 (1) (c), T. P. Act. The suit was contested by Kali Prasad, defendant 7, only but it was decreed by the trial Court and this decree was on appeal by Kali Prasad affirmed by the learned Additional Civil Judge. Both the Courts below have held that owing to the failure of the mortgagors and their successors to keep the house in repair the house has become uninhabitable and that consequently the plaintiff-mortgagee is entitled to recover the mortgage money.

The first point urged before us on behalf of the appellant was that as the plaintiff-respondent has failed to prove what was the condition of the house at the time when it was mortgaged to Nageshar, it could not be said that the security has become insufficient within the meaning of S. 66, T. P. Act. We are of opinion however that under Cl. (c) of S. 68 (1) no question of the security becoming insufficient within the meaning of S. 66 arises and the only question in the present case is whether or not the mortgagee has been deprived of the whole or part of the security by or in consequence of any wrongful act or default of the mortgagor or his representatives-in-interest. It has been found as a fact by the Court below that owing to want of repairs, the house has become uninhabitable and that while one of the tenants has left the house on that account, the other has had his rent reduced by half. This clearly shows that the value of the security has diminished and this is in our judgment a deprivation of part of the security. In 73 I C 902[1] it was held as a general proposition of law that a mortgage security will be considered diminished in value within the meaning of S. 68, T. P. Act, if its letting value is decreased. We consider therefore that the Courts below were right in holding that the case comes under S. 68 (1) (c), T. P. Act.

The other point raised by the learned counsel for the appellant was that the plaintiff was not entitled to a personal money decree against the appellant. It was pointed out that the plaintiff himself did not ask for a personal decree but sued for a decree for sale of the mortgaged property and prayed for a personal decree only in case the proceeds of the property proved insufficient to satisfy the decree. We think however that the Courts below were right in giving the plaintiff a simple money decree. A usufructuary mortgagee has no remedy either by foreclosure or sale of the mortgaged property so that if he is deprived of the whole or part of the security he can only get a simple money decree for the mortgage money. This view finds support in a case of the Calcutta High Court reported in 41 I C 406.[2] The appeal has in our opinion no force and is dismissed with costs.

B.D./R.K. *Appeal dismissed.*

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[1] **Fateh Din v. Kishen Lal, (1923) 10 A I R All 584=73 I C 902.**

[2] **Aghore Nath Shaha v. Natabar Bairaji, (1918) 5 A I R Cal 797=41 I C 406.**

## A. I. R. 1938 Oudh 212

ZIAUL HASAN J.

*Sheo Ram and others* — Applicants.

v.

*Emperor.*

Criminal Revn. No. 73 of 1938, Decided on 23rd August 1938, from order of the Sess. Judge, Unao, D/- 1st June 1938.

**(a) Criminal Trial—De novo—Trial in second Court from very beginning — Accused cannot compel prosecution to produce witness on whom they do not rely—Court will consider effect if such witness has been previously examined in first Court.**

Where the trial in the second Court is a de novo trial from the very beginning, proceedings taken in the first Court should be ignored and the prosecution are at perfect liberty to produce whichever witness they like and they cannot be compelled to produce, at the instance of the accused, a witness on whose evidence they do not rely. Of course the Court will consider the effect of the prosecution not producing a witness previously examined by them and if he should happen to be one named in the first information report, the circumstance will go against the prosecution. [P 212 C 2]

**(b) Criminal P. C. (1898), S. 350 (1) (a)—Contravention of provisions of S. 350 (1) (a) when vitiates trial stated—Prosecution offering witness for cross-examination without examining in chief — Conviction not based on his evidence—Defect held did not vitiate trial.**

A contravention of the provisions of S. 350 (1) (a) will vitiate the trial only when there is a refusal on the Magistrate's part to resummon and rehear the witnesses or when the evidence of witnesses examined against the provisions of Cl. (a) is relied upon by the Court. [P 213 C 1]

Where in a de novo trial prosecution offered a witness for cross-examination without examining him in chief and his evidence was therefore discarded by the Courts and the conviction of the accused was not based on that evidence :

*Held* that the omission of the prosecution to examine the witness had not caused any prejudice to the accused and did not therefore vitiate the trial : *12 C W N 138, Disting.* [P 213 C 1]

Shankar Sahai — *for Appellant.*

B. K. Dhaon — *for Complainant.*

**Order.** — This is an application in revision against an order of the learned Sessions Judge of Unao passed on the applicants' appeal against their conviction and sentences under S. 323, I. P. C. All the four applicants were sentenced to two months' rigorous imprisonment and Rs. 20 fine each by an Honorary Magistrate of the First Class. On appeal by the applicants, the learned Sessions Judge reduced the sentence of imprisonment from two months to one month but maintained the sentences of fine. The case against the applicants was taken up in the first instance by Mr. Prag Narain, a Magistrate of the Second Class, and he framed a charge against the accused. The case was then transferred to Mr. Mohammad Raza, Honorary Magistrate of the First Class, and the accused applied to him to resummon and rehear the prosecution witnesses. All the witnesses except one Ganga Prasad were reheard in the Court of Mr. Mohammad Raza but the medical witness who had examined the injuries of the complainant was only cross-examined in his Court and not examined by the prosecution.

The learned counsel for the applicants argues that the trial was illegal on account of Ganga Prasad, witness, being withheld by the prosecution and the medical witness being produced for cross-examination only. In support of this argument he relies on S. 350 (1) (a), Criminal P. C., and the cases in 19 Cr L J 321,[1] 26 Cr L J 1596[2] and 27 Cr L J 332.[3] No doubt the provisions of S. 350 (1) are mandatory but the question is what is the effect of a contravention of those provisions in the present case. So far as Ganga Prasad, witness, is concerned it seems to me that S. 350 (1) (a) does not require that even a witness on whom the prosecution does not rely and whom it does not wish to produce, though produced before the first Court, should also be produced in the second Court. The trial in the Court of Mr. Mohammad Raza in the present case was a de novo trial from the very beginning so that what proceedings had been taken in the Court of Mr. Prag Narain should, in my opinion, be ignored. This being so the prosecution were at perfect liberty to my mind to produce whichever witness they liked and they cannot be compelled to produce at the instance of the accused a witness on whose evidence they do not rely. Of course the Court will consider the effect of the prosecution not producing a witness previously examined by them and if he should happen to be one named in the first information report, as is the case with regard to Ganga Prasad, the circumstance will go against the prosecution; but S. 350 (1) (a) does not appear to me to authorize an accused person to compel the prosecution to produce a witness whom they do not wish to produce.

So far as the evidence of the medical officer is concerned, it was undoubtedly a breach of S. 350 (1) (a), Criminal P. C., but as his evidence was discarded by both the Courts below on account of the witness not being examined-in-chief in the Court of Mr. Mohammad Raza, no prejudice has been caused to the applicants by the omission of the prosecution to examine him. A contravention of the provisions of Section 350 (1) (a) will in my opinion vitiate the trial only when there is a refusal on the Magistrate's part to resummon and rehear the witnesses or when the evidence of witnesses examined against the provisions of Cl. (a) is relied upon by the Court. In 12 C W N 138[4] the witnesses for the prosecution were summoned before the second Magistrate but were not examined on behalf of the prosecution and only cross-examined by the accused and it was because the Magistrate arrived at conclusions on the evidence the whole of which was not recorded by himself that it was held that the convictions and sentences were bad. I am therefore of opinion that the defects of procedure in the present case have not caused any prejudice to the applicants and do not vitiate the trial. The learned counsel for the applicants contended that in view of the trivial nature of the applicants' offence, their sentences might be reduced to the period of imprisonment already undergone by them. The sentences of the applicants were reduced as noted above, by the learned Sessions Judge who remarked that the injuries were only superficial and that the trying Magistrate seemed to have been influenced by the exaggerated story of the complainant. In view of these remarks of the learned Judge, I allow this application to the extent of reducing the sentences of imprisonment to the period already undergone by them. The sentences of fine will stand.

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[1] Hnin Yin v. Than Pe, (1918) 5 A I R L B 63 =44 I C 337=19 Cr L J 321=9 L B R 92.

[2] Narayan Reddy v. Bojanna, (1925) 12 A I R Mad 1280=90 I C 668=26 Cr L J 1596=49 M L J 423.

[3] Sidik v. Emperor, (1926) 13 A I R Sind 158= 92 I C 748=27 Cr L J 332=20 S L R 50.

N.S.D./R.K. *Sentences reduced.*

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[4] Sobh Nath Singh v. Emperor, (1908) 12 C W N 138=6 Cr L J 431.

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## A. I. R. 1938 Oudh 213

ZIAUL HASAN AND YORKE JJ.

*Suraj Bakhsh Singh — Objector —* Appellant.

v.

*Phaldan Singh — Decree-holder —* Respondent.

Exn. of Decree Appeal No. 55 of 1936, Decided on 4th August 1938, against order of Civil Judge, Partabgarh, D/- 27th August 1936.

**Execution — Decree binding — Executing Court can question validity of decree if Court passing it has no inherent jurisdiction to pass it — Court has no jurisdiction to pass decree against person who is no party to proceeding before Court.**

Ordinarily a Court executing a decree cannot go behind the decree and has no power to entertain any objection as to the validity of the decree or as to the legality of the character of the decree, but this is only true in a case when a Court passing the decree had got jurisdiction to pass it; but where the Court passing the decree was inherently incompetent to pass the decree and had absolutely no jurisdiction to pass it, its decree is a nullity and no question of the validity of the decree arises in such a case: *A I R 1934 Oudh 75 (F B); A I R 1935 Oudh 358 (F B) and A I R 1932 Mad 7, Rel. on.* [P 214 C 1]

A Court is incompetent to pass a decree against a person who is no party to the particular proceeding before it. Where therefore a suit brought by a guardian professing to act as next friend of a person is dismissed awarding costs to defendant and it turns out that the person was major at the time of instituting the suit, the decree passed is without jurisdiction as being against a person who is no party to the suit and the person is not liable for the decree for costs. [P 214 C 1, 2]

S. C. Das and Radha Krishna Srivastava —*for Appellant.*

Nazir Uddin — *for Respondent.*

**Judgment.** — This execution of decree appeal against an order of the learned Civil Judge of Partabgarh, who reversed an order of the learned Munsif of that place, arises out of the following circumstances. In August 1918 the present appellant's mother Mt. Bishunathi obtained a certificate of the appellant's guardianship from the Court of the District Judge in which it was stated that the appellant would come of age in October 1934. On 20th July 1933, Mt. Bishunathi filed a suit against the present respondent and others on behalf of the present appellant in the Court of the Munsif, Partabgarh, professing to act as the next friend of the appellant. The suit was contested by the present respondent one of whose pleas was that the suit was barred by time having been brought more than three years after the plaintiff's attaining majority. The Court went into this question and holding that the plaintiff had attained majority more than three years before the suit, dismissed it as time barred and awarded costs to the respondent. On 15th July 1935, the present respondent applied for execution of the decree so far as it related to costs awarded to him against the present appellant. The appellant filed objections mainly on the ground that as he was no party to the decree awarding costs to the respondent, he was not liable. This objection was upheld by the executing Court, the learned Munsif of Partabgarh. The defendant-respondent filed an appeal against that order and the learned Civil Judge in appeal reversed the first Court's order and directed that the execution case should be proceeded with. Against this order of the learned Civil Judge the present appeal has been filed.

We are of opinion that the order of the lower Appellate Court cannot be sustained. When the Court which was dealing with the suit found that the plaintiff had attained majority more than three years before the suit, it had to our minds no jurisdiction to proceed with the suit as it was not properly brought and should have either dismissed it or allowed the plaintiff to amend the plaint and file it as a major. In 11 O W N 169[1] it was held by a Full Bench of this Court that ordinarily a Court executing a decree cannot go behind the decree and has no power to entertain any objection as to the validity of the decree or as to the legality of the character of the decree, but that this is only true in a case when a Court passing the decree had got jurisdiction to pass it, but where the Court passing the decree was inherently incompetent to pass the decree and had absolutely no jurisdiction to pass it, its decree is a nullity and no question of the validity of the decree arises in such a case: *vide* p. 177 of the report. This principle was later confirmed by another Full Bench of this Court in 1935 O W N 654[2] in which it was held that an execution Court can refuse to execute a decree on the ground of its being a nullity in the sense of its not being a decree at all in the eye of the law either for want of inherent jurisdiction to pass it or for any other reason: *vide* page 660. It was remarked by the late Srivastava J., at page 657 :

> As regards the personal jurisdiction the most familiar instance is that of a case in which a decree is passed against a dead person. In such a case it needs no argument to say that the decree is not a decree at all in the eye of the law and can be disregarded as a nullity on account of absolute lack both of personal and inherent jurisdiction by any Court before which it is presented.

It seems to us that the case of a Court passing a decree against a person who is not before it is no better than that of its passing a decree against a dead person. Of course the Court in the present case could and should have awarded costs against the lady who brought the suit as next friend of the present appellant and it may be presumed that that was the intention of the Court in passing the order for costs; but the omission of the Court to make specific mention of the person against whom costs were being awarded does not in our opinion render the present appellant, who was strictly speaking no party to the suit, liable. We know of no law or procedure, and the learned counsel for the respondent has not been able to point out any which authorizes the Court to pass a decree against a person who is no party to the particular proceeding before it. The learned counsel for the respondent relies on the case in A I R 1932 Mad 7;[3] but in that case also it was held that if a decree is apparently a nullity, so that without going behind it the executing Court can see from its face that it is void, the executing Court is not bound to execute it : *vide* page 8.

It was also argued that the suit was in reality brought by the appellant but that as it was brought more than three years after the plaintiff's attaining majority, it was filed in the next friendship of his mother in order to avoid the plea of limitation. This may possibly be so but this does not render the appellant liable under the decree as it stands and we consider that the remedy of the respondent lies either in executing the decree against Mt. Bishunathi or in getting the appellant's liability established by a regular suit. The order of the learned Munsif was in our opinion quite correct and must be restored. The appeal is therefore allowed with costs, the order of the lower Appellate Court set aside and that of the first Court restored.

D.S./R.K. *Appeal allowed.*

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[1] Ram Narain v. Suraj Narain, (1934) 21 A I R Oudh 75=147 I C 1209=9 Luck 435=11 O W N 169 (F B).

[2] Sheo Behari Lal v. Makrand Singh, (1935) 22 A I R Oudh 358=155 I C 759=1935 O W N 654 (F B).

[3] Govindan Nadar v. Natesa Pillai, (1932) 19 A I R Mad 7=135 I C 314=61 M L J 520.

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## A. I. R. 1938 Oudh 214

ZIAUL HASAN J.

*Manzoor Ali Khan and others* — *Defendants* — Appellants.

v.

*Maharaja Pateshwari Prasad Singh* — *Plaintiff* — Respondent.

Second Appeal No. 85 of 1936, Decided on 1st August 1938, against order of Dist. Judge, Lucknow, D/- 2nd December 1935.

**(a) Second Appeal—Findings of fact.**

High Court in second appeal has no jurisdiction to interfere with findings of fact : *A I R 1930 P C 91 and A I R 1934 P C 5, Foll.* [P 215 C 2; P 216 C 1]

**(b) Limitation Act (1908), Art. 142—Suit for possession of strip of waste land lying on boundary of plaintiff's village, on ground that it formed part of village—Plaintiff's title to land established — Possession within twelve years before suit held should be presumed.**

A suit was brought for possession of certain strip of land on the ground that it formed part of the village granted to the plaintiff. The strip was a piece of waste land lying on the boundary of the plaintiff's property in the village, and plaintiff's title in the land had been established. The question was whether plaintiff was in possession of the land within 12 years before the suit :

*Held* that as the strip of land in question was a piece of waste land lying on the boundary of the plaintiff's property in the village and as title to the land had been established in the plaintiff, it must be presumed that the land had been in the plaintiff's possession. [P 216 C 1]

Niamatullah and S. C. Das — *for Appellants.*

M. Wasim and P. N. Asthana — *for Respondent.*

**Judgment.**—This second appeal against a decision of the learned District Judge of Lucknow, who confirmed a decree of the learned Munsif, North Lucknow, arises out of a suit for possession of a strip of land lying close to the Aminabad Road in the city of Lucknow originally brought by the Manager of the Court of Wards, Balrampur estate against the defendants-appellants. The plaintiff's case was that the land formed part of village Dogawan which was granted to the predecessor of the present holder of the Balrampur estate by a sanad dated 1868, but that the defendants' father had taken unlawful possession of it and built a house thereon. The defendants denied the plaintiff's title to the land and alleged that it was originally the property of the Municipal Board of Lucknow who sold it to the defendants' father and the latter built a house on it at a cost of Rs. 10,000. It was also pleaded that the plaintiff was not in possession of the land within the last twelve years, and further that the defendants were protected by S. 41, T. P. Act.

The learned Munsif who tried the case overruled the pleas of the defendants and decreed the suit subject to the payment by the plaintiff of compensation for the defendants' constructions, the amount of which was to be determined in the execution department. The defendants filed an appeal against the trial Court's decree but the appeal was dismissed by the learned District Judge who confirmed the decree of the trial Court. The appeal raises two points, namely, (1) whether the plaintiff was in possession of the land within twelve years before the suit, and (2) whether the defendants are protected by S. 41, T. P. Act. On the latter plea the learned District Judge held that as the father of the defendants at the time of purchasing the land from the Municipal Board in 1923 did not make the necessary inquiries as to the ownership of the land, the defendants were not protected. This finding was not seriously challenged before me. In fact, the point was not pressed by the learned counsel for the appellants.

On the question of limitation it is argued that the learned District Judge has wrongly placed the burden of proof on the defendants and that the case is governed by Art. 142 and not by Art. 144 of Sch. 1, Limitation Act. It is true that in view of the statements made in the plaint, the proper Article applicable to the case is Art. 142 and it is also true that the learned District Judge appears to have laid more stress on the failure of the defendants to prove adverse possession than on the question whether or not the plaintiff had been in possession within twelve years next before the suit, but at the same time he came to the clear finding that the land in suit did not belong to the Municipality and that the Municipality was not in possession of the land before the sale made to the defendants' father on 23rd October 1922. The plaintiff has produced the sanad Ex. 9 which clearly shows that the village of Dogawan was granted by the Government to the predecessor-in-title of the present taluqdar and Exs. 3, 4, 6 and 8 further prove the plaintiff's ownership of village Dogawan and the land in suit forming part of that village. Indeed the plaintiff's ownership of the land was not seriously disputed before me. The findings of the lower Appellate Court that the land did not belong to the Municipality and that the Municipality was not in possession of it are findings of fact which in view of what their Lordships of the Judicial Committee have laid down in 57 I A 86[1] and 61 I A 93[2] I have no jurisdiction to interfere with in second appeal. Moreover as the strip of land in question is a piece of waste land lying on the boundary of the plaintiff's property in village Dogawan and as title to the land has been established in the plaintiff, it must be presumed that the land has been in the plaintiff's possession. The appeal is therefore dismissed with costs and the lower Court's decree confirmed.

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[1] Wali Mohammad v. Mohammad Bakhsh, (1930) 17 A I R P C 91=122 I C 316=11 Lah 199=57 I A 86 (P C).

[2] Anup Mahto v. Mita Dusadh, (1934) 21 A I R P C 5=147 I C 977=13 Pat 254=61 I A 93 (P C).

D.S./R.K. *Appeal dismissed.*

## A. I. R. 1938 Oudh 216

THOMAS C. J.

*Wali Jan and others*— Applicants.

v.

*Emperor.*

Criminal Revn. No. 30 of 1938, Decided on 1st August 1938, from order of Sessions Judge, Fyzabad, D/- 27th January 1938.

**Criminal P. C. (1898), S. 239—Quarrel between three accused on one side and one *G* on other side—*G* beaten and while going to thana for reporting, her buffalo forcibly taken by three accused and another to cattle pound—Joint trial by joining charges under S. 323, Penal Code, and S. 22, Cattle Trespass Act, in one trial held not illegal.**

A joint trial in violation of the express provisions of S. 239, Criminal P. C., is not illegal or void ab initio, if it has not occasioned a failure of justice and has not prejudiced the accused in his defence on the merits. [P 216 C 2]

A quarrel ensued between three accused on the one side and one *G* on the other side and *G* was beaten by these persons. She then left for the thana to file a report against them, but before she arrived there, her buffalo had been forcibly taken to the cattle pound by the three accused and accused 4. The Magistrate joined at one trial the two charges under S. 323, Penal Code, and S. 22, Cattle Trespass Act :

*Held* that the trial was not illegal as the two incidents formed part of the same transaction and did not represent separate transactions. [P 216 C 2]

Nasirullah Beg — *for Applicants.*

Ali Hasan — *for the Crown.*

**Order.** — This is an application for revision against an order of the learned Sessions Judge of Fyzabad, dated 27th January 1938, upholding the order of conviction of the applicant by the Joint Magistrate of Fyzabad, dated 16th November 1937. Rahman and Suleman are the sons of Wali Jan, applicant 1, and Mt. Mahngina is the wife of Wali Jan. Wali Jan, his wife, Mt. Mahngina, and their son Suleman have been convicted under S. 323, Penal Code, and sentenced to pay a fine ; and these three applicants together with Rahman have each been convicted and fined under S. 22, Cattle Trespass Act. It has been proved that a quarrel ensued one morning between Wali Jan, Mt. Mahngina and their son Suleman on the one side and Mt. Ganga Dei on the other side, because the fowls belonging to Wali Jan ate some grain which Mt. Ganga Dei had spread out in front of her house for drying. Abuse between the parties followed and Mt. Ganga Dei was beaten by these persons. She then left for Tanda to file a report against them, but before she arrived there, she was told by her servant that her buffalo had been forcibly taken to the cattle pound by Wali Jan and applicant 4, Rahman. The Magistrate who tried the case connected these two incidents, as according to him one was found to have followed immediately after the other and in consequence of the other. He came to the conclusion that although they were different offences they were committed in the course of the same transaction.

The learned counsel on behalf of the applicants has not challenged the findings arrived at by the two Courts. His objection is that the Magistrate was not justified in joining at one trial the two charges which amounts to an illegality and is not a mere irregularity. I may mention that this objection was not raised in the Court of the trying Magistrate, but was for the first time raised before the learned Sessions Judge. In my opinion there is no force in this contention. The prosecution case was that the buffalo belonging to Mt. Ganga Dei was unjustifiably impounded by Wali Jan and Rahman as a direct consequence of the quarrel about the fowls. I agree with the learned Sessions Judge that the two incidents formed part of the same transaction and did not represent separate transactions. The object of the applicants was to harass Mt. Ganga Dei. In my opinion a joint trial in violation of the express provisions of S. 239, Criminal P. C., is not illegal or void ab initio, if it has not occasioned a failure of justice and has not prejudiced the accused in his defence on the merits. In the present case, as I have already pointed out, no objection was raised at the trial, nor was there anything on the record to show that there was any failure of justice. There is no substance in this application for revision, which is accordingly rejected.

D.S./R.K. *Application rejected.*

## A. I. R. 1938 Oudh 217

YORKE J.

*Govind Prasad and others — Creditors* — Applicants.

v.

*Mt. Mustafa Begam and others —* Opposite Party.

Civil Misc. Appln. No. 57 of 1938, Decided on 8th August 1938, for transfer of case pending in the Court of Special Judge, First Class, Lucknow.

**Civil P. C. (1908), S. 24 — Scope — Phrase "other proceeding" in S. 24 covers transfer of disposal of claim under U. P. Encumbered Estates Act from Court of one Special Judge to another — Transfer in sub-cl. (iii) covers retransfer of decided case from transferee Court.**

The phrase "other proceeding" contained in S. 24, Civil P. C., is sufficiently general to cover the case of the transfer of the disposal of one claim under U. P. Encumbered Estates Act from the Court of one Special Judge to another. Further, the provision relating to the transfer contained in sub-cl. (iii) of the Section is sufficient to cover the retransfer of the decided case to the file of the Special Judge, after its decision at the place where it had been transferred. [P 218 C 1]

M. Wasim — *for Appellants.*

H. A. Khan and R. K. Srivastava — *for Opposite Party.*

**Order.**—This is an application for transfer under S. 24, Civil P. C., of Suit No. 28 of 1936 from the Court of the Special Judge, First Class, Lucknow, to the Court of the Special Judge, First Class Sitapur. I note that the application is described at the beginning as an application for transfer of a claim under the Encumbered Estates Act, whereas in the last paragraph but one the prayer is for the transfer of Suit No. 28 of 1936, which is apparently the number of the case as a whole.

The applicant Govind Prasad is a mortgagee of Mt. Mustafa Begam and Mt. Gauhar Jahan Begam. Mt. Mustafa Begam has filed an application under the Encumbered Estates Act in Lucknow and has mentioned in her list of debts the applicant's debt under certain mortgage deeds in which she is the owner of the equity of redemption to the extent of a 1/7th share. Similarly Mt. Gauhar Jahan Begam has filed an application under the Encumbered Estates Act in the Sitapur district and has mentioned in the list of debts the same mortgage deeds in which she also is interested as a mortgagor to the extent of a 1/7th share. We are not concerned with the other 5/7th. The case of Mt. Mustafa Begam under the Act in Lucknow has progressed much farther than the case of Gauhar Jahan Begam in Sitapur, in which it is stated that 24th February 1938, was fixed for the settlement of issues. It is to be remembered that each of these claims under the Encumbered Estates Act becomes for practical purposes a separate suit in which ultimately the Special Judge concerned will, under sub-s. (7) of S. 14, pass a simple money decree for such amount as he finds due to the claimant. We have therefore clearly established in the present case, and doubtless this must be the case in numerous such proceedings all over the country, that whereas a redemption suit or a suit on foot of a mortgage could have been filed in one and only one place, two suits to decide the amount due to the creditor claimant under one and the same mortgage or mortgages are to be decided in different districts. Theoretically it will be necessary to produce the same evidence twice over, although it is suggested that by making Mt. Gauhar Jahan Begam a party to the proceeding in Lucknow, the decision of the Special Judge of Lucknow will effectively decide the claim in regard to the other mortgagor in Sitapur. Even this is a point on which it would be unsafe to dogmatise at the present moment, because the Special Judge has in each case under Sec. 14 (2) of the Act to determine the amount, if any, due from the landlord to the claimant on the date of the application under S. 4, which prima facie the Special Judge of Lucknow might not have jurisdiction to do.

On the other hand the results of transferring a suit under this Act from one Special Judge to another are also not free from doubt. The Special Judge to whom the transfer is sought to be made will have no power to do anything in the matter after he has come to a decision and passed a simple money decree provided for by S. 7, and if this proceeding were to stay on the file of that Special Judge, it would not be possible for the Special Judge of Lucknow to comply with the provisions of S. 16 of the Act. With regard to the ranking of the debts and Sec. 19 of the Act and with regard to the sending of the decrees granted under sub-s. (7) of S. 14 to the Collector for execution, it is possible that there may be other complications which have not been foreseen in the arguing of this application. It seems to me however that this particular difficulty can be met by a further direction in the order of transfer that when the Court to which the proceeding is transferred passes a decree, it shall send the record of that particular proceeding back to the Special Judge of Lucknow to be dealt with according to the spirit, if not according to the strict letter of the Act.

Learned counsel for the applicant lays great stress on the difficulties which will befall his client if the case arising out of the claim of the applicant against Mt. Mustafa Begam pending in Lucknow is not transferred to Sitapur. First he will have to file both in Lucknow and Sitapur the originals of his accounts covering a period from 1903 to 1938 of which it is clearly impossible to file certified copies, secondly he will have to produce the same set of witnesses twice over in Lucknow and Sitapur, and thirdly there will be a completely unnecessary duplication of proceedings entirely contrary to the spirit of the law, which on principle is opposed to multiplicity of suits arising out of the same matter. On this score it is clear that the applicant has a very strong case. On behalf of the opposite party it is contended that the provisions of S. 24, Civil P. C., are not wide enough to cover the present application. That Section lays down that:

> On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage:
>
> (a) Transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or
>
> (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and
>
> (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
>
> (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

Learned counsel contends that this transfer, if made, will not amount to the transfer of any suit or proceeding but will amount to a dissection of a suit. It might equally be said that the Encumbered Estates Act itself has in cases of this kind resulted in the dissection of a mortgage suit. It appears to me that the phrase "other proceeding" contained in S. 24 is sufficiently general to cover the case of the transfer of the disposal of one claim from the Court of one Special Judge to another. It further appears to me that the provision relating to the transfer contained in sub-cl. (iii) of the Section is sufficient to cover the retransfer of the decided case to the file of the Special Judge, Lucknow, after its decision at Sitapur.

Learned counsel for the opposite party further contends that this application for transfer is really being made on the ground of the convenience of the applicant and nothing more. I am not satisfied on that point and it seems to me that even if that is a major point in the case of the applicant, it is not one which can be neglected in the present case. The opposite party will be put to little inconvenience comparatively speaking while the result of the transfer will be that the claim against the two encumbered estates applicants under one and the same set of mortgages will be decided in a single Court before which the whole of the evidence both documentary and oral can be produced with comparatively little difficulty. It may be that there may be a few months further delay in the final disposal of Mt. Mustafa Begam's application at Lucknow, but I am not disposed to think that that is really a very serious consideration. Taking all that has been put before me into consideration, I am satisfied that in the interest of justice and the proper disposal of questions arising with reference to the claims of the applicant under these particular mortgages, it is necessary to grant the prayer of the applicant. I accordingly order under S. 24, Civil Procedure Code, that the applicant's claim against Mt. Mustafa Begam under the mortgages mentioned in list A of this application be transferred to the Court of the Special Judge, First Class of Sitapur, for disposal under S. 14, Encumbered Estates Act, and that after decision of the said claim, the case be retransferred to the Court of the Special Judge, First Class, Lucknow for further disposal under the Act. No order as to costs of this application.

D.S./R.K. *Order accordingly.*

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## A. I. R. 1938 Oudh 218

THOMAS C. J. AND YORKE J.

*Gur Dayal — Accused —* Applicant.

v.

*Sheo Dularey — Complainant —* Opposite Party.

Criminal Reference No. 5 of 1938, Decided on 18th August 1938, made by Sessions Judge, Unao.

**Criminal P. C. (1898), S. 350 (1), Proviso — Magistrate deciding under S. 350 (1) to recommence trial — Accused has no right to demand that trial shall not be recommenced.**

**Where a Magistrate succeeding another Magistrate trying a case, decides, under S. 350 (1), to resummon the witnesses and recommence the inquiry or trial, Proviso (a) to S. 350 (1) does not entitle the accused to demand that the trial shall not be recommenced. The accused has no right to**

insist that there shall not be a de novo trial or inquiry. No question of prejudice to the accused arises in such a case. The Proviso (a) to S. 350 (1) has no application in a case in which the second Magistrate decides to recommence the trial. The Proviso merely gives the accused a right to demand that the witnesses or any of them be resummoned and reheard; it gives him no other right : *A I R 1937 Nag 147 and A I R 1935 Mad 318, Rel. on; A I R 1934 Oudh 324, Dissent.; A I R 1926 Mad 815 ; A I R 1925 Mad 317 and A I R 1930 Nag 59, Disting.* [P 221 C 1]

H. N. Misra for Dr. J. N. Misra — *for Accused.*

H. K. Ghosh and S. K. Sukla — *for Opposite Party.*

**Order.** — This is a reference by the learned Sessions Judge of Unao submitting for the orders of this Court a case under S. 408, I. P. C., and recommending that, in the light of the ruling of this Court reported in 11 O W N 825,[1] the order of a Magistrate passed under S. 350, Criminal P. C., for the resummoning of the witnesses and the recommencement of the inquiry or trial be set aside.

What happened in this case was that the opposite party, Sheo Dularey, on 29th July 1937 filed a complaint against Gur Dayal in the Court of the Subdivisional Magistrate of Hasanganj under S. 408, I. P. C. The Subdivisional Magistrate, unwisely as we think, transferred the case for trial to the Court of an Honorary Magistrate of the Second Class, Pandit Shiam Sundar Nath Kaul. The Magistrate on 9th October 1937 framed a charge with respect to one item only of Rs. 200, and the prosecution witnesses were ordered to be resummoned for further cross-examination after the charge, and they were so resummoned and cross-examined. On 28th October 1937, the complainant, whose application in regard to the declaration of one witness as hostile had been refused by the Honorary Magistrate, applied to the District Magistrate for transfer of the case, and the District Magistrate passed an ex parte order transferring the case to the Court of an Honorary Magistrate of the First Class, Saiyid Mohammad Raza. On the case coming up before this Magistrate on 30th October 1937 in the absence of the accused, the Magistrate passed an order that he would resummon the witnesses and recommence the trial. On the next date fixed for the hearing of the case, 10th November 1937, the accused made an application purporting to be an application under the Proviso to Sec. 350, sub-s. (1), Criminal P. C., that he did not want the witnesses to be resummoned. The Court heard arguments, and on 20th November 1937 passed a fresh order stating in full the grounds on which he considered it necessary to begin the case afresh and record all the evidence himself. Thereupon the accused, Gur Dayal, filed an application in revision to the Sessions Judge of Unao with the result that the learned Sessions Judge has submitted the record to this Court for orders.

Learned counsel for Gur Dayal has mentioned to us that the Honorary Magistrate who passed the order of 20th November 1937 has ceased to function as such and implies that in the circumstances it is not necessary for this Court to pass any order. We are however of opinion that as the Magistrate has passed this order, it would not be legitimate for any Court before whom the case might come in future to pass an order inconsistent with this order unless he could found his change of procedure on an order of this Court. Secondly in view of the fact that the matter has been referred to us for orders and the matter is of some importance, and one which frequently comes before the Courts, we think that it is essential to pass orders on the reference, and not merely to treat it as no longer requiring any decision. The proposition put forward on behalf of Gur Dayal is that Proviso (a) to S. 350 (1), Criminal P. C., is to be read as controlling the discretion of the Magistrate not only in cases where he has decided to act on the evidence recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, but also in cases in which he has decided to resummon the witnesses and recommence the inquiry or trial. The relevant portion of S. 350 runs as follows:

> (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself or he may resummon the witnesses and recommence the inquiry or trial;
>
> Provided as follows:
>
> (a) in any trial the accused may, when the Second Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard.

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[1] Manzoor Ali v. Abdul Salam, (1934) 21 A I R Oudh 324=1934 Cr C 877 = 150 I C 857=35 Cr L J 1147=11 O W N 825.

The learned Sessions Judge who has submitted the reference was bound to do so in the light of the ruling of this Court mentioned above. In that case Nanavutty J. held with reference to the circumstances of that case that an order by the Magistrate to whom a case had been transferred that the accused was to be tried de novo under the provisions of S. 350, Criminal P. C., in spite of the protests of the accused that the trial should proceed from the stage at which it had been left unfinished by the original Magistrate and that he would be prejudiced by recommencing the trial was arbitrary and could not be upheld. In the course of the ruling at p. 827, after referring to certain rulings of other Courts and holding that they had no application to the matter which was before him, the learned Judge remarked:

> It is true that S. 350, Criminal P. C., does enable a Magistrate to resummon the witnesses and recommence the inquiry or trial, but that right of the Magistrate is subject to the Proviso that the accused may, when the Second Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard. It follows therefore as a corollary from this that if the accused does not wish to have a fresh trial, he can insist upon his case being decided upon the evidence already recorded by the first Magistrate.

With respect, we are unable to agree that the corollary stated by the learned Judge follows from the premises. The learned Judge went on to refer to three rulings, two of the Madras High Court and one of the Judicial Commissioner's Court at Nagpur. He remarks that in 94 I C 707,[2] it was held by Jackson J. of the Madras High Court that

> the privilege under S. 350, Criminal P. C., was that of the accused and not of the complainant and that if the accused declined to act under sub-s. (1) (a) of S. 350, Criminal P. C., the complainant of necessity must suffer any disadvantage which follows upon the Magistrate electing to proceed upon the evidence already recorded.

That is a proposition about which there is no room for doubt. The case was one in which the Magistrate elected to proceed upon the evidence already recorded. The accused did not put forward any demand under the Proviso and the complainant had no locus standi in the matter at all. The ruling has no applicability to the present case. He next referred to 85 I C 366,[3] another Madras case, in which it was held that:

> Under Proviso (a) to S. 350 (1), Criminal P. C., the right given to an accused person was the right of demanding that the prosecution witnesses or any of them be resummoned and reheard, and it rested on the accused to say who should be resummoned and reheard and that the complainant had no such right and could not claim a de novo trial from the beginning.

The proposition stated in this case also is of no assistance in the present case. The complainant can, of course, put before the Magistrate reasons why it is desirable that the witnesses should be resummoned and the inquiry or trial recommenced, but he has no right to demand that the witnesses be resummoned or to claim a de novo trial from the beginning. The learned Judge referred thirdly to the case in A I R 1930 Nag 59,[4] in the course of which it was said:

> It is however clear that the discretion given to a Magistrate by S. 350 (1), Criminal P. C., to act or not to act upon the evidence recorded by his predecessor is not absolute but is controlled by Proviso (a) to that Section and it is solely left to the accused whether to claim the right to have the witnesses already examined by the previous Magistrate recalled and re-examined by the succeeding Magistrate.

That was a case in which there was a difference of opinion between some of the accused who wanted that only some of the witnesses examined by the first Magistrate should be resummoned and examined afresh before the new Magistrate and others who wanted the whole of the trial to be conducted de novo (we are quoting from the ruling but it may perhaps be noted that Proviso (a) does not entitle the accused to demand that the Magistrate should recommence the trial but only that the witnesses or any of them be resummoned and reheard), and in that case the Magistrate had originally decided to examine all the prosecution witnesses afresh, but on a subsequent application had overridden his first order and accepted the request made by the second lot of accused. The question which is for decision by us now did not at all arise in that case, and it is not in any sense an authority for the proposition that the accused has by virtue of Proviso (a) to S. 350 (1), Criminal P. C., any right to demand that a trial shall not be recommenced by the Magistrate if the Magistrate decides to exercise his option so to order. Nanavutty J. remarked that on the strength of the rulings cited, the order of the learned Deputy Magistrate was arbitrary and could not be upheld, and he therefore set aside the order directing a de novo trial and directed the Magistrate to proceed with the trial of the case from the stage at which it was left unfinished by his predecessor.

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[2] In re Arulay, (1926) 13 A I R Mad 815 = 94 I C 707=27 Cr L J 659.

[3] In re Vadigalapydigadu, (1925) 12 A I R Mad 317=85 I C 366=26 Cr L J 526.

[4] Emperor v. J. B. Sane, (1930) 17 A I R Nag 59=1930 Cr C 147=121 I C 646=31 Cr L J 282.

It does not appear to us on a consideration of the wording of Sec. 350, sub-s. (1) that the Proviso has any application in a case in which the second Magistrate decides to resummon the witnesses and recommence the inquiry or trial. The Proviso gives the accused a right at the time of the commencement of the proceedings before the second Magistrate to demand that the witnesses or any of them be resummoned and reheard, and it does not give him any other right. It would be difficult to say that there can in any judicial sense be prejudice to the interest of the accused by the Magistrate, who is to try the case, resummoning the witnesses and recommencing the trial. It may be that the effect of such an order will be that the trial will be protracted somewhat longer than it might otherwise have been, and it may be that the Magistrate may decide to frame further charges in addition to the charge or charges, if any, framed by the first Magistrate, but that is a matter which would have been within his competence in any case under the provisions of Sec. 227, Criminal P. C. We are therefore unable to hold that any question of prejudice really arises. We are confirmed in the view we take of the interpretation of S. 350, sub-s. (1), Criminal P. C., by a later Nagpur ruling reported in A I R 1937 Nag 147[5] in which it was held, dissenting from the view of this Court in the case referred to above, that :

> The accused has no right to insist that there shall not be a de novo trial or inquiry. The Magistrate beginning the proceedings anew against the wishes of the accused is not acting without jurisdiction. There is no provision in the Code which enables the accused to demand that witnesses examined by the Magistrate, who has ceased to exercise jurisdiction, shall not be resummoned and reheard.

The learned Judge was of opinion that had the proposition now put forward before us and accepted by Nanavutty J. in the reported ruling been correct and had the accused a right both to demand that witnesses be resummoned and that they should not be resummoned, Sec. 350 would have been differently worded. He went on to point out that :

> It is clearly desirable for the proper administration of justice that normally the Magistrate who passes the final order should be the Magistrate who has heard all the evidence, and in order that there should be no prejudice to the accused it is expressly provided that, in cases where the Magistrate does not propose to follow this procedure, the accused is entitled to demand that this procedure shall be followed.

The same view was taken in A I R 1935 Mad 318[6] in which it was held that :

> The Magistrate, as well as the accused, has a privilege under S. 350, Criminal P. C. If he does not like the idea of giving judgment on evidence partly or wholly recorded by his predecessor, he may decide to resummon the witnesses and recommence the inquiry or trial. If he exercises that option, it is clear that the accused cannot object to the examination afresh of any witness.

That is a proposition with which we are in entire agreement. In these circumstances we reject the reference, and as it appears that the Magistrate concerned has ceased to function as such, we direct that the record be returned through the Sessions Judge to the District Magistrate with a direction to make it over for trial to a stipendiary Magistrate who should, in view of the circumstances of the case, resummon the witnesses and recommence the trial.

R.M./R.K. *Reference rejected.*

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[5] Sardari Lal v. Emperor, (1937) 24 A I R Nag 147=169 I C 47=38 Cr L J 697=I L R (1937) Nag 538.

[6] Verrappa v. Emperor, (1935) 22 A I R Mad 318=1935 Cr C 381=157 I C 1020=36 Cr L J 1265.

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## A. I. R. 1938 Oudh 221

ZIAUL HASAN AND YORKE JJ.

*Sheo Nath and another* — Applicants.

v.

*Madan Mohan Lal and another* — Opposite Party.

Civil Revn. Appln. No. 210 of 1936, Decided on 1st September 1938, from order of Civil Judge, Unao, D/- 10th December 1936.

**(a) U. P. Encumbered Estates Act (25 of 1934), S. 7 — Decree-holder in execution of decree for sale putting up property to sale and purchasing it himself — Application by judgment-debtor under O. 21, R. 90, Civil P. C. dismissed and sale confirmed — In meantime appeal by judgment-debtor against dismissal of application under O. 21, R. 90 — Order confirming sale stayed and parties entering into compromise providing that amount would be paid within certain period failing which sale would be confirmed—Default in payment but decree-holder taking no steps to get sale confirmed — Order of Collector under S. 6, U. P. Encumbered Estates Act—Debt held not extinguished at time of Collector's order and subsequent delivery of possession to decree-holder held void.**

A person obtained a decree for sale and in execution of that decree he put up the property for sale and purchased it himself. The judgment-debtors brought an application under O. 21, R. 90, Civil P. C., to have the sale set aside but this objection was dismissed and the sale confirmed in 1932. In the meantime the judgment-debtors had appealed against the dismissal of their objection under O. 21, Rule. 90 and the order confirming the sale proceeding was stayed. The parties to the appeal entered into a compromise whereby it was provided that judgment-debtor would pay the amount within nine months, and that if such payment was not made the sale would be confirmed. No payment was made by them within the stipulated nine months. But the decree-holder took no steps to get the sale confirmed. The judgment-debtors applied under S. 4, U. P. Encumbered Estates Act, and an order under S. 6 of the Act was accordingly passed by the Collector. Subsequently the decree-holder applied under O. 21, R. 95, Civil P. C., to be put in possession of the property purchased by him in execution of his decree and possession was delivered to him :

*Held* that up to the date on which the Collector passed an order under S. 6 of the Act neither had the sale been finally confirmed nor had the decree-holder obtained possession of the property purchased by him. Hence the debt had not been extinguished on the date of the Collector's order under S. 6. The process issued subsequently for delivery of possession to the decree-holder, which was admittedly an execution process, became null and void and the judgment-debtor was consequently entitled to be put back in possession of the property : *1937 O W N 1153, Rel. on.* [P 223 C 2]

**(b) U. P. Encumbered Estates Act (25 of 1934), S. 7 (1) (a) — Processes issued in contravention of S. 7 (1) (a) can be set aside under S. 151, Civil P. C.**

Though S. 144, Civil P. C., does not in terms apply to processes issued in contravention of the terms of S. 7 (1) (a), U. P. Encumbered Estates Act, such processes can be set aside under the provisions of S. 151, Civil P. C. : *A I R 1937 Oudh 106, Rel. on.* [P 223 C 2 ; P 224 C 1]

K. P. Misra and Syed Mohammad — *for Applicants.*

H. Husain — *for Opposite Party.*

**Order.**—This is an application for revision of an order of the learned Civil Judge of Unao dismissing the judgment-debtors' application for re-delivery of possession of certain property to them. The facts are that on 12th April 1930, the opposite parties obtained a decree for sale for Rs. 4000 on a mortgage against the present applicants. In execution of that decree they put up the property for sale and purchased it themselves on 20th October 1931. The judgment-debtors brought an application under O. 21, R. 90, Civil P. C., to have the sale set aside but this objection was dismissed and the sale confirmed on 20th April 1932. On 15th May 1933, the decree-holders were put in possession of the property purchased by them in the Court sale. In the meantime the judgment-debtors had appealed against the dismissal of their objection under O. 21, R. 90 and the order confirming the sale proceedings was stayed on their application by the Appellate Court. On 10th August 1933, the parties to the appeal entered into a compromise the material terms of which were as follows :

1. That the appellants (judgment-debtors) will pay Rs. 3500 within nine months from to-day to the respondents with interest at 6½ per cent. per annum from 1st August 1933. 2. That on such payment being made, the sale will be set aside and the appellants will become the absolute owners of the property in suit. 3. That if such payment is not made the sale will be confirmed and the appeal will be deemed as dismissed and the respondents will be entitled to take possession of the property in suit. 4. That the possession of the property during these nine months will remain with the appellants.

In pursuance of this compromise the present applicants remained in possession of the property but no payment was made by them within the stipulated nine months. Some time in 1934 the judgment-debtors deposited Rs. 2000 in Court and prayed for further time for the deposit of the balance of Rs. 1500. The prayer for extension of time was however refused on 5th October 1934. Against this order they filed an application in revision in this Court and got an order for stay of proceedings in the trial Court. The application for revision was dismissed by this Court on 5th November 1935 and the order of stay discharged.

On 15th October 1935, during the pendency of their application for revision in this Court, the judgment-debtors applied under S. 4, U. P. Encumbered Estates Act, and an order under Sec. 6 of the Act was accordingly passed by the Collector on the same date. On 15th February 1936 the decree-holders opposite parties applied under O. 21, R. 95, Civil P. C., to be put in possession of the property purchased by them in execution of their decree and possession was delivered to them on 17th February 1936. On the following day, namely 18th February 1936, the judgment-debtors filed the application which has given rise to this revision alleging that as they had applied under the Encumbered Estates Act and the Collector had passed an order under S. 6 of the Act, the proceedings relating to the delivery of possession to the decree-holders became null and void under S. 7 (1) (a), Encumbered Estates Act, and prayed that possession be re-delivered to them. The learned Civil Judge to whom the application was made, while holding that after an order under S. 6, Encumbered Estates Act, has been passed, no further proceedings in execution can be taken, came to the conclusion that the judgment-debtors were not entitled to get back possession of the property from the decree-holders in this case as there was no debt to which the judgment-debtors-landlords could be said to be subject and as the execution process issued by his Court was not in connexion with any such debt. Against this order, the present application in revision has been brought. We are of opinion that the learned Civil Judge was in error in thinking that in the circumstances stated above, the judgment-debtors were not entitled to the benefit of the Encumbered Estates Act or that the provisions of S. 7 of the Act do not apply. S. 7 (1) runs as follows :

> When the Collector has passed an order under S. 6 the following consequences shall ensue :
>
> (a) All proceedings pending at the date of the said order in any Civil or Revenue Court in the United Provinces in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered, except an appeal or revision against a decree or order, shall be stayed; all attachments and other execution processes issued by any such Court and then in force in respect of any such debt shall become null and void, and no fresh process in execution shall, except as hereinafter provided, be issued;

The order under S. 6 of the Act was passed, as already noted, on 15th October 1935, and there can be no doubt that on that date proceedings were pending in the Court below in respect of a private debt to which the applicants-landlords were subject. It is true that sale in execution of the decree had been held and even confirmed but the finality of the order confirming the sale ceased when the judgment-debtors filed an appeal in the Court of the District Judge and this was recognized by the parties themselves as appears from para. 3 of the compromise quoted above, which says that if payment is not made the sale will be confirmed, and the appeal will be deemed as dismissed and the respondents will be entitled to take possession of the property in suit. As soon as the period of nine months fixed by the compromise expired, the decree-holders were entitled to get the sale finally confirmed and to take possession of the property. It was held in 1937 O W N 1153[1] that a sale cannot be said to be automatically confirmed merely because no application had been made under Rr. 89, 90 or R. 91 of O. 21, Civil P. C., or such application had been made and disallowed and that something had to be done by the Court for the confirmation of the sale, namely to make an order confirming the sale and that unless the Court made such an order the sale could not be said to have been confirmed. In the present case the confirmation of sale made in 1932 was treated by the parties as non-existent as shown by para. 3 of the compromise, but the decree-holders took no steps to get the sale confirmed or to obtain possession or were precluded from doing so by stay orders of Courts. In the meantime, the Collector had passed an order under S. 6, Encumbered Estates Act. Therefore after the passing of that order, all proceedings should have been stayed. The learned counsel for the opposite parties conceded that his clients' application of 15th February 1936 was in execution under O. 21, R. 95, Civil P. C., but argued that it was not in execution of the original decree but of the compromise decree of 10th August 1933; but he had again to concede that that decree was also in respect of a debt against the judgment-debtors. It is thus clear that upto the date on which the Collector passed an order under S. 6 of the Act neither had the sale been finally confirmed nor had the decree-holders obtained possession of the property purchased by them. In these circumstances we fail to see how it can be said that the debt had been extinguished.

As we are of opinion that on the date of the Collector's order under S. 6 there was a debt against the present applicants, it is clear that under Sec. 7 (1) (a) the process issued for delivery of possession to the opposite parties, which was admittedly an execution process, became null and void and the applicants were consequently entitled to be put back in possession of the property. It was contended by the learned counsel for the opposite parties that the applicants' application for restitution does not come within the purview of S. 144, Civil P. C., and that the Encumbered Estates Act does not also provide for the restitution of the kind claimed by them. It is true that S. 144, Civil P. C., does not in terms apply, but as was held in 1936 O W N 1164,[2] processes issued in contravention of the terms of S. 7 (1) (a), Encumbered Estates Act, can be set aside under the provisions of S. 151, Civil P. C. We allow this application with costs and setting aside the order of the learned Civil Judge direct him to deliver back possession of the property to the applicants-judgment-debtors.

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[1] **Girdhari Lal v. Mohammad Ishrat Ali, 1937 O W N 1153.**

[2] **Mt. Sushila v. Dwarka Prasad, (1937) 24 A I R Oudh 106=165 I C 852=1936 O W N 1164=12 Luck 789.**

D.S./R.K. *Application allowed.*

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## A. I. R. 1938 Oudh 224

ZIAUL HASAN AND YORKE JJ.

*Gulzari Singh — Defendant —* Applicant.

v.

*Ram Adhin — Plaintiff —* Opposite Party.

Civil Revn. Appln. No. 101 of 1938, Decided on 12th August 1938, from order of District Judge, Unao, D/- 6th October 1936.

**(a) U. P. Agriculturists' Relief Act (27 of 1934), S. 7—S. 7 applies to suits instituted before Act came into force.**

Section 7 is applicable to suits instituted before the Act came into force, and the fact that an ex parte decree, subsequently set aside, was passed in the suit before the Act came into force is immaterial: *A I R 1937 All 634 and A I R 1938 All 63, Foll.* [P 225 C 1]

**(b) Civil P. C. (1908), O. 7, R. 10 (1)—Scope.**

The provisions of R. 10 (1) of O. 7 are sufficiently wide to cover a case in which by operation of legislation the situation arises, even after a suit has been instituted, that it should have been instituted in another Court. [P 225 C 2]

H. Husain — *for Applicant.*

D. K. Seth and Sidheshwar Shukla — *for Opposite Party.*

**Judgment.**—This is an appeal from an appellate judgment of the District Judge of Unao, who had reversed the decree of the Munsif of Safipur at Unao, returning the plaint to the plaintiff under the provisions of O. 7, R. 10, Civil P. C., for presentation to the proper Court. A preliminary objection was taken that no appeal lies, and in view of the provisions of S. 104 (2), Civil P. C., read with the provisions of O. 43, R. 1 learned counsel for the appellant concedes the force of the preliminary objection, but urges that as the point for decision is one which relates solely to the question of jurisdiction, it is a matter which can and should be taken up in revision, and we accede to that contention. The plaintiff Ram Adhin had instituted a suit in the Court of the Munsif, Safipur, to recover Rs. 1546, principal and interest on foot of the pronote and receipt dated 27th March 1932. The suit was instituted on 25th March 1935 and there is no question that at that date the suit was properly instituted in that Court. The suit was decreed ex parte, but on 7th April 1936 on the application of the defendant it was restored. Between the date of institution of the suit and this order of 7th April 1936, the Agriculturists' Relief Act had come into force on 10th April 1935, and in consequence when the suit came up for regular hearing a second time, the defendant pleaded that under the provisions of S. 7 of that Act the Court of the Munsif of Safipur had no jurisdiction to entertain the suit, and the suit must be instituted in the proper Court in the Hardoi district. The learned Munsif referred to the provisions of S. 7, Agriculturists' Relief Act, which provides as follows:

> Notwithstanding anything contained in any other enactment for the time being in force, every suit for recovering an unsecured loan, in which the defendant is an agriculturist, shall be instituted and tried in a Court within the local limits of whose jurisdiction the agriculturist defendant actually and voluntarily resides.

(I have omitted all redundant wording not necessary for the decision of the present case.) He went on to say that it was almost undisputed that the defendant was an agriculturist, and it was admitted that he was a resident of a place in the Hardoi district. After considering the effect of the suit having been filed prior to the enforcement of the Agriculturists' Relief Act, he held that the Section quoted had retrospective effect so as to affect suits instituted but not yet decided at the date of the enforcement of the Act. He based this decision largely on the aims and objects with which the Act was passed. He accordingly returned the plaint to the plaintiff for presentation to the proper Court.

Thereupon the plaintiff appealed to the Court of the District Judge, and the District Judge after considering the meaning of the words "instituted and tried" came to the conclusion that the Section had reference only to suits instituted after the coming into force of the Act. He further remarked that O. 7, R. 10, was not properly applicable in the circumstances of the present case, which had certainly not been instituted in any Court other than the proper Court, and he further evidently felt that on this view of O. 7, R. 10, a difficulty would arise as to how a Court could make an order which would not be unjust to the plaintiff since in cases where the plea taken was that the defendant was a resident of another district, neither the trial Court nor the Court of the District Judge would have any power to make an order of transfer, and the Act itself contained no provision to meet this end.

Learned counsel for the defendant applicant did not feel it necessary to discuss the points raised in the judgment of the learned District Judge at any length but relied on two recent rulings of the Allahabad High Court in cases of an exactly similar nature. The first case quoted by him is I L R 1937 All 757,[1] in which the Chief Justice and Bennet J. held that S. 7, U. P. Agriculturists' Relief Act, is applicable to suits instituted before the Act came into force, and the fact that an ex parte decree subsequently set aside, was passed in the suit before the Act came into force is immaterial. In the course of their judgment in this case the learned Judges remarked :

> It seems to us that the intention of the Legislature is that no Court should have jurisdiction to entertain a suit when it is filed or to try it unless the conditions mentioned in that Section are fulfilled. The Act is professedly for the relief of agriculturists. The object of the Section apparently is that an agriculturist defendant should not be dragged to a distant place for the purpose of defending a claim brought against him and that such suit should be tried and decided by a Court within whose jurisdiction he either resides or within whose jurisdiction his property is situated if he resides outside the province.

The order made in that case was that the Court below would return the plaint to the plaintiff for presentation to the proper Court. In 1937 A L J 1235[2] another Bench consisting of Collister and Bajpai JJ. held that where a suit was instituted prior to the Agriculturists' Relief Act coming into force and subsequently an objection was taken under S. 7 of the Act that the suit ought to be tried where the defendants were residing, S. 7 of the Act contemplates that no Court should have jurisdiction to entertain a suit when it is filed or to try it unless the conditions mentioned in S. 7 are fulfilled. In coming to this decision the learned Judges remarked :

> Act No. 27 of 1934 was enacted by the Legislature for the advantage and relief of the agriculturists and the Courts should keep this fact in view when they have to interpret the provisions of any particular Section which may have been drafted in ambiguous language.

Learned counsel for the opposite party has urged on us the difficulty of applying O. 7, R. 10 and has sought to base an argument on the interpretation of a similar provision in the Bombay Agriculturists' Relief Act on which the U. P. Agriculturists' Relief Act is said to have been based in 4 Bom 358.[3] We do not think that this ruling is properly applicable in the present case. He has further suggested that in any case the power of this Court to interfere in revision is a discretionary power and that this is not a case in which this Court should exercise the discretion to interfere with the lower Court's order. We however are of opinion that there is no possible ground on which we should differ from the view taken in this matter by the Allahabad High Court and should refuse to exercise our discretion.

As regards the difficulties suggested by the counsel for the opposite party as arising out of O. 7, R. 10, and the possibility of the suit being now held to be barred by limitation, we think that the provisions of R. 10 (1) of O. 7, Civil P. C., are sufficiently wide to cover a case in which by operation of legislation the situation arises, even after a suit has been instituted, that it should have been instituted in another Court. As regards the question of limitation, it will be for the plaintiff when presenting his plaint to the Court, which is now the proper Court, in which to present it to make an application under the relevant Section of the Limitation Act. Following the view taken by the Allahabad High Court in the case referred to, we allow the application in revision with costs, set aside the order of the learned District Judge and restore the order of the Original Court that the plaint be returned to the plaintiff for presentation to the proper Court. The parties will bear their own costs in the lower Courts.

D.S./R.K. *Application allowed.*

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[1] Jamuna Prasad v. Bhawani Dayal, (1937) 24 A I R All 634=171 I C 419=I L R (1937) All 757=1937 A L J 687.

[2] Chhunni Lal v. Ajudhiya Prasad, (1938) 25 A I R All 63=173 I C 646=1937 A L J 1235.

[3] Suryaji v. Tukaram, (1879) 4 Bom 358.

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## A. I. R. 1938 Oudh 225

THOMAS C. J.

*Puttoo Lal* — Applicant.

v.

*Ewaz Ali and another* —

Opposite Party.

Civil Revn. Appln. No. 6 of 1938, Decided on 3rd August 1938, from order of Judge, Small Cause Court, Lucknow, D/- 15th December 1937.

**Civil P. C. (1908), O. 20, R. 4 (1) – Judgment of Small Cause Court Judge though short must be intelligible — Order not showing what the suit or defence was held no judgment.**

**Under O. 20, R. 4, a Judge in a Small Cause Court suit need not write lengthy judgments. He can reduce his remarks to a minimum, but this**

minimum must be intelligible, thus enabling the High Court in revision to satisfy itself whether the decree or order passed by the Judge was according to law. [P 226 C 1]

Where the order of the Judge was "suit is decreed Rs. 55-8-0 with costs. Rs. 7-8-0 are disallowed for excessive damages claimed."

*Held* that it was impossible to treat this order as the judgment of the Court. [P 226 C 1]

H. D. Srivastava — *for Applicant.*

P. N. Asthana — *for Opposite Party.*

**Order.** — This is an application in revision under S. 25, Small Cause Courts Act, against the judgment and decree of Mr. G. S. Varma, Judge, Small Cause Court, Lucknow, dated 15th December 1937. The plaintiff sued to recover Rs. 40-8-0 being the price of wood sold to the defendant. The defendant pleaded payment. The suit was contested by the defendant. The claim was decreed by the learned Judge of Small Cause Court. I find there is no judgment according to law in this case. The order is as follows: "Suit is decreed Rs. 55-8-0 with costs. Rs. 7-8-0 are disallowed for excessive damages claimed." It is impossible to treat this order as the judgment of the Court. Under O. 20, R. 4 (1), Civil P. C., the judgment of a Court of Small Causes must contain the point for determination and the decision thereon. The Judge is expected to apply his mind to the decision of a Small Cause Court case as carefully as he would apply his mind to the decision of a regular suit. Under O. 20, R. 4, Civil P. C., a Judge in a Small Cause Court suit need not write lengthy judgments. He can reduce his remarks to a minimum, but this minimum must be intelligible, thus enabling the High Court in revision to satisfy itself whether the decree or order passed by the learned Judge was according to law. The order of the learned Judge does not show what the suit or the defence was in this case. I would have sent back this case to the Court concerned for writing a judgment according to law, but the learned Judge, who tried the case, is no longer a Judge of Small Cause Court. I accordingly allow the application with costs, set aside the judgment and decree, and order a retrial of the case.

D.S./R.K. *Application allowed.*

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## A. I. R. 1938 Oudh 226

### SPECIAL BENCH

THOMAS C. J., ZIAUL HASAN
AND YORKE JJ.

*Sita Ram* — Applicant.

v.

*Gaya Din* — Opposite Party.

Civil Ref. No. 6 of 1938, Decided on 14th September 1938, made by Munsif, Kheri, D/. 15th July 1938.

**Stamp Act (1899), S. 60 (1)—Suit on agreement – Report that agreement was insufficiently stamped — Suit decreed in oversight of report —Another report — Court ordering document to be impounded and sent to Collector for necessary action — Collector certifying document to be properly stamped—Court thinking this to be incorrect making reference under S. 60 (1)—Reference held incompetent.**

A person brought a suit on the basis of an agreement for the supply of sugarcane juice. The agreement was written on four annas stamp paper. The Munsif decreed the suit. Before the suit was decreed, the Munsarim on the back of the plaint made a report that the agreement was insufficiently stamped. The Munsarim, after the suit had been decreed, made another report that the Court had not passed any order on the report which was made before on the back of the plaint. The Munsif ordered the document to be impounded and sent to the Collector for necessary action. The Collector on receipt of stamp officer's opinion certified that the document was properly stamped. In the opinion of the Munsif the opinion of the stamp officer was incorrect and he made a reference under Section 60 (1):

*Held* that the reference did not fall under Sec. 60 (1). There was no doubt in the mind of the Court as to the amount of duty to be paid in respect of the instrument. The proper time for making the reference was before the Munsif passed the order impounding the document. By the reference the Munsif was really asking the High Court to open the question which had become conclusive. Under these circumstances the reference was not competent. [P 227 C 1, 2]

**Order.** — This reference dated 15th July 1938 by the learned Munsif of Kheri, purports to be under S. 60, Stamp Act (Act 2 of 1899). In a Small Cause suit *Sita Ram v. Gaya Din*, the plaintiff brought the suit on the basis of an agreement for the supply of sugarcane juice which is commonly called Satta. The agreement was written on four annas stamp paper. The learned Munsif decreed the suit of the plaintiff on 1st December 1936. The Munsarim on 16th October 1936 on the back of the plaint made a report that the agreement was insufficiently stamped. In his opinion the proper stamp was eight annas. The Munsarim on 13th January 1937, that is, after the suit had been decreed, made another report that the Court has not passed any order on the report which was made on 16th October 1936, on the back of the plaint. This undoubtedly was due to an oversight, as the learned Munsif should have decided this point at the time when he decided the suit. The Munsif passed the following order on 13th January 1937: "Let the Ex. 1 (be) impounded and sent to the Collector for necessary action." The Collector obtained the opinion of the Stamp Officer, which is as follows:

> Under 9 All 585,[1] vide Example (c) in note to S. 2 (5) 'bond,' the document for the supply of sugarcane juice is a 'bond' and not an agreement. It is therefore sufficiently stamped under Art. 15 of Sch. 1, Stamp Act. The document may be so endorsed and the Impounding Officer informed accordingly.

The Collector on receipt of this opinion gave the following certificate:

> Certified that this document is properly and sufficiently stamped under Art. 15, Sch. 1, Stamp Act.

In the opinion of the learned Munsif the opinion of the Stamp Officer is incorrect and the document in question is an agreement and not a bond, and it falls under Sch. 1, Art. 5, Stamp Act. In our opinion it is not necessary for us to decide this question as we are of opinion that the reference made by the learned Munsif is incompetent. S. 60 (1), Stamp Act provides:

> If any Court, other than a Court mentioned in S. 57, feels doubt as to the amount of duty to be paid in respect of any instrument under Proviso (a) to S. 35, the Judge may draw up a statement of the case and refer it, with his own opinion thereon, for the decision of the High Court or Chief Court to which, if he were the chief controlling revenue authority, he would, under S. 57, refer the same.

The reference before us does not fall under S. 60 (1) and as far as we have been able to find out, there is no other Section which covers this reference. There was no doubt in the mind of the Court as to the amount of duty to be paid in respect of this instrument. The proper time for making the reference was before the learned Munsif passed the order impounding the document. Under S. 40 (1), Stamp Act, when the Collector receives any instrument sent to him under S. 38, sub-s. (2) not being an instrument chargeable with a duty of one anna only or a bill of exchange or promissory note, he shall adopt the following procedure:

> (a) If he is of opinion that such instrument is duly stamped or is not chargeable with duty he shall certify by endorsement thereon that it is duly stamped or that it is not so chargeable, as the case may be.

Under sub-s. (2) of the same Section

> every certificate under Cl. (a) of sub-s. (1) shall for the purposes of this Act, be conclusive evidence of the matters stated therein.

By this reference the learned Munsif is really asking us to open the question which has become conclusive. We are therefore of opinion that under the circumstances the reference is not competent and we have no jurisdiction to entertain it. We accordingly reject the reference and direct that the papers be returned to the Court concerned.

D.S./R.K. *Reference rejected.*

## A. I. R. 1938 Oudh 227

YORKE J.

*Bisheshwar Singh — Defendant —* Appellant.

v.

*Gaya Baksh Singh and another — Plaintiffs —* Respondents.

Second Rent Appeal No. 33 of 1936, Decided on 22nd August 1938, against decree of District Judge, Unao, D/- 18th January 1936.

**Oudh Rent Act (22 of 1886), S. 108 (15) — Cosharer making usufructuary mortgage of specific plots—Cosharer and mortgagee should be regarded single unit in suit for profits — Court should see if both together get more profits than entitled to—If so, suit for profits by sharer getting less profits may be decreed against them.**

When a cosharer makes a usufructuary mortgage of part of his share or of specific plots of which he is in exclusive possession, a Court in a suit for profits should regard the cosharer and his mortgagee as a single unit. If that cosharer and his mortgagee together are in receipt of a greater share of profits than they are entitled to, then a decree should be passed against them in favour of the other sharer who is in receipt of less profits than he is entitled to by his share. The adjustment between the cosharer and his mortgagee of the liability which they jointly incurred to such other sharer is a matter for the cosharer and his mortgagee to settle between themselves. What the Court has to look to is whether the cosharer plus the mortgagee are in possession of a greater area of sir and khudkasht than they are entitled to, that is whether they are receiving more profits than they are entitled to, taking the annual net income of their area into account: *A I R 1931 All 668, Foll.; A I R 1917 Oudh 32, Ref.* [P 228 C 2]

Haider Husain — *for Appellant.*

Nasirullah Beg — *for Respondent 1.*

**Judgment.**—This is a second rent appeal in a suit for profits under S. 108 (15), Oudh Rent Act, which provides for a suit by a sharer against a cosharer for a share of the profits of an estate or any part thereof, or for the rendering and settlement of accounts in respect of those profits. The facts are not in dispute. One Madari Singh, defendant 1, was the owner of an eight annas share in mahal Baqia. In 1924 he mortgaged six annas eight pies share out of this eight annas share to the plaintiff, and in 1931 he sold the same share to the plaintiff. Between these dates on 22nd May 1928 Madari Singh mortgaged his remaining one anna four pies share to his own brother, Bisheshwar Singh, defendant 2 by means of a simple mortgage. Subsequently he gave his brother actual possession of certain plots in lieu of interest. The plaintiff as purchaser of the six annas eight pies share sued for profits on the allegation that defendants 1 and 2 were in possession of plots with a rental in excess of their share. Defendant 1 failed to put in an appearance. Defendant 2 pleaded that he was only in actual possession of a few plots in lieu of interest which had been made into a sub patti described as "sub patti juz rahni", and that he had not collected more than he was entitled to. He naturally made no objection to a decree being passed against defendant 1, but claimed that he was entitled to exemption.

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[1] In the matter of Gajraj Singh, (1887) 9 All 585 =1887 A W N 190 (F B).

The learned Assistant Collector who tried the case referred to the Allahabad ruling reported in 15 R D 554=1931 A L J 589[1] for the view that for the purposes of profits Madari Singh, mortgagor, and Bisheshwar Singh, his mortgagee, should be taken as one unit, and a joint decree for profits should be passed in favour of the plaintiff against both. He remarked that it appeared that the device of forming a sub-patti and leaving Bisheshwar Singh in possession of some plots as simple mortgagee in lieu of interest was thought out to deprive the purchaser at auction of the share of Madari Singh of his just rights in profits. Learned counsel for the appellant, Bisheshwar Singh, relies on a ruling of this Court reported in 19 O C 326,[2] in which it was held that

> a cosharer who is not the lambardar of the village, being under no obligation towards the other cosharers to collect the village rent, cannot be made to surrender any portion of the amount he has collected to another cosharer if his collections do not exceed his own share of the profits.

On the basis of this ruling it is contended that by virtue of the formation of the sub-patti the contesting defendant Bisheshwar Singh became a separate cosharer, and the plaintiff could only succeed against him if he proved to the satisfaction of the Court that Bisheshwar Singh had himself collected more rent either directly or indirectly (as by means of possession of sir or khudkasht) than was proportionate to the area or rental value of the plots mortgaged to him. It was suggested that the case ought to be remanded for a finding on that point. On behalf of the respondent it was pointed out that this defence was not clearly taken by the appellant in his written statement. It seems to me that the point was raised in the trial Court, but in view of the ruling quoted, it was not considered necessary to go into it. This brings me to the ruling on which reliance has been placed by the trial Court and the lower Appellate Court. It is true that the case reported in Revenue Decisions was a case under S. 227, Agra Tenancy Act, and not under the Oudh Rent Act, but it does not appear to me that there is any difference in principle. In the judgment in this case a Bench of the Allahabad High Court held :

> In our view, when a cosharer makes a usufructuary mortgage of part of his share or of specific plots of which he is in exclusive possession a Court in a suit for profits should regard the cosharer and his mortgagee as a single unit. If that cosharer and his mortgagee together are in receipt of a greater share of profits than they are entitled to, then a decree should be passed against them in favour of a plaintiff who is in receipt of less profit than he is entitled to by his share. The adjustment between the cosharer and his mortgagee of the liability which they jointly incurred to such a plaintiff is a matter for the cosharer and his mortgagee to settle between themselves. What the Court has to look to is whether the cosharer plus the mortgagee are in possession of a greater area of sir and khudkasht than they are entitled to, that is whether they are receiving more profits than they are entitled to, taking the annual net income of their area into account.

The facts of this case are very closely allied to those of the reported case. In effect what Madari Singh has done has been to give Bisheshwar Singh the contesting defendant-appellant a usufructuary mortgage of specific plots of which he was in exclusive possession. Had he not been in exclusive possession, of course, he could not have put Bisheshwar Singh in possession. Moreover, as learned counsel for the respondent has pointed out, the whole defence rests on the foundation that the Court is to ascertain the rights inter se of the mortgagor and the mortgagee, and the plaintiff is to be put to proof of what those are matters which are within the special knowledge of defendants 1 and 2 and the burden of proof would necessarily be upon them. It is suggested that the plaintiff must establish what the arrangement between them was. In my opinion the principle laid down in the Allahabad ruling is clearly applicable to the present case. The two lower Courts have rightly treated the cosharer and the mortgagee as a single unit, and having found that the cosharer and his mortgagee have together been receiving more profits than they were entitled to, have decreed the suit against them. There is no force whatever in this appeal which accordingly fails and is dismissed with costs.

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[1] Jadu Nath Singh v. Hanuman Singh, (1931) 18 A I R All 668=133 I C 476=53 All 794=1931 A L J 589=15 R D 554.

[2] Kalka Singh v. Rai Jwala Prasad, (1917) 4 A I R Oudh 32=38 I C 89=19 O C 326.

N.S.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Oudh 229

ZIAUL HASAN AND YORKE JJ.

*Chintaman Tewari — Plaintiff —* Appellant.

v.

*Bhagirathi Tewari and others — Defendants* — Respondents.

First Appeal No. 72 of 1936, Decided on 5th September 1938.

**Limitation Act (1908), Art. 181 — Art. 181 does not apply to application for preliminary decree in partition suit being made final.**

Article 181 does not apply to an application for making final a preliminary decree made in a partition suit : *A I R 1929 Oudh 117 held not correct law; A I R 1929 Oudh 456 and A I R 1920 Oudh 231, Foll.* [P 230 C 1, 2]

In a suit for partition brought by a member of joint Hindu family, a decree was passed comprising the terms of compromise arrived at between the parties to the suit. One of the clauses of the decree provided that an eight annas share would remain in possession of certain lady for her life time without power of transfer. After her death all the parties to the suit would divide that share among themselves according to the pedigree mentioned in the plaint. Another clause provided that a house occupied by the plaintiff and another member was to be partitioned :

*Held* that the decree not only declared the rights of the several parties interested in the property but also required further proceedings to be taken before the plaintiff could get the relief claimed by him. Hence the decree was preliminary and therefore an application to make it final was not governed by Art. 181. [P 230 C 1]

H. D. Chandra — *for Appellant.*

Hargobind Dayal — *for Respondents 12, 14 and 15.*

**Judgment.** — This is an appeal against an order of the learned Civil Judge of Fyzabad dismissing the appellant's application for preparation of a final decree in a partition suit as time barred. The decree which was sought by the appellant to be made final was passed on a compromise on 16th February 1920, in a suit for partition brought by the appellant and five others. The learned Civil Judge, while holding that Art. 181 of Sch. 1, Limitation Act, does not apply to an application for a preliminary decree in a partition suit being made final, was of opinion that the decree in question was not such a preliminary decree and that consequently the case was governed by Art. 181. In order to see how far the learned Judge was right in his opinion about the nature of the decree, it is necessary to refer to the compromise on which it was based. That compromise runs as follows :

> 1. Out of the property mentioned in list A, eight anans share is entered in the khewat in the name of Mt. Chaurasi. This eight annas share will remain in possession of defendant 1 for her life time without power of transfer. After her death all the parties of this suit shall divide it (among themselves) according to the pedigree mentioned in para. 1 of the plaint.
>
> 2. Up to this time the parties have lived as members of a joint Hindu family and from today's date the joint family has broken up. According to the pedigree mentioned in para. 1 the share of each party be determined; and the sons of Bhagirath also want to separate from their father. The parties shall divide privately the property mentioned in list A within two months from to-day's date. But if they do not divide it privately within two months, then the Court shall divide it by appointing an Amin.
>
> 3. The plaintiffs and defendant 3 shall be liable to pay only that amount of debt that has been contracted by the father of plaintiffs and defendant 3 up to this time, whether it be under a deed or under a ruqqa and which subsists up to this time (such as) some defendant renewed the deed in his own name. The amount of that debt shall be determined before the passing of the final decree. For the present a preliminary decree shall be passed in favour of the plaintiffs.
>
> 4. In list (B) a few houses are entered. Defendant 2 shall be considered to be the owner of the house which is in his possession; and Mt. Chaurasi who lives at this time in the Thakurdwarawala house, shall remain in possession of the same without power of transfer till her lifetime. Out of the houses only that house shall be partitioned among the plaintiffs and defendant 3 in which they live. The house known as Thakurdwara wala house shall not be partitioned. Each party shall be liable for its repairs to the extent of his share in it; and each cosharer shall be liable to pay his proportionate share (of expenses) to meet the expenses of the Thakurdwara.
>
> 5. The suit of the plaintiffs be dismissed as regards the lists (C) and (D). Whatever ornaments and utensils are in possession of a party they shall be considered to be his property.
>
> 6. If any party does not pay the expenses of his share, then the party paying more than his share shall be entitled to realize that extra sum from the party who was liable for its payment.
>
> 7. The plaintiffs and defendant 3 shall pay whatever amount of debt they are held to be liable for. For the settlement of the dispute concerning the exact amount of debt we are entrusting the matter to Thakur Lal Bihari Singh Saheb, Vakil

> and Babu Mahendra Deo Varma Sahib, Vakil. The parties shall abide by and accept whatever amount (of debt) is adjudged by the said persons. If, after the recovery of possession the plaintiffs and defendant 3 do not pay the money due to any defendant, then according to this deed of compromise, that defendant shall realize his money from the plaintiff and defendant 3 by execution of the decree.

We are of opinion that the learned Civil Judge was quite wrong in thinking that the decree which incorporated the terms of the compromise mentioned above was not a preliminary decree. The learned Judge has obviously fallen into the error of taking the expression "by which the shares of the parties are defined" occurring in the cases of 7 O L J 538[1] and 5 Luck 280[2] as a definition of a preliminary decree, though the cases do not at all purport to define a preliminary decree. That expression is only a description of a preliminary decree which may be applicable to some preliminary decrees but may not be applicable to others. For a definition of a preliminary decree the learned Judge ought to have referred to the Explanation to S. 2 (2), Civil P. C., which says :

> A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of.

Order 20, R. 18 (2) of the Code also says :

> If and in so far as such decree relates to any other immovable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

Applying these tests to the decree in question we have no doubt left in our minds that the decree was a preliminary decree. Under para. 1 of the compromise, eight annas share was to be divided after Mt. Chaurasi's death among the parties according to the shares to which they were entitled in view of the pedigree. Similarly para. 4 provided that a house occupied by the plaintiffs and defendant 3 was to be partitioned. Thus the decree not only declared the rights of the several parties interested in the property but also required further proceedings to be taken before the plaintiffs could get the relief claimed by them. The learned counsel for the respondents went so far as to contend that even if the decree in question be deemed to be a preliminary decree Art. 181, Sch. 1, Limitation Act, applied and that therefore the period of limitation must be taken to be three years from the date of the decree. We cannot however accept this argument for a moment. The case in A I R 1929 Oudh 117[3] relied on by him does not lay down the correct law on the subject in view of the decisions in 5 Luck 280[2] and 7 O L J 538.[1] We therefore decree the appeal with costs and setting aside the order of the learned Civil Judge send back the case to him for proceeding with the appellant's application for the preparation of a final decree.

D.S./R.K. *Appeal decreed.*

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[1] Tajammul Husain v. Bande Raza, (1920) 7 A I R Oudh 231=60 I C 433=7 O L J 538.

[2] Lalta Prasad v. Brahma Din, (1929) 16 A I R Oudh 456=121 I C 287=5 Luck 280=6 O W N 804.

[3] Bisheshwar Gir v. Satish Chandra, (1929) 16 A I R Oudh 117=112 I C 205.

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## A. I. R. 1938 Oudh 230

ZIAUL HASAN AND YORKE JJ.

*Syed Mohammad Haider Kazmi* — *Defendant*—Appellant.

v.

*Prince Safdar Jah Zahid Ali Mirza Bahadur and others* — Respondents.

Second Appeal No. 49 of 1936, Decided on 5th September 1938, against decree of Dist. Judge, Lucknow, D/- 16-11-1935.

**Transfer of Property Act (1882), S. 53—Gift by judgment-debtor after decree-holders have obtained decree—Reasons for gift inconsistent and inadequate—Presumption is that gift is with intent to defeat creditors — S. 53 applies even if judgment-debtor had other property to meet decree.**

Each case under Sec. 53 must be decided on its own facts. Where a gift is made orally by judgment-debtor after the decree-holders obtained their decree and the reasons given by the donee for the gift being made in his favour are both inconsistent and inadequate, these facts are enough to raise the presumption that the gift is with intent to defeat or delay creditors. The mere fact that the judgment-debtor had other property to meet the decree does not prevent the application of S. 53 : *A I R 1929 All 458, Rel. on.; 19 A L J 87, Ref.* [P 231 C 2]

H. Husain and Nasirullah Beg — *for Appellant.*

Data Prasad Khare and Ram Asray — *for Respondents 1 to 6.*

**Judgment.**—This second appeal against a decree of the learned District Judge of Lucknow arises out of a suit brought by the plaintiffs-respondents for a declaration that the oral gift of village Amethia Salimpur, Parganna Kakori said to have been made by defendant 2 in favour of defendant 1 (the present appellant) is illegal and void as against them and that the gifted property is liable to attachment and sale in execution of the decree passed in their favour. The plaintiffs-respondents who are assignees of land revenue obtained a decree for Rs. 2407-8.0 against defendant 2 from the Revenue Court on 12th December 1930. On 13th June, 1933 they attached the village in question in execution of that decree. Thereupon the appellant brought an objection under O. 21, R. 58, Civil P. C., claiming that the village had been gifted to him orally by his father, defendant 2. This objection was allowed by the Court and the present suit was filed by the plaintiffs on 8th August 1934, in the Court of the Munsif, Havali, Lucknow. On the pleas raised by the defendant-appellant the following issues were framed by the learned Munsif :

> 1. Is defendant 1 a universal donee as alleged ? If so its effect ? 2. Is the gift fraudulent within the meaning of S. 53, T. P. Act? 3. Are there other creditors of defendant 2 ? If so, is the suit as framed not maintainable ? 4. To what relief if any are the plaintiffs entitled ? 5. Is the property gifted by defendant 2 in favour of defendant 1 still liable to satisfy the claim of the plaintiffs as stated in para. 2 of the plaint by virtue of S. 141, Land Revenue Act.

Issue 3 was decided in favour of the plaintiffs but all the other issues were decided against them, the learned Munsif holding that defendant 1 was not a universal donee, that the gift was not voidable under S. 53, T. P. Act, and that the property was not liable to satisfy the claim of the plaintiffs by virtue of S. 141, Land Revenue Act. Against this decree the plaintiffs appealed to the District Judge and the learned Judge, though he concurred with the learned Munsif in his findings on Issues 1 and 5, reversed the finding of the trial Court on Issue 2 and held that the alleged gift in favour of the present appellant was made with intent to delay and defeat the plaintiffs. On this finding he decreed the plaintiffs' suit. The only question now before us is whether or not the learned District Judge was right in his finding that the gift in favour of the appellant falls under S. 53, T. P. Act.

We have heard the learned counsel for parties at length but see no reason to differ from the finding of the learned District Judge. Although the burden of proof in the case lay on the plaintiffs, it was conceded on behalf of the appellant that the intention with which a certain transfer is made can ordinarily be inferred from circumstances and cannot be proved by direct evidence. In the present case we think there are circumstances which lead to the conclusion that the gift was made with intent to defeat or delay the creditors. The gift is said to have been made orally in July 1932, that is to say, after the plaintiffs-respondents obtained their decree. This by itself is sufficient to raise a presumption that the object of the gift was to defeat or at least to delay the creditors and this conclusion is further strengthened by the fact that the reasons given by the appellant for the gift being made in his favour are both inconsistent and inadequate. In his written statement he said that the gift was made on account of paternal love but in his evidence before the Court his statement was that the village was gifted to him for better management and for discharging the encumbrances. We fail to see how the donor could secure better management of the village by gifting it away. As regards paternal love we note that the donor has other sons besides the appellant and ordinarily one should expect him to have as much love for his other sons as for the donee.

Much stress was laid on the fact that the donor is said to possess chakdari rights in the village and two houses in the city of Lucknow which are said to be worth about Rs. 10,000 and it was argued that the donor's ownership of these properties showed that he had no intention of defeating or delaying his creditors when he made the gift in favour of the appellant. We agree with the learned District Judge however that there is no satisfactory evidence to show the correct value of these properties or to show that they are not encumbered. Reliance was placed on the case in 19 A L J 87[1] in which it was said :

> The mere fact that Fatta gifted some property to his grandson and sold the same property with some other property to his son and grandson would not by itself render the alienations invalid,

and that

> the appellant in order to succeed had to allege and to prove at least that the effect of the said alienation was to deprive him of the amount of the Rent Court's decrees,

but we consider that each case under S. 53, T. P. Act, must be decided on its own facts. In A I R 1929 All 458[2] it was held that the mere fact that the judgment-debtor had other property to meet the decree does not prevent the application of S. 53. We think there is no force in this appeal and dismiss it with costs.

D.S./R.K. *Appeal dismissed.*

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[1] Jwala Singh v. Fatta, (1921) 60 I C 825 = 19 A L J 87.

[2] Gopi Chand v. Jodhraj Deojit, (1929) 16 A I R All 458=116 I C 815.

## A. I. R. 1938 Oudh 232

ZIAUL HASAN J.

*Ram Narain — Defendant —* Appellant.

v.

*Pt. Chandra Sekhar — Plaintiff —* Respondent.

Second Rent Appeal No. 46 of 1936, Decided on 4th August 1938.

**Oudh Rent Act (22 of 1886), Sec. 19-A — Slump in prices cannot be said to be agricultural calamity—Government notification granting remission on account of slump in prices is without legal basis and tenant is not entitled to such remission on basis of such notification.**

Section 19-A authorizes the Local Government or any authority empowered by it in this behalf to remit or suspend land revenue, and the Collector to remit rent, only on the ground of an agricultural calamity; but a fall in prices cannot be said to be an agricultural calamity. There is no provision for remission owing to slump in prices. Hence the notification of the Government No. 4308/IB [Revenue (B) Department] dated 28th October 1932, granting remission on account of slump in prices has no legal basis and Court cannot hold that the tenant is legally entitled to such remissions: *A I R 1938 All 158, Rel. on.* [P 232 C 1, 2]

Gaya Prasad Srivastava — *for Appellant.*

S. C. Das for Radha Krishna — *for Respondent.*

**Judgment.** — The facts of the case have been given in my order dated 23rd January 1938, by which the following three issues were remitted to the Court of the District Judge for findings:

1. Were the remissions claimed by the defendant in the present case made under S. 19-A, Rent Act?

2. If the above issue be found in the negative were the remissions made by executive authority, and if so what was that authority and what were the conditions, if any, attached to the remissions, and for what period were the remissions granted?

3. Was the defendant a tenant of the land in question from before 1339-F or was he a new tenant from that year?

The finding of the learned District Judge on Issue 1 is that the remissions claimed by the defendants were not made under S. 19-A, Oudh Rent Act. This finding is objected to by the learned counsel for the appellant but I consider there is no force in his objection. The remissions in question were admittedly made on account of slump in prices. S. 19-A, Oudh Rent Act, authorizes the Local Government or any authority empowered by it in this behalf to remit or suspend land revenue, and the Collector to remit rent only on the ground of an agricultural calamity; but a fall in prices cannot be said to be an agricultural calamity. In fact it is to my mind just the reverse as prices fall when the production is abundant. This finds support from the very notification of the Government No. 4308/IB (Revenue (B) Department) dated 28th October 1932, relied on by the counsel for the appellant himself in which it is said:

> He (the Governor in Council) recognizes that the action which Government were compelled to take last year was not covered by any provision in the existing law. . . . The law was not framed to meet such a position as has arisen from the recent severe fall in prices. S. 73, Agra Tenancy Act, and and S. 19-A, Oudh Rent Act, were designed for such visitations as scarcity or flood which affect production.

On Issue 2 the learned Judge's finding is that the defendant had failed to prove under what authority rents were remitted or what were the conditions, if any, attached to those remissions. The learned counsel for the appellant relies on the resolution of the Local Government referred to above by which they accepted the recommendations of the rent and revenue committee appointed by them but as the recommendations of the committee or the action of the Local Government had no legal basis, this Court, I am afraid, cannot hold that the defendant is legally entitled to the remissions claimed by him. In a recent case of the Allahabad High Court, 1937 A L J 1396,[1] also the question arose whether the remissions were or were not in accordance with law and the learned Judges who decided the case said:

> The remissions were either in accordance with S. 73 of the Act (Agra Tenancy Act) or they were not. In the former case the suit (of a landholder for a declaration that the defendant, the Secretary of State for India in Council was not legally empowered to interfere with the rates of rent settled between him and his tenants) is barred by S. 74 and in the latter case the plaintiff was entitled to treat the remission as ultra vires and to realize the rents payable by the tenants by means of suits ignoring the remissions notified by means of slips issued by the revenue authorities.

The defendant cannot in my opinion succeed unless he shows that he is by law entitled to the remissions claimed by him. The question whether or not the appellant was a tenant of the land in question from before 1339-F is immaterial in view of the findings on Issues 1 and 2 which I accept. The learned District Judge was to my mind right in giving the plaintiff-respondent a decree for the amount claimed and I dismiss this appeal with costs.

D.S./R.K. *Appeal dismissed.*

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[1] Mohammad Abdul Quaiyum v. Secy. of State, (1938) 25 A I R All 158=174 I C 505=I L R (1938) All 114=1937 A L J 1396.

## * A. I. R. 1938 Oudh 233

ZIAUL HASAN AND YORKE JJ.

*Shital Prasad — Accused* — Applicant.

v.

*Emperor.*

Criminal Revn. No. 52 of 1938, Decided on 2nd September 1938.

*** Criminal P. C. (1898), S. 562, sub-ss. (1) and (1-A)—Scope explained — Section applies to offences punishable only with fine.**

Section 562, sub-ss. (1) and (1-A) deal with cases of first offenders where the conviction is for an offence of less than a certain degree of gravity, the degree of gravity being measured by the maximum punishment which can be imposed for the offence, and the intention is to enable such first offenders to be dealt with leniently. An offence punishable with fine only is clearly an offence of a minor character, of very much less gravity than an offence punishable with imprisonment upto seven years. The expression 'offence punishable with imprisonment for not more than seven years' is intended to be read in the same sense as the expression in sub-s. (1-A) 'offence punishable with not more than two years' and both expressions are intended to cover offences punishable with a less severe sentence than those indicated and therefore to include offences punishable only with fine: *A I R 1935 Bom 402, Foll.* [P 234 C 1]

Kanhaiya Lal Nigam — *for Applicant.*
Govt. Advocate—*for the Crown.*

**Order.**—This is an application in revision against an order of the learned Sessions Judge of Gonda. The applicant was charged before a Magistrate under S. 14/25, Northern India Ferries Act, in that on 16th June 1937, he took his lorry loaded with passengers on the approach road to the Lakarmandi ferry and refused to pay toll for using the road. He was convicted by the trying Magistrate but was bound over under S. 562, Criminal P. C., as a first offender. He appealed against his conviction to the Sessions Judge who maintained the applicant's conviction but as he was of opinion that S. 562, Criminal P. C., applied only to offences punishable with imprisonment while an offence under the Ferries Act is punishable with fine only, he sentenced him to a fine of Rs. 10. Against this order the applicant has brought this application for revision. The first point taken before us is that the Courts below were in error in holding that the plank road along which the applicant took his lorry is an approach to the ferry and not to the Lakarmandi Railway Station. On this point the learned Sessions Judge says:

> The foregoing discussion leaves no doubt that the planked road used by the appellant is an approach to the ferry and only incidentally to the railway station,

and

> another fact which may be mentioned is that there is a signboard at the beginning of the approach road quoting S. 14, Ferries Act.

In these circumstances we are of opinion that the applicant did use the approach road to the ferry knowing full well that it was such an approach road and he was thus liable to pay toll under S. 14, Ferries Act, and to prosecution on refusal to pay the toll under S. 25.

The next point urged is that the learned Sessions Judge was wrong in giving the applicant a sentence of fine inasmuch as it amounted to an enhancement of the sentence which he had no power to do owing to the provisions of S. 423 (1) (b), Criminal P. C. Now, although the imposition of fine in the circumstances of the case can hardly be said to be an enhancement of sentence, as no sentence was given to the applicant by the trying Magistrate, still we are of opinion that the imposition of fine entails a greater burden on the applicant than the execution of a bond under S. 562, Criminal P. C. Moreover, we are clearly of opinion that the learned Sessions Judge was wrong in thinking that S. 562 (1), Criminal P. C., applies only to offences punishable with imprisonment and not to offences punishable with fine only. S. 562 (1) lays down the limit of the gravity of the offences that can be dealt with, in view of the age and sex of the offenders, under that Section, and the mention of imprisonment up to seven years in the case of persons not under 21 years of age and of any sentence short of death or transportation for life in the case of women or men under 21 years of age, does not mean that offences punishable with fine only are not amenable to the provisions of S. 562 (1). In fact it is on the face of it unreasonable to suppose that the Legislature should have intended that while persons guilty of offences punishable with imprisonment up to seven years or, even in certain cases, punishable with a sentence short of death or transportation for life should be released on entering into a bond to keep the peace and be of good behaviour, but that a person guilty of offences punishable with fine only should not be dealt with. The view we have taken is supported by the view of a Full Bench of the Bombay High Court expressed in A I R 1935 Bom 402.[1] In that case Beaumont C. J. in his judgment said :

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[1] **Vaijappa Shivlingappa v. Emperor, (1935) 22 A I R Bom 402 = 1935 Cr C 1109 = 158 I C 649 = 60 Bom 55 = 37 Bom L R 739 (F B).**

> Reading S. 562, sub-ss. (1) and (1-A), it seems to me quite clear that they are dealing with cases of first offenders where the conviction is for an offence of less than a certain degree of gravity, the degree of gravity being measured by the maximum punishment which can be imposed for the offence, and the intention is to enable such first offenders to be dealt with leniently. It is clear that an offence punishable with fine only is an offence of a minor character, of very much less gravity than an offence punishable with imprisonment up to seven years. Reading the Section as a whole, I have no doubt whatever that the expression 'offence punishable with imprisonment for not more than seven years' was intended to be read in the same sense as the expression in sub-s. (1-A) 'offence punishable with not more than two years' and that both expressions were intended to cover offences punishable with a less severe sentence than those indicated and therefore to include offences punishable only with fine.

We therefore accept this application in part, set aside the order of the learned Sessions Judge so far as it imposes a fine on the applicant and restore the order of the trying Magistrate.

N.S./R.K. *Application accepted in part.*

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## A. I. R. 1938 Oudh 234

### FULL BENCH

THOMAS AG. C. J., ZIAUL HASAN AND HAMILTON JJ.

*Sheo Ratan Singh* — Applicant.

v.

*Deputy Commissioner, Fyzabad and another* — Opposite Party.

Civil Revn. Appln. No. 22 of 1936, Decided on 19th September 1938.

**(a) U. P. Agriculturists' Relief Act (27 of 1934), S. 2 (2), Proviso 2 — Second Proviso cannot be interpreted as laying down general rule that no person shall be deemed to be agriculturist if he is assessed to any income-tax —(Per *Division Bench*).**

All that Proviso 2 lays down is that if persons belonging to any of the classes (a) to (g) pay income-tax exceeding the limits prescribed for each class they shall cease to be regarded as agriculturists. It does not lay down any general rule based on mere assessment to income-tax irrespective of the relation which the amount of the income-tax paid by them bears to the local rate, etc., as laid down in the Proviso. Hence it cannot be said that persons who come within the definition of agriculturists by virtue of Proviso 1 to S. 2 (2), Agriculturists' Relief Act, are not to be deemed agriculturists if they are assessed to any income-tax irrespective of its amount. [P 235 C 1; P 236 C 2]

**(b) U. P. Agriculturists' Relief Act (27 of 1934), S. 2 (2), Proviso 2 — Local rate and cesses—(Per *Division Bench*).**

The local rate referred to in Proviso 2 is not the same thing as cesses : *A I R 1936 Oudh 179, Rel. on.* [P 236 C 1]

**(c). U. P. Agriculturists' Relief Act (27 of 1934), S. 2 (2), Provisos 1 and 2 — Persons in Proviso 1 are subject to rule in Proviso 2 — (Per *Full Bench*).**

The persons referred to in Proviso 1 to S 2 (2), U. P. Agriculturists' Relief Act are subject to the rule contained in Proviso 2 of that sub-section : *A I R 1938 Oudh 208, Approved.* [P 238 C 1]

Naimullah — *for Applicant.*

Govt. Advocate and M. Wasim — *for Opposite Party.*

ORDER OF DIVISION BENCH

SMITH J.—This is an application in revision in respect of an order of the learned Subordinate Judge of Sultanpur. The facts, briefly stated, are that Raja Mohammad Yasin Ali Khan and his wife, Rani Khurshed Bano, are judgment-debtors under a final decree dated 27th April 1935. On 25th July 1935, they presented an application under Ss. 4, 5 and 30, Agriculturists' Relief Act, asking for reduction of interest and the fixing of instalments. By his order of 16th November 1935, with which we are now concerned, the learned Subordinate Judge reduced the rate of interest and fixed instalments. The decree-holder denied that the applicants were agriculturists, but the finding of the learned Subordinate Judge on that point was that they are agriculturists. After the order of the learned Court below had been passed, the estate of Raja Mohammad Yasin Ali Khan was in the month of August 1936 taken under the management of the Court of Wards. This present application is by the decree-holder, the opposite parties being the Deputy Commissioner of Fyzabad, as Manager of the Court of Wards, and Rani Khurshed Bano. The only point taken by the learned counsel for the applicant before us is that the finding of the learned Court below on the status of the judgment-debtors was incorrect, and that they are not agriculturists.

The judgment-debtors are big zamindars paying land-revenue of over Rs. 16,000 per annum. According to the written statement put in by the decree-holder in reply to the application of the judgment-debtors, the latter pay income-tax and are not agriculturists. Whether this income-tax is assessed on Raja Mohammad Yasin Ali Khan alone, or on him and his wife, jointly, does not clearly appear. The learned Subordinate Judge speaks as if the income-tax is paid by the Raja alone ; in his order of 16th November 1935, the learned Subordinate Judge said that the amount assessed 'last year' was Rs. 169. As however the cesses payable by the judgment-debtors are approximately Rs. 1700, and this, according to the learned Court below, is the same thing as the "rate" under the District Boards Act, the learned Subordinate Judge said that the income-tax in question is much less than the local rate, and that the applicants before him were therefore not taken out of the category of agriculturists. That, at any rate, was his general conclusion. In his order he sometimes speaks of "applicants" in the plural, and sometimes of "applicant" in the singular. He clearly had in mind, in arriving at his conclusions, the contents both of Provisos 1 and 2 to sub-s. (2) of S. 2, Agriculturists' Relief Act. The whole question that is before us relates to the proper interpretation of Proviso 2, which runs as follows:

> Provided also that no person shall be deemed to be an agriculturist if he is assessed to income-tax, which, if he belongs to any of the classes (a) to (e) above, exceeds the local rate payable on the land which he holds, or, if he belongs to class (f) above, exceeds 5 per cent. of his rent, or, if he belongs to class (g) above, exceeds Rs. 25.

The contention of the learned counsel for the applicant is that this Proviso shuts out from the category of agriculturists all persons who pay any amount of income-tax whatsoever, save for the reservation that the payment of income-tax does not so exclude persons belonging to classes (a) to (e) in sub-s. (2) whose income-tax does not exceed the local rate payable on their land: persons belonging to class (f) of that sub-section whose income-tax does not exceed 5 per cent. of their rent; and persons belonging to class (g) of the sub-section whose income-tax does not exceed Rs. 25. The contention of the learned counsel for Rani Khurshed Bano is that Proviso 2 only applies to the persons mentioned in it, and has no reference to persons who only come within the definition of agriculturists by the application of the contents of Proviso 1. The learned Government Advocate took no part in the discussion when the application was argued before us, but he has since put in an application, in which he urges the same view as that contended for by the learned counsel for Rani Khurshed Bano.

I am of opinion that Proviso 2 must be limited to the persons mentioned in paras. (a) to (g) inclusive, of sub-s. 2 of S. 2, since they are the only persons mentioned in it, and I am further of opinion that the contents of the Proviso 2 do not operate so as to include in the classes mentioned in those paragraphs persons who are only agriculturists by virtue of the contents of Proviso 1. If the contention of the learned counsel for the decree-holder were accepted, the result would be that apart from the reservations made in the Proviso 2, the payment of even one rupee of income-tax would exclude any person from the benefits conferred by the Act upon agriculturists. In other words, the result would be that a zamindar paying over Rs. 1000 per annum as land revenue would be excluded from the category of agriculturists, if he pays one rupee as income-tax. This result does not appear to be reasonable, or to have been intended by the framers of the Act. The learned counsel for the decree-holder does not contend that such a result is reasonable, but he contends that the interpretation he puts upon Prov. 2 is justified by its phraseology, and that the reasonableness or otherwise of such an interpretation is a matter which cannot be taken into consideration. In my opinion the interpretation put upon Prov. 2 by the learned counsel for the decree-holder is not a necessary consequence of the phraseology used in it, and as that interpretation is in itself unreasonable, I think it should not be accepted, if it is possible reasonably to interpret the Proviso otherwise. As I have said already, I take the view that Prov. 2 relates only to the classes of persons mentioned in it namely the classes of persons specified in paras. (a) to (g) inclusive, of sub-s. 2 to S. 2 of the Act, and that within those classes are not included persons, who would belong to those classes if the limits of land revenue, local rates, rent and area mentioned in those paragraphs were omitted, though such persons, by virtue of the contents of Prov. 1, come within the category of agriculturists for the purposes of certain provisions of the Act. It is not, I think, out of place to mention that the view I take is the view that has been taken, presumably independently of one another, by three Commentators on the Act. Mr. S. K. Agnihotri in his commentary entitled "The United Provinces Agriculturists' Relief and other debt Acts, 1934" says at page 17:

> It is noteworthy that the exception based on payment of income-tax relates only to agriculturists whose case falls under Cls. (a) to (g) and not to the class of agriculturists falling within Cl. (h) or Cl. 1 of the Proviso. Hence, obviously in the case of the latter class the payment of income-tax would not stand in the way of their deriving the benefit available to them under the Act.

By the phrase "Cl. 1 of the Proviso," I take this learned Commentator to mean Prov. 1. Mr. M. Akhtar Hasan in his commentary entitled "The U. P. Debt Acts," at p. 18 of the portion of the book dealing with the Agriculturists' Relief Act, says :

> It must be noted that there is no mention in this Proviso of the persons belonging to Cl. (h) or Prov. 1. Therefore it follows that persons belonging to these classes will not be deprived of the benefit of the Act even if they are assessed to any amount of income-tax.

Rai Sahib Rai Rajeshwari Prasad, in his commentary entitled "The United Provinces Debt Acts, 1934" at pp. 8-9 of the portion of the book relating to the Agriculturists' Relief Act, says :

> It will be noticed that the exception on the ground of payment of income-tax relates only to agriculturists as defined in sub-ss. 2 (2) (a) to 2 (2) (g) and not to the class of agriculturists mentioned in sub-s. 2 (2) (h) and Prov. 1. Thus as far as the latter class of agriculturists are concerned, payment of income-tax will not, it is submitted, deprive them of the benefit to which they are entitled under the Act.

The result is that, in my opinion, the payment of the income-tax in question, whether it was assessed on Raja Mohammad Yasin Ali Khan alone, or on both him and his wife Rani Khurshed Bano, does not take them out of the category of agriculturists, and I therefore think that the view taken by the learned Subordinate Judge was correct, and I would accordingly dismiss this revisional application. The learned Subordinate Judge was wrong in saying that cesses are the same thing as the local rate imposed under the District Boards Act, and if my view on the main question is not accepted, it will be necessary to send the case back for an inquiry as to the amount of the local rates payable by the judgment-debtors, but if my view is accepted, no such question arises.

SRIVASTAVA C. J. — The facts of this case have been fully stated by my learned brother Smith J. It is not therefore necessary for me to repeat them. The two questions which are required to be decided are: (1) whether persons who come within the definition of agriculturists by virtue of Proviso 1 to S. 2 (2), Agriculturists' Relief Act, are not to be deemed agriculturists if they are assessed to any income-tax irrespective of its amount, and (2) whether persons referred to in the aforesaid Prov. 1 are subject to the rule contained in Prov. 2 that they shall not be deemed to be agriculturists if they are assessed to income-tax exceeding certain amounts.

The decision of these questions rests on the interpretation to be placed on the first two Provisos to the definition contained in S. 2 (2) of the Act. The scheme of the definition seems to be to divide agriculturists into two classes, namely the small agriculturists and the big agriculturists. The small agriculturists are described in Cls. (a) to (h) of the Section. They are to be treated as agriculturists within the meaning of that term wherever it has been used in the Act and are entitled to the benefits of all the provisions of the Act. The big agriculturists, on the other hand, are to be treated as agriculturists only for the purpose of certain provisions specified in Proviso 1. As regards the first question the contention of the decree-holder is tantamount to this, namely that Prov. 2 should be interpreted as laying down a general rule to the effect that no person shall be deemed to be an agriculturist if he is assessed to any income-tax, and then grafting on this general rule exceptions in the case of persons belonging to any of the classes (a) to (e) if the income-tax paid by them is less than the local rate payable on the land held by them, and in the case of persons belonging to class (f) if the income-tax is less than five per cent. of their rent, and in the case of persons belonging to class (g) if it is less than Rs. 25. I am definitely of opinion that the phraseology of the Proviso does not justify this interpretation. All that the Proviso lays down is that if persons belonging to any of the classes (a) to (g) pay income-tax exceeding the limits prescribed for each class they shall cease to be regarded as agriculturists.

It seems to me clear that it does not lay down any general rule based on mere assessment to income-tax irrespective of the relation which the amount of the income-tax paid by them bears to the local rate, etc. as laid down in the Proviso. The comma placed after the word income-tax and the use of the word "which" which follows it, leaves no doubt in my mind that there is absolutely no justification for the interpretation sought to be put by the decree-holder. The acceptance of that interpretation would also lead to the absurd result that whereas a small agriculturist would cease to be an agriculturist only if he pays income-tax exceeding a certain amount, yet a big agriculturist of the class referred to in Prov. 1 would cease to be an agriculturist and would be deprived of all the benefits of the Act if he pays any income-tax at all. For these reasons I have no hesitation in deciding the first question against the decree-holder. Happily my learned brother Smith and I are in agreement on this point. Next as regards the second question I regret I cannot see eye to eye with him. Proviso 1 lays down that for the purpose of certain provisions of the Act

> an agriculturist means also a person who would belong to a class of persons mentioned in parts (a) to (g) of this sub-section, if the limits of land revenue, local rates, rent and area mentioned in these parts were omitted.

I think that this Proviso may well be paraphrased as meaning that for the purpose of certain provisions of the Act specified therein parts (a) to (g) of this sub-section should be read as if the limits of land revenue, local rates, rent and area mentioned in these parts were omitted. Now in the present case the judgment-debtors are persons paying land revenue of over Rs. 16,000 per annum. The parties are agreed that apart from the effect of Proviso 2 they must be regarded as agriculturists within the definition in S. 2 (2) of the Act. The argument of the decree-holder is that they are agriculturists under Proviso 1 but not under part (a) of the sub-section. The argument seems to me to ignore the fact that Proviso 1 does not lay down any new class of agriculturists and is nothing more than a Proviso to parts (a) to (g) of the sub-section. It seems to me to be wrong to say that the judgment-debtors are agriculturists under Proviso 1. The more correct way of expressing it would be that the judgment-debtors are agriculturists under part (a) of the sub-section read with Proviso 1. It should also be noted that nowhere either in this sub-section or in any other provision of the Act any agriculturist is referred to as an agriculturist under or of the class mentioned in Proviso 1. Wherever we find mention of the class the reference is to one or other of classes (a) to (h).

Turning now to Proviso 2, it lays down that a person belonging to class (a) of the sub-section shall not be deemed to be an agriculturist if he is assessed to income-tax exceeding the local rate payable on the land which he holds. I am of opinion that the judgment-debtors in the present case for reasons mentioned above must be treated as agriculturists of class (a). I can see no point in making the rule laid down in this Proviso applicable to a small agriculturist who pays land revenue not exceeding Rs. 1000 per annum and making it inapplicable to bigger agriculturists paying land revenue in excess of that amount. The object underlying the rule contained in this Proviso clearly is to make

> the question whether a person is to be deemed an agriculturist . . . . depend upon the relation which the income-tax paid by him bears to his income from agricultural sources.

It is difficult to imagine any reason for making a distinction between a small and big agriculturist for the purpose of this Proviso. The interpretation which I seek to place on the terms of this Proviso is not only reasonable but appears to me to be fully consistent with the phraseology used in it. I am therefore of opinion that the proper interpretation to be placed on the first two Provisos is that the persons referred to in Proviso 1 are also subject to the rule contained in Proviso 2. It therefore becomes necessary to find whether the income-tax to which the judgment-debtors are assessed does or does not exceed the local rate payable on the land held by them. The learned Civil Judge has held that the local rate referred to in Proviso 2 is the same as cesses. I cannot agree with this opinion of the Civil Judge. He seems to have overlooked the Bench decision of this Court in 1936 O W N 25[1] in which the distinction between cesses and local rates is clearly pointed out. I would therefore remit the following issue to the lower Court for a finding: Does the amount of income-tax to which the judgment-debtors are assessed exceed the local rate payable on the land held by them ?

As there was a difference of opinion amongst the Judges forming the Division Bench on a question of law, the following question was referred for opinion to a Full Bench :

"Are the persons referred to in Proviso 1 to S. 2 (2), U. P. Agriculturists' Relief Act, subject or not to the rule contained in Proviso 2 of that sub-section ?"

## OPINION

In this application for revision under S. 115, Civil P. C., against an order of the learned Civil Judge of Sultanpur, the learned Judges constituting the Bench before which the case came up for hearing differed as to the correct interpretation to be put on Proviso 2 to S. 2 (2), U. P. Agriculturists' Relief Act. They accordingly referred the following question for decision by a Full Bench :

> Are the persons referred to in Proviso 1 to S. 2 (2), U. P. Agriculturists' Relief Act, subject or

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[1] Lachhman Singh v. Dhanesh Singh, (1936) 23 A I R Oudh 179=160 I C 323=12 Luck 68 =1936 O W N 25.

not to the rule contained in Proviso 2 of that subsection ?

The question of the interpretation of Proviso 2 to S. 2 (2), U. P. Agriculturists' Relief Act, arose in 1938 O W N 836[2] before a Bench of this Court of which two of us were members and it was held :

> . . . . . It is not to our minds the payment of income-tax absolutely which takes away the effect of Proviso 1 but in the case of a person belonging to Cl. (a), only when the income-tax which he pays exceeds the local rate payable on the land which he holds. The Proviso clearly shows that it is not the payment of income-tax irrespective of its amount that attracts the operation of that Proviso.

This clearly shows that the view of the Bench was that a person who is an agriculturist by virtue of Proviso 1 to S. 2 (2) of the Act is as much subject to the rule contained in Proviso 2 as one who is an agriculturist under S. 2 (2) independently of Proviso 1. We are of opinion that the view taken in 1938 O W N 836[2] is correct. We therefore answer the question referred to the Full Bench as follows : The persons referred to in Proviso 1 to S. 2 (2), U. P. Agriculturists' Relief Act, are subject to the rule contained in Proviso 2 of that subsection.

D.S./R.K. *Answer accordingly.*

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[2] B. N. Vyas v. Barkhandi Mahesh Pratap Narain Singh, (1938) 25 A I R Oudh 208 = 1938 O W N 836.

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## A. I. R. 1938 Oudh 238

THOMAS C. J. AND YORKE J.

*Musaheb Khan and others—Plaintiffs* — Appellants.

v.

*Pt. Raj Kumar Bakshi and another—Defendants* — Respondents.

Second Appeal No. 100 of 1938, Decided on 6th September 1938, against decree of Dist. Judge, Lucknow, D/- 7th February 1938.

**(a) Second Appeal — Question of fact and law — Whether particular mosque is public or private is question of law.**

The question whether the building is a private mosque or a public mosque is not a question of fact but a question of law, that is a question of inference from the proved facts : *A I R 1923 Bom 42, Not foll.; A I R 1927 P C 102 and A I R 1926 Oudh 578, Rel. on.* [P 240 C 1; P 244 C 2]

**(b) Mahomedan Law — Mosque — Mere appearance of building as mosque is not enough to make it public mosque - Dedication or permission or user as such is essential.**

Even if a mosque, that is a building having the appearance of a mosque, is built in a place which is not enclosed, that is, is not situated inside a man's house, something more than the mere appearances of a mosque are needed before it will become entitled to be treated as a mosque for all time. There must be proof of dedication or of permission or of user such as by the saying of prayers in a congregational manner : *12 All 494; 1 C W N 76; A I R 1934 All 1013; 35 Mad 681 and A I R 1936 P C 83, Disting.* [P 242 C 1]

**(c) Mahomedan Law—Mosque—Mosque dedicated cannot be undedicated.**

Once a building is proved to be dedicated as a mosque, it cannot be undedicated : *A I R 1934 Pesh 57, Rel. on.* [P 242 C 2]

**(d) Mahomedan Law—Mosque—Mosque can be private.**

The mere construction of a mosque in a private house does not make it a mosque in the sense of a public place of worship : *A I R 1918 Oudh 379, Rel. on.* [P 242 C 2]

**(e) Adverse Possession—Possession should be overt — Person with due vigilance should be able to be aware of it - Mosque abandoned for many years — Worshippers cannot plead that they could not be aware of what was happening.**

It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, be aware of what is happening. Ex hypothesi any mosque is a building in respect of which the local Mahomedan worshippers are expected to be continuously aware of its condition and use or misuse. If by 20, 30, 40 or more years practical abandonment they remain unaware of facts of misuse by the owner of the premises in which the mosque is situated, it is not possible for them to say that by the exercise of due vigilance they could not be aware of what is happening : *A I R 1919 P C 62, 63 Cal 300 and A I R 1932 Oudh 46, Ref.; 7 All 178 (F B); A I R 1938 Lah 369 (F B) ; A I R 1926 Oudh 313 and A I R 1922 P C 181, Disting.; A I R 1935 P C 36, Rel. on.* [P 246 C 1; P 247 C 1]

M. Wasim, Ali Husan, Hakimuddin and Siraj Husain — *for Appellants.*

L. S. Misra, M. L. Tewari and Radha Krishna — *for Respondents.*

**Judgment.**—This is a second appeal in a case relating to a mosque situated in Alamnagar, a mohalla in the Saadatganj Ward of Lucknow City. The plaintiffs, who are Sunni residents in Alamnagar, came to Court with the allegation that in a grove in Alamnagar, which now abuts on the East Indian Railway, there is situated a mosque which is adjacent to the Baradari of the defendants Raj Kumar Bakshi, a minor under the guardianship of his mother Mt. Dhanraj Patti Bakshi, and the Musammat herself. They alleged that this mosque was a public wakf in which the Musalmans had been offering namaz since a very long time, that in 1934 or thereabouts the defendants closed the old passage leading to the mosque (the gateway marked as M. N. in the Commissioner's map), and thereafter allowed the Musalmans to go to the mosque by another route further west.

It was further stated that from 18th July 1936 the defendants closed this alternative route also. It was said that they had damaged the mosque and took no notice of protests. Hence the plaintiffs instituted this suit as a representative suit under the provisions of O. 1, R. 8, Civil P. C., claiming the following reliefs : (a) a declaration that the mosque, with the land and pucca well in front of it, is a place of worship for the Musalmans, (b) a perpetual injunction be issued to the defendants not to demolish the mosque building or to interfere with the land in front of the mosque or the pucca well, (c) the defendants be ordered to demolish the building which has been constructed on the old route to the mosque and reopen the way (M. N.) as it used to be, (d) the defendants be made to repair the damage done to the mosque by its being pulled down.

The defence put forward was shortly that the building described in the plaint as a mosque had never been dedicated or used as a place of worship. It came to the ancestors of the defendants by a Court auction in 1868, and has always been treated and dealt with as private property, forming part of the whole property, a grove containing buildings. As regards the closing of the gate, it was said that there used to be a gate leading into the grove in the place described by the plaintiffs, but that this was closed and shops constructed in 1927. The alteration was entirely within the rights of the defendants. It was denied that the defendants in 1936 closed the route to the building described as mosque or stopped the Mussalman public, this contention being based on the fact that there never had been any right of way either in the plaintiffs or in the Mussalman public of Alamnagar generally to the building alleged to be a mosque. Demolition and damage to the building by the defendants was denied, and the defendants further pleaded that the suit was barred by limitation, estoppel and acquiescence. In proceedings prior to the framing of issues, the plaintiffs admitted that it was not known by whom the mosque was constructed. It was alleged however that a mosque was created by dedication and by user, but it was admitted that the plaintiffs had no documentary evidence to support these allegations. The plaintiffs were asked to clear up some of their other pleas, and they alleged that the old gateway M. N. was part of the mosque, but that in the alternative the plaintiffs had acquired a right of access to the mosque by this route by prescription. The defendants' counsel admitted that the building in dispute had been in existence as far back as 1859, and that there had been a gateway somewhere near the place marked M. N. on the map, but he denied that Mahomedans had ever had any access to the mosque through that gateway. The pleadings in regard to adverse possession were further cleared by a statement of defendants' counsel that the plaintiffs had no subsisting title to use the building as a mosque and the other property in suit or to obtain any relief in respect of it, the defendants having acquired title to the mosque and the property by adverse possession, and the plaintiffs' right to those reliefs having been extinguished by limitation, and a further contention was put forward that the building alleged to be a mosque, even if it is found to be a mosque, is a private mosque and not a public one. In the trial Court a number of issues were framed, but the suit was really disposed of on Issue 1 :

> Whether the building in suit is a public mosque and the land between I. J. and M. N. is part of it. Or is it a private mosque ?

The trial Court held on this issue that there was no evidence of dedication, and implied that the mosque, since the building has all the appearances of the mosque, must be regarded as being a private mosque. On Issue 3 :

> Has the Muslim public been reciting prayers in the alleged mosque a long time up to 18th July 1936 as alleged by the plaintiffs ?

it held, after a careful consideration of the evidence, that it was impossible to accept the case of the plaintiffs that the Mussalman public had been praying in the mosque, for a fong time before 18th July 1936, and it therefore held that the mosque had not become a public mosque by being used as such. On Issue 2, the trial Court held that the defendants' right to hold the building in suit as their private property was proved, and he accordingly did not consider it necessary to decide Issues 4, 5, 6 and 8. By Issue 4 the question had been raised whether there was no limitation if the building was a public mosque, and, if the ordinary rules of limitation applied, what the period of limitation was. Issue 5 raised the question whether the defendants had completed their title by adverse possession. Issue 6 raised the question whether the suit was barred by S. 42, Specific Relief Act. On

Issue 7 (whether the plaintiffs have acquired by prescription a right of way over the defendants' land via the old gate M. N. shown in the map) the trial Court held that in the absence of satisfactory evidence to prove that a right of access to the mosque had been acquired by continuous use of the right of way for 20 years (ending not more than two years before the date of suit), the issue must be answered against the plaintiffs.

In the lower Appellate Court the plaintiffs raised the same questions over again. The learned District Judge, after a very careful consideration of the evidence, held that dedication had not been proved and could not be presumed from the facts on the record. He further held that the evidence in support of the theory that dedication could be inferred from the user was worthless and self-contradictory, and in consequence it could not be said that the building in suit was a public mosque. It must therefore, since it has all the appearances of a mosque, be no more than a private mosque the title in which rests with the defendants who have the title to the whole of the property on which this building stands. The learned District Judge went on to consider Issue 5 in regard to adverse possession, which had been left undecided by the trial Court, and he held that it was proved beyond doubt that the defendants had been in exclusive possession of the mosque for much more than 12 years, and had been storing articles in it, and he concluded that the defendants had established their right to the mosque by adverse possession quite apart from the other findings in the case.

Only two points have really been argued in this Court: first the question whether the building in dispute is a mosque, that is a public mosque, and secondly the question of adverse possession. We will deal first with the question whether the building in suit is a public mosque, and for this purpose it is necessary to go into the history in order to arrive at a conclusion whether the inference drawn by the lower Appellate Court is a proper inference or not. Though it is no doubt well established law that a question of fact cannot be raised in second appeal, yet we are inclined to agree with the contention of the appellants that the question whether the building is a private mosque or a public mosque is not a question of fact, but a question of law, that is a question of inference from the proved facts. It will be convenient to state shortly what those facts are. The property, in which this building is situated, appears in the settlement khasra of village Bhaptamau of 1862 (Ex. 3) as grove No. 465, bagh Meyan Nazhat. In the details column there is an entry of pucca wells for irrigation and drinking, one Masjid pukhta, one Imambara pukhta "Taiyar hain Nazul Sarkar." The words "taiyar hain" have been interpreted as meaning that these were of recent construction, but we are inclined to think they mean no more than that these items are in existence on the plot properly constructed. Ex. 4, the map of this first settlement shows the existence of two buildings on the plot, and the signs used for these buildings suggest that they are mosques or temples. Ex. A-2, the Settlement Moharrir's reports mentions the existence of "a baradari, a mosque, and two wells, kham and pukhta, all the property of Gaya Prasad" on this plot. Ex. A-4 is a court document which appears to be a proclamation of sale of the year 1868, and among other items is the equity of redemption of a garden together with Imambara and Masjid belonging to Janki Prasad situated at Alamnagar. With Ex. A-4 there is a torn paper, which is part of this document, and it also mentions that in the case of *Bahadur Ali Khan* v. *Gaya Prasad and Janki Prasad*, security, the rights and interests of the debtors in, among other properties, an orchard in Alamnagar together with Imambara and Mas (the rest of the word is missing) is advertised for sale. Ex. A-5 is the sale certificate relating to this property and speaks of the property sold as the equity of redemption of the attached grove together with Imambara and mosque, the property of Janki Prasad situated in mohalla Alamnagar. There was a map attached to this sale certificate, and on the map, which is, we note, not by any means accurate, there is a note:

> It may be noted that this grove in which Imambara and Masjid are built belonged to Meyan Nazhat eunuch. After his death his property became Nazul, and from Nazul it was granted to judgment-debtor by the Government in compensation of his dilapidated buildings.

This map, as we have remarked, is not accurate as it shows the mosque placing south-west-north-east instead of north-west-south-east, that is as facing towards the Imambara, now called baradari, instead of facing away from that building. The map shows the portion of the land containing the two buildings and the well as enclosed with a wall, on three sides east, south and west, and with two gateways or openings on the south side. We have it thus that as a matter of record in the years 1862 to 1868, that this building is Masjid. The question is whether it was a private mosque or a public mosque. The contention on behalf of the appellants is that a building having the appearances of a mosque and described in the papers of the relevant dates as mosque, situated in the place where this one was situated, that is at the side of a public road, and being, as it is alleged this always was open to access by the general public or more specifically by the members of the Mussalman public passing along this road out of Lucknow, must be presumed to be a public mosque, even in the absence of proof of actual dedication or actual user. We have to take it for the purposes of deciding this question that there is a definite finding of fact that dedication and user both of them are unproved. It is not suggested that there is on the record any evidence of dedication and as regards the evidence of user that evidence has been rejected by the two Courts below, and so far as recent user is concerned was clearly inconsistent with the state of the building in question: *vide* the inspection reports of the Commissioner and of the District Judge which were fully confirmed by what we ourselves saw on a visit to this building on the morning of Sunday 21st August 1938: *vide* our inspection note of that date.

It is necessary at this stage to consider whether in the absence of evidence of dedication and user, it is possible to say that the building in question can be held and should have been held to be a public mosque whatever the effect might be of that finding. For this purpose it is necessary first to examine what has been said on this subject in leading commentaries on Mahomedan law. According to Baillie, Chapter 7, page 615 (Edition 2):

> When a man has erected a masjid, his property in it does not abate till he has separated it from the rest of his property, with its way, and permits prayers to be said in it. Separation is necessary, because without that the masjid is not made special to Almighty God; and prayer is necessary because delivery is requisite, according to Aboo Haneefa and Mohammad.
>
> If a man should make a masjid within his mansion, and permit entrance to it, and prayers to be said in it, the place becomes a masjid, in all their opinions, if a way is made to it; but not otherwise according to Aboo Haneefa. According to the other two, however, it becomes a masjid and the right of way follows, without any condition to that effect. And if a door were opened to it on the highway, it would become a masjid . . . . . .
>
> When an assembly of worshippers pray in a masjid with permission, that is delivery. But it is a condition that the prayers be with izan, or the regular call, two times or more, and be public, not private. For though there should be an assembly, yet if it is without izan, and the prayers are private instead of public, the place is no masjid according to the two disciples. But if one person were appointed to officiate both as mooezzin and imam, and he should make the call, and then stand up and pray alone, the place would become a masjid by general agreement.

At page 617, there is a further passage, which it will be useful to quote here, which runs as follows:

> When a masjid has fallen to decay and is no longer used for prayer, nor required by the people, it reverts to the appropriator or to his heirs, and may be sold or converted into a mansion; but it has been said that it is masjid for ever, and this is more correct.

The matter has been discussed at some length in Syed Ameer Ali's Mahomedan Law, Vol. I, Edn. 4, at p. 393 and following: On page 394, there is a passage as follows:

> According to the Multeka, the performance of prayer is equivalent to consignment. But in the Zakhira it is stated that the prayer must be congregational . . . . . So that when a person erects a building with the object of dedicating it as a mosque and permits people to offer prayers therein without declaring that he has constituted it into a mosque, and prayers are offered there congregationally, the mosque becomes irrevocably dedicated.

Further down the same page he says "if a man were to build a mosque inside his house" (or for example inside the walled enclosure containing his house),

> it will not become a public mosque, subject to the rules governing a public religious institution, unless permission has been once granted to outsiders to come and pray. It is not necessary that such permission should be given in express terms, but, without an actual or constructive permission, a mosque created within a private building will not become a public mosque so as to entitle the public or any section of the public, to claim the use of it.

On page 395 a passage is quoted from the Fatawai Kazi Khan, which runs as follows:

> The delivery of possession as regards a masjid is complete when only one person has prayed in it with 'azan' and 'ikamat'. Prayer offered by one person in a mosque is sufficient to constitute it a public mosque devoted to the worship of God, for a mosque belongs to the deity and there affixes to it a right of the Musalmans in general, and one person can be a proxy for the establishment of the right of the Creator and the public . . . .According to Abu Yusuf consignment is not necessary for the validity of any dedication, whether it be a mosque or any other wakf. Therefore if a person erect a mosque and give permission to people to pray therein, it becomes complete.

Mr. Ameer Ali sums up the general result of the principles set forth in the passages quoted in the following terms:

Where effect has once been given to a dedication in the mode which is natural to the particular dedication, the wakf is complete and irrevocable. For example, the special purpose of a mosque is that people should perform their devotions there.

In his Principles of Mahomedan law, (Edn. 2) at p. 638, Tayabji, in S. 514, says that:

According to Hanafi law where a person erects or specifies a building for the purpose of dedicating it as a masjid, the wakf is not completed, and his ownership of the land and building does not cease, until he divides them off from the rest of his property, and provides a way to go to it, and either permits public prayers to be said therein, or delivers possession of the mosque to a mutawalli, or to the Judge, or his deputy.

According to Shiah law the wakf of a mosque is completed by the wakif making a formal declaration of wakf, and permitting prayers to be said in the mosque.

In his Notes to this Section on p. 639, there is a remark:

Delivery of possession may be evidenced by the fact that the subject of the wakf is put to the use of the objects of the wakf, just as in the case of a gift, delivery of possession is proved by acts of ownership exercised on the subject by the donee.

We do not think it would be easy to summarize the law in much shorter terms than those in which it has been laid down in Tayabji's book. What it comes to is this: that even if a mosque, that is a building having the appearances of a mosque, is built in a place which is not enclosed, that is, is not situated inside a man's house, something more than the mere appearances of a mosque are needed before it will become entitled to be treated as a mosque for all time. There must be proof of dedication or of permission or of user such as by the saying of prayers in a congregational manner. If we could accept the map which forms part of Ex. A-5 as accurate, it would seem that the mosque was part of an enclosure, but we are not well satisfied on this point in view of the inaccuracy of the map and we are driven back to the question whether in the absence of any direct evidence of dedication and the absence of evidence of user, it is possible to infer dedication from the facts on which stress has been laid by learned counsel for the appellants. The learned counsel has referred us to a number of rulings, but in our opinion the great majority of them are of no service for the decision of the point in issue. He referred for example to 12 All 494[1] but this was a case of a dispute arising out of an attempt of one Mohamedan sect to treat a mosque as reserved for that sect only. Another case to which he referred was 1 C W N 76[2] where there was some discussion on what is necessary to establish the dedication of a mosque, and some of the passages to which we have drawn attention above were quoted. In other respects the case is of no assistance. It was another similar case of a dispute between different sets of persons claiming the right to offer prayers in a particular mosque. In another case quoted by him, 152 I C 323,[3] it was held that:

In Mahomedan law there cannot be any private mosque. When once a place is dedicated to a mosque, it becomes public property; it is property of God in fact.

The dispute here however was not in regard ultimately to the mosque itself, but to certain kothis apparently attached to the mosque, and there was not any dispute about the mosque in this case being used as a place of public prayer. If the word "mosque" is to be understood, as we take it to have been understood, as meaning a public place of prayer, it becomes at once clear that the proposition stated was an obvious one. Once a building is proved to be dedicated as a mosque, it cannot, according to all the commentaries, be undedicated. Another case quoted from A I R 1934 All 1013[4] was a case relating to an Imambara, as also is the case reported in 15 Beng L R 167[5] to which reference was made. The case reported in 5 O L J 551[6] again was a case of a private mosque or private place of Mahomedan worship inside a zenana house to which there was no access for the public. It is quite clear from all the commentaries that the mere construction of a mosque in a private house does not make it a mosque in the sense of a public place of worship.

Learned counsel has sought to argue a kind of converse proposition, as we have indicated above, and to support his contention he has further relied upon 35 Mad 681[7] which however does not appear to us to be helpful. He has fallen back on the Privy Council ruling reported in (1936) 13 O W N

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[1] Ata-ullah v. Azimullah, (1890) 12 All 494 = 1890 A W N 179 (F B).

[2] Adam Sheik v. Isha Sheik, (1897) 1 C W N 76.

[3] M. Ahmad Shah Mubarak Shah v. Atta Khan, (1934) 21 A I R Pesh 57=152 I C 323.

[4] Muhammad Yusuf v. Muhammad Shafi,(1934) 21 A I R All 1013=153 I C 344=1935 A L J 40.

[5] Delrus Banoo v. Abdoor Rahman, (1874) 23 W R 453=15 Beng L R 167.

[6] Kaniz Mehdi Begam v. Mirza Rasul Beg, (1918) 5 A I R Oudh 379=48 I C 39=5 O L J 551.

[7] Kuttayan v. Mammanna Revuthan, (1912) 35 Mad 681=18 I C 195.

153[8] in which it was held, according to the head-note, that :

> Where a plot is recorded as qubristan (graveyard) in an old khasra and shown as such in the map prepared at the First Regular Settlement and is latterly closed as a cemetery by order of the Municipal Board, the land is graveyard in the sense of the Mahomedan law, that is to say, *extra commercium* and dedicated for the benefit of Mahomedans in general in such sense that private ownership therein does not exist.

In the head-note it is further stated that:

> Where a certain land is described as qabristan or graveyard in an old document like a Settlement Khasra, this prima facie means that the land is a graveyard in the sense known to Mahomedan law,

and again

> where the khasra itself is the instrument which confers or embodies rights, the khasra and the map are not merely historical materials but are within the phrase 'instruments of title or otherwise the direct foundation of rights.' The true construction of the effect of the khasra and map is therefore a question of law.

On this ruling learned counsel founds the argument that the entry of Masjid in the khasra kishtwar of 1862 should be interpreted in the like manner, and he argues that his case is a stronger case because, whereas a graveyard may be public or private, a masjid or mosque in the technical sense is always public. It is perhaps deserving of notice that in the Privy Council case the entry of qabristan was found in the third column relating to "description of the plot" whereas the entry in the present case merely states the existence of certain constructions on the plot in question which is not itself a dedicated plot. It is doubtful, in our opinion, whether in the present case it would be possible to regard the khasra, Ex. A-2, as an instrument of title at all. It appears rather to come under the head of historical materials, and if so regarded, it is only to be considered along with the other items of evidence, and more particularly along with the evidence on the record which goes to indicate that this so-called public mosque has been allowed to fall into a state of the grossest neglect, and has in fact been held not to have been used by the plaintiffs-appellants for a great many more than 12 years prior to the date of suit if at all. In fact the evidence has failed to establish its use for congregational prayers at any time within living memory. Literally the only evidence of any interest having ever been taken in this mosque by the Mahomedan public is the admission of one of the defendants' witnesses that some 11 years previously he wanted to build a temple on the other side of the road more or less facing the old entrance M. N., and was stopped from doing so by the fact that some of the Mahomedan public objected to his doing so, but that proves nothing more than that the local Mahomedans judged by the appearance of the building that it must be a dedicated mosque, and that is the very question which is now for decision in the present case.

Supporting his theory that it should be presumed that this mosque is a public mosque, that is a public place of Mahomedan worship, learned counsel sought to rely on 70 I C 850[9] Learned counsel was inclined to suggest that this was a case where the shape of a building was disputable and to argue that as in the present case, the building was by appearance obviously a mosque, it must necessarily be held so to be. It seems to us on a consideration of this particular case that the case rather favours the respondents than the appellants. The building is described throughout the ruling as a mosque. The learned Judges of the Bombay High Court held that :

> After all the question whether a particular building is a public mosque or not is a question of fact, and while the existence of a mihrab and mimbar may be evidence to be considered along with the other facts in the case in deciding that question of fact, it is not possible to lay down that, as a matter of law, the District Judge was bound to accept the existence of such structures as practically conclusive proof of the fact that the building in question was a mosque, by which we mean a public mosque.

Learned counsel further argued that it was incredible that any body would construct a building in the shape of a mosque without the intention that it should be a mosque, and that therefore the descriptive term masjid in the khasra of 1862 and in the subsequent papers should be construed as meaning that this was a building which had been dedicated as a mosque, that is a public mosque. Summing up the case shortly, the whole contention of the appellants rests on three points, first that so far as the documentary evidence goes, the building in dispute is "a mosque" which, it is urged, should be interpreted as meaning a public mosque, secondly that the building is by appearance a mosque, and thirdly in view of its position and of the fact that there used to be a means of access through the open gateway situated close by described as M. N., it is said that by holding out, that is by virtue of its position and its accessibility, it is to be taken to be a public mosque. For the other side stress has been laid chiefly on the facts that evidence of dedication is non-existent and that the evidence of user has been rejected and is directly contradicted by the present condition of the building.

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[8] **8. Ballabh Das v. Nur Muhammad, (1936) 23 A I R P C 83=160 I C 579=(1936) 13 O W N 153 (P C).**

[9] **9. Hasansab v. Mohidinsab, (1923) 10 A I R Bom 42=70 I C 850.**

Learned counsel for the respondents has further argued the possibility that the building was built as a mosque but never reached the stage of dedication, and he contends that the size of the building goes some way to support his contention that it was not built to be a public mosque. There are maps of the mosque on the record which show that the inside portion of it measures roughly 15 ft. by 23 ft. while the outer platform measures 19 ft. by 23 ft. Even if the whole paved area be taken as available for the purpose of congregational prayers, the maximum area which can be arrived at is about 781 sq. ft. In the course of Mahomedan prayer certain physical movements are necessary, which prevent the worshippers from standing shoulder to shoulder and necessitate considerable distance between the ranks. A worshipper goes down on his hands and knees at one stage and in that position an ordinary man occupies a space about 3½ ft. long by 3 ft. wide. On this basis there would be room for not more than 74 persons to pray even if they were to occupy the whole of both portions of the floor space. The mosque was certainly small but not necessarily so small as to preclude the idea of its being built to serve as a public mosque.

Learned counsel further contended that in any case the finding of the lower Appellate Court that this was not a public mosque, is a finding of fact with which this Court has no jurisdiction to interfere in second appeal. Certainly it is clear that that is the view which has been taken by the Bombay High Court in 70 I C 850,[9] a case between which and the present case there is a close analogy, as that also was a case in which the dispute was between persons who alleged the building in dispute to be a public mosque and persons who contended that it was their private property. On the other hand learned counsel for the appellants has relied on 54 I A 178[10] at p. 185 and has urged that this finding is not a simple finding of fact but a mixed question of law and fact, and that the inference to be drawn from the proved facts is a question of law. In the passage in question their Lordships remarked as follows :

> Now their Lordships would be the last to seek to abridge the effect of S. 100 and S. 101, Civil P. C., or weaken the strict rule that on second appeal the Appellate Court is bound by the findings of fact of the Court below. They are well aware however, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from facts, and not itself a question of fact. The High Court has described the question here as a mixed question of law and fact, a phrase not unhappy if it carries with it the warning that, in so far as it depends upon fact, the finding of the Court of first Appeal must be accepted.

In the same connection learned counsel referred to a ruling of this Court reported in 3 O W N 645[11] at p. 658. In the course of his judgment the learned Judge remarked:

> I wish to point out that the question whether a certain property is a private or public property, held in trust for religious or charitable purposes, is a mixed question of law and fact. If the Court of first Appeal has drawn wrong inferences from the facts established in the case, or has applied the law wrongly, the High Court would be competent to interfere with such a finding in second appeal.

He went on to refer to certain Privy Council cases in support of this proposition. It appears to us that on a proper consideration of the question for decision in this case, it is a question of the legal inference to be drawn from the facts put before us which we have summarised above, and that is a point of law which can be taken in second appeal. Treating it as such, however we are not disposed to arrive at any different conclusion from that arrived at by the learned District Judge, namely that it is not established that the building in question is a public mosque. The burden of proof on this point lay upon the appellants and as they failed to establish this fact, their suit was rightly dismissed by the trial Court and the appeal was rightly dismissed by the lower Appellate Court.

The only other question for consideration is the question of adverse possession. Learned counsel for the appellants does not seek to stand on the position sought to be maintained in the *Shahidganj case*[12] that there could be no adverse possession of a mosque. His contention put shortly is that whatever possession the Hindu owners of the grove may have exercised, it is not of such a nature as to constitute adverse possession in the legal sense. Further he contends that there is no satisfactory evidence as to the date from which adverse possession has begun. This latter point is, however, a question of fact into which we cannot go in second appeal, the learned District Judge having held that the defendants have been in exclusive possession for much more than 12 years. By exclusive possession, he evidently meant such possession as was completely inconsistent with the possession of the Mahomedan community. The evidence, so far as it goes is to the effect that over a period of years the mosque has not been used by the Mahomedan community, and has been used by the Hindu owners for storing straw, wood, bamboos, tools and at a later date charkhas and has sometimes been occupied by bandsmen who came to produce music on occasions of weddings. Learned counsel contended that there was no proof of misuse of the building such as to create adversity of possession over a period in excess of 12 years, but the position, as we see it, is that the District Judge had before him proof of misuse of the building, had it been a mosque, extending over a period far beyond the period of 12 years required for the purpose of limitation and along with it complete proof of misuse by the Mahomedan community. It might be that the misuse was not continuous, but we doubt whether this would have any legal effect.

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[10] Dhanna Mal v. Moti Sagar, (1927) 14 A I R P C 102=8 Lah 573=54 I A 178 (P C).

[11] Hari Kishen v. Raghubar Dayal, (1926) 13 A I R Oudh 578=97 I C 853=1 Luck 489=3 O W N 645.

Learned counsel for the appellants argued the case as one falling under Art. 142, Limitation Act. It is we think significant that the plaintiffs-appellants in their plaint carefully avoided the relief of possession and disguised the true nature of the relief, which was the recovery of possession of the mosque for the Mahomedan community, under the cloak of a claim for declaration and injunction. Learned counsel for the appellants however did not in arguing the appeal attempt to take up the position that the question of adverse possession was irrelevant. On the contrary he sought to show that the finding of adverse possession in favour of the respondents was an incorrect inference from the evidence on record. He could not, of course, go behind the finding of fact, and to us it appears that the finding of fact amounts to this that the appellants, if they ever had possession of this mosque at any time in the past, abandoned or discontinued possession at some time outside living memory, and that the respondents have over a period going well beyond 12 years been making such use, or misuse, of the mosque as it was possible for them to make, bearing in mind that the building like a mosque is not one which is particularly convenient to use for other purposes. Learned counsel for the appellants contended that the exercise of the right to pray in a mosque was analogous to the exercise of the right to walk along a public road although it is a right, of course, limited to Mahomedans. It does not seem to us that that analogy based on the ruling reported in 7 All 178[13] at p. 182, is particularly helpful to the decision of this case. Learned counsel contended that the recently decided *Shahidganj case*,[12] an appeal in which is said to be now pending before their Lordships of the Privy Council, stands on quite a different footing from the present case because in that case it was one of the basic facts that the Sikhs had dispossessed the Musalmans more than 150 years ago and had thereafter allowed the Mussalmans no access to the building. He referred to a number of rulings more particularly the following: 1 Luck 469[14] at page 473, 48 I A 395[15] at p. 403, (1935) 12 O W N 252[16] at p. 255 and also to Rustomji's Law of Limitation, 5th Edn., at pp. 1323, 1324 and 1341. The only point on which emphasis was laid in 1 Luck 469[14] was the necessity of a clear assertion of right to justify a Court in holding that possession was adverse, but that was a case having no resemblance in its facts to the facts of the present case. In 48 I A 395[15] again their Lordships have not really laid down any propositions particularly helpful in the present case except by a reference to a former case reported in 27 I A 136,[17] in which it was held by their Lordships of the Privy Council that

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[12] Masjid Shahidganj v. Shromani Gurdwara Parbandhak Committee, Amritsar, (1938) 25 A I R Lah 369=175 I C 985=40 P L R 319 (F B).

[13] Jawahra v. Akbar Hussain, (1884) 7 All 178= 1884 A W N 325 (F B).

[14] Hulas v. Barkatunnissa Begam, Rani, (1926) 13 A I R Oudh 393 = 94 I C 1034 = 1 Luck 469=3 O W N 475.

[15] Kuthali Moothavar v. Peringati Kunharankutty, (1922) 9 A I R P C 181=66 I C 451 = 44 Mad 883=48 I A 395 (P C).

[16] Srischandra Nandy v. Baijnath Jugal Kishore, (1935) 22 A I R P C 36=153 I C 929=14 Pat 327=62 I A 40=(1935) 12 O W N 252 (P C).

> the possession required to be proved must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor.

The case reported in (1935) 12 O W N 252[16] is another Privy Council case which has been equally relied upon by both sides. The portion on which stress is laid is again partly an extract from a former decision. Their Lordships say:

> As regards the defendants' main contention, the principle of law as to what is necessary to constitute adverse possession is well settled, though its application in the circumstances of particular cases may present some difficulty. . . . The principle has recently been restated by this Board in 61 I A 78[18] as follows: 'As to what constitutes adverse possession, a subject which formed the topic of some discussion in the case, their Lordships adopt the language of Lord Robertson in delivering the judgment of the Board in 27 I A 136[17] at p. 140, where his Lordship said that 'the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.' The classical requirement is that the possession should be *nec vi nec clam nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession should be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening.' In their Lordships' opinion, the defendants have failed to show that the plaintiff's predecessors, by exercising due vigilance, ought to have been aware of what was happening, apart from the question of whether the possession was adequate in continuity and extent.

It is of course the latter portion of this ruling on which reliance is placed for the respondents, and the respondents have further in this connexion referred us to two other rulings, namely those reported in 43 Mad 253[19] at p. 269 and 63 Cal 300.[20] In the former case their Lordships of the Privy Council at p. 269 remarked with reference to the question of adverse possession:

> This is a very ordinary case of possession '*nec vi nec clam nec precario*'. The person now claiming to be owner has stood by while others continued to possess not by any derivative title but in practical contravention of his alleged rights. The law does not require that the claimant to ownerships must, in such circumstances, be shown to have protested that his rights were being violated, and that the possession went on adversely to his protests.

Similarly in the Calcutta case the learned Judges referred to another passage in 61 I A 78[18] in which it was said:

> It may be added that it is not necessary in order to establish adverse possession that the proof of facts of possession should cover every moment of the requisite period . . . . "The fact of possession may be continuous though the several acts of possession are at considerable intervals. How many acts will infer the fact is a question of proof and presumption independent of prescription." The nature of the requisite possession must necessarily vary with the nature of the subject possessed.

The learned Judges said further at the foot of page 313:

> The proposition that adverse possession need not be brought to the knowledge of the person against whom it is to operate has been reaffirmed in 62 I A 40[16] in which their Lordships have further pointed out that the proposition is nevertheless subject to the qualification that when the party claiming by adverse possession fails to show that, the person possessed against by exercising due vigilance ought to have been aware of what was happening. Its claim must fail whether his possession be adequate in continuity or not.

On this point learned counsel for the appellants relied on a ruling of a Bench of this Court, 8 O W N 1153,[21] in which it was said at page 1158:

> It is not denied that mere possession for any length of time does not per se create any title by adverse possession. In order to acquire such title, the possession must not only be open and exclusive but it must also be shown to have been adverse for the full statutory period. Notoriety of possession may in some cases justify a presumption that the true owner was aware of the character of the possession being adverse. But whether in the absence of direct proof of actual knowledge on the part of the true owner such a presumption should be raised against him or not must depend upon the special facts and circumstances of each case.

It appears to us that in the light of the findings of fact the position really is this, that although the defendants have been exercising acts of adverse possession by using the building of the mosque for their own purposes in a manner inconsistent with the purposes for which a mosque is constructed, the appellants have, owing to the fact that for many years they have given up the use and preservation of the mosque, been unaware of these acts of the respondents, but we are clearly of opinion that the fact of ignorance based on practical abandonment is no defence. As their Lordships of the Privy Council have repeatedly said :

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[17] Radhamoni Debi v. Collector of Khulna, (1900) 27 Cal 943=27 I A 136=4 C W N 597 =7 Sar 714 (P C).

[18] Secretary of State v. Debendra Lal Khan, (1934) 21 A I R P C 23=147 I C 545=61 Cal 262=61 I A 78 (P C).

[19] Arunachalam Chetty v. Venkatachalapathi Guruswamigal, (1919) 6 A I R P C 62=53 I C 288=43 Mad 253=46 I A 204 (P C)

[20] Surendrakumar v. Ahmad Nawab, (1935) 63 Cal 300=163 I C 897=62 C L J 177.

[21] Suraj Bali v. Mahadeo Prasad, (1932) 19 A I R Oudh 46=137 I C 678=7 Luck 250=8 O W N 1153.

> It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, be aware of what is happening.

Ex hypothesi any mosque is a building in respect of which the local Mahomedan worshippers are expected to be continuously aware of its condition and use or misuse. If by 20, 30, 40 or more years practical abandonment they remain unaware of acts of misuse by the owner of the premises in which the mosque is situated, it is not possible for them to say that by the exercise of due vigilance they could not be aware of what is happening. The classical requirement that possession should be "*nec vi nec clam nec precario*" appears to us to be clearly present in the present case. The Hindu defendants came into the possession of this property 70 years ago and their possession of the property including the mosque and other buildings thereon has not been vitiated by any of the three possible defences of force, secrecy or precariousness. In these circumstances we are satisfied that the learned District Judge rightly held that the defendants had acquired right to the mosque (even assuming for the sake of argument that it be a public mosque) by adverse possession.

We do not think it will serve any purpose to refer to the references quoted in Rustomji's Law of Limitation. Decisions favourable to and damaging to the contention of the appellants can be found in these notes, but the references are all in the form of summaries, and if learned counsel really attached much value to any passage, he would have been in duty bound to put before us the ruling on which the particular passage was based. Learned counsel for the respondents further put forward some argument before us on the question of Issue 7 relating to the acquisition of a right of way over the defendants' land through the old gate M. N. by prescription and also on the question whether the suit was also barred by the six years' rule of limitation under Art. 120, Limitation Act. It will be sufficient to say that no argument was raised before us on behalf of the appellants on either of these two points, and we do not therefore in view of our findings on the two points actually argued, consider it necessary to go into them. On our findings on the two points put before us at great length by learned counsel on both sides, this appeal as shown above necessarily fails and is therefore dismissed with costs.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Oudh 247

ZIAUL HASAN J.

*Gajju* — Applicant.

v.

*Emperor.*

Criminal Revn. No. 58 of 1938, Decided on 23rd August 1938, from order of Sess. Judge, Lucknow, D/- 1st April 1938.

**Criminal Trial — De novo — Effect — After framing charge case transferred to another Magistrate — Accused asking for new trial — Magistrate framing new charge — No irregularity — Trial held not vitiated.**

The grant of a de novo trial by the successor of a Magistrate has the effect of wiping out the prior proceedings : *A I R 1934 Mad 475, Rel. on.* [P 248 C 1]

Where after the framing of charge the case was transferred to another Magistrate and the accused asked for a new trial and in the course of that trial the Magistrate framed a new charge :

*Held* that when accused himself in fact wanted trial de novo, there was absolutely no irregularity in the subsequent Magistrate's framing charge against the accused afresh and hence the trial was not vitiated : *A I R 1915 Mad 23 and A I R 1933 Mad 841, Disting.; A I R 1933 Oudh 86, Explained.* [P 248 C 2]

Nazir Ahmad — *for Applicant.*

Asst. Govt. Advocate — *for the Crown.*

**Order.**—This is an application for revision of an order of the learned Sessions Judge of Lucknow dismissing the applicant's appeal against his conviction and sentence under S. 411, I. P. C. The facts are that Kali Prasad, complainant, left his house for his office at 9.30 A. M. on 24th June 1937. When he returned to his house at 4.30 P. M. he found that a burglary had been committed in his house by one of the shutters of his door being removed. As the burglary was committed in the daytime, some people of the neighbourhood saw the thieves going towards Kali Prasad's house and returning from that direction with a bundle or bundles containing clothes and utensils. An alarm of thief was raised and the thieves took to their heels leaving a bundle of utensils behind. They were pursued and one of them named Nadir who was a co-accused with the applicant was actually caught. The present applicant escaped but he was arrested later on. Both the trying Magistrate and the learned Sessions Judge found the case under S. 411 proved against the applicant and the learned Judge also was of opinion that he could have been convicted under S. 454, I. P. C.

The first point urged on behalf of the applicant is that there has been a material irregularity in the trial and that consequently the trial is vitiated. It appears that the case against the accused was taken up in the first instance by Khwaja Wasiuddin Sahib, a Special Magistrate, and a charge under S. 454, I. P. C., was framed against them. Subsequently the case was transferred to the Court of a Stipendiary Magistrate, Mr. Dhanpat Ram, and a fresh charge sheet under S. 454 and S. 411 was drawn up. Subsequently the case was again transferred to the Court of Mr. Pyare Lal Bhargava who recommenced the trial and framed charges under Ss. 454 and 411.

It is argued that the framing of a new charge by Mr. Dhanpat Ram and Mr. Pyare Lal Bhargava was illegal and that therefore the trial was vitiated. I do not think there is any force in this argument. The learned counsel for the applicant relies on the cases in 38 Mad 585[1] and A I R 1933 Mad 841,[2] but in the first place the facts of those cases were quite different from those of the present case and in the second in 57 Mad 1019[3] a learned Judge of the Madras High Court himself held that the grant of a de novo trial by the successor of a Magistrate has the effect of wiping out the prior proceedings. If that is so, there was absolutely no irregularity in Mr. Dhanpat Ram or Mr. Pyare Lal Bhargava framing a charge against the applicant afresh. In fact it was their duty to do so. The learned counsel for the applicant also relies on the case in A I R 1933 Oudh 86,[4] but all that was held in that case was that where a trying Magistrate does not act suo motu but on the request of one of the accused under S. 350 (1) (a), Criminal P. C., the trial does not become a fresh trial but all that is intended is that the prosecution witnesses should be resummoned and reheard and that the Legislature did not intend that the charge already framed should be wiped out. This means that in a case governed by S. 350 (1) (a) that is to say, where the accused demands that the prosecution witnesses or any of them be resummoned and reheard, it is not necessary for the Magistrate to frame a new charge at the request of the accused. If however he does frame a new charge, I do not think the accused can have any cause for grievance. Under S. 227 (1), Criminal P. C., a Court can alter or add to any charge at any time before judgment is pronounced so that even Mr. Wasiuddin who took cognizance of the case in the first instance could have added a charge under S. 411, I. P. C., at any time and in the circumstances it is absurd to say that if the Magistrate to whom the case was transferred from the Court of Khwaja Wasiuddin Saheb framed a new charge adding S. 411 to it, the accused were in any manner prejudiced. There is yet another reason why the contention put forward on behalf of the applicant cannot be accepted. It appears from the record that in the Court of Mr. Pyare Lal Bhargava, as well as in that of Mr. Dhanpat Ram, the applicant asked for a new trial *(muqadma as sare nau karana chahta hai)*. This clearly shows that the applicant himself wanted trial de novo and this being so, there was absolutely no irregularity in Mr. Pyare Lal Bhargava or Mr. Dhanpat Ram framing the charge against him afresh.

Next it was argued that as some of the witnesses produced by the prosecution did not know the applicant from before, it was necessary that identification proceedings should have been held and the witnesses asked to point out the persons whom they saw going towards and returning from Kali Prasad's house. It would no doubt have been better if identification proceedings had been held, but at least one of the witnesses knew the applicant from before and there is no good reason to interfere with the concurrent finding of both the Courts below that the case was established against the applicant by the evidence on the record. The last ground urged is that in view of the trifling value of the stolen property, namely Rs. 5-12-0, a sentence of 9 months' rigorous imprisonment is too severe for the applicant who is not a previous convict and who is a young man of about twenty years of age. In view however of the fact that the burglary was committed in broad daylight, I do not think the sentence is too excessive. The application is rejected.

N.S.D./R.K. *Application rejected.*

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[1] Sriramulu v. Veerasalingam, (1915) 2 A I R Mad 23=25 I C 1001=38 Mad 585=27 M L J 589=15 Cr L J 673.

[2] Ramanna v. Emperor, (1933) 20 A I R Mad 841=1933 Cr C 1518=146 I C 523=35 Cr L J 79=65 M L J 791.

[3] In re Ramalingam Pillai, (1934) 21 A I R Mad 475=1934 Cr C 801=151 I C 309=35 Cr L J 1363=57 Mad 1019=67 M L J 293.

[4] Kunwar Sen v. Emperor, (1933) 20 A I R Oudh 86 = 1933 Cr C 168=141 I C 192=34 Cr L J 124=8 Luck 286=9 O W N 1136.

## A. I. R. 1938 Oudh 249

ZIAUL HASAN J.

*Sarju and others—Accused*—Appellants.

v.

*Emperor.*

Criminal Appeals Nos. 279 and 282 of 1937, Decided on 12th September 1938.

**Criminal Trial — Evidence — Cross-cases—Evidence for prosecution in one case cannot be used as defence evidence in other case and vice versa.**

In criminal cross-cases evidence for the prosecution in one case cannot be used as evidence for defence in the other case and vice versa. There is no provision in the Criminal Procedure Code that allows such procedure : *A I R 1925 Oudh 438, Explained.* [P 249 C 1]

S. C. Das — *for Appellants.*

H. K. Ghosh, Asst. Govt. Advocate — *for the Crown.*

**Judgment.**—These appeals have been brought by two sets of accused who were convicted, one set under Ss. 147, 304 and 323, I. P. C., and the other under Ss. 147, 323 and 325, I. P. C., in two cross-cases tried by the learned Assistant Sessions Judge of Hardoi. The learned Assistant Sessions Judge adopted the novel procedure of treating the prosecution evidence in one case as defence evidence in the other and vice versa. The learned Judge ought to have known that trials in criminal cases are governed by the provisions of the Code of Criminal Procedure and that the procedure adopted by him is not warranted by any provisions of that Code. No doubt the learned counsel for the accused in both cases put in applications asking the learned Judge to treat the prosecution evidence in each case as defence evidence in the other; but it is not difficult to imagine how these applications came to be presented to the learned Judge. It is surprising how an Assistant Sessions Judge of the standing of Mr. Dwarka Prasad Shukla could think of engrafting the procedure permissible in civil cases on criminal trials before him. In civil cases there are only two parties before the Court who can come to any understanding they like with regard to the evidence to be produced in the case but in almost all cases triable by the Court of Session there is also a third party, namely the Crown, who prosecutes both sets of the accused that are before the Court in cross-cases.

The orders of the learned Judge on the applications of the accused's counsel show that the procedure suggested in the applications was adopted with the consent of the learned Government Pleader of Hardoi. If it is so, it is astounding that an experienced Public Prosecutor like the present incumbent of the post should have given his consent to the proposal. I can think of no reason why it did not occur to the learned Government Pleader that by assenting to the proposed illegal procedure he was giving away his legal and necessary right, which in a regular legal trial he would have, of cross-examining the evidence for the defence, as he could not cross-examine the witnesses whom he himself produced for the prosecution in the two cases. The omission of the learned Government Pleader to protest against the proposed procedure makes me doubt his fitness to hold the post of Public Prosecutor. The learned Judge seems to think that the procedure adopted by him was justified by a remark made by Mr. Daniels, Judicial Commissioner, in 2 O W N 332,[1] but in that he is sadly mistaken. The remark referred to by the learned Assistant Sessions Judge in one of his orders is as follows :

> So far as the evidence in this case goes, there is nothing to show which party first raised the shout. I am informed that this fact appears in the evidence of the first prosecution witness in the cross-case. As the evidence in the two cases was recorded separately, it was an over-sight on the part of the learned Sessions Judge that he did not bring it on the record in this case also.

What was meant by this remark clearly was that the record of a criminal case should be self-contained and that if it be necessary to refer to a document contained in another record, it should be brought on the record before it can be referred to. It is preposterous to suppose that this remark authorizes a Criminal Court to omit to record evidence for the defence, as was done in one of the cases before me, and to treat the prosecution evidence in the cross-case as such evidence. As the trial was entirely illegal, I set it aside and send back the cases to the learned Assistant Sessions Judge for a legal de novo trial. The convictions and sentences of the accused in both the cases are in consequence quashed. The accused in both the cases will be admitted to bail during their trial.

B.D./R.K. *Case sent back.*

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[1] Mulla v. Emperor, (1925) 12 A I R Oudh 438 =89 I C 158=26 Cr L J 1294=29 O C 92=2 O W N 332.

## A. I. R. 1938 Oudh 250

THOMAS C. J. AND YORKE J.

*In re B. N. Varma* — Applicant.
*Rani Suraj Kuar and others,*
**Appellants.**

v.

*Raja Deo Singh and others* —
Respondents.

Civil Misc. Appln. No. 529 of 1938, Decided on 28th September 1938.

**Civil P. C. (1908), O. 45, R. 15—Party awarded costs of appeal to Privy Council praying High Court for preparation of memo of costs—Prayer includes prayer for transmission —Court need not give further directions for execution of decree.**

Where costs of the appeal have been awarded by the Privy Council to a party and the party makes an application to the High Court under O. 45, R. 15 praying that memo of the costs should be prepared, this prayer includes also the prayer for transmission of the order to the Court concerned. The usual procedure adopted by the High Court is that when such an application is made, it is sent to the office for necessary action. The office then prepares the memo of costs and transmits it to the Court concerned without any further directions or orders of the Court. It is not necessary that the Court should give any further directions for the execution of the decree particularly when they are not asked for. [P 251 C 1]

Radha Krishna, Sri Ram, Bishun Singh and S. N. Srivastava — *for Applicant.*

M. H. Qidwai — *for Opposite Party (Raja Deo Singh).*

Karta Krishna—*for Opposite Party Nos. 1, 2 and 3.*

Keoli Singh (Opposite Party) *in person.*

**Order.** — This is an application under O. 45, R. 15, Civil P. C., on behalf of Dr. B. N. Varma, praying as follows:

> That having regard to the terms of the sale deed dated 3rd October 1933 and the order in Council attached herewith this Hon'ble Court be pleased to direct the office to prepare the estimate of costs awarded by their Lordships of the Privy Council in terms of Indian money and transmit it to the Court which passed the decree with the direction that the petitioner would be entitled to execute the decree for costs of all the three Courts against the legal representatives of Thakur Gaya Bakhsh Singh and Raja Birendra Bikram Singh.

It appears that on 16th February 1931, Kr. Deo Singh under the guardianship of of his mother, Mt. Raj Rani Kuar, filed a suit for declaration in respect of certain properties in the Districts of Hardoi, Lucknow and Unao against Thakur Gaya Bakhsh Singh and others on the Original Side of this Court. The suit was decreed in favour of Kr. Deo Singh in respect of properties held to be taluqdari properties. He was awarded costs amounting to Rupees 3585-1-0. Thakur Gaya Bakhsh Singh then appealed to this Court, and during the pendency of the said appeal, in order to meet the expenses for prosecution of the appeal and some other connected appeals pending in this Court and also to raise funds for the prosecution of the appeal before their Lordships of the Privy Council, Mt. Raj Rani Kuar as guardian of Kr. Deo Singh transferred a three annas three pies share in the estates under a sale deed, dated 3rd October 1933, in favour of Dr. B. N. Varma. The other purpose stated in the sale deed is to provide the minor and his mother with maintenance of Rupees 100 per mensem till they obtain possession of the estates or till the date when the judgment of the Court in favour of Kr. Deo Singh becomes final. The applicant's name was added in the array of respondents as respondent 4 by an order of a Bench of this Court dated 11th December 1933.

It is stated on behalf of the applicant that the costs of the Appellate Court amounts to Rs. 4032-2-0 and the costs before their Lordships of the Privy Council, Rs. 8187-1-6. Mr. Mubashir Husain admits that the applicant paid fees to the counsel in the Appellate Court and also sent some money to the Solicitors in London. The applicant has filed the original order of their Lordships of the Privy Council with his application which shows that the costs of the appeal has been awarded to respondent 1 and not to the applicant. Kr. Deo Singh has filed a duplicate copy of the order of their Lordships of the Privy Council signed by the clerk of counsel.

The learned counsel on behalf of the applicant relies on one of the clauses of the sale deed in which it is stated that in the event of success he will be entitled to realize and spend all the costs awarded to respondent 1 (Kr. Deo Singh). It is further contended that the sale deed has been accepted by a Bench of this Court in its order dated 22nd January 1934. There is a good deal of force in this argument. The contention on behalf of Kr. Deo Singh is: (1) that the application is belated, (2) that the application is not maintainable, and (3) that the sale deed is invalid. The application filed by Kr. Deo Singh is dated 16th July 1938, in which it was prayed that a memorandum of costs be directed to be prepared and the following order was passed by one of us : "to office for necessary action." This is the usual order which is passed on such applications. The memo of costs was prepared and signed by the Deputy Registrar on 26th July 1938, while the present application with the application for stay of preparation of memo of costs till the disposal of the application, was made on 2nd August 1938. The following order was passed on the application for stay :

> Let notice go. The preparation of memo. of costs and further proceedings in pursuance of the application made by respondent 1 will be stayed till the decision of the application presented to day.

The following endorsement :

> Copy with the following papers be placed on the file of Original Suit No. 2 of 1931 for information and necessary action

was made on 30th July 1938, on the back of the application made by Kr. Deo Singh, dated 16th July 1938. The papers were transmitted on the Original Side on 6th August 1938. The contention of the learned counsel on behalf of the applicant is that the application on behalf of Kr. Deo Singh simply prays that the memo of costs be prepared, and that there is no prayer that it should be transmitted. We do not agree with this contention. In our opinion this prayer includes also the prayer for transmission of the order to the Court concerned. The usual procedure adopted by this Court is that when such an application is made, it is sent to the office for necessary action. The office then prepares the memo of costs and transmits it to the Court concerned without any further direction or orders of the Court.

It was next pointed out that under O. 45, R. 15, Cl. (2) the Court should have given certain directions for the execution of the decree. In our opinion it was not necessary to give any further directions and particularly when they were not asked for. It was contended by the learned counsel on behalf of Kr. Deo Singh that the act of the Court is only a ministerial act. It is not necessary to discuss this point. We are of opinion that the application is belated and the applicant's remedy now is to raise the points which are raised before us either in the Court which decided the suit or the executing Court. In this view of the case it is not necessary for us to decide the other points which have been raised by the learned counsel on behalf of Kr. Deo Singh. We accordingly reject the application but make no order as to costs.

D.S./R.K. *Application rejected.*

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## A. I. R. 1938 Oudh 251

ZIAUL HASAN J.

*Bankey Lal and another* —
*Defendants* — Appellants.
v.
*Vidya Sagar Abkar* —
*Plaintiff* — Respondent.

Second Appeal No. 168 of 1936, Decided on 29th September 1938, against order of Sub-Judge, Fyzabad, D/- 26th February 1936.

**Abadi — Alienability — Presumption applicable in Oudh to lands of proprietor in agricultural villages do not apply to rights of proprietors in towns — Proprietors occupying houses in towns have right of transfer — Person seeking to eject transferee from such proprietor must prove not only ownership, but also custom or terms of grant making transfer invalid, entitling him to recover possession of site.**

Presumptions, which are applicable in Oudh to the lands of landed proprietors in agricultural villages have no application to the rights of landed proprietors in towns. In the case of proprietors occupying houses in cities and towns, it is to be presumed that they have a right of transfer, unlike those who reside in agricultural areas, and so, if a person sues to eject a transferee from such a proprietor, he has to prove not only his ownership but also prove the existence of custom or terms of the grant under which the house in dispute was built which make the transfer thereof invalid and entitle him to recover possession of the site. A distinction is to to be drawn between the position of persons who have been zamindars and who in their capacity as zamindars own houses, and the position of persons who are mere raiyats. In the case of a mere raiyat the zamindar grants a licence to the raiyat to make a residence, such a licence remaining a licence; the raiyat has no right of transfer of the house, which he makes in pursuance of such licence, but a house built or bought by a zamindar is a transferable house and such rights of transfer do not cease on an auction sale of his undivided zamindari share in the village : *A I R 1930 Oudh 235 ; A I R 1928 Oudh 438 ; A I R 1929 All 494 and A I R 1936 All 14, Foll. ; A I R 1925 All 29, Not foll.* [P 252 C 2 ; P 253 C 1]

N. U. Beg — *for Appellants.*

Radha Krishna — *for Respondent.*

**Judgment.**—This is a defendants' second appeal against a decree of the learned Civil Judge of Fyzabad in a suit brought by the plaintiff-respondent for possession of a house and in the alternative for demolition of the constructions made by the defendants and for a perpetual injunction restraining the defendants from making any constructions on the site in question in future. The plaintiff's case was that the house in suit belonged to him but that the defendants had lately begun making encroachments on the plaintiff's land lying to the west of the house. The defendants denied that the plaintiff was owner of the house in suit and alleged that the house belonged to them and that the constructions made by them have been made on old foundations. It appears that in the village of Janaura, in which the house in suit is situated, two brothers Ram Charan and Sarju were cosharers. On Ram Charan's death the share devolved on Sarju and it is not disputed that the house in suit was occupied by Sarju and his wife Mt. Bhagwanta. Sarju's share in the village was sold and the sale was pre-empted by the plaintiff-respondent's ancestors but Sarju and Bhagwanta continued in possession of their house. After Bhagwanta's death Mata Prasad, son of Ram Charan, and Chittu, son of Mata Prasad, came into possession of the house as reversioners of Sarju and sold it to the present defendants-appellants. The learned Munsif in whose Court the suit was filed dismissed it. The plaintiff appealed and in the Court of Appeal the parties' counsel made the following statement :

> On a careful consideration of the points in controversy and the trial of the case, we abandon some of our pleas and confine our pleadings in which the following four issues alone arise and on which the trial Court be directed to give its findings and decide the case. The parties shall be entitled to lead evidence only on Issue 1 and shall content themselves with the evidence on record on Issues 2 to 4. The issues are :
>
> 1. Whether the site of the house in suit is part of an agricultural village or of a town.
>
> 2. Whether Mata Prasad had a right of transfer under law of the said house to enable the defendants to occupy it in their own right.
>
> 3. Whether the site of the pucca kothris in suit is part of the chabutra appurtenant to the house of Mata Prasad.
>
> 4. Whether the defendants had a right to build pucca kothris on the site of their chabutra.

The case was on this statement of parties' counsel remanded by the lower Appellate Court to the trial Court for trial of the above issues. The learned Munsif accordingly held a new trial of these issues and deciding all of them in favour of the defendants again dismissed the suit. The plaintiff again appealed and the learned Civil Judge though agreeing with the finding of the trial Court that the site of the house was not part of Janaura village but was part of the site of Fyzabad town held that Mata Prasad had no right of transfer in the house, and relying on the wajibularz of village Janaura held that Mata Prasad could only transfer the materials of the house. On these findings he reversed the decree of the trial Court and decreed the plaintiff's suit giving the defendants three months time to remove the materials of the house. Against this decision the defendants have brought this appeal.

I have heard the learned counsel for the parties at length and am of opinion that the appeal must prevail. As found by both the lower Courts the house in dispute is situate within the limits of the Fyzabad Municipality. In 7 O W N 271[1] it was held that the general rule which has been accepted in Oudh, ever since the British Courts have been in existence, to the effect that in the absence of a special contract or custom no raiyat, whether an agriculturist or a non-agriculturist, has any rights in the inhabited areas of an agricultural village except a right of occupation without a right of transfer, does not apply to a site in a town. Similarly in A I R 1928 Oudh 438[2] it was held that any presumptions which are in Oudh applicable to the rights of landed proprietors in agricultural villages have no application to the rights of landed proprietors in towns. In the Allahabad case in 13 R D 615[3] it was held that in case of riyayas occupying houses in cities and towns it is to be presumed that they have a right of transfer, unlike those who inhabit agricultural areas, and so if a licensor sues to eject a transferee of a riyaya he has to prove not only his ownership but must also prove the existence of custom or terms of the grant under which the house in dispute was built which make the transfer thereof invalid, entitling him to recover possession of the site. It was therefore for the plaintiff to prove that the site of the house in suit belongs to him and that Mata Prasad was incompetent to transfer the house.

The plaintiff places reliance solely on the wajibularz of the village but the clause relied on by him applies to riyayas whereas in the present case it is not disputed that Mata Prasad's father and uncle who built the house in suit were cosharers in the village, so that the provisions of the wajibularz do not obviously apply to the present case. In 1935 A L J 1118[4] Sulaiman C. J. and Bennet J. held that a distinction should be drawn between the position of persons who have been zamindars and who in their capacity as zamindars own houses and the position of persons who are mere raiyats and that in the case of a mere raiyat the zamindar grants a licence to the raiyat to make a residence, such a licence remaining a licence the raiyat having no right of transfer of the house which he makes in pursuance of such licence, but that a house built or bought by a zamindar is a transferable house and such rights of transfer do not cease on an auction sale of his undivided zamindari share in the village. A contrary view was no doubt taken by a Judge of the Allahabad High Court sitting singly in A I R 1925 All 29,[5] but that view was dissented from, and rightly, if I may say so with respect, in 1935 A L J 1118.[4]

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[1] Kanhaiya Lal v. Hamid Ali, (1930) 17 A I R Oudh 235=122 I C 774=7 O W N 271.

[2] Muhammad Ali Khan v. Mt. Badrunnissa, (1928) 15 A I R Oudh 438=110 I C 309.

[3] Mohammad Sher Khan v. Amjad Husain, (1929) 16 A I R All 494=117 I C 365=13 R D 615.

Apart from this aspect of the case, the plaintiff's suit is clearly barred by time. If, according to the plaintiff's case, Mata Prasad had no right of transfer in the house in suit, but was only owner of the materials, the defendants came into possession of the house when they purchased it from Mata Prasad and his son on 13th July 1921, adversely to the plaintiff and since they have been in possession since their purchase, they have acquired title even by adverse possession and the plaintiff's right, if any, in the house has been lost for his being out of possession for more than twelve years. As regards the constructions made by the defendants to the west of the house in suit on the site of an old chabutra, the learned Civil Judge himself remarks:

> I believe the plaintiff's witnesses when they say that only a chabutra existed there. Since the chabutra was contiguous to the house which Mata Prasad sold to the defendants, I believe that it was in Mata Prasad's possession up to the time of the sale and went into the defendants' possession from the time of sale.

On the learned Civil Judge's own finding therefore the plaintiff is not entitled even to recover possession of the land covered by the chabutra. I therefore allow the appeal and dismiss the plaintiff's suit with costs in all the Courts.

R.M./R.K. *Appeal allowed.*

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[4] Kanhaiya Lal v. Shiva Lal, (1936) 23 A I R All 14=1935 A L J 1118=58 All 376.

[5] Zahur Hasan v. Shaker Banoo, (1925) 12 A I R All 29=78 I C 189.

## * A. I. R. 1938 Oudh 253

YORKE J.

*Taqi Mohammad and another* — Applicants.

v.

*Haji Mohammad Jan—Complainant*— Opposite Party.

Criminal Revn. No. 97 of 1938, Decided on 11th October 1938, against order of Sess. Judge, Lucknow, D/- 4th June 1938.

**(a) Criminal Trial—Trial of several accused — One of them given benefit of doubt and acquitted — This cannot upset conviction of other accused.**

Where several accused are tried for an offence and one of them is given benefit of doubt and acquitted, his acquittal cannot upset the conviction of the rest of the accused. [P 254 C 1]

**(b) Criminal Trial—Removing of excrescences or ornamentation by Court from complainant's story does not amount to setting up of new case.**

In a case the complainant said that he was the victim of aggression, that he did not put up a fight at all and he denied that there had been any exchange of words between the parties prior to the commencement of the assault. The Courts did not accept this story exactly as told, but held that there was something in the nature of a fight, but it held consistently that the two accused were the aggressors:

*Held* that what had been done by the Court in the case by the removing of excrescences or ornamentation did not amount to the setting up of a new case. [P 254 C 2]

*** (c) Criminal Trial—Cross-cases—Court at request of accused allowing evidence of prosecution witnesses in cross case to be utilized as defence evidence in another case — No prejudice to accused — Procedure is irregular but irregularity is curable under S. 537, Criminal Procedure Code.**

Where the Judge at the request of the accused allows the evidence of the prosecution witnesses in a cross-case to be brought on the record and utilized as defence evidence in the case he is trying, the procedure is irregular. But as the accused cannot be heard that they were prejudiced by this procedure the trial of the case cannot be held to have been vitiated and the irregularity is curable under S. 537, Criminal P. C.: *A I R 1935 All 647, Foll.; A I R 1924 Lah 104; A I R 1928 Lah 380; A I R 1935 Oudh* 488 *and A I R 1938 Oudh 249, Ref.* [P 254 C 2; P 256 C 1]

N. U. Beg — *for Applicants.*

Dr. Q. U. Ahmad — *for Opposite Party.*

**Order.** — This application in revision arises out of a quarrel between the owners of two shops next door to one another in Hazratganj, Lucknow, which culminated in an occurrence of 8th November 1937, in which the complainant was attacked and beaten. The defence story was to the effect that there was a free fight between two parties, one of the complainant and the other of the accused Enayat Beg (who was acquitted) in which the complainant's party were the aggressors. The trial Magistrate accepted the prosecution story and rejected the defence story, acquitted Enayet Beg on the ground that the evidence against him was insufficient and doubtful, and convicted Taqi Mohammad and Mohammad Umar of an offence under S. 323, I. P. C., and sentenced the former to pay a fine of Rs. 25, with two months' rigorous imprisonment in default, and the latter to a fine of Rs. 15 with one month's rigorous imprisonment in default. The parties went in appeal to the District Magistrate of Lucknow where the same points which have been argued since before the Sessions Judge and again before me, were argued, but the conviction and sentences were maintained. The accused then went in revision to the learned Sessions Judge who held that there was no ground for interference and dismissed the application.

The first point which is urged in this application is that although according to the prosecution story and evidence, Enayat Beg was the real ringleader and instigator of the whole affair, he has been acquitted, and therefore the prosecution evidence against him has been disbelieved and the applicants before me should not have been convicted on evidence disbelieved against the third accused. It is scarcely necessary to say more than that this is a thing which happens almost every day. Enayat Beg was only given the benefit of the doubt and I am quite satisfied that the conviction could not be upset on this ground.

The second point which is urged is that the applicants have been convicted on what amounts to the setting up on behalf of the complainant of a new story. The complainant said that he was the victim of aggression, that he did not put up a fight at all and he denied that there had been any exchange of words between the parties prior to the commencement of the assault. The Courts have not accepted this story exactly as told, but have held that there was something in the nature of a fight, but they have held consistently that the two applicants were the agressors. Learned counsel emphasizes that this amounts to a reliance on a story directly repudiated in part by the complainant. That may be the case, but again it is an every day happening that the Courts have to sift the evidence in cases of this kind, and they frequently find that the complainant has enhanced the part taken by the accused and minimized the part taken by himself in order to make the case look as black as possible against the accused. What has been done by the Courts in this case by the removing of excrescences or ornamentation does not in my opinion amount to the setting up of a new case, and the rulings quoted on this point do not really therefore help the applicants at all.

The third point has arisen in this way. There was something which was called by counsel who argued in all the Courts below and indeed even at one stage in this Court a cross-case to the present case. The parties were not absolutely the same, but in the cross-case the applicants of the present case or other persons on their behalf were attempting to give a different account of the same occurrence. Prosecution witnesses were produced in the ordinary way in both cases and examined and cross-examined. When the applicants came to give their evidence in defence in this case, they only asked their witnesses or some of them a few questions and then got their statements as prosecution witnesses in the cross-case brought on the record as their substantive statements in the present case. In the case of one witness what happened was that he made some statement in examination-in-chief and when he was cross-examined, the prosecution counsel after putting a question or two, asked him whether he had made in the cross-case the whole statement in cross-examination recorded in that case. That statement was then apparently brought on the record or at any rate utilized. It does not seem that copies of statements in the cross-cases were brought on the record and there can be no doubt of the substantial impropriety or irregularity of the method adopted by the trial Court in this connexion, which is in contravention of the provisions of Sec. 353, Criminal P. C., which provides that:

> Except as otherwise expressly provided, all evidence taken under Chs. 18, 20, 21, 22 and 23 shall be taken in the presence of the accused, or, when his personal attendance is dispensed with (Sec. 540-A), in the presence of his pleader.

Two questions arise, (1) whether this procedure vitiates the trial entirely and (2) whether, if it is only an irregularity which can be corrected by the application of S. 537, Criminal P. C., it did or did not in fact prejudice the case of the applicants.

We may take it for the purpose of answering the latter question that this evidence was used and relied upon or discarded for reasons given in its judgment by the trial Court. On the first question learned counsel has referred to a number of rulings and has particularly relied on the view of the Lahore High Court set out in 4 Lah 376[1] and A I R 1928 Lah 380.[2] In the former case, a case in which the accused themselves wanted the evidence of prosecution witnesses in the cross-case to be treated as defence evidence in the case under trial, it was held that

> the procedure adopted in these cases was a serious departure from the usual and proper course and the fact that the prisoners and their counsel had consented to it could not give it a legal sanction. It is a well established principle of law that a prisoner can consent to nothing which is not authorized by law and the consent of counsel for an accused person cannot validate a course of procedure which the law does not authorize.

It was further held that S. 537 of the Code does not apply to an infringement of statutory requirement, but only to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by Statute, and that as the trials were prohibited in the mode in which they were conducted, they were therefore illegal. In the latter case the Court followed 4 Lah 376,[1] but the judgment makes it quite clear that the lower Court had relied against the accused on completely inadmissible evidence and in consequence the High Court set aside the convictions and ordered a retrial of the appellants.

Learned counsel has also referred to two recent cases of this Court reported in 12 O W N 922[3] and 1938 O W N 958.[4] The former case was one in which several persons had been tried together for an offence under S. 147, I. P. C. On one of the dates of hearing on which evidence was produced before the Court, one of the accused was absent, and in consequence the conviction and sentence of that particular accused was set aside, but the application of the remaining accused was rejected, that is to say the trial was not treated as wholly vitiated by this error. In the latter case it was held by Ziaul Hasan J. that the procedure of treating the prosecution evidence in one case as defence evidence in the other and vice versa, even with the consent of the accused and the Government Pleader, is entirely illegal and the convictions and sentences of the accused were quashed and a retrial ordered. It appears from the judgment in that case, however, that the question whether this was or was not a curable irregularity as contrasted with an illegality vitiating the entire trial and necessitating its being set aside was not considered. That point was in fact not put before the Court at all. The view which has been taken in the Allahabad High Court on this point is set out in A I R 1935 All 647[5] where apparently what was done was precisely what has been done in the present case. Bennet J. at p. 648 pointed out that it was not alleged for the applicants that there was any irregularity in the recording of the prosecution evidence in the present case or that there was any defence evidence which they desired to produce and which was not allowed. Their objection was merely a technical one. He went on to refer to the Lahore case, which has been quoted before me, and to two other cases of Allahabad and Calcutta, and he concluded that it had not been shown in the present case that there was any prejudice to the case for the accused and therefore he considered that no ground for interference in revision had been made out on this point.

In the present case also we have it that the procedure was really adopted at the request of the applicants. Possibly they wanted to save the time of the Court, or possibly they thought that by examining their witnesses in detail and their being cross-examined in detail, greater doubt might be thrown on their evidence. Whatever the reason was, they themselves asked for the procedure to be adopted and the trial Court did make use of this evidence but rejected it on the merits. It seems to me clear that in these circumstances there could not have been any prejudice to the accused. It does not seem to me that the point is covered by either of the decisions of this Court which have been put before me, and I have therefore no hesitation in following the decision of the Allahabad High Court to which I have just referred. I hold that the procedure adopted by the trial Court was clearly irregular but that as the applicants cannot be heard to say that they were prejudiced by this procedure, the trial of the case cannot be held to have been so vitiated that the irregularity cannot be cured by the application of Sec. 537, Criminal P. C. No other point arises in this application which accordingly fails and is dismissed.

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[1] Allu v. Emperor, (1924) 11 A I R Lah 104=75 I C 980=4 Lah 376=25 Cr L J 68.

[2] Hayat v. Emperor, (1928) 15 A I R Lah 380=107 I C 766=29 Cr L J 282.

[3] Bishnath v. Emperor, (1935) 22 A I R Oudh 488=1935 Cr C 1283=157 I C 378=36 Cr L J 1198=(1935) 12 O W N 922.

[4] Sarju v. Emperor, (1938) 25 A I R Oudh 249=177 I C 559=1938 O W N 958.

[5] Ganga Singh v. Emperor, (1935) 22 A I R All 647=1935 Cr C 650=155 I C 541=36 Cr L J 763=1935 A L J 423.

D.S./R.K. *Application dismissed.*

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## A. I. R. 1938 Oudh 256

ZIAUL HASAN AND YORKE JJ.

*Raja Ram and others* — Appellants.

v.

*Emperor.*

Criminal Appeal No. 233 of 1938, Decided on 12th October 1938, against order of Sess. Judge, Sitapur, D/- 1st July 1938.

**(a) Penal Code (1860), S. 300 — Person hitting another on head with lathi with such force as to fracture skull is guilty of murder.**

A lathi is a lethal weapon, and any one who uses it on the head of another with such force as to fracture the skull, must know that he was doing an act which in all probability must cause death : *3 O W N 451; A I R 1927 Oudh 174 and A I R 1928 Oudh 282, Rel. on.* [P 257 C 2]

**(b) Penal Code (1860), Ss. 34, 111, 325, 109 — Common intention referred to in S. 34 is intention to commit crime actually committed —Deceased dying as result of lathi blow given by only one of three accused—Common intention of all accused appearing only to give deceased beating with lathis — Accused other than accused actually hitting deceased, held were not guilty of murder under S. 34 but were guilty under S. 325 read with S. 109.**

Although S. 34 may have been framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them, S. 34 is not restricted to such cases only and it can well be applied to cases in which the offence was committed by only one of two, or three persons who all had a common intention. The real test is the common intention. The "common intention" referred to in S. 34 is an intention to commit the crime actually committed. [P 258 C 1]

Where the deceased died as a result of a lathi blow on the head, hit by only one of the three accused, and it appeared that the common intention of the three accused was not to kill the deceased but merely to give him a beating with lathis:

*Held* that the two accused other than the accused who actually hit the deceased, could not be held guilty of murder under S. 34. Although the murder was committed with their aid, it could not be said that it was a probable consequence of abetment on their part. Their case came under S. 111. They really abetted an offence under S. 325, and were guilty under S. 325 read with S. 109: *A I R 1917 Pat 456; A I R 1926 Pat 182; A I R 1930 Lah 338 ; A I R 1931 Rang 1 (F B); (1887) A W N 236 and A I R 1919 Lah 375, Rel. on.* [P 258 C 2]

Dr. J. N. Misra — *for Appellants.*

Government Advocate — *for the Crown.*

**Judgment.** — Three Brahmin brothers, Raja Ram, Sheo Prasad and Sarda, residents of village Ataura, police station Tambaur, district Sitapur, have been convicted by the learned Sessions Judge of Sitapur under S. 302, I. P. C., read with S. 34, I. P. C., and sentenced to transportation for life. They bring this appeal against their conviction and sentences. According to Mt. Keoli, P. W. 1, widow of the deceased, Gokaran, Raja Ram was formerly the priest of her husband's family. In April 1938 Gokaran wanted to build a new house and for that purpose he asked Raja Ram to fix an auspicious date and to perform the opening ceremony of the house. He accordingly fixed a date which he said was auspicious and also told him the fee he would charge for performing the opening ceremony. Gokaran however consulted another Pandit named Bhola who told him that the day fixed by Raja Ram was not at all auspicious and he also offered to perform the opening ceremony on a lower fee. Gokaran accepted Bhola's terms and got the opening ceremony performed by him on 15th April 1938. This displeased Raja Ram and on 16th April 1938 at about midday he is said to have appeared along with his brothers Sheo Prasad and Sarda at Gokaran's door and to have called him out. It is said that Raja Ram was armed with a lathi and the other two with kantas. Gokaran who was in the house did not respond through fear and then the three accused rushed into the house; Sheo Prasad and Sarda dragged him to the courtyard of the house and Raja Ram gave him a lathi blow which felled him down. Sheo Prasad and Sarda are then said to have beaten him with kicks and fists. Mt. Keoli tried to intervene but, it is said Sarda aimed a blow at her with his kanta. She however got behind a corn bin and the kanta fell on the bin. On the outcry raised by Keoli some people of the village arrived and then the three assailants went away. The deceased, who was at the time able to walk, started for the police station accompanied by his brother Badri and his wife Keoli but after going a short distance he was unable to proceed further and the party returned to the village. Sometime after, they engaged a cart, put Gokaran on it and set out for the police station. The thana is six miles from the village and the party reached the police station at about 10 P. M. but Gokaran died a short distance away from it. A report was lodged by Mt. Keoli in which she gave the above facts in detail. Investigation followed and all the three appellants were prosecuted under S. 302, I. P. C.

In the Court of the committing Magistrate all the three accused raised pleas of alibi, but in the Court of Session, while Sarda and Sheo Prasad stuck to the plea of alibi, Raja Ram stated that what he had stated in the Court of the committing Magistrate was not true but that a quarrel did ensue between him and the deceased on the latter's buffalo grazing in his field. He stated that on his asking Gokaran to tie up the buffalo, Gokaran used abusive language towards him and also attacked him with a lathi but he parried Gokaran's blow and gave him a blow with his own lathi. He stated that his brothers were not present at the time of the occurrence. Witnesses were produced in support of his defence by each of the accused but the learned Judge disbelieved their evidence and holding the prosecution case to be true convicted the appellants.

Three witnesses, Bishun Kumar, Ganeshi and Chhutkau were produced to prove the defence version of the fight between the deceased and Raja Ram but the learned Judge was in our opinion right in rejecting their evidence. They were cited in the Court of the committing Magistrate where the only plea taken by Raja Ram was one of alibi, but in the Court of Session they were produced to depose to the manner in which, according to Raja Ram, a fight ensued between him and the deceased. Two witnesses, Parag and Tirjugi Narain, tried to prove that on the day of the occurrence they and Sheo Prasad, accused, were engaged from morning to evening in cutting the crops of some fields, but it is strange that though the fields which they were harvesting were only at a short distance from Ataura, the witnesses did not hear any uproar at the time of the occurrence. 6th and last witness, Tirbeni, wants to prove that Sarda, accused, stayed in the village of Naribehar which is close to his own village Bilauli at the house of one Barmahdin Dube for about a month and two days. This is hardly sufficient to prove that Sarda was not present in Ataura on the date of the occurrence specially when the witness cannot say when Sarda visited Naribehar before this. The learned Judge was in our opinion right in rejecting the evidence of the defence witnesses. In fact the learned counsel for the appellants himself did not place much reliance on it.

Turning now to the prosecution evidence, we find that though Mt. Keoli, P. W. 1, is wife of the deceased and Badri, P. W, 4, is his brother, Rameshwar, P. W. 2, and Shankar, P. W. 3, are perfectly independent and as admittedly there was no previous enmity between the accused and Keoli or Badri, there is no reason to disbelieve Keoli and Badri also on the main facts. The evidence of these four witnesses proves to our satisfaction that the deceased was given a lathi blow on the head by Raja Ram after he was dragged out into the courtyard by Sheo Prasad and Sarda. It is also proved by these witnesses that Gokaran himself named the present appellants as his assailants. We are not however prepared to believe that Sheo Prasad and Sarda were armed with kantas as they made no use of them. Similarly, we doubt the truth of the statement that Sheo Prasad and Sarda gave kicks and fist blows to the deceased after he fell down on being hit on the head by Raja Ram with his lathi. The medical evidence shows that the deceased had only one contused wound $2'' \times \frac{3}{4}''$ scalp deep on the top of the head. The second injury mentioned in the post mortem report, namely the whole of the scalp being ecchymosed and swollen, was manifestly a consequence of the contused wound. The inquest report Ex. 2 also shows no more than one injury on the top of the head. We are of opinion that the intention of the appellants was not to kill Gokaran but to give him a thrashing, but nevertheless, so far as Raja Ram is concerned, there can be no doubt that he was guilty of murder and not of culpable homicide not amounting to murder as his learned counsel argued. A lathi is a lethal weapon and anyone who uses it on the head of another with such force as to fracture the skull must know that he was doing an act which in all probability must cause death. The cases in 3 O W N 451,[1] 4 O W N 445[2] and

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[1] Suraj Prasad v. Emperor, (1926) 3 O W N 451 =95 I C 286=27 Cr L J 766.

[2] Sheo Prasad v. Emperor, (1927) 14 A I R Oudh 174=101 I C 484=28 Cr L J 452 = 4 O W N 445.

5 O W N 391[3] are all cases in which the infliction of a single blow on the head which fractured the skull was held to amount to murder.

The real question in the case is about the guilt of Sheo Prasad and Sarda. We have already said that they not only accompanied their brother Raja Ram to Gokaran's house but dragged him out into the courtyard after which Raja Ram gave him a lathi blow. We do not however think that S. 34, I. P. C., can be applied to Sheo Prasad and Sarda. It has sometimes been held that S. 34 was framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them, but the Section is not in our opinion restricted to such cases only and it can well be applied and has been applied to cases in which the offence was committed by only one of two or three persons who all had a common intention. We may cite as examples the cases in 18 Cr L J 382,[4] 26 Cr L J 1498,[5] 32 Cr L J 56[6] and 8 Rang 603.[7] The real test in our judgment is the common intention. The "common intention" referred to in S. 34 is an intention to commit the crime actually committed as was held in 36 Cr L J 1380.[8] Therefore, only those persons can be held liable under S. 34 who had a common intention to commit the crime which was actually committed. In (1887) A W N 236,[9] Mahmood J. referring to the change brought about in Sec. 34, I. P. C., by Act 27 of 1870 remarked:

> This change in the law is very significant, and it indicates to my mind that the original Section having been found to have been somewhat imperfectly worded, these additional words were introduced to draw a clear distinction that unpremeditated acts done by a particular individual, and which go beyond the object and intention of the original offence, should not implicate persons who took no part in that particular act.

Again referring to S. 149 he said:

> I have referred to this Section (S. 149) to show that it is more strongly worded than S. 34; and even upon this Section, a Full Bench of the Calcutta High Court in 11 Beng L R 347[10] held that any sudden and unpremeditated act done by a member of an unlawful assembly would not render all the other members liable therefor unless it was shown that the assembly did understand and realize either that such offence would be committed or was likely to be necessary for the common object.

At p. 67 in Ratan Lal's Law of Crimes, 14th Edition, it is said:

> To establish guilt under S. 34, it is necessary to prove a common intention as distinguished from a common object as in S. 149 and it must be shown that the criminal act was committed in furtherance of that intention.

Similarly, in 8 Rang 603[7] it was held that a common intention is an intention to commit the crime actually committed and each accused person could be convicted of that crime only if he had participated in that common intention. As we have held that the common intention of the three appellants was not to kill Gokaran but to give him a beating, Sheo Prasad and Sarda cannot be held guilty of murder under S. 34, I. P. C. The case of Sheo Prasad and Sarda in our opinion comes under S. 111, I. P. C., which runs as follows:

> When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it: Provided, the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

As the intention of the appellants appears to have been to give Gokaran a beating with lathis, Sheo Prasad and Sarda in reality abetted an offence under S. 325, I. P. C., and though the act of murder committed by Raja Ram was done with the aid of Sheo Prasad and Sarda, it cannot in our opinion be said that it was a probable consequence of the abetment on their part. In 20 Cr L J 711[11] two persons armed with deadly weapons made an attack upon another and it was proved that death was caused by a blow inflicted by only one of them. Sir Henry Rattigan C. J. and Abdul Raoof J. of the Punjab Chief Court held that the one who struck the blow was guilty of murder and the other, who must have known that grievous hurt would in all probability be caused was guilty of having abetted an offence under S. 325 read with S. 109, I. P. C. Although in this case the learned Judges interpreted S. 34 as meaning that the criminal act must be done by all the accused, a view with which with respect, we disagree, it is clear that the accused who did not strike the deceased was held to have abetted an offence under S. 325 and not murder. We therefore dismiss the appeal of Raja Ram but accept that of Sheo Prasad and Sarda in so far that we alter their conviction from one under S. 302/34, I. P. C., to one under S. 325 read with S. 109, I. P. C., and reduce their sentences to rigorous imprisonment for three years each.

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[3] Amar Nath Singh v. Emperor, (1928) 15 A I R Oudh 282 = 113 I C 481 = 30 Cr L J 173 = 5 O W N 391.

[4] Lachho Singh v. Emperor, (1917) 4 A I R Pat 466=38 I C 766=18 Cr L J 382.

[5] Harihar Singh v. Emperor, (1926) 13 A I R Pat 182=90 I C 154=26 Cr L J 1498.

[6] Emperor v. Sada Singh, (1930) 17 A I R Lah 338=1930 Cr C 386=127 I C 855=32 Cr L J 56.

[7] Nga E v. Emperor, (1931) 18 A I R Rang 1 = 1931 Cr C 17=130 I C 355=32 Cr L J 495 = 8 Rang 603 (F B).

[8] Nga Tha Aye v. Emperor, (1935) 22 A I R Rang 299=1935 Cr C 995=158 I C 441 = 36 Cr L J 1380.

[9] Empress v. Dharam Rai, (1887) A W N 236.

[10] Queen v. Sabed Ali, (1873) 11 Beng L R 347= 20 W R Cr 5 (F B).

[11] Bahal Singh v. Emperor, (1919) 6 A I R Lah 375 = 52 I C 791 = 20 Cr L J 711 = 24 P R 1919 Cr.

R.M./R.K. *Order accordingly.*

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## * A. I. R. 1938 Oudh 259

THOMAS C. J.

*Pt. Bishunath Prasad — Defendant —* Appellant.

v.

*Lala Jamuna Das — Plaintiff —* Respondent.

Second Appeal No. 225 of 1936, Decided on 29th September 1938, from order of Dist. Judge, Fyzabad, D/- 30th May 1936.

*** Civil P. C. (1908), O. 22, R. 4—Application to bring on record legal representative of deceased defendant within three months is not necessary when he is already on record — It is enough if plaintiff states the fact and gets it recorded before suit is decreed.**

Where the legal representative of a deceased defendant is already on the record, an application to bring such legal representative on record within three months is not necessary. It is enough if the plaintiff or the appellant at some time or other, before the suit is decreed, states the fact and gets it noted on the record. [P 259 C 2]

H. D. Chandra — *for Appellant.*

Haidar Husain and H. H. Zaidi — *for Respondent.*

**Judgment.**—This is a defendant's appeal against the judgment and decree of the learned District Judge of Fyzabad dated 30th May 1936 upholding the decree of the learned Munsif of Sultanpur, dated 30th August 1935, decreeing the plaintiff's suit. The plaintiff brought the suit for possession of a portion of house No. 999 and for Rs. 97-1-0 as rent. The defence was that the house was situated on No. 996 and that it belonged to Mt. Parbati, wife of the appellant. It appears that Mt. Parbati was then impleaded as a defendant in the case. During the pendency of the suit before the learned Munsif she died. The judgment in this case was delivered by the Munsif on 30th August 1935, and on that date an application was filed by the appellant to the effect that Mt. Parbati had died, and that he was her legal representative. The order passed by the learned Munsif was "file." This order was wrong. The correct order should have been that let it be noted on the record and the name of Mt. Parbati removed. The learned Munsif has committed another error and that is that he has passed the decree against both the defendants though it was brought to his notice that Mt. Parbati had died. The decree should have been passed against the appellant only.

It is contended on behalf of the appellant that the legal representative of the deceased Mt. Parbati should have been brought on record within 90 days. There is no substance in this argument. The case all along proceeded ex parte against Mt. Parbati. The appellant stated that the house in dispute belonged to Mt. Parbati and it was for him to prove this fact. The plaintiff never admitted her title. In my opinion where legal representative of a deceased defendant is already on the record an application to bring his legal representative on record within three months is not necessary. It is enough if the plaintiff or the appellant at some time or other, before the suit is decreed, states the fact and gets it noted on the record. This is exactly what has been done in this case, though the order of the learned Munsif is not happily worded but it really amounts to that.

It appears that a Commissioner was appointed to find out the situation of No. 999 and No. 996. According to the report of the Commissioner the house in dispute was situated on No. 999 as alleged by the plaintiff. Unfortunately the Commissioner did not show the position of No. 996. The appellant filed an objection before the learned Munsif which was rejected. This point was raised before the learned District Judge and in his judgment he stated as follows :

> **But from the evidence, pleadings and circumstances of the case it was clear to me that the plaintiff was the owner of the house and that the defendant was a tenant of it and for this reason I do not think that any order of remand on the ground of the defective nature of the Commissioner's report is necessary in this case.**

It has been contended before me that the case should be remanded for further inquiry. In my opinion there is no need to do this. The sole question for decision in the appeal is whether the house in suit was purchased by the appellant in the year 1916. The finding of the lower Courts is in favour of the plaintiff. This finding has been arrived at after due consideration of the oral and documentary evidence in the case, and I am not prepared to interfere with this finding. In my opinion there is no substance in this appeal and I accordingly dismiss it with costs.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Oudh 260

THOMAS C. J.

*Kunwar Rajendra Bahadur Singh* — *Plaintiff* — Appellant.

v.

*Raja Sri Pratab Bahadur Singh* — *Defendant* — Respondent.

Second Rent Appeal No. 58 of 1937, Decided on 15th August 1938, against order of Dist. Judge, Bara Banki, D/- 7th May 1937.

**Oudh Rent Act (22 of 1886), Ss. 108 (16), 132, 129—Suit for compensation for revenue paid by the lambardar on account of joint lambardar falls under S. 108, Cl. (16) and is not governed by S. 132 but by S. 129.**

A suit for compensation for revenue paid by a lambardar on account of a joint lambardar is covered by the third part of Clause (16) of S. 108, Oudh Rent Act, and as such is governed not by Sec. 132 but by Sec. 129 of the Act and should be instituted within one year from the date of the accrual of the cause of action. [P 261 C 1]

M. H. Qidwai — *for Appellant.*

Haider Husain — *for Respondent.*

**Judgment.**—This is a plaintiff's appeal against the judgment and decree of the learned District Judge of Bara Banki dated 7th May 1937. It arises out of a suit for arrears of revenue. The plaintiff-appellant brought the suit to recover the sum of Rs. 1517 as arrears of revenue due for the years 1339, 1340, 1341 and 1342 Fasli. The sum actually now in dispute is Rs. 512 odd. The defendant's plea was that he was a joint lambardar with the plaintiff, and therefore the suit for the years 1339, 1340, 1341 and 1342 Fasli was barred by limitation under S. 129, Oudh Rent Act. Both the lower Courts have found that the plaintiff is a joint lambardar with the defendant.

The facts briefly are that Raja Raghuraj Bahadur, the taluqdar of Harha, died in 1925 leaving the plaintiff and defendant as his sons by different wives. There was a dispute on the Raja's death between the two sons, but it was amicably settled by some arbitrators who allotted some villages to the plaintiff and some to the defendant and some to the plaintiff's mother. It appears that then a partition took place and the land of each became separate. The defendant on his father's death was appointed lambardar of the entire estate. After the partition the plaintiff and his mother applied for being appointed lambardars of the estate, but the Deputy Commissioner of Bara Banki allowed the defendant to remain lambardar of the entire estate and appointed the plaintiff as joint lambardar with the defendant in respect of the lands which had fallen to his (plaintiff's) share at the partition. The plaintiff's mother was also appointed joint lambardar with the defendant in respect of the lands which fell to her share at the partition. Khokharpur is a hamlet of Mahmudabad, and it appears that this village Mahmudabad was allotted to the plaintiff at the time of the partition, but Khokhapur was given to the defendant. The Record of Rights however shows that the plaintiff was and ever since has been recorded as lambardar of Mahmudabad and Khokharpur, perhaps because Khokharpur is a hamlet of Mahmudabad. The order of the Deputy Commissioner of Bara Banki (Mr. Mason) is as follows:

> . . . . From a revenue point of view however the mahal is still undivided and must remain so until, if ever, any of the owners decide to go through the expensive procedure of a revenue partition. Although therefore each party is, as observed by the S. D. O. in sole possession of his or her own share, I am unable to appoint three separate lambardars for the three shares. All I can do under Sec. 45, L. R. A., is to appoint additional lambardars. I therefore appoint the late Raja's eldest son Shri Pratap Bahadur Singh as lambardar of the mahal in succession to his father. I further appoint the younger son Rajendra Bahadur as additional lambardar for his own villages and his mother Mt. Bhagwant Kuar as additional lambardaria for her villages.

It is thus clear from the above order that from a revenue point of view the mahal is undivided, and therefore the liability for revenue remains joint. The learned counsel for the appellant contends that the entries in the khewat should be treated as conclusive evidence. I do not agree with his contention. In my opinion in view of the order of the Deputy Commissioner they are not complete entries. Taking all the facts and circumstances of the case into consideration, I agree with the finding of the lower Courts that the parties are joint lambardars of the village in suit.

It was next contended by the learned counsel for the appellant that the period of limitation applicable to the suit is three years under S. 132, Oudh Rent Act. I do not agree with this contention. There are three parts of Cl. 16 of S. 108, Oudh Rent Act, (1) suits by a lambardar or by a pattidar who is entitled to collect the rents of the patti . . . (2) by a lambardar for village expenses and other dues for which the cosharers may be responsible to him and (3) against a joint lambardar for compensation for revenue or rent paid by the lambardar on account of the joint lambardar. S. 132, Oudh Rent Act, refers to a suit for recovery of all the arrears of revenue or rent for which the period prescribed for institution of the suit is three years from the last day of the month of Jeth of the Fasli year in which the arrears fell due. The present suit is for compensation for revenue paid by the lambardar on account of the joint lambardar, and is therefore covered by the third part of Clause 16 of S. 108, Oudh Rent Act. A suit therefore under Cl. 16 of S. 108, Oudh Rent Act, for compensation for revenue paid by a lambardar on account of a joint lambardar is governed not by S. 132 but S. 129 of the Act, and should be instituted within one year from the date of the accrual of the cause of action. The claim therefore for the years 1339 and 1340 Fasli is beyond limitation, and the decision of the lower Courts is correct. I accordingly dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Oudh 261

YORKE J.

*Emperor*

v.

*Mahadeo* — Opposite Party.

Criminal Ref. No. 53 of 1938, Decided on 14th October 1938: reference made by Dist. Magistrate, Lucknow.

**Criminal P. C. (1898), Ss. 439, 349 — Fact that accused charged under S. 380, Penal Code, had six previous convictions not brought to notice of Second Class Magistrate trying case—Accused, in consequence, not charged under S. 75, Penal Code, and case not sent up to Magistrate with higher powers under Sec. 349—High Court is entitled under S. 439 (1) to reverse finding and sentence and direct retrial.**

Where the fact that the accused, who is being tried under S. 380 of the Penal Code, has no less than six previous convictions under Ss. 379, 380 and 381 of the Penal Code is not brought to the notice of the Second Class Magistrate who is trying the case, and in consequence the accused is not charged under S. 75 of the Penal Code and the case is disposed of by the Second Class Magistrate himself instead of being sent up to a Magistrate with higher powers under S. 349, Criminal P. C., the High Court has the power under the provisions of S. 439, Cl. (1) Criminal P. C., to reverse the finding and the sentence and order the accused to be retried by a Court of competent jurisdiction or committed for trial; *28 P R 1879, Cr, Rel. on.* [P 261 C 2]

S. C. Das for H. K. Ghose — *for the Crown.*

**Order.**—This is a reference by the District Magistrate of Lucknow recommending that the conviction of one Mahadeo under S. 380, I. P. C., be set aside and the case be ordered to be retried according to law. It appears that the said Mahadeo is a man who has no less than six previous convictions under Ss. 379, 380 and 381, I. P. C. This fact was however not put before the Second Class Magistrate who was trying the case, and in consequence the accused Mahadeo was not charged under S. 75, I. P. C., and the case was disposed of by the Magistrate himself instead of being sent up to a Magistrate with higher powers under Section 349, Criminal P. C. I think it is clear that under the provisions of S. 439, Cl. (1) this Court has the power to reverse the finding and sentence and order that Mahadeo be retried by a Court of competent jurisdiction subordinate to this Court or committed for trial. I am supported in this view by the case in 28 P R 1879 Cr[1] in which the circumstances were very similar. In that case the accused gave a wrong name. After he was convicted he was recognized in jail by the Darogha. The case was reported to the Chief Court which set aside the conviction and directed a new trial ; that is to say in that case the conviction was set aside on what amounted to the discovery of new evidence justifying a charge under S. 75, I. P. C., and that is exactly what I am asked to do by the present reference. I accordingly accept the reference, set aside the conviction of Mahadeo and direct that he be tried de novo before a Magistrate of the District and that the previous convictions be set out in the charge. The Magistrate will of course be at liberty, if he thinks it necessary to commit the case for trial to the Sessions Court. I note that the search slip referred to in the order of reference has not been placed on the record of the trial Court nor sent up to this Court along with the Order of Reference. This should have been done.

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[1] Empress v. Yusaf, (1879) 28 P R 1879 Cr.

R.M./R.K. *Reference accepted.*

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## A. I. R. 1938 Oudh 262

ZIAUL HASAN AND YORKE JJ.

*Ganga Ram Jaitley* — Applicant.

v.

*Dr. J. N. Jaitly* — Opposite Party.

Civil Revision Appln. No. 201 of 1936, Decided on 10th October 1938, form order of Dist. Judge, Lucknow, D/- 12th November 1936.

**Charitable and Religious Trusts Act (1920), S. 3 — Order under S. 3 is revisable.**

A revision under Sec. 115, Civil P. C., lies from an order under Sec. 3, Charitable and Religious Trusts Act. [P 262 C 1]

K. P. Misra — *for Applicant.*

B. K. Dhaon — *for Opposite Party.*

**Order.** — This is an application under Sec. 115, Civil P. C., by Dr. Ganga Ram Jaitley arising out of an application under Sec. 3 of Act 14 of 1920. What happened in this case was that on the application of the opposite party the learned District Judge examined the document on which the original application was founded and came to the conclusion that under that document there was created a public trust. He further held that the original applicant was a person interested in the trust and competent to make the application. He accordingly directed under S. 3 of the Act that the mutawalli or trustee should file accounts of the trust within one month. It is against that order that the present application has been filed and the contention is that the learned District Judge has acted illegally and with material irregularity in passing the order in question. A preliminary objection is taken that no revision lies. We understand that the learned counsel meant that in law no revision would lie from such an order, and in that particular form we would not be prepared to accede to the contention, although that contention has been rested on reference to a number of rulings. Those rulings were not however in connexion with cases under this Act, and for the present applicant reference has been made to cases under this Act in which orders passed under the Act were considered by the High Court of Allahabad in revision. After hearing counsel for the applicant however at considerable length, we are satisfied that he does not make out any case for revision at all. His contention is that the learned District Judge acted with material irregularity in exercising his jurisdiction and thereby vesting himself with jurisdiction to pass the order which he has passed. S. 5, Charitable and Religious Trusts Act (14 of 1920), in sub-s. 3 provides that:

> If any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which this Act applies, and undertakes to institute within three months a suit for a declaration to that effect and for any other appropriate relief, the Court shall order a stay of the proceedings and, if such a suit is so instituted, shall continue the stay until the suit is finally decided.

It is conceded on behalf of the present applicant that he did not in the lower Court give any such undertaking. In a case when no such undertaking is given, sub-cl. 4 of the Section applies. That sub-clause lays down that:

> If no such undertaking is given, or if after the expiry of the three months no such suit has been instituted, the Court shall itself decide the question.

The Section thus in terms gives the Court of the District Judge jurisdiction to decide the question whether the trust is one to which the Act applies, and that is precisely what the District Judge has done in the present case. In these circumstances we have only to consider whether learned counsel has succeeded in bringing forward any point which will justify us in exercising the discretion given by S. 115. It is clear that the Court below has not exercised a jurisdiction not vested in it by law nor has it failed to exercise a jurisdiction so vested in it; on the contrary it has exercised a jurisdiction vested in it by law. Learned counsel is really unable to suggest that the Court below has acted illegally or with material irregularity in the exercise of this jurisdiction and the grounds of the application do not suggest in what respects the Court below is to be supposed to have acted illegally or with material irregularity in the exercise of its jurisdiction. It follows that on the merits no case has been made out for this Court to accept this application under S. 115, which must therefore fail and is dismissed with costs.

D.S./R.K. *Application dismissed.*

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## A. I. R. 1938 Oudh 263

YORKE J.

*Emperor*

v.

*Shankar Dayal and others*—Accused.

Criminal Ref. No. 42 of 1938, Decided on 12th September 1938, made by Sess. Judge, Hardoi.

**(a) Criminal P. C. (1898), Ss. 236 and 237—Conviction under S. 452, I. P. C., of accused charged under S. 323, I. P. C., is not illegal provided it does not cause injustice to accused.**

It is not illegal to convict a man of an offence under S. 452, I. P. C., in a case in which he has been charged under S. 323, I. P. C. But if the alteration of the charge causes injustice to the accused, the conviction from Sec. 323, I. P. C., should not be altered to S. 452, I. P. C. [P 263 C 2]

**(b) Penal Code (1860), S. 442 — Building — Erection of awning.**

The erection of an awning does not constitute the structure a building. [P 264 C 1]

H. K. Ghose, Assistant Govt. Advocate—*for the Crown.*

Dr. J. N. Misra and H. N. Misra —*for Accused.*

**Order.** — This is a reference by the Sessions Judge of Hardoi recommending that the conviction of certain persons under S. 452, I. P. C., be set aside. What happened in this case was that as the result of a dispute the accused persons went in a body to the so-called shop of the complainant Ram Charan whom they beat with the result that he sustained a contused wound 2″ × ½″ bone deep on the front part of the head and a contusion 1½″ × ¾″ behind the middle of the left forearm. The accused persons were convicted by a Second Class Magistrate of offences under Ss. 147 and 323, I. P. C. Under the former Section he sentenced Ram Dayal to four months' rigorous imprisonment, Shankar Dayal to three months' rigorous imprisonment and a fine of Rs. 100 and the other four accused each to three months' rigorous imprisonment and a fine of Rs. 50. Under S. 323, he fined each of the accused Rupees 50, with two months' rigorous imprisonment in default.

The case went up to the District Magistrate in appeal and the District Magistrate on 3rd June 1938 left the sentences on Ram Dayal untouched. He set aside the fines inflicted under Sec. 147, I. P. C., on Shankar Dayal and the other four accused. When he came to deal with the case under S. 323, I. P. C., he concluded that the attack was deliberate and premeditated and that in the circumstances the appropriate Section to apply was S. 452, I. P. C., and not S. 323, I. P. C. He held that the sentences of fine were proper and declined to interfere with them. On the case going in revision to the Sessions Judge, the latter was of opinion that the alteration of the conviction from one under S. 323, I. P. C., to one under S. 452, I. P. C., was not illegal of itself, but he was of opinion that the evidence did not establish that the shop at which the attack took place was a building and thus the offence did not come within the definition of house trespass under S. 442, I. P. C., and therefore the conviction under S. 452, I. P. C., by the District Magistrate was wrong, and he has therefore recommended that it should be set aside.

Two questions really arise and only two. First whether the alteration of the conviction was legal and secondly whether the facts did establish the commission of an offence under S. 452, I. P. C., that is to say whether the shop in question was or was not a building. As regards the first question I am inclined to agree with the Sessions Judge that it is not illegal to convict a man of an offence under S. 452, I. P. C., in a case in which he has been charged under S. 323, I. P. C., in the light of the wording of Ss. 236 and 237, Criminal P. C., but the question which is to be decided in each case is whether the accused has or has not been prejudiced in his trial by the fact that the charge was framed under the wrong Section. In the present case it is suggested with some show of reason that the accused were prejudiced. It is not shown and does not appear that there was any real cross-examination devoted to ascertaining whether the shop in question was or was not a building within the meaning of S. 442, I. P. C., and in these circumstances it would seem prima facie that the alteration of the charge does cause injustice to the accused, and the District Magistrate should not therefore in appeal have altered the conviction from Sec. 323, I. P. C. to S. 452, I. P. C.

On the second point the District Magistrate in his explanation urges that this shop was a building within the definition found in Sec. 442, I. P. C. The Sessions Judge only referred to the statement of Ram Dayal that the shop was under a cover, and if by a cover had been meant a thatched or iron roof, implying that this was the ordinary kind of bazar shop with either a wooden or a mud or a one brick wall, I should have been inclined to agree with the District Magistrate that this was a building, but learned counsel has referred to the Urdu record which shows that the phrase used is "pal para hai" which evidently means that an awning had been rigged up. The erection of an awning certainly does not constitute the shop in question a building. In these circumstances I am in agreement with the learned Sessions Judge that the conviction under Sec. 452, I. P. C., was improper and that conviction must be set aside.

The Sessions Judge has not in terms recommended that the conviction under Sec. 323, I. P. C., should be restored, but I can see no reason why it should not be restored. The only question is whether in the light of the sentences inflicted for the offence under S. 147, I. P. C., and the view evidently taken by the District Magistrate that the sentences originally inflicted were excessive, the sentences of fine should not be reduced. It is to be noted that the complainant sustained only two injuries and had the case been a simple case under Sec. 323, I. P. C., I doubt if the District Magistrate himself would have inflicted such heavy fines as were inflicted by the trial Court. In my opinion the sentences are still on the heavy side and I would reduce the amount of fine inflicted under S. 323, I. P. C. to Rs. 20 each, and I order accordingly. The order in regard to compensation will stand as before.

D.S./R.K. *Order accordingly.*

END

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# 1938

## PESHAWAR SECTION

*WITH PARALLEL REFERENCES TO*

(1) 1938 PESHAWAR LAW JOURNAL
(2) 39 CRIMINAL LAW JOURNAL (3) 173 TO 178 INDIAN CASES

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**CITATION : A. I. R. 1938 PESHAWAR**

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IN GRATEFUL RECOGNITION OF

**THEIR WARM APPRECIATION AND SUPPORT**

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NAGPUR.

# PESHAWAR JUDICIAL COMMISSIONER'S COURT

## 1938

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**Additional Judicial Commissioner :**

K. B. Kazi Mir Ahmed Khan, B.A., LL.B.

**Advocate General :**

Sardar Raja Singh, M.A., LL.B.

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# ALL INDIA REPORTER

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## Peshawar J. C.'s Court

### A. I. R. 1938 Peshawar 1

ALMOND J. C. AND MIR AHMAD J.

*Baldev and others — Plaintiffs —* Appellants.

v.

*Peoples Bank of Northern India Ltd., D. I. Khan — Defendant —* Respondent.

Appeal No. 64/16 of 1935, Decided on 19th October 1937, from order of Dist. Judge, D. I. Khan, D/- 3rd January 1935.

**(a) Succession Act (1925), S. 372—Succession certificate is necessary in respect of interest accrued after death of deceased.**

The interest on a debt forms part of the debt and a person succeeding to the deceased is bound to take a succession certificate for the interest accrued after the death of the deceased. [P 2 C 1]

**(b) Succession Act (1925), S. 214—S. 214 does not prohibit suit for recovery of debts without succession certificate—Court should give opportunity for producing such certificate.**

Section 214 prohibits a Court from passing a decree before a succession certificate is produced, but there is nothing to stop the plaintiffs from prosecuting the suit and producing a succession certificate when called upon to do so in the course of the suit. The Court therefore should give opportunity to the plaintiff to produce a succession certificate. [P 2 C 2]

Beli Ram — *for Appellants.*

S. Saran Singh — *for Respondent.*

**Mir Ahmad J.** — L. Daulat Ram had deposits in the Peoples Bank of Northern India Ltd. (now in liquidation). He died on 28th February 1928 and his fixed deposits matured as follows :

| | | |
|---|---|---|
| D. I. Khan Branch : | Rs. 2,000 | 18-3-1928. |
| | Rs. 1,400 | 17-5-1928. |
| | Rs. 2,000 | 12-10-1928. |
| | Rs. 1,000 | 4-1-1929. |
| Ferozpur Branch : | Rs. 2,200 | 28-1-1928. |

L. Daulat Ram left the money to Baldev, Jai Dev and Sukhdev, his sons, by a will. They corresponded with the Bank and were asked to obtain a succession certificate for the total amount due to Daulat Ram from the Bank. They applied to the Senior Sub-Judge, Ferozpur, and in their application mentioned the principal sums due, using the expression "with future interest" with some items and the words "with interest" with the others. They did not calculate the interest up to the date of the petition which was presented on 24th August 1929. A succession certificate was granted to them and the Court ordered in it that they shall be entitled to recover the principal amount which was mentioned in words. There is no direction as regards the recovery of interest in the order. In pursuance of the succession certificate the sons of L. Daulat Ram were given the principal sum due. It so happened that a sum of Rs. 504-10-8 was also given to them by the Ferozpur branch on account of interest subsequent to the maturity of the securities. It is said that this was done under the orders of the Head Board, but it appears that those orders were soon cancelled, for we find that this sum was deducted from the principal which was paid by the D. I. Khan branch to the sons of Daulat Ram.

On the strength of the orders acted upon by the Ferozpur branch, the sons of Daulat Ram asked that the Bank should give them interest from the dates of maturity to 30th December 1931 on the money due to their father, because the Bank had shown an inordinate delay in paying it. The Bank refused to do so and the present suit was filed by them for recovery of Rs. 1,830-12-0 which includes the aforesaid sum of Rs. 504-10-8 deducted from the principal by the D. I. Khan branch. The trial Judge decreed the claim. An appeal was preferred by the Bank to the

District Judge, Derajat. The Bank raised the objection that the plaintiffs could not bring the suit without first obtaining a succession certificate for the amount which they claimed. The objection prevailed with the learned appellate Judge who dismissed the suit because it was not supported by a succession certificate. The plaintiffs have come up on further appeal to this Court.

The learned counsel who appeared for the appellants urged that the interest had accrued after the death of Daulat Ram and that consequently there was no necessity for obtaining a succession certificate for it. He also pointed out that the Bank had recognized his clients' claim to interest, because the Ferozpur branch paid them a portion of it, and urged that consequently the Bank was estopped from raising the objection with regard to the succession certificate. He asserted that the original succession certificate granted to his clients covered the future interest because the words "with future interest" were used in the certificate when referring to the amounts claimed. He contended that the sum of Rs. 504-10-8 was deducted from the principal for which the plaintiffs held a succession certificate and that therefore they were not required to produce a new succession certificate for the same. Finally he argued that the suit should not have been dismissed and that time should have been given to his clients to obtain a succession certificate if it was necessary to do so. In this connexion he adverted to the fact that this objection was taken on appeal and not in the trial Court.

We will now proceed to discuss the arguments. We are not impressed by the argument that the interest which accrued after the death of the deceased Daulat Ram could be recovered by the plaintiffs without a succession certificate. The interest formed a part of the debt which was due to Daulat Ram and to which the plaintiffs were entitled on succession from him. They were therefore bound to take a succession certificate for the same. The words of the heading of the third column of the form provided in Sch. 8 attached to the Succession Act fortifies us in this opinion. The party has to show in that column the interest up to the date of the application which indicates that the interest which accrued after the death of the deceased person up to the date of the application has also to be included in the succession certificate and ad valorem fee paid therefor. There is nothing on the record to establish the allegation that the Bank had agreed to transfer the deposits to the plaintiffs without the production of a succession certificate. We do not propose therefore to discuss this portion of the argument at all.

We have scrutinized the succession certificate. The operative portion of the document, that is to say the order of the Court, is clear. The plaintiffs have been authorized to recover the principal amount. There is no reference in it to interest. The words "with future interest or with interest" were used by the plaintiffs in their petition and therefore were repeated in the certificate in the precis of the claim. We agree with the learned counsel that the sum of Rs. 504-10-8 was deducted from the principal and that the suit for the recovery of that amount is a claim for the principal and not for interest. A succession certificate has been obtained for the recovery of the whole of the principal amount and we hold that this sum is also covered by that certificate. The Bank cannot convert it into interest merely because the amount was deducted to recoup the interest paid to the plaintiffs by the Ferozpur branch.

We also find ourselves in agreement with the learned counsel in the view that the suit should not have been dismissed. S. 214, Succession Act, prohibits a Court from passing a decree before a succession certificate is produced, but there is nothing to stop the plaintiffs from prosecuting the suit and producing a succession certificate when called upon to do so in the course of the suit. We think that the District Judge should have given an opportunity to the plaintiffs to produce a succession certificate for the interest which they had demanded. The appeal is therefore accepted and the order of the learned District Judge dismissing the suit is set aside. The case will now go back to the learned District Judge, Derajat. He is hereby directed to give an opportunity to the plaintiffs to produce a succession certificate authorising them to recover the interest only, that is to say the amount claimed excluding the sum of Rs. 504-10-8 for which no certificate is necessary. He should fix a date for the production of the certificate and on that date decide the appeal on merits if it is produced or pass such orders as he thinks fit if the plaintiffs fail to comply with the order. The stamp on appeal to be refunded. The costs of this Court shall follow the event.

S.C./R.K. *Case remanded.*

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## A. I. R. 1938 Peshawar 3

MIR AHMAD J.

*Peoples Bank of Northern India, Ltd. and another* — Petitioners.

v.

*Firm Lekhu Ram & Sons and others* — Respondents.

Civil Revision Petn. No. 401 of 1937, Decided on 23rd October 1937, from order of District Judge, D. I. Khan, D/- 31st August 1936.

**(a) Arbitration Act (1899), S. 11 — Order declining to file award — No appeal lies— Appeal wrongly filed can be heard as revision.**

There is no provision in the Arbitration Act for appeal against an order refusing to file an award. But an appeal filed through mistake can be heard as a revision : *A I R 1931 Lah 644, Rel. on.* [P 3 C 2 ; P 4 C 1]

**(b) Arbitration Act (1899), S. 15 — Decree passed on award is a surplusage and nullity and is no bar to enforce award.**

No decree need be passed on an award to which the Arbitration Act applies. The passing of a decree therefore is a superfluous act for doing which a Judge has no legal sanction. It is consequently a nullity and a surplusage which must be ignored and is no bar to the application to enforce the award : *A I R 1933 P C 61, Rel. on.* [P 4 C 1]

Sardar Saran Singh — *for Petitioners.*
Sardar Raja Singh — *for Respondents.*

**Order.**—The Peoples Bank of Northern India entered into arbitration with the firm Lekhu Ram and Sons. The arbitrator gave an award, declaring the Bank entitled to recover Rs. 10,218-5-0 with future interest. The award was presented to the Senior Sub-Judge at Bannu and was made a rule of Court. The Bank went into liquidation and the Official Liquidator proceeded to execute the decree and actually recovered Rs. 4,400 from the judgment-debtors. Later, the Official Liquidator realized that the Senior Sub-Judge had no jurisdiction to entertain the case because by virtue of S. 152, Companies Act, the provisions of the Arbitration Act applied to arbitration to which a joint stock company was a party, and according to that Act it was the District Judge who was authorized to deal with the award. The Official Liquidator therefore applied to the Senior Sub-Judge for the return of the award. The application was accepted and the agreement and the award were handed over to him.

On 3rd January 1936 the arbitrator applied under S. 11, Arbitration Act, to the Court of the District Judge, Derajat, for filing the agreement and the award. Many objections were raised by the opposite party one of which was that in the presence of the decree passed by the Senior Sub-Judge, the award could not be filed in the Court of the District Judge. This objection formed the subject matter of issue 6 which ran thus: "Whether the present award cannot be filed in this Court?" The learned District Judge took up this issue first and held that the decree passed by the Senior Sub-Judge was binding till it was vacated by a competent Court of appeal or revision or by the Senior Sub-Judge himself on review. He held the view that as long as the decree subsisted, he was not competent to order the filing of the award. The application for filing the award was therefore dismissed.

The Official Liquidator has come up on appeal to this Court. A preliminary objection was taken by the learned counsel for the respondents that no appeal lies. It was urged that the Arbitration Act was a complete measure by itself and that there being no provision in it for appeal against an order refusing to file an award, no appeal was competent. As regards the applicability of S. 104 (f), Civil P. C., it was argued that the Civil Procedure Code did not apply to the proceedings under the Arbitration Act. I have considered all the rulings on the subject. It is only the Allahabad High Court which is in favour of allowing an appeal from an order under the Arbitration Act refusing to file an award. A large number of High Courts however hold the contrary view. I am inclined to agree with the majority view and hold that no appeal lies. The learned counsel for the Official Liquidator has requested me to convert his appeal into a petition for revision. I notice that the Lahore High Court did the same in the case reported in A I R 1931 Lah 644.[1] I therefore treat the appeal as a petition for revision.

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[1] Punjab Marwari Chamber of Commerce Ltd. Delhi v. Ram Mal Lilu Shah,(1931) 18 A I R Lah 644=132 I C 850=18 Lah 59=33 P L R 887.

The view of the learned District Judge that the decree passed by the Senior Sub-Judge is a bar to his taking cognizance of the award is obviously incorrect. S. 15, Arbitration Act, says that the award when filed in the Court of the District Judge shall have the force of a decree. So, no decree need be passed on an award to which the Arbitration Act applies. The passing of the decree therefore is a superfluous act for doing which the Senior Sub-Judge, Bannu, had no legal sanction. It is consequently a nullity and a surplusage which must be ignored. I am fortified in this view by the judgment of their Lordships of the Privy Council in 142 I C 324.[2] In this case their Lordships upheld the judgment of the Calcutta High Court reported in 136 I C 466.[3] Their Lordships the Judges of the Calcutta High Court had proceeded to execute the award and ignored the decree altogether. The following passage from their judgment explains the situation:

> Treating the decree as a nullity, the question arises as to whether the decree-holder was entitled to proceed with execution as on the award. It appears that in the case of another decree-holder against the same executors, execution as upon the award has been permitted by this Court: see *Ganendra Mohan v. Bhawani Charan.*[4] The decree being merely a superimposition, unnecessary and void, and the award being under S. 15 of the Act enforceable as a decree and having been referred to in the petition for execution itself (as it has been referred to in the present application), the application may in substance be regarded as application for execution of the award;

and their Lordships of the Privy Council observed as follows when approving the same:

> Their Lordships agree with the view taken by the Courts in India that the decree of 14th February 1919 was passed without jurisdiction and was therefore incapable of execution as such. The respondent, however, as a party to the arbitration, would be entitled under the Act to enforce the arbitrator's award through the Court in exactly the same way as if it was a decree. If therefore there was an existing award in favour of the respondent, the objection to his application was one of form only and not of substance, and therefore their Lordships think that it would be in the discretion of the High Court to treat it in the way they did .... There was, therefore, no reason why he should not enforce the award so far as it gave him rights against the appellant.

It follows that the learned District Judge, Derajat, should have exercised the jurisdiction vested in him by S. 15, Arbitration Act. His refusal to do so is a ground for interference on revision. I accept the petition, set aside the order of the learned District Judge and remand the case to him for decision on the other issues involved in the case. Stamp on petition to be refunded. Costs in this Court will follow the event. Pleader's fee Rs. 32.

B.D./R.K. *Case remanded.*

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[2] Jnanendra Mohan v. Rabindra Nath, (1933) 20 A I R P C 61=142 I C 324=60 I A 71=60 Cal 670 (P C).

[3] Rabindra Nath v. Jnanendra Mohan, (1932) 19 A I R Cal 9=136 I C 466=58 Cal 1018=35 C W N 537.

[4] (1930) 17 A I R Cal 468 = 127 I C 60=34 C W N 268.

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## A. I. R. 1938 Peshawar 4

ALMOND J. C. AND MIR AHMAD J.

*Sardar Bahadur Khan and others* — *Plaintiffs* — Appellants.

v.

*Majid and others* — *Defendants* — Respondents.

First Appeal No. 148/25 of 1936, Decided on 25th October 1937, from judgment and decree of Sub-Judge, First Class, Mardan, D/- 30th June 1936.

**Civil P. C. (1908), O. 22, R. 4 — Failure to implead all legal representatives of deceased defendant does not abate suit against him.**

The failure to implead all the legal representatives of a deceased defendant does not cause the suit to abate as against him. There is no provision in O. 22, R. 4, allowing a suit to abate when an application has been made, merely because the application does not include all the legal representatives of the deceased. [P 5 C 1]

Lala Basheshar Nath and S. Amar Singh — *for Appellants.*

Respondents Nos. 1 to 3 *in person.*

Lala Ram Labhaya — *for Respondents Nos. 6 to 8.*

**Almond, J. C.**—The facts of this case are briefly as follows: The plaintiffs sought a declaration of their title to certain land. Defendant 6, K. B. Abdul Ghafur Khan, who is now represented by respondents 6 to 8, his three sons, contested the suit. He died on 16th February 1936. On 20th February 1936 the plaintiffs applied that his three sons be brought on the record as his legal representatives and an order was made accordingly. When the sons appeared on 22nd May 1936, they put in an application to the effect that the suit had abated in view of the fact that one of the late Khan Bahadur's legal representatives was his daughter, Mt. Zinat Jan. It was held by the learned trial Judge that it was necessary that all the legal representatives be brought on the file, that as the plaintiffs had failed to implead Mt. Zinat Jan, the suit as against the late Khan Bahadur abated, that it could not proceed against the remaining defendants alone and therefore he dismissed the suit. The plaintiffs have filed an appeal against the decree dismissing the suit, and the point for determination before us is whether owing to the failure of the plaintiffs to implead Mt. Zinat Jan as one of the representatives of the late Khan Bahadur, the suit as against him abated. The question depends upon the interpretation of O. 22, R. 4, Civil P. C., and has formed the subject of conflict not only as between different High Courts but also as between the judgments of the same High Court in certain instances. The general result of this conflict has been clearly set out in Note No. 9 of the commentary on that Rule in Chitaley's Code of Civil Procedure and virtually all the cases which have been referred to in the course of that Note have been cited before us as well as some other rulings in addition. It would be useless to deal in detail with all these various rulings, for no doubt a conflict does exist on the subject.

We are of opinion that the failure to implead all the legal representatives of a deceased defendant does not cause the suit to abate as against him. It appears from the first sub-rule of R. 4 that it is the duty of the Court to cause the legal representatives of the deceased defendant to be made parties, and that all that is required of the plaintiff is to make an application in that behalf. Sub-r. (3) provides that where no application is made under sub-r. 1, the suit shall abate as against the deceased defendant. There is no doubt whatever that in the present case an application was made. There is no provision in the Rule allowing a suit to abate when an application has been made, merely because the application does not include all the legal representatives of the deceased. One can imagine circumstances in which it would be quite impossible for the plaintiff to give a complete list of the legal representatives. We therefore find that the suit did not abate as against the deceased defendant 6 and was therefore wrongly dismissed.

We accept the appeal and setting aside the decree of the Court below we remand it to that Court with a direction that Mt. Zinat Jan should be impleaded as a defendant under O. 1, R. 10 and the suit should then be disposed of on its merits. As the suit has been disposed of on a preliminary point, we direct that the court-fee on appeal should be refunded and the other costs incurred in this Court should be costs in the suit. Pleader's fees Rs. 200.

D.S./R.K. *Case remanded.*

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## A. I. R. 1938 Peshawar 5

ALMOND J. C. AND MIR AHMAD J.

*Kishan Chand Kewal Ram*
*Accused* — Appellant.
v.
*Emperor.*

Criminal Appeal No. 438 of 1937, Decided on 3rd November 1937, from order of Sess. Judge, Derajat Division, D/- 16th October 1937.

**(a) Criminal P. C. (1898), Ss. 164 and 533 —Defects in recording confession are cured by S. 533 if accused not prejudiced.**

Omissions and irregularities in recording confessions under S. 164 are condoned by S. 533 provided they do not prejudice the accused : *A I R 1934 All 81, Ref.*; *A I R 1936 P C 253, Disting. Observation in A I R 1937 Nag 220, Dissent.* [P 8 C 1]

**(b) Criminal Trial—Confession—Confession recorded at 9 p. m. and accused afterwards not remanded to judicial lock-up—Confession held of little value.**

Where the confession had been recorded by the Magistrate at 9 o' clock in the night and the accused was not remanded to the judicial lock-up after the confession had been recorded :

*Held* that the confession was not of much value: *A I R 1937 Lah 98, Ref.* [P 8 C 1, 2]

L. Hukam Chand and Qazi Abdul Wahab — *for Appellant.*

Sardar Raja Singh, Advocate-General— *for the Crown.*

**Mir Ahmad J.**—Mt. Sewi Bai was the sister of Kewal Ram and Kishan Chand is his son. Mt. Sewi Bai had two sons, Sahib Ram and Shiva Ram, and she lived with them in D. I. Khan. Kishan Chand had a separate house in that city. Towards the end of July 1937 Mt. Lorindi Bai the mother of Kishan Chand was ill and Mt. Sewi Bai used to look after her. On the morning of 22nd July 1937 Kishan Chand came and asked Mt. Sewi Bai to accompany him to his house to wash the hair of his mother. Sahib Ram her son was sick and was lying in the house. He saw them depart. Mt. Sewi Bai was wearing bangles, earrings and "kholas". The woman did not return till late in the afternoon and her son became anxious. He sent a message to his brother Shiva Ram, who was at his shop in the bazaar, and Shiva Ram proceeded to the house of Kishan Chand. He found it locked from outside. He made several inquiries, and it was suggested to him eventually that he should try to look into the house of Kishan Chand from the roof of one of his neighbours. It is not clear whether he scaled the wall or whether he went through other houses, but it is definite that he reached the house and found the mother of Kishan Chand on the topmost storey. Her hair appeared to have been recently washed and when questioned about Mt. Sewi Bai she pleaded ignorance. Shiva Ram was not satisfied. He came down to the lower storey and in that storey he found something lying on the ground with a quilt on it and some other things placed upon it. When he came near he noticed that two legs of a human being were butting out of the quilt. He removed the stuff and found that it was his mother whose throat had been cut. He cried out that the police should be summoned and Hakim Ram Chand, who was in the street, heard it and hastened to the police station to lay the information that something had happened in the house of Kishan Chand and Shiva Ram wanted the police to come immediately. The Sub-Inspector arrived and he was told of what Shiva Ram had seen inside the house. Presently Kishan Chand appeared with a bundle of clothes under his arm. He was asked to produce the key so that the lock should be opened. He took out the key and opened the lock. On going inside, the police found Mt. Sewi Bai lying dead on the first floor. She had no ornaments on her person. A search was made and the kholas and the earrings were found tied in a handkerchief placed in a flour bin.

On 23rd July 1937, the person of the accused was searched and a handkerchief containing some money was found on him. This handkerchief was similar to that in which the jewellery was discovered. At about 9 P. M. on the same day (23rd July 1937) the accused was produced before Diwan Shiv Saran Lal, A. D. M., Dera Ismail Khan, and he made a confession. The confession was recorded on a form printed in vernacular. In this confession the accused admitted the commission of the offence. He said that he came down with Mt. Sewi Bai after she had attended to his mother, that he complained to her that enough ornaments had not been given to him as compared with his brother, that she answered him rudely, that he gave her a fist blow, that she fell, and that he then stabbed her with a knife. He did not deny that he took off ornaments from her, the "kholas" and the earrings being bloodstained he put them in the bin, but the bangles he went and sold in the bazaar. Although the Magistrate put down the answers to the questions printed in the beginning of the form, he omitted to sign the certificate at the end which practically reproduces the fact that he had put those questions. The police sent up Kishan Chand and he was committed to the Court of Session where he was tried under S. 302, I. P. C. The Doctor stated that the throat of the woman was cut. Sahib Ram and Shiva Ram gave the story which has been set out above. Bhagat Bal Kishan and the police officers proved the recoveries which were made from the house and from the person of the accused. Atar Singh, goldsmith, deposed that the earrings and the "kholas" were made by him for Sahib Ram about five years before the occurrence. A razor and a piece of cloth had also been found in the house, and a shirt and two pyjamas, which were said to belong to the accused, were taken from Allah Yar Dhobi. They were sent to the chemical examiner and human blood was found on them. This was proved by the Sub-Inspector. We may note that the razor and the piece of cloth have no importance. We have seen the garments. They have very few spots of blood on them and we do not attach much value to this piece of evidence also. Diwan Shiv Saran Lal, the Magistrate, appeared to say that he took the handcuffs off the accused, talked to him for half an hour, assured himself that the accused was not under undue influence, and then recorded the statement. He was of the opinion that the statement was made by the accused voluntarily.

The accused denied the charge. He had retracted the confession before the committing Magistrate. He admitted that he had locked his house on the eventful day. He said that on his return from the house of the Dhobi to whom he had given some clothes for washing, he found a crowd collected outside his house including the police. He expressed ignorance as to who murdered the deceased. He said that the deceased was like a mother to him and he had no reason to kill her. He did not produce any defence. The four assessors who assisted at the trial returned a unanimous verdict of guilty. The confession was attacked before the learned Sessions Judge on the ground that the certificate, which is prescribed by S. 164, Criminal P. C., and printed on the form, had not been signed by the Magistrate. It was also urged that the accused was not a voluntary agent when he made it. The learned Sessions Judge rejected this plea and accepted the confession as correct. He also took the circumstantial evidence into consideration and taking the whole *corpus delicti* together held that the case had been made out against the accused. He therefore convicted him under S. 302, I. P. C., and sentenced him to death. The convict has preferred an appeal to this Court and the sentence of death is also before us for confirmation.

The learned counsel who appeared for the appellant hotly contested the admissibility as well as the credibility of the confession. With regard to the admissibility of the document, he said that the absence of the certificate rendered it absolutely valueless and depending on the ruling of their Lordships of the Privy Council reported in A I R 1936 P C 253[1] he asked that we should rule it out of consideration. He pointed out that this was the interpretation placed by the Judges of the Nagpur High Court on the judgment of their Lordships of the Privy Council, in the case reported in A I R 1937 Nag 220.[2] As to the credibility of the statement, he pointed out that the accused was produced before the Magistrate between 9 and 10 P. M. in the night, a very awkward hour, and that after the statement was recorded, the accused was not sent to the judicial lock-up as is required by rules. He invited our attention to the statement of the Magistrate to the effect that he handed over the accused to the police because the police wanted him for further investigation, and contended that this fact was suspicious. On merits the counsel argued that the facts that the accused was seen going with the woman in the morning and that the jewellery was found in the house were not enough to establish that he was the murderer. We will take the points raised by the counsel seriatim and give our finding thereon.

*Point No. 1—Admissibility of the confession.* It has been uniformly held by the High Courts in India that omissions and irregularities in recording confessions under S. 164, Criminal P. C., are condoned by S. 533, Criminal P. C., provided they do not prejudice the accused: *vide* A I R 1934 All 81.[3] The case which went up before their Lordships of the Privy Council was one in which no attempt at recording a confession was made. The accused had made some oral statements to the Magistrate and had showed some places. The Magistrate made a memorandum of what he had seen and heard and it was attempted to treat it as a confession. Their Lordships held that the action of the Magistrate was not under S. 164, Criminal P. C., at all, because no attempt was made to record the confession. In fact it was urged before their Lordships that there were many rulings of the High Courts in India which recognized that S. 533, Criminal P. C., condoned omissions and irregularities in recording confessions. Their Lordships however pointed out that those rulings were not relevant because in the case before them the Magistrate did not purport to act under S. 164, Criminal P. C., at all. It will be useful to reproduce the following passage from the judgment of their Lordships :

> A decision in Burma favourable to the appellant, 3 L B R 173,[4] was also called to the attention of the Board as were a number of other cases which however mainly turned upon the scope and effect of S. 533 and upon the extent to which that section operated to cure defects and to enable statements or records not complying with the requirements of the material sections of the Code to be made admissible in evidence. In this case no question of the operation or scope of S. 533 arises and their Lordships desire to express no opinion on that matter. It is here conceded that the Magistrate neither acted nor purported to act under S. 164 or S. 364, and nothing was tendered in evidence as recorded or purporting to be recorded under either of those sections.

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1. Nazir Ahmad v. Emperor, (1936) 23 A I R P C 253=1936 Cr C 752=163 I C 881=63 I A 372=17 Lah 629=37 Cr L J 897 (P C).
2. Neharoo Mangtu v. Emperor, (1937) 24 A I R Nag 220=168 I C 962=I L R (1937) Nag 268=38 Cr L J 642.
3. Mohammad Ali v. Emperor, (1934) 21 A I R All 81=1934 Cr C 145=147 I C 390=56 All 302=35 Cr L J 385=1933 A L J 1551 (F B).
4. Thein Maung v. Emperor, (1906) 3 L B R 173 =4 Cr L J 198.

In view of this para. in the judgment of their Lordships of the Privy Council, we have no hesitation in holding that their ruling does not cover a case like the one before us. With due respect, we must also observe that their Lordships of the Nagpur High Court have gone beyond the scope of the ruling by observing that the ruling has put a check to the practice of condoning under S. 533, Criminal P. C., the irregularities in recorded confessions. We beg to disagree with the following passage in the judgment of the Nagpur High Court :

> The practice of allowing defects in the formalities in recording confessions to be cured by the application of S. 533, Criminal P. C., has been permitted of late years, with considerable frequency in the Courts in India and any omissions on the part of Magistrates recording confessions to comply with the formalities laid down in Ss. 164 and 364 of the Code have been allowed to be condoned by the evidence of the Magistrates themselves as witnesses for the prosecution. The practice, and the theory underlying it, is crystallized in a Full Bench judgment of the Allahabad High Court in A I R 1934 All 81.[3] This practice has now received a check by a very recent ruling of their Lordships of the Privy Council in A I R 1936 P C 253[1] where the practice is emphatically condemned and, by implication the decision of the Allahabad High Court overruled, as also numerous decisions to the same effect in the Lahore High Court; the case itself, A I R 1936 P C 253,[1] came from Lahore.

We think it is still correct law that S. 533, Criminal P. C., cures defects in a recorded confession provided the accused has not been prejudiced by them. In this case no prejudice has been shown and the Magistrate has stated on oath that he had taken all precautions and it was by an oversight that he had not signed the certificate. We hold therefore that the confession is admissible.

*Point No. 2.—Credibility of the confession.* We must observe that the value of the confession has been considerably reduced by the following two facts : (i) that the accused was produced at about 9 o'clock in the night before the Magistrate; and (ii) that the accused was not remanded to the judicial lock-up after the confession had been recorded. The anxiety to get the statement of the accused recorded at that late hour of the night might be construed by the defence to indicate that the police were nervous, that by the morning the accused might go back on his promise to make a clean breast of the affair. Again the return of the accused to the police and their request that he should be handed over to them for the purpose of investigation does not eliminate the possibility of the argument that the police had threatened him to make the confession telling him that he would come back to them and they would be hard on him if he does not comply with their instructions. In this connexion we would refer to our Circular No. 36 (p. 59 of the Standing Orders of the Judicial Commissioner's Court 1937) which lays down that confessions should be recorded during Court hours and that the accused should be remanded to the judicial lock-up after he has made one. A Division Bench of the Lahore High Court has also deprecated the deviation from this procedure in 38 P L R 791.[5] The following passage from their judgment will make a useful reading :

> To base a conviction upon this evidence, both the confession and the recoveries must be beyond suspicion. In our opinion neither can be said to be free from suspicion. If we take the confession first, as already pointed out, the rule laid down by the High Court that a confession should be, unless there are exceptional reasons to the contrary, recorded in open Court and during Court hours, was disobeyed. It is our opinion that if there were exceptional reasons for the course taken by the police, they should have disclosed those reasons in evidence. Further, the police could have gone to a First Class Magistrate at Chakwal or even to the First Class Magistrate who was only two miles away from the village at Bhaun. We are not told why the Second Class Tahsildar was chosen or why the confession should have been recorded in the peculiar surroundings of the munshi-khana of a rest-house. Further it has been pointed out by the High Court on several occasions that it is necessary that a confessing accused should not be returned to the custody of the police. This rule has been laid down for very obvious and sound reasons. It is seen therefore that the confession itself is not beyond suspicion.

We therefore agree with the learned counsel that the confession is not of much use in deciding this case.

*Point No. 3—Merits.*—Now we turn to the merits of the case. We find the following circumstances to have been established beyond doubt: (1) that Kishan Chand and his aunt Mt. Sewi Bai were last seen by Sahib Ram leaving her house and she was wearing the ornaments then; (2) that she had been asked by Kishan Chand to wash the hair of his mother; (3) that Shiva Ram went to the house of Kishan Chand in the afternoon and found the door locked; (4) that Shiva Ram entered the house by some other passage and noticed that the hair of the mother of Kishan Chand had been washed recently; (5) that Mt. Sewi Bai was found lying murdered in the second storey of the house of Kishan Chand and had no ornaments on her person; (6) that the key was produced by Kishan Chand and he opened the lock; (7) that two of the three ornaments were found in a flour bin and they were tied in a handkerchief similar to that found on the person of Kishan Chand. In our opinion, the cumulative effect of all these points is to prove that Kishan Chand was the murderer. No stranger could have entered the house because it was locked. Of the two inmates of the house, viz. Kishan Chand and his mother, the latter was sick and the inevitable conclusion is that it was Kishan Chand who killed Mt. Sewi Bai. The idea of a stranger having committed the offence is positively ruled out by the fact that the stranger would not leave half the jewellery in the flour bin taking the other portion with him. On the merits therefore, we are satisfied that Kishan Chand has committed the murder. We consequently maintain his conviction. To kill one's own aunt for getting her jewellery is a sordid motive and the appellant deserves no less penalty than death for doing so. We have no hesitation therefore in confirming the sentence of death passed on Kishan Chand and dismiss his appeal.

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[5] Jahana v. Emperor, (1937) 24 A I R Lah 98=166 I C 1003=38 P L R 791=38 Cr L J 338.

D.S./R.K. *Death sentence confirmed.*

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## ✲ A. I. R. 1938 Peshawar 9

ALMOND J. C.

*Baba Dane Shah Suthra—Complainant* Petitioner.

v.

*D. Gurditta Mal and others* — Respondents.

Criminal Revn. Petn. No. 271 of 1937, Decided on 26th August 1937, from order of Addl. Sess. Judge, Peshawar, D/- 15th May 1937.

**✲ Criminal P. C. (1898), Ss. 439 and 195 (1) (a) — Complaint under S. 195 (1) (a) ordered to be withdrawn by District Magistrate under S. 195 (5)—No revision lies against such order.**

**Making of a complaint under S. 195 (1) (a) is not a judicial act but is the act of a public servant. Hence no revision lies under S. 439 from the order of the District Magistrate under S. 195 (5) directing withdrawal of such complaint as it is not passed by him as a criminal Court : *A I R 1934 Mad 473, Dissent.* ; *A I R 1927 Pat 111* ; *A I R 1930 Pat 98*; *A I R 1936 Pat 74 and A I R 1927 Oudh 326, Rel. on.*** [P 9 C 2 ; P 10 C 1]

Kazi Abdul Wahab — *for Petitioner.*

L. Udhe Bhan — *for Respondents.*

**Order.** — On 1st August 1936 Captain Maunsell, Assistant Commissioner and Magistrate, First Class, Kohat, purporting to act under S. 476, Criminal P. C., directed the prosecution of Sunder Das and 12 others under the provisions of S. 188, I. P. C. for having disobeyed an order made under S. 145, Criminal P. C. The case came to the notice of the District Magistrate who by his order dated 1st March 1937, held that the order directing prosecution was illegal as S. 476, Criminal P. C., had no application to a prosecution for an offence referred to in S. 195 (1) (a), Criminal P. C. and that the only persons who could file a complaint in such a case were either K. S. Sadulla Khan who had made the order under S. 145, Criminal P. C. or the District Magistrate himself. He therefore directed under the provisions of sub-s. (5) of S. 195, Criminal P. C. that the complaint should be withdrawn. An application for revision of this order was made to the Sessions Judge by Bawa Danashah and was dismissed by the Additional Sessions Judge on 15th May 1937. A further application for revision has now been made to this Court. It is contended by learned counsel for the respondents that this Court has no power to interfere under S. 439, Criminal P. C., on the ground that the order passed by the District Magistrate is not the order of a Criminal Court. In support of his contention he has referred me to A I R 1930 Pat 98,[1] 6 Pat 39,[2] A I R 1936 Pat 74[3] and 28 Cr L J 681.[4]

Learned counsel for the petitioner, on the other hand, relies on A I R 1934 Mad 473.[5] The Patna and the Oudh Courts have held that the making of a complaint made under S. 195 (1) (a), Criminal P. C. is not a judicial act but is the act of a public servant. In the Madras case re-

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1. Kantir Misser v. Emperor, (1930) 17 A I R Pat 98 = 1930 Cr C 74 = 117 I C 37=30 Cr L J 710=11 P L T 88.
2. Maini Misser v. Emperor, (1927) 14 A I R Pat 111=100 I C 961=28 Cr L J 353=6 Pat 39=8 P L T 488.
3. Thakor Prasad v. Emperor, (1936) 23 A I R Pat 74=1936 Cr C 103=159 I C 503 = 37 Cr L J 104=16 P L T 808.
4. Dore Sah v. Emperor, (1927) 14 A I R Oudh 326=103 I C 409=28 Cr L J 681=4 O W N 640=2 Luck 646.
5. Nagu Servai v. Emperor, (1934) 21 A I R Mad 473=1934 Cr C 799=150 I C 773=35 Cr L J 1134=57 Mad 1101=67 M L J 195.

ferred to, the contrary view is held. It appears to me that the view taken by the Patna High Court and the Chief Court of Oudh is the correct one. There is a very marked distinction between the use of the word "public servant" in sub-s. (1) (a) and 'Court' in sub-s. (1) (b) & (c) and it does not appear to me to be justifiable to make any distinction between different kinds of public servants merely because some of them happen at the same time to be presiding officers of Criminal Courts. In my opinion, the order of the District Magistrate is not passed by him as a Criminal Court and therefore I have no jurisdiction to interfere with it. This application is dismissed.

D.S./R.K. *Application dismissed.*

## A. I. R. 1938 Peshawar 10

ALMOND J. C. AND MIR AHMAD J.

*Ibrahim — Accused —* Appellant.

v.

*Emperor.*

Criminal Appeal No. 395 of 1937, Decided on 1st November 1937, from order of Addl. Sess. Judge, Peshawar, D/- 27th August 1937.

**(a) Criminal Trial — Cross cases—Circular No. 52 of Judicial Commissioner's Court, N. W. F. Province—Interpretation—Cross cases relating to same transaction — File in each case should be complete with regard to whole story.**

By Circular No. 52 of the Court of the Judicial Commissioner, N. W. F. Province, it is intended that in cross cases relating to same transaction the trial Judge should bring on each record separately the whole story complete by itself and should give findings on the issues involved in that case independently from those which arise in the other. But it is never intended that a part of the story should be admitted in each case and the other part shut out. [P 11 C 2]

**(b) Penal Code (1860), S. 304, Part II — Accused striking deceased with stick on head to pick up quarrel—Death of deceased—Accused held guilty under S. 304, Part II.**

Where the accused himself went to a certain place and in order to pick up a quarrel struck the deceased on the head with a stick in a free fight, which took place over certain building, resulting in the death of the deceased :

*Held* that the accused had no right of private defence. The accused however did not intend to commit murder, but was guilty under second part of S. 304, as he knew he was striking on a vital part of the body. [P 11 C 2]

**Mir Ahmad J.** — Guldad of village Thathi Nasrati (Karak Police Station in the Kohat district) was converting one of the rooms of his hujra into a shop. The shop lies on the way from the houses of Ibrahim, Mohd. Din and Khalim Shah. They objected to the shop being opened because their womenfolk passed it en route to the fields. At about noon on the morning of 11th March 1937 Moin Shah, a cousin of Guldad, was struck on the head near this shop, and after making three dying declarations died in hospital. In the dying declarations the deceased charged Ibrahim with having come in company with Khalim Shah and Mohd. Din and having struck two blows on his head. In the first two dying declarations the deceased said that Ibrahim used a stick. In the third he alleged that it was a hoe. In this latter dying declaration, he also stated that the assailants had a row with him on the question of the opening of the shop before they attacked him, that after the quarrel they went back home and then returned armed to strike him. As a result of the charge, the three persons were sent up and committed to the Court of Session where they were tried under S. 302/34, I. P. C. for the murder of Moin Shah.

The dying declarations were duly proved. Three witnesses were produced to establish the prosecution case, viz. Guldad, Malli Khan and Mir Nawaz. The medical evidence showed that the deceased had received a very severe blow on the head which had fractured the skull and caused death. The doctor was of opinion that there was a possibility of two blows having been struck. The accused pleaded that they were set upon by Moin Shah and his party and injured, and that they had not killed Moin Shah. Ibrahim added that the party of the deceased was angry with the accused because the latter were building a wall near the house of Sikandar Shah to which they objected and that the party of the deceased had therefore attacked them. Two witnesses were produced in defence, one Nabiullah who is related to the accused and another Din Mohd. who is a kinsman of the accused. Both of them said that the deceased and his relations attacked the accused with sharp edged weapons and wounded them.

Three of the assessors were of the view that Ibrahim was guilty of culpable homicide not amounting to murder and that the other two accused were innocent. The fourth agreed with them that the other two accused were not guilty but held that

Ibrahim was guilty of murder. The learned Additional Sessions Judge opened his judgment by saying that this case was a cross case to Crown v. Guldad and others but did not give any more information about that case. He rejected the testimony of the three eyewitnesses but accepted the dying declarations. He held that the deceased was all alone at the time when he was attacked, and that it was proved that Ibrahim had struck him twice with a stick on the head. He considered the act of Ibrahim to be murder because he twice hit the deceased on a vital part of the body. He therefore found him guilty under S. 302, I. P. C. and sentenced him to transportation for life.

The accused has appealed to this Court. The counsel, who has appeared for the appellant, put forward the following alternative arguments for our consideration: Firstly, that his client and the two other accused who were acquitted, were wounded with sharp-edged weapons as is shown by the medical evidence in the cross case referred to by the trial Judge, and that consequently the plea of the accused should be accepted that he was set upon by the party of the complainant and had a right of private defence. Secondly, that some of the relations of the deceased had also been wounded with blunt weapons, who were accused in the cross case, that it showed that there was a free fight between the parties over the building of the shop, and that exception 4 to S. 300, I. P. C. applied to the case, reducing the offence of the accused to S. 304 (Part 1), I. P. C. Thirdly, that at any rate by striking the deceased on the head with a stick, the accused did not intend to cause death but was only voluntarily causing grievous hurt with a blunt weapon or if the extreme view be taken he knew that death would ensue in consequence of his act. Counsel therefore suggested that his client was either guilty under S. 325, I. P. C. or S. 304 (Part 2), I. P. C.

With regard to the wounds on Ibrahim and his co-accused on one side and on the relations of the deceased on the other we have got nothing on this record except the statements of the accused and his two defence witnesses which prove that Ibrahim and his co-accused were wounded. The doctor has not been questioned about the injuries on the other wounded persons. In fact neither the Public Prosecutor nor the counsel for the accused have attempted to bring on this record the evidence relating to the charge brought by the accused against the complainant's party in the cross case and it appears that the learned Additional Sessions Judge interpreted Circular No. 52 of this Court to mean that excepting a reference to the cross case by number no mention should be made in one case of the facts of another even though both of them relate to the same transaction. This has obviously prejudiced the accused because one transaction has been split into two parts with the result that legally we cannot take into consideration what has been proved in the cross case.

We want to make it clear that this was not the intention of Circular No. 52. It was intended that in cross cases the trial Judge should bring on each record separately the whole story complete by itself and should give findings on the issues involved in that case independently from those which arise in the other. But it was never intended that a part of the story should be admitted in each case and the other part shut out. In this case only one part of the incident has been taken in one judgment, that is to say the striking of the blow which fell on the head of Moin Shah, but the other part, namely the general melee, has been absolutely kept back. In future we expect that the trial Judges will take care that in cross cases, which arise out of the same transaction, each file in itself is complete with regard to the whole story and not with respect to only one part of it.

Turning to the arguments of the learned counsel, we think that the accused and his partisans had no right of private defence because they themselves went to the place where Moin Shah was struck, in order to pick up a quarrel, a place close to the shop in controversy. We are of opinion that the accused struck the deceased in a free fight which took place between the parties over the building of the shop, and that the accused did not intend to commit murder because he used only a stick. He however knew that he was striking on a vital part of the body and we are satisfied that his act therefore fell within the mischief of the second part of S. 304, I. P. C. The question whether exception 4 to S. 300, I. P. C., applies or not does not arise because this exception comes into play where there is an intention to commit murder and the offence is sought to be reduced to the first part of S. 304, I. P. C. We accept the appeal to this extent, that we alter the conviction of Ibrahim to one under S. 304 (Part 2), I. P. C., and reduce the sentence to 10 years' rigorous imprisonment.

D.S./R.K. *Conviction altered.*

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## * A. I. R. 1938 Peshawar 12

ALMOND J. C. AND MIR AHMAD J.

*Haji Habib Gul* — Appellant.

v.

*Gopi Chand Singh and others* — Respondents.

First Appeal No. 3/1 of 1937, Decided on 20th November 1937, from judgment and decree of First Class Sub-Judge, Mardan, D/- 27th October 1936.

*** Res Judicata — Mortgage suit — Application for final decree — Objection by judgment-debtor alleging payment — Objection dismissed and final decree passed — Suit by judgment-debtor for declaration that he had made payment and that decree should not be executed — Suit held not barred by res judicata but declaration that decree should not be executed held barred by S. 47, Civil P. C. — Payment if made could be recovered as money paid under mistake.**

A payment which is made out of Court, whether or not it be certified under O. 21, R. 2, Civil P. C., cannot be taken into consideration by the Court at the time of passing final decree in a mortgage suit : [P 13 C 2]

In a mortgage suit, the decree-holder made an application for final decree. The judgment-debtor brought an objection that he had made payment in satisfaction of the debt. The objection was disallowed and a final decree was passed. Thereupon the judgment-debtor filed a suit for declaration that he had made payment to the decree-holder and hence the decree should not be executed :

*Held* that the suit was not barred by res judicata and the fact that the plaintiff was unable to produce the receipt of the amount received was no bar to his suit : [P 14 C 1]

*Held further* that the declaration that the decree should not be executed was barred by S.47, Civil P. C. [P 14 C 1]

*Held also* that if the payment had been actually made the judgment-debtor had prima facie cause of action to recover it as a suit for money paid under mistake. [P 14 C 1]

K. B. Saaduddin and K. Mohtadullah — *for Appellant.*

Sardar Raja Singh — *for Respondents.*

**Almond, J. C.**—The defendants in this case, who may conveniently be referred to collectively as Gopichand Singh, obtained from this Court as a Court of Appeal on 17th July 1934, a decree against the plaintiff Haji Habibgul for something over Rupees 18,000 under O. 34, R. 4, Civil P. C. This decree was subsequently amended on 20th November 1934. Subsequently the decree-holders applied for a final decree. (Their application has not been printed but we have consulted the record). On that application the judgment-debtor stated that on 27th September 1934 he had paid to the decree-holders the sum of Rs. 9500 and had entered into an agreement with them regarding the balance of the sum decreed. This objection was being inquired into by Faqir Faizullah Khan, Sub-Judge of the First Class, when it was transferred to Capt. Leeper, also a Sub-Judge of the First Class. Capt. Leeper was of opinion that the inquiry into the judgment-debtor's objection should not take place and he dismissed the objection on the ground that it had been made after the period of limitation allowed for such objections. He treated the application as being one under O. 21, R. 2, Civil P. C., and he noted that that was the Rule under which the objection was made. An appeal was preferred to this Court and it was rejected on 16th November 1935. From the judgment in that appeal it appears that the only point that was argued before the Court was whether Capt. Leeper was correct in setting aside the proceedings of Faqir Faizullah Khan taken on the judgment-debtor's objection.

On 7th December 1935 when the case had been transferred to another Sub-Judge, a final decree was passed and in the order it is noted that the judgment-debtor had again put in an application under O. 34, R. 5 (3), Civil P. C., contending that certain payments had already been made to the decree-holders which disentitled them from applying for a final decree. He referred in the course of his order to the order of Capt. Leeper and impliedly held that Capt. Leeper's order was binding upon him on the principle of res judicata. No appeal against that final decree was preferred. The judgment-debtor Habibgul thereupon filed a suit praying for a declaration to the effect that the decree-holders had received Rs. 9500 from him and had entered into a fresh agreement on 27th September 1934 and that therefore the decree was not executable : also for a perpetual injunction to prevent the decree-holders from executing the decree. In the alternative he asked for a decree for Rs. 10,500 on account of damages together with interest thereon. The Rs. 10,500 was made up of the Rs. 9500 paid to the decree-holders and Rs. 1000, other damages, which he alleged he had suffered. The defendants resisted the suit and the following issues were framed:

(1) Is the plaintiff legally entitled to bring a suit for a declaration and a permanent injunction? (2) Is the suit res judicata? (3) Can the suit not proceed on account of plaintiff's failure to produce the receipt in question or its copy? (4) Has the plaintiff paid Rs. 9500 to defendant 1 and the father of defendants 5 to 10 on account of decrees dated 20th November 1934 and 7th December 1935 by a receipt dated 27th September 1934, and was a new contract entered into in regard to the payment of the balance, and is plaintiff therefore entitled to a declaratory decree and injunction? (5) Is the plaintiff in the alternative entitled to Rs. 10,500 as damages on account of the breach of the contract? If so from whom? (6) Is the plaintiff entitled to interest from the date of the institution of the suit till realization, and if so, at what rate?

He decided issue 1 against the plaintiff relying on the provisions of S. 47 and O. 21, R. 2, Civil P. C. He also decided issue 2 against the plaintiff. In connection with this issue he made the following remarks:

> A Court before which an application for a final decree is pending can consider and recognize payments made by the mortgagor towards a preliminary mortgage decree whether such payment is made in or out of Court, and whether or not it is supported by a certificate under O. 21, R. 2.

He held that the plaintiff ought to have proved the execution of the receipt before the final decree was passed, that he had failed to do so and he had not appealed against the final decree. He therefore held that the question of the payment of Rs. 9500 was governed by the principle of res judicata. He decided Issue 3 in favour of the plaintiff on the ground that the document referred to in that issue was already on a file in the Court's possession and therefore was beyond the power and control of the plaintiff. He held that Issues 4, 5 and 6 must automatically be held against the plaintiff in view of his decision on Issue 2. He therefore dismissed the plaintiff's suit. Against that decree the plaintiff has appealed to this Court.

The principal question for our decision in this case is whether the payment of Rs. 9500 by the plaintiff to the defendants on 27th September 1934 ought to have been decided at the time the final decree in the mortgage suit was passed, and not having been so decided cannot now be raised owing to the principle of res judicata. We have come to the conclusion that the principle does not apply to the facts of this case. In our opinion no payment which is made out of Court, whether or not it be certified under O. 21, R. 2 can be taken into consideration at the time of passing the final decree. O. 21, R. 2 is placed in an Order dealing with execution of decrees. There can be no execution of a preliminary decree under O. 34, R. 4, and it is only when a final decree is passed under R. 5 that execution can be taken out. Furthermore O. 21, R. 2 deals with payments out of Court. O. 34, R. 4 however requires that all sums which are directed to be paid under that Rule are to be paid into Court. Sub-r. 1 of R. 5 prescribes the procedure to be taken where all the amounts due from the defendant are paid into Court and sub-r. 3 of that Rule directs the Court to pass a final decree on application being made to it where payment has not been made in accordance with sub-r. 1. It is clear to us that no payment can be taken into consideration by the Court unless it is made into Court. This is also the view which has been taken in A I R 1931 Mad 592[1], 16 I C 987[2] (a judgment of the Chief Court of the Punjab) and A I R 1932 Lah 231.[3] Two rulings to the contrary have been cited before us: A I R 1917 Pat 577[4] and 39 All 532[5]. In the former of these two cases, it was held that the payment should be recognized as an adjustment of the suit under O. 23, R. 3, and in the latter the matter was complicated by a question regarding limitation for application for a final decree. The question of the applicability of O. 23, R. 3 to payments made after the preliminary decree but before the final decree was considered in A I R 1932 Lah 231[3] referred

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1. Adari Sanyasi v. Nookalamma, (1931) 18 AIR Mad 592=131 I C 487=54 Mad 708.
2. Banarsi Das v. Nathu Mal, (1914) 1 AIR Lah 534=16 I C 987=12 P R 1913=276 P L R 1913.
3. Mt. Durga Devi v. Nandlal, (1932) 19 A I R Lah 231=136 I C 732=33 P L R 138.
4. Jogendra Prasad Narain Singh v. Gouri Shankar Prasad Sahu, (1917) 4 A I R Pat 577=40 I C 138=2 Pat L J 533.
5. Ramji Lal v. Karan Singh, (1917) 4 A I R All 119=40 I C 424=39 All 532=15 A L J 448.

to above and it was held that that Rule had no application. We agree with the reasoning given therein. We are therefore of opinion that the payment of Rs. 9500 could not be considered by the Court dealing with the application for the final decree. We must therefore reverse the finding of the learned trial Judge on the second issue as we hold that the question of the payment of this money is not governed by the principle of res judicata.

As regards the first Issue, we agree with the learned trial Judge that the plaintiff cannot be granted a declaration that the decree should not be executed nor an injunction to restrain the decree-holder from executing the decree, as such a suit is barred by S. 47, Civil P. C.

As regards Issue 5, we are of opinion that prima facie the plaintiff has a cause of action to recover the money which he paid to the decree-holders on 27th September 1934, if he did so pay it, as a suit for money paid under a mistake. As regards Issue 3 no arguments have been addressed to us and we therefore agree with the finding of the learned trial Judge that the failure of the plaintiff to produce the receipt in question cannot be a bar to his suit. We hold therefore that the suit of the plaintiff has been wrongly dismissed on a preliminary point and under O. 41, R. 23, Civil P. C., we remand it to the trial Court and recast the Issues in the following form :

1. Whether the plaintiff paid Rs. 9500 to defendant 1 and the father of defendants 5 to 10 on account of the mortgage decree passed against him? O. P. plaintiff. 2. If so, is he entitled to recover this sum from the defendants or any of them? O. P. plaintiff. 3. Is the plaintiff entitled to recover the sum of Rs. 1000 by way of damages from the defendants or any of them? O. P. plaintiff. 4. Is the plaintiff entitled to any interest on these sums and if so, at what rate and from whom? O. P. plaintiff.

We direct that the stamp on appeal be refunded, and that other costs in this Court should be costs in the suit. We fix pleaders' fees in this Court at Rs. 200. There is one subsidiary matter which is as follows :

The plaintiff in the present suit applied to this Court on 4th January 1937 praying that execution of the mortgage decree should be stayed pending the decision of the present appeal and an order was passed that it should be stayed on certain terms. As the result of our decision in this appeal is to hold that the mortgage decree can be executed, we now set aside that order directing stay of execution of the mortgage decree. There will be no costs on that application.

D.S./R.K. *Case remanded.*

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## A. I. R. 1938 Peshawar 14

MIR AHMAD J.

*Gela Ram Shanker Dass* — *Auction-purchaser* — Appellant.

v.

*Makhan Singh Sikh and others* — Respondents.

Appeal No. $\frac{88/36}{6.c}$ of 1937, Decided on 14th January 1938, from order of Senior Sub-Judge, Kohat.

**Civil P. C. (1908), O. 21, R. 92—Application under—Notice to auction-purchaser is mandatory.**

Before the objection application of the judgment-debtor under O. 21, R. 92 is adjudicated upon, it is mandatory on the execution Judge to send notice to the auction-purchaser and his omission to do so makes the order illegal. [P 15 C 1]

L. Hukam Chand — *for Appellant.*

S. Sawan Singh — *for Respondent (Makhan Singh).*

L. Gokal Chand Kohli—*for Respondents (Gurditt Mal and Shanker Das).*

**Judgment.**—R. B. Makhan Singh had a decree against Gurditta Mal Shanker Das and other judgment-debtors. In execution of that decree a house was auctioned and was purchased by Chaudhri Gela Ram. One of the judgment-debtors Gurditta Mal objected to the sale. On 28th May 1937, the objecting judgment-debtor and the decree-holder were present and the Court fixed 11th June 1937 for evidence. One of the witnesses summoned by the decree-holder was Chaudhri Gela Ram but no regular notice was given to Chaudhri Gela Ram of the objections put in by the judgment-debtor. Chaudhri Gela Ram was ill and he wrote back on the summons that he could not attend on account of indisposition and that a commissioner may be appointed to take his evidence. On 11th June the execution Judge set aside the sale and as regards the auction-purchaser he observed that he did not care to appear. The auction-purchaser has come up on appeal to this Court and has pressed the objection that he was not given an opportunity to be heard. Rule 92, O. 21, Civil P. C. deals with the setting aside of auction sales. The proviso to this Rule runs thus :

> Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

It was therefore mandatory that notice should have been sent to the auction-purchaser who was affected by the application before the objection application of the judgment-debtor was adjudicated upon. The learned counsel for the respondents argues that the auction-purchaser knew of the proceedings because he was summoned as a witness and that his omission to appear through a counsel was therefore deliberate. I am not prepared to agree with this contention. There is nothing to show that the auction-purchaser knew that he was sent for to give evidence in connection with the objection application of the judgment-debtor. The decree-holder was auctioning so many other properties. The auction-purchaser may have got the impression that it was in connection with some other property that he was being summoned.

At any rate a regular notice should have been sent to the auction-purchaser by the execution Judge before he set aside the sale and his omission to do so makes the order illegal. I therefore accept the appeal set aside the order dated 11th June 1937 and remand the case to the execution Judge with the direction that he should hear the objection application in the presence of the auction-purchaser and then pass his orders. Parties to bear their own costs.

V.B.B./R.K. *Appeal accepted.*

## A. I. R. 1938 Peshawar 15

ALMOND J. C. AND MIR AHMAD J.

*L. Bhagwan Dass —Plaintiff —*
Petitioner.

v.

*L. Kishan Chand and others —*
*Defendants* — Respondents.

**Civil Revn. No. 65 of 1937, Decided on 18th January 1938, from order of Dist. Judge, Dera Ismail Khan, D/. 18th November 1936.**

**Civil P. C. (1908), Ss. 20, 23, 151 — Leave granted under S. 20 (b) without notice to opposite party — Objections against such leave cannot be heard under S. 151, as opposite party could resort to S. 23.**

Where leave under S. 20 (b) is granted without issuing notice to the opposite party, the Court cannot hear objection against such leave by exercising its inherent jurisdiction and pass orders in the ends of justice, as the opposite party can approach the Court for an order under S. 23 (3), which is the proper remedy for him : *A I R 1933 Lah 266, Dissent.* ; *A I R 1927 Bom 79, Rel. on*; *30 Mad 438, Disting.* [P 17 C 1]

S. Raja Singh and Jiwan Lal Kapur — *for Petitioner.*

L. Bhawani Dass — *for Respondents (Kishan Chand and Sufi Khuda Bakhsh).*

L. Narain Das Mata — *for Respondent (Partap Singh).*

**Almond J. C.** — L. Bhagwan Das, a resident of Lyallpur through his agent L. Tej Bhan of D. I. Khan brought a suit for cancellation of partnership and rendition of accounts against (1) Kishan Chand of D. I. Khan, (2) Damodar Das of District Kohat, (3) Khuda Bakhsh of District Jhelum, and (4) Partap Singh of Lahore. He admitted in his plaint that no part of the cause of action arose in D. I. Khan but he asked for the leave of the Court under S. 20 (b), Civil P. C., to institute the suit in D. I. Khan and leave was granted. The defendants were eventually served and of them Partap Singh applied that the order giving leave to the plaintiff to institute the suit in D. I. Khan district should be set aside and that the plaint should be returned to the plaintiff for presentation in the proper Court which he alleged was a Court in Sukhar.

The trial Judge accepted the application by invoking the aid of S. 151, Civil P. C. and relied in this connexion on two cases reported as 30 Mad 438[1] and A I R 1933 Lah 266.[2] An appeal against this order was preferred to the District Judge who dismissed it relying on the same two rulings and holding that it was obviously for the convenience of the parties that the case should be heard in Sukhar. Against that order, the plaintiff has applied for revision to this Court. He contends that the order made under S. 151, Civil P. C., was made without jurisdiction. The petition is opposed by Partap Singh. It is not disputed by either party that it is within the jurisdiction of the Court to pass an order granting leave under S. 20 (b) of the Code without notice to the defendants. Learned counsel for the petitioner contends that the provisions of S. 151, Civil P. C., could not be invoked in order to cancel the leave given as such an order was not necessary for the ends of justice or to prevent the abuse of the process of the Court; further on the ground that the provisions of that section could not be invoked when the petitioner had another remedy as in the present case he had under Ss. 22 and 23 of the Code.

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[1] Seshagiri Row v. Askur Jung, (1907) 30 Mad 438=17 M L J 304.

[2] Sant Ram v. Mutual Bank of India Ltd, (1933) 20 A I R Lah 266=150 I C 559.

Learned counsel for the contesting respondent holds that the case was one in which S. 151, Civil P. C., could be applied even if he had another remedy under Ss. 22 and 23 of the Code. He further contends however that the remedy under Ss. 22 and 23 of the Code was not open to him as he was contesting the jurisdiction of the D. I. Khan Court to entertain the suit at all. He argued that the words "Where a suit may be instituted in any one of two or more Courts" occurring in S. 22 of the Act refer to a case which might be instituted in any one of two or more Courts as of right and without the leave of the Court. A large number of authorities have been cited before us but there is no case which is on all fours with the facts of the present case. The Lahore case which was relied upon by the Courts below has certain features in common with the facts of the present case. In that case, leave was given to the plaintiff under S. 20 (b), without issuing notice to the defendants. Two of the defendants went on revision to the High Court and it was held that the granting of leave without first issuing notice to the opposite party was not a strict requirement of S. 20 of the Code, and that the refusal of the trial Court to issue notice did not amount to any illegality or material irregularity in the exercise of jurisdiction so as to justify interference in revision under S. 115, Civil P. C. But the learned Judge himself acting under the provisions of S. 151, Civil P. C. directed that the trial Court should issue notice to the defendants before granting leave. With all due deference, we are unable to agree with the principles laid down in that judgment. It was definitely found that the issuing of a notice to the defendants was not necessary under the law, yet it was directed that in order to meet the ends of justice a notice should be issued.

The Madras case which was relied upon by the Courts below is entirely dissimilar to the present one. That was a case under Clause 12 of the Letters Patent which gave the Court a discretion to refuse to entertain a suit even when a part of the cause of action arose within its jurisdiction. That discretion was exercised against the plaintiff and the order was maintained on appeal. Of the other cases which have been cited before us, the one which is most similar to the facts of the present case is reported in 51 Bom 26[3]. In that case plaintiff had brought a suit in Surat. The Judge who was hearing the case was of the opinion that although he had jurisdiction to hear the case, it should more properly have been brought in Calcutta. He ordered therefore that the proceedings should be stayed. The case went up to the High Court and there it was held that this order could not be maintained under the present Code although it would have been a perfectly valid one under S. 22 of the Code of 1882. They held that the proper course for the defendants to take was to have applied to the Court for an order under S. 23 (3) of the Code and that there was no scope for resorting to the exceptional provisions of S. 151, Civil P. C. S. 151, Civil P. C., is to the following effect :

> Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

And these powers have been used in many cases by Courts in order to revise orders passed by themselves, particularly in cases where an application for revision did not lie. It is however essential in order to invoke the provisions of this section that it should be necessary for the ends of justice or to prevent abuse of the process of the Court. There cannot be any suggestion in the present case that there has been any abuse of the process of the Court. The plaintiff had the option of bringing the case either at Sukhar without leave or bringing it in D. I. Khan with the leave of the Court. He chose the latter course which he was quite entitled to do. Nor are there any apparent grounds on which it is necessary for the ends of justice that the case should be heard at Sukhar. It may be that it would be more convenient to the parties but it is doubtful if this is even the case. Three of the defendants do not oppose the hearing of the case in D. I. Khan and Sukhar is certainly farther from the residence of any of the parties to the case than is D. I. Khan.

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[3] Vallabhbhai Naranji v. Chhotalal Purshottam Das, & Co, (1927) 14 A I R Bom 79=100 I C 154=51 Bom 26=28 Bom L R 1442.

Furthermore it is against the established practice of the Courts to invoke the use of this section when a party has another remedy open to him and we are of the opinion that such a remedy is provided by Ss. 22 and 23 of the Code. We are unable to read into the wording of S. 22, the meaning which learned counsel for the contesting respondent would put upon it. We consider that the respondent could have approached this Court for an order under S. 23 (3), Civil P. C., and that was the proper remedy which he should have pursued. For these reasons we accept this application and set aside the order of the Courts below on the ground that the order of the trial Court dated 27th November 1935 was made without jurisdiction, and we direct that the suit should proceed in that Court. The plaint which was returned to the plaintiff's counsel has been presented in this Court and we direct it to be sent to the trial Court along with the record of the case. Costs incurred up to date in all Courts shall be costs in the suit and we fix pleader's fee in this Court at Rs. 50.

V.B.B./R.K. *Application allowed.*

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## A. I. R. 1938 Peshawar 17

MIR AHMAD J.

*Surjan Singh Bhai Murli Singh* — *Decree-holder* — Appellant.

v.

*Ram Singh Bhai Murli Singh* — *Judgment-debtor* — Respondent.

Appeal No. 98/41 of 1937, Decided on 22nd January 1938, from order of Senior Sub-Judge, Peshawar, D/- 14th June 1937.

**Civil P. C. (1908), S. 51, Proviso, Cl. (b)—Judgment-debtor after decree selling his property, receiving sale consideration but neglecting to pay decretal amount — He becomes liable to be detained in civil prison.**

**Where a judgment-debtor after the date of the decree, sells his property, receives the consideration but neglects to pay the decretal amount or a substantial part thereof, Cl. (b) of the Proviso to S. 51 comes into play and he is liable to be detained in civil prison. [P 18 C 1]**

L. Charanjit Lal — *for Appellant.*

L. Wazir Chand — *for Respondent.*

**Judgment.**—Surjan Singh had a decree against Ram Singh. He applied that Ram Singh should be detained in civil prison. Ram Singh pleaded exemption under the proviso to S. 51, Civil P. C., which has been enacted by the Legislature by Act No. 21 of 1936. Evidence was led by both parties. Ram Singh himself admitted on 1st May 1937 that about 7 or 8 months before that date he had sold his 0.1.3 share in the Peshawar Talkies to one Nirmal Singh for Rs. 2500. Nirmal Singh deposed that Ram Singh had sold his share to him for Rs. 2500, that intimation of the sale was sent to the Registrar of Firms in November 1936, and that he had paid the consideration to Ram Singh in four instalments of Rs. 500, 700, 800 and 500. The trial Judge remarked that the judgment-debtor had been receiving some money but as his daughter was ill and he was out of work, the receipt of the money could not be held to mean that he was able to pay the decretal amount. He therefore refused to send him to prison. Surjan Singh has come up on appeal to this Court. The proviso to S. 51, Civil P. C., is in the following terms:

> Provided that where the decree is for the payment of money execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court for reasons recorded in writing, is satisfied (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree, (*i*) is likely to abscond or leave the local limits of the jurisdiction of the Court, or (*ii*) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or (b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, . . . . . . . . . .

It was pointed out by the counsel for the appellant that the decree was passed on 1st July 1936 and that the transfer of his share in the Talkies by Ram Singh in favour of Nirmal Singh took place after that date. Counsel argued that in the circumstances the respondent had received moneys after the passing of the decree which he could have used to pay the decretal debt of roughly about Rs. 1500 and contended that the fact that he had neglected to do so deprived him of the protection afforded by the proviso to S. 51 Civil P. C. Learned counsel for the respondent met this argument by saying that his client had recovered the money from Nirmal Singh long before the sale and that the sale took place only to liquidate past debts.

I have been through the record and have not been able to find any evidence to substantiate the allegation of the counsel for the respondent. Nirmal Singh definitely states that the intimation of the sale was sent to the Registrar of Firms in November 1936 and the consideration was paid. It does not require an argument to show that the consideration could not have preceded the sale. At any rate, Nirmal Singh was not asked whether the sum had been borrowed previous to the sale and the normal presumption would be that the price was paid after the sale had been effected. It is obvious that the respondent received Rs. 2500 and did not make an attempt to pay up the amount of the decree or a substantial part thereof. Consequently clause (b) comes into play and he becomes liable to be detained in civil prison. I accept the appeal, set aside the order of the trial Judge and hold that Ram Singh is not protected by the proviso to S. 51, Civil P. C. Appellant shall have his costs in this Court. Pleader's fee Rs. 16.

D.S./R.K. *Appeal accepted.*

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## A. I. R. 1938 Peshawar 18

ALMOND J. C. AND MIR AHMAD J.

*Mohd. Zaman and others*
Accused — Appellants.
v.
*Emperor.*

Criminal Appeal No. 505 of 1937, Decided on 31st January 1938, from order of Sess. Judge, Peshawar, D/- 9th December 1937.

**(a) Evidence Act (1872), S. 145 — Witness sought to be contradicted in cross-examination by his statement to police — It is not necessary that statement must be proved first—Cross-examination can be allowed subject to subsequent proof of statement.**

Where a witness is sought to be contradicted by a statement made by him to the police, it is not necessary that such statement must first be proved before the witness is allowed to be cross-examined upon it. In order to avoid delay, there can be no objection to the witness being cross-examined on his statement to the police, provided that the statement is proved subsequently. The accused has no right to dictate the order in which the prosecution witnesses shall be examined : *A I R 1935 Rang 98, Foll.* [P 19 C 2]

**(b) Penal Code (1860), Ss. 34, 325 and 302 — Dispute between deceased and accused who were brothers over right to possess certain land — Land admittedly in possession of accused — Deceased attempting to plough land— Accused and his party arriving on the spot — Sudden quarrel arising between parties and accused and his party inflicting injuries on deceased with sticks—Accused held to be guilty under S. 325/34 and not under S. 302—No right of private defence of person or property held to exist.**

There was a dispute between the deceased and the accused who were brothers over the right to possess certain piece of land. The land was in possession of the accused. The deceased along with two others determined to plough the land and on the day of occurrence the deceased started ploughing it. On being informed about this by the accused, the eldest brother of the deceased and accused went and remonstrated with the deceased with a view to settle matters amicably and on his persuasion the deceased stopped ploughing for the time being. At this stage the accused and his party arrived on the scene and a sudden quarrel having arisen between the parties, the accused and his party assaulted the deceased with sticks inflicting several injuries on him. One of the sticks which was recovered was an ordinary walking stick made of cane. The majority of the injuries inflicted were simple in nature :

*Held* that no question of private defence of person or property arose in the case. Having regard to the circumstances it could be assumed that the accused formed a common intention on the spot to commit the offence. It could not be presumed having regard to the circumstances and the injuries inflicted and the weapons used that there was intention to commit murder. The accused merely intended to cause grievous hurts and were therefore guilty under S. 325/34 and not under S. 302. [P 21 C 1]

S. Aurangzeb Khan — *for Appellants.*

S. Raja Singh, Advocate-General — *for the Crown.*

**Almond J. C.** — Mohd Zaman, aged 40, his son Gulzaman, aged 16, and his sister's son Alizaman, aged 26, have been convicted of an offence under S. 302/34, I P. C. and have each been sentenced to transportation for life. They appeal against their convictions and sentences. With them was tried one Shah Zaman who is the son-in-law of Mohd Zaman. He was acquitted. Malik Aman, the deceased person in the case who was the brother of Mohd Zaman, appellant, was found by the doctor to have the following injuries on his person :

1. A contusion 3½'' x ½'' on the left side of the head.
2. A contused wound 3'' x 2'' on the back of the head.
3. A contused wound 3'' x ½'' on the right side of the head behind the ear.
4. An injury to the middle finger of the left hand ½'' x 1/5''.
5. An injury to the little finger of the left hand ¾'' long.
6. Eight injuries on the back varying in size from 1⅓'' x ¾'' to 7'' x 1½''.

All the head injuries were classed by the doctor as grievous. The skull was fractured at its base in the middle fossa and the right temple bone was also fractured. The patient died in the hospital on 6th June 1937, the offence having been committed on 31st May. We doubt whether the classification of the injury on the left side as grievous is correct. No bone was fractured on that side of the head. There appears to have been no injury to the brain under it and death was actually caused as the result of the fracture of the base of the skull. Bostan, P. W. 3, who is another brother of the deceased and Mohd Zaman had the following injuries :

1. An injury 1'' x ¾'' on the left side of the head.
2. A scratch ¾'' x ¾'' on the left side of the head.
3. Four injuries on the right side of the back varying in size from 2'' x 1'' to 4'' x 1''.
4. An injury 3'' x 1'' on the left side of the back
5. Left leg was swollen.
6. An abrasion 1½'' x 1/10'' above the right elbow.

Mohd Zaman appellant had the following injuries :

1. An injury 1½'' x ½'' on the left arm below the elbow.
2. An abrasion on the right ear ½'' x ¼''.
3. A swelling on the left shoulder 2'' x 2''.

The dispute between the parties arose over the right to possess field No. 39. This field number had been mortgaged by one Sabaz Ali to Abdullah, a deceased brother of Malik Aman, and his two brothers. The equity of redemption was subsequently sold to Khanizaman. (It does not appear in the evidence whether this Khanzaman is the same person as P. W. 8). There had then been an informal partition between the parties but Mohammad Zaman had been put into possession of the share of Malik Aman some five or six years ago, because he had paid a debt due from the latter. That Mohammad Zaman was in possession of the disputed piece of land is admitted by the prosecution witnesses with the exception of Bostan. Bostan stated in Court that the piece of the land which Malik Aman the deceased wanted to plough on the day of occurrence was his own piece of land. He was confronted with the statement which he made to the police in which statement he had admitted that the land which Malik Aman wanted to plough was the land in possession of Mohammad Zaman. At this stage we must make a small digression. The learned Sessions Judge held in the course of his judgment that the defence had not made a proper use of this statement to the police. He remarked as follows :

> Bostan having denied that he made such a statement, it was for the counsel of the accused to prove such a statement and then to make use of it under S. 145, Evidence Act.

The statement of Bostan made to the police was actually proved by Ali Asghar, Head Constable P. W. 13, and we presume that what the Sessions Judge intended was that it was the duty of the accused to prove the statement before using it for the purpose of cross-examination. If that was the intention, we can only say that we do not think it necessary that the statement should be proved before the witness is cross-examined upon it. There is a case decided by a Division Bench of the Rangoon High Court reported as A I R 1935 Rang 98[1] in which the following head-note appears and is correctly reproduced from the judgment :

> Those parts of the statement which are used in cross-examination to contradict the witness must be proved and brought on the record. This can ordinarily be done by the admission of the witness that he made the statement or by examination of the police officer who recorded it. If the latter course is necessary in order to avoid delay, there can be no objection to allowing the cross-examination, subject to subsequent proof of the statement.

So far as we are aware, the accused has no right to dictate the order in which the prosecution witnesses shall be examined and we can see no possible objection to the witness being cross-examined on his statement made to the police, provided that the statement is subsequently proved. To turn to the facts of the case : we are in agreement with the finding of the learned Sessions Judge that Mohammad Zaman was in possession of the disputed piece of land at the time the offence was committed.

There are seven witnesses to the actual occurrence. Bostan states that Malik Aman began to plough the disputed piece of land. Then Safdar Ali came and made Malik Aman sit by him. At this stage the four accused came up and began to assault the deceased with sticks. He (the witness) went running from his threshing-floor a hundred paces away and he was also attacked by the accused. Safdar Ali, another brother of the deceased, states that he had heard that the deceased, Bostan and one other person had held a consultation and determined to plough this disputed piece of land. On the morning of the day of occurrence at about sunrise Mohammad Zaman appellant informed him that the deceased had begun to plough the piece of land. The witness therefore went to the field and remonstrated with the deceased. The deceased stopped ploughing and they began to talk together. Then Bostan arrived and asked the deceased whether he had come to sit down or to plough. Malik Aman thereupon got up, took a stick in his hand and began to plough. At this stage Mohammad Zaman appellant arrived. Bostan abused him and said that he should not enter the field. Malik Aman and Bostan ran towards Mohammad Zaman with upraised sticks. Ali Zaman appellant also appeared on the scene. Gul Zaman and Shah Zaman also appeared and out of the crowd which had assembled he saw Bostan and Malik Aman on one side and Ali Zaman and Mohammad Zaman on the other fighting. After the fight was over, he accompanied his brother to the police station and made the report as his brother was unconscious. Masdar Ali states that he was at his own threshing-floor a hundred paces away when the deceased passed him with a plough. He told the deceased that he ought not to take the law into his own hands. Later he saw the four accused at the scene but did not see them actually delivering any blows. His statement to the committing Magistrate was brought on the record under the provisions of S. 288, Criminal P. C., and in that statement he had said that he had seen all the four accused delivering blows. The deceased and the appellant Mohammad Zaman are the sons of the witness's father's sister. Khanizaman, P. W. is the brother of Masdarali and corroborates the statement of that witness. Even before the Sessions Judge, the witness admitted that he saw the four accused striking the deceased and Bostan. Gulzaman, P. W. 9, was milking a buffalo some distance away when he heard a row. He went towards the scene of occurrence and when he got to some high ground he saw that the four accused on one side and Malik Aman and Bostan on the other side were fighting. With the exception of Bostan, they all had sticks and Bostan was throwing stones. Faqir, P. W. 10, was in his cattle-shed near the scene of occurrence. He also saw that the three present appellants were fighting with Malik Aman and Bostan. Shah Zaman joined in the fight later when the witness reached the spot.

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[1] **Nga U Khine v. Emperor, (1935) 22 A I R Rang 98=1935 Cr C 307=155 I C 66=13 Rang 1=36 Cr L J 665.**

Abdul Rahman is a lambardar who says that after the fight was over he went to the scene of occurrence and there the deceased told him that he had been attacked by the four accused. The witness admitted in a half-hearted fashion that Mohammad Zaman must have given evidence against him in a civil case. The doctor, who conducted the post-mortem examination, was questioned as to whether it was possible for the deceased to have spoken after he had received his injuries and was unable to give a definite opinion.

During the course of investigation a stick was handed over to the police by Mohammad Zaman accused which was sent for medical examination. It was proved to have stains of blood on it but they had disintegrated so far that their origin could not be distinguished. This stick is an ordinary walking stick made of cane just under 1″ in diameter. The four accused pleaded not guilty. Mohammad Zaman stated that Malik Aman and Bostan were forcibly ploughing his land and when he objected, they assaulted him and caused him injuries. He brought a complaint against them which was dismissed in default. The other three accused stated that they took no part in the fight and that they were charged on account of their relationship with Mohammad Zaman. All the four assessors who sat with the learned Sessions Judge found that the accused had no intention to murder the deceased and that the fight had taken place over land. One of them definitely found Shah Zaman, the acqitted accused, innocent.

In the course of his arguments before us learned counsel for the appellants has claimed for his clients the full right of private defence both of person and property. The learned Advocate-General seeks to deny the right of private defence to property not on the ground which was taken by the learned Sessions Judge, namely that although there was a trespass it was not criminal trespass but on the ground that the deceased was doing no irreparable harm to the property and that the accused had time to have recourse to public authorities. He denies that the appellants had any right whatever of private defence of person. We have come to the conclusion that the question of private defence either of person or property does not arise in the present case. It is shown both by Safdar Ali and Bostan that immediately prior to the offence Safdar Ali had intervened with a view to attempting to settle the case and that for the time being at any rate the deceased had ceased ploughing the land. Safdar Ali is the eldest of the brothers and it appears that he genuinely wanted to effect a settlement. It appears that while he was trying to do so, the three appellants arrived upon the scene, that a sudden quarrel arose between them on the one side and the deceased and Bostan on the other, and that it was in the course of that sudden quarrel that they inflicted the injuries. We do not however hold that it follows from this that no common intention was formed between the three appellants, for it is possible for a common intention to be formed on the spot, and in view of the numerous injuries and protracted beating which they gave to the deceased and Bostan, we can only assume that they formed an intention at the spot to commit an offence. It remains to be seen what is the nature of that offence.

We do not think that it can reasonably be presumed that the intention was to commit murder. Sticks are not of their own nature deadly weapons and the one which has been recovered is an ordinary walking stick made of cane. The majority of the injuries which were inflicted were simple in nature and we think, taking into consideration all the circumstances of the case, that the accused formed a common intention to cause grievous hurt with blunt weapons. They are therefore guilty of an offence under S. 325/34, Penal Code. The maximum punishment provided for an offence of that nature is 7 years' R. I. and in awarding punishment we take into consideration the fact that the deceased was undoubtedly to blame for this occurrence in the first instance and also in the case of one of the appellants his age: we refer to Gulzaman in this connexion. We think that in the case of Mohd. Zaman and Ali Zaman a sentence of four years' R. I. will meet the ends of justice and that Gulzaman in view of his age should now be released. For these reasons we accept this appeal to the extent that we alter the convictions from those under S. 302/34, Penal Code, to convictions under S. 325/34, Penal Code, and we reduce the sentences passed upon Mohd. Zaman and Alizaman to four years' R. I. each and that passed upon Gulzaman to the amount of imprisonment which he has already undergone.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Peshawar 21

ALMOND J. C. AND MIR AHMAD J.

*Billa Ram L. Paira Ram and others*
*Accused* — Petitioners.
v.
*Emperor.*

Criminal Revn. No. 352 of 1937, Decided on 18th January 1938, from order of Sess. Judge, D. I. Khan, D/- 17th August 1937.

**(a) Punjab Excise Act (1 of 1914), S. 58 (2) (d)—Rules under—Rules framed by N.W.F.P., R. 3—Local Government by R. 3 permitting transport of foreign liquor free of all restrictions—Rule of Revenue Commissioner placing restrictions on transporting foreign liquor is ultra vires.**

By Rule 3 framed by the Local Government of N. W. F. Provinces and published under Notification No. 753-Exc. dated 13th November 1916, the transport of foreign liquor from one place to another in N. W. F. Provinces has been free of all restrictions. Hence R. 3 framed by Revenue Commissioner under Notification No 4, Exc. dated 5th January 1917, placing restrictions on the transport of foreign liquor is ultra vires and therefore the breach of this rule cannot be punished. [P 23 C 1]

**(b) Punjab Excise Act (1 of 1914), S. 58 (2) (d)—Rules under, framed by Local Government of N. W. F. P., R. 50—Form L. 17—Licensee is not bound to put labels on bottles of methylated spirit when they are in transit or when they are placed in quarters behind shop.**

The license in Form L. 17 granted by the Collector under R. 50 of Notification under S. 58 (2) (d) deals only with the sale of denatured spirit in the premises which is specified in it. It therefore follows that the bottles when exposed for sale on the premises are required to bear the prescribed labels. There is nothing in the Rules to indicate that a licensee is bound to put the labels on the bottles when they are in transit, viz. when he sends them from one place to another or when they are kept in quarters behind the shop. [P 23 C 2]

**(c) Punjab Excise Act (1 of 1914), S. 58 (2) (d)—Rules under, framed by N. W. F. P., R. 30—Entry of bottles in register can be made at any time during day.**

Under R. 30, the entry of bottles in the register may be made at any time during the day. Hence where bottles have arrived at 10 o'clock the entry need not be made immediately but may be made at any time during the day. [P 23 C 2]

L. Narain Das Mata — *for Petitioners.*

S. Raja Singh, Advocate-General — *for the Crown.*

**Mir Ahmad J.**—Billa Ram, Bhagwan Dass, Diwan Chand and Lal Chand are the proprietors of the firm, Messrs. Billa Ram and Sons which deals with wine and methylated spirits at D. I. Khan. The firm has a branch at Manzai for selling liquor, which was run by Girdhari Lal in March 1937. On 16th March 1937, the firm sent 21 bottles of foreign liquor and 6 bottles of methylated spirit to their shop at Manzai. Three bottles of foreign liquor were in one crate and 18 in another. It so happened that the person who was taking the bottles in the lorry handed over the crate of 3 bottles of foreign liquor and 6 bottles of methylated spirit but could not unload the crate of 18 bottles for want of time. The lorry went on to Jandola and on the return trip the crate was delivered. It appears that the Excise Inspector was closely following the consignment and just after the three bottles of foreign liquor and 6 bottles of methylated spirit were landed he appeared in the shop. He asked Girdhari Lal to explain why the three bottles of foreign liquor had not been entered in the register. The 6 bottles of methylated spirit were also found by the Excise Inspector lying in the back quarters of the shop. They had no proper labels on them showing that they contained methylated spirit. Moreover it is common ground that no permit for taking the 21 bottles of foreign liquor to Manzai was obtained by the firm at D. I. Khan.

As a consequence, the proprietors of the firm were challaned under S. 61, Excise Act, for transporting 21 bottles of foreign liquor from D. I. Khan to Manzai without a permit and 6 bottles of methylated spirit without the prescribed labels. Another case was also sent up against the proprietors and Girdhari Lal. Girdhari Lal was prosecuted under S. 61, Excise Act, for keeping the three bottles in the shop without entering them in the register and for being in possession of 6 bottles of methylated spirit without proper labels. The proprietors were charged under S. 77, Excise Act, for the delinquency of their agent. The Magistrate, First Class, Tank, convicted the accused in both cases. In the first case he sentenced each proprietor to a fine of Rs. 25 or in default 30 days simple imprisonment. In the second case the proprietors were fined Rs. 25 each under S. 77, Excise Act, and Girdhari Lal was fined Rs. 50 under S. 61 of the same Act. In this case also they were ordered to undergo 30 days simple imprisonment in default of payment of fine. The proprietors approached the Sessions Judge, Derajat, on revision side without success. They have therefore instituted two revision petitions in this Court against their convictions and sentences.

Counsel for the petitioners urged that no permit was required for taking foreign liquor from D. I. Khan to Manzai, that the three bottles of foreign liquor had just arrived at Manzai and the agent had under the law one day's time to enter them in the book, and that labels were necessary on the bottles of methylated spirits when they were exposed for sale in the shop and not when they were kept in the quarters behind it. An important question of the interpretation of Excise law being involved, the matter was referred to a Bench of this Court. It would be useful first to refer to the law which bears on the points in issue.

*Section 58, clause (1) of the Excise Act* :—

> The Local Government may, by notification, make rules for the purpose of carrying out the provisions of this Act or any other law for the time being in force relating to excise revenue.
>
> Clause (2). In particular and without prejudice to the generality of the foregoing provisions the Local Government may make rules . * *
>
> (d) regulating the import, export, transport or possession of any excisable article. . * *
>
> *Section 59.*—The Financial Commissioner may, by notification, make rules . * * *
>
> (f) prescribing the authority by, the restrictions under and the condition on which any license, permit or pass may be granted . * * *

Now a comparison of the two sections clearly shows that the Local Government has first to make rules regulating the import, export, transport or possession of any excisable article, and then the Financial Commissioner could prescribe the detail as to the authority by, the restrictions under, and the condition on which any license, permit or pass could be granted for that import, export, transport or possession of any excisable article. The Local Government of N. W. F. P. has made rules under S. 58 (2) (d), Punjab Excise Act, for regulating the import, export or transport of liquor and they were published under Notification No. 753-Exc. dated 13th November 1916. R. 3 of this Notification runs thus :

> Imported foreign liquor and beer made in India may be imported, exported, and transported free of all restrictions up to any quantity.

We may note that the term "transport" has been defined in S. 3, Cl. 21, Punjab Excise Act, in the following words :

> 'Transport' means to move from one place to another within the Punjab.

In N. W. F. Province it would mean the moving of the liquor from one place to another in this province. In spite of R. 3 of Notification No. 753-Exc. the Revenue Commissioner has placed restrictions on taking foreign liquor from one place to another: vide Notification No. 4-Exc. dated 5th January 1917, R. 3 of which runs as follows :

> Any person importing, exporting or transporting liquor must obtain a permit from the officer authorized to grant such permits in the district of destination, and a pass from the officer authorized to grant such passes in the district of issue.

The petitioners were convicted for the breach of this rule. We are of opinion that the Local Government having exempted the import, export or transport of foreign liquor from all restrictions the rules contained in Notification No. 4-Exc. are ultra vires altogether. It follows that no permit was necessary for sending the 21 bottles of whiskey from D. I. Khan to Manzai and the conviction of the accused on that account is not maintainable. As regards the despatch of 6 bottles of methylated spirit from D. I. Khan to Manzai we have first to consider the conditions of the license granted to the firm for possessing denatured spirit. R. 50 of Notification No. 793-Exc. dated 27th November 1916 directs that "the Collector may grant licenses in Form L. 17 for the vend of denatured spirits." Form L. 17 begins with the following words :

> Subject to the conditions applicable to all licenses published in the N. W. F. Province Notification No. 722 Exc., 723 Exc., 724 Exc. and 725 Exc., dated 20th October 1916, and in Revenue Commissioner's Notification No. 793 Exc. dated 27th November 1916
>
> and the special conditions below
>
> This license authorizing the sale of denatured spirit only *in the premises herein specified*, that is to say. . . . . and for the period from
>
> to is granted to
>
> of
>
> in the District of .

The underlined (italicized here) is ours.

Six special conditions were laid down in this form for the sale of denatured spirit with which we are not concerned. A seventh condition was added by Notification No. 4865 Exc./XIX-C-343 dated 31st March 1936 as follows :

> All such bottles, jars, drums or casks shall bear a label, printed in red and containing skull and cross bones, with a warning "not to be taken internally" in the vernacular of the district.

We have not been able to find the significance of word "such" because no reference to bottles, jars, drums and casks appears in the previous six conditions. Now it is obvious that the license deals only with the sale of the denatured spirit in the premises which is specified in it and it is therefore only logical to hold that the bottles when exposed for sale on the premises are required to bear the prescribed labels. There is nothing in the rules to indicate that a licensee is bound to put the labels on the bottles when they are in transit, viz. when he sends them from one place to another. Hence the conviction of the accused for sending the six bottles from D. I. Khan to Manzai without the prescribed labels is also untenable.

We will now turn to the second case. We have to see whether any offence was committed by Girdhari Lal because he did not enter the 3 bottles of whiskey in the shop register directly they arrived and because he kept the 6 bottles of methylated spirit in the back room of the shop without the prescribed labels. R. 30 of Notification No. 793-Exc. deals with the register which is kept by the licensee for his stock. It runs thus :

> Every licensee shall maintain the register prescribed for the class of business carried on by him, and shall make all prescribed returns punctually. True accounts of transactions shall be maintained from day to day in ink. * * * *

It is clear that Girdhari Lal had to enter the three bottles of whiskey in his book and he could have done it at any time during that day. It is not denied that it was about 10 o'clock that the bottles arrived and the Inspector also reached the Manzai shop. In the circumstances, we feel that Girdhari Lal was not given breathing time in the matter and we presume that if he had been allowed enough time he would have made the entry as required by law during that day. We therefore hold that Girdhari Lal was not guilty of the breach of R. 30 and his conviction on this score under S. 61, Excise Act, was incorrect. As stated above the exposing of bottles of methylated spirit in the shop without the prescribed labels is an offence because of condition 7 which was added to the form of license No. L-17. But it does not mean that the keeping of the methylated spirit in the back room without the prescribed labels is also an offence. In fact it is otherwise and the lower Courts have wrongly convicted Girdhari Lal for doing so. The proprietors were punished under S. 77, Excise Act, because Girdhari Lal had been guilty of the two offences under S. 61, Excise Act, and as we have found that each of his acts does not amount to an offence the conviction of the proprietors under S. 77, Excise Act, also automatically fails.

The result of the foregoing discussion is that we accept the two petitions and acquit the proprietors of Messrs. Billa Ram and Sons of their convictions under Ss. 61 and 77, Excise Act. The fines if paid should be refunded. Girdhari Lal is said to have left the service of Messrs. Billa Ram and Sons and has not come up on revision to this Court. Acting under our extraordinary jurisdiction, we set aside his convictions under S. 61, Excise Act, and direct that the fine if paid by him shall be refunded.

D.S./R.K. *Convictions set aside.*

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## A. I. R. 1938 Peshawar 24

ALMOND J. C.

*Emperor*

v.

*Sherdil Sher Baz* — Accused.

Criminal Ref. No. 436 of 1937, Decided on 27th January 1938, reported by Dist. Magistrate, Kohat.

**Criminal P. C. (1898), S. 464—Examination of Civil Surgeon under S. 464 for deciding whether accused is of unsound mind or not is part of Magistrate's duty—Accused seeking to produce evidence for rebutting Civil Surgeon's evidence—Prosecution is also entitled to produce evidence to rebut evidence given by accused.**

The evidence of a Civil Surgeon taken under S. 464 in order to decide whether an accused person is of unsound mind or not is not evidence produced by the prosecution. The examination of the Civil Surgeon is a duty placed by statute upon the Magistrate himself. If the accused seeks to produce other evidence in rebuttal of the Civil Surgeon's evidence, the prosecution is also entitled to produce evidence in rebuttal of the evidence of the accused. The burden of proving that the accused is of unsound mind and incapable of making his defence lies upon the accused and it is for him to lead evidence on the point in the first place and such evidence as is led on his behalf can be rebutted by the prosecution. [P 25 C 1]

S. Raja Singh, Advocate-General — *for the Crown.*

L. Wazir Chand — *for Applicants.*

Abdul Ghafur Khan — *for Accused.*

**Order.**—This case has been reported by the District Magistrate, Kohat, under S. 438, Criminal P. C. The report arises out of a case which is being inquired into by the Treasury Officer, Kohat, a Magistrate of the First Class, under S. 302, I. P. C., against Sherdil. The question arose in this case as to whether the accused was of unsound mind within the meaning of S. 464, Criminal P. C., and the Magistrate as required by that section caused the accused to be examined by the Civil Surgeon and examined the Civil Surgeon. The evidence of the Civil Surgeon was to the effect that in his opinion the accused was of sound mind. On 9th November 1937 counsel for the accused applied for permission to produce evidence in rebuttal of the Civil Surgeon's evidence and an order was passed that he should file a list of witnesses for this purpose and that the Public Prosecutor should also file a list of witnesses in rebuttal. On 13th November both parties put in their lists of witnesses and the learned counsel for the accused objected to the prosecution being allowed an opportunity of producing evidence in rebuttal of their evidence. The objection was allowed. On the ground of this order the brothers of the deceased L. Ramji Mal applied to the District Magistrate under S. 528, Criminal P. C., for a transfer of the case. The District Magistrate in considering the orders of 9th and 13th November came to the conclusion that the order of 13th November was bad in law and he therefore reported the case to this Court and also submitted the application for transfer along with his report. Clause 1 of S. 464, Criminal P. C., reads as follows :

> When a Magistrate holding an inquiry or trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Local Government directs and thereupon shall examine such Surgeon or other officer as a witness and shall reduce the examination to writing.

It is clear that the inquiry which is contemplated by this section is not confined to the examination of the Civil Surgeon alone and neither party contends that this is so. In fact learned counsel for the accused himself relies on a case reported in A I R 1933 Oudh 362[1] in which the accused was allowed to produce evidence to rebut the opinion of the Civil Surgeon. The question as to whether the prosecution could also produce evidence was not considered in that case, but in my opinion it would be contrary to all principles of administration of justice to allow one party to produce evidence and not allow the other party to do so. The learned Magistrate who passed the order of 13th November appears to have been under the impression that the evidence of the Civil Surgeon was evidence produced by the prosecution. It is clear that this is not so. The examination of the Civil Surgeon is a duty which is placed by statute upon the Magistrate himself and it is obvious that if one party can produce other evidence, both parties must be allowed to do so. It is further obvious to me that the burden of proving that the accused is of unsound mind and incapable of making his defence lies upon the accused and it is for him to lead evidence on the point in the first place and such evidence as is led on his behalf can be rebutted by the prosecution. I therefore set aside the order of the Magistrate dated 13th November and direct that he should examine the evidence produced on behalf of the accused in the first place and allow the prosecution an opportunity of rebutting it. As the only ground on which the application for transfer was made has now been removed, there are no grounds for ordering a transfer and I decline to order a transfer.

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[1] Onkar Dutt v. Emperor, (1933) 20 A I R Oudh 362=1933 Cr C 1042=144 I C 1031=34 Cr L J 914=10 O W N 719.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Peshawar 25

ALMOND J. C. AND MIR AHMAD J.

*Advocate-General, N. W. F. P.* — Appellant.

v.

*Mirajan Shah Mir Azam* — Respondent.

Criminal Appeal No. 8 of 1938, Decided on 9th February 1938, against order of Sess. Judge, Derajat, D/- 22nd October 1937.

**(a) Penal Code (1860), S. 409—Failure by lambardar to deposit land revenue collected by him does not constitute offence under S. 409—Lambardar does not stand in position of trustee but that of quasi lessee.**

The failure of a lambardar to deposit land revenue collected by him does not constitute an offence under S. 409. As lambardar is bound to pay on due date all the land revenue recoverable from an estate, irrespective of the fact whether he realizes it from the tax-payers or not, he does not stand in the position of a trustee but that of a quasi lessee. The dispute between the Government and the lambardar over the question of recovery of land revenue is consequently one of a civil nature : *A I R 1937 Pesh 35, Affirmed.* [P 25 C 2; P 26 C 1]

**(b) Punjab Land Revenue Act (17 of 1887), S. 28—Rules framed under R. 20, sub-cl. (1)—Word 'same' in the expression 'pay the same' refers to all land revenue and not land revenue collected by lambardars.**

The word 'same' in the expression 'pay the same' in sub-cl. (1) of R. 20 of the Rules made by the Financial Commissioner under S. 28 means all the land revenue and not merely the land revenue which has been collected by the lambardar. [P 26 C 1]

Sardar Raja Singh, Advocate-General — *for Appellant.*

Respondent *in person.*

**Mir Ahmad J.**—Mirajan Shah, Sherin Khan and Sarfraz Khan were convicted by a Magistrate, First Class, Bannu, under S. 403, I. P. C., and sentenced as under: Mirajan Shah a fine of Rs. 55 or in default 4 months' R. I., Sherin Khan one year's R. I., Sarfraz Khan a fine of Rs. 100 or in default 6 months' R. I. Mirajan Shah was charged with having failed to deposit the land revenue which he had recovered as a lambardar from the tax-payers. It was said that he had recovered Rs. 220-6-6 and had paid into the treasury a sum of Rs. 121, retaining Rs. 99-6-6. The accused pleaded that he had realized Rs. 130-14-9 and had deposited Rs. 121 and that only a sum of Rs. 9-14-9 was with him. For the balance he said that the money was still due from the tax-payers. Sherin Khan admitted that he had recovered Rupees 301-15-9 and had deposited Rs. 200 meaning that he had with him a balance of Rs. 101-15-9. Jurabaz Khan Girdawar however alleged that the accused had failed to deposit Rs. 108-15-9. Sarfraz Khan admitted that he had realized Rs. 140 from the asamis but owing to illness he could not produce the amount in time. He produced the amount during the trial.

The three convicts appealed to the Sessions Court at Derajat. The learned Sessions Judge acquitted them all on the ground that no offence had been brought home to them. He relied on a ruling of this Court reported in A I R 1937 Pesh 35.[1] Kazi Mir Ahmad J. had ruled in that case that the failure of a lambardar to deposit land revenue collected by him did not constitute an offence under S. 409, I. P. C. The Provincial Government has presented three appeals in this Court against the acquittal of Mirajan Shah, Sherin Khan and Sarfraz Khan. As a common question of law is involved in all three cases, we propose to dispose of them by one judgment. The learned Advocate-General questioned the correctness of the view taken by Kazi Mir Ahmad J. in the ruling quoted above and asked the Bench to reconsider the conclusions arrived at by him. The ratio decidendi of that ruling is as follows: (a) That a lambardar is bound to pay on due date all the land revenue recoverable from an estate irrespective of the fact whether he realizes it from the tax-payers or not. (b) That the lambardar does not therefore stand in the position of a trustee but that of a quasi lessee, and (c) that the dispute between the Government and the lambardar over the question of recovery of land revenue was consequently one of a civil nature.

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[1] **Said Ahmad v. Emperor, (1937) 24 A I R Pesh 35=168 I C 369=38 Cr L J 530.**

The learned Advocate-General contended that the lambardar was not bound to pay the land revenue due from the tax-payers, that he was only responsible for paying the amount recovered by him, and that therefore he was in the position of a trustee. He urged that the lambardars who had retained the land revenue realized by them were therefore guilty under S. 409, Penal Code. He did not seriously press the suggestion that they were guilty under S. 403, Penal Code, which section obviously does not apply to the cases before us. The decision of the question therefore turns mainly on the interpretation of sub-cl. (1) of R. 20 of the Rules made by the Financial Commissioner under S. 28, Land Revenue Act, regulating the appointment of headmen and prescribing their duties. It runs thus:

> Shall collect by due date all land revenue and all sums recoverable as land revenue from the estate, or sub-division of an estate in which he holds office, and pay the same personally or by revenue money-order or by remittance of currency notes through the post at the place and time appointed in that behalf to the Revenue Officer or assignee empowered by Government to receive it.

The question is whether the word "same" in the expression "pay the same" refers to all the land revenue or the land revenue which has been collected by the lambardar. After giving the matter our careful consideration, we have come to the conclusion that it means all the land revenue. In the first place we would like to point out the importance of the words "due date". They connote the fixing of a date for the collection of all the land revenue and it follows that the whole of the land revenue becomes payable on that date by the lambardar. The fixing of a date would become meaningless if the lambardar were at his own sweet will to collect a portion of the land revenue and leave the rest to be done by the revenue authorities themselves. Reduced to absurdity it will mean that if a lambardar has to recover Rs. 2000 he may realize Rs. 100 and deposit it on the due date and tell the revenue authorities that they should recover the balance of Rs. 1900 themselves. This view if adopted will paralyse the whole machinery set up for realizing the revenue.

Then there are other indications to show that this interpretation of the rule is correct. S. 97, Land Revenue Act is worded as follows:

> When a village officer required by rules under S. 28 to collect any land revenue or sum recoverable as an arrear of land revenue satisfies a Revenue Officer that the revenue or sum has fallen due and has not been paid to him, the Revenue Officer may, subject to any rules which the Financial Commissioner may make in this behalf, recover it as if it were an arrear of land revenue.

It may be noted that the expression 'village officer' includes a lambardar. Rr. 64-66 have been framed by the Financial Commissioner under S. 97, Land Revenue Act. Rule 64 lays down the necessary information which the lambardar should give in his petition to the Revenue Officer under S. 97, Land Revenue Act. Cl. (i) of Rule 65 is to the following effect:

> If the application is in due form and the arrear of which recovery is desired has not been due for more than six months, the Revenue Officer shall fix a date for the hearing of the case .....

and Cl. (ii) directs that:

> If the arrear has been due for more than six months the application shall be rejected, unless the applicant satisfies the Revenue Officer that the delay in realizing the arrear is not due to his neglect.

Now what was the necessity of devising this procedure if the lambardar were not bound to pay all the land revenue recoverable from his estate without any consideration whether he had realized it himself or not? In our opinion this portion of the revenue law would be absolutely useless if the lambardar had to pay only those sums which were actually received by him. Otherwise what is the meaning of the lambardar being bound to come within six months for assistance, and what is the sense in directing the revenue authorities to refuse to help him altogether if he did not do so? Again the revenue authorities are not without any remedy in the matter. Once a lambardar is held to be responsible to pay by due date the whole of the land revenue, he becomes a defaulter if he does not pay it on the due date. Section 3 (8), Land Revenue Act defines a "defaulter" as follows:

> "Defaulter" means a person liable for an arrear of land revenue, and includes a person who is responsible as surety for the payment of the arrear.

Section 3 (7), Land Revenue Act defines "arrear of land revenue" as follows:

> "Arrear of land revenue" means land revenue which remains unpaid after the date on which it becomes payable.

Section 67 of the Land Revenue Act authorizes the revenue authorities to realize arrear of land revenue from defaulters (a) by arrest and detention of the person, (b) by distress and sale of moveable property and uncut or ungathered crops, and (c) by proceeding against other immovable property of the defaulter. We have to remember in this connexion that before a lambardar is appointed it is seen that he has enough landed property to pay the land revenue. R. 15 of the Rules framed under S. 28, Land Revenue Act makes the "extent of the property in the estate possessed by the candidate" as one of the considerations to be kept in mind when appointing a lambardar. Lastly it is significant that the learned Advocate-General has not been able to cite a single authority of any of the High Courts in India in support of the proposition put forward by him. The result of the discussion given above is that we confirm the view taken by Kazi Mir Ahmad J. in A I R 1937 Pesh 35.[1] The learned lower Appellate Court was therefore right in acquitting the accused and affirming its judgment we dismiss the appeals of the Government.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Peshawar 27

MIR AHMAD J.

*Shrimati Vidyawanti w/o Som Nath Bhateja — Plaintiff* — Applicant.

v.

*Gowindi Bai w/o Nirmal Dass Gulati and others — Defendants* — Respondents.

**Civil Revn. No. 309 of 1937, Decided on 25th February 1938, from order of Senior Sub-Judge, D. I. Khan, D/- 6th May 1937.**

**Civil P. C. (1908), O. 9, R. 3 — Preliminary decree for partition — Proceedings for final decree — Suit should not be dismissed for default.**

Where a preliminary decree for partition has been passed and the Court takes proceedings for passing the final decree, the suit should not be dismissed for default. The suit should be adjourned *sine die* and made revivable on payment of costs: *A I R 1924 P C 198, Rel. on.* [P 27 C 2]

S. Mohammad Aurangzeb Khan — *for Petitioner.*

Pandit Raghu Nath — *for Respondent (Mt. Tulsi Bai.)*

**Order.**—On 11th August 1932 Shrimati Vidyawanti, the petitioner before me, obtained a preliminary decree for partition against the respondents. The Court proceeded to take steps for passing the final decree. On 31st August 1933 the parties were absent and the Court dismissed the suit under O. 9, R. 3, Civil P. C. On 2nd October 1933 Shrimati Vidyawanti applied for the re-admission of the suit. It was admitted on 24th October 1933 but again dismissed on the 30th November 1933 on account of the absence of both parties. On 30th November 1936 Shrimati Vidyawanti presented an application to the Court asking that steps should be taken to pass a final decree in the case. This petition was rejected on 5th January 1937 by the Court in the following terms:

> The original file perused. The suit had been dismissed under O. 9, R. 3, Civil P. C. There is no subsisting decree. The petition is rejected.

On 9th March 1937 an application for review of the order passed on 5th January 1937 was instituted and it was pointed out that there was a preliminary decree in existence. The petition for review was rejected. Shrimati Vidyawanti has come up on revision against the last order. A I R 1924 P C 198[1] is a clear authority for the view that where a preliminary decree for partition has been passed and the Court takes proceedings for passing the final decree, the suit should not be dismissed for default. Their Lordships of the Privy Council have suggested that the suit should be adjourned *sine die* and made revivable on payment of costs. It follows that the order dismissing the suit under O. 9, R. 3, Civil P. C., was ultra vires and Shrimati Vidyawanti was well within her rights in ignoring it and presenting a fresh application for the final decree to be passed.

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[1] **Lachmi Narain v. Balmakund Marwari, (1924) 11 A I R P C 198=81 I C 747=51 I A 321= 4 Pat 61 (P C).**

The trial Judge had therefore wrongly dismissed the application dated 30th November 1936 and it was a fit case in which the order of dismissal dated 5th January 1937 should have been set aside on review. I accept the petition and set aside the order under revision. The application for review is accepted and the order dated 5th January 1937 is vacated. The trial Judge is directed to take proceedings on the application dated 30th November 1936 for passing the final decree. Costs will follow the event. Pleader's fee Rs. 16.

V.B.B./R.K. *Petition allowed.*

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## A. I. R. 1938 Peshawar 28

ALMOND J. C. AND MIR AHMAD J.

*Azizur Rahman Moulvi Hazrat Ji* — *Plaintiff* — Appellant.

v.

*Abdur Rahim and others* — *Defendants* — Respondents.

Civil Appeal No. 91/15 of 1937, Decided on 7th March 1938, from order of Dist. Judge, Peshawar Division at Abbottabad, D/- 16th June 1937.

**Mortgage — Redemption — Suit for declaration of title by mortgagee of occupancy rights after attestation of redemption mutation that part of property was wrongly included in entry — Plaintiff in possession — Frame of suit is proper—Plaintiff's correction mutation rejected — Cause of action accrued only on day of attestation of redemption mutation.**

In all suits for a declaration of title to immovable property by persons in possession the condition precedent for giving a fresh start is that there should be an attempt at ouster of the plaintiff by the opposite party. [P 29 C 2]

A mortgagee of occupancy right brought a suit after the redemption mutation had been attested for a declaration that only certain khasras had been redeemed and the others were wrongly included in the mutation. He alleged that he had got a correction mutation entered but it was rejected. The plaintiff was in possession of the property in suit :

*Held* that the frame of the suit for a declaration was not incorrect. The Proviso to S. 42, Specific Relief Act, was no bar, the plaintiff being in possession. [P 29 C 1]

*Held also* that the cause of action accrued when the redemption mutation was attested. The mere fact that the plaintiff himself tried to get correction made and failed afforded him no fresh cause of action : *J R 64 and A I R 1937 Pesh 94, Rel. on.* [P 29 C 2]

Diwan Chand — *for Appellant.*

Ghulam Rabani Khan — *for Respondents 1 and 2.*

Respondent 3 *in person.*

**Mir Ahmad J.** — Abdul Majid mortgaged his occupancy rights in land to Hazrat Ji as follows : (1) By mutation No. 440, attested on 25th September 1919 Khasra No. 153 measuring 1 kl. 11 mls. was mortgaged for Rs. 60. (2) By mutation No. 441, attested on 25th September 1919 Khasra No. 183/3 measuring 3 kls. 4 mls. was mortgaged for Rs. 140. (3) By mutation No. 454, attested on 5th October 1920 Khasra No. 331 measuring 27 kls. 15 mls. was mortgaged for Rs. 600. (4) By mutation No. 475, attested on 31st October 1921 Khasra No. 157/2 measuring 16 kls, 17 mls. was mortgaged for Rs. 600. Hazrat Ji died leaving three sons Azizur Rahman, Khalil-ur Rahman and Ziaur Rahman.

On 16th February 1929 an entry was made in the roznamcha waqiati of the patwari in which it was alleged by Abdul Majid that Rs. 200 had been paid by him to Azizur Rahman, etc. for which a receipt dated 20th November 1928 had been obtained by him, and that the mortgage of the occupancy rights in 49 kls. 7 mls. had been redeemed by him. He also stated therein that he had taken possession. On 2nd May 1929 the revenue officer entered mutation No. 693 on the strength of the entry in the roznamcha waqiati dated 16th February 1929. By virtue of this mutation all the land mortgaged was shown to be redeemed. Kalil-ur-Rahman appeared before the attesting officer and admitted the correctness of the entry. He held himself responsible for his brothers. The attesting officer therefore sanctioned the mutation on 15th June 1929.

Aziz-ur-Rahman, plaintiff, has filed this suit for a declaration to the effect that only Khasra Nos. 153 and 183/3 had been redeemed on payment of Rs. 200, and that Khasra Nos. 331 and 157/2 were wrongly included in mutation No. 693. He alleged in the plaint that he had got a correction mutation (No. 899) entered but it was rejected and hence he had to bring a suit. Abdul Majid had died and the suit was brought against his sons Abdur Rahim major and Ghulam Akbar minor. Khalil-ur-Rahman and Ziaur Rahman were also made defendants in the case. The first two defendants took two preliminary objections, firstly that the suit was time-barred, and secondly that it was not properly framed. The original Judge framed the following issues : (1) Is the suit within time? (2) Is the plaintiff in possession of the land and can the suit therefore lie in its present form.

Evidence was adduced by both sides. The plaintiff tried to produce correction mutation No. 899 to which he had referred in his plaint but the trial Judge returned it on the ground that it was not mentioned in the list of documents. Unfortunately therefore, owing to the extreme technical view taken by the trial Judge we have not got the original correction mutation which was according to the patwari entered on 2nd January 1934 and dismissed on 6th September 1936. It was an important document because it is the case for the plaintiff that he had a fresh start for limitation from the date on which it was rejected. The trial Judge held that the cause of action for filing the suit had arisen on 15th June 1929 when the redemption mutation was attested and that the suit having been filed on 21st December 1936 was time-barred. As regards the second issue he was of the view that the plaintiff could not sue for a mere declaration. He admitted that the plaintiff was in possession but he observed that his possession was that of a tenant under the sons of Abdul Majid and argued that he should have consequently brought a suit for possession and not for a mere declaration. On these findings the suit was dismissed.

An appeal was preferred by the plaintiff to the District Court at Peshawar. The District Judge agreed with the trial Court on the question of limitation. It was argued on appeal that the rejection of the correction mutation on 6th September 1936 gave a fresh cause of action to the plaintiff to file the suit. But this allegation did not find favour with the appellate Judge. As to Issue 2 the appellate Judge remarked that the finding of the lower Court on it was not questioned before him. The appeal was consequently dismissed. The plaintiff has come up on further appeal to this Court. We agree with the learned counsel for the appellant that the finding of the trial Judge as to the frame of the suit is incorrect. The plaintiff is admittedly in possession and the Proviso to S. 42, Specific Relief Act was therefore no bar to the suit. He was consequently well within his rights in bringing a suit for declaration. We however think that the decision on the point of limitation is correct. It is not denied that the original cause of action accrued on 15th June 1929 when the redemption mutation was attested. It is urged that the date on which correction mutation No. 899 was rejected (that is to say 6th September 1936) should be taken as the *terminus a quo* in computing limitation because the fact that the attempt to make the correction failed gave a fresh cause of action to the plaintiff.

The point is covered by authority. In the judgment reported in J R 64[1] the Judicial Commissioner has laid down as follows:

> A suit for a declaration of title to immovable property by persons in possession as proprietors is not barred, if brought within six years from the time when the defendant last attempts to oust them from the land, although a right to sue the defendant who had been recorded as sole owner of the property in the revenue papers, had already accrued and become barred.

A similar view has been taken by other High Courts in India. It will be observed that in all these cases the condition precedent for giving a fresh start is that there should be an attempt at ouster of the plaintiff by the opposite party; for instance where the opposite party applies for partition or brings an ejectment suit on the strength of the wrong entry. It has been held that in such cases the party in possession may file a declaratory suit within six years from that date asking that the revenue entries be declared to be wrong.

There is however no justification for the view that the mere fact that the plaintiff himself tried to get correction made and failed afforded him a fresh cause of action. This question came up before Almond J. C. in Chambers in the case reported in A I R 1937 Pesh 94.[2] He held that:

> If a defendant by several acts attempts to oust the plaintiff from his property, then every such act gives the plaintiff a fresh cause of action, but where the plaintiff himself has done some act which has merely been resisted by the defendant, he has no further cause of action. If it were so, the plaintiff would be able by his own act to create a fresh cause of action any time he wished.

The Allahabad and Lahore High Courts have also expressed the same opinion in 31 All 9,[3] 42 I C 346[4] and 91 I C 605.[5] We hold therefore that the suit is time-barred and dismiss the appeal with costs.

V.B.B./R.K. *Appeal dismissed.*

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1. Chimnai v. Adal Shah, J R 64.
2. Akbarullah v. Hassan Ali, (1937) 24 A I R Pesh 94=171 I C 267.
3. Akbar Khan v. Turban, (1909) 31 All 9=1 I C 557=5 A L J 637=1908 A W N 252.
4. Ghulam Hussain v. Saifullah Khan, (1917) 4 A I R Lah 293=42 I C 346=79 P R 1917.
5. Jaimal Singh v. Chand Singh, (1924) 91 I C 605.

## A. I. R. 1938 Peshawar 30

ALMOND J. C. AND MIR AHMAD J.

*Lala Mukanda Ram s/o Bhai Udho Dass — Decree-holder* — Appellant.

v.

*Malik Sher Mohd. s/o Malik Khan — Judgment-debtor* — Respondent.

Appeal No. $\frac{101/44}{10\text{-c}}$ of 1937, Decided on 9th April 1938, from order of Senior Sub-Judge, Dera Ismail Khan, D/- 4th May 1937.

**Receiver—Appointment of — Decree against agriculturist in N. W. F. P.—Receiver for limited period of less than 20 years can be appointed if it is just and convenient.**

Agriculturists in N. W. F. Province have the right to alienate their lands within specified limits and to enjoy the benefits of those lands. In execution of a decree held against an agriculturist, the appointment of a receiver for a limited period less than 20 years is not against public policy on the ground that it would enable money-lenders to circumvent the provisions of the Punjab Alienation of Land Act, for, that Act itself allows agriculturists to alienate their lands temporarily for a period not exceeding 20 years. Hence, the executing Court can do so if it is just and convenient : *A I R 1936 Pesh 90, Expl.*; *A I R 1920 Pat 700, Disting.*; *A I R 1931 P C 160, Rel. on.* [P 30 C 1, 2; P 31 1]

Diwan Chand — *for Appellant.*

**Almond J. C.**—This is an appeal against the order of the Senior Subordinate Judge, Dera Ismail Khan, refusing to appoint a receiver in execution of a decree held by Lala Mukanda Ram against Malik Sher Mohd. Khan. The application was refused on three grounds : (1) That it would be contrary to public policy on the ground that it would allow money-lenders to get round the Punjab Alienation of Land Act. (2) That the learned Senior Sub-Judge was informed by counsel for the decree-holder that a recent ruling of this Court had prohibited temporary alienations of agricultural land. The ruling is not actually cited in the judgment and was presumably not produced in the trial Court as it has only recently been published. It is now reported in A I R 1936 Pesh 90.[1] (3) That a case reported in A I R 1920 Pat 700[2] was an authority that a receiver could not be appointed in such circumstances.

As regards these grounds, we do not think in the first place that the appointment of a receiver for a limited period is against public policy on the ground that it would enable money-lenders to circumvent the provisions of the Punjab Alienation of Land Act, for that Act itself allows agriculturists to alienate their lands temporarily for a period not exceeding 20 years. In the second place, the ruling of this Court which was referred to is no authority for the proposition that a receiver cannot be appointed in execution of a decree held against an agriculturist. It only laid down that the land of an agriculturist could not be temporarily alienated on an application for execution under S. 51 (b), Civil P. C. In the third place the facts of the *Patna case*[2] are not similar to those of the present case. In the *Patna case*[2] the position of the judgment-debtor was controlled by S. 27 of Regulation III of 1872 which provides that :

> No transfer by a ryot of his right in his holding or any portion thereof by sale, gift, mortgage, lease or any other contract or agreement shall be valid unless the right to transfer has been recorded in the Record of Rights and then only to the extent to which such right is so recorded;

that is to say, there was a total prohibition on alienation by the ryots. That case has been distinguished in a subsequent ruling of the Lahore High Court reported in A I R 1937 Lah 738.[3] That case dealt with an occupancy holding to which the provisions of S. 18, Colonization of Government Lands Act applied. By the provisions of that Act, the rights or interests of tenants in Government lands to which the Act applies could not be attached or sold in execution of a decree, but the tenant had the right to transfer his land by lease for a period not exceeding seven years, and the learned Judge who decided that case held that a receiver could be appointed but that the period of his appointment should be limited to seven years. The present case appears to us to be one on all fours with the case which went up from the Calcutta High Court to the Privy Council and is reported in A I R 1931 P C 160.[4] In that case the Nawab of Murshidabad was granted certain lands by Government on the condition that he should not alienate them except within specified limits. A bank obtained a decree against him and applied for execution by the appointment of a receiver. Their Lordships of the Privy Council held in that case that although the lands of the Nawab could not be alienated except within specified limits, the Nawab was entitled to enjoy the profits of those lands and the profits could be made available for the satisfaction of the decree-holder by the appointment of a receiver. In the present case also agriculturists in this Province have the right to alienate their lands within specified limits and to enjoy the profits of those lands. We think that the appointment of a receiver is not prohibited by any of the grounds on which the learned executing Judge has held himself unable to appoint a receiver. It is for the executing Court to consider in the circumstances of each case whether the appointment of a receiver is just and convenient within the meaning of O. 40, R. 1 and if so, what powers should be conferred on him. We are unable on the material before us to come to any conclusion whether such an appointment would be just and convenient in the circumstances of the present case. We do not know the amount of land possessed by the judgment-debtor or the probable period which it will take to realize the debt by the appointment of a receiver.

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[1] Jethanand v. Khuda Bakhsh, (1936) 23 A I R Pesh 90=161 I C 628.

[2] Abdul Ali v. Emperor, (1920) 7 A I R Pat 700 =59 I C 41=22 Cr L J 9=1 P L T 446.

[3] Gopal Das v. Devi Das, (1937) 24 A I R Lah 738 = 39 P L R 649.

[4] Wasif Ali Mirza v. Karnani Industrial Bank Ltd. (1931) 18 A I R P C 160 = 132 I C 727 = 59 Cal 1 = 58 I A 215 (P C).

We therefore accept this appeal and setting aside the order of the executing Judge direct that the petition be reconsidered by him on its merits in view of the remarks made in the course of this judgment. The only limitation which we place upon the executing Judge in consideration of this question is that a receiver should in no circumstances be appointed for a period of more than 20 years, as to do so would in our opinion enable the decree-holder to circumvent the provisions of the Punjab Alienation of Land Act. Appellant to have the costs of this appeal from respondent. Pleader's fee Rs. 32.

V.B.B./R.K. *Case remanded.*

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## A. I. R. 1938 Peshawar 31

MIR AHMAD J.

*Lakhmi Das and others* — *Plaintiffs* — Petitioners.

v.

*Kirpa Ram of Baffa* — *Defendant* — Respondent.

Civil Revn. Case No. 422 of 1937, Decided on 3rd May 1938, from order of Senior Sub-Judge, Hazara, D/- 30th August 1937.

**Bond — Construction — Bond making debt payable in instalments and stipulating that on three successive defaults whole amount is recoverable—Suit for instalments due before expiry of three years is not barred.**

Where a bond stipulated that the amount of debt shall be paid by yearly instalments and in case of three successive defaults the whole amount shall become payable, the default clause does not take away the right of the creditor to bring suit for instalments due before the expiry of three years. If the creditor chooses to get his instalment every year by means of a suit and thus make it impossible to recover the whole amount at the end of three years, he does it to his own detriment, but there is nothing in law to stop him from doing so. [P 31 C 2; P 32 C 1]

Diwan Chand — *for Petitioners.*

L. Charanjit Lal — *for Respondent.*

**Order.** — On 5th August 1934, Kirpa Ram executed a bond for Rs. 800 in favour of Lakhmi Das. It was stipulated that the amount shall be paid by yearly instalments of Rs. 100. It was further agreed that in case Kirpa Ram defaulted to pay three successive instalments the whole amount shall become recoverable in a lump sum with interest. Lakhmi Das and his three sons have brought this suit for the recovery of two instalments of Rs. 100 each which have fallen due. Kirpa Ram took up many defences one of which was that in view of the default clause the suit for the recovery of instalments did not lie; in other words it was pleaded that the plaintiffs could not bring a suit for recovery of the instalment money this side of three years. The trial Judge decided all points raised by the defendant in favour of the plaintiffs except that of prematurity. He held that in effect a three years' grace was given to the defendant to pay off his debt and that a suit for instalments falling due before the expiry of three years was incompetent. He therefore dismissed the suit. An appeal was preferred by the plaintiffs to the Senior Subordinate Judge, Hazara, which was dismissed. The plaintiffs have come up on revision to this Court.

In my opinion it is a clear case of refusal to exercise jurisdiction which was vested by law in the lower Courts. The two conditions given in the bond were quite distinct. One was for the protection of the debtor and another for the protection of the creditor. The debtor was allowed to pay Rs. 100 a year and has not been made liable to interest if he were to continue to pay the instalments. On the other hand it was agreed for the benefit of the creditor that if the debtor made default in paying three instalments the whole amount shall become due and the creditor shall also have interest. In my opinion, it cannot be held by any stretch of reasoning that these two conditions govern each other in the sense that the default clause takes away the right of the creditor to bring his suit for instalments as they fall due this side of three years. If the creditor chooses to get his instalment every year by means of a suit and thus makes it impossible to recover the whole amount at the end of three years he does it to his own detriment, but there is nothing in law to stop him from doing so. Similarly there is nothing to stop the debtor from paying Rs. 100 a year regularly and not allowing the creditor any chance of recovering the total debt due under the bond in a lump sum with interest. For the reasons given above, I accept the petition, set aside the orders of the two Courts below and hold that the suit lies. There being no other point in dispute between the parties, I pass a decree in favour of the plaintiffs against the defendant for Rs. 200. The plaintiffs shall have their costs throughout.

V.B.B./R.K. *Petition allowed.*

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## ✲ A. I. R. 1938 Peshawar 32

ALMOND J. C.

*Bhagwan Das Lala Gangaram — Plaintiff* — Petitioner.

v.

*Amardas Shamdas and another— Defendants* — Respondents.

Civil Revn. No. 18 of 1938, Decided on 19th May 1938, from Judgment and decree of Senior Sub-Judge, Peshawar, D/- 16th October 1937.

**✲ Stamp Act (1899), S. 36 — S. 36 applies only to original documents — Original lost and copy admitted by trial Court—Appellate Court can consider whether secondary evidence has been properly admitted.**

Section 36 applies only in the case of original documents. Hence, where the original document has been lost and a copy of the original has been admitted as secondary evidence by the trial Court, the Appellate Court is entitled to consider on appeal whether the secondary evidence has or has not been properly admitted : *Case law referred.* [P 33 C 1]

Diwan Chand — *for Petitioner.*

L. Wazir Chand and K. Abdul Wahab —*for Respondent 1.*

Respondent 2 *in person.*

**Order.**—In this case the plaintiff Bhagwan Das sued the defendant Amardas for Rs. 500 on the basis of a pro-note. L. Gangaram, defendant 2, was added as a pro forma defendant. The trial Court decreed the plaintiff's suit. An appeal was preferred in the Court of the Senior Sub-Judge where two points were taken by the defendant. Both these points were decided, the first one against the appellant and the second in favour of the appellant. As a result of the decision on the second point, the plaintiff's suit was dismissed with costs throughout. The second point was decided in favour of the appellant on an interpretation of Ss. 35 and 36, Stamp Act. It may be noted that the original of the pro-note was not produced in Court because the plaintiff alleged that it had been lost. Secondary evidence of the contents of the pro-note was admitted and one of the pieces of this secondary evidence was a copy from the Notary Public to whom the note had been presented for attestation. A copy of the document existing in his office was placed on the file by the defendant showing that the pro-note was stamped with one anna postage stamp, and it is not denied before me that the original pro-note was so stamped. The learned appellate Judge held that S. 36 did not apply to the documents referred to in Proviso (a) to S. 35, which could not be admitted in evidence even on the payment of a penalty, and in this connexion he also referred to S. 61, Stamp Act.

I do not think that the reasoning of the learned Senior Sub-Judge was correct on this point and learned counsel for the petitioner before me has cited a large number of rulings in which it has been laid down that when a pro-note has been admitted in evidence by the trial Court, its admission cannot be questioned under S. 36 of the Act. Virtually all those rulings, however, refer to the case in which the document in original was admitted in evidence. He has only referred me to one case in which the document was not produced in original. That is a judgment of the Rangoon High Court reported in 101 I C 198.[1] Learned counsel for the respondent has also quoted a large number of rulings before me but those which appear to me to be relevant to the facts of the present case are 23 Mad 49,[2] a Judgment of their Lordships of the Privy Council, 7 Mad 440,[3] 18 All 295[4] and 62

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1. Mg. Po Htoo v. Ma Ma Gyi, (1927) 14 A I R Rang 109=101 I C 198=4 Rang 363.
2. Raja of Bobbili v. China Sitaramaswami Garu, (1900) 23 Mad 49=26 I A 262=7 Sar 597=4 C W N 117 (P C).
3. Kopasan v. Shamu (1884) 7 Mad 440.
4. Kallu v. Halki, (1896) 18 All 295 = 1896 A W N 68.

I C 637,[5] a judgment of the High Court of Bombay. In 23 Mad 49[2] their Lordships of the Privy Council laid down that S. 34 of the Act of 1879, which corresponds to Ss. 35 and 36 of the present Act, applied only in the case of original documents and that it had no application whatever to copies of documents. The judgment of the Rangoon High Court to which I have referred above made reference to this judgment of the Privy Council but held that the principles were not applicable where the trial Court had admitted in evidence secondary evidence of a document which itself was not admissible in evidence for want of a stamp. They remarked as follows :

> Our view is that S. 35 of the present Act read with the provisions of the Evidence Act excludes both the original instrument itself and secondary evidence of its contents. Similarly under 36 when either the original instrument itself or secondary evidence of its contents has in fact been admitted, that admission may not be called in question in the same suit on the ground that the instrument was not duly stamped.

It does not appear to me that those remarks correctly interpret the intention of their Lordships of the Privy Council, for it is virtually applying S. 36 to cases where the original document has not been produced, and their Lordships of the Privy Council specifically stated that S. 34 of the old Act, which corresponds in part to S. 36 of the present Act, applied only in the case of original documents. I do not think therefore that there was any question of the application of S. 36 in the present case and that the lower Appellate Court was entitled to consider on appeal whether secondary evidence had or had not been properly admitted. All the rulings which have been cited before me directly bearing on this point are in view of the proposition that where the original document is itself not admissible through being understamped, secondary evidence of its contents cannot be given. The rulings to which I refer are 7 Mad 440,[3] 18 All 295[4] and the Bombay case reported in 62 I C 637.[5] I am of opinion therefore that the decree of the Appellate Court is correct but for reasons other than those which have been given by the Appellate Court. I therefore dismiss this application with costs.

V.B.B./R.K. *Application dismissed.*

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[5] **Hiralal Ram Narayan v. Shankar Hirachand, (1921) 8 A I R Bom 401=62 I C 637=45 Bom 1170=23 Bom L R 506.**

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## * A. I. R. 1938 Peshawar 33

ALMOND J. C. AND MIR AHMAD J.

*Hanif Gul Rahim Gul*
*Convict* — Appellant.
v.
*Emperor.*

Criminal Appeal No. 149 of 1938, Decided on 5th May 1938, from order of Sess. Judge, Peshawar, D/- 1st April 1938.

*** Evidence Act (1872), S. 32 (1) - Dying declarations are admissible under S. 32—Satisfactory way of proving it is to let person who recorded it or in whose presence it was recorded directly prove the writing itself.**

The dying declarations of a deceased person are admissible under S. 32 (1). [P 34 C 2]

The only satisfactory and reliable way of proving the dying declaration of a deceased person is to let the person who recorded it or in whose presence it was recorded directly prove the writing itself. Otherwise the proceedings would be reduced to a farce. No human being can be expected to remember word for word what he had written long ago and either the witness will have to learn the evidence by heart before he enters the witness-box or no dying declaration could be proved in a satisfactory manner at all : *Case law discussed.* [P 35 C 2]

Mian Ziauddin — *for Appellant.*

Sardar Raja Singh, Advocate-General — *for the Crown.*

**Mir Ahmad J.**—Rahimullah, aged 20, was a resident of Yakubi (Mardan district). At peshin time, on 27th January 1938, he was stabbed in the fields outside the village. He made a dying declaration to the local patwari and was taken to the Kalu Khan Police Station where he lodged a report at 5.35 P. M. In both these documents he charged Hanif Gul with having injured him. He made three more dying declarations and then died. Consequently, Hanif Gul was sent up and committed to the Court of Session where he was tried under S. 302, I. P. C. The doctor stated that Rahimullah had the following wounds on his person : (1) A stab wound $\frac{3}{4}'' \times \frac{1}{4}''$ penetrating into the abdomen. (2) A stab wound $\frac{1}{2}'' \times \frac{1}{4}''$ skin deep on the angle of the left scapula. The stomach and the liver were cut and caused death. The Surgeon also examined Hanif Gul accused and found that he had five scratch marks on his person. The witness was of opinion that these scratches could have been caused in a struggle. The doctor was asked with regard to the age of Hanif Gul and he said that he was about 18 years old. Surjan Lal, patwari of Yakubi, deposed that he recorded the statement of Rahimullah, deceased, in the afternoon on 27th January 1938. This witness was asked to say from his memory as to what statement had been given by the deceased. He said that the deceased had charged Hanif Gul along with others whose names he could not recollect at the time. Then there is a note by the Court that the Public Prosecutor wanted to make a statement and an order was passed that that statement should be recorded. The statement is as follows :

> I may be permitted to tender in evidence the dying declaration recorded by this witness Ex. P. B. 1 in order to confront it to the witness and ask him whether this is the statement which he recorded.

The order passed by the Judge on this statement may be usefully reproduced. It runs thus :

> The witness is in the witness-box and the statement that he recorded can only be proved to corroborate his statement that he makes in this Court. The learned Public Prosecutor has cited in his statement no law on the authority of which he wants to tender in evidence Ex. P. B. 1 as substantive evidence in the case. He does not want to make use of this statement under S. 159, Evidence Act. I do not know as he himself has not said what other use can he make of such a statement. This statement would not be considered as evidence unless the learned Public Prosecutor satisfies me that this statement is admissible under any section of the Evidence Act. The witness is still in the witness-box and the learned Public Prosecutor can examine him and can make also legal use of what the witness wrote in Ex. P. B. 1. Exhibit P. B. 1 cannot be read out at this stage.

Then the examination of the witness was resumed and he said the following sentences :

> Until I read the statement Ex. P. B. 1, I cannot say word for word what statement the deceased made. I do not word for word remember what statement the deceased had made to me. I want to read that document in order to refresh my memory.

At this stage the witness seems to have remembered the names and said that the deceased charged Hanif Gul and his two companions Muqadar and Abdul Razak, and that the deceased had said that they came into his barley field and cut his barley, and when asked to desist, Hanif Gul caused him a wound in the abdomen with a dagger. (After discussing the evidence, the Court proceeded.) The accused denied the charge. He said that the day before the occurrence, Rahimullah had asked him not to take earth from a mound which was used by many villagers, that the deceased had abused him and that he told him that if he did not desist the deceased would remove his trousers. On the fateful day, the deceased was standing in his field and saw the accused passing that way. The deceased asked him to stop and then ordered him to remove his trousers. The accused refused to do so. The deceased put his hand on his trousers string. The accused did not permit him to do so and the deceased dragged him towards his field. The accused began to bite the deceased in order to save himself. Then the deceased threw a sickle on the ground and started struggling with the accused. The deceased fell on his own sickle and injured himself. The accused did not produce any defence.

The four assessors who assisted at the trial brought in a unanimous verdict of guilty. The learned Sessions Judge did not attach much value to the testimony of the eye-witnesses but depending on the dying declarations of the deceased he convicted the accused under S. 302, Penal Code. Taking the age of the accused into consideration and also the fact that the quarrel was sudden he sentenced him to transportation for life. The accused has presented an appeal to this Court. Before we deal with the merits of the case, we wish to clear a matter which seems to have created some difficulty in the Sessions Court. It is with regard to the procedure which should be adopted in proving the dying declaration of a deceased person. The quotations given above and the omission to prove the records of the dying statements show that some doubt is being entertained in the Sessions Court as to the section of the Evidence Act under which dying declarations are admissible and as to the correct method of proving such declarations. There is no difficulty as to the section which applies. All the High Courts in India are agreed that S. 32, Cl. 1, Evidence Act, is applicable and makes such statements admissible.

The only question which arises for consideration is as to how the statement of a deceased person should be brought on the record. There are two ways of doing it. One of them is that the witness should say from memory what he heard from the deceased and in doing so refresh his memory under S. 159, Evidence Act, by referring to the record of the statement prepared by him. Another is that he should prove the record itself as the reproduction of what fell from the lips of the dying man. The first view found favour with the Calcutta High Court in 1881. In 8 Cal 211[1] the Judges observed as follows :

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[1] **Empress v. Samiruddin, (1881) 8 Cal 211=10 C L R 11.**

> The piece of evidence to which the observation relates is the dying statement of the deceased Baber Ali. This was recorded by the Deputy Magistrate as a 'deposition' but it does not appear that Baber Ali was examined in the presence of the accused Samiruddin, and unless he were so examined by the Deputy Magistrate exercising judicial jurisdiction, the writing made by such Magistrate could not be admitted to prove the statement made by the deceased. This statement must have been proved in the ordinary way by a person who heard it made. If the Deputy Magistrate had been called to prove it, he might have refreshed his memory with the writing made by himself at the time when the statement was made.

In fact a Bench of the Madras High Court followed this ruling in 15 I C 308[2] and a single Judge of the Lahore High Court adopted it in 67 I C 577.[3] It was however soon found that the method suggested was unsatisfactory and that there was no objection in law to the production of the record of the declaration by the person who prepared it as the evidence of the statement made to him. The latest authority of a Bench of the Calcutta High Court on the subject, (49 Cal 358[4]) has therefore laid down that this direct method of proving the statement is perfectly legal. The Magistrate who had recorded the dying declaration in this case had died and the Assistant Surgeon who was present when the statement was recorded gave the following evidence :

> **Before the deceased died I wrote to the Magistrate to have his dying declaration recorded. The Sub-Deputy Collector, Surendra Nath Gosh, came and recorded his dying declaration on the 29th night. He recorded the declaration in my presence. Surendra Babu is dead. This was over two years ago. Ex. 2 is the dying declaration as recorded by Surendra Babu in my presence. I know Suren Babu's handwriting and signature. He read it over to the deceased in my presence. The declarant Surendra admitted it to be correct. Ex. 2 read over.**

It was contended that this statement was not enough to prove the dying declaration. It was pointed out on the strength of 8 Cal 211,[1] that even if the Magistrate himself had been alive and had entered the witness-box he could only be allowed to state from his memory as to what he had recorded and could only use the document to refresh his memory. Their Lordships made the following observations :

> But we hold that the evidence that the deceased used the words contained in the statement given by the witness who can speak to these words by refreshing his memory is not the only way in which the statement of the deceased person can be proved. If the witness who heard that statement swears that the written statement correctly reproduces the words used by the deceased, this is sufficient to prove that the deceased did use the words contained in that statement. Here the important part of the evidence is that the dying declaration was recorded in the presence of a witness, that it was read over to the deceased in the presence of the witness and was admitted by the deceased to be correct. This we think is sufficient.

A Bench of the Madras High Court held a similar view in 31 I C 359[5] and in another ruling in 54 Mad 678.[6] On page 686 of the latter report the fact was mentioned that 8 Cal 211[1] was dissented from in 31 I C 359[5] and on page 687, 49 Cal 358[4] was also referred to. Their Lordships then observed on page 689 :

> We think that as the statement was recorded in April and the evidence was not given by P. W. 1 at the Sessions trial until July, P. W. 1 cannot be expected accurately to reproduce the words of the deceased and that he was entitled therefore to put in Ex. B as a correct record of what the deponent said at the time.

A Bench of the Lahore High Court also veered to this point of view in A I R 1926 Lah 310[7] and this ruling was followed by another Bench of this Court in A I R 1930 Lah 450.[8] We find ourselves in perfect agreement with the later view of the High Courts and think that the only satisfactory and reliable way of proving the dying declaration of a deceased person is to let the person who recorded it or in whose presence it was recorded directly prove the writing itself. Otherwise the proceedings would be reduced to a farce. No human being can be expected to remember word for word what he had written long ago and either the witness will have to learn the evidence by heart before he enters the witness box as was probably done by Abdul Aziz, P. W., in the case before us or no dying declaration could be proved in a satisfactory manner at all. We therefore direct that this procedure should be adopted in the Sessions

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[2] **Public Prosecutor v. Bala Nagi Reddi, (1912) 15 I C 308=22 M L J 453=1912 M W N 405 =13 Cr L J 468.**

[3] **Kunj Lal v. Emperor, (1924) 11 A I R Lah 12 =67 I C 577=23 Cr L J 417.**

[4] **Emperor v. Balaram Dass, (1922) 9 A I R Cal 382=71 I C 685=24 Cr L J 221=49 Cal 358.**

[5] **Karuppan Samban In re, (1916) 3 A I R Mad 1211=31 I C 359=16 Cr L J 759.**

[6] **Krishnama Naicken v. Emperor, (1931) 18 A I R Mad 430 = 1931 Cr C 478 = 135 I C 337=33 Cr L J 115=54 Mad 678=60 M L J 404.**

[7] **Partab Singh v. Emperor, (1926) 13 A I R Lah 310=92 I C 167=27 Cr L J 215=7 Lah 91= 28 P L R 222.**

[8] **Kapur Singh v. Emperor, (1930) 17 A I R Lah 450=1930 Cr C 554=123 I C 120=31 Cr L J 475=31 P L R 83.**

Court in future. Turning to the merits of the case, we agree with the learned Sessions Judge that there being no enmity between the parties, there is no reason why the deceased should charge the accused falsely. The three witnesses who have given ocular evidence of the tragedy are also disinterested. They depose that they saw the two boys grappling with each other and two of them (Abdul Qadim and Khanai) are definite that Rahimullah was wounded and that Rahimullah charged Hanifgul with having wounded him. On this evidence we are satisfied that it was at the hands of Hanifgul that Rahimullah was fatally injured.

This brings us to the defence of the accused. There is not an iota of evidence to the effect that before the tragedy occurred an assault was made on the accused by the deceased. It does not appeal to us that Rahimullah would choose an open place like the field in question and peshin time for an attempt to sodomize the accused. The accused has said that he had bitten the deceased and yet the doctor did not find any teeth marks on the person of the deceased. Again the accused has alleged that the deceased fell on his own sickle and injured himself. A sickle is a dented instrument and if a sickle was the cause of the injury the wound would have been jagged. On the other hand Abdul Qadim and the Sub-Inspector found barley plants lying cut on the spot. This corroborates the deceased with regard to the cause of the fight. We do not attach any value to the statement of Ainuddin that he did not find any barley cut in the field on the evening of the occurrence. We would certainly prefer the statements of Abdul Qadim and the Sub-Inspector who are more reliable. For the reasons given above we do not accept the version of the accused. It follows from what has been said above that the accused caused the death of the deceased by stabbing him when the deceased asked him to desist from cutting his barley. The conviction under S. 302, I. P. C., is consequently correct and is hereby maintained. The accused has been rightly given the lesser penalty. His appeal is dismissed.

V.B.B./R.K. *Appeal dismissed.*

## A. I. R. 1938 Peshawar 36

ALMOND J. C. AND MIR AHMAD J.

*Boota Mal Charandas—Judgment-debtor* — Appellant.

v.

*Nand Ram Santo Mal — Decree-holder* —Respondent.

Appeal No. $\frac{94/20}{9\text{-c}}$ of 1937, Decided on 22nd March 1938, from order and decree of Dist. Judge, Peshawar, D/- 16th April 1937.

**Civil P. C. (1908), O. 21, R. 84—Failure to deposit 25 per cent. amounts only to irregularity.**

The omission to pay 25 per cent. of the sale money amounts only to an irregularity and a sale can be set aside on this ground only if it is proved that substantial injury has been caused by it: *A I R 1924 Pesh 25, Expl.*; *Case law referred.* [P 37 C 2]

Boota Mal *in person.*

Nand Ram *in person.*

**Judgment.** — Nand Ram obtained a decree under R. 4 of O. 34, Civil P. C., against Boota Mal which was made final. In execution of that decree the mortgaged property was brought to sale. Nand Ram bid at the sale and the property was knocked down to him on payment of Rs. 3400. It may be noted that by an amendment made by this Court the necessity for obtaining leave to bid has been removed. The judgment-debtor objected to the sale. One of the objections was that the 25 per cent. deposit had not been made by the decree-holder. The execution Judge rejected the objection. An appeal was preferred by the judgment-debtor to the District Judge. The appellant took two objections before him. Firstly that the failure of the decree-holder to deposit the 25 per cent. of the purchase money vitiated the sale, and secondly that his objections had not been heard and decided. In support of the first point the appellant relied upon A I R 1934 Pesh 25,[1] a ruling given by Mr. Middleton, Judicial Commissioner, in Chambers. The learned appellate Judge held that the wording of the decree made the payment of 25 per cent. of the purchase money unnecessary. He pointed out that instead of ordering the proceeds of the sale to be paid into Court and then applied to liquidate the mortgage debt the Court had only ordered in the decree sheet that the proceeds of the sale should be applied to pay the amount due under the decree. In the opinion of the Judge, the omission of the direction that the money should be paid into Court obviated the necessity of making the 25 per cent. deposit required by O. 21, R. 84, Civil P. C. As regards the second ground taken by the appellant, the Judge held that the objector had waived his objections because subsequently he had asked for time to make payment and did not insist that his objections should be heard and decided. The appeal was consequently dismissed. Boota Mal has come up on further appeal to this Court. At the preliminary hearing he had a counsel. His counsel mainly concentrated on the point that the failure to make the necessary deposit was fatal to the sale and relied upon A I R 1934 Pesh 25[1] in support of this proposition. The case was referred to the Bench to consider the effect of that ruling on this case.

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[1] Bhag Chand v. Mt. Najab Sultan, (1934) 21 A I R Pesh 25 = 148 I C 1082.

The facts of the case reported in A I R 1934 Pesh 25[1] are as follows: A sale had taken place but the 25 per cent. deposit had not been made. In the meantime, the judgment-debtor had made an application under O. 21, R. 89, Civil P. C. offering to pay the decretal amount. Objection was taken that the application having been made more than 30 days after the date of sale was time-barred under Art. 166, Lim. Act. It was held by the Judicial Commissioner that the fact that 25 per cent. deposit had not yet been made left the sale incomplete and that there being no complete sale limitation did not run at all and the application was within time. Reliance was placed by him on A I R 1919 Lah 309,[2] A I R 1931 Oudh 291[3] and A I R 1928 Nag 111,[4] but great stress was laid on A I R 1934 Oudh 25[5] in arriving at this conclusion. We have carefully considered A I R 1934 Pesh 25,[1] and the authorities on which reliance was placed by the Judicial Commissioner in that ruling. The ruling itself and the four cases referred to in it dealt with applications under O. 21, R. 89, Civil P. C. Such applications must be made within 30 days of the date of sale: vide Art. 166, Lim. Act. The question before the High Courts was as to when do the 30 days begin. They held that the period of 30 days began from the date the 25 per cent. deposit was made. It is obvious that A I R 1934 Pesh 25,[1] and the rulings cited therein do not directly bear on the question before us and consequently do not help us much in deciding the present case. But we may, however, make it clear that if the ratio decidendi of these rulings be taken to be that the failure to deposit the one-fourth of the purchase money amounted to an illegality and made the sale a nullity altogether, we, with due respect, differ from that view. We think that the omission to pay 25 per cent. of the sale money amounts to an irregularity and a sale can be set aside on this ground only if it is proved that substantial injury has been caused by it. We are supported in this opinion by the following authorities: A I R 1924 Rang 81,[6] A I R 1929 Lah 492,[7] A I R 1933 Oudh 345,[8] 28 All 238,[9] 16 Cal 33[10] and 14 Mad 227.[11]

Applying the principle laid down above, we hold that A I R 1934 Pesh 25[1] does not help the appellant and the sale which is now in dispute cannot be set aside merely because the decree-holder purchaser has failed to make a deposit under O. 21, R. 84, Civil P. C. We may point out that no substantial injury has been shown to have resulted from this default. We may also remark in passing that we do not agree with the learned District Judge that the form of the decree makes any difference so far as the application of O. 21, R. 84, Civil P. C. is concerned. He has drawn a distinction without a difference.

There remains the objection that the execution Judge did not dispose of all the pleas taken up by the judgment-debtor. We have carefully considered the objections and we find that there is no substance in them. In fact the judgment-debtor never persisted in them. He has been asking for more and more time to pay up the decretal amount. It does not amount to an estoppel but at any rate it does lead to the conclusion that the judgment-debtor was not very serious about the objections taken by him.

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[2] Khairan v. Alliance Bank of Simla, (1919) 6 A I R Lah 309=50 I C 914.

[3] Kanwal Ram v. Gurdei, (1931) 18 A I R Oudh 291=132 I C 263=8 O W N 633.

[4] Ronya v. Ballram, (1928) 15 A I R Nag 111=106 I C 333.

[5] Iqbal Narain v. Raj Kumar Bakhshi, (1934) 21 A I R Oudh 25 = 147 I C 1077=9 Luck 393=11 O W N 18.

[6] Mg. Chit Hlaing v. N. A. R. M. Chetty, (1924) 11 A I R Rang 81=79 I C 747.

[7] Firm Mathra Das-Prabhu Dayal v. Brij Rani, (1929) 16 A I R Lah 492=116 I C 212.

[8] Jangli Bakhsh Singh v. Buddhan Lal, (1933) 20 A I R Oudh 345 = 144 I C 314=8 Luck 731=10 O W N 440.

[9] Ahmad Bakhsh v. Lalta Prasad, (1906) 28 All 238=1905 A W N 263.

[10] Bhim Singh v. Sarwan Singh, (1889) 16 Cal 33.

[11] Venkata v. Sama, (1891) 14 Mad 227.

For the reasons given above we dismiss the appeal with costs.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Peshawar 38

ALMOND J. C. AND MIR AHMAD J.

*B. Sundar Singh Bhai Jiwan Singh and another — Defendants* — Appellants.

v.

*R. B. Makhan Singh, Plaintiff and others, Defendants* — Respondents.

Appeal No. 127/25 of 1937, Decided on 9th May 1938, from order of Addl. Judge, Peshawar, D/- 17th June 1937.

**Court-fee — Appeal against order making decretal amount recoverable from certain property—Value for court-fee is price of property or decretal amount.**

Where a decretal amount has been ordered to be recovered from a certain property and an appeal is preferred to get that property released from the liability, the value for the purposes of court-fee would be the price of the property or the decretal amount whichever is less : *A I R 1916 Lah 151; A I R 1926 Lah 408; 10 Mad 187; 30 Mad 96 and 37 Cal 914, Rel. on.* [P 38 C 2; P 39 C 1]

Hukam Chand — *for Appellants.*

L. Charanjit Lal — *for Respondents.*

**Mir Ahmad J.** — R. B. Makhan Singh brought this suit for recovery of Rupees 4088-2-0 against Jewan Singh, his sons Sawan Singh, Gurbachan Singh and Sundar Singh, and Sundar Singh's son Kuldip Singh. It was admitted in the plaint that Jewan Singh was the principal debtor and that the other defendants were responsible to pay the money only to the extent of their share in the coparcenary consisting of Jewan Singh, his sons and grandson. Sundar Singh and Kuldip Singh set up the plea that they were not joint with Jewan Singh and were therefore not liable to pay the amount. These defendants alleged that they had separated from Jewan Singh in 1924. R. B. Makhan Singh produced a deed dated 25th April 1930, by which a house worth Rs. 2000 was gifted to Sundar Singh by Jewan Singh and in which it was mentioned that from that date onwards Sundar Singh and Kuldip Singh shall have nothing to do with the joint family. The trial Judge held that Sundar Singh and Kuldip Singh had separated from Jewan Singh in 1930. He was however of the view that the debt in question having been contracted before the partition (viz. in 1924) the property which fell to Sundar Singh and Kuldip Singh on partition in 1930 was liable to pay it. He therefore passed a decree against the person and property of Jewan Singh and also against his sons and grandson to the extent of the coparcenary property in their possession. An appeal was preferred by Sundar Singh and Kuldip Singh to the District Court at Peshawar asking that they should be absolved from the liability laid upon them, obviously meaning that the property which had fallen to them on partition should be released from the burden of the decree. A court-fee of Rs. 10 was affixed to the memorandum of appeal and an objection was taken by the respondent that it was insufficient. Cross-objections were also preferred by R. B. Makhan Singh respondent in the District Court for the grant of future interest.

The learned appellate Judge ordered the appellants to pay ad valorem court-fee on the amount of the decree. In doing so he followed 11 P R 1916[1] and A I R 1926 Lah 408.[2] The court-fee was not produced by the appellants and the cross-objections were not seriously pressed by the plaintiff respondent and consequently the appeal and cross-objections were both dismissed. The parties were directed to bear their own costs. Sundar Singh and Kuldip Singh have come up on further appeal to this Court and have contended that the court-fee of Rs. 10 was sufficient. R. B. Makhan Singh has also filed cross-objections in which he has questioned the allegation of the lower Appellate Judge that the cross-objections were not pressed before him, and has further urged that the costs in the Appellate Court should have been granted to him when the appeal of the opposite party was dismissed. His counsel has, however, withdrawn the first contention. The two rulings cited by the learned Appellate Judge when read with 10 Mad 187,[3] 30 Mad 96[4] and particularly 37 Cal 914[5] conclusively establish the following proposition : Where a decretal amount has been ordered to be recovered from a certain property and an appeal is preferred to get that property released from the liability the value for the purposes of court-fee would be the price of the property or the decretal amount whichever is less.

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[1] Tharu Mal v. Chandu Ram, (1916) 3 A I R Lah 151=33 I C 138=11 P R 1916.

[2] Atma Singh v. Nathu Mal, (1926) 13 A I R Lah 408=96 I C 473=7 Lah 215=27 P L R 412.

[3] Venkappa v. Narasimha, (1887) 10 Mad 187.

[4] K. Appu Rama Krishna Reddi v. K. Kota Reddi, (1907) 30 Mad 96=16 M L J 458=1 M L T 311 (F B).

[5] Jugal Pershad Singh v. Parbhu Narain, (1910) 37 Cal 914=8 I C 1145.

We find ourselves in agreement with this view of law and prima facie the appellants had to pay ad valorem court-fee on the price of the coparcenary property in their possession or the sum decreed whichever was less. The learned counsel for the appellants has argued that the case fell under Art. 17, Cl. 6 of Sch. 2, Court-fees Act, because the value of the coparcenary property in possession of the appellants could not be ascertained. We do not agree with him. Art. 17, Cl. 6 only applies to cases where the relief claimed is not possible to estimate at a money value. In this case the coparcenary property which is in possession of Sundar Singh and Kuldip Singh could certainly be valued by them. It is the house which was gifted to them at the time of partition. Its value is given in the document itself as Rs. 2000. It follows that Sundar Singh and Kuldip Singh have deliberately understamped their memorandum of appeal and did not make up the court-fee when called upon to do so by the learned Additional Judge. In the circumstances their appeal was correctly dismissed and we dismiss their further appeal with costs. Pleader's fee Rs. 100. Turning to the cross-objections of the plaintiff-respondent with regard to the costs of appeal in the Court below, we think that the learned appellate Judge having exercised his discretion in the matter of costs we should not interfere. We therefore dismiss the cross-objections also with costs.

V.B.B./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Peshawar 39

MIR AHMAD J.

*Saihgal Brothers* — *Defendant* — Petitioner.

v.

*Messrs. Jai Ram Jugatri Lal, Plaintiff and another, Defendant* — Respondents.

Civil Revision No. 423 of 1937, Decided on 20th May 1938, from order of Judge, Small Cause Court, Nowshera, D/- 27th October 1937.

**Decree — Setting aside — Application to set aside ex parte decree—Court must be satisfied that applicant did try to get there in time but was delayed by inevitable accident — Breakdown of lorry was considered sufficient cause.**

Once the Court is satisfied that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court to set aside the judgment passed ex parte mulcting in proper cases the delinquent man in costs. It should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right so far as the other side is concerned, by making the man to blame, pay for it: *A I R 1934 Lah 416 and A I R 1923 Mad 63, Rel. on.* [P 40 C 1]

A break down of the lorry on the way was considered sufficient cause for setting aside the ex parte decree. [P 39 C 2; P 40 C 1]

Krishan Chandra — *for Petitioner.*

Pandit Mool Chand—*for Respondents.*

**Order.**—Messrs. Jairam Jugatri Mal of Nowshera brought a suit for Rs. 149-3-0 against H. R. Sugar Factory Ltd., Bareilly and Saihgal Brothers of Jullundar city. It may be noted that Saihgal Brothers are the agents of H. R. Sugar Factory Ltd. The case was fixed for 18th August 1937 for hearing in the Court of the Sub-Judge Nowshera. The agent of Saihgal Brothers who lived at Peshawar could not reach in time and consequently an ex parte decree was passed. On the morning of 19th August 1937, the agent of the defendants Saihgal Brothers presented an application to the Court for setting aside the ex parte decree. He urged that he was prevented from arriving in time by a break down of the lorry by which he was coming and that it was therefore not due to his fault that he could not appear in the case. He produced Bahadur Khan the driver of the lorry, Mathra Das a co-passenger and a petition-writer as his witnesses. The first two deposed to the break-down of the lorry and the third said that the plaintiff had asked him at about 3 o'clock on that day to write a petition for setting aside the ex parte decree. The agent himself also went into the witness-box to speak to the correctness of his allegations. The learned trial Judge pointed out that the agent gave the time of his arrival as about 10.30 or 11 A. M. and that the petition writer said that the agent went to him at about 3 P. M. He held that this discrepancy was sufficient to put the agent out of Court. He therefore dismissed his application.

Saihgal Brothers have come up on revision to this Court. In my opinion, the ground given for rejecting the petition is not sufficient. Ample evidence was produced to show that there was a breakdown on the way. It is just possible that the agent may have arrived at about 11 A. M. and yet may have gone to the petition-writer later. He must have taken some time in finding out as to what had happened and in deciding as to what plans he should adopt for the future. In a case reported in A I R 1934 Lah 416,[1] the fact that a puncture on the way had made a party late was considered to be sufficient cause for setting aside an ex parte decree. A Division Bench of the Madras High Court has in A I R 1923 Mad 63[2] laid down the general principles applicable to such cases. The head-note may usefully be reproduced here. It runs thus :

> On an application to set aside ex parte decree, the question to be considered by the Court is not whether by some human possibility, being wise after the event, he could not have got there in time or whether a man who studied his Railway guide a little better would not have got in another train or taken another route, but whether the man honestly intended to be in Court and did his best, though in his own stupid way, to get there in time; and once the Court is satisfied that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court to set aside the judgment mulcting in proper cases the delinquent man in costs. It should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right so far as the other side is concerned, by making the man to blame, pay for it.

I concur with the views of the Judges of the Lahore and Madras High Courts and applying the principles laid down in the rulings quoted above to this case I hold that the agent has made out a case for setting aside the ex parte decree. I therefore accept this petition for revision. The application of the agent of Saihgal Brothers for setting aside the ex parte decree is accepted and the case is remanded to the lower Court for decision on merits. Costs to follow the event. Pleader's fee Rs. 10.

V.B.B./R.K. *Petition allowed.*

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[1] Arjan Singh v. Bachan Singh, (1934) 21 A I R Lah 416=150 I C 735=36 P L R 55.

[2] Arunachala Aiyar v. Subbaramiah, (1923) 10 A I R Mad 63=68 I C 971=46 Mad 60=43 M L J 632.

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## A. I. R. 1938 Peshawar 40

ALMOND J. C.

*Collector of Peshawar — Decree-holder* — Appellant.

v.

*Abdul Majid and another* — Respondents.

Civil Appeal No. 134/57 of 1937, Decided on 26th May 1938, against the order of Senior Sub-Judge, Peshawar, D/- 25th June 1937.

**Criminal P. C. (1898), S. 386 as amended in 1923 — Warrant issued to Collector for realization of fine from accused's immovable property — Warrant must be accepted by Civil Court as decree.**

The plain reading of S. 386 after the amendment of 1923 is that the warrant issued by a Magistrate to a Collector authorizing him to realize the amount of fine from accused's immovable property must be accepted as a decree by the nearest Civil Court competent to execute it. *Civil Revn. No. 161 of 1937 and A I R 1929 Lah 667, Rel. on.* [P 40 C 2]

L. Jaggan Nath — *for Appellant.*

**Judgment.** — The two respondents were convicted of a criminal offence and sentenced to fines totalling Rs. 50,000. In order to realize that fine, the Magistrate issued a warrant to the Collector authorizing him to realize the amount from their immovable property under S. 386, Criminal P. C. The Collector then applied for execution of the warrant in the Court of the Senior Sub-Judge, Peshawar. The Senior Sub-Judge refused to entertain the application on the ground that the proceedings had to be taken before the Magistrate and not before a Civil Court, and he referred in this connexion to the commentary in Sohoni's Criminal Procedure Code, 1931 edition, S. 386, Notes 8, 11 and 15. It is clear that these Notes have no application to the facts of the present case. They all refer to cases where moveable property has been distrained and the cases which are cited relate to a date prior to the amendments of the Criminal Procedure Code made in 1923. Prior to that date it was only possible to realize a fine by distress and sale of moveable property. By the amendments of 1923 it was made lawful to proceed against the immovable property also. The plain reading of the section as it now stands is that the warrant which is issued to the Collector must be accepted as a decree by the nearest Civil Court competent to execute it. I have already held to this effect in Civil Revision No. 161 of 1937 decided on 13th November 1937.

There is also a case of the Lahore High Court reported in A I R 1929 Lah 667[1] in which proceedings on a similar warrant against immovable property were held in a Civil Court. For these reasons I accept this appeal and setting aside the order of the Senior Sub-Judge, direct that he proceed with the execution of the warrant according to the provisions of S. 386 (3), Criminal P. C. No costs in this Court.

D.S./R.K. *Appeal accepted.*

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[1] Emperor v. Milkha Singh, (1929) 16 A I R Lah 667=1929 Cr C 212=119 I C 227=30 Cr L J 1006.

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## A. I. R. 1938 Peshawar 41

MIR AHMAD J.

*In the matter of Khattar Electrical Engineering and General Supply Co. Ltd., Dera Ismail Khan.*

Misc. Appln. No. 30/7.C of 1937, Decided on 13th June 1938.

**(a) Companies Act (1913), Ss. 55 and 81—Share-holders of company deciding to reduce its share capital by a resolution and applying under S. 55 for sanction—Company held entitled to reduce its capital – Resolution relating to question of reduction of capital held valid.**

A notice was issued on 21st December 1936 for the purpose of calling an ordinary general meeting of the share-holders of a private limited liability company on 30th December 1936 for deciding the question of reducing the capital and assets of the company. At the meeting held on 30th December 1936, eight out of the nine share-holders of the company were present. The ninth share-holder had died before the notice was issued and his legal representatives had not obtained succession certificate to entitle them to take part in the proceedings. An objection having been raised as to circulation of the balance sheet, the meeting was adjourned to 21st February 1937. Another notice was issued on 6th February 1937 to convene the adjourned meeting on 21st February 1937. In this notice the meeting was designated as an extraordinary general meeting of the share-holders of the company. The same eight share-holders were present at the meeting. One of the share-holders left the meeting under protest and the remaining passed the proposal relating to the reduction of the share capital of the company and certain other proposals. Another meeting of share-holders held on 10th March 1937 confirmed the reduction of the capital agreed upon by the meeting of 21st February 1937, and in pursuance of the proceedings an application under S. 55 was presented to the Judicial Commissioner's Court for sanction to be awarded to the proposals. It was contended that full 21 days' notice as required by S. 81 (as amended) not having been given the meeting of 21st February was not validly held and the resolutions were ultra vires :

*Held* that the company was well within its rights in resolving to reduce its capital. The meeting of 30th December 1936 was regularly called because seven days' notice was given for it and this was all that was required to be done by the law then in force (S. 81 of the old Act read with Art. 63 of the Articles of Association of the company). The meeting of 21st February 1937 was clearly a continuation of the meeting of 30th December 1936, because the latter meeting had been validly adjourned to the former date under Art. 67 of the Articles of Association of the company. The fact that S. 81 was amended in the meantime had no effect on the meeting of 21st February 1937 so far as the procedure for convening it was concerned. The resolutions passed at the meeting of 21st February 1937 were therefore in order. The omission to name the meeting of 30th December 1936 as an extraordinary meeting in the notice dated 21st December 1936 had no importance and did not vitiate the proceedings. As the old Act was no longer law when the meeting of 21st February 1937 was held, the confirmatory meeting of 10th March 1937 was unnecessary and the decision of the meeting of 21st February 1937 became final on that very day. (Conduct of company in lending money to share-holders disapproved) : *(1925) 94 L J Ch 201 ; A I R 1928 Mad 1215 ; (1900) 1 Ch 656 ; (1890) 45 Ch D 330 ; (1920) 1 Ch 466 ; (1921) 3 K B 32 and (1888) 37 Ch D 1, Rel. on.* [P 43 C 2 ; P 44 C 2 ; P 45 C 1 ; P 46 C 1]

**(b) Companies Act (1913), S. 55—Application presented under S. 55 for sanction to proposal relating to reduction of share capital—Principles applicable enunciated.**

Where an application under S. 55 is presented to the Court by a company for its sanction to a proposal relating to a reduction of the share capital of the company, the following principles are the principles applicable :

(1) That a company has the power to reduce its capital much more so if the power is conferred by the Articles of Association. (2) Subject to confirmation by the Court which is the safeguard of the minority, the question of reducing capital is a domestic one for the decision of the majority. (3) The company is to determine the extent, the mode and incidence of the reduction. (4) The company may reduce the share capital of all its share-holders pro rata or may reduce the shares of any individual share-holder or any class of share-holders wholly or in part. (5) That the Court has to see that interests of the minority have been protected and no unfairness has been shown to it. (6) That in doing so the Court should keep in view the consideration that the decision has been arrived at by businessmen who are fully cognizant of their necessities and are the best custodians of their interests and should therefore be slow to interfere : *English cases relied on.* [P 45 C 1, 2]

Beli Ram — *for Petitioner.*

Jiwan Lal Kapur — *for legal representatives of Rochi Ram Khattar.*

**Order.**—The Khattar Electrical Engineering & General Supply Co. Ltd., Dera

Ismail Khan, is a private limited liability company. It was first founded by R. B. Rochi Ram Khattar and about the year 1921-22 it was decided to convert it into a limited liability company. R. B. Rochi Ram alleged that he had borrowed ten lakhs for initiating the concern and therefore wanted to transfer it to the company for that sum. It appears that the persons who agreed to take shares were not prepared to pay that amount. Consequently a reference to arbitration was made to which R. B. Rochi Ram Khattar and the proposed share-holders of the new company were parties. The arbitrator, R. S. Gopi Chand, valued the assets of the company at about Rs. 9,21,000. The share-holders paid this amount to R. B. Rochi Ram and the company came into existence. R. B. Rochi Ram became its chairman. It so happened that R. B. Rochi Ram Khattar could not pay off the loan of about Rs. 92,000 which according to the arbitrator's decision was left for him to pay. He therefore asked the company to lend him some money. The company advanced a lakh of rupees to him to pay off the debt. The company seems to have thereafter begun to lend money freely to its share-holders and the share-holders continue to be indebted to it to the present day. In 1930, 10 per cent. of the capital was reduced by the company and was confirmed by this Court. On 16th December 1936, a meeting of the directors took place. The following two resolutions were passed at this meeting :

(a) Definite proposal regarding the reduction of the assets and capital of the company be placed before the share-holders by the chairman.

(b) That a loan up to the extent of 45 per cent. of the share money be advanced to each share-holder at the rate of 1 per cent. per annum with a view to ultimate reduction of the share capital to the same extent. The previous advances paid to the share-holders to the extent of 30 per cent. be deducted with interest up to 31st March 1937 from this 45 per cent.

On 21st December 1936, a notice was issued for the meeting of the share-holders to be held on 30th December 1936. The notice purported to call an ordinary general meeting of the share-holders. Amongst others the following items were on the agenda :

(5) Proposal of R. B. Rochi Ram Khattar regarding his loan account submitted for consideration.

(6) Definite proposal by the chairman of the company regarding the reduction of assets and capital of the company for consideration.

(9) R. B. Rochi Ram Khattar submitting his explanation and the claim in writing regarding dead account of Rs. 14,798-9-11 is put up with the objection No. 15 of the auditor for disposal.

Eight out of the nine share-holders of the company were present at this meeting. The ninth was L. Sundar Das who had died before the notice was issued and whose legal representatives had not yet obtained a succession certificate in order to entitle them to take part in the proceedings. An objection was taken that the balance sheet, which was also to be considered at the meeting, had not been properly circulated. As a result the meeting was adjourned to 21st February 1937. Another notice was issued on 6th February 1937 to convene the adjourned meeting on 21st February 1937. In this notice the meeting was designated as an extraordinary general meeting of the share-holders of the company. Practically the same agenda was repeated.

The same eight share-holders were present at this meeting. L. Dharam Chand Khera however walked out soon after because he raised an objection to the balance sheet and wanted the objection to be recorded but the chairman would not do so. The remaining share-holders continued the meeting. The following proposals were passed unanimously by them :

(1) That the share capital of the company be reduced by 45 per cent. of the share capital and the same should come for confirmation before the extraordinary meeting of the share-holders.

(2) That the total loan of Rs. 74,400 against R. B. Rochi Ram Khattar be discharged against reduction of his shares by that amount.

(3) That the company's claim for Rs. 14,798-9-11 against R. B. Rochi Ram Khattar regarding the account named as dead account be settled by reducing the share money of R. B. Rochi Ram Khattar to the extent of Rs. 4800.

By a notice dated 23rd February 1937, another extraordinary general meeting of the share-holders was called for 10th March 1937. It was summoned in order to confirm the reduction of capital agreed upon by the meeting of 21st February 1937. Seven share-holders were present on 10th March 1937; Lala Dharam Chand Khera had absented himself. The reductions proposed were confirmed subject to the sanction of the Court of the Judicial Commissioner. It was also resolved that the revaluation of the assets of the company be carried out in consultation with the Electrical Inspector, Waziristan District. In pursuance of these proceedings this application has been presented to this Court by the company for sanction to be accorded to the three proposals passed by the meeting of the share-holders on 21st February 1937 and confirmed by a second meeting of the shareholders held on 10th March 1937. The revaluation of the assets of the company was also carried out with the assistance of the Electrical Inspector, Waziristan District. The usual notices were issued by this Court and a date fixed for settling the list of creditors.

Mr. Baldev, who represented one of the share-holders, appeared on the date fixed to contest the application. He took the objection that there were no valid resolutions before the Court. An issue was framed and another date fixed for evidence. On that date Mr. Baldev withdrew his objections. The list of creditors was therefore sanctioned and the creditors were called upon to show cause why the petition should not be accepted. On the adjourned date Mr. Dharam Chand Khera and Sh. Ram Kaur on her own behalf and on behalf of her son Kishori appeared to contest the application. The following issues were framed by the Court:

(1) Is the resolution valid? *O. P.* on petitioner.

(2) Does the proposal to cancel 45 per cent. of the capital amount to refund of capital under S. 55, Companies Act and is it therefore not permissible under the law? *O. P.* on respondents.

(3) Is Lala Dharam Chand estopped from raising the objection taken by him? *O. P.* on petitioner.

(4) Has Mt. Ram Kaur no *locus standi* to question the application? *O. P.* on petitioner.

(5) Is it permissible for the company to make additional reduction in the share capital of the late Rai Bahadur Ch. Rochi Ram Khattar to the extent of Rs. 70,000? *O. P.* on petitioner.

The evidence of Mr. A. N. Ghosh, Engineer in charge of the company, was taken in part on 20th April 1938, and L. Ganpat Rai, one of the directors of the company, was also examined on that date. The case was adjourned to 27th May 1938 for completing the statement of Mr. A. N. Ghosh and for recording the other evidence in the case. However, on that date counsel for L. Dharam Chand Khera and Mt. Ram Kaur withdrew from the case. On the other hand Mr. Baldev, the share-holder, who had previously objected and then withdrawn his objections, again appeared with an application for stay of proceedings. He alleged that the company had been guilty of misconduct and that he had given application to the Registrar of Joint Stock Companies under Ss. 137, 138, 166 and 282-A, Companies Act, against it. He requested that the case should be kept pending till the disposal of that application by the Registrar. The application made to the Registrar having no concern with the proceedings before me the application of Mr. Baldev was rejected. Mr. A. N. Ghose was further examined by counsel for the petitioner and also by counsel for the legal representatives of R. B. Rochi Ram Khattar. The case was closed by the company. Mr. J. L. Kapur, counsel for the representatives of R. B. Rochi Ram Khattar, addressed the Court and very ably explained the facts and the law bearing on the application. S. 55, Companies Act, permits the reduction of capital by a company and Cl. (c) of the Section applies to the present application. Art. 8 of the Articles of Association of this Company also runs thus:

> The company, from time to time (may) by special resolution, reduce its capital in any manner for the time being authorised by law and in particular, capital may be paid off on the footing that it may be called up again or otherwise. This Article is not to derogate from any power this company would have if it were omitted.

It follows therefore that the company is well within its rights in resolving to reduce its capital. The only questions which arise for decision however are: (1) Whether the company has by a valid resolution resolved that the reduction should be carried out, and (2) whether the Court should accord its sanction to the proposed reduction. As regards the fact that the resolutions were passed by the share-holders who were present at the meeting there is no quarrel. The minutes show that except Sundar Das who is dead and Dharam Chand who walked out, all the other share-holders of the company unanimously passed the proposals both on 21st February 1937 and 10th March 1937. The objection taken by the contesting share-holders, who withdrew later, was that no valid notice was given for convening the two meetings. It was contended that the Amending Act came into force on 15th January 1937, that the meeting of 21st February 1937 should therefore have been convened under the provisions of the Amended Companies Act, that under S. 81 as amended a notice of 21 days was necessary for the meeting and that full 21 days' notice having not been given the meeting was not validly held and the resolutions were ultra vires. It was also pointed out that the first meeting of 30th December 1936 was designated as "an ordinary meeting" in the notice while it should have been called "an extraordinary meeting."

On the other hand it was urged by the counsel for the petitioner and the counsel for the representatives of R. B. Rochi Ram Khattar that the meeting of 21st February 1937 was only a continuation of the meeting of 30th December 1936 which was held when S. 81 of the old Act was in force. Counsel pointed out that 21 days' notice was not necessary under S. 81 of the old Act which only enjoined that the meeting should be called by giving a notice as prescribed by the Articles of the Association. He adverted to Art. 63 of the Articles of Association of the company which lays down that seven days notice should be given for holding a meeting of the shareholders. He argued that more than seven days' notice having been given the meeting dated 30th December 1936 was properly convened. He then referred to Art. 67 of the Articles of Association which runs thus:—"The chairman, with the consent of the meeting, may adjourn any meeting from time to time and place to place in Dera Ismail Khan" and contended that the meeting of 21st February 1937 was a continuation of the meeting of 30th December 1936 and was valid. He cited (1925) 94 L J Ch 201[1] and A I R 1928 Mad 1215[2] to show that on general principles also when a meeting is called to transact business for which proper notice had been given and that meeting is adjourned to a subsequent date the adjourned meeting is a continuation of the previous meeting although fresh notices with the agenda had been sent round.

In the alternative counsel took up the position that all the share-holders except Sundar Das deceased having been present at the beginning of the meeting of 21st February 1937 and no one having objected to the validity of the meeting the right to object had been lost. He asked the Court to consider Sundar Das non-existent. He quoted (1900) 1 Ch 656,[3] in support of this allegation. It lays down that no notice need be sent to the representatives of a deceased share-holder of a company when their names have not been entered in the register of members. Counsel emphasized the facts that all the share-holders present knew full well the purpose for which they had assembled and unanimously passed the resolutions put before them. He maintained that in the circumstances the criticism that the meeting of 30th December 1936 was called as an ordinary meeting and that due notice was not given for convening the meeting of 21st February 1937 lost all importance and pressed that it should be presumed that the share-holders present had impliedly condoned the irregularities if any. He relied on (1890) 45 Ch D 330,[4] (1920) 1 Ch 466,[5] (1921) 3 K B 32[6] and (1888) 37 Ch D 1[7] in support of this proposition. After carefully considering the facts in the light of the authorities referred to by counsel, I have come to the conclusions: (1) that the meeting of 30th December 1936 was regularly called because seven days' notice was given for it and this was all that was required to be done by the law then in force (S. 81 of the old Act read with Art. 63 of the Articles of Association of the company); (2) that the meeting of 21st February 1937 was clearly a continuation of the meeting of 30th December 1936 because the latter meeting had been validly adjourned to the former date under Art. 67 of the Articles of Association of the Company; (3) that the fact that S. 81, Companies Act, was amended in the meantime had no effect on the meeting of 21st February 1937 so far as the procedure for convening it was concerned, and (4) that the resolutions passed at the meeting of 21st February 1937 were therefore in order.

The argument that the meeting of 30th December 1936 was summoned as an ordinary meeting and was therefore not one called under S. 81 of the Act has no substance in it. The agenda clearly indicated the object of the meeting and the share-holders understood full well that they had met to consider the reduction of capital. No objection was raised at the meeting on the ground that it was an ordinary meeting and not an extraordinary meeting. It follows that the omission to name it as an extraordinary meeting in the notice dated 21st December 1936 has no importance at all and cannot vitiate the proceedings. The only question which remains for considera-

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1. Neuschild v. British Equitorial Oil Co., (1925) 1 Ch 346=94 L J Ch 201=133 L T 227=41 T L R 414.
2. Subramania Iyer v. United India Life Insurance Co. Ltd., (1928) 15 A I R Mad 1215=114 I C 636=55 M L J 385.
3. Allen v. Gold Reefs of West Africa Ltd., (1900) 1 Ch 656=69 L J Ch 266=82 L T 210=48 W R 452=16 T L R 213=7 Manson 417.
4. Henderson v. Bank of Australia, (1890) 45 Ch D 330=59 L J Ch 794=2 Meg 301.
5. In re Express Engineering Works Ltd., (1920) 1 Ch 466=89 L J Ch 379=122 L T 790=36 T L R 275.
6. In re Oxted Motor Co., (1921) 3 K B 32=90 L J K B 1145=37 T L R 737.
7. Browne v. La Trindad, (1888) 37 Ch D 1=57 L J Ch 292=58 L T 137=36 W R 289.

tion is whether the meeting of 10th March 1937 was necessary and if so was it regularly summoned. If S. 81 of the old Act be kept in view, the meeting of 10th March 1937 was necessary because S. 81 of the old Act required a confirmatory meeting to be held not less than 14 days after the meeting in which a special resolution had been passed so that the resolution should be ratified by it. On the other hand, if S. 81 of the Amended Act be taken to apply, no such confirmatory meeting was necessary. The meeting of 10th March 1937 would have been necessary if the old Act remained in force. But, it is apparent that the old Act was no longer the law when the meeting of 21st February 1937 was held. Consequently I hold that the confirmatory meeting was unnecessary, and the logical result of this finding is that the decision of the meeting of 21st February 1937 became final on that very day. Now I will turn to the second question relating to the reduction of capital. I understand from the learned counsel who argued the case that there is no reported Indian authority on this point. The English authorities which were quoted by the learned counsel may for convenience be grouped together as follows :

(1) Bunckley 1930 Edition, p. 120 (2) (1894) A C 399,[8] (3) (1902) 2 Ch 601,[9] (4) (1904) 1 Ch 87,[10] (5) (1907) A C 229,[11] (6) (1909) 2 Ch 552,[12] (7) (1910) 2 Ch 464,[13] (8) (1911) 2 Ch 361[14] and (9) (1888) 39 Ch D 582.[15]

**These authorities lay down the following principles:** 1. That a company has the power to reduce its capital much more so if the power is conferred by the Articles of Association. 2. Subject to confirmation by the Court which is the safeguard of the minority, the question of reducing capital is a domestic one for the decision of the majority. 3. The company is to determine the extent, the mode and incidence of the reduction. 4. The company may reduce the share capital of all its share-holders pro rata or may reduce the shares of any individual share-holder or any class of share-holders wholly or in part. 5. That the Court has to see that interests of the minority have been protected and no unfairness has been shown to it. 6. That in doing so the Court should keep in view the consideration that the decision has been arrived at by business men who are fully cognisant of their necessities and are the best custodians of their interests and should therefore be slow to interfere.

I will first take up the question of the general reduction of the capital by 45 per cent. In this connexion a reference to the report of the Electrical Inspector, Waziristan District, will be useful. He was unfortunately away from India and could not be examined. His report has however been proved by Mr. A. N. Ghosh. Although the assets of the company were held by the arbitrator to be worth about nine lakhs in 1921-22 the Electrical Inspector of Waziristan District has actually found them to be of the value of Rs. 2,52,000. He has remarked that the company has been presenting its assets at an inflated figure and therefore had been paying heavy depreciation charges thereon. The Inspector was also of the opinion that the company should reduce their share capital and approved of the reduction by 45 per cent. capital. In his opinion this would lead to the following results : (1) a satisfactory dividend will be declared ; (2) a reserve fund will be formed, and (3) the charges for electricity will be reduced.

Mr. Ghosh has also told us that the reduction would be useful. He stated that since the foundation of the company dividend has been declared only once. In his opinion dividend could be declared if the depreciation charges were reduced and the amount of the dividend to be distributed is also decreased by reduction in the share capital. A further advantage indicated by Mr. Ghosh is that the old debts from the share-holders will all be wiped out with the exception of those due from R. B.

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[8] British & American Trustee and Finance Corporation v. John Couper, (1894) A C 399=63 L J Ch 425=6 R 146=70 L T 882 = 42 W R 652=1 Manson 256.

[9] In re Credit Assurance & Guarantee Corporation Ltd., (1902) 2 Ch 601=71 L J Ch 775 = 87 L T 216=51 W R 20=18 T L R 787.

[10] In re Welsbach Incandescent Gas Light Co. Ltd., (1904) 1 Ch 87=73 L J Ch 104=89 L T 645 = 52 W R 327 = 11 Manson 47 = 20 T L R 122.

[11] Poole v. National Bank of China Ltd., (1907) A C 229=76 L J Ch 458 = 96 L T 889 = 14 Manson 218=23 T L R 567=51 S J 513.

[12] In re Louisian & Southern States Real Estate & Mortgage Co., (1909) 2 Ch 552=79 L J Ch 17=101 L T 495=16 Manson 350.

[13] Neal v. City of Birmingham Tramways Co., (1910) 2 Ch 464=79 L J Ch 683=103 L T 59 =54 S J 651=26 T L R 588.

[14] In re De La Rue & Co. Ltd., (1911) 2 Ch 361 = 81 L J Ch 59 = 105 L T 542=19 Manson 71=55 S J 715.

[15] In re Barrow Hasmatite Steel Co., (1888) 39 Ch D 582 = 58 L J Ch 148=59 L T 500=37 W R 249.

Rochi Ram Khattar and L. Ganpat Rai. R. B. Rochi Ram will owe only Rs. 10,000 more than which is a part of a loan raised after this application was filed (he died during the pendency of these proceedings), and L. Ganpat Rai will remain a debtor only to the extent of about Rs. 11,000. The letters from the Punjab National Bank produced by Mr. Ghosh show that the company has got enough money in that bank to meet its requirements. A sum of Rs. 39,785-13-1 was in the floating account on 26th April 1938 and a sum of Rs. 22,000 which was in the fixed deposit became payable on 29th May 1938. The reduction of 45 per cent. capital does not appear therefore to be likely to have any disturbing effect on the equilibrium of the company's finances. For the reasons given above, I have no objection to the reduction of the company's capital by 45 per cent. and hereby accord my sanction to the proposal. I must note however in passing that Art. 13 of the Articles of Association of the company lays down as follows: "None of the funds of the company shall be applied in the purchase of or lent on the share of the company." I therefore take this opportunity of expressing my strong disapproval of the conduct of the company in lending money to its share-holders from time to time as if it were a money-lending concern and particularly in allowing the share-holders to withdraw the amounts equal to 45 per cent. of their share capital in anticipation of the sanction of the meeting of the share-holders and of this Court. I would recommend that in view of the past conduct of the company and the attitude of at least three of the share-holders during these proceedings, the Registrar Joint Stock Companies should keep an eye on its future dealings so as to make sure that no irregularities occur.

Now I turn to the proposal to reduce the share money of R. B. Rochi Ram by Rs. 74,000 due from him and by Rs. 4800 which the company has accepted in satisfaction of its claim against him for Rs. 14,798-9-11. L. Ganpat Rai has said that R. B. Rochi Ram had openly declared in the meeting in which the question of his loan was discussed that he was unable to pay this amount. R. B. Rochi Ram is dead and it appears to me that there is very little likelihood of such a large amount being realized from his assets. I feel therefore that the company has acted bona fide in resorting to this form of recovery. I may note that the company could have easily written off this sum altogether and the fact that they have decided to reduce his share by this amount appears to have been adopted in the best interest of the institution. It is obvious that by recovering the debt in this way the burden of the company will also be reduced, for lesser dividend will have to be paid to the heirs of R. B. Rochi Ram. I have therefore no objection to this reduction also and sanction the proposal. As a result, the petition succeeds. No serious opposition having been offered there shall be no order as to costs.

R.M./R.K. *Petition allowed.*

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## A. I. R. 1938 Peshawar 46

MIR AHMAD J.

*Dassa Ram Lakhmi Das and others* — Petitioners.

v.

*Hakim Sayed Zaffaryab Ali* — Respondent.

Civil Revn. No. 23 of 1938, Decided on 25th May 1938, from Judgment and decree of Small Cause Court and Sub-Judge, 4th Class, Abbottabad, Dist. Hazara, D/- 4th January 1938.

**Practice— Small cause suit — Recording of evidence of witness.**

It is not enough that the Judge should refer to the evidence in his judgment. It is mandatory that he should make a separate memorandum of the evidence given by each witness and shall sign it. [P 47 C 1]

L. Mela Ram — *for Petitioners.*

**Order.**—Dassa Ram and others brought a suit against Hakim Sayed Zaffaryab Ali for recovery of Rs. 100. The suit was heard by the Judge, Small Cause Court, Abbottabad who dismissed it. The plaintiffs have come up on revision to this Court. On going through the record I find that there is the plaint, the pleas and the judgment. There is no abstract of the evidence of the witness or witnesses heard by the Court. Under S. 17, Provincial Small Cause Courts Act, the procedure prescribed in the Code of Civil Procedure, 1908, is to be followed in a Court of Small Causes. O. 18, R. 13, Civil P. C., prescribes that in case in which appeal is not allowed it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge as his examination of each witness proceeds shall make a memorandum of the substance of what he deposes and such memorandum shall be written and signed by the Judge and shall form part of the record.

decree of the Appellate Court restore that of the trial Court granting the plaintiffs a decree for possession of 1kl. 5mls. of land as shown in the plan prepared by the judicial kanungo. The plaintiffs will have their costs throughout from the contesting defendants.

R.M./R.K. *Application accepted.*

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## A. I. R. 1938 Peshawar 49

MIR AHMAD J.

*Ram Ditta Mal-Moti Ram — Plaintiff* — Petitioner.

v.

*Charat Singh Lehna Singh and another* — Respondents.

Civil Revn. No. 98 of 1938, Decided on 22nd June 1938, from order of Senior Sub-Judge, Kohat, D/. 14th March 1938.

**(a) Civil P. C. (1908), Ss. 65 and 115—Property purchased by auction-purchaser vests in him from date of confirmation of sale, whatever proceedings judgment-debtor may take in connexion with setting aside sale — Court ignoring this fundamental principle commits material irregularity.**

Court ignoring the fundamental principle laid down in S. 65, that confirmation of an auction sale relates back to the date on which the auction was held and the property vests in the purchaser from that date, commits material irregularity within the meaning of S. 115 and its order is open to revision. [P 50 C 1]

Where a person purchases certain property in a Court auction held in execution of a decree and the sale is subsequently confirmed in his favour, the property vests in him from the date of confirmation of sale, whatever proceedings may be taken in connexion with the confirmation of the sale by the judgment-debtor whose property is sold. The vesting of the property in auction-purchaser is not postponed till the final decision of the proceedings started by the judgment-debtor. [P 50 C 1]

**(b) Evidence Act (1872), S. 116 — Tenant admitting title of landlord and acknowledging liability to pay rent to him — S. 116 applies — Tenant is estopped from denying title of landlord—It does not make any difference whether landlord has put him in possession or whether tenant has merely attorned to him.**

Once a tenant admits the title of his landlord and acknowledges that he is the person to whom he shall pay the rent, S. 116 will apply and it does not make any difference whatsoever whether the landlord has put him into possession or whether the tenant has merely attorned to him. Of course it is open to every tenant to prove that he attorned under coercion or as a result of fraud, misrepresentation or mistake, but subject to this modification every tenant is estopped from denying the title of his landlord when with open eyes he has attorned to him and has admitted that he was entitled to receive the rent. [P 50 C 1, 2]

L. Ram Labhaya — *for Petitioner.*

L. Ram Parkash — *for Respondents.*

**Order.** — On 6th May 1936 Ramditta Mal, petitioner, purchased in auction eight houses in Kohat belonging to Attarsingh. The sale was made absolute on 8th June 1936. Charat Singh respondent was living in two of these houses and on 24th June 1936 he executed a lease deed in favour of Ramditta Mal agreeing to pay him with effect from 8th June 1936 the sum of Rs. 10 per month for the two houses. Before this lease was executed, Ramditta Mal had applied to the Court for possession of the eight houses and an order was issued directing it to be given. The report of the bailiff dated 25th June 1936 shows that possession of two houses (presumably those of Charat Singh) was given to Ramditta Mal but the tenants of the other houses refused to attorn. It so happened that Attar Singh came up to this Court against the order confirming the sale. This Court set aside that order on the ground that the objections put forward by Attar Singh had not been heard and adjudicated upon. The case was therefore sent back. The objections were duly heard and decided against Attar Singh on 27th November 1936. The Sub-Judge confirmed the sale again. This order was maintained by this Court on 7th May 1937. On 10th August 1937, Ramditta Mal filed this suit for the recovery of Rs. 140 against Charat Singh. This represents the rent for 14 months, that is to say from 8th June 1936 to 8th August 1937, of the two houses leased to Charat Singh. The defence taken by Charat Singh was that Ramditta Mal did not become the owner of the property till the appeal was finally disposed of by this Court in 1937.

The trial Judge held that Charat Singh was estopped under S. 116, Evidence Act, from questioning the title of Ramditta Mal. He therefore overruled the defence and granted a decree. An appeal was preferred by Charat Singh to the Senior Sub-Judge, Kohat. The appellate Judge was of the opinion that Ramditta Mal did not become the owner of the property till 2nd July 1937 when he finally took possession of the property sold to him viz. after the appeal of Attar Singh was dismissed by this Court. As regards the month of July and part of the month of August the Judge remarked that both sides admitted before him that the rent for that period had been paid by Charat Singh to Ramditta Mal.

The appeal was therefore accepted and the suit dismissed. Ramditta Mal has come up on revision to this Court. In my opinion the learned Senior Sub-Judge has committed a material irregularity in ignoring the fundamental principle that whenever a court auction is confirmed, the confirmation relates back to the date on which the auction was held and the property therefore vests in the owner with effect from that date. S. 65, Civil P. C., is to this effect and runs thus:

> Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

It follows that directly the sale was confirmed the property became vested in Ramditta Mal with effect from 6th May 1936, whatever may have been the proceedings taken in connexion with the confirmation of the sale by Attar Singh in the meantime. Ramditta Mal should for the purposes of this suit have therefore been taken to be the owner of the property during the period for which he has claimed rent. Again S. 116, Evidence Act, is to the following effect:

> No tenant of immovable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

It is plain that Charat Singh is barred by this Section from denying the title of Ramditta Mal during the continuance of the tenancy created by the lease. The learned Appellate Judge has observed that S. 116, Evidence Act, did not apply because Charat Singh was already in possession when he executed the lease deed and Ramditta Mal did not put him into possession. I do not agree with this view of the law. I am of opinion that once a tenant admits the title of his landlord and acknowledges that he is the person to whom he shall pay the rent, S. 116 will apply and that it does not make any difference whatsoever whether that landlord has put him into possession or whether the tenant has merely attorned to him. Of course it is open to every tenant to prove that he attorned under coercion or as a result of fraud, misrepresentation or mistake, but subject to this modification every tenant is estopped from denying the title of his landlord when with open eyes he has attorned to him and has admitted that he was entitled to receive the rent. The view of the learned Senior Sub-Judge is wrong on this aspect of the case also. It is agreed before me by the parties that Rs. 12-8-0 has been received by Ramditta Mal out of the sum claimed (Rs. 140). I therefore accept the petition, set aside the order of the lower Appellate Court and pass a decree for Rs. 127-8-0 in favour of Ramditta Mal against Charat Singh. Ramditta Mal shall have his proportionate costs throughout.

R.M./R.K. *Petition accepted.*

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## A. I. R. 1938 Peshawar 50

ALMOND J. C.

*Vaishnodas and another* — *Plaintiffs* — Petitioners.

v.

*Rehmat Khan Nawab Khan and another* — *Defendants* — Respondents.

Civil Revn. No. 80 of 1938, Decided on 14th June 1938, from order of Sub-Judge, Second Class, Peshawar, D/- 4th March 1938.

**(a) Civil P. C. (1908), O. 33, R. 7—Court has power to deal with technical objections under R. 5 before hearing witnesses produced by parties.**

Court has under O. 33, R. 7 power to dismiss the application either because on the evidence produced it is not satisfied that the petitioner is a pauper or because the petition falls within some of the prohibitions specified in Rule 5. Hence there is no objection to the Court in dealing with the technical objections mentioned in R. 5 before hearing the evidence as to whether the petitioner is actually a pauper or not. [P 51 C 1, 2]

**(b) Civil P. C. (1908), O. 33, R. 2—Property which is subject-matter of suit is not exempt.**

The property which is the subject-matter of the suit is not exempted from the operation of R. 2. [P 51 C 2]

**(c) Civil P. C. (1908), O. 33, R. 5 — Applicant even though possessed of immovable property not including it in schedule—Application must be dismissed.**

Where it is apparent on the face of the application to sue in forma pauperis that the applicant is possessed of immovable property which he has not included in a schedule and on which he has placed no value, the application must be dismissed: *A I R 1932 Pat 308 ; A I R 1932 Lah 548; A I R 1932 Lah 328 ; A I R 1928 Pat 28 and A I R 1923 Oudh 118, Expl. ; 7 L B R 60, Rel. on.* [P 52 C 1]

L. Manohar Lal — *for Petitioners.*

K. Abdul Wahab — *for Respondent 1* (Rehmat Khan.)

**Order.** — This is an application for revision of the order of the Subordinate Judge, Second Class, dated 4th March 1938 refusing the petitioners permission to sue in forma pauperis. The application was presented on 7th January 1938. On 10th January the Court Reader drew the attention of the Court to the fact that the application was not accompanied by the schedule of property required by O. 33, R. 2. On the same date notices were issued to the defendants and to the Collector. The Collector did not intervene in the proceedings but counsel for the contesting defendant was present on 25th February and on that date raised the point that the absence of the schedule of property was fatal to the application. It may be noted that prior to that date the parties had been required to produce their witnesses but in view of this objection being raised the witnesses were not heard and the case was fixed for arguments on the question of the schedule for 2nd March. Three points have been taken by learned counsel for petitioners. The first is that it was incompetent for the Court to dismiss the application without hearing the petitioners' witnesses. The second is that the only property possessed by the petitioners is the subject-matter in dispute and is therefore not included in the property referred to in R. 2. The third point taken is that even if there ought to have been a schedule of property, the defect could have been cured by the Court directing the petitioners to amend their petition.

As regards the first point, it should be noted that the Court has power without notice being issued to the respondent or to the Collector to reject an application for permission to sue in forma pauperis under R. 5 where it is not framed as required by R. 2. If it is not rejected in limine, notice has to be given for the hearing of evidence under R. 6, and under R. 7 (1) it is directed that on the date so fixed or as soon after as may be convenient, the Court shall examine the witnesses produced by the parties. Under R. 7 (2) the Court has also to hear any arguments which the parties may desire to offer on the question of whether the application is not subject to any of the prohibitions specified in R. 5. It appears to me that the Court has under R. 7 power to dismiss the application either because on the evidence produced it is not satisfied that the petitioner is a pauper or because the petition falls within some of the prohibitions specified in R. 5. I can therefore see no objection to the procedure which has been taken by the Court in this case in dealing with the technical objections mentioned in R. 5 before hearing the evidence as to whether the petitioner is actually a pauper or not.

As regards the second point it is contended by learned counsel that the residential house of the petitioners, which is mentioned in the petition as the subject-matter of the suit, need not be included in the property to be given in the schedule prescribed by R. 2. This does not appear to me to be the correct interpretation of that rule. The property which is the subject-matter of the suit is not exempted from the operation of R. 2. Furthermore there is nothing in the plaint to show that the residential house mentioned in the plaint is the subject-matter of the suit. The suit is for a decree to set aside a decree obtained by defendant 1 against the plaintiffs. Learned counsel for the petitioners informs me that that decree was a money decree and that in execution thereof the residential house of the plaintiffs has been attached and sold to the decree-holder. There is however no mention of these facts in the plaint. I am unable therefore to hold that, even if the first contention of learned counsel were correct, there is anything to show that the residential house of the plaintiffs is the subject-matter of the suit.

As regards the question whether the petitioners should be allowed to amend their application, I have been referred by learned counsel to the following cases: In A I R 1932 Pat 308[1] it was held that the omission of moveables of small value from the schedule of the property should not be fatal to the suit. It has to be observed however that a schedule was actually put in in that case. A I R 1932 Lah 548[2] is only an authority for the proposition that it is the application and not the schedule of property which is to be signed and verified. In A I R 1932 Lah 328[3] the facts are not very clear; but it is apparent at any rate that a schedule of property was filed with the application. In A I R 1928 Pat 28[4] there was also a schedule filed and the point at issue was the omission from that

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1. Mt. Chamela Kuar v. Pursottam Das, (1932) 19 A I R Pat 308=140 I C 74=13 P L T 538.
2. Amar Nath v. Rattan Chand, (1932) 19 A I R Lah 548=138 I C 652=33 P L R 733.
3. Praphull Dev v. Sham Lal, (1932) 19 A I R Lah 328=138 I C 335.
4. Brij Ballab Lallji v. Beney Krishna, (1928) 15 A I R Pat 28=104 I C 864=8 P L T 794.

schedule of one item, to wit an interest under a will. In A I R 1923 Oudh 118[5] the schedule of moveable property was attached but no schedule of immovable property, although the petitioner had immovable property. It was held that the defect was fatal to the case. In 20 I C 640[6] it was held that as no schedule of the property was attached, the application should be dismissed. It is not apparent from the judgment in that case whether as a matter of fact the petitioner had any property or not. In this case on the reading of the application it is apparent on the face of it that the plaintiffs are possessed of immovable property which they have not included in a schedule and on which they have placed no value. For these reasons I am of opinion that the application was correctly dismissed and I dismiss this petition with costs. Pleader's fee Rs. 30.

D.S./R.K. *Petition dismissed.*

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[5] Sheo Narayan Lal v. Mt. Munaqqa, (1923) 10 A I R Oudh 118=74 I C 344.

[6] Kali Kumar Sen v. N. N. Burjorjee, (1913) 7 L B R 60=20 I C 640.

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## A. I. R. 1938 Peshawar 52

ALMOND J. C.

*Firm Kahan Chand-Gobind Ram, Lahore, through L. Kidar Nath, Proprietor — Decree-holder —*
Appellant.

v.

*Nawabzadi Roshan Jan, Objector and others — Judgment-debtors —*
Respondents.

Appeal No. 140/62 of 1937, Decided on 27th June 1938, from order of Senior Sub-Judge, Abbottabad, D/- 6th August 1937.

**Civil P. C. (1908), O. 21, R. 90, Proviso (N. W. F. P.) — Decree-holder taking out execution against legal representatives of deceased judgment-debtor—Property attached and agent of *R*, widow of judgment-debtor, served with notice under O. 21, R. 66 — Agent making endorsement on notice of inability to appear because of illness — Sale taking place—*R* putting in objection alleging that property sold formed part of property given to her in lieu of dower and also alleging fraud in conduct of sale — Objection of *R* held one under O. 21, R. 90—Proviso to O. 21, R. 90 applied and sale could not be set aside as there was no material irregularity in conduct of sale.**

*K*, who had a decree against one *A*, took out execution after his death, against his legal representatives. The property was attached and the agent of *R*, one of the widows of the deceased judgment-debtor, was served with notice under O. 21, R. 66 on 15th June 1936 for appearing in Court on 22nd June 1936. He endorsed the notice to the effect that he was lying ill in hospital after an operation and was therefore unable to attend Court on the date fixed. The sale took place on 6th August 1936 and *R* put in objection to the sale of the property alleging that it was part of the property given to her in lieu of dower and that the sale had been conducted fraudulently :

*Held R's* interests were affected by the sale and she was entitled to prefer an objection under O. 21, R. 90. That the Proviso to O. 21, R. 90 however applied to the case and the sale could not be set aside as the objection made by *R* could have been made before the sale was conducted and the fact that an agent was lying ill was not sufficient ground for the objection not having been made before the sale. That as the objector did not appear nor was represented when the conditions of the sale were published, it could not be said that there had been any material irregularity in publishing and conducting the sale : *15 Cal 488 (FB), Disting.* [P 53 C 2]

**Judgment.** — The appellants Kahan Chand Gobindram held a decree against the late K. B. Ahmad Khan of Serai Saleh and after his death they instituted execution proceedings making his representatives his three sons and two widows. Amongst other property which they attached in execution is the house now in suit. The property was attached and on 15th June 1936 the agent of Mt. Roshan Jan, one of the widows, was served with a notice under O. 21, R. 66, Civil P. C. The notice was issued on 8th June and was for appearance in Court on 22nd June 1936. The agent of Mt. Roshan Jan endorsed this notice to the effect that he was lying in hospital after an operation and was therefore unable to attend the Court on the date fixed. The sale took place on 6th August 1936 and on 8th August 1936 Mt. Roshan Jan put in objections to the sale of the property alleging that it was part of the property given to her in dower in lieu of Rs. 40,000, that the sale had been conducted fraudulently and that therefore the sale should be set aside. Evidence was recorded on behalf of the objector. It consisted of two marginal witnesses to a registered dower deed in favour of the objector, the statement of a patwari relating to certain entries regarding the property in the revenue records and the statement of the agent of the objector stating that he had been ill in hospital when he was served with a notice under O. 21, R. 66 and that he had attended the Court two days after the sale when he had been allowed to do so by the Doctor. After recording this evidence the executing Judge dismissed the objection on the ground that it was an objection made under O. 21, R. 58

and therefore could not be made after the sale had taken place. An appeal was preferred by Mt. Roshan Jan in this Court, and in the appellate order of this Court dated 7th May 1937 in Appeal No. 187 of 1936, it was held that the objection had not been preferred under O. 21, R. 58 as Mt. Roshan Jan, as one of the representatives of K. B. Ahmad Khan, was a party to the execution proceedings and therefore her objection must be decided under S. 47, Civil P. C. The case was therefore remanded for decision on its merits.

On remand the question of whether the application fell under O. 21, R. 90 was argued and the learned executing Judge held that that order was not applicable in view of a certain passage at p. 819 of Mulla's Civil Procedure Code which he quoted in full. He held that Mt. Roshan Jan held the property by paramount title created before the proceedings and that therefore she could not be evicted from possession of the house by the decree-holders unless they satisfied her charge. He remarked however that the property could be resold subject to her charge and he formally allowed her objection. It may be noted in this connexion that the objector's case was not that she had a charge on the property but that the property had been conveyed to her in full ownership by the dower deed. S. 47 of the Code provides that all questions arising between the parties to a suit in which the decree was passed or their representatives and relating to the execution, discharge and satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit, and it has been held in the order of this Court that Mt. Roshan Jan is a representative of a party to the suit and therefore any question arising between her and the decree-holders must be decided in execution proceedings. Under O. 21 from R. 58 to R. 92 are included the modes in which an objection can be taken by parties to the proceedings or by third parties to attachments and sales of immovable property. The objection of Mt. Roshan Jan is an objection to the sale. There are three modes in which an objection to a sale can be taken. They are contained in Rr. 89, 90 and 91. The only possible rule applicable in the present case is R. 90 and it is provided in R. 92 that where no application is made under R. 89, R. 90 or R. 91 or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute. It has been held by the Court below that the objection was not made under R. 90 and therefore in those circumstances the sale had to be confirmed and became absolute. As a matter of fact, it appears to me that the objection which was made by Mt. Roshan Jan was an objection under R. 90. Rule 90 reads as follows :

> Where any immovable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it.

The passage in Mulla's Civil Procedure Code on which the learned executing Judge relied is based on a judgment reported in 15 Cal 488.[1] The facts of that case are distinguishable from those of the present case. In that case the person objecting under R. 90 was not a party to the proceedings within the meaning of S. 47 and a right was left to him to establish his paramount title by a separate suit. Such a suit between Mt. Roshan Jan and the decree-holders would be barred in the present case and therefore her interests were affected by the sale and she was entitled to prefer an objection under R. 90. A second Proviso has however been added to R. 90 as in force in this province. It is to the following effect :

> Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted.

It is clear that the objections now made by Mt. Roshan Jan could have been made before the sale was conducted, and the fact that her agent was lying ill in hospital was not a sufficient ground for the objection not being made before the sale. A period of over six weeks intervened between the date he was served and the date on which the sale took place, and it is obvious that he could have made arrangement for his representation before the sale took place. The Proviso to R. 90 therefore applies to the facts of the present case. Apart from that no evidence whatever was produced by the objector to show that there had been any material irregularity or fraud in publishing or conducting the sale. Had the objector appeared in answer to the notice under O. 21, R. 66 and then taken objection that the property did not belong to the original judgment-debtor and the sale had been ordered in spite of that, there would undoubtedly have been ground for holding that there had been a material irregularity in publishing the sale, but as the objector was not represented when the conditions of the sale were published, it cannot be said that there has been any material irregularity in publishing or conducting the sale. For these reasons I accept this appeal, set aside the order of the Court below dated 6th August 1937 and dismiss the objections of Mt. Roshan Jan. The appellants will have their costs against Mt. Roshan Jan, respondent 1, in both Courts. No other respondents have appeared and no orders as to their costs. Pleader's fee Rupees 50.

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[1] **Asmutunnissa Begam v. Ashruff Ali, (1888) 15 Cal 488 (F B).**

R.M./R.K. *Appeal allowed.*

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## * A. I. R. 1938 Peshawar 54

ALMOND J. C. AND MIR AHMAD J.

*Peoples Bank of Northern India Ltd.* — Petitioner.

v.

*Padam Lal Wasu Ram* — Respondent.

Civil Revn. No. 410 of 1937, Decided on 27th June 1938, against order of Dist. Judge, Derajat, D/- 31st August 1937.

*** (a) Companies Act (1913), S. 152—References to arbitration by limited liability companies—Arbitration Act alone applies—Award is executable by District Judge only and not by Sub-Judge.**

The word 'may' after the words 'a company' in the beginning of S. 152 does not go with the sentence 'in accordance with the Indian Arbitration Act, 1899', but with the words 'refer to arbitration. Again the existence of the words 'in accordance with the Indian Arbitration Act, 1899' in Cl. 1 of S. 152 is an indication that the Legislature considered it to be *de rigueur* that every reference by a limited liability company to arbitration should be in accordance with the Arbitration Act. Cl. 3 is conclusive on the point that the provisions of the Arbitration Act only apply to arbitrations to which a limited liability company is a party. Limited liability companies cannot refer to arbitration independently of this provision of the law and Sch. 2, Civil P. C., has no application. The Arbitration Act alone applies to all references to arbitration made by limited liability companies and hence the award is executable by the District Judge only and not by the Sub-Judge : *A I R 1934 Pesh 107, Foll.; AIR 1936 Lah 721, Dissent.* [P 56 C 2; P 57 C 1]

**(b) Companies Act (1913), S. 152—Reference under — Decree if passed is nullity — Decree passed and executed by Sub-Judge without objection does not make question decided therein res judicata.**

Where in a reference to arbitration by a limited liability company a decree is passed by a Sub-Judge and is executed without objection by the judgment-debtor, the question whether the decree could be executed in that Court or not does not become res judicata. The decree is a nullity in such arbitrations because it is the award which has to be executed. It follows that the Court should ignore the decree and the execution of such decree is ultra vires. A fortiori a point decided in such ultra vires proceedings cannot become res judicata. It is the award which has to be enforced and it can only be enforced by the District Judge and no one else : *A I R 1933 Pesh 66, Rel. on.* [P 57 C 2]

Besides this, the consent of the parties cannot confer jurisdiction where no jurisdiction exists : *11 Mad 26 (P C), Rel. on.* [P 57 C 2]

Sardar Saran Singh — *for Petitioner.*

**Mir Ahmad J.**—On 1st May 1931, the Peoples Bank of Northern India Ltd. and Padam Lal made a reference to arbitration. The arbitrator gave an award in favour of the Bank directing that Padam Lal should pay the sum of Rs. 1482-9-6 to it. The award was filed in the Court of the Senior Sub-Judge, Bannu on 15th July 1931, and made a rule of Court. The Peoples Bank of Northern India then went into liquidation and the Official Liquidator applied to the Court of the Senior Sub-Judge, Bannu, for execution of the decree. The judgment-debtor contended that the District Judge and not the Senior Sub-Judge was competent to enforce the award. He relied on a ruling of this Court reported in A I R 1934 Pesh 107[1] in which it was held that by virtue of S. 152, Companies Act, read with the Arbitration Act, an award of an arbitrator made on a reference to which a limited liability company is a party is executable by the District Judge. The objection prevailed with the executing Court and the appellate Judge also dismissed the appeal. The Peoples Bank of Northern India has come up on revision to this Court. The learned counsel who appeared for the petitioner invited the attention of the Judge in Chambers before whom the revision was placed for decision, to A I R 1936 Lah 721,[2] a Full Bench ruling, in which the Judges of the Lahore High Court have held that a reference to arbitration by a limited liability company is not always under S. 152, Companies Act, that unless and until it is categorically mentioned in the reference that it is being made under the Companies Act and is therefore governed by the Arbitration Act, it should be presumed to have been made under the Civil Procedure Code and that an award based on a reference in which no such mention is made is not necessarily executable by the District Judge. As this decision of the Lahore High Court came in conflict with the view of this Court expressed in A I R 1934 Pesh 107[1] the case was referred to the Bench for reconsideration of the point.

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[1] Kewal Krishan v. Punjab National Bank Ltd., (1934) 21 A I R Pesh 107=151 I C 860.

[2] Balmukand v. Punjab National Bank Ltd., Ambala, (1936) 23 A I R Lah 721=164 I C 393=17 Lah 722=39 P L R 35 (F B).

The question of reference by limited liability companies came up for the first time before the Bench of this Court in A I R 1933 Pesh 66.[3] The award had been filed in the Court of the District Judge and a decree had been passed in accordance with the award. In the meantime the Court of the District Judge was denominated the Court of Senior Sub-Judge and the Court of Appeal called the Divisional Judge was designated the Court of District Judge. The decree was sought to be executed in the Court of the Senior Sub-Judge. The judgment-debtor contended that by virtue of S. 152, Companies Act, the provisions of the Arbitration Act were applicable to the arbitration, that according to that Act the award itself was to be executed and no decree was necessary, and that the decree which was being executed was therefore a nullity. The Bench held that all references by limited liability companies were by operation of S. 152, Companies Act, governed by the provisions of the Arbitration Act, that under the Arbitration Act the award itself was to be enforced and no decree was necessary, that the decree which had been passed was a nullity and should be ignored, and that the award itself should be executed. The Judges made the following observation towards the end of their judgment :

> It is doubtful whether the Senior Sub-Judge as such would be in a position to proceed with the execution in view of the definition of Court as given in the Arbitration Act. If it is found that the Senior Sub-Judge cannot proceed with the execution the petition may be returned to the Bank to be presented to the District Judge, Derajat.

The Senior Sub-Judge did find that the award should be executed by the District Judge. He returned the execution petition to the decree-holder to be presented to that Court. The District Judge refused to execute the award holding that it was not necessary that he should do so. The case therefore came up again before a Bench of this Court and the judgment is reported in A I R 1934 Pesh 107.[1] The Bench reiterated that S. 152, Companies Act, applied to references made by limited liability companies, that according to that Section the provisions of the Arbitration Act excepting those which limit its scope to the presidency towns or to the areas specially notified for the purpose, applied to such references, and that the Arbitration Act having laid down that such awards should be executed by the District Judge, that Court alone was competent to execute them. It was directed therefore that the execution should be taken up by the District Judge himself.

Now we will discuss the ruling given by the Full Bench of the Lahore High Court. The judgment was delivered by Bhide J. and was concurred in by two other Judges. Bhide J. reproduced S. 152, Companies Act, which runs as under :

> (1) A company may by written agreement refer to arbitration in accordance with the Arbitration Act, 1899, an existing or future difference between itself and any other company or person.
>
> (2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.
>
> (3) The provisions of the Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of this Act.

He stressed the point that the word used was "may" and the expression "in accordance with the Arbitration Act of 1899" went with it. It was observed that the word "may" when read with "in accordance with the Arbitration Act, 1899" made it clear that it was for the company to decide whether the reference should be made in accordance with the Arbitration Act of 1899 or not, and that when it is not specifically mentioned in the reference that the provisions of that Act shall apply, they shall not be applicable. The Judge concluded that a reference by a company was normally under Sch. 2, Civil P. C., and was subject to the provisions of the Civil Procedure Code and not of the Companies Act and therefore of the Arbitration Act. The learned Judge then proceeded to lay great stress on the words "in pursuance of *this* Act" *(italics is ours)* which he says occur at the end of Cl. 3 of Sec. 152. He made the following observations:

> There are other indications also in the Section and other parts of the Act which lead to the same conclusion, for instance if the procedure laid down in S. 152 were obligatory the words "in

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[3] Punjab National Bank v. Kewal Krishan, (1933) 20 A I R Pesh 66=143 I C 485.

pursuance of the Act" occurring at the end of sub-section 3 of the Section would seem to me wholly redundant. On the other hand if the Section is merely an enabling one, the words would be perfectly intelligible; for they would serve to show in that case that the provisions of the Section would apply when the parties decide to go to arbitration, in pursuance of the Act,' i. e., when they agree that the arbitration proceedings should be governed by the Arbitration Act.

The learned Judge then referred to Sec. 214, Companies Act, as it stood before the Act was amended in 1937. It deals with a dispute between a liquidator and a shareholder about the price of the latter's interest, and provides that if the dispute cannot be determined by agreement, it shall be settled by arbitration. Clause 2 lays down that the provisions of the Indian Arbitration Act shall apply to all arbitrations in pursuance of the Section. The learned Judge pointed out that there would have been no necessity for making this special provision in Cl. 2 if all references to arbitration by limited liability companies were covered by S. 152, Companies Act, and therefore controlled by the provisions of the Arbitration Act. The fact that the Legislature made such special provision in Cl. 2, S. 214, was in the opinion of the learned Judge sufficient to show that Sec. 152, Companies Act, gave only an option to a limited liability company to make reference to arbitration under the Indian Arbitration Act and did not make that Act apply to all arbitrations to which such a company was a party. Turning to the Civil Procedure Code the learned Judge remarked that there was nothing in that Code to exclude a reference by a limited liability company. Lastly the learned Judge adverted to the fact that the Arbitration Act originally applied to the presidency towns only, that it could only be extended to such areas as the Local Government may notify in that behalf, and that in the Punjab a special Act had been passed (Act 1 of 1911) by which the Arbitration Act even if extended to any area could only apply if the parties expressly declared by an agreement in writing that their arbitration shall be governed by it. On these grounds the Full Bench was of opinion that an award based on a reference to which a limited liability company is a party is not necessarily governed by the Arbitration Act and may be enforced by the Courts in the ordinary way.

Unfortunately the respondent did not appear in this case and we have not had the benefit of hearing the other side. We have however given our best consideration to the question and have perused all the authorities relevant to the question. We have come to the conclusion that no case has been made out for our departing from the opinion expressed by this Court in A I R 1934 Pesh 107.[1] In our opinion the word "may" after the words "a company" in the beginning of S. 152 does not go with the sentence "in accordance with the Indian Arbitration Act 1899," but with the words "refer to arbitration." It is obvious that the word "shall" could not be used because then it would become incumbent on the companies to refer every existing or future dispute to arbitration. The making of the reference being optional, the draftsman had to use the word "may" and consequently it does not bear the construction placed upon it by their Lordships of the Lahore High Court. Again, we think that the existence of the words "in accordance with the Indian Arbitration Act 1899" in Cl. 1 of S. 152 is an indication that the Legislature considered it to be *de rigueur* that every reference by a limited liability company to arbitration should be in accordance with the Indian Arbitration Act. We know that the Indian Arbitration Act lays down certain rules with regard to the submission to be made to the arbitrator and it is clear that by inserting these words, the Legislature intended that the company should from the very beginning proceed according to those rules. We do not therefore attach the same signification to the words 'in accordance with the Indian Arbitration Act, 1899,' as the learned Judges of the Lahore High Court do.

Then we think that Cl. 3 is conclusive on the point that the provisions of the Indian Arbitration Act only apply to arbitrations to which a limited liability company is a party. The word "shall" has been used in this clause which leaves no option in the matter. In this connexion we wish to point out with due respect that the last words of this clause seem to have been misunderstood by their Lordships of the Lahore High Court. The last five words of this clause are "in pursuance of *this* Act" *(italics is ours)*. The learned Judges of the Lahore High Court have read this to be "in pursuance of *the* Act" *(italics is ours)*. In other words they have read "the" for "this" and it makes a great difference. No doubt if the word "the" had occurred before the word "Act" the argument of the learned Judges would have had a great force, but the word "this" leaves us in no doubt that the Companies Act is intended and not the Arbitration Act. If "this Act" means the Companies Act, as it obviously does, then there can be no two opinions that the Legislature intended that all arbitrations in pursuance of the Companies Act shall be subject to the provisions of the Arbitration Act. We do not find ourselves in agreement with this portion of the argument of their Lordships of the Lahore High Court also.

We have shown above that S. 152, Companies Act, specifically deals with references by limited liability companies and says that the submission should be made in accordance with the Arbitration Act and the procedure governing the reference shall also be that contained in that Act. We are firmly of opinion that in the circumstances limited liability companies cannot refer to arbitration independently of this provision of law and that Sch. 2, Civil P. C., has no application. We are fortified in this opinion by S. 3, Arbitration Act, and S. 89, Civil P. C. S. 3, Arbitration Act, is in the following terms:

> The last 37 words of Sec. 21, Specific Relief Act 1877, and Ss. 523 to 526, Civil P. C., shall not apply to any submission or arbitration to which the provisions of the Act for the time being apply.

Sections 523 to 526, Civil P. C., we may note, represent Sch. 2, Paras. 17, 19, 20 and 21 which deal with the order of reference on agreements to refer to an arbitration without the intervention of a Court. Cl. 1, S. 89, Civil P. C., is to the following effect:

> Save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Sch. 2.

It needs no argument to show that these two provisions of law when read along with sub-s. 3 of Sec. 152, Companies Act, make it indubitable that the Arbiration Act and the Arbitration Act alone applies to all references to arbitration made by limited liability companies. The result is that we agree with the view of the two Courts below that the award is executable by the District Judge only and not by the Senior Sub-Judge, Bannu. The learned counsel for the petitioner has raised two other questions also for consideration. First that the decree having once been passed by the Senior Sub-Judge and no appeal having been preferred against it, it was not open to the trial Court to go behind it, and second that the Court of the Senior Sub-Judge having already executed the decree on previous occasions without objection by the judgment-debtor the question whether the decree could be executed in that Court or not had become res judicata in favour of the petitioner. We do not agree with the learned counsel on these points also. A Bench of this Court has already held in A I R 1933 Pesh 66[3] that the decree is a nullity in such arbitrations because it is the award which has to be executed. It follows that the Court should ignore the decree and the execution of such decree is ultra vires. A fortiori a point decided in such ultra vires proceedings cannot become res judicata. It is the award which has to be enforced and it can only be enforced by the District Judge and no one else. We may point out in this connexion that the consent of the parties cannot confer jurisdiction where no jurisdiction existed. Their Lordships of the Privy Council have in 11 Mad 26[4] at p. 35 enunciated this proposition in very clear and lucid terms. They say:

> It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had, to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point, it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case in *Ledgard* v. *Bull*,[5] as it in very concise terms deals with the circumstances under which there can be a waiver of a right to complain of a want of jurisdiction. Their Lordships say: The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought; and their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his juris-

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[4] **Minakshi Naidu v. Subramanya Sastri, (1888) 11 Mad 26=14 I A 160=5 Sar 54 (P C).**

[5] **(1887) 9 All 191=13 I A 134=4 Sar 741 (P C).**

diction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. In the present case there was inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed.

For the reasons given above we dismiss the petition.

D.S./R.K. *Petition dismissed.*

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## A. I. R. 1938 Peshawar 58

ALMOND J. C. AND MIR AHMAD J.

*Ismail Khushal and others—Plaintiffs* — Appellants.

v.

*Yakub Madad Khan and others — Defendants* — Respondents.

Appeal No. 146/28 of 1937, Decided on 20th June 1938, from Judgment of Senior Sub-Judge, Peshawar, D/- 18th October 1937.

**(a) Custom (N. W. F. P.)—Awans — Awans have unrestricted power of making testamentary dispositions of their property — Will in favour of sister's sons to total exclusion of collaterals is valid.**

Statements in Riwaj-i-am and the manuals of customary law in accordance with Riwaj-i-am issued by authorities for each district are admissible subject to rebuttal as evidence of custom even if unsupported by instances: *A I R 1928 P C 294, Rel. on.* [P 59 C 2]

The case of each tribe should be decided on its own custom. Awans are governed by Awan Customary law and the mere fact that they live in a village Kukar which is part of Tapa Daudzai does not alter the position. According to the customary law of Awans, the Awans have unrestricted power of making testamentary dispositions of their property and hence a will in favour of sister's sons to the total exclusion of collaterals is valid: *Case law reviewed.* [P 60 C 1, 2; P 61 C 1, 2]

**(b) Evidence Act (1872), S. 145—Examination of witness regarding statements to police — Witness not confronted with statement — Statement is inadmissible.**

In an examination of a witness regarding his statement to the police, he had not been confronted with the statement which he made to the police:

*Held* that the statement was not admissible in evidence. [P 61 C 2]

Saaduddin Khan — *for Appellants.*

S. Raja Singh and Saidali Shah — *for Respondents 1 and 4 to 8 respectively.*

**Mir Ahmad J.** — One Faizullah Khan, the lambardar of village Kukar, made a will on 7th July 1925 by which he left all his property to the sons of his sisters, that is to say Ismail, Akram, Sardar and Gul Badshah. Faizullah was murdered on 5th October 1935. His property was mutated in the names of his collaterals. Consequently the four beneficiaries under the will brought this suit for a declaration that the will was duly executed and was operative, and that the mutation of the property of Faizullah Khan in favour of his collaterals was ineffective and liable to cancellation. The defendants took up several pleas and the trial Judge therefore framed the following issues:

(1) Whether the suit in the present form is competent ? (2) Is the value for purposes of jurisdiction correct ? (3) Whether the will in question was executed by the deceased and is genuine ? (4) If so, whether Faizullah Khan was competent to make the will both according to custom and shariat ? (5) Whether the parties are governed by custom or shariat ? (6) To what relief are the plaintiffs entitled and in respect of what property?

Abdul Rashid, the scribe of the will, appeared to say that he wrote it for Faizullah Khan. Atar Singh and Pir Mohammad, two marginal witnesses, deposed that the will was duly executed by Faizullah Khan. Mohammad Anwar Beg, Patwari of Kukar, said that a part of the property left by Faizullah Khan was in possession of the plaintiffs. So did Firdaus Khan, Patwari of Nachapa Payan, in which village also Faizullah Khan had lands. One Abdul Ghani stated that Feroz a cousin of Faizullah Khan, had willed all his property to his sister Mt. Fakhar Nissa. A copy of the mutation of the property of Feroz in favour of Mt. Fakhar Nissa was also placed on the file. The Naib Judicial Qanungo, Peshawar, produced a copy of S. 21 of the Riwaj-i-am of 1870. For the defence Mohammad Akbar Shah, Sub-Inspector, was produced who said that he investigated the case relating to the murder of Faizullah Khan. He stated that Akram made the statement before him that the deceased had made a will. He admitted that Akram had first told him that the will had been lost by Attar Singh with whom it was kept but informed him later that the will had been found.

The trial Judge decided Issues 1 and 2 in favour of the plaintiffs because they were not seriously contested. As regards Issue 1 he also added that there was sufficient evidence on the file to show that the plaintiffs were in possession of some of the property and that therefore a suit for declaration was competent. Regarding Issue 5 he observed that the counsel on both sides admitted that the parties were governed by custom. Under Issue 3 he held that the will was duly executed. As to Issue 4 he gave the finding that the will was invalid.

In doing so he depended on the judicial pronouncements of this Court in the following cases: Civil Appeal No. 167/27 of 1925; Civil Appeal No. 198/48 of 1926; 66 J R; 78 J R; 104 J R; 2 J R 34;[1] 2 J R 28;[2] and 2 J R 29.[3] He has summed up his finding on this issue in the following paragraph:

> Tapa Khalsa, Tapa Mohmand, Tapa Daudzai and Tapa Khalil within the Peshawar District are almost contiguous to each other and the trend of authorities in such cases shows that a will to the total exclusion of near collaterals would not be justified and that a will can be made in favour of widow, sons and daughters, but there is no authority for holding that a will can be made in favour of the sons of one's sister of the entire estate of the testator to the total exclusion of his collaterals. Reading the rulings as they stand and following the principles which seem to have been adopted almost in conformity with the earlier rulings in the Judicial Record, it must be held that the will in favour of the plaintiffs to the exclusion of the collaterals of the deceased Faizullah cannot be upheld by the custom prevailing within the Peshawar Tahsil and different Tappas. I must therefore find Issue 4 against the plaintiffs.

The suit was therefore dismissed. The beneficiaries under the will have come up on appeal to this Court. On appeal it has been pointed out that Faizullah Khan was an Awan, that village Kukar is occupied by Awans, though administratively it has been made a part of Tapa Daudzai, that Daudzai Pathans have customs different from those of Awans, and that according to Awan custom Faizullah Khan had full right to make a testamentary disposition of his property. To prove this last allegation our attention was invited to paras. 92 and 93 of Lorimer's Hand-book of Customary Law of Peshawar District compiled at the Settlement of 1895-96 which counsel urged were in his favour, and to the fact that one Feroz who was a cousin of Faizullah Khan had similarly given all his property to his sister Mt. Fakhar Nissa. The learned counsel for the appellants has urged that in view of the pronouncement of their Lordships of the Privy Council in A I R 1928 P C 294[4] (case from this Court) the statement of custom recorded in Lorimer's Hand-book was per se evidence of the existence of the custom irrespective of any instances in support of it. Counsel pointed out that his clients had however proved an instance also in support of the recorded custom, that is to say the will by Feroz, a cousin of Faizullah Khan, in favour of his sister. Counsel urged that as against this evidence there was nothing on the file to show that the recorded custom was incorrect, and that in the absence of rebuttal the recorded custom must have its way as implied in the judgment of their Lordships of the Judicial Committee quoted above.

The learned counsel for the respondents said that no custom of testamentary disposition had been proved to exist amongst Awans, that village Kukar being situated in Tapa Daudzai the custom of Daudzai Pathans should be taken to apply, and that according to custom prevailing amongst Daudzai Pathans the power of will-making was restricted to only a portion of the property being given to dependants. For the custom prevailing amongst Daudzai Pathans he relied on the authorities of this Court in particular Judicial Record No. 66. The position of recorded custom has been made very clear by their Lordships of the Judicial Committee in the ruling referred to. It will be useful to reproduce what their Lordships have said in this connexion:

> In these circumstances it has been rightly held in the Lahore Court in the case above mentioned that, where a custom is alleged, a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom; and the Local Government has come to their assistance by establishing a Riwaj-i-am or record of custom in the different parts of the Punjab, including the North-West Frontier Province which was formerly included in it. It has been held by this Board that the Riwaj-i-am is a public record prepared by a public officer in discharge of his duties and under Government rules; that it is clearly admissible in evidence to prove the facts entered therein subject to rebuttal and that the statements therein may be accepted even if unsupported by instances: *Beg* v. *Allahditta*,[5] *Ahmad Khan* v. *Mt. Channi Bibi*.[6] Further, manuals of customary law in accordance with Riwaj-i-am have been issued by authority for each district, and in their Lordships' opinion stand on much the same footing as the Riwaj-i-am itself as evidence of custom. In these circumstances their Lordships are of opinion that, even though there be no evidence of instances, still, if the custom spoken to by the party's witnesses is in accordance with the custom applicable to his community according to the Manual of the Customary law of the district, there is sufficient prima facie evidence of the existence of the custom, subject, of course, to rebuttal and that it ought not to be insufficient merely for want of instances.

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1. **Zaman Khan v. Mt. Sultana, (1933) 20 A I R Pesh 44=144 I C 320=2 J R 34.**
2. **Aurang v. Kalam Khan, (1936) 23 A I R Pesh 94=2 J R 28.**
3. **Sultan v. Wazir, (1936) 23 A I R Pesh 92 = 2 J R 29.**
4. **Mt. Vaishno Ditti v. Mt. Rameshri, (1928) 15 A I R P C 294=113 I C 1 = 10 Lah 86 = 55 I A 407 (P C).**
5. **(1916) 3 A I R P C 129=38 I C 354 = 44 Cal 749=44 I A 89=45 P R 1917 (P C).**
6. **(1925) 12 A I R P C 267=91 I C 455 = 6 Lah 502=52 I A 379 (P C).**

When we apply the principles enunciated in this authoritative pronouncement it becomes clear that the onus lies on the plaintiffs in the first instance to prove their claim that custom authorizes the will made by Faizullah Khan. In this connexion they wish us to consider questions and answers 92 and 93 of Lorimer's hand-book, which, according to their Lordships, are relevant pieces of evidence by themselves and do not need any instances to support them. When considering these questions and answers we have first to decide whether the custom of Awans or the custom of Daudzai Pathans should apply to this case. Faizullah Khan was an Awan and there is no reason why the custom of Awans should not apply to him. The mere fact that this Tapa is called Tapa Daudzai, which is a very vague geographical division, does not in our opinion alter the situation. Now question 92 runs thus:

> Power of a proprietor to make by word of mouth or in writing a disposition of his property to take effect after his death ?

The answers of several tribes have been recorded in reply to this question but the Awans are not mentioned at all. The Daudzais were inclined to refer all questions of wills to the test of Shariat. The next question 93 is: "Limitation of the power of bequest." In reply to this question the Awans acknowledged that there were no restrictions on the power of bequest. It is obvious that if there were no restrictions on the power of bequest, the power of bequest was there. The allegation of the learned counsel for the respondents that the absence of reply from Awans to question 92 showed that there was no recorded custom regarding them is negatived by question and answer 93. We therefore hold that according to recorded custom Faizullah Khan who was an Awan, had a power to dispose of his property by a will and that there was no limitation on him in the matter. In addition to this we have got the family instance of Feroz who gave all his property to his sister and his will was carried into effect. Keeping their Lordships' view in mind this evidence should be sufficient to establish the plaintiffs' case if no rebuttal is forthcoming; in other words the onus which initially rested on the plaintiffs is shifted to the defendants.

The defendants have not proved anything to show that the recorded custom is wrong. They have depended upon the rulings of this Court made from time to time by the Judicial Commissioners of this Province. We do not propose to go into them in detail so far as the generalizations made in them with respect to the Pathans of Peshawar District are concerned; for we think that the case of each tribe should be decided on its own custom. We may however briefly give a survey of the judge-made law on the subject of will-making in Peshawar District to show that the generalizations contained in the judgments have influenced the learned trial Judge to a large extent in departing from the established principle that the case of every tribe must be decided on its own recorded Riwaji. In 2 J R 26[7] Mr. Bunbury, Judicial Commissioner, was of opinion that Pathans had an absolute right of making testamentary dispositions. He relied on the Riwaj of 1870 in which the power of transfer inter vivos was recognized amongst the Pathans. We may point out that no mention was made of will-making in this Riwaj. In 66 J R Mr. (now Sir William) Barton struck a discordant note. He held that although testamentary disposition was allowed in the Peshawar District, there were restrictions. What those restrictions were became the subject of various decisions from time to time and much time was spent in defining dependants and the portion which a testator could give of his property to such dependants. Eventually Mr. Pipon, Judicial Commissioner gave his judgment which is reported in J. R. No. 111.[8] In this judgment he noticed that in the Riwaj of 1870 the power of gift inter vivos was conceded but no mention was made of a power of bequest, that the result of the influence of British rule for 25 years was that in 1895 the power of making testamentary disposition was recognized, but in the case of some tribes restrictions were imposed on it, that the advance of modern civilization made will-making popular, and that by the time his judgment was being delivered the onward march had reached such a stage that will-making had become established in the district subject to the restriction that a minor son could not be disinherited and that a major son could only be disinherited for disloyalty.

In the case before us we do not propose to be guided by any general considerations. As remarked by their Lordships of the Privy Council every case has its own merits and must be decided on the proof adduced in favour of the custom and the rebuttal thereof. The only relevant authority brought to our notice by the learned counsel for the respondents is 2 J R 28[2] in which a Bench of this Court has held that amongst Awans of Tapa Khalsa a bequest to dependants of a portion of an estate even up to half was valid, but the total exclusion of a brother in favour of a nephew could not be permitted. We may note that the other rulings referred to by the trial Judge deal with tribes with which we are not now concerned. The head-note in 2 J R 28[2] runs as follows :

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[7] Bahadur Khan v. Official Receiver, (1936) 23 A I R Pesh 109=2 J R 26.

[8] Abdul Manan v. Mt. Faruqa, J R No. 111.

> It is difficult to determine exactly what restriction on the testamentary power exists among Awans; bequests of a portion of the estate even upto half to dependants, even to married daughters, are valid, but the devolution of the whole estate away from reversioners is a power which is not recognized.

In this judgment it was admitted that the Awans had a power of will-making. The Bench was not sure as to what were the restrictions on it. A reference was made to a case of Daudzais in which the same Bench had held that the exclusion of one heir in favour of another was not recognized. The Court then proceeded to say:

> We applied the principle which is now universally admitted to prevail amongst all tribes that a father may not totally disinherit a minor son, or a major son except for disloyalty. We pointed out that in our opinion there would be *a fortiori* no distinction between the position of a son to his father and that of a near heir like a brother to his brother. We think that the same argument applies in the case of Awans also, especially when the heir excluded stands in such close propinquity to the testator. Counsel for the nephews argues that it is not fair to apply to Awans a test which might be suitable to the Daudzais, because at the time of the revised settlement the Daudzais did not recognize the testamentary power, whereas according to Answer 93 of Lorimer's Customary Law the Awans acknowledged no restrictions upon it. It is urged that it would be more logical to apply rules which have been held to govern Muhammadzais who have the same answer to Question 93 as did the Awans. The most recent decision about the Muhammadzais is contained in J R No. 111[3] in which Mr. Pipon, Judicial Commissioner, laid down that a sonless Muhammadzai proprietor had an absolutely unrestricted power to will away the whole of his estate to daughters whether married or unmarried. On the material before him, Mr. Pipon was possibly correct in absolving the Muhammadzais completely from any restrictions. His judgment certainly dealt with the will-making power throughout the district as a whole, but in our opinion it must not be held that his decision did more than lay down what was necessary for the purpose of deciding the appeal before him, namely the rights of Muhammadzai proprietors. We are certainly not prepared to hold that an equally unrestricted right exists amongst the Awans.

We have quoted in extenso from the judgment to show the reasons on the strength of which the Bench of this Court held that there were restrictions on an Awan proprietor in the matter of making wills. It will be seen that it was admitted that no restriction was placed on the power of bequest by the Awans at the time when the Customary law was being recorded by Mr. Lorimer. It was not denied in the case of Muhammadzais who gave a similar answer to Mr. Lorimer that the Judicial Commissioner had only recognized two restrictions, to wit that he could not disinherit a minor son at all and a major son he could deprive only if he was disloyal. And yet in the end the Bench was not prepared to grant an unrestricted right of testamentary disposition to the Awans. It is evident that the decision was not arrived at on any evidence of custom but on general considerations only. We are of opinion therefore that this judgment has no probative value and the evidence adduced by the plaintiffs stands unrebutted. The result of the discussion given above is that the plaintiffs have proved that the will of Faizullah Khan was justified by the Custom of Awans.

The learned counsel for the respondents has however questioned the correctness of the finding of the learned trial Judge that the will was duly executed by Faizullah Khan. He has attempted to maintain the decree on the ground that no will existed. He pointed out that Pir Mohammad was a relation of the plaintiffs, and that Attar Singh had not stated to the police in the investigation of the murder case that a will had been made by Faizullah Khan. He urged therefore that there was no satisfactory proof of the genuineness of the document. We do not see any force in this argument. The learned counsel has not been able to say anything with regard to the scribe who is an independent person and whose evidence alone is enough to prove the will. We think that under the law the portion of the examination of Attar Singh regarding his statement to the police is inadmissible. He has not been confronted with the statement which he made to the Sub-Inspector. He was just asked to say from memory whether he had mentioned the will to the Sub-Inspector and he answered in the negative. Under S. 145, Evidence Act, it was necessary that he should have been confronted with it. We would therefore ignore this portion of his statement altogether. Attar Singh is a Sikh and has no bias either way. There is no reason why he should tell a lie. Consequently we hold that the finding of the learned trial Judge that the will was duly executed is correct. As a result the appeal is accepted, the order of the lower Court is set aside and the suit is decreed with costs throughout. Pleader's fee Rs. 200.

D.S./R.K. *Appeal accepted.*

## A. I. R. 1938 Peshawar 62

ALMOND J. C.

*Mt. Durga Devi w/o Kalu Mall and another* — Petitioners.

v.

*Rup Chand Duni Chand*— Respondent.

Civil Revn. No. 62 of 1938, Decided on 2nd June 1938, against order of Addl. Judge, Peshawar, D/- 14th January 1938.

**Succession Act (1925), S. 388—Appeal from order of Senior Sub-Judge on application under Act lies to Judicial Commissioner's Court and not to District Court.**

Where the Senior Sub-Judges have been invested with powers to hear applications under the Succession Act, but they have not been so empowered by a Notification of the Local Government published in the local official Gazette as required by S. 388, the normal course of appeal laid down in the N.-W. F. P. Courts Regulation is therefore not affected, and the appeal from an order made by the Senior Sub-Judge on an application under the Succession Act lies to the Judicial Commissioner's Court and not to the Court of the District Judge. [P 62 C 2]

L. Ram Parkash — *for Petitioners.*

L. Charanjit Lal — *for Respondent.*

**Order.**—This is a petition made by Mt. Durga Devi and one other for revision of the appellate order of the Additional Judge, Peshawar, reversing the order of the senior Sub-Judge, Mardan, by which the latter refused to grant a succession certificate to Rupchand, the respondent in the present case. The Appellate Court granted the certificate which Rupchand prayed for. The first point taken by learned counsel for the petitioners is that the District Court had no jurisdiction to hear this appeal and that the appeal from the order of the Senior Sub-Judge lay to this Court. The first two sub-sections of S. 388, Succession Act, read as follows :

(1) The Local Government may by notification in the local official Gazette invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this part.

(2) Any inferior Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge and the provisions of this Part relating to the District Judge shall apply to such inferior Court as if it were a District Judge.

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-s. (1) of S. 388 shall lie to the District Judge and not to the High Court and that the District Judge may, if he thinks fit, by his order on the appeal make any such declaration and direction as that sub-section authorizes the High Court to make by its order on an appeal from an order of the District Judge.

It is not suggested by either of the learned counsel who have appeared before me that any notification has been issued under this Section of the Act. S. 23 of the N.-W. F. P. Courts Regulation of 1931 reads as follows :

The Judicial Commissioner may by general or special order authorize any Subordinate Judge to take cognizance of and any District Judge to transfer to a Subordinate Judge under his control, any proceedings or any class of proceedings specified in such order under :

(a) the Succession Act, 1925, if the proceedings cannot be disposed of by the District Delegate.

By a general order all Subordinate Judges in this province have been authorized to take cognizance of such proceedings. S. 30 of the same Regulation reads as follows :

Save as otherwise provided by any law for the time being in force, appeals from decrees of Courts exercising original jurisdiction shall lie as follows ;

(a) in a suit of the value not exceeding Rs. 5000 to the Court of the District Judge, and

(b) in all other cases to the Court of the Judicial Commissioner.

It is clear in these circumstances that although Senior Sub-Judges have been invested with powers to hear applications under the Succession Act, they have not been so empowered by a Notification of the Local Government published in the local official Gazette as required by S. 388, Succession Act. The normal course of appeal laid down in the N.-W. F. P. Courts Regulation is therefore not affected, and the appeal in this case lay to this Court and not to the Court of the District Judge. I therefore accept this application on the ground that the order of the Additional Judge was made without jurisdiction and setting aside that order direct that he do return the memorandum of appeal to the appellant for presentation in the proper Court. The petitioners will have their own costs in this Court and pleader's fees are fixed at Rs. 30.

K.S./R.K. *Application accepted.*

## * A. I. R. 1938 Peshawar 63

ALMOND J. C. AND MIR AHMAD J.

*Punjab National Bank Ltd., Lahore—*
*Decree-holder*—Appellant.
v.
*L. Hukam Chand Shah and others — Judgment-debtors and another —*
Respondents.

Civil Appeal No. 7/3 of 1938, Decided on 29th July 1938, from order of Senior Sub-Judge, Hazara at Abbottabad, D/- 17th January 1938.

*** (a) Rateable distribution—Appeal—Question between rival decree-holders not affecting judgment-debtor—No appeal lies—If question affects judgment-debtor it falls under S. 47, Civil P. C., and is appealable—Execution application held ultra vires because agent filing it had no locus standi—Order held affected judgment-debtor and was appealable.**

Where the question of rateable distribution is solely between the two rival decree-holders, the decision of that question is purely one under Sec. 73, Civil P. C., and no appeal having been allowed from an order under that Section, the aggrieved person has no right to appeal. Of course S. 73 (2), Civil P. C., gives him a right of suit. But where the judgment-debtor is directly or indirectly interested in the order under S. 73, Civil P. C., it falls under Section 47, Civil P. C., as well and is therefore appealable : *Case law referred.* [P 64 C 2]

The question as to the locus standi of the agent of the decree-holder is one in which the judgment-debtor is pre-eminently interested and a decision on that question is no doubt one which will also have effect between the decree-holder and the judgment-debtor so far as the execution, discharge or satisfaction of the decree is concerned. Therefore an order of the execution Judge treating an execution application as ultra vires holding that the agent who filed it has no locus standi is appealable under Section 47. [P 65 C 2]

**(b) Agent—Delegation of power—Delegation beyond limit of agent is debarred.**

The maxim *deligatus nonpotest delegare* is clear and debars the agent from delegating his powers beyond the limit prescribed by the principal. [P 65 C 2; P 66 C 1]

Diwan Chand — *for Appellant.*

R. S. Mehta Ramji Das—*for Respondent (Diwan Giyan Chand).*

Ch. Jai Krishan — *for Respondents 4 and 7.*

Respondent No. 1 *in person.*

**Mir Ahmad J.**—The Punjab National Bank holds two decrees against Lala Hukam Chand Shah and others. The Bank has by a document dated 18th January 1932 appointed Firm R. B. Lala Tirath Ram Shah of Nawan Shahr as agent for the recovery of this amount from the judgment-debtors. It was stipulated that the agent firm shall be responsible to pay the Bank the sum of Rs. 45,000 out of the decretal amount which comes to about Rs. 70,000 and costs, the balance if realized going to the agent firm as remuneration. On 30th May 1934, R. B. Ishar Das on his own behalf and on behalf of the proprietors of the Firm R. B. Tirath Ram Shah appointed L. Kanhya Lal and L. Jai Karan as their agents authorizing them to do all acts necessary in connexion with the business of the Firm R. B. Tirath Ram Shah. Diwan Giyan Chand also has a decree against Lala Hukam Chand Shah and others. He has obtained an order of attachment and sale of the property belonging to the judgment-debtors.

On 30th August 1937, Lala Jai Karan, acting on behalf of the Punjab National Bank, presented an application for execution in which he asked for a rateable distribution of the assets expected to be realized in the execution proceedings initiated by Diwan Giyan Chand. Diwan Giyan Chand objected that the Punjab National Bank was not properly represented before the Court and therefore their application for rateable distribution was not competent. The execution Judge observed that the power of attorney executed in favour of the Firm R. B. Tirath Ram Shah was not attested as required by S. 85, Evidence Act, and that he could not therefore presume that it was genuine. He also added that in this power of attorney the Bank had authorized the Firm R. B. Tirath Ram Shah to appoint a pleader or an advocate or vakil or Court mukhtiar to prosecute the proceedings, that Lala Jai Karan was neither of these, and that therefore Lala Jai Karan also had no authority to institute the application for rateable distribution on behalf of the Firm R. B. Tirath Ram Shah. On these grounds the learned Judge dismissed the application as ultra vires. The Punjab National Bank has presented an appeal to this Court.

A preliminary objection has been taken by the respondent that the order of the execution Judge is not open to an appeal. It is urged on the authority in 42 Cal 1,[1] that an order refusing rateable distribution made under S. 73, Civil P. C., between two rival decree-holders is not appealable. The learned counsel for the appellant has contended that the order affects the judgment-debtors so far as the execution, discharge or satisfaction of the decree held by the Bank is concerned, that it therefore falls within the purview of S. 47, Civil P. C., and that such a decision under S. 47, Civil P. C., having the force of a decree is appealable; 42 Cal 1,[1] may be called the basic ruling on the point in dispute. The head-note of that ruling runs thus:

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[1] Balmer Lawrie & Co. v. Jadunath Banerjee, (1915) 2 A I R Cal 658=27 I C 644=42 Cal 1 =19 C W N 1202.

> An order, refusing rateable distribution made under S. 73, Civil P. C. (Act 5 of 1908), between two rival decree-holders, *which does not affect or interest the judgment-debtor*, is an order in execution proceedings but is not a decree, as all the conditions enumerated in S. 47 of that Code are not present, and consequently is not appealable.

The underlined (here italicized) is ours. This principle has been reiterated by the other High Courts in India. For instance, the Madars High Court has held in A I R 1936 Mad 136[2] as follows:

> Two persons obtained decrees against the same judgment-debtors. One of them attached some properties of judgment-debtors while the other put in an application for rateable distribution. The application was dismissed by the Court executing the decree:
>
> *Held* that judgment-debtors were not in any way interested in the question as to whether the amount realized by sale of the properties should be rateably distributed between the rival decree-holders. The question related only to a dispute between rival decree-holders in which the judgment-debtors were not interested, and the question was not one which arose under S. 47, Civil P. C., and the decision was not therefore liable to appeal. *(Headnote of A I R 1936 Mad 136.)*

To the same effect is the view of the Bombay High Court: *vide* A I R 1931 Bom 252;[3] of the Rangoon High Court: *vide* A I R 1929 Rang 198[4] and of the Lahore High Court: *vide* A I R 1932 Lah 96.[5] A Judge of this Court has also expressed a similar opinion in A I R 1936 Pesh 52.[6] By way of illustration we may as well quote one or two cases in which an order passed under S. 73, Civil P. C., was found to be one which affected the judgment-debtor and was therefore held to be appealable. One of them is 36 Bom 156.[7] Two judgment-creditors obtained the attachment of the property belonging to their judgment-debtor. On the date fixed for sale the judgment-debtor apparently acting under O. 21, R. 55, Civil P. C., produced money sufficient to satisfy the two decrees. The Court set aside the attachment and entered the complete satisfaction of the claims of the judgment-creditors. On the next day a third person who held a decree against the same judgment-debtor applied for a rateable distribution of the money paid into Court by the judgment-debtor. He also asked for the sale of the properties which had been attached but released. The execution Judge accepted the petition and issued orders as prayed for. The judgment-debtor went up on appeal and it was held that the order was appealable because it fell under S. 47, Civil P. C. In 39 Mad 570[8] the judgment-debtor had objected to the application for rateable distribution on the ground that there were no assets with the Court, the assets received having long ago been dealt with. His objection was overruled and the judgment-debtor appealed against that order. It was held by the High Court that the judgment-debtor being interested in the matter, the order though relating to rateable distribution was one under S. 47, Civil P. C., and was appealable.

It follows from what has been said above that there is a unanimity of opinion that where the question is solely between the two rival decree-holders the decision of that question is purely one under S. 73, Civil P. C., and no appeal having been allowed from an order under that Section the aggrieved person has no right to appeal. Of course S. 73 (2), Civil P. C., gives him a right of suit. The High Courts are also agreed that where the judgment-debtor is directly or indirectly interested in the order under S. 73, Civil P. C., it falls under S. 47, Civil P. C., as well and is therefore appealable. In fact these conclusions are justified by a comparison of S. 47 and Sec. 73, Civil P. C. They run thus:

> *Section 47.* — **(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.**
>
> **(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this Section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fee.**

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2. Viswanatham Krishtiah v. Venkata Reddy, (1936) 23 A I R Mad 136=160 I C 573=59 Mad 399=70 M L J 33.
3. Navaj Bhavdu Patil v. Totaram Govind Patil, (1931) 18 A I R Bom 252=133 I C 737=33 Bom L R 503.
4. M. T. T. K. M. M. N. Chettyar Firm v. K. P. A. N. M. Firm, (1929) 16 A I R Rang 198=120 I C 693.
5. **Daulat Singh v. Rup Narain, (1932) 19 A I R Lah 96=134 I C 195=33 P L R 89.**
6. **Hemraj v. Balu Ram & Sons, (1936) 23 A I R Pesh 52=160 I C 892.**
7. **Sorabji Coovarji v. Kala Raghunath, (1912) 36 Bom 156=12 I C 911=13 Bom L R 1193.**
8. **Venkataperumal v. Venkata Reddi, (1916) 3 A I R Mad 20 = 29 I C 231 = 39 Mad 570= 29 M L J 96.**

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall for the purposes of this Section be determined by the Court.

*Section 73.* — (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons:

Provided as follows:

(a) Where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale:

(b) Where any property liable to be sold in execution of a decree is subject to a mortgage or charge the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold.

(c) Where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of the sale shall be applied first, in defraying the expenses of the sale; secondly, in discharging the amount due under the decree; thirdly, in discharging the interest and principal moneys due on subsequent incumbrances (if any); and fourthly, rateably amongst the holders of decrees for the payment of money against the judgment-debtor, who have prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this Section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this Section affects any right of the Government.

It is clear that where two rival decree-holders are fighting for rateable distribution, the fight is between two strangers either of whom is not a party to the execution proceedings in which the other is interested. A decision amongst them inter se is therefore evidently not one relating to the execution, discharge or satisfaction of any of the two decrees and does not fall under S. 47, Civil P. C. The adjudication would undoubtedly be covered by S. 73, Civil P. C., only. Again, it is obvious that if the execution Judge in deciding the question between two rival decree-holders regarding rateable distribution gives a finding which also affects the liability of the judgment-debtor so far as one of the decree holders is concerned, that finding is one under S. 47, Civil P. C., as well being an adjudication on a point involved between the judgment-debtor and a particular decree-holder.

Applying these principles to the present case we are of opinion that the order under appeal is one which affects the judgment-debtor. The question as to the locus standi of the agent of the decree-holder is one in which the judgment-debtor is pre-eminently interested and a decision on that question is no doubt one which will also have effect between the Punjab National Bank and the judgment-debtor so far as the execution, discharge or satisfaction of the decree of the Bank is concerned. We hold therefore that the order of the execution Judge is appealable under S. 47, Civil P. C.

We will now turn to the merits. The first point to consider is whether the power of attorney alleged to have been executed by the Bank in favour of the Firm R. B. Tirath Ram Shah has been duly proved to have been executed by the former. Had it been attested, a presumption would have arisen under S. 85, Evidence Act in favour of its execution. But this has not been done. There is no material on the record to establish that it has been executed by the Bank. We hold therefore that the document stands unproved on the record. If this had been the sole objection raised by the rival decree-holder and accepted by the execution Judge, we would have remanded the case to that Judge with the direction that he should give the party producing the power of attorney an opportunity to prove its execution by evidence. For, we do not approve of the dismissal of the execution application on this ground when evidence could have shown whether the power was conferred on the agent or not. But there is another objection which is fatal to the application and in view of our opinion on it we do not consider it necessary to ask for evidence as to the execution of the power of attorney. The objection is that Mr. Jai Karan who presented the petition could not act for the Firm R. B. Tirath Ram Shah according to the text of the power of attorney said to have been given by the Bank. It is pointed out that the power of attorney allows the agent firm only to employ a pleader, or an advocate or a vakil or a Court mukhtiar to act on its behalf and that Mr. Jai Karan is neither of them. We think that there is a great force in this contention. The maxim *delegatus nonpotest delegare* is clear and debars an agent from delegating his powers beyond the limit prescribed by the principal. In this connexion we may also quote S. 190, Contract Act which runs thus :

> An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub-agent must be employed.

It is obvious that the Bank intended that the Firm R. B. Tirath Ram Shah should act through one of its partners or through a pleader or an advocate or a vakil or a Court mukhtiar and no one else. Mr. Jai Karan does not fall under any one of those categories and the execution Judge was right therefore in holding that the application of the Punjab National Bank was ultra vires in this respect. As a result we maintain the order of the execution Judge on this ground and dismiss the appeal with costs.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Peshawar 66

ALMOND J. C. AND MIR AHMAD J.

*Mohd. Ramzan* — Petitioner.

v.

*Civil Employees Co-operative Society Ltd. and others* — Respondents.

Civil Revn. No. 6 of 1938, Decided on 18th July 1938, from order of Sub-Judge, 4th Class, Peshawar, D/- 9th October 1937.

**Civil P. C. (1908), O. 21, R. 93 — Refund— Execution sale confirmed and application by auction-purchaser to be put in possession — Possession not given on account of decree passed in favour of another in regular suit claiming property as his own —Application for refund by auction-purchaser is not one under O. 21, R. 93, nor can he get refund in execution proceedings.**

An execution sale was confirmed. Subsequent to this a person brought a regular suit claiming the property as his own and obtained a decree. In the meantime the auction-purchaser applied to be put in possession of the property and the decree-holder in the regular suit put in an application objecting to possession being given to the auction-purchaser. It was held that the auction-purchaser could not be given possession in view of the decree in the regular suit and was remarked that the auction-purchaser could apply for refund of purchase money. Accordingly he applied for it:

*Held* that the application for refund could not be made under R. 93 as the sale was not set aside under O. 21, R. 92, and that the auction-purchaser was not entitled as of right to get any refund in execution proceedings. [P 67 C 1]

Kazi Abdul Wahab — *for Petitioner.*

R. S. Mehta Ramjidas — *for Respondents.*

**Almond J. C.** — The Civil Employees Co-operative Society in execution of their decree against Abdul Rahim got a house sold and it was purchased at the Court auction sale by Mohammad Ramzan. After the sale Mt. Fatima brought an objection under O. 21, R. 58, Civil P. C., claiming the property as hers. The objection was dismissed on the ground that it could not be brought after the sale had taken place and the sale was then confirmed on 10th October 1936. Mt. Fatima then instituted a regular suit to establish her title and obtained a decree on 28th January 1937. In the meantime the auction-purchaser had applied to be put in possession of the property, and after her suit was decided Mt. Fatima put in an application purporting to be under O. 21, R. 97, Civil P. C., objecting to the auction-purchaser being put into possession. Both these applications were decided on 13th March 1937 and it was held that in view of the decree passed in favour of Mt. Fatima the auction-purchaser could not be put into possession and a remark was made by the learned executing Judge that the auction-purchaser could apply for refund of the purchase money. The auction-purchaser did so on 25th March 1937 and he recovered out of the purchase money Rs. 694 from the decree-holder and Rs. 350, the surplus money, from the sale which was lying in Court. There still remained due to him the fee paid to the auctioneer and the commission charged by Government on the sale, and he also claimed Rs. 22-8-0 on account of the cost of the stamp of the sale certificate.

The learned executing Judge refused to pass an order that these sums should be paid to him by the decree-holder. He held that the auction-purchaser could recover them from the judgment-debtor. The auction-purchaser has applied for revision of that order and he claims that as the decree-holder was responsible for getting the property wrongly auctioned, he should be made responsible for payment of the sums which are now claimed by the auction-purchaser. It is clear that the petition cannot succeed. Learned counsel who has appeared on behalf of the petitioner contends that the claim for refund was made under O. 21, R. 93, and that by its order refusing to give possession to the auction-purchaser, the Court in effect set aside the sale under R. 92. This is clearly not the case. The Court could only set aside the sale under Rule 92 on an objection taken under Rr. 89, 90 or 91, and there is a period of limitation fixed for making those applications. The sale was therefore not set aside under R. 92 and the application for refund could not be made under R. 93. In fact there is no provision for ordering a refund in circumstances similar to those of the present case. It is clear that the auction-purchaser was not entitled as of right to get any refund in execution proceedings, and it is not possible for us to give him the relief which he now seeks. We therefore dismiss this application with costs. Pleader's fee Rs. 30.

K.S./R.K. *Application dismissed.*

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## A. I. R. 1938 Peshawar 67

MIR AHMAD J.

*Mt. Tajbaro w/o Wahid Gul* — Appellant.

v.

*Gopi Chand Singh and others* — Respondents.

Civil Appeal No. 31/17 of 1938, Decided on 24th June 1938, from order of Senior Sub-Judge, Mardan, D/- 31st March 1938.

**Civil P. C. (1908), O. 39, R. 1—There is no restriction that suit should be for perpetual injunction, if temporary injunction is to be granted.**

The power of a Court is very wide with respect to the issue of a temporary injunction and the injunction can be issued in any suit if it is proved to the satisfaction of the Court that the property in dispute in the suit is being wrongfully sold in the execution of a decree. There is no restriction in O. 39, R. 1 that the suit should be for the issue of a perpetual injunction if a temporary injunction is to be granted : *A I R 1934 Cal 694 and A I R 1926 Lah 504, Expl.* [P 67 C 2]

L. Ram Labhaya — *for Appellant.*

S. Raja Singh — *for Respondents 1 to 10.*

Respondent 11 *in person.*

**Judgment.**—Respondents 1 to 10 hold a mortgage decree and the final decree having been passed they are executing it against respondent 11. They have proceeded against a Mandi situated in Mardan. The appellant Mt. Tajbaro is a daughter-in-law of respondent 11. She presented an objection petition to the executing Court stating that the Mandi had been given to her in dower and that the Court should not therefore sell it in the execution of the decree. The objection was dismissed. She then instituted a suit under O. 21, R. 63, Civil P. C. The Judge who heard the case dismissed the suit on the ground that the decree in favour of respondents 1 to 10 being one under O. 34, Civil P. C., the objection was not competent under O. 21, R. 58, Civil P. C., and a suit also did not lie under O. 21, R. 63, Civil P. C. She then brought the present declaratory suit under S. 42, Specific Relief Act. She claims that the Mandi is in her possession and is her dower property and should not therefore be sold in execution of the decree in favour of respondents 1 to 10. During the proceedings, she applied to the trial Judge for the issue of a temporary injunction under O. 39, R. 1, Civil P. C., restraining respondents 1 to 10 from auctioning the property in execution of their decree. The trial Judge dismissed the application and the reason for dismissing it is given in the last portion of the order which is as follows :

> As the plaintiff's suit is only for a declaration and not for a perpetual injunction she cannot get the latter (injunction) against defendants 1 to 10 : *vide* A I R 1934 Cal 694[1] and A I R 1926 Lah 504.[2] Hence her application for grant of an injunction is rejected.

Mt. Tajbaro has come up on appeal to this Court. O. 39, R. 1 is as follows :

> Where in any suit it is proved by affidavit or otherwise : (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or (b) that the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

It is clear from the words "where in any suit" and "wrongfully sold in execution of a decree" that the power of a Court is very wide with respect to the issue of a temporary injunction and that the injunction can be issued in any suit if it is proved to the satisfaction of the Court that the property in dispute in the suit is being wrongfully sold in the execution of a decree. There is no restriction in this Rule that the suit should be for the issue of a perpetual injunction if a temporary injunction is to be granted. The rulings to which reference has been made by the lower Court do not lay down this proposition. In fact the applications were rejected in those cases on merits. I hold therefore that the application for the grant of a temporary injunction was competent and the trial Judge should have decided it on merits. The appeal is accepted and the order of the lower Court is set aside. The case will now go back to the trial Judge with the direction that he should decide the application on merits. The costs will follow the event. Pleader's fee Rs. 32.

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[1] **Durgadas Das v. Nalin Chandra Nandan, (1934) 21 A I R Cal 694=155 I C 354=61 Cal 814=38 C W N 771.**

[2] **Shiromani Gurdwara Parbandhak Committee Nankanna Sahib v. Banta, (1926) 13 A I R Lah 504=96 I C 439=27 P L R 453.**

D.S./R.K. *Case remanded.*

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## A. I. R. 1938 Peshawar 68

ALMOND J. C. AND MIR AHMAD J.

*Mt. Howani Bai w/o Asu Ram* — *Plaintiff*—Appellant.

v.

*Devi Dial and others* — *Defendants* — Respondents.

Appeal No. 154/29 of 1937, Decided on 27th June 1938, from decree of Dist. Judge, Dera Ismail Khan, D/- 30th October 1937.

**(a) Civil P. C. (1908), S. 11, Expln. 5—Suit by widow for maintenance—Prayer that it should be charged on property not granted—Subsequent suit to charge property with maintenance is res judicata.**

Where a widow in her suit for maintenance asks that her maintenance should be made a charge on the property left by her husband and the Judge assesses the amount of maintenance but does not charge it on any property, she cannot subsequently ask the Court to declare that she is entitled to recover from the property in suit her maintenance which has fallen into arrears or that which will fall due in the future as it is tantamount to a request to charge the property with her maintenance. [P 69 C 2]

**(b) Hindu Law—Debts—Joint family trading business—Debts incurred in connexion with it take preference over right of widow to maintenance.**

Where a coparcenary is of the nature of a trading concern, debts incurred in connexion with the business will take preference over the right of a widow to maintenance. No question arises in such circumstances as to the benefit of the family or of the creditor having notice of the claim of the widow. Of course the condition precedent is that the debts should have been genuinely raised in connexion with the trade or business of the family and the transaction should not be tainted with fraud : *A I R 1933 Lah 901, Rel. on.* [P 70 C 1]

Diwan Chand and L. Bhowani Das — *for Appellant.*

S. Raja Singh and L. Pearey Lal — *for Respondents 1 to 6.*

L. Ram Lubhaya — *for Respondent (Dhallu Ram).*

**Mir Ahmad J.**—Asu Ram and Sidhu Ram, brothers, admittedly formed a joint Hindu family. They lived at Tank (D. I. Khan District). Asu Ram died leaving a widow Mt. Howani Bai and two daughters. The property belonging to Asu Ram naturally went to Sidhu Ram by right of survivorship. Mt. Howani Bai and her daughters were entitled to maintenance according to Hindu law. She therefore brought a suit requesting that her maintenance should be fixed and charged on the property left by her husband. On 9th May 1918 the District Judge, D. I. Khan, gave her a decree for recovery of Rs. 25 a month as maintenance. There is no mention in the judgment as regards the charging of this amount on the property left by Asu Ram. Sidhu Ram later made an attempt to get the maintenance reduced because the daughters had married. But he did not succeed. Sidhu Ram was carrying on business. He dealt in cloth. On 25th July 1927 he mortgaged all the family property to the Firm Jetram Rikiram of Kulachi for Rs. 8995. On 25th September 1933 Sidhu Ram and the mortgagees executed a deed of reference in which they appointed another Riki Ram of Kulachi as an arbitrator to decide their dispute with regard to the mortgage money. The arbitrator gave his award on the same day by which he declared that the property under mortgage shall thenceforward be considered as sold to Jetram Rikiram for Rs. 9700 ; Rs. 8995 due on the footing of the mortgage being adjusted and a balance of Rs. 705 to be paid to Sidhu Ram by the vendees. This award was made a rule of Court on 6th October 1933. Jetram Rikiram sold a house out of the property purchased by them to one Dhallu Ram. Sidhu Ram did not pay the maintenance due to Mt. Howani Bai. The arrears amounted to Rs. 1136. In execution of her decree Mt. Howani Bai attached the joint family property sold to Jetram Rikiram and Dhallu Ram.

Two objections were preferred to this attachment, one by Jetram Rikiram and another by Dhallu Ram. The objections were accepted and the property released from attachment. Mt. Howani Bai has therefore brought this suit against the proprietors of the Firm Jetram Rikiram their transferee Dhallu Ram and her husband's brother Sidhu Ram under O. 21, R. 63, Civil P. C., for a declaration that her maintenance is a charge on the property belonging to the joint family, and that she has therefore the right to recover from it the arrears due to her and also the maintenance which may fall due to her in future. The defendant-vendees denied the claim and raised various pleas. The following issues were framed by the trial Judge:

1. Has proper court-fee been paid? On plaintiff.

2. Is the suit defective on account of misjoinder of defendants? On defendants.

3. Whether at the time of the decree for maintenance in favour of the plaintiff against Sidhu Ram, defendant 8 Asu Ram, her husband had any share in the property in dispute? On plaintiff.

4. In case Issue 3 is proved whether the plaintiff's right of maintenance in the suit property is preferential to the rights of the defendants? On plaintiff.

5. Can the plaintiff get the property in dispute attached and sold in execution of her decree? On plaintiff.

The first two issues were found in favour of the plaintiff. Under Issue 3 the Court found that Asu Ram had a share in the suit property at the time when the decree for maintenance was passed in favour of the plaintiff. Regarding Issue 4 the Court observed that Mt. Howani Bai had a right to recover her allowance of Rs. 25 a month from the property in question. When discussing this issue the trial Judge expressed the view that the transfer in favour of Jetram Rikiram was fraudulent and intended to defeat the right of Mt. Howani Bai to recover her maintenance. He was of opinion that the vendees had notice of the claim which the widow had on the property purchased by them. Issue 5 was also given in favour of the plaintiff by the trial Judge. As a result he granted her a decree as prayed for. The proprietors of the Firm Jetram Rikiram preferred an appeal to the Court of the District Judge, Derajat as far as their property was concerned. Dhallu Ram also appealed about his own house.

The learned appellate Judge disposed of the cases in a consolidated judgment. He observed that in effect the suit of Mt. Howani Bai was an attempt to charge the property with her maintenance allowance. He pointed out that this relief was prayed for by her in her suit of 1918 but had not been granted by the Judge. He concluded that the issue whether her maintenance allowance should be made a charge on the property or not had become res judicata against her by virtue of Explanation 5 to S. 11, Civil P. C. As to her general right to recover the arrears of maintenance from the property which belonged to the joint family the Judge remarked that according to Hindu law the property could be transferred by Sidhu Ram when it had not been charged with the maintenance allowed to Mt. Howani Bai and that the transaction being bona fide and genuine there was no reason why it should not be maintained by the Courts. The appellate Judge therefore accepted the appeals and dismissed the suit of the plaintiff. Mt. Howani Bai has presented two further appeals to this Court and this judgment will cover both cases. After hearing the counsel on both sides at length we have come to the conclusion that the findings of the lower appellate Judge were correct and should be maintained. Mt. Howani Bai had asked in her suit for maintenance, which she instituted in 1918, that her maintenance should be made a charge on the property left by her husband. The Judge who decided the case assessed the amount of maintenance but did not charge it on any property. Expln. 5 to S. 11, Civil P. C., is in the following terms:

> Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

It is obviously applicable and under S. 11, Civil P. C., she cannot now ask the Court to declare that she is entitled to recover from the property in suit her maintenance which has fallen into arrears or that which will fall due in the future. It is tantamount to a request to charge the property with her maintenance. The alternative position taken by the learned counsel for the plaintiff is that she being entitled to recover maintenance according to the decree and also according to Hindu law was justified in asking that the amount should be realized from the property the devolution of which on Sidhu Ram had given rise to that right. Counsel contended that Sidhu Ram had no power to transfer the property without making arrangement for the payment of the allowance due to Mt. Howani Bai. In meeting this argument the learned counsel for the respondents urged that the debts to pay which the property was sold were incurred by Sidhu Ram in connexion with the trading business of the coparcenary, that such a sale was binding on the widow, and that Mt. Howani Bai cannot ask for her allowance to be recovered from that property after it had been sold to a bona fide transferee for value for the purpose of liquidating the liabilities of the firm. In this connexion counsel quoted S. 570 of Mulla's Commentary on

Hindu Law (Edn. 8) and 15 Lah 9.[1] The relevant portion of S. 570 of Mulla's compilation is as follows :

> Debts contracted by a Hindu take precedence over the right of maintenance of his wife, or infant child, or his widow after his death. The same is true of debts contracted by the manager of the joint family of which the husband was a member, provided the debts were incurred for the benefit of the family. Similarly debts incurred by a joint family trading business take precedence over the widow's right to maintenance and residence. Therefore, if property belonging to the husband or to the joint family is sold in liquidation of such debts, the sale is binding on the widow, and she has no right of maintenance against the purchaser or against the property sold to him, even if the purchaser had notice of her claim for maintenance.

The statement of law in Mulla's handbook regarding loans raised for family trade is based on the ruling of the Lahore High Court reported in 15 Lah 9.[1] The headnote of that ruling runs thus :

> Held that the suit must fail as the whole family property was liable for the payment of the debts incurred by the manager for the purpose of the family business, the shares of the minor coparceners being also liable ; and the rights of the widow to maintenance and residence must be postponed to the payments of the debts.

We find ourselves in perfect agreement with the view expressed by their Lordships of the Lahore High Court in 15 Lah 9.[1] We think that where a coparcenary is of the nature of a trading concern debts incurred in connexion with the business will take preference over the right of a widow to maintenance. No question arises in such circumstances as to the benefit of the family or of the creditor having notice of the claim of the widow. Of course the condition precedent is that the debts should have been genuinely raised in connexion with the trade or business of the family and the transactions should not be tainted with fraud.

Applying these principles to the present case, we think that the contention of the learned counsel for the respondents is correct. There is evidence on the file to show that Sidhu Ram carried on cloth business, that he became indebted in connexion with that business, and that the property was therefore transferred by him in order to clear his liabilities. No evidence has been brought on the record to rebut these facts which were proved by the defendants. There is no connexion of any kind between Sidhu Ram, who belongs to Tank, and Jetram Rikiram who come from Kulachi. Therefore there can be no suggestion that the transaction of sale was fictitious or meant to defeat the right of Mt. Howani Bai. At any rate Sidhu Ram would not deprive himself of such a large property merely to avoid paying the petty sum of Rs. 25 a month to his brother's wife. For the reasons given above we hold that Mt. Howani Bai was bound to pay the debts of the joint family trading concern and Sidhu Ram having sold the property of the coparcenary to pay off those debts she cannot now ask that her maintenance should be recovered from that property. As a result the appeals are dismissed with costs. Pleader's fee Rs. 75 in each appeal.

D.S./R.K. *Appeals dismissed.*

## ✻ A. I. R. 1938 Peshawar 70

ALMOND J. C. AND MIR AHMAD J.

*Sital Ram Kalicharan — Judgment-debtor* — Petitioner.

v.

*Dr. Thakur Das — Decree-holder* — Respondent.

Civil Revn. No. 396 of 1937, Decided on 9th July 1938, against order of Small Cause Court Judge, Nowshera, D/- 18th October 1937.

**✻ Civil P. C. (1908), S. 39 (d)—Small Cause Court cannot by transferring execution application to its regular side confer upon itself jurisdiction to proceed against immovable property.**

It is a principle of the interpretation of statutes that where a list of certain circumstances in which a particular act can be done is followed by a general clause, that clause must be interpreted as referring to circumstances ejusdem generis as those which have been recited in the foregoing clauses. Sub-cl. (d) of S. 39 must be interpreted on these principles and it was not intended by the Legislature that this sub clause should be utilized in order that a Court should proceed in execution in a matter which was not otherwise permitted by law. The Legislature has provided in various ways that a Small Cause Court shall have no jurisdiction over immovable property. Hence a Small Cause Court cannot by transferring execution application to its regular side under S. 39 confer upon itself jurisdiction to proceed against the immovable property : *A I R 1926 Lah 465; A I R 1929 Lah 398; 8 Bom 230; 1 All 624 and 9 Bom 237*, *Expl.* [P 71 C 2 ; P 72 C 1]

Ch. Jai Krishan — *for Petitioner.*

M. Sher Bahadur Khan — *for Respondent 2.*

**Almond J. C.**—Respondent 1, Dr. Thakardas obtained a decree against the petitioner Sital Ram in the Court of Small Causes and applied for execution on 29th June 1937. On 3rd July 1937 the decree-holder's counsel was present and an affidavit was filed to the effect that the only property of the judgment-debtor was a house against which the decree-holder prayed that proceedings might be taken. The Judge of the Small Cause Court who exercises ordinary jurisdiction also ordered the case to be transferred to the regular side and proceedings to be taken against the judgment-debtor's immovable property. This was eventually put to sale and sold to respondent 2, Sarbiland Khan, and the sale was confirmed in his favour on 18th October 1937. Against that order the judgment-debtor has presented this petition for revision in which he takes two grounds. The first is that the order of transfer to the regular side was wrongly made without notice being given to him, and the second is that the Court on its regular side had no jurisdiction to proceed against immovable property in execution of a decree which had been passed by a Small Cause Court. In our opinion the petition can be disposed of on this second point. In support of his case learned counsel for the petitioner has argued on the analogy of S. 24 (4), Civil P. C., which is to the following effect:

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[1] Mt. Champa v. Official Receiver, Karachi, (1933) 20 A I R Lah 901=149 I C 693=15 Lah 9=36 P L R 450.

> The Court trying any suit transferred or withdrawn under this Section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Learned counsel has referred us to a case of the Lahore High Court reported in A I R 1926 Lah 465[1] in which it was held that the word "suit" in that sub-section includes execution proceedings. The question in that case was whether an appeal lay from an order made by the Court to which the suit was transferred. No question of the sale of immovable property was involved and the remark that a suit included an execution proceeding for the purposes of that sub-section was not supported by the citation of any authority. So far as the ruling goes however it does support the petitioner's case to a slight extent.

Learned counsel for the respondent on the other hand relies on the following four cases: A I R 1929 Lah 398;[2] 8 Bom 230;[3] 1 All 624[4] and 9 Bom 237.[5] In the first of these cases it was held that as no formal order of transfer had been passed by the Court of Small Causes transferring the suit to a Court having ordinary jurisdiction, the latter Court could not proceed against immovable property. The point for decision in this case, however, was not directly in issue in that case for no formal order of transfer had been made in that case whereas in the present case a formal order of transfer was made. 8 Bom 230[3] and 1 All 624[4] are both judgments relating to the time when neither the present Civil Procedure Code nor the present Provincial Small Cause Courts Act was in force. They were decided with reference to S. 20 of Act 11 of 1865 which was the Act then in force relating to Courts of Small Causes, and S. 20 of that Act prescribed definite procedure whereby the immovable property of a judgment-debtor could be proceeded against in a regular Court, if a certificate of non-satisfaction were granted by the Court of Small Causes. There is no section in the present Small Cause Courts Act corresponding to S. 20 of that Act. 9 Bom 237[5] was decided with reference to S. 323, Civil P. C. of 1882, which corresponds in part to S. 39 of the present Code. In that case also, the question at issue was whether a formal order of transfer was necessary under that Section before the Court on its regular side could proceed against the immovable property of the judgment-debtor against whom a decree had been passed on the Small Cause side.

It will be seen therefore that none of these cases which have been cited before us is an authority for the proposition that a Small Cause Court can transfer an execution application to its regular side under S. 39 of the present Code, thereby conferring upon itself jurisdiction to proceed against the immovable property of the judgment-debtor and the question now before us must be decided by reference to S. 39 as it stands. That section gives four circumstances under which a Court can transfer a decree for execution to another Court. The first three of these circumstances relate to the convenience of execution from a territorial point of view and the fourth is as follows:

> **If the Court which passed the decree considers for any other reason which it shall record in writing that the decree should be executed by such other Court.**

**It is a principle of the interpretation of statutes that where a list of certain circumstances in which a particular act can be**

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**[1] Fielding v. Janki Das & Sons, (1926) 13 A I R Lah 465=95 I C 243.**

**[2] Siri Ram v. Tulsi Ram, (1929) 16 A I R Lah 398=114 I C 329=30 P L R 40.**

**[3] Bhagwan Dayalji v. Balu, (1883) 8 Bom 230.**

**[4] Gopal v. Nanku, (1875-77) 1 All 624.**

**[5] Dharam Das Santidas v. Waman Govind, (1885) 9 Bom 237.**

done is followed by a general clause, that clause must be interpreted as referring to circumstances ejusdem generis as those which have been recited in the foregoing clauses, and it appears to us that sub.cl. (d) of S. 39 must be interpreted on these principles and that it was not intended by the Legislature that this sub-clause should be utilized in order that a Court should proceed in execution in a manner which was not otherwise permitted by law. The Legislature has provided in various ways that a Small Cause Court shall have no jurisdiction over immovable property and we cannot believe that it was intended that merely by transfer to another kind of Court those provisions should be defeated and in particular we refer to the fact that S. 20 of Act 11 of 1865 has been omitted from the present Provincial Small Cause Courts Act. It appears to us in these circumstances that the intention of the Legislature is that in petty cases which are tried summarily by a Small Cause Court, execution should not be taken out against immovable property. We therefore accept this petition, set aside all the proceedings of the executing Court from 3rd July 1937 onwards. In view of the fact that this petition has been decided on a point of law for which no authority existed, we direct that the parties should bear their own costs in this Court.

D.S./R.K. *Petition accepted.*

## A. I. R. 1938 Peshawar 72

MIR AHMAD J.

*Mt. Pukhraj Begum* — Petitioner.

v.

*Hidayat Ali Shah and others* — Respondents.

Civil Revn. No. 115 of 1938, Decided on 2nd July 1938, from order of Addl. Judge, D/- 21st January 1938.

**Mahomedan Law—Dower—Prompt dower.**

A wife can claim prompt dower before consummation of marriage: *A I R 1916 P C 46, Rel. on.* [P 72 C 2]

Anup Chand — *for Petitioner.*
Pir Bakhsh — *for Respondents.*

**Order.**—Mt. Pukhraj Begum is married to Hidayat Ali Shah. The marriage has not yet been consummated but dissentions have already begun between them. Hidayat Ali Shah brought a suit for restitution of conjugal rights and Mt. Pukhraj Begum instituted a suit for possession by partition of a share in a house which had been given to her in dower. The whole of the dower I may note is prompt. In the suit for restitution of conjugal rights, Mt. Pukhraj Begum pleaded that she had not been given the whole of her prompt dower and that therefore the suit could not be maintained. The plea succeeded and the suit was dismissed. The suit of Mt. Pukhraj Begum however was decreed. The trial Judge passed a preliminary decree for possession by partition. It was found that the house was too small to be divided by metes and bounds and the trial Judge therefore proceeded to act under S. 4, Partition Act. In the meantime an appeal was preferred by Hidayat Ali Shah, his brother and his father, the three defendants in the partition suit, against the preliminary decree. The Additional Judge who heard the appeal held that Mt. Pukhraj Begum could not claim her dower because she had not agreed to consummate the marriage. He therefore dismissed the suit. Mt. Pukhraj Begum has come up on revision to this Court. The question whether a dower debt which is prompt can be demanded before consummation has been dealt with by their Lordships of the Judicial Committee in the case reported in 38 All 581[1] at p. 588. The relevant passage is as follows :

> Dower is an essential incident under the Musalman law to the status of marriage;. to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called prompt, payable before the wife can be called upon to enter the conjugal domicile; the other deferred, payable on the dissolution of the contract by the death of either of the parties or by divorce.

It leaves no doubt that a wife can claim prompt dower before consummation and the judgment of the lower Appellate Court is therefore obviously wrong. I accept the petition, set aside the order of the lower Appellate Court and restore that of the trial Court with costs throughout.

D.S./R.K. *Petition accepted.*

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[1] Hamira Bibi v. Zubaida Bibi, (1916) 3 A I R P C 46=36 I C 87=38 All 581=43 I A 294 (P C).

## A. I. R. 1938 Peshawar 73

ALMOND J. C. AND MIR AHMAD J.

*Babu Bhag Chand Sardar Mool Singh and another — Defendants —* Appellants.

v.

*Sujan Singh Nirmal Singh, Plaintiff and others, Defendants —* Respondents.

Civil Appeal No. 29/8 of 1938, Decided on 8th August 1938, against order of the Senior Sub-Judge, Peshawar, D/- 14th December 1937.

**(a) Mortgage — Mortgagee not bound to recover his money at earliest opportunity—Right to recover interest is not lost.**

A mortgagee is under no duty to recover his mortgage money as soon as possible and if he does not do so, he does not lose his right to get interest. [P 75 C 2]

**(b) Mortgage — Sub-mortgagee — Mortgagor not having notice — Mortgagor can redeem mortgage — Money paid becomes property of mortgagee— Right of sub-mortgagee is against mortgagee only.**

A sub-mortgagee is not privy to the original contract of mortgage and until and unless he gives notice to the mortgagor, the mortgagor has got every right to redeem the mortgage and get rid of the liabilities thereunder. The money becomes the property of the mortgagee and he may pay it to anyone he likes The sub-mortgagee has a remedy in such circumstances against his transferor only, that is to say the mortgagee and no one else : *A I R 1932 Mad 115, Rel. on; 41 Cal 654 (P C), Disting.* [P 76 C 1]

Ganesha Khan (in C. A. No. 29/8) and L. Hukam Chand (in 19/5) — *for Appellants.*

L. Wazir Chand Ahuja (in 18/4) and S. Raja Singh for Respondent (plaintiff) — *for Respondents.*

**Mir Ahmad J.** — On 6th March 1921, Murad Bakhsh and Mt. Najbul Sultan jointly mortgaged to Bhag Chand one house situated in Mohallah Shah Burhan for Rs. 10,000. On 13th March 1925, Mt. Najbul Sultan and Murad Bakhsh jointly mortgaged one house situated in Thathi Bazar to Achraj Ram for Rs. 3400. Besides this another house belonging to Murad Bakhsh only and situated in the same bazar was given as an additional security to cover any damage which may be caused on account of a defect in title in the mortgaged house. On 26th August 1925 Achraj Ram transferred these mortgagee rights in favour of Bhag Chand for Rs. 3400. Bhag Chand raised some money on 3rd January 1927 from R. B. Karam Chand by mortgaging some other property to him for Rs. 7000 with which property we are not concerned. On 4th February 1927 Bhag Chand mortgaged the mortgagee rights, which he had obtained from Murad Bakhsh and Mt. Najbul Sultan by the document dated 6th March 1921 and from Achraj Ram by the document dated 26th August 1925, to Sant Ram for Rs. 6000. On 26th February 1929 Sant Ram obtained a decree for Rs. 6793 with costs against Bhag Chand personally and also against the mortgagee rights transferred to Santram. On 7th March 1930, Bhag Chand executed a deed in favour of S. Sujan Singh by which he mortgaged a 3½ storeyed house in Mohallah Mehtian, his paternal property, for Rs. 8000. Besides this property he gave the mortgagee rights he held in the house situated in Mohallah Shah Burhan under the mortgage executed by Murad Bakhsh and Mt. Najbul Sultan on 6th March 1921 as additional security. The words are as follows :

> In order to assure the mortgagee I give an entire house . . . which is mortgaged to me with possession by Murad Bakhsh, etc. for Rs. 10,000. . . . to the mortgagee by way of additional security so that this property also may be considered additional security for the mortgagee's dues. The mortgage money due on the additional security property whenever recovered will be paid to the mortgagee in payment of his dues.

It may be noted that this mortgage dated 7th March 1930 was for one year, that Rs. 960 was kept by the mortgagee out of the mortgage money as the interest received in advance for that period, and that it was stipulated that the mortgagor (Bhagchand) shall keep the possession of the property and pay Rs. 80 a month rent and if he failed to pay the rent for three months Rs. 100 a month. One S. Tej Singh stood surety in this document for the payment of the rent. On 21st June 1930 Santram was paid Rs. 5000 in Court in execution of his decree against Bhag Chand. On 27th June 1930, Bhag Chand obtained a decree against Mt. Najbul Sultan (Murad Bakhsh had died in the meantime) for Rs. 14,692 and costs on the footing of the mortgage dated 6th March 1921 executed by Murad Bakhsh and Mt. Najbul Sultan in favour of Bhag Chand. Curiously Bhag Chand ignored the transfer he had made of these rights in favour of other persons. On 19th August 1932 Rs. 18,000 were deposited in Court by Mt. Najbul Sultan for payment to Bhag Chand in execution of his decree. Sant Ram asked that the balance of his decree, that is to say Rs. 2813, should be paid to him out of this amount. The Senior Sub-Judge ordered accordingly on 22nd August 1932 and the money was taken by Sant Ram. R. B. Karam Chand had also sued for the recovery of his own money and obtained a decree on 22nd August 1932 for Rs. 11,086 and costs against Bhag Chand. Instead of proceeding against the property which was mortgaged to him R. B. Karam Chand asked the Senior Sub-Judge, to satisfy his decree out of the amount which Mt. Najbul Sultan had deposited for payment to Bhag Chand. Bhag Chand opposed this application and requested that he should be allowed to take the money himself. The Senior Sub-Judge however did not agree and ordered on 3rd October 1932 that the amount should be paid to R. B. Karam Chand. R. B. Karam Chand received Rs. 12,250 on 11th October 1932 (by mistake the year in the receipt is given as 1931).

On 8th March 1937, S. Sujan Singh instituted the present suit against Bhag Chand, S. Tejsingh, R. B. Karam Chand and Sant Ram. (a) He asked for a decree under O. 34, Rule 4, Civil P. C., for Rs. 15,000 against the paternal house of Bhag Chand in Mohallah Mehtian and also against his mortgagee rights in the house of Murad Bakhsh, etc. in Mohallah Shah Buhran. (b) He requested that Tej Singh should be made liable for the payment of rent which was Rs. 7000. (c) He referred to the fact that without his knowledge the mortgagee rights in the house situated in Mohallah Shah Burhan had been redeemed and a sum of Rs. 18,000 was deposited by the mortgagor. He claimed that this money belonged to him and had been illegally taken away by Sant Ram and R. B. Karam Chand. He therefore asked for its refund. The prayer in the last paragraph is as follows:

> It is respectfully prayed that a decree for Rupees 15,000 be passed against the defendants; defendants 3 and 4 be made to deposit the mortgage money which they have unlawfully received and the same be allowed to the plaintiff out of the decree money ; Rs. 7000 on account of rent be recovered from defendant 2 and the decree money, costs and future interest from the date of the institution of the suit till realization at the rate of Re. 1 per cent. per mensem be recovered by sale of the mortgaged property under O. 34, R. 4, Civil P. C., or in the event of non-recovery of the amount (in full) permission be granted for obtaining a regular decree in respect of the balance against defendant 1 and his property.

Bhag Chand pleaded that the bargain was not conscionable because he was in jail at the time and had been forced to agree to the terms, that the plaintiff should have been vigilant to recover the money which Mt. Najbul Sultan had deposited in Court and which had been taken away by R. B. Karam Chand and Sant Ram and that his laches entitled Bhag Chand to refuse to pay him the rent from the date on which that amount was deposited. He also suggested that the condition that Rs. 100 a month should be paid as rent, if there was a default for three months in paying Rs. 80 a month, was penal. S. Tejsingh took up the same position as that adopted by Bhag Chand, He also stated that the suit was bad for misjoinder of parties and causes of action. R. B. Karam Chand took up the attitude that the plaintiff had no cause of action against him and that the plaintiff's suit was time-barred. Sant Ram did not appear and the proceedings were taken ex parte against him. The following issues were framed :

1. Is the suit within time ? On plaintiff.
2. Is the suit bad for misjoinder of parties and causes of action ? On defendants.
3. Have defendants 3 and 4 realized any money from the property mortgaged with the plaintiff ? On plaintiff.
4. If so, are they liable to refund it ? On plaintiff.
5. Was the rate of interest mentioned in the mortgage deed excessive and penal and is liable to reduction ? On defendant 1.
6. To what extent are Bhag Chand and Tej Singh liable for the money claimed ? On plaintiff.
7. To what relief is the plaintiff entitled ?

S. Sujan Singh was examined. He admitted that he did not give any notice to Mt. Najbul Sultan and Murad Bakhsh intimating that he had obtained the mortgagee rights of the house in Mohallah Shah Burhan from Bhag Chand. He did not deny that he had before filing the suit inspected the execution files : (1) Bhag Chand v. Najbul Sultan, (2) R. B. Karam Chand v. Bhag Chand, and (3) Sant Ram v. Bhag Chand. These files were referred to by him in his evidence. Ram Nath and Mohibullah proved the mortgage deed dated 7th March 1930 to have been voluntarily executed by Bhag Chand in favour of S. Sujan Singh. Ramnath said that Bhag Chand and Tejsingh had fully understood the implications of the document before signing it. Milap Singh, agent of R. B. Karam Chand, proved the receipt dated 11th October 1932 by which money was drawn by R. B. Karam Chand from the Court. Bhag Chand and Tejsingh entered the witness-box and adhered to the position which they had taken in their pleas.

The learned trial Judge held that Art. 132, Limitation Act, applied to the case so far as Bhag Chand and Tej Singh were concerned and that the suit against them was within time. Regarding R. B. Karam Chand and Sant Ram he was of the view that Art. 120, Limitation Act, applied. He followed 21 I C 961,[1] a ruling of their Lordships of the Privy Council, in this respect. He observed that the suit was within time under Art. 120, Limitation Act, because six years had not elapsed from the dates on which R. B. Karam Chand and Santram had recovered the money. He therefore gave Issue 1 in favour of the plaintiff. His opinion about Issue 2 was that the suit was not bad for misjoinder of parties and causes of action.

Regarding Issues 3 and 4 he observed that the mortgagee rights in the house situated in Mohallah Shah Burhan having been transferred to S. Sujan Singh by Bhag Chand, the plaintiff Sujan Singh was entitled to recover the money which the mortgagor paid into Court to redeem the property. He found therefore that R. B. Karam Chand and Santram were bound to return the money which they had received out of that amount. The Judge did not find the rate of interest heavy and adverted to the fact that Bhag Chand had with open eyes entered into the contract. He therefore found Issue 5 against defendant 1 (Bhag Chand.) He declared Bhag Chand responsible as the mortgagor and Tejsingh as surety for the payment of the total amount due under the mortgage and the rent respectively when deciding Issues 6 and 7. As a result he gave a decree to the plaintiff in the following terms :

> In view of the above I grant the plaintiff a decree under O. 34, R. 4, Civil P. C., for Rs. 15,000 with costs and interest at the rate of 6 per cent. per annum against the defendants. The amount will be realized from the mortgaged property, namely the house in Mohallah Mehtiyan and from R. B. Karam Chand and Santram to the extent only of the amount realized by them out of the proceeds of the mortgagee rights in Najbul Sultan's property. Tejsingh as a surety will also be liable to the extent of Rs. 7000, the outstanding interest.

In drawing up the decree sheet the learned Judge calculated the total amount of principal, interest and costs due under the mortgage up to 14th December 1937 (the date of the decree) as Rs. 15,000. In fact the sum due was Rupees 16,776-4-0 as under :

| | | | |
|---|---|---|---|
| Principal | Rs. | 8000-0-0 | Claimed in plaint. |
| Interest up to 7-3-37 | Rs. | 7000-0-0 | |
| Interest from 7-3-37 (date of institution of the suit) to 14-12-37 (date of decree), i. e. nine months seven days at 6 per cent. per annum allowed by the trial Judge. | Rs. | 370-0-0 | |
| Costs as per decree sheet. | Rs. | 1406-4-0 | |
| Total | Rs. | 16776-4-0 | |

Three appeals have been preferred against this order to this Court as follows : 1. By Bhag Chand and Tejsingh who ask for reduction of the decretal amount by Rupees 9990 which represents interest and which they allege the plaintiff is not entitled to recover on account of his laches. 2. By R. B. Karam Chand who requests that he should be allowed to retain the amount recovered by him out of Mt. Najbul Sultan's money. 3. By Santram who has made a request similar to that of R. B. Karam Chand. Sardar Raja Singh, counsel for the plaintiff-respondent, has presented a petition under Section 152, Civil P. C. He has pointed out in it that there was an arithmetical error in the decree sheet and has prayed that the decree sheet should be amended. This judgment will cover all four cases. The case of Bhag Chand and Tejsingh is that the mortgagee did not exercise due diligence in recovering his money, that the mortgagee could have received the amount due to him from out of the sum of Rs. 18,000 which was deposited by Mt. Najbul Sultan in August 1932, that his failure to do so disentitled the mortgagee to interest from that date onward. They also took up the plea that the plaintiff had charged compound interest on Rupees 960 because that was paid as interest in advance out of the mortgage money and yet interest was assessed on the whole of the mortgage money in the plaint. We do not see any force in these arguments. The learned counsel for Bhag Chand has not been able to show us any authority for the view that a mortgagee is under a duty to recover his mortgage money as soon as possible and that if he does not do so he loses his right to get interest. Consequently S. Sujan Singh is not liable to lose his interest on this ground. Turning to the question of compound interest L. Bhag Chand paid Rs. 960 in advance, and he and Tej Singh agreed to pay interest on it in future. We do not see how they can get over their contract now. We therefore dismiss the appeal of Bhag Chand and Tejsingh with costs. Pleader's fee Rs. 100.

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[1] Barhamdeo Prasad v. Tara Chand, (1913) 41 Cal 654=21 I C 961=41 I A 45=19 C L J 132=18 C W N 345 (P C).

The learned counsel for R. B. Karam Chand argued that a sub-mortgagee (as S. Sujan Singh was of the property situate in Mohallah Shah Burhan) was bound, on obtaining the mortgagee rights, to give a notice to the mortgagor that he had taken over those rights. He urged that if the notice is not given and the mortgagor redeems the mortgage in the meantime, the rights of the sub-mortgagee against the mortgaged property and the mortgagor are extinguished. According to counsel all he can do is to proceed against the person of the original mortgagee only for his money. He contended that the logical result of this position at law was that if the mortgagee paid the redemption money received by him to third parties (just as R. B. Karam Chand) those persons were not liable to the sub-mortgagee in any way so far as the money paid to them was concerned. Counsel concluded that on these principles R. B. Karam Chand, who received the money which had become the property of Bhag Chand, was not under obligation to refund it to S. Sujan Singh. Counsel also argued that the suit of the plaintiff against his client was governed by Art. 62, Limitation Act, and was therefore barred by time.

We think that there is considerable force in the first argument advanced by the counsel for R. B. Karam Chand, and we therefore do not consider it necessary to decide the question of limitation. We agree with him that S. Sujan Singh, a sub-mortgagee could not ask R. B. Karam Chand to refund the money which he had recovered through Court from Bhag Chand in the shape of redemption money deposited by Mt. Najbul Sultan. A sub-mortgagee is not privy to the original contract of mortgage and until and unless he gives notice to the mortgagor, the mortgagor has got every right to redeem the mortgage and get rid of the liabilities thereunder. The money becomes the property of the mortgagee and he may pay it to anyone he likes. The sub-mortgagee has a remedy in such circumstances against his transferor only, that is to say the mortgagee and no one else. A I R 1932 Mad 115[2] is a direct authority for this proposition. The learned trial Judge has referred to 21 I C 961[1] for holding that R. B. Karam Chand is bound to refund the money. We have consulted that ruling. There is nothing in this authority to justify such a proposition. We therefore hold that R. B. Karam Chand is entitled to keep the money which he recovered from Bhag Chand through Court. His appeal is consequently accepted, the order of the lower Court against him is set aside and the suit of S. Sujan Singh against him is dismissed with costs throughout. Pleader's fee Rs. 150.

Sant Ram's case is stronger. Not only the mortgagee rights in the property in dispute had been mortgaged to him before the deed in favour of S. Sujan Singh was drawn up, but he had also obtained a decree for recovering his debt from that property. In the circumstances he was also well within his rights when he recovered Rupees 2813 from the mortgage money deposited by Mt. Najbul Sultan. The learned counsel for S. Sujan Singh concedes that Sant Ram has an unanswerable case. He only urged that Sant Ram did not appear in the trial Court and put in his pleas, and that if he had done so and brought to the notice of the plaintiff the strength of his title the plaintiff would have perhaps conceded his claim. Counsel alleged that in the circumstances Sant Ram was not entitled to his costs. We do not agree with this contention. We know that S. Sujan Singh had consulted all the files including the execution proceedings instituted by Sant Ram and was therefore fully cognizant of the title of Sant Ram before he instituted the suit. If in spite of that knowledge he filed the suit and brought Sant Ram into the litigation he must pay his costs. Consequently we accept the appeal of Sant Ram, set aside the order of the trial Judge so far as his case is concerned and dismiss the suit of S. Sujan Singh against him with costs throughout. The petition of S. Raja Singh is more or less an appeal against the decree of the trial Judge. It should have been properly stamped. We therefore do not propose to take action on that application and reject it in limine.

Our dismissal of the petition of the plaintiff-respondent does not debar us from drawing up a correct decree sheet so as to

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**[2] Viswanath Ayyar v. Chimmu Kutti Amma, (1932) 19 A I R Mad 115=135 I C 535=55 Mad 320=62 M. L J 272.**

make it conform to the judgment of the trial Judge and to the variations made by us on appeal in that judgment. The trial Judge gave a decree for Rs. 15,000 principal and granted Rs. 1406-4-0 costs. The order is not very clear but it appears that the Judge intended to give 6 per cent. interest from the date of the suit to the date of realization. There is no appeal before us against this order fixing the rate of interest. In the circumstances, the plaintiff is entitled to 6 per cent. interest for nine months seven days, that is to say from 7th March 1937 (date of institution of the suit) to 14th December 1937 (the date of the decree). This comes to Rs. 370. The total amount due on the date of the decree therefore works out at Rs. 16,776-4-0 on which the plaintiff is entitled to 6 per cent. interest till realization. Tej Singh has to pay costs on Rs. 7000 because he was only held liable to that extent in the judgment of the trial Court. He has been wrongly made liable for the total amount of costs in the decree sheet. The decree should now therefore be drawn up accordingly.

B.D./R.K. *Order accordingly.*

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## A. I. R. 1938 Peshawar 77

MIDDLETON J. C. AND
MIR AHMAD J.

*Amir Khan and another* — Appellants.

v.

*Khair Mohammad Ghulam Habib and others* — Respondents.

First Appeal No. 137/63 of 1936, Decided on 16th February 1937, against order of Sub-Judge, First Class, Peshawar, D/- 12th June 1936.

**(a) Execution—When decrees can be treated as nullities — Exception of S. 11, Suits valuation Act, and S. 21, Civil P. C. —Territorial or pecuniary jurisdiction — Question cannot be raised in execution Court.**

Section 11, Suits Valuation Act, and Section 21, Civil P. C., are two legislative exceptions to the general principle of law that where a Court has no jurisdiction, its judgments and orders are mere nullities and can be declared to be void by every Court in which they may be presented. In view of only these exceptions it has been generally held that question of territorial or pecuniary jurisdiction of the decretal Court cannot be raised in execution proceedings before it : *A I R 1925 Cal 907 (F B), Not foll.*; *A I R 1935 Pesh 142, Rel. on.* [P 78 C 2]

**(b) Execution—Court neither of first instance nor Appellate cannot execute decree.**

A Court which is neither the Court of first instance nor the Appellate Court has no jurisdiction to execute a decree : *A I R 1932 Lah 289, Disting.* [P 78 C 2]

**(c) Res judicata — Order in execution — Wrong order attaining finality, appeal therefrom being dismissed — Subsequent execution — Such order cannot be set aside.**

Where a wrong order in execution has become final because an appeal therefrom has been dismissed as time-barred, principles of res judicata come into play and that order cannot be set aside in subsequent execution. [P 78 C 2]

S. Raja Singh and Lala Gur Lal — *for Appellants.*

Agha Sayed Ali Shah — *for Respondent (Khair Mohd.).*

**Middleton J. C.** — Khair Mohammad brought a suit for possession of immovable property in the Court of the Sub-Judge Fourth Class, Peshawar, and obtained a decree dated 17th October 1932. Amir Khan and Nazir Khan (defendants) appealed to the District Judge who held that the suit had been wrongly valued and that the court-fee should have been paid on Rupees 5400. This court-fee was made up in his Court and he dismissed the appeal affirming the decree of the trial Court. He however was doubtful whether the suit was one which should have been tried by a Revenue Court. Although he dismissed the appeal himself, he referred the case under S. 100, Tenancy Act, to this Court with a recommendation that his appellate decree should be registered as an appellate decree of a Revenue Court. This Court found that the suit was one in which a Civil Court had jurisdiction and by order dated 5th October 1933 returned the reference stating that the case had been rightly heard by a Civil Court and the District Judge had rightly exercised appellate powers. It may be noted that the question of valuation had never been raised at all in this Court and that the decision was merely as regards jurisdiction of a Civil Court as opposed to jurisdiction of a Revenue Court. Meanwhile execution had already been taken out and possession of a part of the immovable property had been granted to the decree-holder Khair Mohammad on 10th January 1933. He had also received his original costs incurred in the trial Court by execution. On 6th January 1934 Khair Mohammad again applied in execution (a) for possession of the remaining portion of the property, and (b) for his costs in appeal including the additional court-fee which had been levied by the Appellate Court.

The Presiding Officer of the Court of the first instance had been transferred before this last execution application was decided and his successor went behind the decree and by order dated 18th June 1934 held that the decree was a nullity because it had been granted by a Court without the necessary pecuniary jurisdiction. Khair Mohammad appealed in the Court of the District Judge. That Court holding that it had no jurisdiction returned the memorandum of appeal which was thereafter presented in this Court where it was rejected as time-barred by order dated 11th June 1935. Amir Khan and Nazir Khan on 30th July 1935 applied under S. 144, Civil P. C., for restitution of the property and refund of costs which Khair Mohammad had obtained in execution. This application was rejected by the executing Court on 8th April 1936. Amir Khan and Nazir Khan now come up in revision against this order of rejection dated 8th April 1936. On 6th April 1936 Khair Mohammad again applied in execution for recovery of his costs in his appeal but instead of presenting his application to the Court of first instance he presented it to the Senior Sub-Judge who sent it to the Court of Syed Ali Haidar Shah, a Sub-Judge with First Class powers, who by order dated 12th June 1936 came to the conclusion that the execution could proceed and that Raja Mohammad Nazir Khan in previously holding that the decree was a nullity and could not be executed had gone behind the decree which he was not empowered to do. He further held that Raja Mohammad Nazir Khan's order was not res judicata as the execution application lay to the District Judge and not to him. Amir Khan and Nazir Khan now come up in appeal against the order of Sayed Ali Haidar Shah dated 12th June 1936 permitting the execution to proceed.

This judgment will dispose of both the revision application and the appeal. The question of pecuniary jurisdiction was never raised in the trial Court or in the Appellate Court and the latter acted on its own motion in levying additional court-fee. In these circumstances S. 11, Suits Valuation Act, comes into operation so that had the appellate order come before this Court in further appeal or revision, it would not have been set aside for want of pecuniary jurisdiction. The first question that arises is, whether the Court of first instance, acting as an execution Court, could disregard the decree as a nullity even though the decree could not have been set aside by this Court. S. 11, Suits Valuation Act, and S. 21, Civil P. C., are two legislative exceptions to the general principle of law that where a Court has no jurisdiction its judgments and orders are mere nullities and can be declared to be void by every Court in which they may be presented. In view of these exceptions it has been generally held that questions of territorial or pecuniary jurisdiction of the decretal Court cannot be raised in execution proceedings before it. The Calcutta High Court however in 53 Cal 166[1] has differed from the general consensus of opinion. The question has been before this Court in A I R 1935 Pesh 142[2] in which Almond A. J. C. held that as a question of territorial jurisdiction cannot be raised in an appellate or revisional Court, still less can it be raised in an execution Court. In accordance with the generally accepted view and with the previous ruling of our own Court we must hold that the order of the execution Court dated 18th June 1934 was incorrect. It however has become final because an appeal against it was dismissed as being barred by time. That order having become final and it having been held therein that the decree could not be executed we are of opinion that the principles of res judicata apply and were a bar to the subsequent order of Sayed Ali Haidar Shah dated 12th June 1936 reopening execution.

Moreover S. 37, Civil P. C., lays down that in the case of an appellate decree "a Court which passed the decree" shall in relation to the execution of that decree be deemed to include the Court of first instance. The Court of the Sub-Judge, Fourth Class was still in existence when Khair Mohammad presented his last execution application in the Court of the Senior Sub-Judge. That Court was neither the Court of first instance nor was it the Appellate Court and therefore it had no jurisdiction. It could neither proceed in execution itself nor could it transfer execution proceedings to another Court under S. 39, Civil P. C. In this connexion our attention has been drawn to a case reported in A I R 1932 Lah 289.[3] The main ruling therein was to the same effect as that already given in this judgment, namely that an executing Court cannot question the validity of a decree on the ground of lack of pecuniary jurisdiction of the Court which made the decree; but from the facts of the case mentioned in the judgment it appears that though the Court of first instance was a Sub-Judge the execution proceedings had been taken in the Court of the Senior Sub-Judge and by order of the High Court were continued therein. At first sight this would appear to indicate that the Court of the Senior Sub-Judge had executional jurisdiction in respect of a decree made by the Court of another Sub-Judge, but on further examination we find that it was the Court of first instance which had transferred the decree to the Court of the Senior Sub-Judge thereby conferring jurisdiction upon it. In the present case the execution application was merely presented by the applicant to the Senior Sub-Judge and he obtained no jurisdiction from the Court of the first instance. For the reasons mentioned above, we must hold that Sayed Ali Haidar Shah was debarred from passing the order under appeal, both by lack of jurisdiction and by the principle of res judicata, and hence the appeal must be accepted.

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[1] Gora Chand Haldar v. Prafulla Kumar Roy, (1925) 12 A I R Cal 907=89 I C 685=53 Cal 166=29 C W N 948=42 C L J 1 (F B).

[2] Mian Ziaudin v. Secretary of State, (1935) 22 A I R Pesh 142=158 I C 363.

[3] Ahmadyar v. Jesaram, (1932) 19 A I R Lah 289=133 I C 276=13 Lah 25=32 P L R 309.

It is evident from what has already been stated that Khair Mohammad obtained a decree which he was perfectly entitled to execute in full, and that after executing it in part he was debarred from executing the remaining part by a mistaken order which has unfortunately become final by reason of the fact that he failed to appeal to the proper Court within the period of limitation. There is no reason whatever why he should be made to restore what he managed to obtain in his first execution. The only reason why he cannot obtain the remainder is a technical one. The revision petition accordingly has no basis, whilst the appeal must succeed upon a technicality. We therefore dismiss the revision petition with costs, fixing pleader's fee at Rs. 50, whilst we accept the appeal and set aside the order dated 12th June 1936 but direct that parties to the appeal shall bear their own costs.

B.D./R.K. *Order accordingly.*

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### A. I. R. 1938 Peshawar 79

### ALMOND J. C.

*Zamin Shah Mir Ahmad* — Petitioner.

v.

*Mukamil Shah and another*—Respdts.

**Civil Revn. No. 133 of 1938, Decided on 12th August 1938.**

**Provincial Small Cause Courts Act (1887), Art. 28 — Allegation in plaint and not position of defendant determines jurisdiction.**

The question of jurisdiction depends entirely on the allegations made in the plaint and it is immaterial whether the defendant is a rival claimant to the estate or merely a person in wrongful possession : *A I R 1926 Mad 37 ; A I R 1933 Mad 346 and A I R 1924 Cal 536, Rel. on ; 27 All 622, A I R 1915 Cal 740 ; 12 Bom 573 and A I R 1917 L B 61, Ref.* [P 80 C 1]

Ch. Jai Krishan — *for Petitioner.*

R. S. Mehta Ramji Das — *for Respondents.*

**Order.**—This is an application for revision of the decree of the Small Cause Court, Mardan, whereby he granted to the plaintiff Mukamilshah a decree for Rs. 77.8.0 against defendant 1, Zaminshah. Defendant 1 applies that the decree be set aside on the ground that the case was excluded from the cognizance of the Small Cause Court by Art. 28, Provincial Small Cause Courts Act. That Article reads as under:

> A suit for a legacy or for the whole or a share of a residue bequeathed by a testator or for the whole or a share of the property of an intestate.

The plaint in the present case was to the following effect: That 3½ months ago Muzamilshah, the brother of the plaintiff, had died leaving a widow, a step-mother and a consanguine brother, that when the deceased's clothes were taken off in order to have his body washed before burial, 5 sovereigns were found tied up in the deceased's trousers string; that the plaintiff made over the coins for safe custody to his uncle defendant 1 who was present at the time, that the plaintiff as the heir of the deceased was entitled to ¾th of the estate and that defendant 1 refused to hand back his share of the coins recovered from the body of the deceased. Learned counsel for the respondents has relied on the following cases in support of the fact that the case was cognizable by a Small Cause Court. 12 Bom 573[1]: That was a suit by an executor. The defendant set up in defence a gift by the testator to him and it was found that there had been an incomplete gift. 27 All 622[2]: This is a case of 1905 in which it was held in effect that Art. 28 applied only to rival claimants to the estate. 27 I C 773,[3] a judgment of the Calcutta High Court. In that it was held that Art. 28 only referred to cases between rival claimants to the estate or to suits against persons administering the estate. 27 All 622[2] was cited with approval in that case. 37 I C 75,[4] a judgment of the Chief Court of Lower Burma. The suit in that case was by an executor and the question of the jurisdiction of the Small Cause Court was not disputed by counsel who appeared in the case.

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[1] Khursedji Rustomji Kolah v. Pestonji Cowasji, (1888) 12 Bom 573.

[2] Chedi v. Gulabo, (1905) 27 All 622=2 A L J 388=1905 A W N 134.

[3] Tika Shahu v. Chirkat Shahu, (1915) 2 A I R Cal 740=27 I C 773=19 C W N 614.

As against these rulings learned counsel for the petitioner cites A I R 1926 Mad 37,[5] A I R 1933 Mad 346[6] and A I R 1924 Cal 536.[7] In the first of these Madras cases the matter was discussed in detail and it was held that the question of jurisdiction depended entirely on the allegations made in the plaint and it was immaterial whether the defendant was a rival claimant to the estate or merely a wrong-doer. It specifically dissented from the view given in 27 All 622.[2] A I R 1933 Mad 346[6] approved of the principle laid down in the earlier Madras case and in A I R 1924 Cal 536[7] the same view was taken but no reference was made to the earlier ruling, 27 I C 773,[3] which was a decision of two Judges, whereas the later case was a decision of a single Judge.

In my opinion this case is clearly excluded from the cognizance of the Small Cause Courts. It does not appear to me to be material as to whether the defendant is a rival claimant to the estate or merely a person in wrongful possession of the estate. It is the nature of the suit and not the position of the defendant which must govern the question, and the suit is clearly one for a share of the property of a person who died intestate. For these reasons I accept this application and set aside the decree of the Small Cause Court Judge on the ground that the case was not cognizable by him. The plaint will be returned to the plaintiff for presentation in a Court exercising jurisdiction. Costs in the trial Court and costs in this Court will abide the event.

B.D./R.K. *Application allowed.*

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[4] Ma Pu v. Ma Su, (1917) 4 A I R L B 61=37 I C 75.

[5] Samu Asari v. Ananchi Ammal, (1926) 13 A I R Mad 37=91 I C 561=49 M L J 554.

[6] Rethinaswami Thevar v. Nataraja Thevar, (1933) 20 A I R Mad 346=142 I C 613.

[7] Prianath Sardar v. Mohendra Nath, (1924) 11 A I R Cal 536=70 I C 316.

## A. I. R. 1938 Peshawar 80

MIR AHMAD J.

*Jinahuddin* v. *Sarfraz Khan.*

Civil Revn. Petn. No. 384 of 1937, Decided on 20th May 1938.

**Civil P. C. (1908), Sch. 2, Para. 1—Sch. 2 is inapplicable to execution proceedings.**

Schedule 2 does not apply to execution proceedings : *A I R 1936 All 378, Rel. on.* [P 80 C 2]

L. Vishnu Dutt — *for Petitioner.*

Qazi Motadullah Khan — *for Respdt.*

**Order.**—K. B. Sarfraz Khan brought a suit against Abdul Ghani and Jinahuddin, sons of Mohiyuddin, for the recovery of Rs. 500 which sum was due from Mohiyuddin. A decree was granted to him against the property of Mohiyuddin in the hands of the two defendants. In executing his decree K. B. Sarfraz Khan attached some mianas (villages houses). Jinahuddin objected that two of the mianas, one of which was occupied by him for residential purposes, and another which was used by him for housing cattle belonged to him and not to his father. The question of the ownership of these mianas was referred to arbitration with the consent of the objector and the decree-holder. The arbitrator reported in favour of the decree-holder. The execution Judge upheld the award. Jinahuddin has come up on revision to this Court. The learned counsel for the petitioner has taken the objection that the provisions of Sch. 2 (reference to arbitration) did not apply to execution proceedings and that consequently the reference and the award were both ultra vires. He has quoted A I R 1936 All 378[1] in support of this proposition. The learned counsel for the respondent has not been able to cite any authority to the contrary. In my opinion Sch. 2 does not apply to execution proceedings and consequently the objection of Jinahuddin could not be legally referred to arbitration. I therefore accept the petition, set aside the order of the execution Judge as well as the award itself and direct that the objection of Jinahuddin should be decided on merits by the execution Judge himself. The case should be sent back to him for this purpose. As the application has been decided on a question of jurisdiction which was raised for the first time in this Court I direct that the parties shall bear their own costs in this Court.

B.D./R.K. *Petition allowed.*

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[1] Sarju Lal Behari Lal v. Sukhdeo Prasad, (1936) 23 A I R All 378=161 I C 107=58 All 797=1936 A L J 142.

## A. I. R. 1938 Peshawar 81

ALMOND J. C.

*L. Kanshi Ram Babu Nand Lall — Auction-purchaser* — Appellant.

v.

*Gobind Ram Jiwan Mal and others* — Respondents.

Civil Appeal No. 32/1 of 1938, Decided on 22nd July 1938, from order and decree of Dist. Judge, Peshawar, D/- 14th January 1938.

**(a) Civil P. C. (1908), S. 151—Order under, is not appealable—Order passed on appeal is without jurisdiction and open to further appeal or revision.**

As there is no specific provision in the Code of Civil Procedure for an appeal against an order passed under S. 151, no appeal lies from such an order and therefore the order of an Appellate Court passed on appeal from such order is passed without jurisdiction. And where such an order has been passed without jurisdiction a further appeal or a revision application can be entertained to set aside the order which has been passed without jurisdiction : *A I R 1936 Lah 212, Rel. on.* [P 82 C 2]

**(b) Civil P. C. (1908), S. 115 — Judicial Commissioner's Court can exercise revisional powers on its own motion in appropriate case.**

The Judicial Commissioner's Court in an appropriate case can exercise powers of revision on its own motion if it appears that there had been any material irregularity in the exercise of its jurisdiction by the lower Court. [P 82 C 2]

L. Hukam Chand and L. Ladha Ram — *for Appellant.*

S. Raja Singh and S. Anup Singh — *for Respondent 1 (Gobind Ram).*

Gulzari Lal, Respondent 2 *in person.*

**Judgment.**—The history of the litigation leading to this further appeal is as follows: On 11th April 1932, Gulzarilal obtained a decree for Rs. 3473-12-0 and costs under O. 34, R. 4, Civil P. C., in the Court of the Sub-Judge of the Second Class, Peshawar. On 16th March 1933, after the final decree had been passed Kanshi Ram purchased the property for Rupees 6500. The auction purchase money was correctly deposited as required by O. 21, R. 84, Civil P. C., and the statement in the judgment of the lower Appellate Court to the contrary is incorrect. On 22nd June 1933, the Subordinate Judge of the Second Class had been succeeded by another Judge who exercised only third class powers. He confirmed the sale although it was beyond his pecuniary jurisdiction to do so. The judgment-debtor then moved the Court of the Senior Sub-Judge and the case was transferred to his Court. On 25th July 1933 he ordered the property to be resold. On 27th July 1933 the auction purchaser withdrew his purchase money in view of the order of the 25th July.

An appeal against the order of 25th July was preferred by the decree-holder and on 1st December 1933 the District Judge set aside the order directing the resale and ordered that the objections of the judgment-debtor to the sale should be heard and disposed of. On 25th October 1934, the Senior Sub-Judge confirmed the sale after disposing of the objections and directed the auction purchaser to redeposit the purchase money by 30th October 1934. Against that order of confirmation, the judgment-debtor appealed and his appeal was dismissed on 22nd January 1935. The case again went back to the Senior Sub-Judge who on 15th May 1935 again ordered the auction purchaser to deposit the sale money by 28th May 1935. Against this order the auction purchaser appealed and subsequently applied for revision. His appeal was dismissed on 29th October 1935 and his application for revision on 17th June 1936.

On 30th January 1937 the auction purchaser deposited the purchase money. The question of the amount due to a prior mortgagee, Lala Veshno Ditta Mal, then arose and on 2nd February 1937 L. Veshno Ditta Mal put in a statement of his accounts. On 4th February the judgment-debtor put in an application in which he objected to the accounts filed by L. Veshno Ditta Mal and also claimed that the auction purchaser should pay interest on the sale-money from the date of the sale until the date of the deposit of the money in Court on 30th January 1937. These objections were disposed of by the Senior Sub-Judge on 18th March 1937. He accepted the judgment-debtor's application in so far as it concerned the amount due to L. Veshno Ditta Mal and rejected it in so far as it related to interest on the purchase money. The judgment-debtor appealed to the District Judge against the decision on the latter point. Objections were taken by the auction purchaser that no appeal lay. But the learned District Judge overruled these objections and held that although the order of the Senior Sub-Judge had been passed under S. 151, Civil P. C. the District Judge could hear an appeal against that order. As regards the merits he remarked that the claim of the judgment-debtor was for interest from 28th May 1935 and he considered it equitable that the auction purchaser should pay interest for that period, and that had he deposited the sale money when he was directed to do, he would at once have obtained possession of the property.

Against the order of the District Judge a further appeal has been presented to this Court and cross-objections have been put in by the judgment-debtor claiming interest from 27th July 1933. Learned counsel for the respondent judgment-debtor contends that no appeal lies as the order of the District Judge was made under S. 151, Civil P. C. and that if this Court comes to the conclusion that on the merits the order of the District Judge is correct, then it is competent for the Court to refuse to interfere even if it be found that the appeal to the District Judge was heard without jurisdiction. In connexion with the latter part of his argument he has referred me to four cases in which it was held that a Court of revision need not interfere with an order of a lower Court even if it was passed without jurisdiction if justice has been done between the parties. These cases are: 36 P R 1902,[1] 125 P R 1907,[2] A I R 1926 Mad 1059[3] and A I R 1929 Rang 198.[4] The contention of the learned counsel for the appellant on the other hand is that the order of the District Judge which was passed without jurisdiction is a nullity and that an appeal lies against it in order to set it aside as being a nullity. In this connexion he relies on two cases reported in A I R 1931 Lah 344[5] and A I R 1936 Lah 212.[6] In the former of these cases a single Judge of the High Court had set aside an order of an original Court made under S. 151, Civil P. C. An appeal under the Letters Patent was filed against that appellate order and it was held that as no appeal lay from an order under S. 151, Civil P. C., the order of the single Judge was without jurisdiction and a nullity and it was set aside. In the latter case an order of the District Judge had set aside an order of the trial Court made under S. 151, Civil P. C., and on a further appeal to the High Court it was remarked that although some other Courts did recognize an appeal against an order under S. 151, Civil P. C., the Lahore High Court did not recognize such a right of appeal. The order of the District Judge was therefore set aside and in order to do justice between the parties the learned Judge of the High Court himself passed the same order which had been made by the District Judge. Learned counsel for the respondent has also referred me to two cases of the Calcutta High Court reported in A I R 1927 Cal 285[7] and A I R 1931 Cal 779[8] in which it has been held that an order under Sec. 151, Civil P. C., is appealable if it is passed in circumstances analogous to those of S. 144, Civil P. C.

It is clear to me that the order of the Senior Sub-Judge in this case was made under S. 151, Civil P. C. There is no other Section of the Code under which it could have been made. It appears to me further that as there is no specific provision in the Code of Civil Procedure for an appeal against an order passed under that Section no appeal lies and therefore the order of the District Judge passed in this case was passed without jurisdiction. I am furthermore in agreement with the reasoning given in A I R 1936 Lah 212[6] that where such an order has been passed without jurisdiction a further appeal or a revision application can be entertained to set aside the order which has been passed without jurisdiction. For these reasons, I find that the order of the District Judge must be set aside as having been passed without jurisdiction. It would have been competent for the decree-holder to have applied for revision against the order of the Senior Sub-Judge but his remedy by that procedure is now time-barred. I could however in an appropriate case exercise powers of revision on my own motion if it appeared that there had been any material irregularity in the exercise of his jurisdiction by the Senior Sub-Judge.

In connexion with this aspect of the case, the learned counsel for the appellant has taken up the position that the order of the Senior Sub-Judge is in itself a just order,

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1. Hansa v. Ransing, (1902) 36 P R 1902 (F B).
2. Hakim v. Ralya, (1907) 125 P R 1907 = 80 P W R 1907.
3. Krishnamacharlu v. Venkatasubbiah, (1926) 13 A I R Mad 1059=97 I C 795.
4. M. T. T. K. M. M. N. Chettyar v. K. P. A. N. M. Firm, (1929) 16 A I R Rang 198=120 I C 693.
5. Mul Rai v. Bura Mal, (1931) 18 A I R Lah 344=134 I C 292 = 12 Lah 602 = 33 P L R 224.
6. Maghimal v. Ganpat Rai, (1936) 23 A I R Lah 212=163 I C 121=38 P L R 717.
7. Gnanada Sundari Mojumdar v. Chandra Kumar De, (1927) 14 A I R Cal 285=100 I C 735=31 C W N 290.
8. Sasikanta Acharjee v. Jalil Baksh Munshi, (1931) 18 A I R Cal 779=135 I C 1185 = 53 C L J 49=35 C W N 105.

that if the opposite view is taken then he relies on the fact that the Senior Sub-Judge had no jurisdiction to pass any order at all upon the point as the question is governed by the principle of res judicata in view of the remarks made in the judgment of this Court in Civil Revision No. 72 of 1936 decided on 17th June 1936. In the penultimate paragraph of the judgment of that case are the following words:

> I agree with counsel for the respondent (the respondent being decree-holder) that the order directing the auction-purchaser to refund the money returned to him, which was passed on 30th October 1934, became a final order in the absence of appeal.

Learned counsel has argued that if the judgment-debtor had any claim to interest at that time he ought to have put it forward in those proceedings. I cannot agree that the principle of res judicata can apply to the facts of this case, for a portion of the interest at any rate which is now claimed is interest subsequent to the date of that order. But, apart from this question, it appears to me that the order of the Senior Sub-Judge was essentially a just order. It was no fault of the auction-purchaser that the re-sale of the property was ordered on 25th July 1933. In fact, up till 15th May 1935, it was the appellate proceedings filed by parties other than the auction-purchaser which led to the disposal of the case. It is true that from 15th May 1935 till 30th January 1937 the delay in the disposal of the case was due to objections made by the auction-purchaser himself and the delay in complying with the orders of the Court. But, as against this fact we must remember, as has been noted in the order of the learned Senior Sub-Judge, that the judgment-debtor has been enjoying the use of the property and I am unable to see why in these circumstances he should require the auction-purchaser to pay interest on the sale money. I therefore accept this appeal, set aside the order of the District Judge and restore that of the Senior Sub-Judge. The auction-purchaser will have the costs of the application in all Courts from the judgment-debtor. Pleader's fee Rs. 30. The cross-objections are dismissed with costs.

K.S./R.K. *Appeal accepted.*

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## A. I. R. 1938 Peshawar 83

MIDDLETON J. C.

*Mt. Umtul Quresh and others* — Appellants.

v.

*Ghulam Hassan and others* — Respondents.

Civil Appeal No. 171/74 of 1936, Decided on 9th February 1937, from order of Sub.Judge, First Class, Peshawar, D/- 14th April 1936.

**Criminal P. C. (1898), S. 195 (3) — Subordinate Court — Meaning explained.**

The wording of Sec. 195 does not refer to the locus of the appeal in a particular suit but to the ordinary or usual locus : *2 Bom 481; 11 Bom 438 and A I R 1922 Lah 346, Rel. on.* [P 84 C 1]

Hence the Court of Judicial Extra Assistant Commissioner is subordinate to that of the District Judge for the purposes of S. 195, even though an appeal in the suit in respect of which proceedings under S. 195 arise lies to the Judicial Commissioner's Court and not the District Court. [P 83 C 2; P 84 C 1]

Diwan Chand and Qazi Abdul Wahab — *for Appellant.*

Sheikh Allah Bakhsh — *for Respondent No. 1 (Ghulam Hassan).*

**Judgment.** — Respondents 2, 3 and 4 have not been served. They are not interested in this appeal which affects Ghulam Hassan, respondent 1, alone. The appellant applied to the Court of the Judicial Extra Assistant Commissioner, Peshawar, moving that Court to institute a criminal complaint against Ghulam Hassan under Sec. 466, I. P. C. The application was rejected and the appellant now appeals under S. 476-B, Criminal P. C. A preliminary objection is taken that the appeal lies to the Court of the District Judge and not to this Court. Under S. 476-B, Criminal P. C., the appeal lies to the Court to which the Court of the Judicial Extra Assistant Commissioner is subordinate within the meaning of Sec. 195 (3), Criminal P. C. The relevant portion of S. 195 is as follows :

> For the purposes of this Section, a Court shall be deemed to be subordinate to the Court to which appeals ordnarily lie from the appealable decrees of such former Court.

In suits up to the value of Rs. 5000 appeals from the decrees of the Judicial Extra Assistant Commissioner lie to the District Judge but in suits of higher value appeals lie to this Court. According to the plain meaning of the words used, I must hold that the Court of the Judicial Extra Assistant Commissioner is subordinate to that of the District Judge for the purposes of S. 195, Criminal P. C. It is true that the civil suit out of which these proceedings arise was one of value greater than Rs. 5000 but the wording of the Section does not refer to the locus of the appeal in a particular suit but to the ordinary or usual locus. The same view has been held in cases reported in 2 Bom 481,[1] 11 Bom 438[2] and A I R 1922 Lah 346[3] as well as in other High Courts and no ruling to the contrary has been cited before me. I hold that the present appeal lies to the District Judge and not to this Court. Accordingly I direct that the memorandum of appeal be endorsed with the date of its presentation to and return by this Court and that be returned to the appellant for presentation in the Court having jurisdiction. The respondent Ghulam Hassan is granted costs in the proceedings before this Court. Pleader's fee Rs. 20.

B.D./R.K. *Order accordingly.*

END

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[1] Imperatrix v. Lakshman Sakharam, (1877) 2 Bom 481.

[2] In re Anant Ram Chandra, (1887) 11 Bom 438.

[3] Fazal Ilahi v. Mohan Lal, (1922) 9 A I R Lah 346 = 72 I C 383 = 24 Cr L J 383.

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| FB | 177 | I C | 766 |
| 315 | 1938 | I T R | 210 |
| SB | 177 | I C | 630 |
| 317 | 1938 | R L R | 580 |
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| | 1938 | R L R | 692 | | 178 | I C | 607 | 414 | 178 | I C | 549 | 447 | 178 | I C | 583 |
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| 363 | 177 | I C | 919 | | 178 | I C | 592 | 420 | 1938 | R L R | 397 | 451 | 179 | I C | 43 |
| 364 | 178 | I C | 538 | 396 | 178 | I C | 566 | | 178 | I C | 918 | 453 | 178 | I C | 896 |
| 367 | 178 | I C | 822 | 397 | 1938 | R L R | 236 | 423 | 178 | I C | 398 | 454 | 178 | I C | 942 |
| 369 | 178 | I C | 700 | | 178 | I C | 644 | **SB** | 40 | Cr L J | 53 | 456 | 179 | I C | 72 |
| 372 | 178 | I C | 544 | 400 | 1938 | R L R | 227 | 426 | 1938 | R L R | 480 | 459 | | ... | |
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| 381 | 178 | I C | 830 | | 40 | Cr L J | 80 | 435 | 1938 | I T R | 470 | 468 | | ... | |
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THE

# ALL INDIA REPORTER

# 1938

## Rangoon High Court

### * * A. I. R. 1938 Rangoon 1

BRAUND J.

*In the matter of Aviet Stephens, Insolvent.*

Insolvency Case No. 4 of 1937, Decided on 14th June 1937.

**(a) Transfer of Property Act (1882), Section 130 (1) — "Hypothecation" or "charge" is transfer.**

A mere "hypothecation" or "charge" is a "transfer" for the purpose of S. 130 (1) : *33 Bom 610 ; 34 Mad 53 ; A I R 1915 Mad 1031 ; 37 Bom 198 and A I R 1931 Cal 223, Rel. on.* [P 3 C 1]

*** (b) Transfer of Property Act (1882), Ss. 3 and 130 (1) — Liability to become due in future from unascertained person and arising out of relationship not yet in existence is not debt either within S. 3 or S. 130 (1).**

Prima facie a liability to arise in the future on the part of an unknown person out of a relationship, contractual or otherwise, which does not yet exist, cannot, on any ordinary use of language, be described as a "debt", still less can it be described as an "existing" debt. Neither can it be "accruing" or "conditional" and it cannot be "contingent." A contingency is something that may happen in future which affects a present relationship. For instance, a contingent interest such as a contingent life-interest presupposes an existing interest which may or may not develop into interest in possession. The interest is there all the time. It is even saleable as such. When S. 3 refers to an "existing" debt, it intends thereby to exclude a debt which does not yet exist at all. So also S. 130 (1) in its terms points to an immediate interest of some sort passing. While it is in every way appropriate to an accruing, conditional or contingent debt, it cannot be reconciled with a debt which does not exist at all. [P 4 C 1]

**(c) Transfer of Property Act (1882), Section 130 (1) — Effect — S. 130 (1) clothes transferee with right to sue for debt in his own name without notice to debtor.**

The effect of S. 130 (1) is, in the cases which it covers, to confer without notice to the debtor a legal title on the transferee as opposed to an equitable title only. But it cannot be too strongly emphasised that its purpose and effect is merely to confer a title and to enable the assignee to sue in his own name and has nothing to do with possession. It is merely designed to circumvent the necessity for notice to be given to the debtor before the assignee sues him. [P 5 C 1]

**(d) Transfer of Property Act (1882), Section 130 (1)— Right under and right conferred by S. 52 (2) (c), Presidency Towns Insolvency Act—Distinction between.**

The express right of the assignee to sue a debtor in his own name conferred by S. 130 (1), T. P. Act, and the "possession, order or disposition" giving rise to a condition of "reputed ownership" under S. 52 (2) (c), Presidency Towns Insolvency Act, are two entirely separate and distinct things. It may very well be that so far as the assignee's right to sue is concerned it is complete, and yet there may be left with the assignor such an appearance of continued or reputed ownership as to invoke the order and disposition clause. [P 5 C 2]

*** * (e) Presidency Towns Insolvency Act (1909), S. 52—Mortgage of book debts — Appropriate way to end reputed ownership is by express notice— Assignee only taking possession of mortgage properties and posting notices at entrances — Insolvency of transferor — Act of assignee held did not amount to notice to debtors—Book debts outstanding on date of insolvency application held available for creditors of transferor.**

The only appropriate way to put an end to the assignor's reputed ownership of book debts is for the assignee to give notice to debtors. If he does not do so, he prima facie leaves them—and voluntarily leaves them—in the order and disposition and reputed ownership of the assignor. In view of the fact that he might at any time since the commencement of the security by giving notice have terminated his consent to the insolvent's reputed ownership, it is not open to him if he waits until the very last moment to say that he has had no time to do it. [P 10 C 1]

In 1931 a person mortgaged his book debts. On 5th January 1937 the assignee took possession of the transferor's property under the charge and posted express notices to the same effect at the entrances. No express notice of the charge was despatched to the debtors. On 6th January 1937 the transferor applied and got himself adjudicated insolvent :

*Held* that the act of the assignee did not constitute notice to the debtors. It did not result in ending the reputed ownership of the insolvent. Hence the debts outstanding on 6th January 1937 were property of the insolvent divisible among his creditors : *English case law discussed.*
[P 10 C 2]

Hartnell, Paget and Foucar — *for Official Assignee.*

Clark and Surridge — *for Messrs. Balthazar & Son.*

**Judgment.** — The only simple thing about this case is its facts. A certain Mr. Aviet Stephens was at all material times the lessee of an establishment known as the "Silver Grill" at which he carried on the business of a modern restaurant. Mr. Stephens had a current account with Messrs. Balthazar & Son, Ltd., bankers of Rangoon whom I shall hereafter call "the Bank". In March 1931, Mr. Stephens executed a document whereby he charged in favour of the Bank the whole of the stock-in-trade, furniture, fittings, and goods and chattels relating to his business at the "Silver Grill," together with all his "book debts, present and future, for the time being due and owing" to him in connexion with his said business, with the repayment to the Bank on demand of any balance outstanding on his current account. On or at some date prior to 5th January 1937, the Bank closed Mr. Stephens's account and default was therefore made by him in payment of the amount due to the Bank. Though it is not, I think, anywhere so admitted in the pleadings, I must take it that that was so, as the whole matter has, without contradiction from either party, been argued upon the footing that when the Bank "went into possession" on 5th January 1937, under Cl. 9 of the instrument of charge, the charge had become fixed and the Bank's power of entry had arisen under that clause. It is not alleged that any power of attorney was ever executed by Mr. Stephens under Cl. 11 of the charge. On the afternoon of 5th January 1937, the Bank exercised its right of taking possession under Cl. 9 of the instrument of charge. It is important to observe what steps the Bank actually took and there being no dispute in this respect, I shall set them out briefly. On 5th January at 3 p. m. the Bank by its servants took physical possession of the premises and posted notice at each entrance bearing the words "Balthazar & Son, Ltd., mortgagees in possession". The Bank's assistants were forthwith placed in charge of the premises. On 7th January 1937, Mr. Stephens was adjudged insolvent upon his own petition presented on the previous day. In this case therefore the insolvency "commenced" with the presentation by Mr. Stephens of his own petition on 6th January 1937. The Bank proceeded to ascertain from the books what the outstanding debts were and from 6th January onwards started to send bills out in the name of the Silver Grill. They were some 340 in number. It was not until 12th January that the Bank acquired a rubber stamp, "Balthazar & Son, Ltd., mortgagees in possession", which was used upon all bills sent out on and after that date. In addition to that it appears from para. 7 of the respondent's particulars dated 8th May that specific notice of the fact that the book debts were charged to the Bank was given to all debtors resident outside Rangoon and to certain debtors resident in Rangoon on or after 8th January. The upshot therefore is that, though the Bank seems to have lost no time in sending out the bills, no express notice was given until after the date of the commencement of the insolvency to any individual debtor of the fact that the debts were charged to the Bank. By 30th January 1937, however, all the debtors, except 30 whose addresses were unknown, had received express notice of the charge from the Bank.

Those constitute the whole of the essential facts and upon them the Official Assignee claims that the whole of the book debts outstanding on 6th January 1937 vested in him as property divisible amongst the insolvent's creditors. On the other hand, the Bank claims to assert a charge over these book debts in priority to the rights of the unsecured creditors. The questions involved are both important and difficult and upon many of them there appears to be a complete absence of authority in India or Burma. The first question I have to consider is whether the instrument of charge of 31st March 1931 falls within S. 130 (1), T. P. Act, 1882, as amended, for, upon the answer to that question certain consequences may depend. The question is whether a mere "hypothecation" or "charge" of book debts which do not exist at the time of the charge but are to arise in future constitutes a "transfer of an actionable claim" within the meaning of the section. The section is in these words :

The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, and shall be complete and effectual upon the execution of such instrument and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person, from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

I entertain no doubt that a mere "hypothecation" or "charge" amounts to a "transfer" for the purpose of S. 130 (1). The definition of "transfer of property" contained in S. 5, T. P. Act, 1882, does not, I think, affect the question, as that is a definition of the composite phrase "transfer of property" for the purpose only of those sections of the Act which immediately succeed it in which those particular words frequently occur. I think that quite obviously the word "transfer" is used in S. 130 (1) of the Act in the same wide sense as that which is attributed to the word "convey" by the definition to be found in S. 205 (i) (ii) of the Law of Property Act, 1925. And there is a substantial authority in India for so extending its meaning: *see* 33 Bom 610[1] at p. 627, 34 Mad 53[2] and 38 Mad 297[3] at p. 299. Had there remained any doubt in my mind as to this, that doubt would have been dispelled by the words of Lord Moulton in 37 Bom 198=40 I A 24[4] where he expressly dealt with the question by saying:

In the present case the respondent bases his claim on a deposit of the policy and not under a written transfer, and claims that this creates a charge on the policy. The section, i. e. S. 130, T. P. Act, specifically enacts that such a proceeding shall not have any such effect; such a charge can only be created by a written document. It follows that the respondents acquired no right whatever to the policy or its proceeds by reason of the deposit.

And the comment made upon that passage by Sir George Rankin in 58 Cal 136[5] at p. 147 is:

Thus, the Board rejected the respondent's contention that S. 130, as amended in 1900, referred to the transfer of absolute rights and not to the creation of a mere charge.

In my judgment therefore, a mere "hypothecation" or "charge" is a "transfer" for the purpose of S. 130 (1), T. P. Act, 1882, as amended. But the more difficult question, and one upon which there seems to be a complete absence of authority in India or Burma, is whether a debt which is in every sense a future debt can constitute an "actionable claim" for the purpose of the section. The sense in which the words "future debt" are used in the instrument of charge of 31st March 1931 is not merely that of *debitum in præsenti solvendum in futuro*, but must include debts to become due from potential customers who are not yet ascertained or ascertainable and with whom no present relationship exists giving rise to any possibility of any future liability. The question is whether such a debt can be said to constitute any "actionable claim", against a class of persons who, as debtors, do not exist. Had S. 130 (1), T. P. Act, stood alone, I think that its own terms would have been strong enough to point irresistibly to a construction of the words "actionable claim" in the sense of an existing claim in the sense that the relationship upon which it rests must already exist. For, it appears to contemplate the immediate vesting in the transferee of "all the rights and remedies of the transferor". Obviously no immediate right or remedy can "thereupon" rest in a transferee in a case in which no liability, certain or contingent, exists. And I should for that reason have been disposed to construe S. 130 (1), had it stood alone, in a restricted sense. But the real difficulty is created by the definition of "actionable claim" which is contained in S. 3 of the Act. That definition is:

Actionable claim means a claim to any debt other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in immoveable property in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

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[1] Ardesir Bejonji Surti v. Sirdar Ali Khan, (1909) 33 Bom 610=4 I C 804=10 Bom L R 1146.

[2] Ramasami Pillai v. Muthu Chetti, (1911) 34 Mad 53=5 I C 834.

[3] Muthukrishna Aiyar v. Veraraghava Iyer, A I R 1915 Mad 1031=21 I C 816=38 Mad 297=25 M L J 356 (F B).

[4] Mulraj Khatan v. Vishwanath, (1913) 37 Bom 198=17 I C 627=40 I A 24=15 Bom L R 9 (P C).

[5] Imperial Bank of India v. Bengal National Bank Ltd., A I R 1931 Cal 223=131 I C 689 =58 Cal 136=53 C L J 269=34 C W N 605.

It is, to my mind, the word "existent" which for the present purpose is the significant word. It has to be noticed that the four words in question qualify not the claim but "the debt or beneficial interest". There are four classes of debts described: existing debts, accruing debts, conditional debts and contingent debts. A debt, the relationship giving rise to which does not yet exist, is clearly not a contingent debt. It appears to me that I must treat these four classes as the only classes of debt that the definition intends to embrace. Prima facie, a liability to arise in the future on the part of an unknown person out of a relationship, contractual or otherwise, which does not yet exist, cannot, on any ordinary use of language, be described as a "debt" : still less can it be described as an "existing" debt. Neither can it be "accruing" or "conditional" and, in my view, it cannot be "contingent". A contingency is something that may happen in future which affects a present relationship. For instance, a contingent interest, such as a contingent life-interest, presupposes an existing interest which may or may not develop into an interest in possession. The interest is there all the time. It is even saleable as such. It seems to me that when S. 3, T. P. Act, refers to an "existing" debt, it intends thereby to exclude a debt which does not yet exist at all. To hold otherwise would I think involve reading into the definition the antithesis of each of the words used and expanding it to read "existing or non-existing", accruing or immediate conditional or unconditional, contingent or certain. That in my view does too much violence to the language. Moreover, as I have already pointed out, S. 130 (1) in its terms appears to point to an immediate interest of some sort passing. And that while it is in every way appropriate to an accruing, conditional or contingent debt, it cannot be reconciled with a debt which does not exist at all. In the three first cases an interest already exists which may or may not become a present debt. It would for instance in such cases be proved for as a debt under S. 46 (3), Presidency Towns Insolvency Act. But a non-existent debt in the sense of a liability to become due in future from an unascertained person and to arise out of a relationship not yet established obviously imports no present interest at all and is not easy to fit into the intention of S. 130 (1) of the Act. It may be quite true that apart from the Transfer of Property Act a non-existent debt may be capable of a present assignment. Indeed it has in England been held over and over again that it can. To take for instance one case only: Lord Watson in the well-known case in (1888) 13 A C 523[6] at p. 533 says :

> Choses in action do not come within the scope of the Bills of Sale Acts, and though not yet existing may nevertheless be the subject of present assignment.

With that I respectfully agree. And I should also agree that as has been argued before me, a floating charge creates a present security. Of that there can be no doubt. But what I have to consider here is not whether a non-existent debt is capable of assignment in general or whether in general a charge is capable of being presently created over it, but whether it is capable of assignment under the particular terms of S. 130 (1), T. P. Act, so as to bring it within that section, and for that purpose I have to construe the expression "actionable claim" not in the light of the English authorities, but according to the strict and technical definition that the Act itself has provided. It is merely confusing to say that a charge upon future non-existent debts is one which creates a present security in the sense that it will attach if and when those debts arise. Of course it is. The point which I am considering now however is only whether such a charge when created is of that particular kind that is described in S. 130 (1) by the words "transfer of an actionable claim". In my judgment therefore, a claim to a debt which does not exist at the date of the transfer — in the sense that there is no ascertainable debtor and no present relationship out of which a debt will or may mature—is not capable of being the subject of a transfer under S. 130 (1), T. P. Act, 1882, as amended in 1900.

I have so far, I fear, merely touched upon the outlying difficulties that this case involves. Before going further it is necessary to see what is really the matereality of the effect of S. 130 (1), T. P. Act, upon the facts of this case. There is no doubt that in India and in Burma a thing in action, e. g. a debt, if it falls outside S. 130 (1), T. P. Act, is as much transferable in equity as it is so transferable in England. That is I think accepted on both sides and indeed it does not permit of argument. So far as a transfer of such a chose in action in equity in Burma is concerned, no question of S. 130 (1) can ex hypothesi arise. And in that case the English authorities which clearly recognize over and over again an assignment of a debt not yet existing are relevant. It is as I think of the utmost importance to appreciate that S. 130 (1), T. P. Act, does no more than to clothe the transferee with the right to sue for the debt in his own name without the necessity of giving notice to the debtor as is necessary in England in the case of an equitable assignment of a chose in action under S. 25, Judicature Act 1872, now S. 136, Law of Property Act 1925, or in India and Burma in the case of a chose in action or actionable claim which falls outside S. 130 (1), T. P. Act. In both the two last mentioned cases, the assignment is an assignment in equity and as such requires notice to vest in the assignee the power to sue the debtor in his own name without joining the original creditor in the action or suit. The effect of S. 130 (1), T. P. Act, is to create a position in India or Burma which is unique as regards those actionable claims which fall within it in that in the case of assignments which are within the section, the necessity for notice to the debtor or other person subject to the actionable claim is discarded. It is misleading to talk in this country of legal and equitable titles. But if I may do so for once, the effect of S. 130 (1) is in the cases which it covers to confer without notice to the debtor a legal title on the transferee as opposed to an equitable title only. But it cannot be too strongly emphasized at this stage that its purpose and effect is merely to confer a title and to enable the assignee to sue in his own name and has nothing to do with possession. It is merely designed to circumvent the necessity for notice to be given to the debtor before the assignee sues him, as is still required in England.

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[6] Tailby v. Official Receiver, (1888) 13 A C 523 =58 L J Q B 75=60 L T 162=37 W R 513.

While dealing with S. 130, I desire also to point out that the Proviso which, while it does not expressly enable the transferor to give a good discharge, nevertheless protects the debtor in the case of his paying the debt to the transferor before he has received express notice of the transfer. The notice must be express notice. Mr. Clark who has argued this case on behalf of the Bank has first argued, as I have said, that the charge upon the non-existent debts covered by the floating charge contained in the instrument of 31st March 1931 is within S. 130 (1), T. P. Act. I have already decided that they are not. But I propose for the moment to assume that I am wrong on that point. In that case it is urged that being within S. 130 (1) all questions of their falling within the order and disposition clause—Cl. 52 (2) (1) of the Rangoon Insolvency Act—is automatically precluded. In deference to the arguments addressed to me, I will deal with that point though strictly it does not arise in view of the opinion I have already expressed that S. 130 (1) does not apply. S. 52, Rangoon Insolvency Act, 1909, is the section which describes what the property of the insolvent divisible amongst his creditors does not comprise. It comprises (inter alia)

> . . . . . (c) all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof:
>
> Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of Cl. (c).

That business book debts are "goods" of the insolvent "in his trade or business" is quite clear. Now what Mr. Clark says is that if S. 130 (1), T. P. Act, 1882, applies and being applied operates to vest in the assignee the right to sue for the book debts in his own name, with no necessity for that purpose to give any notice to the debtor, then there is no room left for the operation of the "order and disposition" section of the Rangoon Insolvency Act. I don't agree with this contention. The express right of the assignee to sue a debtor in his own name conferred by S. 130 (1), T. P. Act, and the "possession, order or disposition" giving rise to a condition of "reputed ownership" under S. 52 (2) (c), Presidency Towns Insolvency Act, are in my judgment two entirely separate and distinct things. It may very well be that so far as the assignee's right to sue is concerned, it is complete and yet there may be, as it seems to me, left with the assignor such an appearance of continued or reputed ownership as to invoke the order and disposition clause. This question cannot, of course, arise under English law as it so happens that the title to sue cannot become complete without notice and once notice is given there can be no question but that the order and disposition clause ceases to apply. It is quite clear that the giving of notice to the debtor is the only recognized way of putting an end to the reputed ownership of the transferor. It is only in India and Burma where a right to sue under S. 130 (1), T. P. Act, where it applies, can be obtained without giving notice, that this question can arise. Let me take a simple case of a man who on entering his employment makes a deposit with his employer by way of guarantee of his good behaviour and gets a receipt for that deposit. The right to recover that deposit is an actionable claim and assignable under S. 130 (1). Let us suppose it is so assigned. The assignee gets the right when the time comes to sue for the deposit in his own name without giving any notice to the employer. Yet if the assignee leaves the receipt in the hands of the employee, the latter may have every appearance of the ownership and disposition of the deposit. I give that merely as an illustration of the difference between the "right to sue" conferred by S. 130 (1), T. P. Act, and the "possession, order or disposition" of S. 52 (2), Rangoon Towns Insolvency Act. It seems to me to be not impossible that an appearance of "possession, order or disposition" may very well—theoretically at least—remain long after the title of the original creditor has been transferred.

For these reasons, even if I had thought that the non-existent debts which are covered by the instrument of charge dated 31st March 1931 were within the meaning of "actionable claim" under S. 130 (1), T. P. Act, 1882, I should still have held that they were not, for that reason alone, incapable in law of being in the "possession, order or disposition" of the insolvent. That brings me to the third point in this case. And in some ways it is the most difficult of all, because it involves, when understood, a painful conflict of opinion between two eminent lawyers. Mr. Paget says, and Mr. Clark accepts it—and, indeed, there can be no doubt—that, if S. 130 (1), T. P. Act, 1882, does not apply to this case, then no notice having in fact been given to the several book debtors of the insolvent's business at the date of the commencement of the insolvency, the book debts as at that moment were in the "possession, order or disposition" of the insolvent. That is conceded.

It has been established by a long line of English authorities that, in the case of an equitable assignment of book debts, the only way of putting an end to the "possession, order or disposition" of the bankrupt is by giving or attempting to give notice to the debtors and that until then they remain in his order and disposition. I do not, of course, overlook that under S. 25 of the Judicature Act it so happens that the same notice is the means of completing the assignee's right to sue the debtor. That was the foundation of the argument of Mr. Clark which I have rejected that the question "right to sue" and "order and disposition" are really one and the same thing. However that may be, it is too firmly established to be doubted now that notice is necessary under English law to put an end to "the order and disposition" of the bankrupt and, upon the footing that S. 130 (1), T. P. Act, 1882, does not apply, that is accepted here by both parties. The real difficulty arose from the words "by the consent of the true owner". I am not concerned, for the moment, with whether a chargee is a "true owner". But the point taken by Mr. Clark is this. He admits that, if my decision on either of the last two points is right, the book debts were "in the possession, order or disposition" of the insolvent. But he says that by the steps the Bank had taken, it had done everything in its power to put an end to its own "consent and permission" and that, accordingly, the order and disposition section of the Rangoon Insolvency Act had ceased to operate on the book debts at the moment the insolvency commenced. He points particularly to his having taken physical possession of the premises on the afternoon of 5th January and to his having put notices up at their doors to the effect that the Bank was in possession as mortgagee. No reasonable man he says who saw that would doubt that the Bank's consent to any further order and disposition by Mr. Stephens of his own book debts had ceased. There may be force in that contention. But before reaching it, I have to determine—and this as it seems to me is the crux of the matter—whether there is, or is not, in India a rule—it may be an arbitrary rule—that the consent and permission of the true owner of book debts to the continued order and disposition of them by the insolvent must and can only be withdrawn by the process of giving, or at any rate of attempting to give, notice of the assignment to the debtors.

So far as the English authorities go—and they are the only authorities which exist for this purpose—it is I think true to say that over a long period of time it has been thought that until such a notice has been given or been attempted to be given, book debts remain, not only in order and disposition of the bankrupt, but in his order and disposition with the consent and permission of the true owner. Bovill C. J. in (1868) 3 C P 334[7] at pp. 344 and 345 referred with approval to the well-known passage from Lord Justice Turner's judgment in (1857) 1 De G & J 127[8] at p. 140 in which he said:

> Looking at the question upon principle, what is the object of the enactment? Clearly to prevent credit being obtained by an apparent ownership assumed with the consent and permission of the true owner. To confine the enactment to cases in which there is a visible ownership, would be to subvert decisions without end upon the subject; nor would it be consistent with the object of the enactment, for, credit may be got as readily upon property in which there is not, as upon property in which there is, a visible ownership. Considering then the enactment to extend to personal chattels in which there is no visible ownership, when (to adopt the language of the statute) is a bankrupt to be said with the consent and permission of the true owner to have had in his possession, order or disposition goods and chattels of this description, whereof he was the reputed owner or whereof he has taken upon himself the sale, alteration or disposition as owner? How is the true owner to prevent the reputed ownership? How can it be prevented, otherwise than by notice to the person who is under liability in respect of the chattels? The law has said this is the mode of preventing reputed ownership as to debts: and, is there to be one law as to debts and another as to legacies? The plain object of the statute is that the true owner shall not permit the order and disposition to remain with the bankrupt; and, if he does not take the steps which are necessary to prevent it, surely he must be taken to permit it.

Long before this date it appears to have been recognized in England that the one way of withdrawing "consent" to the order and disposition of the transferor was by giving notice to the debtor, because until that notice was given the debts remained capable of being discharged by the original creditor. Again in (1888) 13 A C 523[6] at p. 534 the rule is stated broadly by Lord Watson. He says:

> In the case of book debts, as in the case of choses in action generally, intimation of the assignee's right must be made to the debtor or obligee in order to make it complete. That is the only possession which he can attain so long as the debt is unpaid, and is sufficient to take it out of the order and disposition of the assignor. In this case the appellant's right, if otherwise valid, was, in any question with the respondent, duly perfected by his notice to Wilson Brothers & Co. before Izon became a bankrupt.

In (1898) 1 Q B 787[9] A. L. Smith L. J. makes the general observation that:

> It is not disputed that absence of notice to a debtor by the assignee of a debt leaves a debt within the order and disposition and reputed ownership section of the Bankruptcy Act.

It is true that I am now dealing with "consent" and not "order and disposition". But that passage must imply the view that, being within the order and disposition clause until such notice is given, there is a voluntary and permissive leaving of the goods in the assignor's order and disposition. It is not altogether easy—and indeed I am not sure that it is not a mistake to try—to sever the question of order and disposition from that of consent, because so long as a man refrains from doing that which is necessary to put an end to the order or disposition of the insolvent, it is implicit that that order and disposition continues with his "consent". It is suggested in the present case that it would be unreasonable, and almost impossible, for the Bank to have taken steps to give notice to the debtors earlier. I do not follow why. The security was originally taken in 1931. The Bank had power at any moment since then to make the appropriate demand under the instrument of charge, to crystallize the security and to give notice to the debtors. For six years it did not do so. It is very material to observe that the Bank did in fact have power at any moment to establish its own position without any doubt. It even had power to require a power of attorney. Against this it is contended that if the Bank had done so, it would inevitably have brought the business to a standstill. That is quite true. But the answer to that appears to me to be that that is a defect which is inherent in any kind of floating security. If a person takes this form of charge, he takes it with the risk of waiting too long before giving, or attempting to give, that notice which is necessary to put an end to the reputed ownership of the insolvent. It is a risk inherent in the form of security itself.

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[7] Cooke v. Hemming, (1868) 3 C P 334=37 L J C P 179=18 L T 772=16 W R 903.

[8] Bartlett v. Bartlett, (1857) 1 De G & J 127=26 L J Ch 577=3 Jur (NS) 705=5 W R 541.

[9] In re Goetz, Jonas & Co.: Ex parte The Trustee, (1898) 1 Q B 787=67 L J Q B 577=78 L T 399=46 W R 469=5 Manson 76=14 T L R 327.

I desire now to pass to those cases which have introduced a modification in the absolute and arbitrary rule that notice must actually have been received by the debtor at the date of the bankruptcy of the assignor in order effectually to withdraw the assignee's consent to the order and disposition remaining with him. Those cases are: (1833) 5 B & Ad 674,[10] (1873) 8 Ch A 144[11] and (1848) 2 Ex 303.[12] They all, in the first place, recognize the principle that prima facie notice to the debtor is the proper and only means to withdraw consent. There is no relaxation whatever of that principle. I cannot emphasize that too strongly. But they go on to say that if the assignee has done all in his power to give that notice, then that will suffice, although, because either of some accident or through shortness of time, the notice does not reach the debtor in time before bankruptcy intervenes. In (1833) 5 B & Ad 674[10] the true owner of goods permitted them to remain in the possession of the bankrupt until the day before the commencement of the bankruptcy. He then demanded them. But his demand was refused. This was not actually a case of an assignment of a chose in action but of a chattel. The principle is, however, the same. It was held that he had, before the bankruptcy intervened, taken the proper steps and that it was not his fault that it had been unsuccessful. (1873) 8 Ch A 144[11] was again a case of assignment of goods. Here again a demand for delivery of possession was given before the bankruptcy but was not complied with. Again it was held that the proper and appropriate step had been taken and that "consent" was thenceforth at an end. (1848) 2 Ex 303[12] is a case of an assignment of a debt. Here, a letter containing the notice was posted by an assignee in England to a debtor in Australia. Before the notice reached Australia, the assignor had become bankrupt. It was held that the assignee had taken the proper step before bankruptcy by despatching notice of the assignment to the debtor and that by so doing he had withdrawn his consent to the continued order and disposition of the bankrupt. In order to understand the real meaning of these cases, it has to be appreciated that in each case the proper step had been taken before the bankruptcy commenced but for some reason or other was not effectual.

I now come to the case in (1895) 2 Ch 872.[13] It has first to be observed that this is a decision of Stirling L. J. and, as such, entitled to more than usual respect. In this case in 1891 a tobacconist mortgaged (inter alia) his book debts for the time being. On 9th May 1893, the mortgagees appointed a receiver of the entire premises and business under the Conveyancing Act, 1881 and the receiver went into possession. On 16th May the tobacconist committed an act of bankruptcy and on 17th May the mortgagees commenced an action on their mortgage, in which, on 19th May, the same receiver was appointed by the Court. No notice was ever given to the debtors by the mortgagee or by the receiver at any time. It is to be seen therefore that in this case the receiver was first appointed on 9th May and the act of bankruptcy took place on 16th May. It has to be observed too that no one had the courage to suggest in this case that the appointment of the receiver on that date and his going into possession of the business premises could by itself have served to withdraw the consent of the true owner to either the book debts or any other chose in action remaining in the order and disposition of the assignor. It is assumed throughout that the proper and normal way is to give notice to the debtor. The importance of this case is the statement of principle which Stirling L. J. draws from the three cases in (1833) 5 B & Ad 674[10], (1873) 8 Ch A 144[11] and (1848) 2 Ex 303[12] which I have already dealt with. He says:

> The conclusion from these authorities appears to be that although from absence of notice consent on the part of the true owner to the debt remaining in the order and disposition of the bankrupt, is prima facie to be inferred, still that inference may be rebutted by other facts and will be rebutted if, in the language of the Judges of the Court of Exchequer, the true owner takes every possible step to obtain possession of the debt; or if, in the language of Mellish L. J., the failure to obtain possession is not attributable to any fault of his own. I may add that the cases in (1841)

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[10] Smith v. Topping, (1833) 5 B & Ad 674=2 Nev & M 421=3 L J K B 47=110 E R 939.

[11] Ex parte Ward; In re Conston, (1873) 8 Ch A 144=42 L J Bk 17=27 L T 502=21 W R 115.

[12] Belcher v. Bellamy, (1848) 2 Ex 303=17 L J Ex 219=76 R R 606.

[13] Rutter v. Everett, (1895) 2 Ch 872=64 L J Ch 845=13 R 719=73 L T 82=44 W R 104=2 Manson 371.

2 M D & D 219[14], (1848) 2 Ex 105[15] and (1855) 5 El & Bl 227[16] appear to me to establish that if the proper steps are taken while the assignee has no notice of any act of bankruptcy, the assignee will be entitled to the benefit of the protection conferred by S. 49, Bankruptcy Act, 1883.

> This being my view of the state of the law, I have next to apply it in the present case. If the bankruptcy had occurred within a short time after 9th or 16th May 1893, I should have thought that the doctrines laid down in (1833) 5 B & Ad 674[10], (1873) 8 Ch A 144[11] & (1848) 2 Ex 303[12] applied. In point of fact, however, the receiving order in bankruptcy was not made until 16th June 1893, a month later than the receivership order. In the interval there was ample time to give the usual notice to the debtors of the bankrupt.

It is that last paragraph that is relied upon by the Bank in this case. It is said that, if there had not been that interval between the date of the appointment of the receiver on the 9th May and the date of the receiving order on the 16th June, the learned Judge would have applied the principles in (1833) 5 B & Ad 674[10] notwithstanding that no attempt to give any notice had been made. It is said to be authority for the proposition that both notice and any attempt to give notice may be dispensed with if circumstances show that the assignee has taken other steps to withdraw his consent. In my view that is not an accurate view of what Stirling L. J. has said. He nowhere says that any other step than the step of giving notice will suffice to withdraw the assignee's consent. What he does say is that, if there is no time to take that step, then he thought that the principle in (1833) 5 B & Ad 674[10] might apply and it might in the special circumstances be dispensed with. Mr. Clark is contending before me that the giving of notice to the debtors may be replaced by the act of going into possession and displaying notices at the entrance. (1895) 2 Ch 872[13] is no authority for that. All it is authority for is that if there is not time to take the proper step, then in the opinion of Stirling L. J., it is of course obiter, as he eventually decided that there had been neglect on the part of the assignee, it might be dispensed with altogether. On the contrary, he expressly recognizes that the giving of notice and no other expedient is the proper means of terminating the consent to the order and disposition of the bankrupt and he expressly rejects any suggestion that the appointment of the receiver was by itself sufficient. For he says at p. 882:

> I think that neither the appointment on the 9th May nor the subsequent appointment by the Court was sufficient to take the debts out of the order and disposition of the bankrupt with the consent and permission of the true owner, unless followed within a reasonable time by the appropriate step for obtaining possession of the debts by giving notice to the debtor.

He expressly recognizes the giving of notice as the appropriate and only sufficient step, but he thinks that in a proper case it might be excused where the assignee has had no time to do so otherwise than by his own neglect. That is the case on which the Bank principally relies. And I concede that, if Stirling L. J.'s observations there represent the law, then it is very apposite to this case. For, in this case, the Bank went into possession on 5th January and the insolvency commenced less than forty-eight hours later. But Stirling L. J.'s view has been the subject of a strong criticism in (1914) 2 K B 910.[17] The facts in this case were very similar to those in (1895) 2 Ch 872.[13] A receiver had been appointed by the mortgagee on the 29th November and had remained in possession till the 17th December without giving notice to the debtors. The reason was that certain negotiations for a compromise were in progress. The actual decision was the same as in (1895) 2 Ch 872,[13] that there had been undue delay in giving notice. Again it is never doubted that the proper step is to give notice. In the course of his judgment, Horridge J. reviews the authorities and refers to the passage in Stirling L. J.'s judgment which I have set out earlier and says:

> In that case the assignee of the debts had on 9th May 1893 appointed a receiver and had no notice of the act of bankruptcy committed by the assignor on the 16th May until the receiving order was actually made, which was on the 16th June and Stirling J. in his judgment, in the passage at p. 881 which begins 'this being my view of the state of the law', does intimate that, inasmuch as the assignee had commenced proceedings which would in the ordinary course have culminated in a notice to the debtors before the act of bankruptcy if so short a time had elapsed between the appointment of the receiver and the receiving order as in fact not to have given the assignee an opportunity of serving the notice, he would have held that the assignee, by getting the receiver appointed had intimated the withdrawal of his consent. I have great doubts in my mind whether

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[14] Re Styan, (1841) 2 M D & D 219.

[15] Young v. Hope, (1848) 2 Ex 105.

[16] Brewin v. Short, (1855) 5 El & Bl 227=24 L J Q B 297=1 Jur (N S) 798=3 W R 514.

[17] In re Neale: Ex parte the trustee, (1914) 2 K B 910=83 L J K B 1118=110 L T 988=58 S J 536.

that passage in Stirling J's. judgment is correct. My doubt is whether, when the assignee could at any time have given notice to the person owing the debt, he can be said to have taken every possible step by getting the appointment of a receiver even in a case where the receiver has no reasonable time in which to give notice.

What Horridge J. is saying there is that he gravely doubts whether, in a case in which there have been years in which notice could have been given but during which it has not been given, the assignee who is in the end forestalled by an abrupt bankruptcy can say that he had taken "every possible step" towards cancelling his consent to the order and disposition of the bankrupt. The words "at any time" in the passage from the judgment of Horridge J. clearly mean "at any time since the security was created". As I have already said, it seems to me that, if an assignee delays giving notice till the last moment, he must, having regard to this form of security, do so at his own risk. It is an inherent danger in the form of security itself. He cannot say that he could not at any time during the past six years have reduced these debts into possession and terminated all semblance of reputed ownership on the part of the assignee. I feel bound, but not without considerable diffidence, in this conflict of dicta of distinguished English Judges, to prefer the view expressed by Horridge J.

The principles which I deduce from these authorities are these: (1) That throughout the cases the only appropriate way to put an end to the assignor's reputed ownership of book debts that is recognized is for the assignee to give notice to the debtors. (2) That, if he does not do so, he prima facie leaves them—and voluntarily leaves them—in the order and disposition and reputed ownership of the assignor. (3) That in view of the fact that he might at any time since the commencement of the security by giving notice have terminated his consent to the insolvent's reputed ownership, it is not open to him if he waits until the very last moment to say that he has had no time to do it.

I have been able to find no reported cases in which any step but the step of giving or attempting to give notice before the bankruptcy has been held to be adequate to withdraw consent. As to the facts of this case they are simple. It is not contended that, before the commencement of the insolvency, any express notices of the charge were despatched to, or received by the debtors. What is really relied upon is, first, the act of the Bank in taking possession on the 5th January and secondly the posting of notices at the entrances. I am unable to hold that the mere act of taking possession of the business and the premises by the Bank constitute notice of the assignment of the book debts any more than the appointment of the receiver in (1895) 2 Ch 872[13] was thought by Stirling L. J. by itself to be sufficient to withdraw the mortgagee's consent to the order and disposition of the bankrupt. Indeed, what is it notice of? Merely of the possession of something unspecified! And to whom is it notice? To those observant passers by who happen to see it! The same observations apply to the posting of the notices at the entrances. I do not think for a moment that they can be taken to constitute notice to debtors who may, indeed, be in any part of Burma or the world.

If I am right in thinking, upon the authority of Horridge J's. criticism in (1914) 2 K B 910[17] of the dicta of Stirling L. J. in (1895) 2 Ch 872,[13] that where the security was created long ago and might at any time have been fixed by the chargee, the giving or attempted giving of notice to the debtors is not to be dispensed with altogether upon the footing that the assignee has done his best to withdraw his consent, then I should be unable to hold that the steps actually taken by the Bank have been sufficient to withdraw their consent to Mr. Stephens' reputed ownership. It would not, moreover, have been beyond the Bank's powers, even in a case where there are four hundred book debts, to have got the required notices into the post between 3 P. M. on the 5th January and the morning of the 7th January. The books were actually in their possession. I have only to add that in my view the owner of a charge upon book debts is, upon the authorities, the "true owner" of them for the purpose of S. 52 (2) (c), Rangoon Insolvency Act.

In the result therefore I must declare that such of the book debts belonging to the insolvent and relating to his business carried on at the "Silver Grill" as at the date of the commencement of the insolvency of the insolvent on 7th January 1937, were outstanding and were not book debts which actually existed on 31st March 1931, are property of the insolvent divisible among his creditors. I must order the respondent Bank to account to the Official Assignee for all such book debts as have been received by the Bank or by any person for the order of the Bank since the date of the commencement of the insolvency subject nevertheless to the deduction by the Bank of such proper expenses as may have been incurred by it in or about their collection. I must make an order upon the Bank to pay the Official Assignee's costs of this petition. The hearing has lasted four days and, I think, an advocate's fee of fifteen gold mohurs for each of the four days will be a proper one.

V.B.B./R.K. *Order accordingly.*

## A. I. R. 1938 Rangoon 11

ROBERTS C. J. AND SHARPE J.

*Hashim Ismail Dooply — Defendant 1* — Appellant.

v.

*Chotalal — Plaintiff* — Respondent.

First Appeal No. 67 of 1937, Decided on 13th July 1937, against decree of Braund J., D/- 10th August 1936.

**(a) Presidency Towns Insolvency Act (1909), S. 43—Acts done by insolvent subsequent to his discharge are not invalid—But Court may in certain cases revoke discharge.**

Although under S. 43 it is the duty of the discharged insolvent to assist the Official Assignee in the realization of his property, this does not mean that acts done by him subsequent to his discharge are rendered thereby invalid, but only that in some circumstances the discharge may be revoked. An order of conditional discharge is not a contingent order but an absolute one. [P 12 C 2]

**(b) Contract Act (1872), S. 23 — Insolvent getting discharge conditional upon his consenting to decree being passed for all proved debts—Subsequently, one of scheduled creditors agreeing to advance certain loan to insolvent and to waive all claims to his debt in insolvency — Insolvent and *B* as surety for insolvent executing promissory note in favour of creditor for original debt with interest—Suit by creditor on promissory note—Agreement held valid and enforceable and decree could be passed in favour of creditor.**

An insolvent was granted a discharge under S. 39 (1), Presidency Towns Insolvency Act conditional upon his consenting to a decree being passed against him in favour of official assignee for the full amount of his debts proved in the insolvency. Subsequently *A*, one of the scheduled creditors, agreed to advance certain amount of loan to the insolvent and to waive his claim to the sum due to him from the official assignee as a creditor in the insolvency. The insolvent and *B* as a surety for the insolvent executed a promissory note for the original amount of debt proved in the insolvency with interest thereon from the date of insolvency. The creditor subsequently brought a suit upon the promissory note:

*Held* that as the creditor did not seek to prejudice the rights of any of the scheduled creditors by his new and independent contract, the consideration for the note was neither of such a nature as would defeat the provisions of the Presidency Towns Insolvency Act nor was opposed to public policy. The agreement was perfectly valid and enforceable and a decree could be passed in favour of the creditor: *(1914) 3 K B 36*; *(1878) 4 Ex D 26 and (1904) 2 K B 478, Rel. on*; *20 Bom 636*; *20 Mad 84 and A I R 1925 Bom 346, Disting.* [P 13 C 1, 2; P 14 C 2]

Foucar — *for Appellant.*

M. C. Naidu — *for Respondent.*

**Roberts C. J.**—This is an appeal from a decision of Braund J. who granted to the plaintiff, Chotalal, a decree for Rs. 36,229 with interest at the Court rate, being the total amount of the balance due upon five promissory notes dated 9th December 1929, made by the defendants. It is conceded that the suit was not time-barred since payments in respect of interest as such were made on 8th December 1932, and the suit was filed on 7th December 1935. The only point taken in the appeal has been that the consideration for which the notes were given is unlawful by reason of Ss. 23 and 24, Contract Act. It is admitted that defendant 1 signed the notes. In October 1925 defendant 2 became insolvent on his own petition, the debts amounting to Rs. 55,600. The plaintiff was one of six creditors and Rs. 16,000 was shown as due to him by the insolvent in his schedule of creditors. In March 1928 the insolvent was granted a discharge conditional upon his consenting to a decree being passed against him for the full amount of his debts proved in the insolvency, and in conformity with S. 39 (1) (d), Presidency Towns Insolvency Act. After this conditional discharge and in the month of December 1929 the plaintiff agreed to lend defendant 2, Rs. 4,500 in cash and to waive his claim to the sum due to him from the Official Assignee as a creditor in the insolvency, thereby enabling the amount of that decree to be reduced pro tanto; and the defendants executed the promissory notes in suit, defendant 1 doing so as a surety for defendant 2 who was his brother-in-law. The principal sums appearing on the notes amounted to Rs. 28,600; the learned trial Judge was satisfied with the explanation given as to how the total was arrived at, and there is no attempt to attack the transaction other than by saying that the consideration for the notes was void as against public policy. This has simplified the issues before the Appellate Court.

Before granting a decree, the learned Judge required and obtained an undertaking by the plaintiff that he would at once apply to the Official Assignee for a reduction of the amount of the decree held by the latter by a sum equal to the amount of the principal moneys secured by the notes. This seems to have been a slip. Reduction of the amount of the decree could only be applied for as far as Chotalal had any interest in the allocation of the moneys thereunder, that is to the extent of his debt proved in the insolvency, namely Rs. 16,000, and not to the extent of Rs. 28,600. So far as the balance of the decretal amount is concerned (Rs. 39,600), this sum when realized would be held by the Official Assignee on behalf of the other creditors.

Mr. Foucar on behalf of the appellant, Hashim Ismail Dooply, who was defendant 1, contended that the agreement arrived at between the plaintiff and defendant 2 was void as being of such a nature that if permitted it would defeat the provisions of the Insolvency Acts : or that it implied injury to the property of the other creditors in the insolvency : or that at any rate the Court should regard it as opposed to public policy. He cited a number of cases to show that before an insolvent had obtained his final discharge, he could not lawfully agree to settle the claims of one creditor in consideration of such creditor agreeing not to oppose his final discharge, such agreement being made behind the back of the Official Assignee and the other creditors: 20 Bom 636,[1] 20 Mad 84[2] and 27 Bom L R 419.[3] All the transactions which took place in the cases cited were tainted with fraud and all took place before the insolvent had obtained his final discharge. It was however argued from these authorities that it was inconsistent with the provisions of the Insolvency Acts that an insolvent, who had received a discharge conditional upon assenting to a decree in favour of the Official Assignee for the amount due in the insolvency which the latter should distribute upon realizing the amount of the decree rateably amongst all the creditors, should borrow from one of his former creditors and as part of the consideration for the advance should agree to apply to the Official Assignee for a reduction of the decree. After-acquired property or future earnings, subject to such conditions as the Court may direct, is applied to paying off the Official Assignee as decree-holder, who may execute the decree with leave of the Court. It was urged that here the plaintiff was obtaining promissory notes jointly from both the defendants for a much larger sum than the debt proved in the insolvency of one of them together with the new loan of Rs. 4,500 would amount to, and that he was getting an advantage over the other creditors thereby.

It is fair to say that no allegation of fraud was made in the pleadings, nor attempted at the trial, and though there is a phrase in the memorandum of appeal which states that the notes were void as "presumably in fraud of creditors", we have to deal with the case on the footing that there was no fraud on the part of the plaintiff. What in effect the plaintiff obtained was the right to proceed against the surety upon the notes instead of the right to demand payment on such of defendant 2's property as might find its way into the hands of the Official Assignee; and I agree with the learned trial Judge that this does not prejudice the rights of the other creditors. The surety was in no way connected with the insolvency of defendant 2. Moreover, although it has been urged that under S. 43, Presidency Towns Insolvency Act, it was the duty of the discharged insolvent to assist the Official Assignee in the realization of his property, this does not mean that acts done by him subsequent to his discharge are rendered thereby invalid but only that in some circumstances the discharge may be revoked. An order of conditional discharge is not a contingent order but an absolute one. The case in (1878) 4 Ex D 26[4] was one in which the defendant's affairs were liquidated by arrangement, and he obtained an order of discharge. He subsequently promised the plaintiff, who was a butcher, that if the latter would continue to supply him with meat on credit he would pay not only for the meat to be supplied but a prior debt proof of which had been admitted in the liquidation proceedings. Kelly C. B. said:

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[1] Naoroji Nusserwanji Thoonthi v. Kazi Sidick Mirza, (1896) 20 Bom 636.

[2] Krishnappa Chetti v. Adimula Mudali, (1897) 20 Mad 84.

[3] Mohanlal Motilal v. Harilal Bhogilal, A I R 1925 Bom 846=87 I C 929=27 Bom L R 419.

[4] Jakeman v. Cook, (1878) 4 Ex D 26=48 L J Ex 165=27 W R 171.

> He says to one of his creditors, if you will supply me with food on credit, I will pay you the old debt. Is not that a good consideration ?

There had clearly been other creditors, and the principle of this case appears to me to be applicable in the present appeal. In (1914) 3 K B 36[5] the present Lord Atkin (then Atkin J.) held that a contract by a bankrupt in consideration of a loan of £15 to pay in full a debt of £913-11.0 due from him at the commencement of his bankruptcy and provable therein was a valid and enforceable contract, notwithstanding that the bankrupt was still undischarged. An attempt was made to distinguish this case on the ground that the larger debt was provable merely but that no proof had been lodged at the time of the contract. But the creditor could do one of three things: he could prove in the bankruptcy; he could enter into an independent contract for fresh consideration given to the insolvent and sue upon that; or he could forego his debt altogether. The contract was made after adjudication and the creditor was well aware that his new chose in action would keep alive the pre-existing debt even if the defendant obtained a subsequent discharge from the bankruptcy; since debts incurred after adjudication are not provable in insolvency, the object of the action was to secure a judgment which would outlive the discharge. This was an advantage which he was able to obtain which in no wise diminished the sums which other creditors might obtain in the bankruptcy, but it gave to the plaintiff a judgment which the discharge of bankrupt would not render ineffective. It appears to me that the present is a somewhat similar case, in that the plaintiff here did not seek to prejudice the rights of other creditors, but by a new and independent contract (after discharge had taken place) secured for himself a more advantageous position by reason of his readiness to advance to defendant 2 a further substantial sum.

Accordingly in my opinion the learned trial Judge was right in holding that the agreement entered into between the plaintiff and defendant 2 was valid and enforceable. It follows that this appeal must be dismissed, but the consent decree in favour of the Official Assignee is only reducible by a sum equal to the amount for which the respondent proved in the insolvency. Costs eight gold mohurs with liberty to apply.

**Sharpe J.**—In this action brought by one Chotalal against two defendants, Dooply and Patail, Braund J. passed a decree for Rs. 36,229-15-6 against both defendants. The appeal before us is brought by defendant 1, Dooply, alone. The facts, so far as now material, are as follows. On 27th October 1925, defendant 2 became insolvent on his own petition. The debts in that insolvency amounted to an aggregate figure of Rs. 55,600 spread among six creditors. The plaintiff, now the respondent, was one of the six creditors and was shown by defendant 2 himself in his schedule as a creditor for Rs. 16,000-0-0, part of which was due upon promissory notes and part upon a decree. In March 1928, defendant 2 secured his discharge under the provisions of S. 39 (1) (d), Presidency towns Insolvency Act 1909, by consenting to a decree being passed against him in favour of the Official Assignee for Rs. 55,600-0-0, which was the full amount of the debts provable under the insolvency (there having been no distribution whatever among the creditors), such decree to be satisfied out of defendant 2's future earnings and after-acquired property. On 9th December 1929, about twenty months after his discharge, nothing whatever having been paid by defendant 2 to the Official Assignee towards satisfying his decree, defendant 2 went to the plaintiff and told him that he and defendant 1 wanted to open a milling store, and he asked the plaintiff for a fresh loan for that purpose. The plaintiff said that he would lend them Rs. 4,500-0-0 in two instalments, Rs. 2,500-0-0 immediately and Rupees 2,000-0-0 a few days later, if he got, instead of his entirely fruitless claim in defendant 2's insolvency, a new obligation from both the defendants to pay the amount of defendant 2's original indebtedness to the plaintiff before his insolvency in 1925 together with interest on such amount from the date of that insolvency. A bargain was finally entered into on that basis, and both the defendants executed five promissory notes dated 9th December

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[5] Wild v. Tucker, (1914) 3 K B 36=83 L J K B 1410 = 111 L T 250 = 21 Manson 181 = 30 T L R 507.

1929, upon which the plaintiff subsequently brought the present suit. The appellant pleaded in para. 2 of his written statement (a) that there was no consideration for the promissory notes in suit, and (b) that, if there was any, the same was unlawful and the promissory notes, therefore, void.

Mr. Foucar for the appellant has conceded that here there was consideration and his only concern has been to show that that part of the consideration which related to defendant 2's original indebtedness to the plaintiff was of such a nature that, if permitted, it would have defeated the provisions of the Presidency Towns Insolvency Act and was opposed to public policy and that the promissory notes in suit are consequently void by reason of the provisions of Ss. 23 and 24, Contract Act. The Presidency-towns Insolvency Act was modelled on the English Bankruptcy Acts of 1883 and 1890, so that since 1909, the basic principles of the law of insolvency in the presidency towns and in the town of Rangoon have been the same as those obtaining in England. It is therefore possible to turn for guidance in the present case to such English decisions as bear upon the point. In (1878) 4 Ex D 26,[4] Kelly, Chief Baron, said that he could see nothing contrary to the spirit of the bankruptcy laws in a debtor, who had given up all his property and obtained his discharge, saying to one of his creditors that if he would supply him with meat on credit he would pay him the old debt. The learned Judge was of opinion that that was a good consideration. That case was considered by Atkin J., as he then was, in (1914) 3 K B 36,[5] a decision given before the coming into force of the Bankruptcy Act of 1914, and, therefore, under the English Bankruptcy Acts of 1883 and 1890, on which, as I have pointed out already, the Presidency Towns Insolvency Act is based. In (1914) 3 K B 36,[5] the debtor was still an undischarged bankrupt at the time of entering into a fresh agreement. At p. 39 of the Report, Atkin J. said that a promise to pay a debt from which the debtor is already discharged in bankruptcy is an enforceable promise, and he made reference to the case in (1878) 4 Ex D 26[4] mentioned above. In the concluding paragraph of his judgment the learned Judge said :

> I am not prepared, in the absence of express authority, to invoke public policy in a new form to invalidate a contract between two business men of full capacity.

That decision, as might be expected, coming as it does from so eminent a lawyer, has stood unchallenged for almost a quarter of a century and I certainly propose to follow it in the present case. It is suggested that it is distinguishable, because in (1914) 3 K B 36[5] the person entering into the new agreement with the debtor had not proved in the bankruptcy. A person who is a creditor of another at the time of that other's insolvency is entitled either to abstain from proving in the insolvency, as in (1914) 3 K B 36,[5] or to prove in it as here and if he adopts the latter course and proves, it is always open to him at any time to withdraw his proof, and in my judgment he is then in the same position as if he has never proved. Here the plaintiff proved but subsequently withdrew his proof and he is therefore now in the same position as he would have been if he had never proved. I am therefore unable to distinguish the present position in the case before us from the position in (1914) 3 K B 36.[5] To my mind it is impossible to say here that any part of the consideration for the promissory notes in suit was of such a nature that, if permitted, it would defeat the provisions of the Presidency Towns Insolvency Act. It is equally impossible for this Court to regard such consideration as opposed to public policy. Here was a discharged insolvent getting an advance of Rs. 4,500-0-0 wherewith to set up in business, and, as was said by Vaughan Williams L. J. in (1904) 2 K B 478,[6] at p. 482 :

> After all, the overriding intention of the Legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood, and having the ordinary inducements to industry.

Consequently, I agree with my Lord the Chief Justice that the learned Judge was right in passing a decree against both defendants for the amount which he did, and I also agree that there was an obvious slip in the judgment. The reduction in the amount of the decree held by the Official Assignee must clearly be Rs. 16,000-0-0 and not Rs. 28,600-0-0. I think it only right to the plaintiff that I should add something about the word "fraud" which was frequently used in the course of argument before us. The consideration in the present case would have been unlawful if it had been fraudulent; but it is to be observed that fraud was nowhere pleaded and no issue of fraud was before the learned trial Judge. The word however found a place in the third ground in the memorandum of appeal to this Court where it was alleged that the learned Judge should have held that the promissory notes in suit were void as being passed presumably in fraud of creditors—a somewhat unfortunate phrase. I think it right in Mr. Chotalal's interests that it should be known that the learned advocate for the appellant has in this Court quite properly stated that there is no suggestion of fraud against him. This appeal must be dismissed.

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[6] In re Gaskell, (1904) 2 K B 478=73 L J K B 656=91 L T 221=11 Manson 125=20 T L R 469.

K.B./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 15

ROBERTS C. J. AND SHARPE J.

*Syed Ahmed* — Appellant.

v.

*The King.*

Criminal Appeal No. 624 of 1937, Decided on 1st July 1937, from order of Addl. Sess. Judge, Pyapon, D/- 25th May 1937.

**(a) Penal Code (1860), S. 300, Excep. 4—Accused using weapon against unarmed person in sudden fight — Excep. 4 to S. 300 cannot apply as unfair advantage is taken by accused.**

The using of a weapon by one person against an unarmed person in a sudden fight is not within the limits of Excep. 4 to S. 300, because it is expressly provided that no unfair or undue advantage must be taken by one of the combatants if the plea of sudden fight is to be raised by way of exception. [P 16 C 1, 2]

**(b) Penal Code (1860), Ss. 302 and 304—Deceased expressing his intention to attack and kick accused in course of sudden quarrel between them and thereafter proceeding towards him — Accused inflicting injury in sudden fight on deceased and thereby causing his death—Accused held could be convicted under S. 304 and not under S. 302.**

Where in a course of sudden quarrel between the accused and the deceased, the deceased expressed his intention of attacking and kicking the accused and went towards him and in the sudden fight that ensued between them the accused used a clasp knife and inflicted a wound in the chest of the deceased causing his death :

*Held* that as there was grave and sudden provocation from the deceased when he proceeded towards the accused with the intention of kicking him and as the accused had used a clasp knife when he had so far lost his self-control during the struggle that he did not inflict the injury with the intention of causing such bodily injury as was likely to cause the death, he could therefore be convicted under S. 304 and not under S. 302. [P 16 C 2]

M. I. Khan — *for Appellant.*

Myint Thein — *for the Crown.*

**Roberts C. J.**—The appellant was convicted by the Additional Sessions Judge of Pyapon of the murder of one Abdul Samoot at Akha Kwin in the Township of Bogale on 24th March this year, and was sentenced to death. Both the deceased and the appellant were employed as coolies by a man named Abdul Rashid who had since died but who lived in a hut with them, and it appears that at about 9.30 on the evening in question the deceased said that he would go out to the village and the appellant objected to this saying that he was always going out in the evenings and ought not to do so as there was property to be guarded. Words passed between them, and the deceased expressed an intention of attacking the appellant and kicking him, and he was held back by one of the other coolies. However he struggled and broke away from the coolies and made for the appellant. They struggled and fell and efforts were made to separate them unavailingly by one witness and then another person was brought and the two men managed to separate them. It was then discovered that the deceased was suffering from a stab wound in the chest, and he at once said he had been stabbed. He repeated it when the headman came and said that the appellant was his assailant. On the following morning, he gave a first information report in which he said that he ran at the appellant to kick him and the latter stabbed him on the chest with a small clasp knife. At 9 O'clock that morning his dying statement was recorded by the First Additional Magistrate of Bogale and he said that Syed Ahmed stabbed him with a small clasp knife which he had with him. Later he died from the wound.

An attempt has been made to show that there was no clasp knife and the witnesses who were present in the hut did not speak of having seen one and none was found. On the other hand there can be no doubt that the first thing they did when they found the deceased injured was to attend to his injuries, and they had only the light of one kerosine lamp and the hour was between 9 and 10 at night. There was, as the Additional Sessions Judge thought, ample opportunity for the appellant to dispose of any weapon which he might have had in his possession and with which he inflicted the mortal injury upon the deceased. The suggestion was made that the fatal injury could have been inflicted either by the deceased falling upon a piece of sharp bamboo or by the appellant taking up a piece of sharp bamboo which might happen to be lying upon the floor and inflicting the injury with it without realizing that it was, or looking upon it as a deadly weapon. There was evidence that some bamboo chippings were lying in a heap somewhere near the place where the appellant and the deceased fell. But the doctor when asked about the nature of the injury said that there was a stab wound half an inch long and half an inch broad penetrating into the chest cavity and that a pint of blood was found in the left pleural cavity, and the injury was caused by a sharp-pointed weapon. It would be possible for it to have been caused by a fall on a sharp-pointed bamboo provided that the bamboo chipping was firmly fixed on the ground and in an upright position. There is no evidence whatever of a bamboo chipping having been firmly fixed in the ground and in an upright position, or that the deceased fell upon it. No such piece of bamboo was found after the affray, and we are driven to follow the conclusion of the learned Additional Sessions Judge that the suggestion that this wound was caused by a bamboo chipping is too far fetched to require serious consideration.

It therefore appears clear that the appellant used a knife upon the deceased ; and we have had addressed to us an argument based upon three possible lines of defence. One was that the right of self-defence which the appellant undoubtedly possessed when he was attacked had been exceeded by him but that his excess of his right was not such as to make him guilty of murder : another was that what was done to the appellant gave him such grave and sudden provocation as to deprive him of the exercise of his self-control and that in these circumstances he is guilty of culpable homicide merely : and the third was that the two men were having a sudden fight and that in the circumstances the appellant was guilty only of culpable homicide.

With regard to the third matter it need only be pointed out that the using of a weapon by one person against an unarmed person is not within the limits of the exception of a sudden fight, because it is expressly provided that no unfair or undue advantage must be taken by one of the combatants if the plea of sudden fight is to be raised by way of exception. With regard to the question of the exercise of the right of self-defence, we have felt a considerable difficulty, because under S. 300, Excep. 2, it is clearly stated that excess of the right of self-defence will not be murder provided there is no intention of doing more harm than is necessary for the purpose of such defence. It is very difficult, if not impossible, to say here that there was no intention of doing more harm than was necessary for the purpose of self-defence, since the deceased was about to kick the appellant, so far as the evidence shows, with bare feet and we think that the use of a knife and the infliction of such a serious stab wound in the chest could hardly have been in circumstances in which mere self-defence was intended.

However, we are on ground more favourable to the appellant when the other defence comes to be considered. We think it is clear that he did suffer provocation which was both sudden and also grave when the deceased attacked him with such determination and after repeated declarations that he was anxious to get at him and kick him. In these circumstances, we think it is evident that in the course of this struggle—and at what stage we cannot say — the appellant lost his power of self-control and having a knife with him he used it with unfortunately fatal effects. It seems clear, considering the two kinds of culpable homicide which are punishable under S. 304, I. P. C., that the wound was inflicted at least with the knowledge that it was likely to cause death, but after careful consideration we think that it may be that the appellant had so far lost his self-control that he did not do it with the intention of causing such bodily injury as was likely to cause death and that, therefore, in these circumstances the proper conviction is one under the second part of S. 304. Accordingly the conviction under S. 302, I. P. C., and the sentence of death passed upon the appellant will be set aside. We have considered what sentence to pass in relation to the other offence : it is true that the appellant is a young man and has not been previously convicted, but he has used a knife with a deadly effect in a struggle in which at the most the threat was by an unarmed man to kick him. We think the proper sentence is one of seven years' rigorous imprisonment.

**Sharpe J.**—I agree.

K.B./R.K. *Sentence reduced.*

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### A. I. R. 1938 Rangoon 17

BAGULEY AND SPARGO JJ.

*Abor Ahmed* — Appellant.

v.

*The King.*

Criminal Appeal No. 632 of 1937, Decided on 21st July 1937, from order of Sess. Judge, Arakan, D/- 26th May 1937.

**Penal Code (1860), Ss. 302 and 304, Part 1 —Accused injuring deceased's leg above ankle with dah thereby cutting bones and arteries—Deceased dying in consequence— Accused held guilty under S. 304, Part 1 and not under S. 302.**

The accused after an altercation smote the deceased on the leg above the ankle with his dah with such force that he cut through the bones and the arteries and the man died in consequence after four days. The accused was convicted under S. 302 :

*Held* that though the injury caused by the accused was sufficient in the ordinary course of nature to cause death, yet the accused could not be imputed with the intention of causing such injury as was sufficient in the ordinary course of nature to cause death, as most cuts on the leg were not injuries sufficient in the ordinary course of nature to cause death. The accused could therefore be convicted under S. 304, Part 1 and not under S. 302 : *A I R 1923 Rang 247, Dissent.* [P 17 C 2]

Kya Gaing — *for Appellant.*

Lambert (Govt. Advocate) — *for the Crown.*

**Baguley J.**—The question which was referred to the Full Bench* having been answered in the sense in which it has been, this case has now to be determined on what are really the agreed facts. The appellant after an altercation smote the deceased on the leg above the ankle with his dah with such force that he cut through the bones and the arteries. In consequence the man died four days later in hospital. The medical officer when examined in the committing Court said that the injury inflicted was sufficient in the ordinary course of nature to cause death. When examined in the Sessions Court, he went further and said that the injury was necessarily fatal. The fact that he made these divergent statements does not inspire very great confidence and it is difficult to decide which of these statements must be accepted. In view of this fact, and relying on what is common knowledge, we think it cannot be held that the injury was more than sufficient in the ordinary course of nature to cause death. The question then arises as to what offence the appellant has committed. He did in fact inflict injury sufficient in the ordinary course of nature to cause death. Can he be imputed with the intention to cause such injury or the knowlegde that he must inflict such injury? In my opinion this cannot be assumed against him.

Our attention has been drawn to a Bench decision of this Court, not officially reported, 2 Bur L J 103,[1] in which the appellant was convicted of murder, where the injury inflicted was much the same as the injury inflicted in the present case. This decision is now 14 years old and the more recent decisions of this Court which have been referred to in the order of reference to the Full Bench show that the general tendency of opinion now is not in accordance with the rule laid down in 2 Bur L J 103.[1]

The intention, so far as I can see, of the appellant was to cut the deceased on the leg, and the cut inflicted was quite low down near the ankle. A man who directs a blow in this direction as a general result would be a man who did not intend to cause injury sufficient in the ordinary course of nature to cause death, because most cuts on the leg are not injuries sufficient in the ordinary course of nature to cause death. The blow was delivered with great force, perhaps we could say, and even residents in the jungle must be held to know that a violent blow of this nature with a formidable weapon is likely to cause death wherever the blow may fall, but I do not think that any intention higher than this can be imputed against the appellant. I would therefore set aside the conviction under S. 302, I. P. C. and the sentence of death, and in its place record a conviction under S. 304, Part 1, and order that the appellant be rigorously imprisoned for ten years.

**Spargo J.**—I agree.

K.B./R.K. *Sentence reduced.*

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* *See* A I R 1937 Rang 396.

[1] Kra Chan U v. Emperor, (1923) 10 A I R Rang 247=76 I C 575=2 Bur L J 103=25 Cr L J 207.

## A. I. R. 1938 Rangoon 18

MOSELY AND SHAW JJ.

*Alan Murray* — Appellant.

v.

*L. H. Wellington* — Respondent.

First Appeal No. 123 of 1937, Decided on 22nd September 1937, against order of High Court, Original Side, in C. M. No. 127 of 1937.

**(a) Rangoon City Municipal Act (6 of 1922), S. 13 (2) — S. 13 (2) applies to Mayor also — Notice of censure motion against Mayor — Mayor disallowing resolution — Suit by mover under S. 45, Specific Relief Act — Adequate remedy held was under S. 13 (2), hence no suit could lie under S. 45, Specific Relief Act.**

Section 13 (2), Rangoon City Municipal Act, can be applied in the case of a Mayor as in the case of any other councillor. [P 21 C 1]

A member of the Rangoon Corporation wanted to move a certain resolution which the Mayor said was against the policy of the Corporation. The member objected to the remark of the Mayor and gave notice of a resolution of non-confidence against him. This resolution was ruled out of order by the Mayor. Hence, the member filed a suit under S. 45, Specific Relief Act, making it incumbent upon the Mayor to allow the moving of the censure resolution:

*Held* that as the member had another adequate remedy under S. 13 (2), Rangoon City Municipal Act, the remedy under S. 45, Specific Relief Act, was not available. [P 21 C 1]

**(b) Rangoon City Municipal Act (6 of 1922), Sch. 1, R. 6—'Substantive proposition' — Vote of non-confidence is not such proposition (*Obiter*).**

The words "substantive proposition" connote the idea of something put forward on which the council can, if it desire, take subsequent action. A vote of non-confidence is a mere resolution of protest, which by itself, admittedly, need not necessarily be effective. Therefore a vote of non-confidence is not a substantive proposition. [P 20 C 2; P 21 C 1]

A. Eggar, Advocate-General and M. M. Rafi — *for Appellant.*

P. K. Basu — *for Respondent.*

**Mosely J.**—This is an appeal against the order, under S. 45, Specific Relief Act, of the Judge on the Original Side, granting the application of the petitioner-respondent, Mr. L. H. Wellington, a member of the Corporation of Rangoon, directing that the appellant, Dr. Murray, the Mayor of the Corporation, allow the petitioner to move a vote of non-confidence in the Mayor at the next monthly meeting of the Corporation. It appears from the affidavit of Dr. Murray, which also served as written statement in the application, that at a special meeting of the Corporation, held on 29th May, Mr. Wellington moved that the existing scale of pay of certain employees of the Corporation be not reduced. The Mayor observed that their object all along had been to retrench salaries and now they wanted their employees to get more pay. Mr. Wellington took exception to this remark from the Chair and said that it was unbecoming. The Mayor replied that the Chair must be above criticism and that he was merely stating a fact. The same day Mr. Wellington gave notice, under R. 6 of the rules framed under Ch. 9, Sch. 1, City of Rangoon Municipal Act 6 of 1922. R. 6, as amended by Act 7 of 1922, is as follows:

> *6.* Any councillor who desires at any meeting to ask any question, to bring forward any business or to make any substantive proposition, shall give written notice of the same to the Secretary at least ten clear days before the date fixed for the meeting; such notice shall state the nature of such question or business or the terms of such proposition as the case may be; and shall (unless disallowed by the Mayor or Chairman of the Standing Committee, as the case may be) be included by the Secretary in the notice of the meeting.

I would remark here that it was never stated in the Court below, or in argument in this appeal, that Mr. Wellington had any other grievance against the Mayor than what passed at the special meeting of 29th May, and no counter-affidavit was filed in reply to the Mayor's affidavit. The Mayor's statutory powers, under which motions are allowed or disallowed, are contained in Rule 6-A. Rule 6-A, as amended, is as follows:

> The Mayor, or the Chairman of the Standing Committee concerned, as the case may be, shall decide on the admissibility of a question which a councillor proposes to ask or a substantive proposition he proposes to make, or other business he proposes to bring forward, and the Mayor (or the Chairman of the Standing Committee, as the case may be) may disallow any question or proposition or other business proposed to be brought forward, or any part thereof, on the ground that: (a) it relates to a matter which is not the concern of the Corporation or is outside the province of the Corporation (and in the case of a Standing Committee is foreign to the subjects with which such Standing Committee is concerned); (b) it contravenes the provisions of R. 11-A or of some provision of the Municipal Act or rules and has not for its object the amendment of the relevant provisions of the Act or rules; (c) that in his opinion the question is an abuse of the right of questioning, or that the question or proposition is calculated to obstruct or prejudicially affect the course of business or the procedure of the Corporation (or of the Standing Committee concerned as the case may be).

On 3rd June Mr. Wellington received a notice from the Secretary to the Corporation to the effect that the Mayor had ruled his motion as inadmissible on the ground that there was no provision in the Act or the rules for moving a motion of this kind. In Dr. Murray's affidavit, filed in the proceedings, he said (para. 1) that having been duly elected as Mayor in January 1937, he was entitled to hold his office as of right until the first meeting of the Corporation in January 1938. He went on (para. 2) to file a copy of the extract from the minutes of the special meeting to which reference has already been made, and (para. 5) to deny that the applicant as a councillor had any right under the Act to move a vote of censure. The learned Judge of the trial Court exhaustively discussed the nature of proceedings under S. 45 of the Act. He referred in particular to para. 1 of Dr. Murray's affidavit and he said that this left no room for doubt that the Mayor had disallowed the proposed resolution, not because it in his opinion infringed any of the conditions set out in R. 6-A, but because he thought that he could hold his office as Mayor up to January 1938. That, in the Court's opinion meant, in the language of Lord Esher in (1890) 24 Q B D 371[1] "taking into account matters, which the Court considers not to be proper for the guidance of" the respondent's discretion, and therefore the Court held that he must be deemed not to have exercised his discretion honestly and conscientiously. The learned Judge went on to say that whether the respondent could or would be removed from his office, even if the resolution of the applicant was carried by the vote of the majority of the councillors, was a matter with which the Court was not concerned. For that reason it was unnecessary to discuss the implication of S. 13 (2) of the Municipal Act, which could be if necessary considered by the proper authorities at the proper time. It was held by the Court that the Mayor had disallowed the resolution, not because it infringed any of the conditions set out in R. 6-A, but because of this extraneous matter. It was not thought necessary to direct the Mayor to reconsider the question of allowing or disallowing the resolution, as it was clear from his own statement (in his affidavit) that the proposed resolution did not come within the mischief of any of the conditions set out in R. 6-A. It was held that the applicant had no other way of obtaining redress for the infringement of his right as a councillor, and it was therefore directed that he be allowed to move his resolution.

There would appear to have been no contention before the learned Judge as to whether the motion came within the four corners of R. 6 or not. The grounds of appeal which have been argued are firstly, that the admission of the proposed resolution was not "clearly incumbent" on the Mayor, within the meaning of S. 45, Specific Relief Act; secondly, that the Mayor had a discretion under R. 6-A to disallow any item of business brought forward if, in the opinion of the Mayor, it relates to a matter which is outside the province of the Corporation and that as the Mayor had a right to hold office for a year, and the Corporation had no power to remove him on a motion of non-confidence, it was within the power of the Mayor to disallow the motion; thirdly, it is urged that the trial Court erred in holding that the Mayor disallowed the resolution, not because it infringed any of the conditions set out under R. 6-A, but solely because he thought he could hold office for one year; and lastly that the trial Court erred in holding that the Mayor had taken extraneous matters into consideration and had not exercised his discretion honestly and conscientiously. S. 45, Specific Relief Act, as amended by the Adaptations Order, is as follows :

> The High Court may make an order requiring any specific act to be done or forborne within the local limits of its ordinary original civil jurisdiction by any person holding a public office, whether of a permanent or a temporary nature, or by any Corporation or inferior Court of Judicature :
>
> Provided—(a) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act; (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such Corporation in its corporate character; (c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice; (d) that the applicant has no other specific and adequate legal remedy; and (e) that the remedy given by the order applied for will be complete.

**The questions before the Court are whether it was clearly incumbent on the**

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[1] The Queen v. The Vestry of St. Pancras, (1890) 24 Q B D 371.

Mayor to grant the resolution, whether his forbearing to do so was inconsonant with right and justice, and whether the applicant has any other specific and adequate legal remedy: clauses (b), (c) and (d). It is clear I think that the Mayor originally disallowed the motion on the ground that there was no provision in the Act for moving a motion of non-confidence. It was only later, when the matter came to Court that he added another reason, that he was entitled to hold office as of right for a year, that is to say, that the motion, even if carried, could not have been effective, in that he could not be obliged to resign his position. There is no provision in the Rangoon Municipal Act for the removal of the Mayor, though I note from Aiyangar's "Law of Municipal Corporations in British India" (at p. 33) that such provision is found in corresponding enactments of Bombay, Madras, the Central Provinces, the United Provinces, and Bihar and Orissa. From the extract of the minutes of the special meeting filed, there was perhaps an implication too that the Mayor would not have considered resigning on a motion, even if carried, which he thought had been moved petulantly or frivolously.

It is argued now for the appellant Dr. Murray that the motion could have been disallowed under R. 6-A (a), as it related to a matter which is not the concern, or is outside the provisions of the Corporation. The argument is that contained in the ground of appeal to the effect that the Corporation had no power to remove the Mayor. Another argument which might have been made, that the proposition in question was a frivolous one, moved merely out of pique, and therefore calculated to obstruct or prejudicially affect the course of business [R. 6-A (c)], has not been put forward. What is meant is that the resolution could not have been an effective one. It is interesting to note that the only authority quoted in Aiyangar's "Law of Municipal Corporations" on the subject is a Canadian ruling (cited page 35 ibid) which is to the effect that Municipal Councils have no power to sit in judgment upon or censure the conduct of their members where no such power is given them by statute or by the general law. A great many rulings have been cited for the respondent in this appeal (Mr. Wellington), which go to show that the Mayor must exercise a "proper discretion", which has been defined in (1891) A C 173[2] at p. 179 as

> that which is according to the rules of reason and justice, according to law, and not humour. It is to be not arbitrary but legal and regular.

I do not think it is necessary to discuss these rulings, as the question is whether the Mayor was under a statutory obligation under the Act to allow the motion or not. He could clearly only disallow it for one of the reasons given in R. 6-A. The subsequent question whether he exercised a proper discretion in the interpretation of those rules does not I think arise in these proceedings. As to the interpretation of R. 6, the question is whether the proposed motion was a substantive proposition or not. No other use of the expression in any legislative enactment has been mentioned to us.

"Substantive" evidently means that which originates something and is not merely auxiliarly or adjectival, such as an amendment. The word "proposition" (apart from its logical or mathematical sense) has two current meanings according to the Oxford Dictionary. One is the mere making (propounding) of a statement or assertion; the other is something put forward as a scheme or plan of action. In this second use the word is not so concrete or definite as the word "proposal" (to do something), but it means something put forward on which subsequent action can be taken. Fowler's "Modern English Usage" gives further extended developments of the meaning of the word, but these are clearly only slang or journalese. The expression used, it must be remembered, is not "substantive motion," but "substantive proposition," and I am inclined to think that the words "substantive proposition" used in this context connote the idea of something put forward on which the Council can, if it desires, take subsequent action. A vote of non-confidence is a mere resolution of protest, which by itself admittedly need not necessarily be effective. I do not think that a vote of non-confidence is a "substantive proposition". It is unnecessary however to determine what is the proper interpretation of this vague expression as another consideration is conclusive to show that this Court has no power of interference under S. 45, Specific Relief Act. The deciding question is whether the

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[2] Susannah Sharp v. Wakefield, (1891) A C 173 =60 L J M C 73=64 L T 180=39 W R 561 =55 J P 197.

**person aggrieved has any other legal remedy.** S. 13 (2) is as follows :

> 13 (2). The Government may, if it thinks fit, on the recommendation of the Corporation made after due inquiry, in which the councillor shall have the right to be heard, remove any councillor elected or appointed under this Act if such councillor has been guilty of misconduct in the discharge of his duties or of any disgraceful conduct.

There is no doubt in my opinion that this provision can be applied in the case of a Mayor as in the case of any other Councillor. It is open to any person aggrieved to propose a motion that an inquiry shall he held into the conduct of the Mayor provided, that particular charges of misconduct are alleged. (He may, if he likes, doubtless tack on a motion of non-confidence to this). That is a substantive proposition on which action can be taken. In the present case, I might remark, Mr. Wellington's advocate admits that there are no grounds for alleging any such misconduct. It appears to me therefore that the Mayor may well have been right in disallowing the proposed motion on the ground which is mentioned in the Secretary's letter to Mr. Wellington, that the motion was not provided for by the Act. But in any case there can be no doubt that the application to this Court does not lie, because the applicant had another adequate and specific legal remedy if he had a grievance. This appeal will therefore be allowed and the application dismissed with costs throughout, advocate's fee in this Court five gold mohurs.

**Shaw, J.**—I agree.

B.D./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 21

MYA BU AND MACKNEY JJ.

*Mohamed Hajee Valli Mohamad* — Applicant.

v.

*Vednath Singh and others* — Respondents.

Application in First Appeal No. 175 of 1936, Decided on 22nd December 1936, against decree of Dist. Court, Toungoo, D/- 31st October 1936.

**Civil P. C. (1908), O. 39, R. 1 (Rangoon Amendment) — Effect of amendment — Suit under O. 21, R. 63 or appeal from such suit— Court in which such suit or appeal is pending cannot grant temporary injunction to prevent sale of property under attachment in execution case which led to suit and then to appeal — Reasons stated.**

The result of the amendment of O. 39, R. 1, prima facie, is that the Court in which a suit under O. 21, R. 63, is pending or the Court in which an appeal from such a suit is pending does not enjoy the power of granting a temporary injunction to prevent the sale of the property under attachment in the execution case which led to the suit and then to the appeal. The reason for the present Rule is this. The claimant in a proceeding under O. 21, R. 58, who files a suit under O. 21, R. 63, is not the judgment-debtor against whom execution is taken; and by sale of the attached property attached in the execution case his right, title or interest in the property cannot be impaired, for it is only the right, title and interest of the judgment-debtor which is conveyed to the purchaser at the sale. If his suit or his appeal succeeds, then the interests which are declared in his favour are to be deemed not to have been disposed of by the sale. There is obviously no good ground for thinking that a sale made in the execution case during the pendency of a suit under O. 21, R. 63, or an appeal from such a suit will be injurious to the right, title and interest, if any, of the claimant in the property sold. Hence an application for stay of the sale and also of other steps taken or in contemplation in aid of execution, cannot be granted; nor can it be granted under S. 151, Civil P. C., as the order sought for is not necessary for the ends of justice or to prevent abuse of the process of the Court. [P 22 C 1, 2]

Foucar — *for Applicant.*

V. S. Aiyar and Shukla — *for Respondents 1 and 2.*

**Order.** — The application before us has been made in the course of an appeal from a decree passed in a suit for declaration under O. 21, R. 63, Civil P. C., filed by respondents 1 and 2 against the appellant and respondent 3. Respondents 1 and 2 are the decree-holders against the estate of the late father of the appellant and husband of respondent 3, and in execution of that decree they attached certain immovable property as the property of the estate of the deceased. The estate was represented by the appellant and respondent 3. Upon attachment having been made, the appellant in his personal capacity made an application under O. 21, R. 58, Civil P. C., and obtained an order for removal of attachment. In consequence of that order, respondents 1 and 2 filed the suit for declaration under O. 21, R. 63, and obtained a decree in their favour against which the appellant has now appealed. The application of the appellant, which is under consideration, is for an order to stay all proceedings, including sale, in the execution case from which the proceeding for removal of attachment and the subsequent suit for a declaration under O. 21, R. 63 arose. These facts show that the application is not one for stay of execution of the decree under appeal and therefore is not one under O. 41, Rr. 5 and 6, Civil P. C. Nor is this application one falling within the ambit of O. 21, R. 29, for there was no suit on the part of the person against whom the decree in execution was passed pending in any Court. Before the amendment of O. 39, R. 1, Civil P. C., there was no doubt as to the power of a Court, in which a suit under O. 21, R. 63, filed by an unsuccessful claimant under O. 21, R. 58 was pending or in which an appeal from a decree in such a suit filed by the decree-holder against such claimant was pending, to prevent a sale of the property under attachment in the execution case, pending the disposal of the suit or the appeal. The relevant portion of that Rule ran as follows:

> Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wrongfully sold in execution of a decree, the Court may by order grant a temporary injunction until the disposal of the suit or until further orders.

Since the report of the Civil Justice Committee, this Rule has undergone an amendment whereby the words "wrongfully sold in execution of a decree" were deleted. The result of the amendment, prima facie, is that the Court in which a suit under O. 21, R. 63 is pending, or the Court in which an appeal from such a suit is pending, does not enjoy the power of granting a temporary injunction to prevent the sale of the property under attachment in the execution case which led to the suit and then to the appeal. The reason for the present Rule is not far to seek. The claimant in a proceeding under O. 21, R. 58, who files a suit under O. 21, R. 63, is not the judgment-debtor against whom execution is taken; and by sale of the attached property attached in the execution case, his right, title or interest in the property cannot be impaired, for it is only the right, title and interest of the judgment-debtor which is conveyed to the purchaser at the sale. If his suit or his appeal succeeds, then the interests which are declared in his favour are to be deemed not to have been disposed of by the sale. There is obviously no good ground for thinking that a sale made in the execution case during the pendency of a suit under O. 21, R. 63, or an appeal from such a suit will be injurious to the right, title and interest, if any, of the claimant in the property sold. The application is for stay not only of the sale but also of other steps taken or in contemplation in aid of execution. We feel no doubt that this application does not fall within any definite provision either in the body or in the Rules of the Civil Procedure Code. It has, however, been urged on behalf of the applicant that this Court should grant the application in the exercise of the inherent power under S. 151, Civil P. C. which says:

> Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

We do not desire in the present proceeding to enter upon a discussion as to the applicability of this section to the matter before us. But the order sought for by the applicant in the present case is in our opinion not such as is necessary for the ends of justice or to prevent abuse of the process of the Court. As has already been pointed out, the applicant's right, title and interest, if any, in the property under attachment cannot be affected or injured by the sale. It cannot be said that the sale will do him any injustice whatever. It has further been pointed out to us that the decree-holders (respondents) are taking steps to have a receiver appointed in the execution case to take possession of the attached property before the time comes for the contemplated sale. Such steps taken will have to be by way of an interlocutory application in the execution proceeding. Such an application would be dealt with under O. 40, Civil P. C., in sub-r. 2, R. 1 of which it is provided that:

> Nothing in this Rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

So that if the present applicant is in possession in his own right, he would not be liable to be removed from the possession or custody of the property even though a receiver might be appointed. If he is not in possession or custody of the property in his own right at the present moment, he can complain of no grievance whatever if a receiver be appointed to take possession of it. Similarly, in the event of a suit, if the applicant is in possession of the property in his own right, the purchaser will not be able to oust him by recourse to the summary procedure under O. 21, Rr. 97 and 98. In such an event, the purchaser will be entitled to only symbolical possession, and for purposes of getting actual possession, he will have to have recourse to a regular suit the trial of which must under S. 10 be postponed to the determination of the appeal now pending in this Court. For all these reasons we hold that the application under consideration cannot be granted, and it is accordingly dismissed with costs; advocate's fee three gold mohurs. The interim order for stay of sale is cancelled.

D.S./R.K. *Application dismissed.*

## * A. I. R. 1938 Rangoon 23

DUNKLEY J.

In the matter of

*Maung Thet Pyin* — Appellant.

v.

*Ma Nu* — Respondent.

Court-fees Reference in First Appeal No. 140 of 1936, Decided on 16th March 1937.

*** Court-fees Act (1870), Ss. 7 (iv) (f), 11—Principle of S. 11 applies to appeal also—Suit for account—Final decree fixing definite sum as due by defendant—Appeal by defendant from final decree—He must value his appeal according to that decree and not arbitrarily.**

In suits for an account, although at the commencement of the litigation when the value of the relief sought is uncertain, the plaintiff shall have the privilege of making his own valuation of that relief, yet he shall not obtain the relief to which he is declared to be entitled by the decree until the whole of the court-fee thereon has been duly paid; and consequently in such suits as soon as the value of the relief sought is rendered certain, then court-fee must be paid upon that amount. This principle is equally applicable to an appeal as to a suit. [P 24 C 1, 2]

Thus, although S.7 (iv) (f) says that the plaintiff or appellant shall state the amount at which he values the relief sought, this does not mean that he shall be permitted to state any fanciful amount which may occur to his mind; it means that the appellant or in the case of a suit, the plaintiff, shall truly state the value of the relief sought by him to the best of his knowledge and belief. He cannot put a fictitious value upon his suit or appeal when the relief sought is capable of exact valuation. Therefore in a suit for account, when the value is made certain, as by a final decree, the necessity for an estimate does not arise and the defendant appealing from such decree must pay the court-fee on the ascertained amount: *A I R 1929 Cal 815 and A I R 1933 Lah 683, Rel. on; A I R 1931 Rang 146 and A I R 1929 P C 147, Disting.* [P 24 C 2; P 25 C 1]

A. N. Basu — *for Appellant.*

**Dunkley J.**—This is a reference by the Taxing Master under the provisions of S. 5, Court-fees Act. It arises out of an appeal which has been brought before this Court by the defendant in the original suit which was heard and decided by the Assistant District Court of Mandalay. The original suit was a suit for dissolution of partnership and accounts. The plaintiff valued the relief sought in the suit at Rs. 7,761-7-3, and valued the suit for jurisdiction at the same figure. She paid court-fees ad valorem on this amount. A preliminary decree for the taking of accounts was passed on 5th September 1934. No appeal therefrom was preferred. The final decree was passed on 1st June 1936. It declared that there was due by the defendant to the plaintiff a sum of Rs. 3,915-3-6. The appeal of the defendant appellant is against this final decree. The memorandum of appeal states that the appeal is valued at Rs. 300 "tentatively" for the purpose of court-fees, under S. 7 (iv) (f), Court-fees Act, and at Rs. 3,915-3-6 for the purpose of jurisdiction. Under the provisions of S. 8, Suits Valuation Act, in a suit of this description the valuation for the purpose of court-fees and the valuation for the purpose of jurisdiction must be the same, and consequently the fact that the defendant-appellant has found himself compelled to value his appeal for the purpose of jurisdiction at Rs. 3,915-3-6 amounts almost to a tacit admission that this is the correct valuation for the purpose of court-fees also. The appellant relies mainly on a judgment of a Full Bench of this Court in 9 Rang 165,[1] where it was held that in a suit for accounts under Cl. (iv) (f) of S. 7, Court-fees Act, the plaintiff in the trial Court, and the appellant in the Court of Appeal, is the person to make an estimate of the value of the relief that is claimed, and this valuation cannot be called in question or revised by the Court. The question which was propounded for the decision of the Full Bench was as follows:

> Whether in a suit coming under Cl. (iv) (f) of S. 7 of Court-fees Act, when the plaintiff has valued the relief prayed for and the trial Court has amended that valuation under the provisions of S. 12 of the said Act, and the plaintiff has obtained a preliminary decree for accounts and the defendant appeals against the whole decree, the defendant is bound by the valuation of the plaint in the trial Court or is at liberty to make a fresh valuation for the purpose of the appeal.

Consequently this case refers only to an appeal against a preliminary decree. Mr. Basu, for the appellant, has quoted several authorities in which it has been held that in an appeal against a preliminary decree in a suit for the taking of accounts, the defendant-appellant is not bound by the valuation of the relief made in the plaint and is at liberty to make a fresh valuation for the purposes of the appeal. This is, no doubt, settled law, but it is not the point which is now before me, as the present appeal is an appeal against a final decree, by which it has been decided that a certain specific sum of money is due by the defendant-appellant to the plaintiff-respondent. The decision of their Lordships of the Privy Council in 56 I A 232,[2] to which reference has been made, does not render assistance in the elucidation of the point which is now for decision, for, in that case the appellant paid the court-fee ad valorem on the whole amount which had been decreed against him.

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[1] C. K. Ummar v. C. K. Ali Ummar, A I R 1931 Rang 146=133 I C 91=9 Rang 165 (F B).

The argument of Mr. Basu, on behalf of the appellant, is that there is no distinction and there can be no distinction, so far as court-fees are concerned, between a final decree and a preliminary decree, as section 7 (iv) (f), Court-fees Act, refers generally to suits and appeals and makes no distinction between an appeal against a preliminary decree and an appeal against a final decree, but it appears to me that the provisions of S. 11, Court-fees Act, are against this contention. This section lays down that in a suit for an account, if the amount decreed is in excess of the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole amount so decreed shall have been paid to the proper officer. It is therefore clear that it is the intention of the Legislature that in suits for an account, although at the commencement of the litigation, when the value of the relief sought is uncertain, the plaintiff shall have the privilege of making his own valuation of that relief, yet he shall not obtain the relief to which he is declared to be entitled by the decree until the whole of the court-fee thereon has been duly paid; and consequently, that in such suits, as soon as the value of the relief sought is rendered certain, then court-fee must be paid upon that amount. The principle of that section appears to me to be equally applicable to an appeal as to a suit, and the principle is that when the value of the relief sought has been ascertained, the uncertainty vanishes, and the party who has to pay the court-fee must pay the full court-fee upon the ascertained amount. The provisions of S. 7 (iv) (f), Court-fees Act, are as follows :

> In suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. In all such suits the plaintiff [in this case, the appellant] shall state the amount at which he values the relief sought.

I agree that this section is applicable to an appeal against a decree in a suit for account, and that under the provisions of the section it is for the appellant to value the relief sought by him. If the value is uncertain, he can make his own estimate; but when the value is made certain, as it is by the final decree, the necessity for an estimate does not arise, and it would be manifestly absurd to allow the appellant to make an arbitrary and erroneous valuation when the real value is known. There is a decree against the appellant for a specific sum of money, and the appellant seeks to have this decree wholly set aside. He seeks to get rid of a decree against himself for a specified sum of money, and that sum is plainly the value of the relief sought. The valuation of the appeal for the purpose of court-fees is therefore this amount, and the appellant has no option but to accept this valuation and, under S. 7 (iv) (f) of the Act, to state it as the amount at which he values the relief sought. S. 7 (iv) (f) says that the plaintiff or appellant shall state the amount at which he values the relief sought. This does not mean that he shall be permitted to state any fanciful amount which may occur to his mind; it means that the appellant, or, in the case of a suit, the plaintiff, shall truly state the value of the relief sought by him, to the best of his knowledge and belief. He cannot put a fictitious value upon his suit or appeal when the relief sought is capable of exact valuation. This principle has been laid down by Rankin C. J. in 57 Cal 463,[3] where it was decided that in a suit for an account, the defendant appealing against the final decree must value his appeal according to that decree. The decision of Bhide J. in 14 Lah 738[4] is to the same effect. Neither of these decisions is affected by the decision of the Judicial Committee in 56 I A 232[2] and in fact the Lahore case was decided subsequent to the publication of this decision and reference to it was made by Bhide J. in the course of his judgment.

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[2] Faizullah Khan v. Mauladad Khan, A I R 1929 P C 147=117 I C 493=56 I A 232=10 Lah 737 (P C).

[3] Kantichandra v. Radharaman, A I R 1929 Cal 815=124 I C 77=57 Cal 463=33 C W N 743.

[4] Mt. Niamati Bai v. Daulat Ram, A I R 1933 Lah 633=144 I C 559=14 Lah 738=34 P L R 1079.

I am clearly of opinion that in this case, although S. 7 (iv) (f), Court-fees Act, is applicable and it is the duty of the appellant to value the relief sought, the only valuation which he can be permitted to put upon that relief is the amount of the decree which he seeks to have set aside, namely Rs. 3,915-3-6. The decision of the learned Taxing Master is therefore correct, and court-fee ad valorem on this amount must be paid on the memorandum of appeal.

D.S./R.K. *Reference answered.*

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## A. I. R. 1938 Rangoon 25

MACKNEY AND SPARGO JJ.

*Bibian Ludwig DeCruz* — Applicant.

v.

*Alice Winifred DeCruz* — Respondent.

Criminal Revn. Appln. No. 379-B of 1937, Decided on 27th August 1937, from order of 2nd Addl. Magistrate, Rangoon, D/- 18th June 1937.

**Criminal P. C. (1898), S. 488 — Neglect to maintain — Husband living away from his wife on account of frequent quarrels — Suit by wife for judicial separation dismissed— Application by her under S. 488 — Offer by husband to maintain wife if she lived with him — Offer held not bona fide — Order of maintenance held proper.**

A husband lived away from his wife as he had frequent quarrels since their married life began. On such desertion by the husband, the wife filed a suit for judicial separation but it failed. Thereupon the wife applied under S. 488 for maintenance. The husband expressed his willingness to maintain his wife. There was an attempt on the part of the neighbours to bring about a compromise but it failed on account of the stubborn attitude of the husband :

*Held* that the belated offer of the husband to maintain his wife on condition of her staying with him was not a bona fide one, as it was made simply as a defence against the wife's application for the maintenance. Moreover, the failure of the wife's suit for judicial separation did not alter the fact that he deserted her and failed to maintain her. Under the circumstances, the order for maintenance was proper. [P 26 C 1]

N. A. Christopher — *for Applicant.*

W. A. Moore — *for Respondent.*

**Mackney J.** — The applicant and the respondent were married some six years ago and were living together. On 27th May 1936 the applicant left the house in which they were living together and went to live elsewhere. He left behind him a note pointing out that they had been quarrelling ever since they were married and that owing to these quarrels and unpleasantness, he was unable to continue their joint living. He further alleged that he suspected that the respondent on one occasion had poisoned his soup. Other allegations of minor causes of discontent were also made. Applicant made no attempt to maintain his wife, the respondent, and on 16th July 1936 she instituted a suit on the Original Side of this Court for judicial separation. This suit was dismissed on 28th January 1937, it being held that the respondent had failed to establish cruelty. During the pendency of this suit, the applicant had to pay alimony to the respondent. This alimony, of course, ceased on the dismissal of the suit. On 22nd February 1937 the respondent filed an application before the 2nd Additional Magistrate, Rangoon, under S. 488, Criminal P. C. for maintenance. The applicant filed a written statement in which he expressed his willingness to maintain petitioner and offered to maintain her on condition that she lived with him. This offer the learned Magistrate did not consider bona fide, and as it is clear that applicant had failed to maintain his wife he ordered him to pay her Rs. 50 a month maintenance and to pay the costs of the application. The applicant has now applied to this Court to revise the Magistrate's order. It is argued that as the respondent's suit for judicial separation failed and as he is ready to maintain her, it cannot be said that she is refusing to live with him for sufficient cause and she is therefore not entitled to maintenance.

Now, supposing the respondent had not brought her suit for judicial separation, what would have been the position ? The applicant had abandoned the house with the express intention of living together with her no more. He ceased to maintain her and only when she filed her application under S. 488, Criminal P. C., did he make an offer to maintain her on condition that she lived with him. We have the evidence of witnesses, whose word there is no reason to disbelieve, who stated that after the failure of the suit, they endeavoured to persuade the couple to become reconciled. They say that the applicant told them that he could not compromise with his wife inasmuch as she had injured his character to a great extent and that he could not be reconciled to her as she had made his life unbearable and miserable. Even in the Magistrate's Court he maintained that he still believed that his wife had put something into his soup with intent to harm him mentally or physically. It is obvious that in such circumstances the Magistrate quite rightly refused to believe that the belated offer to maintain his wife on condition that she lived with him was made bona fide. I cannot see what difference it can make that in the interim the wife had brought a suit for judicial separation which had failed. That suit does not alter the fact that applicant had deserted his wife and failed to maintain her. It appears to me that the respondent was justified in refusing to entertain this offer seriously. It is quite obvious that the applicant has no serious intention of carrying it out, and that he made it simply as a move in his defence against her application for maintenance. I am therefore not of the opinion that the Magistrate's order is wrong, and I decline to interfere. This application is dismissed.

A.L./R.K. *Application dismissed.*

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## A. I. R. 1938 Rangoon 26

BAGULEY AND SHARPE JJ.

*Mohamed Hajee Valli Mohamed* — Appellant.

v.

*Vednath Singh and others* — Respondents.

First Appeal No. 175 of 1936, Decided on 16th August 1937, against decree of Dist. Court, Toungoo, in C. R. No. 13 of 1934.

**(a) Benami — Burden to prove transaction benami is on person alleging it to be so — Main test to determine benami character is to find out real intention of parties—Burden when shifts on opposite party stated.**

The burden of proof is on the person seeking to establish that any particular transaction is a benami one. It is notorious that in benami transactions all the subordinate parts are well fitted in to correspond with the benami arrangement in its integrity, and if it is once established that a transaction is benami, the fact that the deeds bear the benamidar's name is necessarily consistent with the benami case and is of no essential weight on one side or the other. Since therefore it is unlikely that there will often be any other relevant circumstances from which the conclusion can be drawn that a transaction is a benami one, the usual mode of proving that a purchase is a benami transaction is by showing that the funds from which the purchase was made were exclusively the funds of the person alleged to be real owner of the property. The main test is to find out the real intention of the parties. All the peculiar circumstances and probabilities of each particular case must be carefully considered. Although no one of those circumstances taken by itself may be of any particular value or afford any conclusive proof of the intention to transfer the ownership from one person to the other, yet a combination of some or all of them, and a proper weighing and appreciation of their value, may well raise such a presumption of real ownership as to shift the burden of proof on to the opposite party, and if the latter is unable to discharge the burden so transferred, he will fail: *Case law referred.* [P 31 C 1, 2; P 32 C 1]

**(b) Practice—Findings of fact —Decisions of Township Judges on questions of fact or credibility of evidence have not same weight as findings of County Court Judges or High Court Judges in England (*Baguley J.*)**

Findings of fact by the High Court in England, or by the County Courts, [Courts which are presided over by members of the Bar of proved ability who have had years of experience before they are appointed, have got to be dealt with on different lines from findings of fact arrived at perhaps by the Township Judges in Burma who may be appointed almost direct from the University. These Judges have not always the experience nor perhaps the ability of County Court Judges or High Court Judges, and their decisions on points of fact or the credibility of evidence can never be regarded as having the same weight as findings of the County Court Judges or High Court Judges: *A I R 1936 Rang 5, Expl.* [P 35 C 1, 2]

Foucar and C. A. Soorma — *for Appellant.*

E. Hay and J. H. Shukla — *for Respondents 1 and 2.*

**Sharpe J.** — This is an appeal by one Mohamed Hajee Valli Mohamed against a decree of the Judge of the District Court of Toungoo, dated 31st October 1936, declaring (a) that the transaction contained in a sale deed dated 15th March 1924 and registered in the office of the joint Sub-Registrar, Toungoo, under No. 747 of 1924, was fraudulent, collusive and benami, and inoperative against respondents 1 and 2 to this appeal, and (b) that the property, the subject matter of the said sale deed, which had been attached in Civil Exn. No. 58 of 1932 of the said District Court, was liable to attachment and sale in execution of a decree obtained by respondents 1 and 2 against one Hajee Valli Mohamed Hajee Abba (to whom I will hereafter refer as Abba) in Civil Regular Suit No. 80 of 1928 of this High Court. The present suit is but a comparatively small part of the somewhat complicated litigation, extending over a period of some 21 years, in which have been engaged either the parties to the present appeal or those whose legal representatives the present parties are. For a proper understanding of the present appeal, it is necessary to trace in outline the history of this matter since 1916.

In 1916, one Baijnath Singh instituted two regular suits against Abba and against one Hajee Mohamed Jamal for the redemption of certain shares which he alleged had been mortgaged by him, and for the taking of an account. Those suits were Nos. 60 and 62 respectively of 1916 in the late Chief Court of Lower Burma. The plaintiff also alleged that there was an agreement to take reduced interest. The plaint in Suit No. 62 was subsequently amended by adding one Abdul Kareem Abdul Shakoor Jamal as defendant 2. The plaintiff's right to redeem was denied on the ground that the several transactions on which the plaintiff relied were not mortgages but sales with a right of repurchase which had expired. The trial Judge upheld the plaintiff's contentions in both suits, and decrees were accordingly passed for an account and for redemption of the shares on payment of the amount found due and costs. The amounts subsequently found to be so due were Rs. 1,36,467-4-0 in Suit No. 60 and Rs. 54,259-7-6 in Suit No. 62. Those sums were deposited in Court by Baijnath Singh. Both the defendants appealed (Civil First Appeals Nos. 67 and 68 of 1917), and during the pendency of the appeals, Abba's name was substituted as defendant in the second case for that of the defendant Jamal, as Abba had by purchase succeeded to the rights of Jamal. On 23rd May 1919 judgment was delivered on appeal, when the judgments of the trial Court were varied, the Division Bench holding that the agreement to take reduced interest was not proved. The amounts requisite for redemption were fixed at Rupees 2,24,086-13-6 in Suit No. 60 and at Rupees 1,88,092 in Suit No. 62, a total sum of over four lakhs, and Baijnath Singh then paid into Court the extra amount necessary. On 5th January 1920 Baijnath Singh obtained leave to appeal to His Majesty in Council, and he thereafter applied for an order that security should be given by Abba before the latter was allowed to withdraw the amounts deposited in Court. Abba however swore an affidavit on 25th March 1920 wherein he affirmed that he was possessed of a rubber plantation at Shwegyin worth at least three lakhs, and he was thereupon allowed to withdraw the money from Court without giving security; and he promptly did so. Subsequently Abba withdrew his appeal in Suit No. 60 and therefore the decision that Baijnath Singh was entitled to redeem the shares in the transaction, the subject matter of that suit, stood and could not be controverted. In the appeal in Suit No. 62 their Lordships of the Privy Council were of opinion that Abba had failed in his contention that those transactions were not mortgages and also so far as excess interest had been awarded from the date of the agreement for reduction of interest. The decree of the Appellate Court was therefore set aside and the decree of the Court of first instance restored; and Abba was ordered to pay the costs of both appeals. As a result of this decision, Baijnath Singh was entitled to recover back from Abba a very substantial sum of money besides the costs. The judgment of the Privy Council was delivered on 8th December 1924 and is reported in 3 Rang 106.[1]

From about 1913 Abba had been carrying on business in Rangoon as a paddy merchant; he was assisted in that business by his four sons, Hajee Ahmed Hajee Valli Mohamed (to whom I will hereafter refer as Ahmed), Oomar Hajee Valli Mohamed (to whom I will hereafter refer as Oomar), Mohamed Hajee Valli Mohamed (the present appellant), and Abdul Sattur (to whom I will hereafter refer as Sattur); in 1913 they were then aged about 23, 22, 20 and 19 years respectively. On 17th July 1918 Abba bought from Moosa Abdul Shakoor Jamal for Rs. 85,000 a piece of land at Shwegyin. The instrument of sale recited that the land measured 577.33 acres or thereabouts, that it was then held on lease from the Deputy Commissioner of Toungoo for the term of 30 years from 18th March 1912, with an option of renewal for a further 20 years and that it had been planted with rubber trees. In 1923 Abba ceased to carry on the paddy business in which his sons had been assisting him. On 15th March 1924 an indenture of sale was executed by Abba, as vendor, and his two sons, the present appellant and Ahmed, as purchasers, by which indenture Abba purported to sell to his two said sons, at the price of Rupees 75,000, the above-mentioned rubber estate at Shwegyin which he had bought in 1918. This deed, which was duly registered on 3rd July 1924, is the one which is the subject matter of the present appeal. Abba's youngest son Sattur had died at the end of the previous month (June), and just five months later, namely on 4th December 1924, came the Privy Council decision which I have already mentioned. On 3rd March of the following year, Abba entered into an agreement in writing with Baijnath Singh with a view to liquidating his (Abba's) liability to the latter arising from the Privy Council decision. By this agreement Baijnath Singh agreed to accept in full settlement and satisfaction Rupees 50,000 in cash, a promissory note for Rs. 50,000 signed by Abba's brother Abdulla (to whom I will hereafter refer as Abdulla), delivery of 50,500 shares in the Nath Singh Oil Company, and 1860 shares in the Syriam Land Company. Altogether Baijnath Singh was to receive the equivalent of about two lacs of rupees in satisfaction of a claim which, if interest had been included, must have run into five or six lakhs.

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[1] Baijnath Singh v. Hajee Valley Mahomed, (1925) 12 A I R P C 75=86 I C 332=3 Rang 106 (P C).

On 2nd April 1925 Abba applied to the Court to record this settlement and to enter up satisfaction of the decree of the Privy Council. The application was opposed by Baijnath Singh on the ground that his consent to the settlement had been obtained by misrepresentation. He alleged that Abba had told him that he had no money and no property and that he had disposed of the rubber estate at Shwegyin to outsiders; that he (Baijnath Singh) had believed Abba's statements; but that in truth and in fact Abba had some Indo-Burma Petroleum shares and had transferred the rubber estate to two of his sons for an alleged consideration of Rs. 75,000. At the conclusion of the evidence Chari J., before whom the matter came, expressed a doubt as to whether an application to record the adjustment was the proper course, and suggested that, in order to obviate any legal objections which might be taken later, Baijnath Singh should file an application under S. 144, Civil P. C., for restitution of the money withdrawn from Court without security, which money had become payable to him in terms of the decree of the Privy Council. On 29th June 1925 Baijnath Singh duly made such an application to which Abba filed objections relying upon the settlement of 3rd March 1925. In his judgment, delivered on 28th July 1925, the learned Judge held that Baijnath Singh dealt with the properties which he received under the settlement after having acquired, according to his own admission, a knowledge of the misrepresentation which he alleged, and he had accordingly put it out of his power to restore the benefits he had derived, which by S. 64, Contract Act, it was essential for him to do in order to have rescinded a contract which he alleged was voidable. He therefore dismissed Baijnath Singh's application for restitution, but entered up satisfaction of the Privy Council decree to the extent of the costs involved. From the order passed therein Abba, although successful, appealed (Civil Misc. Appeal No. 169 of 1925), apparently with the object of preventing a plea of res judicata being successfully raised in any subsequent action of deceit which might be brought against him. On that appeal, this Court expressed the view that the decision of Chari J. could not operate as res judicata, and the appeal was dismissed.

On 10th February 1928 Baijnath Singh filed the necessary suit (Civil Regular No. 80 of 1928) against Abba and his two sons, the present appellant and Ahmed, to recover damages for fraudulent misrepresentation whereby he (Baijnath Singh) had been induced to enter into the above-mentioned compromise of his rights under the Privy Council decree, which settlement, so he alleged, he would never have accepted if it had not been for such misrepresentations. The misrepresentations alleged were similar to those which had been put forward in the proceedings before Chari J. Objection was taken that the suit was multifarious, and on 16th March 1929, Cunliffe J. upheld the objection and struck Abba's two sons off the record; thereafter the case proceeded against Abba alone. Baijnath Singh alleged, inter alia, that the defendant had told him that he had sold his rubber plantation, that he had no money and no property, that he had lost heavily in trade, that his friends and relatives were coming to his help and that there was no possibility of Baijnath Singh getting anything more in satisfaction of his right under the Privy Council judgment than what was then being offered. The case occupied 19 days before

Ormiston J. who delivered judgment on 9th August 1929. He held that Baijnath Singh had been induced to enter into the agreement of 3rd March 1925 by untrue representations and he passed a decree against Abba for Rs. 4,99,789 and interest thereon at 9 per cent. per annum from 10th February 1928.

Abba appealed (Civil First Appeal No. 211 of 1929). The appeal was dismissed on 5th June 1930. Baijnath Singh died on 17th November 1931. The plaintiffs in the present suit (who are respondents 1 and 2 before this Court) were brought on the record on 20th July 1932 as his legal representatives, and in order to obtain satisfaction of the decree of 9th August 1929, they attached the rubber plantation at Shwegyin which was described in the attachment order as measuring 403.28 acres (Civil Execution No. 58 of 1932 of the District Court of Toungoo). In Civil Misc. No. 6 of 1933 of that same District Court, the present appellant and his brother Ahmed applied, under O. 21, R. 58, Civil P. C. for the removal of such attachment on the ground that they, and not Abba, were the owners of the property and were in possession of the same on their own account at the time of attachment. The learned District Judge declined to investigate the title of the two sons. He found that they were in possession of the rubber estate, and he held that he could not go into the question whether they came into possession by fraud or benami. Accordingly, on 14th October 1933, he allowed the application and the attachment was removed. The order removing the attachment came before this Court in revision (Civil Revn. No. 17 of 1934)[2] it being contended on behalf of the plaintiffs in the present suit, who, as decree-holders, were the applicants for revision, that in refusing to go into the question of title the District Judge failed to exercise a jurisdiction vested in him by law. This Court held that as the decree-holders then still had open to them the remedy provided in O. 21, R. 63, Civil P. C., it ought not, in view of the decision in the case in 7 Rang 466,[3] to interfere with the order passed by the District Court. Accordingly, on 21st May 1934, the application for revision was dismissed.

Abba had died in November 1933 leaving as his legal representatives his two sons, the present appellant and Ahmed. Ahmed died on 22nd August 1934, leaving as his legal representative his widow, Ma Bibi. On 27th August 1934 the present plaintiffs, on behalf of themselves and other creditors, if any, of the deceased judgment-debtor Abba, presented a plaint in the District Court of Toungoo against the present appellant and his brother Ahmed, for themselves as well as the legal representatives of Abba, and also against Hajina Amma (Abba's widow) and Oomar, also as legal representatives of Abba. The plaintiffs in that suit apparently thought, not without justification, that some point might be taken against them that the plaint was defective in form or otherwise, and on 11th October 1934 they applied for, and were granted, permission to withdraw the suit, with liberty to institute a fresh suit in respect of the same subject matter and on the same cause of action. That same day, namely, 11th October 1934, the present suit was instituted.

According to the heading of the plaint, the present suit is brought both under O. 21, R. 63, Civil P. C., and also under S. 53, Transfer of Property Act. The suit is expressed to be brought by Vednath Singh and Janki Devi, the heirs and legal representatives of Baijnath Singh, on behalf of themselves and other creditors, if any, of Abba. The persons made defendants are (1) Mohamed Hajee Valli Mohamed (the present appellant) for himself as well as the legal representative of Abba (deceased) and Ahmed, and (2) Ma Bibi, widow of Ahmed, as legal personal representative of Ahmed and Abba. Para. 8 of the plaint alleges that the property attached in Civil Exn. No. 58 of 1932 of this High Court (namely the rubber plantation before mentioned, which according to para. 5 of the plaint measures about 403.28 acres) is the sole property of Abba. Para. 14 of the plaint alleges that the sale deed dated 15th March 1924, by which Abba purported to convey to his sons, the present appellant and Ahmed (deceased), the before mentioned rubber plantation, was merely a collusive, sham and benami transaction made by Abba with intent to defraud and delay his creditors, more especially Baijnath Singh. The relief sought in the present action is a decree (1) declaring that the transaction contained in the sale deed of 15th March 1924 was a fraudulent, collusive and benami one, and was further invalid and as such inoperative against the plaintiffs and other creditors, if any, of the judgment-debtor Abba; and (2) declaring that the said rubber plantation is liable to attachment and sale in execution of the decree obtained by Baijnath Singh against Abba on 9th August 1929 and confirmed on appeal on 5th June 1930.

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[2] Vednath Singh v. Mahomed, *Reported in* (1934) 21 A I R Rang 212=154 I C 128.

[3] S. R. M. M. A Firm v. Maung Po Saung, (1929) 16 A I R Rang 297=120 I C 236=7 Rang 466.

In para. 4 of his written statement, the present appellant alleges that the rubber plantation belonged absolutely to him and to his late brother Ahmed and that Abba had no interest therein at the date of the attachment or thereafter; in para. 10 he denies that the conveyance of the rubber plantation was collusive, sham or benami or made by Abba with intent to defraud his creditors, and asserts that the conveyance was made bona fide for consideration without any intention of defrauding his creditors or anyone; and in para. 15 he states that the suit is barred by limitation. As will be seen later, this last defence is no longer one which need be taken into consideration by this Court. Other defences also were raised but were not subsequently relied upon. The written statement of defendant 2, Ma Bibi, is substantially to the same effect as that of her co-defendant. Defendant 1 then filed an amended written statement, to which the plaintiffs filed a reply and objection, and such amended written statement was subsequently withdrawn. Of the seven issues framed by consent on 6th February 1935, I need only refer to two: Issue 1—Whether the properties in suit (i. e. the rubber plantation at Shwegyin) belonged to Abba (deceased), or to Ahmed (deceased) and defendant 1 (the present appellant); and Issue 3—Whether the conveyance deed dated 15th March 1924, between Abba (deceased) on the one part, and Ahmed (deceased) and defendant 1 on the other part, is a collusive, sham and benami transaction. On 3rd January 1936 the plaintiffs filed a petition alleging that the burden of proof was upon the defendants and praying that the defendants might be ordered to begin the case. This matter was argued before the District Judge on 27th January 1936, when he held, on the authority of two Privy Council cases, 5 Rang 852[4] and 60 M L J 341,[5] and the recent 1932 case in 55 Mad 748,[6] that the burden of proof was in the present case upon the plaintiffs, as being persons seeking

> to give to a purchase a different meaning and complexion from what it bears on its face, that is who maintains that the apparent state of things is not the real state of things.

When the case next came before the District Judge, which it did on 31st January 1936, it was first of all agreed between the parties that the evidence of one W. T. Mack in Civil Regular Suit No. 80 of 1928 of this High Court and the evidence of one Tan Kyin Hye in Civil Miscellaneous Case No. 6 of 1933 of the District Court of Toungoo should be taken as evidence in the present case. Then the evidence of the plaintiff Vednath Singh was taken. He was only a formal witness and his own oral evidence was of no real importance on the issues with which we are now concerned, but he filed as exhibits, the judgment of this High Court in Civil Revision No. 17 of 1934[2] (Ex. A), the judgment of this High Court in Civil Regular Suit No. 80 of 1928 (Ex. B) and the judgment on appeal therefrom in Civil First Appeal No. 211 of 1929 (Ex. C), and the judgment of this High Court delivered by Chari J. in Civil Regular Suit Nos. 60 and 62 of 1916 (Ex. D). It is to be noted that no objection was taken by or on behalf of the defendants to the filing of any of these four exhibits. The plaintiff also filed certified copies of (i) the affidavit sworn by Abba on 25th March 1920 in which he set out his estimate at that time of the value of the rubber plantation at Shwegyin (Ex. E), (ii) the accounts filed by Abba in Civil Regular Suit No. 80 of 1928 of this High Court (Ex. F), and (iii) Abba's deposition in the same suit (Ex. G). The defendants objected to the filing of these last three exhibits on the ground that they would not be binding on the defendants who were not parties to the earlier proceedings. The learned District Judge overruled the objection as he considered that they were "relevant to show the value of the estate of the subject matter", a reason which I for one fail to understand. (After considering certain exhibits and evidence the judgment proceeded further). As has necessarily been conceded on both sides, the sole dispute in the case is whether the transfer of the rubber plantation on 15th March 1924 was a genuine sale or a fraudulent benami transaction. The burden of proof is on the person seeking to establish that any particular transaction is a benami one; for, as Lord Hobhouse said in the Privy Council case in 15 Cal 20[7] at p. 23, it is for the person impugning the apparent character of a deed executed in proper form and apparently effecting a valid transfer to another to show something or other to establish that it is a benami or sham transaction. In 3 M I A 229[8] at page 240 Lord Campbell stated: "The criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid", and the same principle was enunciated in 6 M I A 53.[9] In the comparatively recent Privy Council case in 37 All 557,[10] Sir George Farwell said, at p. 565, that the general rule in India in the absence of all other relevant circumstances is the one so stated by Lord Campbell in 3 M I A 229.[8] Further, 21 Mad 56,[11] to which case Mr. Foucar called our attention, is a Bench decision to the effect that:

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[4] V. E. A. R. M. Firm v. Maung Ba Kyin, (1927) 14 A I R P C 237=105 I C 788=5 Rang 852.

[5] Mahomed Ali Mahomed Khan v. Mt. Bismillah Begam, (1930) 17 A I R P C 255=128 I C 647=60 M L J 341 (P C).

[6] Appathurai Chettiar v. Veelayan Chettiar, (1932) 19 A I R Mad 302=137 I C 879=55 Mad 748=62 M L J 236.

> When a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof, it needs to be shown for what purpose other than the ostensible one the deed was executed.

Mr. Foucar also called our attention to the Privy Council case in 11 M I A 28,[12] which was a suit to set aside a sale on the ground that the purchase was not bona fide, being made in collusion with judgment-debtors. At page 43 Lord Westbury said:

> Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant; but in matters of this description, it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony.

That principle was cited with approval by James L. J. in the later Privy Council case in 14 M I A 234[13] at p. 244. But although possibly the Courts will not readily credit the assertion of hidden and fraudulent intention, one must not forget that in 15 Cal 20[7] Lord Hobhouse had pointed out that:

> The system of putting property benami is so extremely common in India that the mere fact of a deed being executed in proper form and apparently effecting a valid transfer to another is not as good evidence of a real transfer as it would be in other countries, and even slight evidence to show that it was a sham transaction will suffice for the purpose.

It is notorious that in benami transactions all the subordinate parts are well fitted in to correspond with the benami arrangement in its integrity, and if it is once established that a transaction is benami, the fact that the deeds bear the benamidar's name is necessarily consistent with the benami case and is of no essential weight on one side or the other. Since, therefore, it is unlikely that there will often be any of what Sir George Farwell called "other relevant circumstances" from which the conclusion can be drawn that a transaction is a benami one, the usual mode of proving that a purchase is a benami transaction is by showing that the funds from which the purchase was made were exclusively the funds of the person alleged to be the real owner of the property. The main test is to find out the real intention of the parties. All the peculiar circumstances and probabilities of each particular case must be carefully considered. Although no one of those circumstances taken by itself may be of any particular value or afford any conclusive proof of the intention to transfer the ownership from one person to the other, yet a combination of some or all of them, and a proper weighing and appreciation of their value, may well raise such a presumption of real ownership as to shift the burden of proof on to the opposite party, and, if the latter is unable to discharge the burden so transferred, he will fail. Such then was the problem before the learned District Judge, and I will now state how he dealt with it. He appears very properly to have adopted the course laid down in 15 Cal 20,[7] mentioned above, for he said :

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[7] Uman Parshad v. Gandharp Singh, (1888) 15 Cal 20=14 I A 127=5 Sar 71 (P C).

[8] Dhurm Das Pandey v. Shama Soondri Dibiah (1848) 3 M I A 229=6 W R 43=1 Sar 271=1 Suther 147 (P C).

[9] Gopee Krist Gosain v. Gunga Persaud, (1854) 6 M I A 53=2 Suther 13=1 Sar 493=4 W R 46 (P C).

[10] Bilas Kunwar v. Desraj Ranjit Singh, (1915) 2 A I R P C 96=30 I C 299=42 I A 202=37 All 557 (P C).

[11] Ranga Ayyar v. Srinivasa Ayyangar, (1898) 21 Mad 56.

[12] Sreemanchunder Dey v. Gopaulchunder Chuckerbutty, (1867) 11 M I A 28=7 W R 10=1 Suther 651=2 Sar 215 (P C).

[13] Faez Bax Chowdry v. Fakiruddin Mahomed Ahasan Chowdry, (1871) 14 M I A 234=9 Beng L R 456=2 Suther 490=2 Sar 783 (PC).

> The fact that the father transferred this property to his sons when he was admittedly in harassed circumstances and was unable to meet the large amount of about rupees five lakhs which might fall due from Abba on account of the Privy Council decree, would by itself throw upon the defendants the liability to prove the bona fides and the validity of the transaction of sale set up,

and he cited 36 M L J 483=50 I C 264.[14] In the remainder of his judgment he discusses the evidence put forward by the present appellant, and the effect of his conclusion is that he decided that the burden of proof had originally lain upon the plaintiffs but had, as he found, been transferred, for the reasons above mentioned, to the defendants, and that the defendants had not discharged the burden so transferred to them. He therefore held:

> That the purported sale of the rubber garden to Abba's two sons was nothing but a benami transaction only and that this estate of rubber plantation at Shwegyin was asset of Abba at the time of the attachment though it was in the possession of the two brothers but not as owners.

In the result he passed a decree as prayed, with costs to be paid by the defendants to the plaintiffs. The present appellant has appealed to this Court and asks us to reverse the decision of the trial Court and to dismiss the plaintiffs' suit with costs. I will here mention a matter which I myself raised with Mr. Foucar almost at the outset of the hearing of the appeal. According to the heading of the plaint, the suit was brought against (1) the present appellant, for himself as well as the legal representative of Abba and Ahmed, and (2) Ma Bibi, widow of Ahmed, legal representative of Ahmed and Abba. It is very difficult to appreciate at first sight what that means. The admitted facts are that the present appellant and Ahmed were the personal representatives of Abba now deceased, and that Ma Bibi is the widow and personal representative of Ahmed. Mr. Foucar agreed with me that strictly speaking it came to this that the defendants were (1) the present appellant and Ma Bibi (as personal representatives of his deceased brother Ahmed) as personal representatives of Abba, (2) the present appellant in his personal capacity, and (3) Ma Bibi as personal representative of Ahmed, deceased. The heading of the memorandum of appeal is as much confused as the heading of the plaint. Ma Bibi does not join with the present appellant so that they may together appeal as personal representatives of Abba; therefore it must be taken (and Mr. Foucar accepted the position as being) that the present appellant is appealing in his personal capacity. Respondents 1 and 2 must be taken to have been made respondents to this appeal in the capacity in which they originally filed the suit, namely on behalf of themselves and other creditors, if any, of Abba deceased. The plaintiffs ought really to have filed the suit as being the personal representatives of Baijnath Singh and as bringing it both on behalf of themselves, as such representatives, and on behalf of the other creditors, if any, of Abba. Ma Bibi's appearance as respondent in this appeal can therefore only be accounted for as being in her capacity as personal representative of Ahmed. She has however taken no part in the proceeding before this Court, but it has been necessary to clarify the position so that proper orders as to costs can hereafter be made.

Mr. Foucar, in opening this appeal, stated that in so far as this suit is brought under S. 53, T. P. Act, he was relying inter alia upon the plea in his client's written statement that the suit is barred by limitation, but he agreed that in so far as it was alleged that the sale of the rubber plantation was a mere benami transaction (this is to say, in so far as it is a suit under O. 21, R. 63, Civil P. C.), no question of limitation arises. Mr. Hay, for respondent 1 and 2, intimated that he would not seek to bring the case under the Transfer of Property Act, but would only contend that the sale was a benami transaction. Therefore, the question of limitation ceased to be a matter for our consideration, and the only question left for our determination was an appeal on the learned District Judge's finding that the sale was a benami transaction. It was agreed on both sides that, if that finding stands, the plaintiffs are entitled to retain their decree for the two declarations prayed for.

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[14] Seth Ghunsham Das v. Uma Pershad, (1919) 6 A I R P C 6=50 I C 264=36 M L J 483=15 N L R 68 (P C).

In the course of my consideration of this case, I have naturally given some thought as to the correct way in which this Court should approach an appeal such as the present one, which, as it now appears, involves really a pure question of fact. I am familiar with the principle established both by the recent (English) House of Lords case in (1935) A C 243[15] and the earlier (Scotch) House of Lords case in (1919) S C (H L) 35.[16] I have therefore deemed it right to investigate how far, if at all, the principle laid down in those two cases has any application to Burma. I have only found one Rangoon decision touching upon the subject, and that is the recent case in 14 Rang 11,[17] wherein Lord Shaw's speech in the House of Lords in the above-mentioned Scotch case was referred to by Sir Arthur Page, the then Chief Justice, who held and with whose judgment Mya Bu J. agreed, that the principles enunciated in that decision ought to be applied by this Court at the hearing of appeals from decrees or orders passed by learned Judges sitting on the Original Side of the Court.

I have looked carefully at this Rangoon case, 14 Rang 11,[17] and I would take this opportunity of pointing out that the head-note in that case goes too far and appears to lay down a general rule for Appellate Courts, no matter what the tribunal from which the appeal is brought. A perusal of the judgment, however, shows that the final sentence in the head-note should read: "This High Court will not, in its appellate jurisdiction, when the appeal is one from the Original Side of the Court, interfere with such a decision unless it comes to the conclusion that the Judge on the Original Side was plainly wrong".

As I have said, I can find no other Rangoon decision dealing with the English principles to which I have referred. Doubtless, some day it will be necessary for this Court to lay down the principles which should guide it on the hearing of an appeal from the decision of a District Judge upon a question of fact only, but so far no such principles have been laid down. Fortunately, perhaps, it is unnecessary for us to lay down any such principles in the present case; we need not do so because there is sufficient material upon which we can ourselves decide the only question of fact which it is necessary to have decided, and because, after a long and careful consideration of all the evidence in the case (except Exs. E, F and G to which I will refer again in a moment) we have no doubt as to the correctness of the learned District Judge's decision of the question.

The result of my own independent examination of the evidence is that I am of opinion that when the facts are considered as a whole, as indeed they must be in a case such as this, there can be no doubt that the sale of this rubber plantation was a mere device for reserving some part of Abba's then available assets for his own benefit. The fact that originally Abba bought this rubber plantation with money which was admittedly his; Abba's inability to say how the sums to the credit of his sons, appearing in his books, were made up; the fact that although the rubber plantation was clearly a far more valuable asset than the sugar estate, two of Abba's sons, Oomar and Sattur, having been allotted a half-share in the rubber plantation, exchanged for no apparent reason, that share for a half-share in the sugar estate; that Abba after the sale received the proceeds of the rubber out of which he made payments and had in his own hands upwards of Rs. 20,000 of such proceeds for a long period; that in June 1924 Abba was also transferring again for no apparent reason his oil shares; the imminence of the Privy Council decision (it appears from the diary in Civil Misc. Appln. No. 58 of 1919 that by March 1923 the record had already been despatched to England, and without a doubt, Abba would imagine that the case would come before the Board at any rate by the early part of 1924); that he made further substantial transfers of oil shares immediately after the Privy Council decision; that those transfers were to his brother Abdulla; that it was a promissory note of that same brother that Abba was offering to Baijnath Singh in March 1925; the circumstances attending the transaction whereby this rubber plantation was temporarily mortgaged to Abba's brother Abdulla in 1925—the mortgage debt was repaid within two months, yet the deed of release was not executed for 2½ years, although the mortgagee was this same brother of Abba's, namely Abdulla; that Abba's detailed account books which were admittedly kept have been unaccountably lost; the present appellant's failure to file the mortgage deed in the present suit, although he had obtained it for that express purpose; and also his failure to give evidence in Civil Regular Suit No. 80 of 1928; the relationship of the purchasers to the vendor—all these material facts and circumstances tend to the conclusion at which I have arrived in my own independent examination of the facts. I am satisfied upon the evidence, taken as a whole, that this sale of the rubber plantation at Shwegyin was a benami transaction. Both the finding of the learned District Judge and also my own conclusions of fact are based upon all the evidence which was before the former, except, so far as I am concerned, Exs. E, F and G. The point, however, has been taken in this appeal (a):

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[15] Powell v. Streatham Manor Nursing Home, (1935) A C 243=104 L J K B 304=152 L T 563=79 S J 179=51 T L R 289.

[16] Clarke v. Edinburgh and District Tramways Co., (1919) S C (H L) 35=56 S C L R 303.

[17] U Chinnaya v. U Khay, (1936) 23 A I R Rang 5=161 I C 387=14 Rang 11.

> That the learned Judge of the Court below acted illegally in admitting as evidence in this case evidence given in Civil Regular Suit No. 80 of 1928 of the High Court of Judicature at Rangoon and the judgment therein to which the present appellant was not a party,

and (b):

> That the learned District Judge acted illegally in admitting in this case the evidence of the witnesses Haji Ahmed and Tan Kyin Hye given in Civil Misc. Case No. 6 of 1932 of the District Court of Toungoo,

being grounds 7 and 11, respectively, in the memorandum of appeal to this Court. The former evidence (a) said to have been illegally admitted, is the affidavit of Abba which was sworn on 25th March 1920, (Ex. E), the accounts filed by Abba (Ex. F) and Abba's deposition (Ex. G). No part of any of these exhibits were read by counsel on either side in this Court, and speaking for myself I have entirely disregarded them in coming to the conclusion which I have reached. The judgment of Ormiston J. in Civil Regular Suit No. 80 of 1928 recites however what I imagine are the material parts of those three exhibits. In the Court below that judgment was put in by the plaintiff Vednath Singh and as appears from his deposition was not objected to, as were Exs. E, F and G; further that judgment was read to us by Mr. Hay, for respondents 1 and 2, and his reading of it was not then objected to by Mr. Foucar. In other words, the objection to that particular document is no longer pressed, if indeed it was ever really intended that it should be. In view of the fact that that judgment was properly put in and contained in a summarized form the contents of the other three exhibits, it is extremely unlikely that the learned District Judge waded through those other three exhibits or even looked at them. Even if he did, there is no substance in the point now raised in regard to them, as they really carried the matter no further than the judgment, Ex. B; at any rate there is no sentence appearing in the trial Judge's judgment touching upon what is likely to have appeared in those three exhibits which cannot be found in the judgment. In any event, in coming to my conclusion on the facts, I have ignored them.

The objection put forward to the reading of the depositions of Ahmed and Tan Kyin Hye cannot be sustained for a single moment; for, as appears in the learned District Judge's diary-entry of 31st January 1936 to which I drew attention earlier in this judgment, it was eventually agreed between the parties that those two depositions should "be taken as evidence in this case." Indeed, according to my own notes, Mr. Foucar himself read them both to us in the course of opening this appeal. Accordingly I find no ground upon which it is possible now to say that any evidence has been improperly admitted. Therefore in my judgment the appellant fails in his appeal. There remains one minor matter, and that is a question of costs. The decree passed in the Court below provided:

> That the sum of Rs. 2,240-5-0 (two thousand two hundred and forty and annas five) only be paid by the defendants to the plaintiffs on account of the costs.

Both defendants filed written statements and apparently they both participated in the trial right to the end. In my judgment, the order for costs should have provided that: (1) the present appellant and Ma Bibi (as personal representative of Ahmed deceased) as personal representatives of Abba deceased; (2) the present appellant, himself personally; and (3) Ma Bibi (as personal representative of Ahmed deceased), should in those respective capacities be jointly and severally liable for the plaintiff's costs. Ground 13 in the memorandum of appeal alleges:

> That the costs awarded in the decree against the appellant are excessive and are not based on any judicial principles and should be dismissed;

but that point has neither been argued, nor even mentioned, on behalf of the appellant. It was I myself who drew attention during the argument to the somewhat confused description of the parties in the title of the plaint, and even then no argument was addressed to us in support of the thirteenth ground of appeal. As I have already mentioned, the confusion is certainly not lessened by the heading of the memorandum of appeal, wherein all reference is omitted to the representative capacities in which any of the parties are alleged to have been acting at the material times. Therefore, although in my judgment the appeal should be allowed to the extent of directing that the decree, so far as it relates to costs, should have certain words added to it, it would not be right to give the appellant any costs in connexion therewith. On the contrary, the appellant, having fought this appeal before us for some days solely on grounds upon which he now entirely fails, must pay the costs of this appeal. He has brought this appeal in his personal capacity, and he must therefore pay the costs personally. Respondent 3 has taken no part in the appeal, and therefore the persons who are entitled to recover the costs of this appeal are only respondents 1 and 2 in their representative capacity. To my mind therefore the proper order which we should make is: (a) that the appeal be allowed to the extent of varying the decree passed in the Court below by the addition of the direction as to costs which I have already indicated, and (b) that the costs of this appeal be paid by the appellant personally to respondents 1 and 2 as legal representatives of Baijnath Singh.

**Baguley J.**—I agree with the order proposed by my brother in the main judgment in this case. I only wish to add one comment with regard to 14 Rang 11.[17] In this case the late Chief Justice laid down that this Court while hearing appeals from the Original Side should follow the rule laid down in (1935) A C 243.[16] He went no further than that. It must be remembered that the House of Lords was dealing with a class of appeals arising from cases tried either by the High Court in England or by the County Courts, Courts which are presided over by members of the Bar of proved ability who have had years of experience before they are appointed in the same way that Judges of this Court are appointed. It is clear that findings of fact by Judges of that description have got to be dealt with on different lines from findings of fact arrived at, perhaps, by Township Judges, who may be appointed almost direct from the University. These Judges have not always the experience nor perhaps the ability of County Court Judges or High Court Judges, and it seems clear to me that their decisions on points of fact or the credibility of evidence can never be regarded as having the same weight as findings to which the late Chief Justice was referring. The case in 14 Rang 11[17] does not lay down a rule applicable to findings of fact by all Courts in this country.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 35

DUNKLEY J.

*U. K. Seal* — Applicant.

v.

*A. R. A. Aramugam Chettyar* — Respondent.

Civil Revn. Appln. No. 190 of 1936, Decided on 21st July 1936, from decree of Township Court, Kyaiklat, D/- 4th April 1936.

**(a) Provincial Small Cause Courts Act (1887), S. 15—Court is at liberty to record full evidence and give considered judgment.**

There is no provision of law which prevents the Judge of a Small Cause Court from recording the evidence given at any trial before him at full length, or from delivering a full and considered judgment such as is ordinarily passed in a regular suit. [P 36 C 1]

**(b) Provincial Small Cause Courts Act (1887), S. 16—Small cause suit tried as Regular suit—Judgment is not nullity.**

The character of the suit is not altered by the mode in which it is tried. [P 37 C 1]

The effect of the provisions of S. 16 is not to deprive the Regular Court altogether of jurisdiction in suits cognizable by a Court of Small Causes, but merely to prevent the exercise of that jurisdiction by the Regular Court so long as there is a Court of Small Causes having jurisdiction within the same local limits. But if a Court by error tries a suit which is of a small cause nature and is cognizable by a Small Cause Court exercising jurisdiction within the same local limits, then the proceedings of the Court are not entirely without jurisdiction, and therefore are not a nullity: *25 Bom 417; 40 Cal 537 and A I R 1930 Bom 80, Ref.* [P 36 C 2; P 37 C 1]

**(c) Contract—Third party—Contract between *X* and *Y*—*X* hypothecating his launch to *Y*—*Y* to pay servants of *X* on the launch—Suit by servant against *Y* for arrears of salary held bad as servant could not take advantage of contract between *X* and *Y*.**

*X* hypothecated his launch to *Y* and it was agreed between them that *Y* should defray the expenses of running it. In order to have a check on the income of *Y* it was further agreed that *X* should appoint a clerk of his choice on that launch whose pay was to be paid by $Y$. The clerk so appointed brought a suit against $Y$ for arrears of salary :

*Held* that the clerk was the servant of $X$ and could not take advantage of the contract between $X$ and $Y$ to which he was not a party and under which his position was not that of a *cestui que trust* : *37 Bom 471* ; *34 All 63 (PC)* ; *A I R 1928 Cal 518 and A I R 1926 Cal 1009, Rel. on.*
[P 38 C 1, 2]

C. K. Ray — *for Applicant.*

P. K. Basu — *for Respondent.*

**Judgment.** — The plaintiff-applicant brought a suit in the Township Court of Kyaiklat for the recovery of four months' salary amounting to a sum of Rs. 60. The Township Court of Kyaiklat has been invested with jurisdiction as a Court of Small Causes under the Provincial Small Cause Courts Act to try suits of a small cause nature up to Rs. 100 in value. The learned Township Judge correctly recognized that the suit of the applicant was of a small cause nature and fell within the jurisdiction of his Court as a Court of Small Causes, and in fact the plaint was headed as a "small cause". However, after the defendant-respondent had been served with summons, it appears that the pleaders for the parties represented to the Judge that the suit was of a somewhat difficult nature (which it was not) and that therefore it ought to be tried in a regular way. In consequence of this representation, on 15th February 1936, the learned Judge passed the following order :

> The case involves the question of master and servant, with intricate law points. By consent, this case is transferred to Regular Side.

It consequently appears that the learned Judge consciously, although aware that the suit was of a small cause nature and within the jurisdiction of his Small Cause Court, caused it to be tried in his Civil Court with regular jurisdiction. There is no provision of law which prevents the Judge of a Small Cause Court from recording the evidence given at any trial before him at full length, or from delivering a full and considered judgment such as is ordinarily passed in a regular suit, and therefore this order of the learned Township Judge served no purpose whatever. It was also made without jurisdiction, for, a Township Judge has no authority to order the transfer of a suit from one Court to another, and as it was made without jurisdiction there is no reason why any attention should be paid to it. It is however clear that when the learned Township Judge tried this suit, and ultimately passed a judgment and decree dismissing the plaintiff-applicant's claim, he considered that he was sitting as the Township Judge and not as Judge of a Small Cause Court.

The main point which has been raised on this application for revision on behalf of the plaintiff-applicant is that the Township Court, as such, had no jurisdiction to try the suit, and that there being an inherent want of jurisdiction the proceedings at the trial are a nullity and must be set aside. Reference has been made to authorities in support of the well-known proposition that even the consent of parties cannot give jurisdiction where there is an inherent want of jurisdiction, and that the proceedings of a Court taken without jurisdiction are a nullity and can be set aside at any time. I do not propose to quote any of these authorities because in my view the present case is not a case of this nature. Learned counsel for the applicant relies on the provisions of Ss. 16, 32 and 33, Provincial Small Cause Courts Act. S. 16 is in the following terms :

> Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable.

A Township Court has jurisdiction under the Burma Courts Act to try all suits of a civil nature up to Rs. 1,000 in value. If it tried a suit in excess of Rs. 1,000 in value, it would be acting without jurisdiction and its proceedings would be a nullity, but that is entirely different from the present case. Even allowing that the suit was tried by the Township Court and not by the Small Cause Court, it was a suit which the Township Court had jurisdiction to try. The effect of the provisions of S. 16, Provincial Small Cause Courts Act in my opinion is not to deprive the Regular Court altogether of jurisdiction in suits cognizable by a Court of Small Causes, but merely to prevent the exercise of that jurisdiction by the Regular Court so long as there is a Court of Small Causes having jurisdiction within the same local limits. The provisions of Ss. 32 and 33 of the Act do not appear to me to affect the matter at all. S. 32 merely lays down, so far as it is relevant to the present matter, that the provisions of Ch. 3 and

4 of the Act, within which S. 16 occurs, in regard to the exclusion of the jurisdiction of other Courts, apply

> to Courts invested by or under any enactment for the time being in force with the jurisdiction of a Court of Small Causes so far as regards the exercise of that jurisdiction by those Courts.

Section 33 lays down that:

> A Court invested with the jurisdiction of a Court of Small Causes, with respect to the exercise of that jurisdiction, and the same Court, with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, shall, for the purposes of this Act and the Code of Civil Procedure, be deemed to be different Courts.

The effect of these provisions therefore is that the Township Court of Kyaiklat, when trying a suit of a small cause nature and of a value less than Rs. 100, is a different Court from the Township Court when trying a suit not of a small cause nature, but this does not alter the fact that the Township Court as a Regular Court has inherent jurisdiction to try all suits of a civil nature up to the value of Rs. 1,000. Consequently if that Court by error tries a suit which is of a small cause nature and is cognizable by a Small Cause Court exercising jurisdiction within the same local limits, then the proceedings of the Township Court are not entirely without jurisdiction and therefere are not a nullity. This is the view which has been taken by this Court in a number of cases which have come before the Court where a Township Court having small cause jurisdiction has tried a case of a small cause nature and within that jurisdiction as a regular suit, and there has been an appeal from the decision to the District Court. It is the view which has been generally accepted by the High Courts in India. Briefly stated, the proposition is that the character of the suit is not altered by the mode in which it is tried. As authorities therefor, the cases in 25 Bom 417[1] and 40 Cal 537[2] may be mentioned. With due respect, the point was well stated by a Bench of the Bombay High Court in 31 Bom L R 1307[3] at p. 1309. The Bench, referring to a case where a Subordinate Judge who had jurisdiction under the Provincial Small Cause Courts Act had transferred a case to another Judge who had no small cause powers, said:

> We do not mean to infer from this that he had no jurisdiction to try the suit, because failure to comply with S. 16, Provincial Small Cause Courts Act, seems to us to be merely a defect in procedure in proceeding in a Court other than the Small Cause Court having jurisdiction to try the case.

That this must be the correct view is apparent from the provisions of S. 24, sub-s. (4), and O. 46, Rule 7, Civil P. C. Supposing, for the sake of argument, it be admitted that the learned Township Judge, in making his order of 15th February 1936 transferring this suit for trial from his small cause jurisdiction to his regular jurisdiction, was acting within his authority, then it is plain that under the provisions of sub-s. (4) of S. 24, Civil P. C., he would still be trying the suit as a Court of Small Causes, for this subsection is as follows:

> The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Order 46, R. 7 of the Code makes it clear that where a suit which is cognizable by a Court of Small Causes has been tried by a Court which is not a Small Cause Court, in contravention of the provisions of S. 16, Provincial Small Cause Courts Act, then the only procedure which may be taken to correct that error is for a party to the suit to require the District Court to make a reference to the High Court, and upon that reference, the High Court may make such order in the case as it thinks fit. This provision clearly shows that the proceedings of the Regular Court, although the suit has been tried by it in contravention of the provisions of S. 16, Provincial Small Cause Courts Act, are by no means a nullity, but may be upheld if the High Court considers that substantial justice has been done. This is the view which was taken by Nanavutty J. in 56 Bom 387[4] at p. 393 with which I respectfully agree. Moreover, whether the present application in revision be looked upon as an application under S. 25, Provincial Small Cause Courts Act, or under S. 115, Civil P. C., the power of this Court to interefere to reverse or vary the decree of the original Court is discretionary, and in regard to this matter, I desire to remark that if the contention which has been put forward on behalf of the applicant is correct, then it would appear that the present application must have been made under S. 115, Civil P. C., although it purports to have been brought under S. 25, Provincial Small Cause Courts Act. Learned counsel for the applicant is unable to contend that his client has been prejudiced in any way by the fact that the suit has been tried as a regular suit instead of as a small cause, and it would scarcely be possible for either party so to contend as in the regular trial they have had a better opportunity of placing their respective cases before the Court, and also they have obtained a full record of the evidence and a considered judgment. Consequently I should be unable to hold that it was a proper exercise of the discretion which is vested in me to interfere in this case on the sole ground that the Township Court tried the suit without jurisdiction, when it has to be admitted that neither party has been prejudiced by that action.

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[1] Shankarbhai v. Somabhai, (1901) 25 Bom 417 =3 Bom L R 129.

[2] Indra Chandra Mukherjee v. Srish Chandra Banerjee, (1913) 40 Cal 537=21 I C 120.

[3] Jodha Bijal v. Maganlal Chhaganlal Desai, (1930) 17 A I R Bom 80=124 I C 112=31 Bom L R 1307.

[4] Parshottamdas Chunilal v. Bhagubai Nathubhai, (1932) 19 A I R Bom 486=139 I C 194 =56 Bom 387=34 Bom L R 931.

Turning now for a brief moment to the facts, the applicant was employed on a launch as a clerk. He admits that he was actually employed by the owner of the launch who is a person named Khulla Meah Sawdagar. He however relies on an agreement which was entered into between the launch-owner and the respondent, who was the mortgagee of Khulla Meah's launches. Under the terms of this agreement, the respondent as mortgagee appointed the crew of the launches, paid the expenses of running the launches and also received the earnings of the launches; but in order to check what these earnings were, the mortgagor had the right under the agreement to put one clerk on each launch. Obviously this clerk was a servant employed by the mortgagor, Kulla Meah Sawdagar. The agreement sets out that the salary of this clerk, although chosen and placed on the launch by the mortgagor, was to be paid by the mortgagee, the respondent. It is upon the strength of this agreement that the applicant has sued the respondent for the recovery of his salary. He is not a party to this agreement, and it scarcely requires any authority for the obvious proposition that a person who is not a party to an agreement cannot sue upon it; but two cases in which this proposition has been laid down may perhaps be cited: 37 Bom 471[5] and 39 I A 7.[6] Reference may perhaps also be made to the cases in 53 Cal 922[7] and 55 Cal 1315.[8] In these last two cases it was definitely laid down that persons who are not parties to a contract cannot be permitted to sue thereon except where there is an obligation in equity amounting to a trust arising out of the contract. The only circumstance, under which the present applicant could sue the respondent upon the basis of this agreement, would be if the agreement had been made for his benefit and therefore he was a *cestui que trust* and the respondent a trustee. This is not the case here because the agreement is an ordinary agreement for the hypothecation of certain moveable property which concerned the respondent and Khulla Meah only, and the term regarding the payment of the salaries of the clerks who were placed on the launches by Kulla Meah is merely an incidental term of this hypothecation agreement. The applicant must look to his employer, Khulla Meah, for his salary, and the rights under the agreement are not rights upon which he can sue, but upon which Khulla Meah might have a right of suit against the respondent if and when he is called upon by the applicant to pay the applicant's salary.

The judgment and decree of the Township Court of Kyaiklat dismissing the applicant's suit was correct although based on other grounds, and this application in revision fails and is dismissed with costs, advocate's fee three gold mohurs.

B.D./R.K. *Petition dismissed.*

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[5] Shankar Vishvanath v. Umabai Sadashiv, (1913) 37 Bom 471=19 I C 736=15 Bom L R 320.

[6] Jamna Das v. Ram Autar Pande, (1912) 34 All 63 = 39 I A 7=13 I C 304 = 9 A L J 37 (P C).

[7] Jiban Krishna v. Nirupama Gupta, (1926) 13 A I R Cal 1009=96 I C 846=53 Cal 922=30 C W N 812.

[8] Krishna Lal v. Promila Bala Dasi, (1928) 15 A I R Cal 518=114 I C 658 = 55 Cal 1315 = 32 C W N 634=47 C L J 587.

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## A. I. R. 1938 Rangoon 38

ROBERTS C. J. AND LEACH J.

*Kyan Win Ta* — Appellant.

v.

*Daw Khin and others*—Respondents.

First Appeal No. 152 of 1936, Decided on 15th June 1937 against decree of Dist. Court, Myitkyina, D/- 28th July 1936.

**Contract — Pledge — Deposit of jade by *A* with *B* —Oral evidence to explain nature of deposit is admissible.**

Where certain amount of jade was deposited by *A* with *B* and the nature of the deposit is in dispute, oral evidence is admissible to show whether it was put there for safe custody only or as pledge. [P 39 C 2]

Hormasji and Masani — *for Appellant.*

K. C. Sanyal, Kyaw Myint and G. D. Williams—*for Respondents 1 and 3.*

**Roberts C. J.**—This is an appeal from a decision of the Assistant District Judge, Myitkyina, by the defendant in an action in which Daw Khin, respondent 1, and widow of Chun Lan Tin successfully sued him upon a promissory note for the sum of Rs. 23,488 together with interest Rs. 1,409 totalling Rs. 24,897. Li Kyauk Pyin and Kyan Yon Saing were joined as defendants because they signed the note. The former was agent for the appellant and his mother Daw Po and the latter was a nephew of the appellant. Two firms are concerned, Pao Tsi Sheng which was the firm name of Chan Hta Hin and Lang Ting Chi which was the firm name of Chan Lan Tin who were partners in the jade business. Chan Hta Hin died in 1928 and sometime in 1931 his son, the present appellant, went with Chan Lan Tin to China and took with them 7 baskets of jade to sell. Another 6½ large baskets of uncut jade were left in the house of Chan Lan Tin and afterwards placed in the joss house at Mogaung. After the return of appellant and Chan Lan Tin from China, Daw Khin made a claim against the Pao Tsi Sheng Firm for an account and moneys due or to be held due thereunder. After some dispute about whether this account was to be taken at Bhamo or Mogaung, the representatives of the Pao Tsi Sheng Firm with respondents 2 and 3 accompanied the appellant to Mogaung : they took with them a pleader to advise them, and after much discussion they entered into an agreement which is Ex. B and shows an amount of Rupees 23,488 and a fraction overdue from the Pao Firm to the Lan. The agreement recited :

> It is approved that the account affairs of the business transactions have been clearly closed and settled in the presence of both parties and witnesses. This statement of affairs is made as proof.

This was at the end. At the beginning of the statement of accounts it is also stated :

> The credit and debit accounts of the various departments of the business between Pao Tsi Sheng and Lan Ting Chi are clearly closed and settled as follows :

The statement is dated 23rd September 1934. Now the defence to the suit brought by Daw Khin on the promissory note dated 23rd September 1934 (the same date as the settlement) is that the promissory note was given "pending a final settlement of accounts" and under a promise by the plaintiff that she would not enforce her claims. The appellant's written statement dated a year later pleads that a settlement of accounts between the defendants and others amongst whom the plaintiff is included, is still pending and is not concluded yet. So far from showing want of consideration, the production of Ex. B conclusively proves its existence. The appellant on whom the burden of proof lay, actually swore that no accounts were settled at all in Mogaung but admitted signing Ex. B. He said that after signing the document he disagreed with it. It is now pretended that the debt was due to the Lang Ting Chi Firm, but it is plain that the note was made out in the plaintiffs' favour by mutual agreement in discharge of this debt as agent for the firm. Plaintiff was allowed to amend her plaint by claiming a lien on the 6½ baskets of jade left at her husband's house. It seems to us idle to say that they were not deposited as security for payment of the amount due upon their removal to the joss house at Mogaung. One of the appellant's own witnesses Wang Hsan Yao says in precise terms that they were entrusted with the jade licensee as security for the money due on the promissory note. Swe Shu Feng, a witness for the plaintiff, also said that the jade was placed in the joss house as security. Yin Sin Tin, a witness for the appellant, says :

> The 6½ baskets of jade were entrusted to the jade lessee because it was not decided whose jade it was and because Kyan Win Ta could not pay Daw Khin the money she demanded.

It is agreed that the jade was placed in the joss house and oral evidence in my opinion was clearly admissible to show whether it was put there for safe custody merely or by way of pledge. The Additional Judge disbelieved the evidence of the appellant and in his admirably clear judgment dealt with the issue of fact on this point in a way which we are satisfied was correct. The appeal will accordingly be dismissed with costs.

**Leach J.**—I agree.

B.D./R.K. *Appeal dismissed.*

## A. I. R. 1938 Rangoon 40

BAGULEY AND SPARGO JJ.

*U Tun Pe* — Appellant.

v.

*Ma Aye Kyi* — Respondent.

First Appeal No. 13 of 1937, Decided on 22nd June 1937, against decree of Dist. Court, Pyapon, in C. R. No. 2 of 1936.

**Buddhist Law—Burmese—Adoption—Keittima—*A* alleging that she was adopted by *D* as keittima daughter — *A* living at *D's* house since she was four years — Evidence to show that *A* had reputation of being adopted daughter of *D*— *A* married to *D's* nephew—*A* living in *D's* house with her children even after her divorce and still having reputation as adopted daughter — Evidence held was sufficient to establish keittima adoption.**

*A* applied for letters of administration to the estate of *D* on the ground that *A* was the keittima adopted daughter of *D* and her sole heir. *D* and her husband were a childless couple. *A* was living at *D*'s house since she was four years old, and so she was not able to give evidence of actual adoption but there was a good deal of evidence to show that she had been so adopted and had a reputation of an adopted daughter. *A* was married to the nephew of *D* and even after her divorce she lived with her children at the house of *D* and there was also evidence that her reputation as an adopted daughter still persisted. The opposite party contended that *A* lived at *D's* house not as an adopted daughter but as a servant girl :

*Held* that the evidence was sufficient to establish the adoption as keittima daughter. The fact that *A* was married to the nephew of *D* and that she lived with her children at the house of *D* even after her divorce with him made it impossible that she had the position of a servant girl. As *D* and her husband had no child and *A* lived with them for many years, there was nothing surprising in their adopting *A* as keittima daughter. [P 42 C 1]

U E Maung — *for Appellant.*

U Tha Kin — *for Respondent.*

**Spargo J.**—In Civil Regular Suit No. 2 of 1936 in the District Court of Pyapon, which arose out of Civil Miscellaneous Case No. 18 of 1935 of the same Court, Ma Aye Kyi applied for letters of administration to the estate of Daw Yon. Her case was that she was the keittima adopted daughter of the deceased and was the sole heir to her estate. She made her own three children defendants and also added one Maung Tun Pe as a defendant. He is a nephew of Daw Yon's. Maung Tun Pe denied that Ma Aye Kyi was the keittima adopted child of Daw Yon and prayed that Ma Aye Kyi's petition might be dismissed. He had made his own application for letters of administration to the estate of Daw Yon, and that was tried in Civil Regular Suit No. 1 of 1936. It is quite clear that the contest is between Ma Aye Kyi and her three children on the one hand and Maung Tun Pe on the other. If Ma Aye Kyi and/or her children are keittima adopted children of Daw Yon, then it is clear that they will exclude Tun Pe, as the nearer excludes the more remote ; and if none of them have been adopted as keittima children, then Maung Tun Pe excludes them.

I will deal first with the case of Ma Aye Kyi. She says that she was adopted when she was a small girl about four years old. She cannot therefore give any evidence about the actual adoption, but she was able to relate subsequent events. She says that she had no further association with her natural father. In fact she says that she only heard of his death, which she says took place at Letpadan about 19 years ago, the inference being that she did not attend his funeral or know anything about his last illness. There is no dispute that Ma Aye Kyi married a nephew of Daw Yon's, a brother of Tun Pe's named Mya Din. There is no dispute that she lived in the house from the time when she was four, up to the time of her marriage. She produced a considerable body of evidence to show that she was adopted by Daw Yon and U Po Thein as their keittima adopted daughter. U Han Myat does not say that he was present at the actual adoption, but he does say that Daw Yon told him that she had adopted Aye Kyi with a view to inherit. He was able to say of his own observation that Daw Yon and U Po Thein treated Ma Aye Kyi as a natural child. Even after the divorce between Ma Aye Kyi and Maung Mya Din and Ma Aye Kyi's subsequent marriage, this witness was able to say that Ma Aye Kyi's reputation as the adopted child of U Po Thein and Daw Yon persisted. U Po Ok is an old man of 65, and he says that he was present at the ceremony when Ma Aye Kyi was adopted by Daw Yon and U Po Thein with a view to inherit. He says that he was specially sent for to witness and be present at the adoption ceremony. U Po Nyunt is another old man of 62, and he says he was present at the ceremony when Ma Aye Kyi was adopted with a view to inherit by U Po Thein and Daw Yon. U Shwe Zan was present at the ceremony. He was the natural father. At the ceremony her name was changed from Ma Aye Khin to Ma Aye Kyi

U Wayama, the presiding monk at a kyaung where U Po Thein and Daw Yon were disciples, says that Ma Aye Kyi was reputed generally to be the adopted daughter of U Po Thein and Daw Yon. He says that U Po Thein and Daw Yon told him that they had adopted Ma Aye Kyi with a view to inherit. U San Bwint says that he was instrumental in getting the attendance of a number of elders at the adoption ceremony ; and U Lu Gale and U Ohn Myat say that they also were present at the adoption.

There was nothing in the cross-examination of these witnesses to cast any doubt upon their reliability. It was generally directed to showing that they had very little property ; but U Han Myat claimed to be a man of considerable property, and it cannot be said of the others who had less that they therefore had any interest to serve in giving false evidence for Ma Aye Kyi. It is true that Maung Mya Din gives evidence for Mg Tun Pe, but no great reliance can be placed upon what he says because he is Tun Pe's brother and is evidently on bad terms with Ma Aye Kyi. The story set up by the defence was that it was true that Ma Aye Kyi was brought to Daw Yon's house many years ago and left there by her father, but that it was not an adoption. She was taken there to be kept by U Po Thein and Daw Yon as a servant because she "could not pull on with her step-mother". It is suggested that the change of name from Ma Aye Khin to Ma Aye Kyi was not on account of her having been adopted by U Po Thein and Daw Yon, but because U Po Thein had a lesser wife by the name of Ma Aye Khin. Daw Yon changed it to Ma Aye Kyi for this reason.

From the fact that Ma Aye Kyi married the nephew of U Po Thein and Daw Yon, it seems probable that her position was not that of a servant girl. It is not impossible of course that Mya Din eloped with her, but there is this fact also to be taken into account that after the rupture with Mya Din and his going away and deserting his wife and children, both wife and children remained on at Daw Yon's house where presumably one would expect them not to be very welcome if Ma Aye Kyi was a servant girl with whom the nephew had contracted a misalliance. She remained there for four years before she re-married. A number of witnesses were called for U Tun Pe to say that they bought houses from Daw Yon or had some transactions involving immovable property with her, and that as part of the necessary inquiries incidental to such transactions they asked Daw Yon whether she had any children. Some of the witnesses say "children;" others say "keittima adopted children". It is suggested that there is a current idea that when a Burmese Buddhist spouse dies leaving the other spouse and children, the children become entitled to a vested interest in the property and that therefore it is considered necessary to ask about the existence of children before purchases are made from the surviving spouse.

I do not think that there is a great deal of value in the evidence to show that Daw Yon said on such occasions that she had no children or that she had no keittima adopted children. The evidence concerned the purchase of an unusually large number of houses from Daw Yon. U Myaing says that two Chettyars purchased two houses from her. Aung Than says he bought another. U Po Kyaw refers to the purchase of yet another house from Daw Yon. Even if all these statements were true, it might be that Daw Yon, feeling sure in her own mind that the adopted children having been well provided for, would not create any trouble subsequently over the possession of the property that was being sold, told the purchasers that there were no children in order to re-assure them. Ma Aye Kyi had lived in Daw Yon's house for many years. U Po Thein and Daw Yon were a childless couple and there would therefore be nothing surprising in their adopting Ma Aye Kyi as their keittima adopted child. She has proved that she bore this reputation. Utinayana (witness 2 for Maung Aye Gyan) relates how there was a gift of books to the kyaung from U Po Thein and Daw Yon and Daw Yon's brother U Po Kin. When these books were brought some days later by U Po Kin and U Po Thein, Utinayana found that there was an inscription on them showing the names of the donors as U Po Thein, Daw Yon and their group of children. This is an odd expression, and Utinayana says that he inquired from U Po Thein what the meaning of it was, and U Po Thein said that he (U Po Thein) and his wife Daw Yon had "also adopted the three children of Ma Aye Kyi with a view to inherit". This witness says he knew that Ma Aye Kyi had been adopted by U Po

Thein and Daw Yon from personal knowledge.

I think that this body of evidence is sufficient to establish the adoption as a keittima daughter of Ma Aye Kyi. It is not necessary in this case to decide whether Ma Aye Kyi's three children were also adopted as keittima children because it is sufficient for the disposal of this appeal to decide that Ma Aye Kyi was so adopted. I would therefore confirm the decree granting to Ma Aye Kyi letters of administration in respect of the estate of Daw Yon, deceased, with costs; advocate's fee five gold mohurs.

**Baguley J.**—I agree.

S.C./R.K. *Decree confirmed.*

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## ✲ A. I. R. 1938 Rangoon 42

MACKNEY J.

*Ma Mya Khin* — Applicant.

v.

*N. L. Godenho* — Respondent.

Criminal Revn. No. 446-B of 1937, Decided on 30th September 1937 on a reference made by Addl. Sess. Judge, Magwe, D/- 17th August 1937.

**✲ Criminal P. C. (1898), S. 489—Wife's living in different manner after order of maintenance was passed is not change in her circumstances — Keeping mistress, getting children by her and contracting debts for litigation are not circumstances for reducing allowance of legal wife.**

Before the original order of maintenance against husband can be altered, it must be shown that there has been, if not a change in the circumstances of the husband, then a change in the circumstances of the wife. The mere fact that the wife is living in a different manner from the manner in which she lived at the time the order of maintenance was passed does not necessarily constitute a change in her circumstances. Husband's keeping a mistress and getting children by her and contracting debts for litigation are not circumstances for reducing the allowance awarded to his legal wife. [P 42 C 2]

Kyaw Htoon — *for Applicant.*

G. D. Williams — *for Respondent.*

**Order.**—This case has been submitted to the Court by the learned Additional Sessions Judge of Magwe in order to review the order of the Township Magistrate of Chauk in his Criminal Miscellaneous Case No. 57 of 1936 where he has reduced the monthly allowance of Rs. 100 which the First Additional Magistrate of Chauk awarded to the applicant, Ma Mya Khin, on 20th December 1932, in his Criminal Miscellaneous No. 52 of 1932. The Magistrate has reduced the allowance to Rs. 50 a month. His grounds for doing so are that the respondent, Godenho, has to maintain a big family; he has taken another woman as his "wife" since Ma Mya Khin left him, and he is heavily in debt: further, from Ma Mya Khin's own statement, it was clear that her monthly expenditure for food and lodging was Rs. 25, and holding therefore that the circumstances of her living had changed, he reduced the allowance. The learned Additional Sessions Judge in his order of reference has pointed out, correctly I think, that so far as the respondent Godenho is concerned, there has been no such change in his circumstances since the passing of the original order of maintenance which would justify the reduction of the amount awarded. If he is heavily in debt, it is because of the infructuous litigation which he has been conducting against Ma Mya Khin, and because of debts which he had already contracted at the time the maintenance order was passed. If he has a woman and two children to maintain, that is because he has chosen to take a mistress, and surely that would be no reason for reducing the allowance awarded to his legal wife. As regards the circumstances of Ma Mya Khin herself, the learned Additional Sessions Judge was of the opinion that there has been no allegation that a change in the mode of living of Ma Mya Khin has taken place since the passing of the order of maintenance.

Both parties have been represented before me by learned counsel. On behalf of the respondent it is urged that he is not obliged to pay more than is enough to maintain Ma Mya Khin in a reasonable manner, and that if she herself can subsist, as her evidence shows she can, on Rs. 25 a month for board and lodging, it is unreasonable that he should continue to pay Rs. 100 a month to her. I do not think that this is a point for decision. Before the original order of maintenance can be altered, it must be shown that there has been, if not a change in the circumstances of the respondent, then a change in the circumstances of the applicant. The mere fact—if it is a fact—that Ma Mya Khin is living in a different manner from the manner in which she lived at the time the order of maintenance was passed does not appear to me necessarily to constitute a change in her circumstances. Supposing the respondent had been able to prove that, at the time the original order of maintenance was passed, Ma Mya Khin was obliged to pay so much for rent, but that now she is able to find accommodation at very much less, that would certainly be a change in Ma Mya Khin's circumstances which might justify the reduction of the maintenance awarded. No evidence has been brought, so far as I can see, to show that any such change in Ma Mya Khin's circumstances has taken place.

It is also open to the respondent to have his relations with Ma Mya Khin settled definitely in a Civil Court. Whether the Civil Court will order him to pay less maintenance than he is now paying is a moot question; but if he thinks that the Civil Court would make him pay less, then his best plan is to institute suitable proceedings in that Court. For these reasons I set aside the order of the Township Magistrate of Chauk reducing the amount of maintenance ordered in Criminal Miscellaneous No. 52 of 1932 of the First Additional Magistrate of Chauk, and I direct that the respondent N. L. Godenbo's application for a reduction of the maintenance be dismissed.

S.C./R.K. *Order set aside.*

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## A. I. R. 1938 Rangoon 43

ROBERTS C. J. AND SHARPE J.

*A. B. Neogi* — **Appellant.**

v.

***B. B. Neogi and another*** — Respondents.

**First Appeals Nos. 101 and 102 of 1935, Decided on 24th June 1937, against decrees of the Court on Original Side, D/- 18th June 1935.**

**(a) Succession Act (1925), S. 297—Revocation of probate – Effect of — Mortgage by administrator on grant of probate does not become invalid on subsequent revocation of probate.**

**There is nothing in the Probate and Administration Act (now Succession Act) to suggest that a grant either of probate or letters of administration becomes, on revocation, void ab initio. [P 44 C 2]**

**A mortgage therefore by the administrator on the grant of such probate does not become invalid merely on account of the subsequent revocation of the probate by the Court : *A I R 1931 Rang 15, Foll.* [P 43 C 2]**

**(b) Practice—Full Bench—It is for Judges, and not counsel, normally to make motion to refer matter to Full Bench when they find fettered by previous decision and when in their opinion such decision requires further consideration** (Per *Roberts C. J.*).

The motion to refer a matter to a Full Bench should normally come from the Judges themselves and not from counsel when they find that they are fettered by a decision in a previous case which appears to them to require further consideration. When the authorities upon a proposition of law are plain and straightforward, it is not for counsel to argue, what is in effect an appeal against an authoritative decided case, by asking the Bench to adopt the machinery laid down by means of which a Full Bench hearing can be obtained. [P 44 C 1]

Bhattacharyya — *for Appellant.*

Clark — *for Respondent No. 2.*

**Roberts C. J.**—These two appeals are brought by A. B. Neogi in two connected suits, one against B. B. Neogi and Messrs. Balthazar & Son, and the other against B. B. Neogi and the Great Eastern Life Assurance Co., in each of which the plaintiff asked for a declaration (in effect) of the invalidity of a mortgage by the administrator on the ground that probate had been wrongly granted; and (in terms) that the plaintiff's right to the property of his father had not been affected by any action of defendant 1. The learned trial Judge dismissed both the suits. There was contemporaneous litigation, in that there was an application for the revocation of probate which was held by the learned trial Judge to be mala fide, and he continued the hearing of the two regular suits although an appeal was brought against his decision with regard to the revocation of probate which was ultimately successful. During the pendency of the appeal, Mr. Bhattacharyya asked for postponement of the hearing of the two regular suits, but the learned Judge decided to dismiss the two suits in the following terms:

> Mr. Clark objects to the postponement of the hearing of the case, and I consider that in the circumstances of the case he is entitled to have it heard. In view of this decision Mr. Bhattacharyya states that he does not propose to proceed with the suit, which must be dismissed with costs.

**The first point which has been taken before us by Mr. Clark dealt with the right of appeal, and we think, having considered it, that it is not necessary for us to decide whether the learned Judge's order was one of dismissal for default and therefore not a decree; if it were so no appeal would lie. But we think it unnecessary to decide whether an appeal in fact lies here or not, because what we are asked to do is to exercise a discretionary power under O. 41,**

R. 23, and to send these cases back for re-hearing having regard to the fact that the appeal succeeded in so far as probate of the will has been revoked by the appellate Court. O. 41, R. 23, runs as follows:

> Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate Court may, if it thinks fit by order remand the case. . . .

I entertain myself some doubt as to whether this Order applies in the circumstances of this particular case; but even if it does, we have both come to the conclusion that there is no good reason for exercising our discretion to send the cases back to a Judge upon the Original Side, for the reason that the relief sought by the plaintiff would in our opinion be bound to fail having regard to the decision in 8 Rang 463.[1] We have been strongly pressed by Mr. Bhattacharyya to refer the subject matter of this decision for further consideration by a Full Bench, but we are not disposed to take the course. And I desire to say that in my opinion the motion made to refer a matter to a Full Bench should normally come from the Judges themselves when they find that they are fettered by a decision in a previous case which appears to them to require further consideration. When the authorities upon a proposition of law are plain and straightforward, it is not for counsel to argue, what is in effect an appeal against an authoritative decided case, by asking the Bench to adopt the machinery laid down by means of which a Full Bench hearing can be obtained. In this case again, the learned advocate for the appellant has urged us that the facts are quite different from those which were the subject of litigation in 8 Rang 463[1] and this is of course true. But we think the principle of law to be applied is the same, and we observe in the rejoinder of the plaintiff to the written statement that the plaintiff submits that:

> The mortgage was created under a probate which is void ab initio as the same was in respect of a forged will and obtained by fraud practised on the Court.

This pleading discloses a misconception of the law laid down in the case to which I have referred and relief sought in such a way would be unobtainable by reason of that decision. We have therefore come to the conclusion that even if an appeal lies in this case and even if we have the power to send the cases back to a learned Judge on the Original Side, we ought not to do so as in our opinion the plaintiff-appellant would be debarred by reason of the case to which I have referred from obtaining any relief. Accordingly in our opinion these appeals ought to be dismissed with costs five gold mohurs in each case for each day.

**Sharpe J.**—It may well be that these appeals are misconceived, but we did not pursue the preliminary point raised in argument to a conclusion, and we assume for the purposes of this decision that these appeals are properly before us. Secondly Mr. Bhattacharyya asks us to avail ourselves of the power vested in us under O. 41, R. 23, and to order a remand of these cases. I am not at all satisfied that we have power under that Rule to do that in this case, but we will assume a second thing in favour of Mr. Bhattacharyya for the purposes of our decision and say, without deciding whether we have that power, that we will consider it on the basis that we have got that power. Then we come to the point which Mr. Bhattacharyya has raised and we look at the pleadings, and here I make a third assumption in Mr. Bhattacharyya's favour that all the facts pleaded would be proved as he would like them to be proved. And with those three assumptions, any one of which might be fatal to him if argued to its proper conclusion, I find that upon the pleadings the plea which is raised in para. 10 of the plaint and then dealt with in para. 7 of the written statement of defendant 2 and rejoined to by Mr. Bhattacharyya in the first sentence in para. 1 of his rejoinder, the position in law under that plea is, in view of the decision in 8 Rang 463[1], that Mr. Bhattacharyya could not succeed if these cases were to be sent back for trial, as he asks us to do. The matter is summed up by Carr J. at p. 472 when he says that:

> There is nothing in the Probate and Administration Act to suggest that a grant either of probate or of letters of administration becomes on revocation void ab initio,

and Otter J. agreed with that. It seems to me clear that there is no reason whatever to suppose that that case was wrongly decided. It seems to me quite clear that even if these cases were to be sent back Mr. Bhattacharyya must fail. That being so, it is quite useless for us to send the cases back even if we think they are cases in which we can exercise the discretionary power vested in us under O. 41, R. 23.

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[1] Ma Thein v. E. G. Nepean, A I R 1931 Rang 15=128 I C 359=8 Rang 463.

Making every possible assumption in favour of Mr. Bhattacharyya, I agree with my Lord the Chief Justice that these appeals must be dismissed with costs.

A.L./R.K. *Appeals dismissed.*

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## A. I. R. 1938 Rangoon 45

ROBERTS C. J. AND SHARPE J.

*Nga Kyaw Hla* — Appellant.

v.

*The King.*

Criminal Appeal No. 654 of 1937, Decided on 29th June 1937, from order of Addl. Sess. Judge, Pyapon, D/- 4th June 1937.

**(a) Criminal Trial—Appeal against conviction—Duty of Appellate Court—Duty of appellant is to bring before Appellate Court matters casting doubt on his conviction — Though conclusions of trial Court are not to be lightly disregarded, Appellate Court must independently scrutinize evidence and be convinced that no reasonable man can come to any other conclusion.**

In all cases in which the Court sits in criminal appeal, it has to consider the case against the appellant bearing in mind exactly the same principles as must be borne in mind by the Court of trial in the first instance. The appellant does not come here as one who has been convicted and has to satisfy the Court beyond all reasonable doubt that he has been wrongly convicted. If after a conviction before a subordinate Court, the Court of Appeal comes to the conclusion that there may have been a miscarriage of justice, the Appellate Court cannot allow the conviction to stand. The task of the appellant is therefore to bring before the consideration of the Appellate Court such matters as may cast a reasonable doubt of his guilt having regard to all the circumstances of the case. It is true that a trial Judge hears and sees the witnesses and in many cases his opinion as to their demeanour or truthfulness may be of the highest value, and an Appellate Court should not lightly disregard the conclusion at which for properly expressed reasons he arrived. On the other hand it does not absolve the Appellate Court from an independent duty of scrutinizing the evidence with care and of being satisfied, not that a reasonable person might have come to the conclusion which the trial Judge came to, but that no reasonable person could have come to any other conclusion but that the accused was guilty of the offence charged against him. [P 47 C 2]

**(b) Criminal Trial—Duty of prosecution—Prosecution need not call as witnesses everyone whose statement is recorded by police.**

It is not the duty of the prosecution to call as witnesses every one whose statements have been taken by the police but only to call such people as may be likely to give truthful and reliable evidence with regard to the matter in question. [P 48 C 1]

G. D. Williams — *for Appellant.*

Myint Thein (Government Advocate) — *for the Crown.*

**Roberts C. J.** — The appellant Nga Kyaw Hla was convicted by the learned Additional Sessions Judge of Pyapon of the murder of Maung San Nyun on 20th February last, and was sentenced to death. The mass of evidence which was adduced at the Sessions trial is in many respects contradictory and difficult to follow, and we feel indebted to Mr. Williams and the learned Government Advocate for having guided us through its intricacies so admirably. The evidence shows—and the witnesses are agreed up to a certain point—that the appellant was asked to go and gamble at the house of Maung Mye in the village where the murder of the deceased is alleged to have taken place, and there were present Maung Po Sein, his servant Ohn Pe, Hla Shwe, Pan Maung and the deceased San Nyun; and during the course of the day, while the play was in progress, three more players came upon the scene, Sein Chai, Hla Maung and Maung Pyu. During the earlier part of the day, the appellant acted as a sort of commission agent or cashier, the actual players being Ohn Pe, the deceased, Pan Maung, and Hla Maung; and it is agreed that during the afternoon there was a pause for a meal and that, after that the players resumed.

As to the events of the evening, there is a marked discrepancy between the evidence of the prosecution witnesses. The case for the prosecution rests in the main upon the evidence of Ohn Pe, and his story is that during the evening Pan Maung was insisting on cashing five rupees worth of tokens which he had, and the appellant was not willing to give him cash for these: that Pan Maung insisted on getting the money and Kyaw Hla said "your waing (gambling circle) is very troublesome," and so saying he went to the kitchen and threw a frying pan and an earthern cooking pot into the group of card players hitting Ba Thaung on the head. It is then said by Ohn Pe that he and his master Po Sein, Hla Shwe and Pan Maung, who form the group of important witnesses, left in order to avoid further quarrel, but San Nyun, who came from their village, was left behind. Ohn Pe says that the only person who was drunk at the time was Maung Mye and that neither the appellant nor the deceased was drunk. After witness had gone some distance away from the hut with his companions, he recollected that his umbrella and sandals had been left behind, and went back to fetch them when Maung Mye aimed a spear at him and San Nyun stood up and using an insulting expression uttered a challenge. Witness says that Ba Thaung and Kyaw Hla held him (San Nyun) by his left hand and made him sit down, and appellant said "you are abusing me" and picked up a mamooti and struck San Nyan (the deceased) with it on the head, at the same time throwing something which hit the witness's right knee. Ohn Pe says he ran back to his companions and told them what had happened: and they also give evidence and, although they were out of sight of Ohn Pe and cannot say what took place in the hut, they substantially corroborate his story to the extent that they say their party left the hut to avoid a disturbance; that Ohn Pe left them to return for his umbrella and sandals: and that he came back with the story of the appellant having killed the deceased and told it to them in substantially the same terms as he gave it at the committal Court and at the Court of Session. The learned Sessions Judge in considering his evidence came to the conclusion, as he expressed it, that it was quite believable, and we have to consider whether we can act upon it not to the extent of believing it credible or possible, but to the extent of confirming the conviction and sentence of death passed upon the appellant as the result of its having been believed.

Now, although Ohn Pe in his evidence said that the appellant was not drunk at the time of his leaving the hut, it is clear that before the committal Court he said that Kyaw Hla was drunk; and in his report to the headman he said that one pot was thrown by Kyaw Hla from the kitchen whereas in his evidence he says it was a frying pan and a pot. According to Ohn Pe's evidence, he was not the only eye-witness of this murder; he says that Maung Mye, Ba Thaung and Tha Su were in the hut, and it is clear from his evidence that Ba Thaung must have witnessed the murder because he says that Ba Thaung and the appellant made San Nyun sit down when the deceased uttered the challenging words; also that Maung Mye must have witnessed the murder because the witness says: "Ko Mye turned and looked at San Nyun who had fallen and as he did so I ran away". All these other three persons were called as witnesses for the prosecution and each of them severally and emphatically denied that they were in the hut at all at the time when San Nyun was struck, and they tell a story quite different from that which is told by Ohn Pe. The consequence is that Ohn Pe, who says that he was one of four eye-witnesses is the only person who gives evidence saying that he saw the deceased struck at all.

There are several comments which have been made, not without force, by the defence in relation to Ohn Pe's evidence, and one is that, although he denied it, there was evidence on the record to show that there had been trouble between Kyaw Hla and himself because Ohn Pe was living separately from his wife and believed Kyaw Hla to have had some guilty association with her. In addition the evidence of Ohn Pe is not fully borne out as regards the events of the evening, and Maung Pyu, who it is not pretended was present at the time of the attack upon the deceased, says that there was earlier in the evening a dispute between San Nyun and Ohn Pe's master Po Sein over a sum of Rs. 4, which San Nyun was demanding. He says that San Nyun searched and found Rs. 4 in the pocket of Ohn Pe and that thereupon there was a fight between them: and his evidence is really to the effect that the deceased and the principal witness for the prosecution, who is now put forward as the only eye-witness, were having a fight earlier in the day.

Against the evidence of Ohn Pe is another body of evidence represented by other witnesses for the prosecution who tell an entirely different story with regard to the events of the evening. They first of all bear out Maung Pyu's story with regard to the quarrel, and then they say that it is not true that Kyaw Hla ever threw anything at Ba Thaung. Ba Thaung says so himself and entirely denies the story put forward by Ohn Pe and his companions. It is then said that at 2 in the morning there was a dispute between San Nyun and Po Sein, and the appellant and Maung Mye, who were sharing this hut and were the occupiers of it, told them to stop saying they might come to blows and took away their cards, and that that is how the party broke up. When that happened, it is said that Ohn Pe with his master and Hla Shwe and Pan Maung left the hut and began to throw stones at it: San Nyun was still remaining in the hut.

According to the evidence of Tha Su, Tha Su had gone home. According to the evidence of the other two witnesses Ba Thaung and Maung Mye and the statement of the appellant, those three persons ran away while the hut was being stoned, and having run away to report to other villagers they stayed away a considerable time. On re-visiting the hut they found that the deceased had met with some injuries, but they did not at that time know that the injuries were of a serious nature, and they summoned his wife to come presumably to take him home. On reaching the hut they noticed that there was a broken lamp chimney as the result of one of the stones which had been thrown by the party to which I have just referred, and this broken lamp chimney was produced as an exhibit at the Court of Session. And the case put forward substantially by this group of witnesses for the prosecution is this: that Ohn Pe, who had a grudge against the deceased and whose master had been that afternoon fighting with the deceased, must have returned to the hut realizing that every one had gone from it except the deceased who was drunk, and that there—whether there was a struggle, or what happened precisely, can never be known—Ohn Pe might well have inflicted upon San Nyun the wound which he afterwards was found to have. When San Nyun's wife came, it was noticed that there was a wound upon San Nyun's head and he was unconscious, but they seem to have taken his condition for one of drunken stupor, and even his wife said he would be all right in the morning. They cut away some hair from his head and left him to sleep off the effect of his drunkenness.

Now the two stories which are told by these two groups of witnesses might either of them be true, and it is exceedingly difficult to pick out the small matters in each group of evidence which seem to indicate its truth or to be in some way inconsistent with the rest of the testimony in that group of evidence. But we are asked to affirm a conviction in a case in which Ohn Pe says there were three other persons present seeing the fatal blow struck by the appellant and each of those three persons declines to corroborate Ohn Pe's story. Then again Ohn Pe and his group of friends went right away from the scene back to their own village and reported to their village headman and that report was not in the hands of the police till some days afterwards. Kyaw Hla and his friends reported the next morning to the village headman in whose immediate jurisdiction this offence was committed, and when the police came they took away a number of articles from the hut; stones and various other things that had been thrown as was alleged by the second group of prosecution witnesses. Maung Te, who is one of the villagers who took no part in any affray at the hut, says that Kyaw Hla came running to him and said to Ko Pyu that stones were being thrown at his hut, and the witness says: "I heard stones falling and also voices abusing", so that although he is a member of the same village as the appellant and possibly may be friendly with the rest of the second group, he is a person who is not immediately concerned with the dispute that went on while the card play was taking place.

Now, in all cases in which the Court sits in criminal appeal, it has to consider the case against the appellant bearing in mind exactly the same principles as must be borne in mind by the Court of trial in the first instance. The appellant does not come here as one who has been convicted and has to satisfy the Court beyond all reasonable doubt that he has been wrongly convicted. If after a conviction before a Subordinate Court the Court of Appeal comes to the conclusion that there may have been a miscarriage of justice, the Appellate Court cannot allow the conviction to stand. The task of the appellant is therefore to bring before the consideration of the Appellate Court such matters as may cast a reasonable doubt of his guilt, having regard to all the circumstances of the case. It is true that a Sessions Judge hears and sees the witnesses and in many cases his opinion as to their demeanour or truthfulness may be of the highest value, and an Appellate Court should not lightly disregard the conclusion at which for properly expressed reasons he arrived. On the other hand that does not absolve the Appellate Court from an independent duty of scrutinizing the evidence with care and of being satisfied not that a reasonable person might have come to the conclusion which the learned Sessions Judge came to, but that no reasonable person could have come to any other conclusion but that the accused was guilty of the offence charged against him.

Bearing these principles in mind, we are of opinion that either of the stories told by the two main groups of witnessess might be true. It is necessary to say once more, although it has been clearly laid down on previous occasions, that it is not the duty of the prosecution to call as witnesses every one whose statements have been taken by the police but only to call such people as may be likely to give truthful and reliable evidence with regard to the matter in question. In the present case every one who could possibly give any evidence in regard to this case was called as a prosecution witness, and the case for the prosecution as a whole is a mass of contradictions and inconsistencies. Bearing all these facts in mind, we think that although it may be that the learned Additional Sessions Judge came to a conclusion which in fact was right, there is always the possibility that he came to a conclusion which was wrong, and that being so, we ought to say that the prosecution has not made out its case beyond all reasonable doubt and that the conviction and sentence at the Sessions Court should be set aside and the appellant set at liberty.

**Sharpe J.**—The appellant in this case has been convicted by the learned Additional Sessions Judge, Pyapon, of the murder of Maung San Nyun. Mr. Williams on behalf of the appellant has presented to us a careful analysis of the evidence for the prosecution, which falls into two compartments. If one group of witnesses for the prosecution is believed the appellant is guilty; if the other group is believed the appellant is not guilty. It is quite clear from his judgment that the learned Additional Sessions Judge appreciated that position. The appellant was represented by an advocate and therefore presumably the many points urged before us by Mr. Williams were also urged before the learned Additional Sessions Judge. It must be borne in mind that the learned trial Judge is in many ways in a much better position than this Court to form an opinion as to which group of witnesses are to be believed when there are as in the present case, two sets of witnesses, the evidence of either of which set it is open to the learned Additional Sessions Judge to accept in preference to the other; and when he has accepted the evidence of one set he is entitled to convict the accused so long as the evidence which he does accept really satisfies him as to the guilt of the accused. The learned trial Judge has the advantage of seeing the witnesses; we only hear the appeal on the written record of the proceedings in the Court below. Therefore this Court must give every reasonable weight to and should not lightly disregard the conclusions of fact arrived at by a Sessions Judge who has seen and heard the witnesses, when those conclusions of fact are based upon the credibility of evidence involving the appreciation of the demeanour of witnesses. But on the other hand it is open to an appellant in this Court to show that the conclusions of a Sessions Judge on such matters of fact as those which I have just mentioned are against the weight of the evidence adduced in the Court below, and if such be the conclusion of this Court, the appeal must be allowed, but an appeal ought not to be allowed if this Court disagrees only with the reasons of the learned trial Judge and comes to the same conclusions of fact as the Court below although for reasons entirely different from those that moved the learned trial Judge. A ground for allowing an appeal such as the present one is that this Court is not satisfied affirmatively of the guilt of the accused; but the burden is on the appellant to cause in the minds of this Court a doubt as to whether his conviction is justified.

Turning to the memorandum of appeal in the present case, six grounds are there set out. Ground 1 is not in itself, in my judgment, a sufficient ground for allowing this appeal; nor in my judgment are grounds 2 and 3, which naturally fall to be dealt with together, sufficient reason by themselves for us to allow this appeal. Grounds 4 and 5 are not now relied upon by Mr. Williams. Ground 6 is the only ground which in my judgment affords a sufficient reason for allowing this appeal, that is to say, the evidence of the prosecution is not sufficient to establish the guilt of the appellant beyond all reasonable doubt. My Lord the Chief Justice has dealt with the evidence so exhaustively that it is unnecessary for me to say more than this that exercising my own independent judgment and on a general review of the whole of the evidence in this case, I am left with a sufficient doubt as to the guilt of the appellant as to entitle him to have his conviction set aside. Accordingly I agree with my Lord the Chief Justice that this appeal must be allowed.

V.B.B./R.K. *Conviction set aside.*

## A. I. R. 1938 Rangoon 49

MYA BU OFFG. C. J.

*Maung Po Kwe and another* — Appellants.

v.

*Maung Po Sein and others* — Respondents.

Special Second Appeal No. 117 of 1937, Decided on 24th August 1937, against decree of Assist. Dist. Court, Bassein, D/- 27th December 1936.

**Transfer of Property Act (1882), S. 53-A— There must be agreement or contract of sale in writing — Mere document ascertaining with reasonable certainty terms necessary to constitute transfer is not sufficient.**

A contract or an agreement in writing or a written agreement is a *sine qua non* under S. 53-A. Such written agreement may of course be the embodiment of what has already been orally agreed upon and may also refer to payment by the purchaser and receipt by the vendor of part of the purchase money, but it must essentially be a written agreement. Unless a document can be held to be an agreement or contract of sale, it will not, by the mere fact that from it the terms necessary to constitute the transfer can be ascertained with reasonable certainty, be sufficient to satisfy the requirements of S. 53-A as what the section requires is not a document from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty but a contract or an agreement in writing from which such terms can be so ascertained. [P 50 C 2; P 51 C 1]

K. C. Sanyal — *for Appellants.*

A. N. Basu — *for Respondents.*

**Judgment.**—This appeal arises out of a suit for recovery of possession of a house and site in Bassein Town from the four defendants-respondents, Maung Po Sein, Ma Lay Yauk, Maung Ohn and Ma Thein Yin. Maung Po Sein and Ma Lay Yauk are husband and wife, while Ma Thein Yin is their daughter, and Maung Ohn is her husband. The house and site were originally the property of Maung Po Sein and Ma Lay Yauk. They mortgaged the property to N. A. S. R. M. Firm who ultimately obtained a mortgage decree over the property, had it sold by the Court, and became the purchaser. The Court sale took place on 1st August 1934. On 4th February 1936, N. A. S. R. M. Firm sold the property to the plaintiff-appellants by a registered deed of sale. The plaintiffs' suit is based upon title acquired by them under this deed. The defendants contested the suit relying on S. 53-A, T. P. Act. They alleged that there was a contract for sale of the property by the firm to Maung Ohn and Ma Thein Yin, and that Maung Ohn and Ma Thein Yin had, in part performance of the contract, taken possession of the property and paid a sum of Rs. 300 towards the price of Rs. 350 on 3rd June 1935 and were ready and willing to pay the further sum of Rs. 50, and that the plaintiffs had notice of the firm's contract with Maung Ohn and Ma Thein Yin, and of the part performance thereof. In the course of the trial a document, Ex. 1, was produced on behalf of Maung Ohn and Ma Thein Yin, which runs as follows :

> At an auction sale held by the Court in Execution Case No. 199 of 1934 of the Township Court of Bassein West, in execution of the mortgage decree passed in Civil Regular Suit No. 172 of 1932 of the said Court, against Ko Po Sein and his wife Ma Lay Yauk, cultivators of Ma-nyein-hla-gon, Bassein, the decree-holder N. A. S. R. M. Firm has purchased the mortgaged property together with the revenue receipt (for) holding No. (29) for this year 1934-35, as well as a 3 posted, 2 roomed, plank-walled, corrugated iron-roofed house standing on the said land, in adjustment with the decretal amount in the abovementioned suit ; and as such (the property) belongs (to the said firm). Accordingly as it has already been agreed to sell the said house and land for Rs. 350 outright to Ko Maung Ohn, cultivator of Ma-nyein-hla-gon, Bassein, the abovementioned house and land are sold for Rs. 350 on the 3rd lazan of Nayon, 1297 B. E., corresponding to 3rd June 1935, and having received, in cash, Rs. 300 out of the said sum (Rs. 350), from Ko Maung Ohn, Ramasami, holder of general power-of-attorney for the abovementioned decree-holder firm, writes and gives a receipt (signs) to that effect.

This document bears the signature "N. A. S. R. M. Ramanathan Pillay" but according to the evidence this document was signed by Ramasami, who was at that time a clerk of the firm. The firm was at that time under the management of a duly constituted agent Raman Chettyar. It is alleged on behalf of the defendants that Ramasami was not a mere clerk but also held a power-of-attorney under which he used to act as the agent of the firm. This allegation is not controverted, but according to Raman Chettyar the power-of-attorney had been withdrawn by the time of the alleged signing of the document, Ex. 1, by Ramasami. In spite of what Raman Chettyar says, there can be no doubt that the power-of-attorney, under which Ramasami was said to have acted, must be held to be still subsisting so far as the defendants were concerned on the date of the execution of the document, Ex. 1. The contract entered into by Ramaswami was therefore binding on the firm. To ascertain the ingredients of a valid defence under S. 53-A, T. P. Act, the following parts of that section are relevant :

> Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, . . . . . . .
>
> * * * *
>
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

Besides the condition mentioned in the Proviso, these ingredients are : (1) a contract to transfer for consideration immovable property by writing, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty ; (2) the transferee having in part performance of the contract taken possession of the property ; or, having in part performance of the contract, continued in possession and done some act in furtherance of the contract ; and (3) the transferee having performed or willing to perform his part of the contract.

In the present case the document Ex. 1 was tendered and admitted in evidence on the footing that it was a receipt. It sets out the terms necessary to constitute the transfer, but the setting out of such terms is referable to the object of describing the account in reference to which Rs. 300 was paid. The document itself states : "As it has already been agreed to sell the said house and land," and does not of itself purport to be the contract of sale. A contract of sale is nothing more or less than an agreement to sell, and S. 53-A requires such an agreement to be in writing signed by the party whom it is sought to bind or its agent. An agreement or contract to sell immovable property need not be in writing, but such oral agreement or contract does not satisfy the requirement of the section which lays down definitely and advisedly that it is to be in writing—I say advisedly because, to meet the objection that a mass of perjured evidence would be introduced if oral agreements were allowed to be proved, it was enacted that the agreement should be in writing. Therefore, to satisfy the requirement of the section, there must be inter alia an agreement in writing which, under Art. 5, Stamp Act, is liable for payment of a duty. That the document Ex. 1 was given and given only as a receipt is shown by the fact that it was stamped as a receipt and not as an agreement. Therefore in my opinion the defendants have failed in this case to produce an agreement in writing which is essential to the validity of the defence under S. 53-A, T. P. Act.

The learned advocate for the appellant urges that because the document sets out the terms necessary to constitute the transfer and consequently such terms can be ascertained from this document with reasonable certainty, it satisfies the requirement for an agreement in writing, and this contention cannot be upheld for the reason that if it were so, any scrap of paper, from which the term necessary to constitute the transfer can be ascertained with reasonable certainty, would do without its being a valid agreement in writing. A contract or an agreement in writing or a written agreement is a *sine qua non.* Such written agreement may of course be the embodiment of what has already been orally agreed upon and may also refer to payment by the purchaser and receipt by the vendor of part of the purchase money, but it must essentially be a written agreement. A document bearing much similarity to Ex. 1 in the present case was brought to the notice of my learned brother Dunkley J. in 13 Rang 17.[1] That document ended with the words : "I, Ma Thet, sign this receipt as having received the money" and was stamped with a one anna stamp and the Courts below had admitted that document in evidence. The learned Judge on second appeal pointed out that

> As an agreement for sale it is insufficiently stamped, but as it has been admitted in evidence by both the lower Courts, its admissibility cannot be questioned by me now.

Whether that document had been admitted merely as a receipt, or as an agreement, I am not in a position to say ; but in the case before me Ex. 1 was tendered as a receipt and was admitted and treated all along as a receipt and nothing more by both the Courts below. Further, from its wording it is clear that the agreement, which is relied on as the contract, had taken place on a different occasion prior to the drawing up of Ex. 1. Therefore, in the present case, there does not appear to be any just ground for acting upon this document as the contract pleaded in support of the defence in suit. Nor has Ex. 1 been put forward as an unregistered sale deed. In these circumstances, I do not think it will be just and fair to the appellants to have Ex. 1 impounded and admitted in evidence as an agreement or contract for sale in this case. The lower Appellate Court however treated it as a document which set out an agreement and from which the terms necessary to constitute the transfer could be ascertained with reasonable certainty, and thus accepted the document as being sufficient to satisfy the requirements of S. 53-A, T. P. Act. In my opinion, unless the document Ex. 1 can be held to be an agreement or contract of sale, it will not, by the mere fact that from it the terms necessary to constitute the transfer can be ascertained with reasonable certainty, be sufficient to satisfy the requirements of the section as what the section requires is not a document from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty but a contract or an agreement in writing from which such terms can be so ascertained.

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[1] Ma Thet v. Ma Se Mai, A I R 1934 Rang 304 =154 I C 13=13 Rang 17.

Furthermore, both the Courts below have discredited the evidence adduced on behalf of the defendants to show that on the day of the execution of the document, Ex. 1, Ramasami went and delivered possession of the property to Maung Ohn and Ma Thein Yin. Therefore the ingredient of the transferee having taken possession of the property in part performance of the contract has not been established in this case. It is true that Maung Ohn and Ma Thein Yin have all along been living in the house since some time before the alleged payment of Rs. 300 to the Chettyar firm, but considering the relationship between them and the defendants Maung Po Sein and Ma Lay Yauk, their residence at the house both before and after the alleged payment of Rs. 300 to Ramasami Chettyar is traceable to their residence there as the members of the family of Maung Po Sein and Ma Lay Yauk, and not in their own right; and therefore their continuance in residence after the payment of Rs. 300 cannot be traced particularly to taking possession in part performance of the contract. Since N. A. S. R. M. Firm became the purchaser of the property at the auction sale, the defendants Maung Po Sein and Ma Lay Yauk had no right to continue in their residence in the house and Raman Chettyar explains that the house had been leased to them and that they were in occupation of the house as his tenants. The probability of the truth of the statement lies in the fact that they were allowed to continue in peaceful possession of the house all along. Maung Ohn and Ma Thein Yin were admittedly living with them all along and therefore their continuance in residence in the house must undoubtedly have been in pursuance of the right of Maung Po Sein and Ma Lay Yauk as tenants of the house. Their continuance in residence, if there was no delivery of possession which they attempted to establish by evidence in the case, is therefore traceable to their residence under Maung Po Sein and May Lay Yauk, and not as continuance in possession on account of part performance of the contract.

Under these circumstances, in my opinion, the defence falls to the ground. I set aside the judgment and decree of the lower Appellate Court and restore that of the Court of first instance with costs throughout.

S.C./R.K. *Decree set aside.*

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## A. I. R. 1938 Rangoon 51

BAGULEY AND SHARPE JJ.

*Chinnasamy Pillay* — Appellant.

v.

*Ma Toke and another* — Respondents.

First Appeal No. 8 of 1937, Decided on 12th August 1937, against decree of Dist. Court, Myaungmya, D/- 19th October 1936.

**(a) Buddhist Law (Burmese)—Applicability—Person whether Hindu or Buddhist—Hindu building kyaung, selecting koyin, raising him to position of upazin and accepting him as private chaplain—Such Hindu also permanently settling in Burma in Buddhist way—Inference is that he is Buddhist.**

Where a Hindu not only formally recites the five recepts after a pongyi, but builds and endows a kyaung and after selecting a koyin and getting him raised to the position of upazin accepts him in the position of private chaplain, he is going a long way further than any Hindu can be expected to go if he retains Hinduism. When this is coupled with his completely cutting himself off from his relations in India and settling down permanently in Burma in the Burmese Buddhist way, the only possible inference is that he has become a Buddhist: *31 Cal 11 (P C)*; *A I R 1922 P C 197 and A I R 1923 Cal 265, Disting.* [P 52 C 2]

**(b) Buddhist Law (Burmese) — Marriage — Legality.**

Where a person having become a Buddhist domiciles in Burma and marries conforming with the customs of Buddhists in Burma, the marriage must be regarded as a legal marriage on the principle of *lex loci contractus.* [P 52 C 2]

P. K. Basu — *for Appellant.*

C. H. Campagnac — *for Respondents.*

**Baguley J.**—This appeal arises out of an application filed by the appellant for letters of administration to the estate of one Nagalingam Pillay. The appellant filed an application in the District Court of Myaungmya claiming to be a cousin of the deceased. He made as respondents Ma Toke, the present respondent 1, who, he said, claimed to be the wife of the deceased, and Po Kauk, who claimed to be the adopted son. He claimed that in addition to being the sole surviving heir of Nagalingam, he was also his partner and had a half share in all the properties in his own right. Ma Toke opposed the application claiming that the petitioner was not related in any way to the deceased and claiming further that Nagalingam Pillay was a Buddhist before his death and she was his legal wife. She further asserted that the petitioner was not a fit and proper person to administer the estate. The other respondent Po Kauk filed an objection that he was the adopted son of the deceased and that Ma Toke was not the legally married wife of the deceased: and he claimed that the application should be dismissed with costs as he himself had a better claim. Po Kauk however seems to have taken no active part in the proceedings. Four issues were framed: whether the applicant Chinnasamy Pillay was the cousin of the deceased; whether his conduct was such that he ought not to be allowed to administer the deceased's estate; whether the deceased was a Hindu or a Buddhist at the time of his death; and whether Ma Toke was the deceased's legally married wife. The learned District Judge after recording all the evidence wrote a judgment in which he found that the applicant had not proved that he was the deceased's cousin. He also found that his conduct was such that he should not be allowed to administer the estate, but he came to no decision on the point of whether the deceased was a Buddhist or whether Ma Toke was his legally married wife. (After discussing evidence, the judgment proceeded further.) Of slightly more evidentiary value is the copy of an affidavit where in the heading there is the citation:

I, Nagalingam Pillay aged 45 years, Madrasee Hindu, son of Sundaram Pillay . . . on solemn affirmation state as follows.

Here again I can hardly hold this as a solemn declaration of a confession of Hindu faith. It is true that Nagalingam Pillay was a Hindu to start with. It is argued that most Hindus may often offer prayers to pagodas and may even have salaamed or otherwise done respect to the image of the Buddha because the Buddha is one of the gods in the Hindu pantheon. This argument I am prepared to accept, but for a Hindu to go further and not only formally recite the five recepts after a pongyi, but to build and endow a kyaung and to select a koyin and get him raised to the position of upazin and to accept him in the position of private chaplain is going a long way further than any Hindu can be expected to go if he retains Hinduism. When this is coupled with Nagalingam completely cutting himself off from his relations in Madras and settling down permanently in Burma in the Burmese Buddhist way, the only possible inference is I think that he had become a Buddhist and as near a Burman as he could make himself, and for what happened to his body after he was dead he was not responsible. Nagalingam having become a Buddhist domiciled in Burma, I presume his marriage to Ma Toke, conforming as it did with the customs of Buddhists in this country, must bere garded as a legal marriage on the principle of *lex loci contractus*; and Ma Toke being his wife and sole heir, the question of whether the applicant is his second cousin or any other distant relation is a matter not even of academic interest. For these reasons I would dismiss the appeal with costs; advocate's fee 10 gold mohurs.

**Sharpe J.**—Issue 3 in this case was whether the deceased was a Hindu or a Buddhist at the time of his death. Mr. Basu, on behalf of the appellant, called our attention to three cases: 30 I A 249,[1] the Privy Council case in 11 L B R 155[2] and 26 C W N 799.[3] As regards the first of those cases, reliance was placed on a passage in Sir Arthur Wilson's judgment in the middle of p. 257, which was said to establish the proposition that even lapses from orthodox practices, in matters for example of diet and ceremonial observance, could not have the effect of excluding from the category of Hindu one who was born within it. I do not think that it is possible to extract from the passage to which I have referred any such proposition which can be of universal application. Nowhere in the report of the case is there any indication as to the detailed nature or extent of the deceased's practices, except that they were practices as to eating and living which were reprobated by Hindus other than Brahmos. Their Lordships of the Privy Council merely held on that part of the case that as a matter of fact the practices which were presumably detailed to them but the details of which it is not vouchsafed to us to know were not in that particular case sufficient to cause them to hold that the deceased had died otherwise than as a Hindu. I am therefore unable to derive any assistance from the first case cited to us.

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[1] Rani Bhagwan Kuar v. Jogendra Chandra Bose, (1903) 31 Cal 11=30 I A 249=84 P R 1903=7 C W N 895=8 Sar 543 (P C).

[2] Ma Yait v. Maung Chit Maung, A I R 1922 P C 197=66 I C 609=48 I A 553=49 Cal 310 =11 L B R 155 (P C).

[3] In the goods of Jnanendra Nath Ray, A I R 1923 Cal 265=70 I C 463=49 Cal 1069=26 C W N 799.

Nor am I able to obtain much help from the second one, except possibly in a manner adverse to the appellant. At p. 162 Lord Haldane said that if a twice-born Hindu migrates across the sea to Burma and marries a Burmese woman, that in itself may not necessarily deprive him of his Hindu status in the eye of the law. From that statement of the Lord Chancellor it appears to follow that, in certain circumstances, even the bare fact of such migration and marriage may conceivably deprive such a person of his Hindu status; and if in any particular case there are other additional circumstances, then it may be more likely than not that he has lost his Hindu status; it is obviously a pure question of fact in each case, and I am unable to extract any principle of law from this second case which was cited to us.

The third case relied upon by the learned advocate for the appellant merely decides that a Hindu by becoming a Brahmo does not necessarily cease to be a Hindu; that something further than the mere becoming a Brahmo is necessary for a man to cut himself off from Hinduism. Which again shows that it is all a question of fact. I will only add, in connection with this last case, that ceasing to be a Hindu and becoming a Brahmo is a very different thing from going over from Hinduism to Buddhism, as in the case with which we are at present concerned, for the founder of the Brahmo sect was a Hindu who never abjured his ancestral religion. So that none of the three decisions cited really helps us to decide the present case. It is a pure question of fact, and I entirely agree with my brother Baguley that the only possible inference which can be drawn from the evidence before us is that the deceased was a Buddhist at the time of his death. It is conceded that, if that is our decision, the appellant is not entitled to the grant of letters of administration; so it is therefore unnecessary for me to discuss the other issues in the case. I accordingly agree that this appeal must be dismissed. Advocate's fee 10 gold mohurs.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 53

BAGULEY AND SHARPE JJ.

*Daw Nyi Ma* — Appellant.

v.

*Ma E Tin and others* — Respondents.

First Appeal No. 167 of 1936, Decided on 14th July 1937, against decree of Dist. Court, Yamethin, D/- 27th June 1936.

**Registration Act (1908), S. 25—Document already four months old registered by Sub-Registrar—Registration is bad.**

A Sub-Registrar has no power to extend the time beyond the standard four months for the registration of document and he has no jurisdiction to proceed with the registration of a document which is already four months old. Where therefore a document already four months old is registered by a Sub-Registrar, the registration is bad. [P 55 C 1]

Tha Kin and Tun Aung—*for Appellant.*

K. C. Sanyal and P. K. Basu — *for Respondents Nos. 1 to 4, 6 and 7.*

**Baguley J.**—This appeal arises out of a suit upon a mortgage. The only defendants who really are interested in the matter appear to be various parties impleaded as puisne mortgagees. The man who executed the mortgage sued upon and who was originally defendant 1 is now dead. The mortgage sued upon is Ex. A, and it bears definite and significant alterations. The important dates which appear upon it are the dates which now appear as the date of execution, namely the 30th June 1924, corresponding to the 14th waning of Nayon 1286. I say dates of execution, because, omitting the years, the only portions of these dates which remain unaltered are the "30" of "June 30" and the first "1" and "waning" of "14th waning Nayon." The word "June" has been altered; the word "Nayon" has been altered, although the word appearing underneath also ended in the sound "on", and the date of the Burmese month was originally a double figure date, of which the left hand digit was "1". The alterations of the words "June" and "Nayon" bear the initials of Maung Nge, one of the executants: "14" is not initialled. The two stamp sheets on which the document consists were bought on 30th May 1924, and the document was presented for registration and was accepted and registered on 4th October 1924. The plea has been raised that the document is not properly registered, the case for the respondents being that it was really executed more than four months before the date on which it was presented to the Sub-Registrar, and of course under Ss. 23 and 25, Registration Act, a Sub-Registrar cannot under any circumstances register a document presented to him more than four months after the date of execution. Only the Registrar has the power to condone the delay and allow registration on payment of a fine.

The plaintiff has not given the Court any help in finding out how this document came to be in its present unsatisfactory condition. She has called some witnesses however and it is really from the cross-examination of these witnesses that the respondents have made their strongest points. Day Nyi Ma herself is very definite that she was first approached with regard to this loan one day, and that she consulted Po Tun about the matter, she decided to lend the money, she had the money in hand, the document was executed and the money was taken all on the same day. Ba Shwe, the writer of the document, peculiarly enough, was never asked in examination-in-chief any question as to how the date came to be altered. He said he did not make the alterations: the document was signed immediately after it was written: and as he was there from the time the document was written until the document was signed, his evidence points very strongly to the alterations having been made after the document was signed. Po Tun, one of the attesting witnesses, says definitely that Maung Nge and Daw Swe Mi each made their signatures once at the time of execution. They did not, therefore, initial any corrections at the time of execution. The witness cannot say in whose hand-writing the corrections were; and this witness also states that the corrections were initialled at the registration office at the instance of the Registration Officer. The second attesting witness, U Ba Zan, gave evidence carefully but obviously his memory is not very clear: he said he thinks the dates were incorrect, and he thinks Ba Shwe, the writer, corrected it. He certainly cannot say definitely that the corrections were there when he signed the document as a witness. The position then is that, so far as the evidence goes, the mortgage deed was executed on the same day on which the transaction was initiated: it was executed and attested, and when that process was finished it bore some date, but what that date is no one can now tell for certain. It was however on the 30th of some English month, it was also a date during the waning of some Burmese month, and it was between the 10th and the 15th of the waning of that month. When the document was presented for registration on 4th October, the date had been altered and had become 30th June: the Registration Officer noticing this directed the executant to initial the correction and he did so. How the mistake arose, why it arose and who altered the date, the plaintiff has not given us any information whatsoever.

On the other hand, the learned Judge has taken all possible 30th days of the month. The stamp was bought on 30th May, which would fit in very well with the document having been executed on 30th May. The plaintiff had not got the stamp paper handy when she was approached for this loan: she agreed to make the loan and she had to get the stamp paper immediately and it might have been bought that day. The 30th June was presumably not the date which originally appeared, because it had been altered to that date. The 30th July should be a possible date, but as the learned Judge points out it would really have been foolish to alter the date from July to June: no good purpose could have been served: it would have been merely silly. The 30th August and 30th September are impossible as the dates of execution, because both these dates are in the waxing of the Burmese month. The only possible dates on which it could have been executed would be 30th July and 30th May.

There could have been no point in altering 30th July to 30th June, because it would serve no good purpose. There would have been good reason for altering 30th May to 30th June, because that would have made the date of execution appear less than four months before the date of presentation for registration; also 30th May was in a Burmese month which ended in the sound "on", whereas 30th July was in the Burmese month Wazo. In addition to this the stamp paper was bought on 30th May and that would fit in very well with the story that the plaintiff was approached for a loan and the transaction was carried through all in one day, which would require the production of the stamp paper from somewhere. We have been asked, on the authority in 11 Rang 207,[1] to hold that once the document has been registered, it must be held to be a good registration; but it seems to me that this case does not determine the matter in favour of the appellant: in fact the head-note of the case starts by saying:

> The certificate of registration endorsed on a document is prima facie evidence that the document has been duly registered, but it is not conclusive.

From the facts that I have already set out it seems to me that, taking the definition of the word "proved,' as given in S. 3, Evidence Act, this document may be said to be proved to have been executed on 30th May. That being the case, the Registration Officer, who was merely a Sub-Registrar, and therefore not empowered to extend the time beyond the standard four months (a power which is only vested in the Registrar himself under S. 25, Registration Act) had no jurisdiction to proceed with the registration of the document which was already four months old. The registration is bad. I would therefore dismiss the appeal with costs ad valorem, one set only.

**Sharpe J.**—I agree that this appeal should be dismissed and concur in the order proposed as to costs.

K.B./R.K. *Appeal dismissed.*

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[1] U Aung Din v. Maung Aung Myint, A I R 1933 Rang 194=147 I C 287=11 Rang 207.

## A. I. R. 1938 Rangoon 55

MYA BU OFFG. C. J. AND BAGULEY J.

*Saw Yu Hlaing* — Appellant.

v.

*K. S. A. K. Chettyar Firm and others* — Respondents.

First Appeal No 44 of 1937, Decided on 12th August 1937, against decree of Dist. Court, Thaton, D/. 5th January 1936.

**(a) Burma Land and Revenue Act (2 of 1876), S. 45—Sale under S. 45—Sale transfers only right, title and interest of owner—Mere fact that revenue officer signs sale certificate under wrong form cannot alter nature of sale.**

Where the attachment for sale is under S. 45 and the sale proclamation is also under S. 45, the sale must be under that section, and it would transfer only the right, title and interest of the owner. The mere fact that after some months the revenue officer signs the sale certificate in the wrong form cannot alter what is actually sold. [P 56 C 1]

**(b) Burma Land and Revenue Act (2 of 1876), S. 45—Sale certificate is not document of title.**

It is not the owner that signs a sale certificate; a revenue officer signs it and he signs it to give effect to the sale that has taken place; and the power of selling property belonging to other people is strictly limited by law. Hence a sale certificate is not a document of title. [P 56 C 1]

K. C. Sanyal — *for Appellant.*

E. Hay — *for Respondent 1.*

**Mya Bu Offg. C. J.** — This appeal is concerning only one of the items of property over which the plaintiff-respondent sought for and obtained a mortgage decree in the District Court. The question for determination is whether that item of property which was mentioned as no. 1 is still subject to the mortgage which defendant 1 executed in favour of the plaintiff. After the mortgage, this property was put up for sale for arrears of Municipal taxes and at the sale defendant 2 became the purchaser. By virtue of this sale it is claimed by defendant 2 that he acquired the property free from all encumbrances. In the trial Court two issues were raised in respect of this matter:

> (1) Had defendants 1 and 2 collusively caused the auction of property item 1 for arrears of Municipal taxes and bought it in the name of defendant 2 for the benefit of defendant 1? (2) Is property no. 1 still subject to the plaintiff's mortgage?

Having acquainted ourselves with the facts and circumstances of the case, it appears to us that for the purpose of this case it is not essential to determine whether defendant 2 was the real or merely an ostensible purchaser of the property at the auction sale. As the sale was held under the provisions of S. 45 and not under the provisions of S. 47, Burma Land and Revenue Act, the answer to the question for determination will be the same whether defendant 2 was a real purchaser or only a benamidar. It cannot be disputed that in order that a revenue sale of land might convey a title free from all encumbrances it must have been a sale under S. 47. The warrant of attachment recites S. 45 of the Act as the authority under which it was issued : the proclamation of sale announced that the sale was going to be under that section. Upon these materials it cannot be doubted that the sale was held under S. 45 and not under S. 47, Burma Land and Revenue Act. The certificate of sale that was issued however was in the form used for sale under S. 47 and stated that the land was sold for recovery of arrears of land revenue and was free from all encumbrances. It is obvious that this form was used through inadvertence. Whatever this form may state, it cannot in any way alter the real nature of the sale which had been held about five months before the certificate was issued. For these reasons in my opinion the learned Additional District Judge was right in holding that the land was still subject to the mortgage in favour of the plaintiff-respondent. The appeal fails and it is dismissed with costs.

**Baguley J.**—I agree that this appeal must be dismissed. There is no question of the sale having been under S. 47. The attachment for sale was under S. 45 ; the sale proclamation was also under S. 45 : the sale therefore must have been under that section, and it would transfer only the right, title and interest of the original mortgagor. The mere fact that after some months the revenue officer signed the sale certificate in the wrong form cannot alter what was actually sold. It is argued by Mr. Sanyal that a sale certificate is a document of title and that until that is set aside the original mortgagee can do nothing. That is not a correct view of the law as I understand it. It is not the owner that signs a sale certificate : a revenue officer signs it and he signs it to give effect to the sale that has taken place ; and the power of selling property belonging to other people is strictly limited by law. The Judge of the trial Court should draw the attention of the Collector to the carelessness of the revenue officer in issuing a sale certificate in the wrong form. If this is merely an isolated lapse it was gross carelessness. If the wrong form is habitually used in such cases, the practice should be stopped at once.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 56

ROBERTS C. J. AND SPARGO J.

*Nga Myauk Nyo (a) Po Bein*
Appellant.
v.
*The King.*

Criminal Appeal No. 707 of 1937, Decided on 15th July 1937, from order of Sess. Judge, Myaungmya, D/- 23rd June 1937.

**(a) Criminal Trial — Responsibility of accused — Injury, though ordinarily sufficient to cause death, not fatal — Death due to infection — Criminal responsibility does not change.**

Where an injury was sufficient in the ordinary course of nature to cause death but was not necessarily fatal and the death took place because infection set in, the fact however would make no difference to the criminal responsibility of the person charged. [P 57 C 1, 2]

**(b) Criminal Trial—Medical evidence—Age —Doctors should say with certainty what they feel the age should be.**

Medical officers must not forget that the Court must decide matters regarding age beyond reasonable doubt and not on a preponderance of probability. If they are convinced beyond reasonable doubt they should say "I feel certain accused is of a particular age" and not "I do not think he is younger than a particular age". [P 57 C 2]

**(c) Criminal Trial—Sentence—Guilt proved —Crime inexplicable — Sentence should be lenient.**

Where there are features in a case which render the crime inexplicable in that although the guilt of an accused has been proved, yet the whole story has not been told, it is better to err, if at all, upon the side of leniency while passing sentence. [P 57 C 2 ; P 58 C 1]

S. Loo-Nee — *for Appellant.*

E. W. Lambert, Govt. Advocate — *for the Crown.*

**Roberts C. J.** — The appellant Myauk Nyo (a) Po Bein was convicted of the murder of Teh Po near Kathabaung on 4th February 1937, by the learned Sessions Judge, Myaungmya, and was sentenced to death. Maung Nyun Tin who was ill at the time of the trial and whose deposition was admitted in evidence under S. 33, Evidence Act, says that he found a Chinaman lying on a cart track about forty fathoms from U Tha Byaw's pond (which is near Kathabaung) some time after 9 o'clock one morning. The Chinaman had blood oozing from his neck and asked to be taken to the house of Ko Sit Kyi. There was no information given by the Chinaman about his assailant. Witness reported to Ko Mo Gyo, the ten-house gaung. Ko Mo Gyo was next on the scene. He went there with 9 or 10 villagers on receiving Maung Nyun Tin's report. The injured man, he says, told him that he did not know the name of his assailant but that he could identify him if he saw him again. There were two men of whom he knew one. He was not asked and he did not mention where either man lived or worked. Ko Mo Gyo left eight men at the place and went to report to the headman. Then the headman U Tun Tet came. He had collected about twenty villagers and he saw Teh Po lying in the place described by Maung Nyun Tin. U Tun Tet asked the deceased who had cut him. There were present at that time U Ta Lok, Saya Chone and Maung Sein amongst others. The deceased said the assailant was the younger of the two brothers who had worked as coolies under Ko Kyaw Saing about two years ago. Those present were called to support this, and Saya Chone says that the deceased said:

> Last year two brothers worked under Kyaw Saing as his coolies. The younger of those two brothers had cut me with a da.

But U Ta Lok and Maung Sein do not support this evidence. U Ta Lok says:

> When the headman questioned him the wounded man said: 'Two men came up to me from near the tank and from behind and one of them cut me. . . . I know one of the two but I do not know his name. He was the younger of the two brothers who worked under Kyaw Saing two years ago.

The deceased did not definitely mention that the younger brother who worked under Kyaw Saing had cut him; he merely said he was one of the two. Maung Sein agrees; he said:

> The wounded man did not say that the younger brother had cut him. He merely said he was included in the two men who had cut him.

Pausing at that point, there is a plain discrepancy as to what deceased actually said. It is clear he said the younger brother of the two coolies was there, but not clear whether he said that he was his actual assailant. (His Lordship after discussing evidence came to the conclusion that appellant was the person who struck the fatal blow, and proceeded). The wound was an incised one on the back of the neck cutting the vertebral bone and exposing the spinal cord. Great force was necessary and the injury was sufficient in the ordinary course of nature to cause death. It was not necessarily fatal but death took place because infection set in. This fact, however, makes no difference to the criminal responsibility of the person charged. It is difficult to know whether there was premeditation. According to the deceased's dying deposition, the attack was sudden and unexpected; the motive could have been but slight and must have been to gain possession of the da, scabbard and lamp in the deceased's possession. No one can tell whether the motive, such as there was, occurred to the appellant, or whether it was suggested to him by his companion.

The appellant is only 19. He says he is 16 but the doctor considers him to be 19 and the learned Sessions Judge accepted this evidence. The doctor says "In my opinion he is between 19 and 20." He then gives some reasons and adds "I do not think he can be younger than 19." The use of these phrases has caused us a little doubt as to the precise attitude of the doctor's mind; there was practically no cross-examination and we do not know what his answer would have been if it had been suggested to him that though it may be unlikely that the appellant is less than 19, it is still possible. Medical officers must not forget that the Court must decide these matters beyond reasonable doubt and not on a preponderance of probability. If they are convinced beyond reasonable doubt they should say "I feel certain accused is 19", and not "I do not think he is younger than 19." There was no evidence which could implicate Mya Maung in the striking of the fatal blow, but two men were undoubtedly present. No one will ever know whether this murder was committed by this youthful appellant at the instigation of an older man or not: nor will it ever be known whether the death of the victim was intended. The blow was such that hopes were entertained of the victim's recovery: it was a single blow. I have hesitated long with regard to the penalty, but there are features in the case which render the crime so inexplicable that I feel that although the guilt of the appellant has been proved the whole story has not been told. In these circumstances I think it better to err, if at all, upon the side of leniency and accordingly I would affirm the conviction but set aside the sentence of death and substitute therefor a sentence of transportation for life.

**Spargo J.**—I agree with what my Lord the Chief Justice has said, and I only desire to add that there was considerable obscurity in the evidence of the medical officer. He said "To support my opinion I found in him 16 teeth in the lower jaw and 15 in the upper. The right upper molar had not yet erupted." In cross-examination he said "I have never seen a case where wisdom tooth has erupted before any age less than 19 among the Burmans." He had made no mention of wisdom tooth in his examination-in-chief, and this sudden introduction of the topic causes confusion. It may be that there was one wisdom tooth in the lower jaw and that explained the difference in the number of teeth there from the number of teeth in the upper jaw; but that should have been made perfectly clear. It was partly on account of our doubts respecting the age that we felt impelled to alter the sentence.

B.D./R.K. *Sentence reduced.*

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## ✻ A. I. R. 1938 Rangoon 58

BAGULEY AND SHARPE JJ.

*M. K. Ahmed Ebrahim Rowther* — Appellant.

v.

*O. T. Mohamed Meera Sahib* — Respondent.

Misc. Appeal No. 31 of 1937, Decided on 25th August 1937, against order of High Court, in C. M. No. 220 of 1936.

**✻ Letters Patent (Rangoon), Cl. 13 — Judgment—Petition to sue as pauper — Rejection of—No appeal lies from order of rejection of petition as it is not judgment.**

The right to sue as pauper under certain circumstances is not a substantive right but is merely a matter of procedure. When a petition to sue in forma pauperis is rejected, the plaint is not rejected but only the petition praying to be allowed to prosecute the suit as a pauper without paying court-fee. The plaint can be filed in the ordinary way by paying proper court-fee on the same. This is a mere matter of procedure, and the rejection of the petition does not involve any decision on any substantive right. Therefore no appeal lies from an order rejecting a petition to sue as pauper as it is not a judgment within Cl. 13 : *A I R 1925 Mad 167 and 35 Mad 1, Dissent; A I R 1935 Rang 267 (F B), Rel. on; C M A No. 31 of 1935 and C M A No. 134 of 1929, Held overruled by A I R 1935 Rang 267 (F B).* [P 59 C 2]

Cowasjee — *for Appellant.*

Doctor — *for Respondent.*

**Baguley J.** — This is an appeal against an order passed by the learned Judge on the Original Side dismissing the appellant's application for leave to sue as a pauper. A preliminary point has been raised that no appeal lies. In my opinion this preliminary point is a good one. It is admitted that an appeal will not lie against this as an order under the Civil Procedure Code, but it is argued that the order amounts to a judgment under Cl. 13, Letters Patent. What a judgment is has been laid down by this Court in 13 Rang 457,[1] and on p. 475 there occurs the passage:

> I am of opinion that in the Letters Patent of the High Courts the word "judgment" means and is a decree in a suit by which the rights of the parties at issue in the suit are determined;

and that is the gist of the whole case which was a unanimous decision by a Bench of seven Judges. It is argued on behalf of the appellant that a rejection of the application for leave to sue as a pauper is equivalent to a dismissal of the plaint. O. 33 has been recast by the Rule Committee of this Court. It is now laid down in O. 33, R. 2 that the plaintiff may obtain leave to sue as a pauper by presenting his plaint, with a petition signed and verified in the manner prescribed for the signing and verification of plaints, stating certain matters. It is pointed out that the person who comes to Court is not described as a petitioner but as a plaintiff and he has brought a plaint to the Court. It is argued that if his petition for leave to sue as a pauper is rejected the plaint is automatically rejected together with it, and as the rejection of the petition involves the rejection of the plaint, the rejection of the plaint is a decree. With this argument I would be in full accord were I to agree that the rejection of the petition involves with it the rejection of the plaint; but the Code does not say that it shall be the case. R. 4 deals with the rejection of the plaint. In R. 4 (4) it is stated :

> * * * * the petition shall be rejected under this Rule if the Court is not satisfied of the truth of any of the statements made in the petition; provided that the Court may admit the plaint on payment of the court-fee due thereon,

which shows that the plaint is certainly not rejected automatically if a petition is rejected, because it says that the Court may allow the plaint to continue provided it is supported by the necessary stamp-fee. Again in sub-r. (5) of the same Rule the result of rejecting a petition is noted :

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[1] Dayabhai Jiwandas v. A. M. M. Murugappa Chettiar, A I R 1935 Rang 267=157 I C 1107 =13 Rang 457 (F B).

> If the petition is rejected the plaintiff shall be precluded from filing any further petition to sue as a pauper in respect of the same cause of action.

That is the result if the petition is rejected: the plaintiff cannot sue in that way again, but the Rule does not say that the plaint is automatically rejected or that the plaintiff is precluded from suing on his plaint if he files his plaint in the ordinary way: all that happens to the plaintiff is that he is precluded from availing himself of this particular form of suing, namely suing without paying the necessary court-fees. This however is a matter of procedure. It should be unnecessary to labour this point, because the right to sue as a pauper in certain circumstances is given not even in the Civil Procedure Code but in the Schedule attached to the Civil Procedure Code, and in my opinion a substantive right cannot be given in a Code which deals only with procedure. It is however necessary to mention this particular point in view of 48 Mad 700,[2] a case in which a Bench of the Madras High Court held that an appeal against an order permitting a plaintiff to sue in forma pauperis was held to lie. On p. 701 occurs the passage :

> We think that the law confers a substantive right on every plaintiff who has a good case at law, but no means to prosecute it, to sue in forma pauperis.

With due respect I am unable to accept this view. I do not think substantive rights are meant to be awarded in the Code of Procedure: the plaintiff may have a right to a certain form of procedure: it can hardly be called a substantive right. It is also to be noted that the Madras High Court in this matter is governed by 35 Mad 1,[3] which is the leading case in Madras as to what is the meaning of the word "judgment" in the Letters Patent. 35 Mad 1[3] was dissented from in 13 Rang 457[1] aforementioned. Mr. Cowasjee has referred us to two cases of this Court. One is Civil Misc. Appeal No. 31 of 1935[4] in which an appeal by this Court was allowed against an order rejecting an application to sue as a pauper. The question whether an appeal lay or not was not discussed, but this can be explained easily by the fact that this case was decided before the Full Bench decision in 13 Rang 457[1] was announced. Another case, Civil Misc. Appeal No. 134 of 1929,[5] again is no longer good law because that also was decided before 13 Rang 457.[1] In my opinion it cannot possibly be said that the rejection of the petition for leave to sue as a pauper finally decides the matters in issue between the parties: the plaintiff can still file his plaint in the ordinary way, that is to say with proper court-fee attached; all that he loses is the right to a certain procedure and this is not a final determination of the matters in issue between the parties. For these reasons I would dismiss this appeal with costs; advocate's fee two gold mohurs.

**Sharpe J.**—An application for leave to sue as a pauper is entirely a matter of procedure. I agree with my brother Baguley that the preliminary objection taken in this case succeeds. We are not at liberty to entertain this appeal.

B.D./R.K. *Appeal dismissed.*

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[2] P. Baba Sah v. Purushothama Sah, A I R 1925 Mad 167=85 I C 201=48 Mad 700=47 M L J 932.

[3] Tuljaram Row v. Alagappa Chettiar, (1912) 35 Mad 1=8 I C 340=21 M L J 1.

[4] J. C. Maurice v. Secretary of State, Civil Misc. Appeal No. 31 of 1935.

[5] S. M. Mitra v. Corporation of the Royal Exchange Assurance, Civil Misc. Appeal No. 134 of 1929.

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## A. I. R. 1938 Rangoon 59

BAGULEY AND SPARGO JJ.

*N. Padayachi and another*—Appellants.

v.

*A. Ammal* — Respondent.

First Appeal No. 7 of 1937, Decided on 15th July 1937, against order of Dist. Court, Hanthawaddy, D/- 16th October 1936.

**Hindu Widows' Re-marriage Act (1856), Ss. 6, 7—Re-marriage—Substantial performance of requisite religious ceremonies is essential—Neither consent of widow of full age under S. 7 nor mere talk by person in presence of visitors of his intention to take her as his wife is enough.**

There can be no valid marriage in any form without a substantial performance of the requisite religious ceremonies. The performance therefore of the necessary religious rites is necessary for the completion of a marriage even in a gandharv form, of which re-marriage of a widow is an instance. [P 61 C 1]

**So, neither the consent of a widow to re-marry herself under last paragraph of S. 7 nor mere talk by a person in the presence of visitors of his intention to take her as his wife is sufficient to constitute a valid marriage in the absence of the**

performance of some religious or secular rites: *12 Mad 72, Rel. on.* [P 60 C 2; P 61 C 1]

R. A. R. Aiyar — *for Appellants.*

Chari — *for Respondent.*

**Baguley J.**—In the main appeal the only point for decision is whether Doraiswamy married Kamalam in such a way as to make her his lawful wife and her children by him legitimate. There is little doubt as to what actually happened. Doraiswamy and Narayanaswami were brothers living with their father Utharapathi Padayachi and his father-in-law Nagamuthu. When Narayanaswami died he left his widow Kamalam. Doraiswamy at that time had no wife but only a woman he was keeping. Kamalam was pregnant but it would seem certain that immediately after Narayanaswami died Doraiswamy was having intercourse with Kamalam and it is claimed that within a month or two of Narayanaswami's death Doraiswamy married Kamalam. Kamalam's claim is that on the day in question her foster father and others came to take her back to his house. Why this widow should have gone back to the house of the man who stood in place of her father is not explained. The general idea particularly among Hindus of this class is that when a wife becomes a widow she stays in her husband's family and exchanges from being in charge of her husband to being in charge of her mother-in-law or father-in-law as the case may be. However, Kamalam says that Doraiswamy's grandfather suggested that Doraiswamy should take her as his wife, and she says that Doraiswamy said "I will keep her as my wife: I will not allow her to go elsewhere". The witness Govindaswami Vanniar says:

> Nagamuthu Padayachi said that he had two adopted sons and that one of them had died and he was going to marry the wife of that deceased son to the other son Doraiswamy. . . . Then we said that it would be alright if Doraiswamy took Kamalam as his wife. . . . . So saying we came away.

The witness Thangavelu Pillay says that "after the discussion Doraiswamy said 'I will take Kamalam as a wife'. Then we all consented and said 'Alright you can take her as your wife' ". Supaya Odaya says:

> A little while later Doraiswamy came and said that as neither he nor his brother had any children, he was going to keep Kamalam with him. Then they fed us and we came away. . . . . He (Doraiswamy) said that he was going to keep Kamalam as his wife, as Kamalam was then pregnant.

In cross-examination this witness puts it as "He" (Doraiswamy) "said that he was going to take her as his wife. We did not ask him when he was going to do so". On this we are asked to hold that there was a valid legal marriage between Doraiswamy and Kamalam. In argument, first of all stress is laid on the Hindu Widows' Re-marriage Act (Act 15 of 1856). I am unable to see what help the appellant can get out of this. This is merely an act to remove legal obstacles in the way of the marriage of Hindu widows. S. 1 says that no marriage shall be invalid by reason of the woman having been previously married; S. 2 deals with her rights in her deceased husband's property; S. 3 deals with the guardianship of children of the first marriage; S. 4 refers to childless widows inheriting, but S. 5 saves certain rights to property on re-marriage; S. 6 says that if the ceremonies performed would have constituted a valid marriage for a Hindu female had she been a virgin, those same ceremonies would constitute a valid marriage if the woman is a widow and S. 7 deals entirely with the question of who is to consent to the re-marriage of a widow. The first part of the section deals with the consent in the case of re-marriage of a minor widow and the last part is the one upon which stress is laid:

> In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

From this it is argued that a widow can re-marry herself merely by consent. This is a meaning which the section will not bear: for all Hindu marriages some formal consent has got to be given on behalf of the woman. In the ordinary way when a virgin is married her parents give their consent. The last part of this section simply says that if the widow is of full age her consent will only be necessary. For the appellant reliance is placed on Sarkar's Hindu Law (7th Edn.) p. 120—quotations from Manu. From these it is deduced that they cannot be used for widows. This of course is contrary to the Hindu Widows' Re-marriage Act, and from p. 169 a passage was quoted:

> Grown-up, as well as widows, are deemed sui juris in this respect, and therefore may become self-given, or give their ownselves in marriage to men willing to marry them. The secular gift and acceptance of the bride would be sufficient to create the relation of husband and wife between the acceptor and the woman.

From this it is argued that some mutual consent is sufficient to constitute a marriage in the case of a widow. This passage however can obviously not be taken by itself. A paragraph appears on page 168 with the sentence:

> The latest commentators unanimously maintain the necessity of the performance of religious rites for the completion of marriage in all cases including even the gandharva.

And in the previous page there is another passage:

> Accordingly, religious ceremonies do not appear to be performed or deemed necessary in the remarriage of women who are either widows, or relinquished, deserted or released by their living husbands. . . . These marriages are instances of the gandharva form, as they take place by consent of the bride who is presumably a grown-up woman. But some customary secular ceremony is performed, such as exchange of garland of flowers or the putting by the man of a red mark of vermillion on the forehead of the bride in the presence of assembled friends and relations, and some ceremony is necessary, otherwise it would be difficult to distinguish gandharva marriage from concubinage.

It will be seen from these quotations that Sarkar's Hindu Law does not help the appellant. Gour's Hindu Code was also referred to but the utmost help that the appellant can get from this work is at page 302 of the 3rd Edition:

> Of all widow marriages, the marriage of the widow to the deceased husband's younger brother is that most favoured and one which needs least ceremony everywhere.

Trevelyan's Hindu Law is quite definite. On p. 63 it is stated:

> There can be no valid marriage in any form without a substantial performance of the requisite religious ceremonies.
>
> Even when the gandharva form of marriage is permissible by custom, the Courts will not recognize it unless religious rites have been performed, although the gift of the bride is in a marriage in that form unnecessary.

*Vide also* 12 Mad 72.[1] There seems to be no evidence whatsoever in this case of any religious ceremony having been performed and it is difficult to say that there was even a civil ceremony. There was at most a certain amount of talk at which consent was given to a marriage taking place but that this talk was regarded as the actual marriage ceremony is not made out. As a last resource the appellant urges that there has been produced sufficient evidence to show that what was done constituted a marriage by custom.

The first witness called was Utharapathi Padayachi, Doraiswamy's father. He was asked in examination-in-chief "What was the relationship between Doraiswamy and Kamalam"? His answer was "Kamalam is the wife of Doraiswamy's younger brother, Narayanaswami", which certainly does not sound that this witness regarded her as Doraiswamy's wife. The witness not having come up to expectations he was asked: "Was Doraiswamy married to Kamalam or not?" and the answer given was "In our custom we can take a woman in the presence of ten persons". This witness was clearly unsatisfactory, for he went on to say that widows had not been re-marrying since, although in olden times they had done so. After this the Court adjourned for lunch and he came back with his re-collections sharpened. He then said that he had seen a good many re-marriages himself but in the case of widows' re-marriages the ceremonies were not performed so elaborately as in other cases. He was then asked in examination-in-chief a somewhat unfair question "Were any ceremonies performed at the marriage of Kamalam and Doraiswamy"? I say this is not a fair question because up to this point the witness had not said that Kamalam and Doraiswamy had got married at all. He however still would not commit himself because the answer he gave was "Kamalam was taken by Doraiswamy as if in marriage in the presence of ten persons". The distinction between taking "a person in marriage" and "as if in marriage" is to my mind very clear. The witness admits that none of the ordinary marriage ceremonies was performed between Doraiswamy and Kamalam. He tries to make out that this 'taking' constituted a marriage but when asked "What happened at this marriage between Doraiswamy and Kamalam"? he gave inexplicable reasons. Apparently the family wanted to keep her in their custody in case the child she was bearing happened to be a son. When asked with regard to other cases of men marrying widows he said "They did not actually marry widows, but took them as wives", and then explained that the two things were the same. When asked "Were those widows wives of the brothers?" the reply he gave was "It was not a marriage, but was a taking in the presence of ten persons". Later on he said that respondent was the real wife of Doraiswamy. The witness also said:

> As there were frequent quarrels between Ammakannu and Kamalam, Doraiswamy kept her in

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[1] Brindavana v. Radhamani, (1889) 12 Mad 72.

the field hut. Kamalam used to live in the field hut for two or three months at a time and then return to Doraiswamy's house in the village.

Kamalam's own version of her marriage seems to be that Doraiswamy said that he was going to keep her as his wife when her foster father came to take her away, and in cross-examination she said "I was told that formerly widows used to re-marry, but widows do not now re-marry in our caste because it would be a shame on them". And later on she said she had never seen any widow re-marrying in her community. The witness Govindaswami Vanniar says his caste is the same as that of Utharapathi Padayachi and in his caste widows do not re-marry. Later on he makes out that marriages of widows with other husbands would be Gandharva marriages; but he says he does not know of any case in which a pregnant widow had been married before the birth of the child by the former husband. Thangavelu Pillay, the next witness, distinctly says that when the talk took place, Nagamuthu and Utharapathi Padayachi said that Kamalam was going to be married to Doraiswamy. Supaya Odaya, the next witness for the appellant, after saying that he had married a widow explains that he did not really marry her but merely took her as a wife and this witness also, as I have said before, speaks of Doraiswamy announcing that he was going to take Kamalam as his wife. The utmost that I can make of this evidence is that a party of visitors came to talk about Kamalam's future and Doraiswamy said that he would take her as his wife, very possibly in view of the custom suggested by the witness Govindaswami Vanniar that a pregnant widow would not get married before the birth of the child by her former husband. There is no suggestion whatsoever in this case of any attempt to have any ceremony religious or secular performed after the birth of the child Kamalam was bearing at the time her husband died and therefore it cannot be held that she was the wife of the deceased Doraiswamy. For these reasons the appeal must fail: it is dismissed with costs, advocate's fee ten gold mohurs. A cross-objection has been filed to this appeal but it does not really arise out of this decree and as it is being dealt with in Civil First Appeal No. 24 of 1937, it is formally dismissed: no orders as to costs.

**Spargo J.**—I agree.

A.L./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 62

ROBERTS, C. J. AND SPARGO, J.

*Nga Paw* — Appellant.

v.

*The King.*

Criminal Appeal No. 708 of 1937, Decided on 19th July 1937, from order of Addl. Sessions Judge, Thayetmyo, D/- 18th June 1937.

**(a) Criminal Trial — Murder — Sentence— Accused eighteen years old, bit excited and somewhat drunk striking heavily on head of man lying prostrate—Death of victim—Case held one of murder—Sentence of transportation passed — Accused recommended to be detained in Borstal School for four years.**

The accused who was eighteen years of age and who on his wedding day was a bit excited and somewhat drunk struck a heavy blow with a stick on the top of the head of a man who was already lying prostrate because of an attack on that person by another man, and the person died:

*Held* that although the case came near the border line between culpable homicide and murder, yet it fell on the side of murder. [P 64 C 1, 2]

*Held further* that under the circumstances a sentence of transportation should be passed with recommendation for commuting sentence to detention for four years in Borstal School which would be sufficient. [P 64 C 2]

**(b) Criminal Trial — Intention — Accused hitting with stick picked out at random from among several sticks — Size of stick does not necessarily indicate intention.**

Where accused has picked out a stick from among several sticks lying to hand and there is no evidence that he specially picked out a particular one, the size of the stick by which he hits is not a necessary indication of his intention. [P 64 C 1]

**(c) Criminal Trial—Murder and culpable homicide—Case on border line—Court is not to invent defence to make case one as of culpable homicide.**

Where a case is on the border line of murder and culpable homicide, it is not for the Court to invent a defence which would bring the case of an accused within the ambit of culpable homicide. [P 64 C 2]

S. T. Leong — *for Appellant.*

**Roberts C. J.**—The appellant Nga Paw was convicted by the learned Additional Sessions Judge of Thayetmyo of the murder of one Maung Saw on 23rd January of this year and was sentenced to death. The case has presented many features of difficulty and we are both of opinion that, although the evidence that the appellant inflicted the fatal blow upon his victim is convincing in every respect, we have not heard the full story of how the blow came to be inflicted, and that a number of circumstances about which we have been anxious to find enlightenment were not disclosed at the Sessions trial. In saying this we are not passing any criticism on the learned Judge who tried the case, but the village in which this incident occurred (Sitsaba) appears to be a primitive place and the persons who were eye-witnesses of the crime appear not to have had a very high degree of intelligence.

The day in question was the appellant's wedding day. He was marrying a young woman named Ma Nwe who was the daughter of Ma Nu, and the bride's sister was married to a young man named Nga Khe who has been convicted under S. 323, I. P. C., for the assault on Maung Saw a few seconds before it is alleged the present appellant made the attack upon him which proved fatal. The wedding festivities had taken place in the morning, and there is unquestioned evidence that the villagers concerned in the festivities, who were Chins, had taken a quantity of Khaung-ye to drink and were, at any rate some of them, during that day probably in an excited condition. The appellant himself, as the bridegroom, would be the centre of these festivities, but throughout the trial no single question was put which would imply that he was intoxicated or unable to form any clear intention of what he was doing, or in such a condition that we should not ascribe to his actions the normal intentions which are to be expected in every normal man. The evidence is that during the early part of the day there was some slight dispute about water. The appellant went to the deceased for water and Ma Byaing asked him not to take it, and the appellant agreed and left. Maung Saw then let the water out of the receptacle in which it was placed and was seen to do so by Ma Bon. Ma Bon and Ma Byaing later heard the appellant uttering an abusive expression, but there is no evidence that he went further and used any threats or that the quarrel, if any, was taken up immediately. At about lamp-lighting time Ma Bon went up to the house of the deceased who said that there were persons near the house of his uncle Maung San presumably with some evil intent, for the deceased said he would warn his uncle of their presence. Maung San saw Nga Khe (the man who has been convicted of assault upon Mg. Saw) and Nga Khe was armed with a stick and said he was waiting to thrash Htaung Bo. Maung Saw turned up in a moment or two and warned Maung San that there were persons near his house, but Maung San told the deceased that he knew about that; and the deceased and Ma Bon thereupon were about to return to their houses.

Now, there is a volume of evidence which shows that when they were somewhere near the house of Ma Byaing, Nga Khe came and struck a blow at the deceased with the stick which he was carrying, which has not been found and as to the nature of which we are imperfectly informed although it has been said that it was a bamboo stick. It is said that he used both hands to strike the blow and that the deceased fell at once. The blow was on the nape of the neck, but it is part of the case for the prosecution that although the blow felled the deceased and he remained motionless upon the ground for some moments afterwards, no mark of injury from this first blow was noticed when he was afterwards brought in from the scene. Ma Bon cried out "Come, come, Nga Khe has beaten and run" and Maung Ohn Maung is said to have come on the scene; and he says that he saw, after Nga Khe had run off, the appellant coming up to beat the deceased and that the appellant struck two blows with a stick, using both hands, upon the deceased's head as he lay prostrate on the ground. Ma Bon, who also saw this happen, tells the same story, and she cried out again to say that the appellant was striking the deceased. The witness Ma Byaing is the widow of the deceased, and at the committal Court she declared that she was an eye-witness of the murderous assault by the appellant; but this was not her story in the Sessions Court and we think, having been satisfied that the appellant was her husband's assailant, she has consciously improved upon her evidence. Accordingly, that part of the story would have to be regarded with suspicion if it were not for the evidence of other witnesses which goes far to substantiate it.

Ko San, Maung Pay and Maung Pyit are three witnesses for the prosecution who all heard Ma Bon call out at the time that Nga Khe and Nga Paw had beaten the deceased and, although we were at first asked by the advocate for the defence to say that the story of Ma Bon and Mg. Ohn Maung was consciously untrue, it is clear that they have not deflected from the account which they gave at the moment the murderous assault took place.

We are, however, not satisfied that the appellant struck two blows upon the deceased. It is true he may have done so, but only two marks of injuries were found by the doctor and we think that the blow on the nape of the neck alleged to have been delivered by Nga Khe, which felled the deceased, may very well be the same blow as that on the back of the head spoken of by the doctor. If a blow were just above the nape of the neck, it would be very difficult to distinguish it from one at the base of the back of the skull, and although we are satisfied that the witnesses were telling the truth to the best of their ability and that the appellant struck the very serious blow on the top of the deceased's head, we are not satisfied that he struck two blows, but think that the injury at the back of the head may have been caused by the first assailant. That being so, we have to deal with the case upon the footing that one blow only was struck by the appellant.

It has been urged upon us that the offence, in all the circumstances of the case, does not amount to murder. The doctor, however, says that very great force was used and that the wound inflicted on the top of the head was necessarily a fatal one and that no prompt medical aid could have saved the deceased. The stick which the appellant used was 2 feet 10 inches long by 7 inches in circumference and weighed over 3 pounds. Although the stick was a heavy one and appears to have been used for killing pigs in connexion with the wedding festivities that morning, there is no evidence that it was specially picked out from other sticks by the appellant: it seems to have been lying to hand, and we do not think that the size of the stick by itself is necessarily a fair indication of the appellant's intention. On the other hand the injuries were inflicted upon a man who had already been struck so that he lay prostrate on the ground, and we have to ask ourselves whether in all the circumstances we can say that the appellant did not intend to cause such bodily injury as was sufficient in the ordinary course of nature to cause death. We find it impossible to come to that conclusion.

Although the case is somewhere near the border line between culpable homicide and murder, and we feel that in the circumstances of the wedding feast it is possible that there may have been a degree of excitement in the appellant's mind and that he may have been to some extent inflamed by the drink which he had consumed during the day, it is not for this Court to invent a defence which would bring him within the ambit of culpable homicide merely. We therefore feel that we are obliged to say that this is a case of murder. It is not a case, in all the circumstances, for the confirmation of the death sentence. In passing the only other sentence open to us, that of transportation for life, we desire to draw the attention of the authorities to the fact that had we been able to find that this was a case of culpable homicide merely, we should have thought in view of the age of the appellant, which must be taken in view of the medical evidence to be 18 years, that Borstal treatment for four years would have been a sufficient sentence. The doctor says he is sure the appellant is not less than 18 years of age and most probably he is 19. Upon this basis his age must be judicially fixed, and we do this by fixing the age at 18 years.

The circumstances of the case have given us great anxiety; for we feel that, although we are obliged to classify the offence as one of murder, the extreme youth of the appellant and the exceptional circumstances of the day may have contributed to his commission of an act with a less degree of intention as to its consequences than would ordinarily be the case. It is dangerous to lay down a general rule in cases of this kind, and we think that each case must be judged according to its special circumstances. In the absence of direct evidence which would establish an offence of culpable homicide in a case which prima facie is one of murder, we feel obliged to confirm the conviction for murder and to substitute the only legal alternative to a sentence of death, namely, that of transportation for life; but we draw the attention of the authorities to our observations in the hope that the sentence may be further commuted to one of four years' detention in a Borstal institution.

**Spargo J.**—I agree.

B.D./R.K. *Sentence reduced.*

## ✲ A. I. R. 1938 Rangoon 65

MACKNEY J.

*Ma E Khin and others* — Appellants.

v.

*P. S. Mohamed Ali* — Respondent.

Special Second Appeal No. 111 of 1937, Decided on 26th August 1937, against decree of Dist. Court, Yamethin at Pyinmana, in C. A. No. 98 of 1936.

**✲ Limitation Act (1908), Arts. 137 and 144 —Suit for possession—Co-mortgagor redeeming property — Sale of entire property — Representative-in-interest of non-redeeming co-mortgagor bringing suit for recovery of possession on payment of proportionate amount—Suit held was covered by Art. 144 and not by Art. 137 – Co-mortgagor redeeming property and getting possession does not hold adversely to non-redeeming co-mortgagor—Adverse possession by them starts only from date of sale of entire property.**

The words "entitled to possession" in Art. 137 mean "able to exercise his right of possession", and the words "out of possession" imply that the judgment-debtor at the time of the sale was not in a position to exercise his right of possession. [P 66 C 2; P 67 C 1]

*M* in a Court auction purchased the share of *X* in property jointly belonging to *X* and others. At that time the property was under a mortgage executed by *X* and other co-owners. After that, the other co-owners other than *X* or *M* redeemed the entire mortgage and after further mortgages and redemptions finally sold it to a third party. *M* brought a suit to recover his share on payment of proportionate amount. The suit was brought more than 12 years after the redemption of the joint mortgage by *X* and his co-mortgagors but within 12 years of the sale of the entire property to the third party. It was contended that Art. 137 applied to such suit and as such it was barred by time:

*Held* that the co-mortgagors on redeeming the land and coming into possession thereof did not hold adversely to the non-redeeming partner. They either held a charge or obtained the rights of the original mortgagee over the share belonging to *M*. Although they dealt with the land as they would their own and mortgaged and redeemed it, none of these acts would make their possession adverse to that of *M*. It was not until they sold the whole of the land including *M's* share that they exercised claim adverse to him. Therefore *M's* suit must be brought within 12 years of the date of sale under Art. 144 and Art. 137 was not applicable. So long as the redeeming co-mortgagor did not so act as to indicate that his possession has become adverse to that of the non-redeeming co-mortgagor, the latter was always able to recover his share, unless under the rights conferred by S. 92, T. P. Act, the co-mortgagor could claim that the time for redeeming the original mortgage has passed: *A I R 1936 Rang 252, Disting.*; *130 P R 1906, Ref.* [P 66 C 1; P 67 C 1]

R. M. Sen — *for Appellants.*

De for Basu — *for Respondent.*

**Judgment.** — The plaintiff-respondent, P. S. Mohamed Ali, in the Township Court of Yamethin sued seven persons for recovery of possession of a one-fourth share in a certain piece of land on payment of Rs. 225. In that suit the present appellants were defendants 1, 6 and 7 respectively. Defendants 2, 3, 4 and 5 were found to have no interest in the suit. The facts in the case are as follows: The land originally belonged to four persons, three of whom were represented by defendants 3, 4 and 5. The share of the remaining person, Maung Lu Hein, was bought by P. S. Mohamed Ali at a Court auction on 12th May 1923. At that time the land was under usufructuary mortgage in which all four original owners had joined (about 1913). This mortgage was redeemed by the co-mortgagors other than those representing Lu Hein's interest on 19th May 1923, and on the same date they re-mortgaged a large proportion of the land to some other person. This mortgage they again redeemed on 21st February 1927 making another usufructuary mortgage of the whole of the land on the same date. Finally these co-sharers relinquished their interest in the land by selling it to Ma E Khin on 11th May 1930. Ma E Khin again on 15th May 1930 mortgaged the property to Maung Kyi and Ma Toke. Mohamed Ali brought his suit on 2nd July 1936.

The Township Court held that Art. 137, Lim. Act applied and that the plaintiff's suit was therefore statute barred. He dismissed the suit with costs. Mohamed Ali appealed and the learned District Judge set aside the order of the Township Court and granted the plaintiff a decree for redemption of his quarter share, declaring him further entitled to partition and separate possession thereof. The learned District Judge held that Art. 137, Lim. Act did not apply in virtue of the provisions of S. 92, T. P. Act, which, although it was not enacted in 1929, he held, had retrospective effect. He applied Art. 134, Lim. Act and held that limitation started to run from the date of the sale of the land to Ma E Khin, so that the suit was well in time. Against this decision Ma E Khin and her mortgagees have appealed on the grounds that Ss. 92 and 95, T. P. Act, cannot be held to have retrospective effect; that Art. 134, Lim. Act, does not apply but Art. 137 thereof does apply.

Some confusion has been introduced into the case by the raising of the question as to whether S. 92, T. P. Act, is retrospective or not. S. 92, T. P. Act, deals with the rights of a co-mortgagor on redeeming property subject to a mortgage, and it declares that he shall have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. In the present case we are not concerned so much with the rights of the redeeming co-mortgagors as with the rights of the representative-in-interest of the co-mortgagor who did not redeem. The plaintiff-respondent is not claiming to recover possession of his quarter share without payment of the amount of money due for the redemption of his share of the original mortgage, that is to say, he recognizes the rights of the co-mortgagors enacted by S. 92, T. P. Act. Before the introduction of S. 92 as now worded, a co-mortgagor redeeming had merely a charge on the share of the co-mortgagor who did not redeem. There was a conflict of decisions of the Indian High Courts as to whether the redeeming co-mortgagor's charge amounted to a mortgage or not, and as to whether he was subrogated to the rights of the mortgagee who had redeemed. A Bench of this Court in 14 Rang 494[1] has held that S. 92, T. P. Act, is not retrospective in its effect.

The co-mortgagors on redeeming this land and coming into possession thereof did not hold adversely to the non-redeeming partner. They either held a charge or obtained the rights of the original mortgagee over the share belonging to P. S. Mohamed Ali. Although they dealt with the land as they would their own and mortgaged it, redeemed it, and mortgaged it again, none of the these acts would make their possession adverse to that of the plaintiff-respondent. It was not until they sold the whole of the land including the respondent's share that they exercised claims adverse to those of the respondent; and clearly Ma E Khin's possession is adverse to that of the plaintiff-respondent. It would appear, therefore, that the plaintiff-respondent must bring his suit within 12 years of the date of sale: Art. 144, Lim. Act. In 20 Bom 557[2] the share of a co-mortgagor was purchased by the plaintiffs in execution of a decree against him in 1875. In 1877 that very same judgment-debtor with his two brothers, co-mortgagors, paid off the mortgage of the land and re-mortgaged it to certain other persons. It was found that Babaji, the judgment-debtor, had become entitled to possession of his share in 1877 when the mortgage of 1874 was redeemed and his possession and that of his mortgagees were clearly adverse to the plaintiff as purchaser of his share and Art. 137, Lim. Act, applied. That case is hardly parallel with the present and even so I venture to think the correct Article to apply was Art. 144. Art. 137, Sch. 1, Lim Act, reads as follows:

| | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 137. Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale. | Twelve years. | When the judgment-debtor is first entitled to possession. |

(Art. 136 to which reference is made refers to a suit by a purchaser at a private sale for possession of immovable property sold when the vendor was out of possession at the date of the sale.) It does not appear to me to be possible to apply this Article to the case of a person who steps into the shoes of a co-owner whose co-mortgagors have redeemed his share of the property from a usufructuary mortgage. Such a co-owner is always entitled to possession of his share and he will get possession on payment of his share of the money due on the mortgage, and time now will run from the date of the mortgage. The auction-purchaser having acquired all the interest of his judgment-debtor in the property, it is quite unnecessary for the judgment-debtor to take any further action. The purchaser has acquired the right to possession of the judgment-debtor's share in the property subject to the payment of his proportionate share of the mortgage debt. The judgment-debtor cannot, by any means, subsequently become entitled to possession. The words "entitled to possession" seem to mean "able to exercise his right of possession" and the words "out of possession" seem to imply that the judgment-debtor at the time of the sale was not in a position to exercise his right of possession. This form of words is obviously inapplicable to a judgment-debtor not in actual possession of his share of a jointly owned piece of property which has been redeemed by his co-mortgagors, and is not held adversely by them, but can be obtained by him merely by paying the amount due from him : *see* 130 P R 1906.[3]

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[1] Bank of Chettinad Ltd. v. Ma Ba Lo, A I R 1936 Rang 152=163 I C 645=14 Rang 494.

[2] Ganesh Mahadeo v. Ramchandra Sambhaji, (1896) 20 Bom 557.

The question then arises as to what is the appropriate Article of the Limitation Act to apply in the present case. It appears to me that it is Art. 144, and time began to run against the plaintiff-respondent from the date of the sale to Ma E Khin, that is to say, 11th May 1930. A co-mortgagor who has redeemed the whole mortgage does not become a mortgagee of the share of his non-redeeming co-mortgagor. Art. 148, Lim. Act, therefore which refers to suits against mortgagees, will not be directly applicable; and it appears to me that so long as the redeeming co-mortgagor does not so act as to indicate that his possession has become adverse to that of the non-redeeming co-mortgagor, the latter is always able to recover his share, unless under the rights conferred by S. 92, T. P. Act, the co-mortgagor can claim that the time for redeeming the original mortgage has passed. This appeal must therefore be dismissed and the decree of the District Court confirmed, although not for the same reasons as are set out in the judgment of the District Court. The appeal is dismissed with costs; advocate's fee five gold mohurs.

B.D./R.K. *Appeal dismissed.*

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[3] Badri Mal v. Gopal, (1906) 130 P R 1906=100 P L R 1907.

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## A. I. R. 1938 Rangoon 67

BAGULEY AND SHARPE JJ.

*Zubeida Khatoon* — Appellant.

v.

*Mohamed Zakaria and another* — Respondents.

First Appeal No. 48 of 1937, Decided on 14th July 1937, against order of Dist. Court, Bassein, D/- 1st March 1937.

**Succession Act (1925), S. 291 — Security— It is discretionary with Court to order security to be furnished on grant of probate— Appellate Court cannot interfere with discretion reasonably and judicially exercised, except for strong reasons.**

The ordering of security to be furnished by the executor on the grant of the probate is purely a discretionary matter with the Court. The Court has power, if it so desires, to issue probate without any security at all. Where the discretion is exercised in a reasonable and judicial manner, the Appellate Court cannot interfere with it unless very strong reasons are shown to persuade the Court that the result is incorrect. [P 68 C 1]

Rauf — *for Appellant.*

Hay — *for Respondents.*

**Baguley J.**—This is an appeal against an order passed by the District Judge of Bassein varying a former order which he had passed with regard to the furnishing of security. The estate with which he was dealing was that of one Ahmed Abdul Latiff, deceased. The deceased left a will in which he appointed three persons executors, his brother, his widow and his son. The brother renounced probate, and the widow and his son applied for probate to be issued to them. The learned Judge found that the will was in order and directed probate to issue. In the exercise of his discretion however he decided that the executors should furnish security to the extent of Rs. 25,000. One of the reasons which he gave for asking this amount of security was that the son, who was clearly going to be the active executor doing most of the work, was a young man of no experience, and it is quite clear that at the time he was told that there would be no difficulty to security being furnished, as the brother of the deceased, who was renouncing probate, was willing to stand as surety for the remaining executors.

After the order had been passed, however, difficulties arose, and the learned Judge was satisfied, although we do not know on what grounds—there is nothing on the record to explain it—that the present appellant was the cause of her uncle refusing to stand as surety. The two executors now come to Court and say that they are unable to furnish outside security but are willing that their interests in the deceased's estate, amounting in all to seven-sixteenths of the estate, should be made security for the due performance of their duties. The learned Judge, after hearing the present appellant, who objected to the variation of the security to be given, decided that he had power to vary his order, and that under the circumstances he would allow the prayer of the two executors. In his order dealing with this, he states definitely :

> ....Had the circumstances been represented to me then as they are now, I should certainly not have passed the order I did, which has had the effect of preventing the estate being administered.

The ordering of security to be furnished is purely a discretionary matter: the Court had power, if it wished, to issue probate without any security at all. For certain reasons which then appeared and because of certain representations that were made with regard to existing facts, the learned Judge decided that security in the sum of Rs. 25,000 should be furnished. Now, nine months later, it is found that the facts were not as they were represented to him at the time, and clearly there has been a change in the other circumstances, because in spite of the probate not having been issued until last April, the young man of no experience has been running the business for some time and has gained, it may be presumed, further experience. The matter is purely a discretionary one. The Judge exercised his discretion after considering the facts before him; even now the order which he has passed will result in some security being given for the due performance of the duties of the executors, although he might quite legally have issued it in the first place without any security at all: and when a discretion has been exercised in a judicial and reasonable manner, I do not think that an appellate Court should interfere with the way in which it is exercised unless very strong reasons indeed are shown to persuade the Court that the result is incorrect. For these reasons, I would dismiss the appeal with costs; advocate's fee three gold mohurs.

**Sharpe J.**—I agree.

A.L./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Rangoon 68

MACKNEY J.

*Maung Chit Tin* — Applicant.

v.

*H. O. Reynolds (Financial Commissioner Burma)* — Respondent.

Criminal Misc. Appln. No. 35 of 1937, Decided on 6th July 1937, for transfer from the Court of Addl. Dist. Magistrate, Rangoon.

*** Criminal Trial—Transfer — Case against Financial Commissioner — Trying Magistrate in his capacity as Collector subordinate to accused – Case held should be transferred.**

A case was put up in the Court of the Additional District Magistrate against a Financial Commissioner. The Additional District Magistrate was also a Collector and as such was immediately subordinate to the Financial Commissioner, the accused. The complainant applied for transfer:

*Held* that the applicant might reasonably have an apprehension that such relation between the accused and the Magistrate might militate against a proper trial and hence the case should be transferred to another Court. [P 68 C 2; P 69 C 1]

Ba So — *for Applicant.*

Beecheno — *for Respondent.*

Myint Thein, Offg. Govt. Advocate — *for the Crown.*

**Order.**—This is an application by one Maung Chit Tin who is prosecuting Mr. H. O. Reynolds, Financial Commissioner, Burma, on a charge under Ss. 323 and 354, I. P. C., in the Court of the Additional District Magistrate of Rangoon. The Additional District Magistrate of Rangoon has not yet issued summons to the accused as immediately on the transfer of the complaint to the Additional District Magistrate for disposal, the applicant has applied to this Court for a transfer of the case to the Court of some other Magistrate on the ground that the present Additional District Magistrate is also Collector of Rangoon Town and as such is immediately subordinate to Mr. Reynolds as Financial Commissioner. The applicant apprehends that this fact might unconsciously influence Mr. Crosby's approach to his case.

It must be admitted that Mr. Crosby himself is in rather an embarrassing position in having before him as accused person a high officer of the Government who is his superior officer in respect of a considerable amount of his duties. The Collector of Rangoon Town is only incidentally a Magistrate appointed merely to assist the District Magistrate of Rangoon. No allegations are made against any person connected with the case, but it seems to me that this is not a case which ought to be tried by the Additional District Magistrate of Rangoon Town. It seems to me that the applicant might quite reasonably, albeit quite wrongly, have the apprehension that the particular relationship that the Additional District Magistrate has to the accused in this case might have some influence on him; and even if it merely embarrasses him, it would be sufficient to justify the applicant's apprehension that the trial might not be all that could be desired. Where a party to a case has such an apprehension with reasonable grounds, it has always been considered right that the case in question should be transferred to some other Court; for, the existence of such an apprehension in the mind of one of the parties must militate against a proper trial, if for no other reason than that it places the party concerned under a very serious handicap. I therefore direct that the complaint of Maung Chit Tin in Criminal Regular No. of 1937 of the Additional District Magistrate of Rangoon be transferred to the District Magistrate of Rangoon for disposal by himself.

D.S./R.K. *Case transferred.*

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## A. I. R. 1938 Rangoon 69

ROBERTS C. J. AND SHARPE J.

*Chwan Seng Chan* — Appellant.

v.

*Commissioner of Police, Rangoon* — Respondent.

First Appeal No. 68 of 1937, Decided on 8th July 1937, from the order of Sen J; in Misc. Case No. 172 of 1936.

**(a) Rangoon Hackney Carriages Act (4 of 1917), S. 4—Grant of license—Commissioner of Police has unfettered discretion to grant or refuse license.**

Section 4 gives the Commissioner of Police an unfettered discretion to grant or refuse a license. If it had been intended by the Legislature that it was to be obligatory upon the Commissioner of Police to grant license in every case, there would have been a section in the Act to say so: *28 Bom 253, Rel. on; A I R 1933 Cal 243 and 26 Bom 396, Disting.* [P 70 C 2; P 71 C 1]

**(b) Rangoon Hackney Carriages Act (4 of 1917), S. 23—Rules under, R. (1)—Rule is not ultra vires—Commissioner of Police has no power to make rules or general orders, breach of which would entail action similar to penal breaches— Rule is unnecessary: (*Obiter*, per *Roberts C. J.*)**

When one looks at the objects of the Hackney Carriages Act, "for the regulation and control of hackney carriages and rickshaws in Rangoon", and when one sees that by S. 23 the Local Government may make rules from time to time for carrying these objects into effect, there is nothing ultra vires in R. 1 so made. This rule does not give the Commissioner of Police power to make rules, still less to make general orders the breach of which is to be treated as though they were breaches of a penal enactment. All it does is to say that the maximum number of vehicles plying for hire may be fixed by the Commissioner of Police. In fact it is unnecessary as its terms are implicit in the wording of S. 4. [P 70 C 1, 2]

**Foucar** — *for Appellant.*

**A. Eggar, Advocate-General** — *for Respondent.*

**Roberts C. J.**—This is an appeal from a judgment of Sen J. who dismissed with costs the petition of Messrs. Chwan Seng Chan of 15th Street, Rangoon, under S. 45, Specific Relief Act, 1877, praying for a finding that the respondent, who is the Commissioner of Police for the City of Rangoon, is not authorized to restrict the number of licenses issued or to fix the maximum number of hackney carriages and rickshaws which might ply for hire, under the provisions of the Rangoon Hackney Carriages Act, or to give a preference to certain classes of rickshaws already licensed, and further to direct the respondent to consider the appellants' application for the issue of 100 licenses in respect of the said rickshaws and to grant the said licenses to the appellants, provided that the said rickshaws, as to their condition and description, complied with the provisions of the said Act and valid rules made thereunder. Now, by S. 4, Rangoon Hackney Carriages Act (Burma Act No. 4 of 1917):

> No vehicle shall be let to hire, or taken to ply, or offered for hire, except under a license duly granted to the owner thereof in that behalf by the Commissioner of Police;

and by S. 45, Specific Relief Act, the High Court may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office

> provided that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person in his public character.

The petitioners in this case have therefore to show that the Commissioner of Police was obliged to grant the license at the time at which it was applied for, provided the rickshaws as to their condition and description complied with the provisions of the Act and the rules made thereunder. The case in 26 Bom 396[1] shows that in a case in which an Act of the Legislature says that

> the Commissioner of Police shall from time to time grant licenses . . . and the said licenses may be granted by the said Commissioner for any term not exceeding one year;

the word "shall" must be construed in a mandatory sense; and where the word "shall" therefore is found in a statute of this character, the Commissioner would have no option but to comply with the requirement that a license should be granted, provided that the necessary formalities were carried out and the conditions under which the license should be granted were fulfilled. But the present is not a case in which there is any such mandatory direction. It is not, for instance, like a case under the Burma Motor Vehicles Rules where S. 2, R. 9, says:

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[1] **Rustom v. Kennedy, (1902) 26 Bom 396=4 Bom L R 1.**

> The Commissioner of Police, Rangoon, shall register every motor vehicle in respect of which registration is applied for under R. 8 if he is satisfied . . .

**Rule** 10 says:

> The Commissioner of Police shall, upon registering any motor vehicle, issue to the owner thereof a certificate . . .

and R. 11 says that upon registering, the Commissioner of Police shall record the particulars relating to the motor vehicle in a register to be maintained by him in a certain form. It is therefore, to say the least, probable that if the Legislature had desired to make it incumbent upon the Commissioner of Police to grant a license in every case, similar words would have been used in the Hackney Carriages Act. But in the Act, as I have already pointed out, there is neither the word "shall" nor "may". In 60 Cal 689[2] it was held that a discretion to refuse a license was implied in a case to which S. 391, Calcutta Municipal Act (Bengal Act 3 of 1923) applied. That section runs as follows:

> No person shall, without or otherwise than in conformity with the terms of a license granted by the Corporation in this behalf, keep open any theatre, circus or other similar place of public resort, recreation or amusement: Provided that this section shall not apply to private performances in any such place.

It was held in that case that there was a discretion to refuse a license, although the discretion must be exercised in a reasonable manner and in a judicial spirit. In the case we are considering, it is not contended for a moment that the exercise of the discretion by the Commissioner of Police was animated by any wrong motive or was not bona fide: and I am clearly of opinion, looking at the authorities, that the petitioners have failed to prove that it was ever incumbent upon the Commissioner of Police to grant the license at the time it was applied for. I would add, speaking for myself alone, that when one looks at the objects of the Act, "for the regulation and control of hackney carriages and rickshaws in Rangoon", and when one sees that by S. 23, Hackney Carriages Act, the Local Government may make rules from time to time for carrying these objects into effect, there is to my mind, nothing ultra vires in R. 1 so made by them which says:

> The Commissioner of Police may fix the maximum number of hackney carriages and rickshaws which may ply for hire.

In my view this rule does not give the Commissioner of Police power to make rules still less to make general orders the breach of which is to be treated as though they were breaches of a penal enactment as in 17 Mad 118[3] which was cited to us. All it does is to say that the maximum number of vehicles plying for hire may be fixed by the Commissioner of Police. But I think that the rule is unnecessary since its terms are implicit in the wording of S. 4 of the Act, and holding the view that I do of S. 4 of the Act, the matter is conclusive upon that point alone. It follows that this appeal must be dismissed. No order as to costs.

**Sharpe J.**—This is an appeal from a refusal of Sen J. to make an order under S. 45, Specific Relief Act, 1877, requiring the respondent to grant 100 rickshaw licenses to the appellants, provided that the rickshaws in respect of which the licenses are sought comply as to their condition and description with the provisions of the Rangoon Hackney Carriages Act, 1917, and the rules made thereunder. It is to be observed in the first place that the power to make the order prayed is discretionary, and secondly that it may only be made provided that the doing of a specific act, which is in this case the granting of rickshaw licenses, is clearly incumbent upon the particular public officer against whom the order is sought.

Mr. Foucar for the appellant admits that nowhere in the Rangoon Hackney Carriages Act is to be found any express provision that these licenses must be granted, and he is therefore forced to rely upon the argument that as under S. 4 of the Act, no vehicle shall be offered for hire except under a license granted by the Commissioner of Police, therefore the Commissioner of Police must license all rickshaws which comply with the provisions of the rules laid down. That argument cannot to my mind be accepted. To my judgment S. 4 gives the Commissioner of Police an unfettered discretion to grant or refuse a license. If it had been intended by the Legislature that it was to be obligatory upon the Commissioner of Police to grant license in every case, there would have been a section in the Act to say so, just as S. 12 was inserted in Act 48 of 1860. There the words were clear: "The Commissioner of Police shall from time to time grant licenses, etc." In the absence of any such mandatory provision in the present Act, it is impossible to say that the Commissioner of Police was bound to grant these rickshaw licenses. I am supported in the view which I take by the decision in 28 Bom 253[4] where it was held that

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[2] S. R. Varma v. Corporation of Calcutta, (1933) 20 A I R Cal 243=1933 Cr C 322=144 I C 198 =34 Cr L J 693=60 Cal 689=37 C W N 344.

[3] Queen-Empress v. Marian Chetti, (1894) 17 Mad 118=1 Weir 857=4 M L J 38.

> The power of the Municipal Commissioner of Bombay to grant a license under S. 394, City of Bombay Municipal Act includes the power to refuse it.

In my judgment therefore the appellants have failed to bring themselves within Proviso (b) to S. 45, Specific Relief Act, 1877. Consequently the application fails, and this appeal must be dismissed.

B.D./R.K. *Appeal dismissed.*

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[4] Haji Ismail v. Municipal Commissioner of Bombay, (1904) 28 Bom 253=5 Bom L R 1001.

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## A. I. R. 1938 Rangoon 71

BAGULEY AND SHAW JJ.

*Daw Kyin and others*—Appellants.

v.

*Ma Hla Yi and another*—Respondents.

First Appeal No. 136 of 1936, Decided on 15th June 1937, against decree of Dist. Court, Amherst, D/- 10th August 1936.

**(a) Buddhist Law (Burmese) — Joint property — Members of patriarchal family not having separate property of themselves and working for family without remuneration — One member not working so from his boyhood but starting independent life and joining Government service—On death of father such member managing business and having banking accounts in his own name as distinct from family accounts — Banking accounts in his name would be his personal property in absence of proof to contrary.**

A family kept together in a kind of patriarchal state: all the family worked for the father and after his death for the mother. They had no separate property of their own; they just provided themselves with board and lodging, clothing and pocket money, and worked without remuneration. One member did not work in this way from his boyhood but had been out in the world on his own account, employed as a clerk in a Government office. On his father's death, he came back to the family and began to manage the business but continued to have his own banking accounts as distinct from the family accounts:

*Held* that having once been earning his living independently in this way and had the spending of it, it was incredible that he should come back to the family fold and reduce himself to a position worse than that of a hired servant, depending on his mother for everything. Prima facie banking accounts in his name would be his personal property, and unless and until the contrary was proved they must be so regarded. [P 72 C 2]

**(b) Principal and Agent — Agent though cannot make profits may get remuneration.**

Though an agent cannot make profits as against his principal, yet he may get remuneration from his principal. [P 73 C 2]

Dr. Ba Han — *for Appellants.*

Kyaw Din and Maung Maung Gyi — *for Respondent 1.*

**Baguley J.**—This appeal arises out of a suit filed by Ma Hla Yi, respondent 1. In her plaint she alleges that she was the widow of one Shwe Win, deceased. Shwe Win was the son of Daw Kyin, appellant 1, and the brother of the other three appellants; she claims that when Shwe Win died he was a salvage contractor employed by defendant 6, Messrs. T. D. Finlay & Son, Ltd.; that at the time of his death he had a savings bank account and a fixed deposit account with the Imperial Bank of India, Moulmein; cash security deposited with Messrs. T. D. Finlay & Son, Ltd.; four motor boats; cash deposited with a Chettyar firm, which has since been withdrawn by the first four defendants; a workshop and various gear used in connection with his business as salvage contractor; a motor car and two pieces of garden land. She seeks for a declaration that she is the sole heir of Shwe Win, deceased, and that the properties mentioned form part of his estate, and she is entitled to the same, and she asks for a decree for possession of all the property mentioned. The contesting defendants, mainly relations of Shwe Win, contended that the salvage contract work was not Shwe Win's at all, that the business had been begun by Shwe Win's father, U Cho, and since U Cho's death in 1926 Shwe Win had carried on the business for his family and had been provided with board and lodging and clothes and pocket money, and that all the assets mentioned by the plaintiff in her plaint belonged to Daw Kyin. The learned District Judge after hearing evidence found that the deposits with the bank and the Chettyar firm, one motor boat and the motor car belonged to Shwe Win at the time of his death, and he gave a decree in plaintiff's favour to that extent; the remainder of the claim be dismissed. It is against this decree that the present appeal has been filed.

It is common ground that Shwe Win started life independently of the rest of the family. He took a post in the Office of the Sanitary Commissioner of Burma and worked for nine years, from March 1909 to March 1918, after which he resigned. He returned to Moulmein and helped his father in this salvage business until the father died in 1926, eight years later. After that the business was transferred to his name. He was recognized by Messrs. T. D. Finlay & Son Ltd. as their contractor, and his father's deposit was transferred to him. He also took out the regular licenses from the Forest Department and carried on the business as though it were his own. The savings bank account with the Imperial Bank of India was opened in the name of Shwe Win in March 1921, i. e. three years after he began to help his father, with a deposit of Rs. 600, and for some time small deposits of Rs. 20 each were made, and then the deposits increased to Rs. 50. In May 1922 there was a deposit of Rs. 600 and after that there were both deposits and withdrawals. The account with the Chettyar firm was opened in 1927 with a deposit of Rs. 3,000, and deposits and withdrawals were irregular and were of various sums. After Shwe Win died, Rs. 1,000 was taken from this account to pay for his funeral expenses, and then the account was closed and the money taken possession of by Daw Kyin, though Ma Hla Yi signed an acquittance for the Chettyar along with the other relations. In addition to this savings bank account with the Imperial Bank of India in the name of Shwe Win, there were in the family also two other saving bank accounts: one was in the names of Daw Kyin and Ma E Khin and another in the names of Ma Nyein Yin and Ma Ngwe Zin. Daw Kyin explains that the reason why three accounts were opened was that as withdrawals from savings bank accounts could not be made more than once a week, more than one account was opened, so that more frequent withdrawals might be made. The learned trial Judge in his judgment says that he cannot accept this explanation because, according to Daw Kyin, the family, that is to say she herself also had accounts with the Chettyar and with one To Lon who would allow money to be withdrawn without notice and at shorter intervals.

It was urged in the trial Court and also before us that this family kept together in a kind of patriarchal state: all the family worked for the father and after his death for the mother. They had no separate property of their own; they just provided themselves with board and lodging, clothing and pocket money, and worked without remuneration. Had Shwe Win worked in this way from his boyhood, it is possible that there might have been some force in the contention, but as Shwe Win had been out in the world on his own account, employed as a clerk in a Government Office, it is impossible to accept this contention; having once been earning his living independently in this way and had the spending of it, it is incredible that he should come back to the family fold and reduce himself to a position worse than that of a hired servant, depending on his mother for everything. Prima facie, banking accounts in his name would be his personal property, and unless and until the contrary is proved they must be so regarded. As pointed out by the trial Judge, this savings bank account began with a deposit of Rs. 600 or so after Shwe Win had worked with his father for three years, and after that at first small monthly payments were credited to it, in exactly the same way as one would expect a man to behave if he were being made a regular allowance. The plaintiff's contention that the whole business was Shwe Win's business after his father died has been rejected by the learned trial Judge, and in my opinion he undoubtedly was carrying on the family business for the benefit of the family, namely his mother, but that he was carrying on this business without remuneration I am unable to believe. If this money in the hands of the bank and the Chettyar really belonged to the family business, the account books of the business must show that he deposited money belonging to the business. There are the usual statements of witnesses that they have never seen any account books, but these statements do not prove that no account books existed, and a business of this size could not have been carried on without some records or accounts. The defendants' own witnesses show that the salvage fees received by the business were in the neighbourhood of Rs. 20,000 a year. There were regular monthly expenses of

Rs. 400, and if this business had been carried on in the way in which most businesses of a like nature are carried on, there must have been advances made from time to time to workmen, and, no doubt, to the men who built the four launches. The four launches were built by a man who describes himself as a mechanic. He made the keels and the ribs at Martaban and had the launches put together in the compound of Daw Kyin's house. A man of this type does not complete a launch and then ask for payment in one lump sum : he gets advances made to him from time to time, and it is quite clear that a business of this size and description must have had account books, and these account books were never produced. We are asked to draw no inference against the defendants to this effect because no formal notice to produce the account books was given to the defendants, but the production of those account books was necessary to complete the case for the defendants, and the fact that they have not been produced must be held against them.

The appellants have not got their case strengthened by the way in which Daw Kyin and Ma E Khin have given evidence. I have no doubt whatsoever that their evidence is untruthful, and that what really has happened is that this daughter-in-law was driven out of the house. It is admitted that she left the house hastily with only a small portion of her wardrobe and all her wedding presents remained behind in the house. Ma E Khin says: "She did not take any of her clothes. She left the key of the chest of drawers. The chest of drawers was empty." Ma Hla Yi's entire wardrobe has therefore vanished into thin air. She also says that Maung Shwe Win used to keep his clothes in his mother's box. Daw Kyin says that the three savings bank accounts were all opened at the same time, when as a matter of fact Shwe Win's was opened in 1921, and the other two many years later. I have no doubt that all the money which came in was kept in the house in a steel trunk or in a safe, and payments were made out of the money kept in the house.

The learned trial Judge has dealt very adequately with this question of the bank accounts, and it is really unnecessary to add anything to what has already been said. I would hold that these accounts must have come into existence out of the remuneration which Shwe Win got for working for his father and afterwards for working the business for the family. In appeal a further point was raised, namely that as Shwe Win was acting as agent for the family he was not entitled to any profits. This contention having been made must be met, but it is founded on a fallacy. An agent cannot make profits as against his principal, but I know of no law which says that an agent may not get remuneration from his principal, and that is really all that is held to have occurred in this case. He is entitled to remuneration, he got it, and he saved it. There is nothing in law against that being done, and the same argument of course applies to the deposit with the Chettyar firm. The claim for the land and the deposit with Messrs. T. D. Finlay & Son Ltd. was dismissed by the trial Court, and no counter objections have been filed with regard to these items. The claim for the workshop had also been disallowed by the trial Court.

With regard to the claim for the four motor boats, the learned Judge allowed the claim for the one that was built after the death of U Cho, but had disallowed the claim for the three boats built before his death. With regard to the motor boat which was awarded to the plaintiff, I do not think the decree can be supported. These motor boats were used for the purpose of the business, and clearly some means of conveyance was necessary for business of this kind. This boat seems to have been put on the same level with the other parts of the necessary plant required for the salvage business, and having once held that the whole salvage business was being run by Shwe Win for the benefit of Daw Kyin and the family, the motor boat must go with the business. There is no suggestion that Shwe Win got this boat built for pleasure purposes or for any separate business of his own; it simply went in as part of the plant required for the salvage work, and with regard to this motor boat the appeal must be successful. So far as the motor car is concerned, it was bought by Shwe Win. Daw Kyin says he bought it with her money and under her directions because she wanted to send her grandnephew to school. The grandnephew was a small boy who was going to be sent to a school in Moulmein, and it was thought that he must have a motor car for his daily progress from the landing stage to the school. This explanation I am unable to accept. Daw Kyin and her daughter Ma E Khin have shown themselves untruthful witnesses in many ways, and a far more reasonable contention seems to me to be that Shwe Win bought this motor car in view of his intended marriage, he having bought it a month or two before he got married.

The fixed deposit receipt is in Shwe Win's name. There is nothing to show where this money had come from. It is not shown to be the money belonging to the salvage business. It would not in the ordinary way have been a normal part of a salvage business carried on in this way to put money in fixed deposit with a bank. It must therefore be regarded as being Shwe Win's money. For these reasons I would modify the decree of the trial Court. In the course of the hearing it was noted that although the plaintiff asked for a declaration that she is the sole heir of the estate of Maung Shwe Win, such a declaration is not embodied in the decree, and it was asked to embody it in the new decree. The decree of the trial Court will therefore be varied by striking out the words 'the motor boat Peacock' and all other references to the motor boat Peacock and its value. In addition to this the plaintiff will get a declaration that she is the sole heir of Shwe Win, deceased: otherwise the decree will stand as it is including the order for costs. In view however of the very partial success which the appellants have obtained in this Court, I would direct that the appellants do pay to respondent half only of her costs in this Court.

**Shaw J.**—I agree.

D.S./R.K. *Decree modified.*

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## A. I. R. 1938 Rangoon 74

MYA BU OFFG. C. J. AND MACKNEY J.

*Mrs. Kirkwood (a) Ma Thein and others* — Appellants.

v.

*Maung Sin and others* — Respondents.

First Appeal No. 24 of 1931, Decided on 19th August 1937.

**(a) Buddhist Law (Burmese) — Succession — Relations of same degree — Full blood is preferred to half blood — Rule that succession should not ascend does not operate in such case.**

Among relations of the same degree of relationship to the deceased, the full blood relations should be preferred to the half blood relations. The rule that inheritance should not ascend when it can descend does not operate in a competition between relations of the full blood and those of the half blood of the same degree of relationship to the deceased. [P 75 C 2]

**(b) Buddhist Law (Burmese)—Succession—Brothers and sisters are preferred to their parents — Rule that nearer relation excludes more remote is not thereby abrogated.**

The method of calculating relationship by counting the number of degrees from the propositus upwards to the common ancestor and then downwards to the claimant is obviously fallacious when calculating the degree of relationship between two children of the same parents. There can be no closer relationship than exists between such persons as they are of identical blood. In fact so far as blood relationship goes, such children are more closely related to one another than they are to their father or to their mother, and therefore if in the case of competition between parents and brothers and sisters, the latter are preferred, this is no abrogation of the rule that the nearer relation excludes the more remote. [P 75 C 2; P 76 C 1]

**Mya Bu Offg. C. J.** — Ma Chaw, Ma Ohn Bu and Ma Moe apply to have themselves brought on the record of this appeal as legal representatives of respondent Ma Nga Ma who died on 12th January last. Before they made this application, respondent Maung Sin had, on an application of the appellants, been brought on the record as the legal representative of Ma Nga Ma. Maung Sin is therefore at the present stage a respondent in his personal capacity as well as in his capacity as the legal representative of Ma Nga Ma. Ma Nga Ma was a spinster and Maung Sin is her elder brother of the full blood. The present applicants claim to be the younger half-sisters of Ma Nga Ma and Maung Sin. By this application they claim a better right to be Ma Nga Ma's legal representatives than Maung Sin on the ground that in the matter of succession to Ma Nga Ma's estate under the Burmese Buddhist Law, they as younger half-sisters should be preferred to Maung Sin who, though a brother of Ma Nga Ma of the full blood, is an elder relation of Ma Nga Ma.

It has often been pointed out that with reference to the rights of relations of the half blood in the matter of succession and inheritance the Dhammathats are silent on the point. There have however been certain judicial decisions dealing with the question of succession and inheritance arising between relations of the half blood and those of the full blood; but none of such decisions support the view that the relations of the half blood can succeed in competition with, much less to the exclusion of the relations of the full blood of the same degree of propinquity to the deceased. In 12 Bur L T 103,[1] it was even held that full blood relations exclude half blood relations although the latter may be nearer in degree, and consequently the claim of the grandnephews, being the grandchildren of the brother of the full blood was preferred to that of a niece, being the daughter of a sister of the half blood. In 3 Bur L J 137[2] a younger half-brother or a half-sister was allowed to take in preference to the son of an elder brother, and it was pointed out that the proposition in 12 Bur L T 103[1] to the effect that full blood relations exclude half blood relations although the latter may be nearer in degree was stated in too general terms, and that there was no sufficient authority in the texts of the Burmese Buddhist Law, or in the case law on the subject for so wide a proposition. It must be noted that the half blood relations in 3 Bur L J 137[2] were one degree nearer than the full blood relations. The pronouncement in 12 Bur L T 103[1] again received notice in 8 Rang 23,[3] where a Bench of this Court ruled that a brother or sister of the half blood stands in the same degree of relationship for the purposes of succession as a nephew or niece of the full blood and would share equally, and it was observed :

> In our opinion the law laid down by Maung Kin J. that full blood relations exclude half blood relations however nearer in degree of relationship is too wide. We might agree with him if he had said that among relations of the same degree the full blood should be preferred to the half blood.

In a still later case, namely Civil Misc. Appeal No. 9 of 1933[4], a Bench of which I was a member approved of the above quoted observation, and thus accepted the proposition that among relations of the same degree the full blood should be preferred to the half blood, and consequently held that a nephew of the full blood excluded a nephew of the half blood. On the state of the case law on the subject as it stands, which in my opinion is perfectly consonant with the Burmese public opinion, I can see no sufficient ground for doubting the correctness of the proposition that among relations of the same degree of relationship to the deceased, the full blood relations should be preferred to the half blood relations. The learned advocate for the applicants urges that by application of the rule that inheritance should not ascend when it can descend, his clients, though of half blood, should be preferred to Maung Sin who, though of full blood, is an elder brother of the deceased. In my opinion there is no sufficient authority to warrant the view that the rule that inheritance should not ascend when it can descend still operates in a competition between relations of the full blood and those of the half blood of the same degree of relationship to the deceased. For all these reasons, in my opinion, the application should be and is hereby dismissed with costs in favour of Maung Sin only ; advocate's fee three gold mohurs.

**Mackney J.** — I agree. Reliance was placed on the obiter dictum in 9 Rang 217[5] appearing at page 230 :

> Applying the principles enunciated by the Judicial Committee in *Ma Hnin Bwin v. U Shwe Gon*[6], the rule of construction to be applied for determining whether the parents or the brothers and sisters in such a case are the heirs of the deceased is under the Burmese Customary law that the right of succession, whenever possible, is not to ascend, and that rule is to prevail rather than the rule that the nearer relation excludes the more remote.

With great respect I do not think that such a conclusion is possible. It appears to me to be rather the case that the rule that the nearer relations exclude the more remote usually prevails against the rule that the succession whenever possible is not to ascend. In Manukye, Ch. 10, S. 19, we have instances where, "though it was said that property shall not ascend," the law is stated as to when it shall do so. Nor does it appear to me that the case of the preference of the brothers and sisters before their parents is an instance where the rule that the right of succession is not to ascend prevails over the rule that nearer relations exclude the more remote. The method of calculating relationship by counting the number of degrees from the propositus upwards to the common ancestor and then downwards to the claimant is obviously fallacious when calculating the degree of relationship between two children of the same parents. There can be no closer relationship than exists between such persons as they are of identical blood. In fact so far as blood relationship goes, it is clear that such children are more closely related to one another than they are to their father or to their mother, and I should say therefore that if in the case of competition between parents and brothers and sisters, the latter are preferred; this is no abrogation of the rule that the nearer relation excludes the more remote.

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[1] Taung Mro v. Aung Nyun, A I R 1920 L B 173=58 I C 488=12 Bur L T 103.

[2] Maung Kyi Hlaing v. Maung Tun Lin, A I R 1924 Rang 367=84 I C 279=3 Bur L J 137.

[3] Ma Galay v. Ma E Mya, A I R 1930 Rang 75 =125 I C 843=8 Rang 23.

[4] Maung Tun Zan v. Maung Tun Zan Gyi, *Reported in* A I R 1933 Rang 317 = 147 I C 1098.

[5] Maung Kun v. Ma Chi, A I R 1931 Rang 113 133 I C 234=9 Rang 217 (F B).

[6] A I R 1914 P C 97=23 I C 433=41 I A 121= 41 Cal 887=8 L B R 1 (P C).

D.S./R.K. *Application dismissed.*

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## A. I. R. 1938 Rangoon 76

BAGULEY AND SHARPE, JJ.

*Ma Ma Nyun and others* — Appellants.

v.

*Maung Mya and another*—Respondents.

First Appeal No. 39 of 1937, Decided on 21st July 1937, against decree of Dist. Court, Mandalay, in Civil Regular No. 5 of 1936.

**(a) Court-fees Act (1870), Sch. 2, Art. 17 (6) and S. 7 (iv) (b)—Suit for partition by person in possession as co-tenant—No ad valorem court-fee is required.**

A suit for partition of immovable property, by a person who alleges he is in possession of it as co-tenant on behalf of himself and others, is not, by a mere denial on the part of the defendant as to the plaintiff's title and possession, converted into a suit for declaration of title and recovery of possession, and is governed by Sch. 2, Art. 17 (6). No ad valorem court-fee is required: *A I R 1920 Mad 585; A I R 1932 Cal 227; 8 Cal 757; 12 C W N 37, A I R 1934 Lah 563 (F B) and A I R 1930 Rang 164, Foll.; 28 All 340, Disting.* [P 79 C 1; P 80 C 2]

**(b) Court-fees — Determination on perusal of plaint.**

The court-fee on the plaint is fixed by the plaint itself, and it has got to be determined on a perusal of the plaint and not by the defence raised: *28 All 340, Rel. on; 20 Cal 762 and A I R 1932 Cal 227, Ref.* [P 78 C 2]

**(c) Civil P. C. (1908), O. 2, R. 2 (3) — Right to split claim arising out of same cause of action cannot be reserved—Remedy is under O. 2, R. 2 (3).**

There is no provision of law by which a person can reserve the right to split his claim arising out of the same cause of action. He may ask the Court to allow him to do so under O. 2, R. 2 (3), but the Civil Procedure Code gives no unilateral right to reserve a claim of this sort. [P 79 C 1]

D. R. Mitter — *for Appellants.*

K. C. Sanyal — *for Respondents.*

**Baguley J.**—This appeal arises out of a suit for partition. The parties are Mahomedans. The plaint sets out that the two defendants and one Hla Gyi, who was the husband of plaintiff 1 and father of the remaining plaintiffs, were three brothers who inherited from their mother certain properties which are described in the schedule attached to the plaint. Since the properties were inherited, they were by arrangement kept as one estate, which had been managed by defendant 2 who collected the rents, paid expenses, etc., and disbursed the balance to the real owners. This arrangement had gone on until October 1934 (the suit was filed in January 1935) after which date defendant 2 had failed to pay anything to the plaintiffs: so the plaintiffs asked for partition and separate possession of their shares. The plaint was stamped with a court-fee of Rs. 10 under Art. 17, Cl. 6, Sch. 2, Court-fees Act, though the plaintiffs' share of the properties was valued at Rs. 20,400. The learned Judge had doubts about the correctness of the court-fees, but after hearing the plaintiffs' advocate he noted that the plaintiffs claimed to be in possession of the joint property and merely asked for partition, so he accepted the valuation "for the time being". The defendants in their written statement denied that two of the seven items of property mentioned in the schedule formed part of the joint estate. They claimed that the plaint was not properly stamped, but it was admitted that there was an estate which had been inherited jointly as set out in the plaint, and they also admitted that the property had been managed as stated by defendant 2 and that the profits of the estate had been divided among the heirs. Objection was raised to plaintiff 1 suing as next friend of the other plaintiffs, and defendant 2 stated that he held the shares of plaintiffs 2 to 5 as their de facto and de jure guardian.

The case went to trial on five issues. Issue 1 related to whether the two disputed items in the schedule were part of the joint estate; the second dealt with the plea of res judicata; the third runs as follows: "Is the plaint not properly stamped? Is this suit maintainable without a prayer for consequential relief?" Issue 4 was: "Was U Sein the de facto guardian of the minor plaintiffs? If so, are they entitled to bring this suit against him for partition?" And the fifth was whether the plaintiffs were entitled to partition and on what terms. The learned Judge answered Issues 1 and 2 in favour of the plaintiffs. He answered

Issue 4 in favour of the plaintiffs and also the fifth; but, as on Issue 3 he had come to the conclusion that court-fees had got to be paid ad valorem on the value of the relief sought, namely Rs. 20,800 (apparently Rs. 20,400 was intended that being the value mentioned in the plaint), he directed that a preliminary decree be passed for partition declaring the rights of the parties interested in the estate only after the plaintiffs had deposited the full court-fees necessary. (Again there seems a mistake in the judgment as the order runs that the "minor plaintiffs must deposit the full court-fees necessary".) He also directed that the plaint should be formally amended with regard to items 3 and 6, as he had indicated earlier in the judgment that

> The plaintiffs should make formal amendments of their plaint and claim that the two items 3 and 6 be restored to the joint estate.

After judgment had been pronounced, the plaintiffs indicated their willingness to supply the necessary court-fees and they asked for time. Several extensions of time were given during which period an application to revise the order was made to this Court, but before orders could be passed on the revision matter the learned Judge on 22nd December 1936 refused further extension of time and rejected the plaint for non-payment of court-fees. It is against this decree rejecting the plaint for non-payment of court-fees that the present appeal has been brought. The portion of the judgment dealing with the question of court-fees is not very satisfactory. No authorities are mentioned in the judgment. It states that it was argued that Art. 17 (6) of Sch. 2, Court-fees Act, applied. It then goes on:

> The Calcutta High Court has held in one or two cases that this is the correct section. This was possibly due to the cases before it being those of co-parceners of a Hindu joint family estate. I cannot however see in what way it can be said that it is not possible to estimate at a money value the subject matter in dispute. The other High Courts have all held that the court-fees must be paid on the value that the plaintiff puts upon the relief sought in his plaint.

This passage shows a confusion of ideas because the value of the relief sought in the plaint may be something quite different from the value of the subject matter in dispute. The statement with regard to the Calcutta High Court is correct. In 8 Cal 757[1] Garth C. J. who dealt with the matter on a reference by the Taxing Master, stated:

> If the plaintiff's suit had been to recover possession of or establish his title to the share which he claims in the property, he must have paid an ad valorem stamp-fee upon the value of that share. But, as I understand, he is already in possession of his share, and all that he wants is to obtain a partition which is merely . . . . . to 'change the form of his enjoyment' of the property, or in other words, to obtain a divided instead of an undivided share.

This case was followed in 12 C W N 37[2] and 59 Cal 315[3] showing that the practice of the Calcutta High Court has not varied for the last fifty years. With regard to the other High Courts however, the statement in the judgment seems to be in the main incorrect. As regards the Madras High Court in 43 Mad 396[4] it was held that:

> A suit for partition of immovable property, by a person who alleges he is in possession of it as co-tenant on behalf of himself and others is governed by Sch. 2, Art. 17 (6), Court-fees Act.

In the Allahabad High Court in 28 All 340,[5] where there was a claim for partition, the plaintiff apparently being out of possession, it was held that the proper court-fees would be one calculated ad valorem and not Rs. 10 under Art. 17, Cl. 6 of Sch. 2; but it was stated that if the suit had been merely for partition without recovery of possession, the intended court-fee would have been correct. This, of course, was an obiter dictum but when the reciprocal case came before the same Court in 34 All 184[6] where the plaint asking for partition contained an allegation that the plaintiff was in possession of his share, it was held that Rs. 10 was a sufficient court-fee. In the Lahore High Court there was a Full Bench reference in 15 Lah 531,[7] one of the questions being:

> What is the proper court-fee payable on a plaint in a suit for partition of property, alleged to belong to a joint family of which the plaintiff and the defendant are stated to be members, and of

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[1] Kirty Churn Mitter v. Aunath Nath Deb, (1882) 8 Cal 757=11 C L R 95.

[2] Bidhata Rai v. Ram Chariter Rai, (1908) 12 C W N 37=6 C L J 651.

[3] Nandalal Mukherji v. Kalipada Mukherji, A I R 1932 Cal 227=136 I C 600=59 Cal 315 =35 C W N 942.

[4] R. P. Gill v. L. Varadaraghavayya, A I R 1920 Mad 585=55 I C 517=43 Mad 396=38 M L J 92.

[5] Wali-Ullah v. Durga Prasad, (1906) 28 All 340=1906 A W N 88=3 A L J 181.

[6] Tara Chand v. Afzal Beg, (1912) 34 All 184= 13 I C 185=8 A L J 1329.

[7] Asa Ram v. Jagan Nath, A I R 1934 Lah 563 =150 I C 994=15 Lah 531=36 P L R 48 (F B).

which the plaintiff alleges to be in actual or constructive possession?

and the answer to the reference given by the Full Bench was that the proper Court-fee was Rs. 10 under Sch. 2, Art. 17 (6), Court-fees Act. This shows that these three High Courts take the same view as Calcutta. The Bombay High Court seems to hold the opposite view, but we have been referred to no definite case showing that in a suit for partition, in which there is an allegation that the plaintiff is in possession, it has been held that an ad valorem stamp is required. Two cases have been referred to. In 22 Bom 315[8] the point for decision was really with regard to the jurisdiction of the Court. The plaintiffs valued their share at Rs. 250 and paid court-fees on this amount, but whether they alleged they were in possession or not is not clear. In the statement of facts however there occurs the passage: "The plaintiffs sought to recover by partition their share of certain landed property at Nadiad;" which suggests that very possibly the plaintiffs were out of possession. The other case is 33 Bom 658.[9] Here again in the statement of facts we find: "The plaintiff sued to recover by partition a moiety of certain moveables, houses, house sites and lands" and the same expression is used in the argument for the appellant "in a suit to recover possession of property by partition". In this case in which the respondent was not represented, the question seems to have been as to whether the properties should have been valued under S. 7 (iv) (b) or under S. 7 (v), Court-fees Act. The question of the applicability of Art. 17 (6) of Sch. 2, Court-fees Act, was not considered.

There is no officially reported decision on this point from this Court, but in First Appeal No. 10 of 1929[10] of this Court sitting at Mandalay, an appeal arising out of a suit for partition, the appeal was filed on a Rs. 10 stamp although the original suit had been stamped ad valorem. The question was raised as to the sufficiency of the stamp-fee on the appeal, and it was held that as both parties were in possession of part of the property to be partitioned, the original suit for partition could have been on a Rs. 10 court-fee, so the appeal was held to be correctly stamped. I see no reason for not following the decisions of the Calcutta, Madras, Allahabad and Lahore High Courts which are all quite definite on the point. I held that opinion when deciding the case referred to at Mandalay, and the doubtful authority of the Bombay cases mentioned seems to me quite insufficient to warrant my taking an opposite view now. The learned trial Judge seems to have had an idea that the defence raised might possibly require a reconsideration of the court-fee payable on the plaint. This is quite incorrect. The court-fee on the plaint is fixed by the plaint itself, and it has got to be determined on a perusal of the plaint. S. 6, Court-fees Act, says that no plaint specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of justice, unless the proper fee has been paid. The proper fee therefore has got to be determined as soon as the plaint is presented and any subsequent defence cannot alter that fee unless a defence is raised which requires the plaint to be amended; then and then only can the value of stamp required be affected. In 28 All 340[5] the learned Judge said :

> We also agree with the lower Appellate Court that in determining what the court-fee should be, regard must be had to the allegations of the plaintiff in his plaint and to the relief sought, apart altogether from evidence.

(Surely the last word should be 'defence'). It is true that in the present case it was alleged that items 3 and 6 of the property formed no part of the estate but on the evidence the Court has held that they did form part of the estate, and no amendment of the plaint on that point before a decree can be passed in favour of the plaintiffs can be necessary. For the respondents the main argument put forward was that the plaint should have been stamped under S. 7 (iv) (b), Court-fees Act, as the suit should be held to be one to enforce a right to share in the joint family property. This argument seems to me quite misconceived, as it overlooks the fact that there is not to be found the word "a" between the words "to" and "share". A suit to come under this sub-clause must be one "to enforce the right to share in the property" and therefore would only be brought by a person whose right to share in the property has been denied. In the present case the plaintiffs' rights to share in the property had been admitted and allowed for a long time and the written statement in para. 6

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[8] Motibhai v. Haridas, (1898) 22 Bom 315.

[9] Dagdu Sakharam v. Totaram Narayan, (1909) 33 Bom 658=4 I C 243=11 Bom L R 1074.

[10] Haji Abdul Rahman v. A. B. Grisp, *Reported in* A I R 1930 Rang 164=126 I C 645.

admitted that the plaintiffs were entitled to some share, because it states the reason why nothing had been paid for the last few months was due to a dispute with regard to the accounts. It states that defendant 2 was constantly requesting plaintiff 1 to go through the accounts and to accept whatever was due after deducting the expenditure for maintenance of the estate, income-tax, and interest due to the estate from her, but she declined to comply and insisted on payment of round sums irrespective of expenditure and interest due. The right to share was admitted, even though the amount payable was disputed, so this suit cannot possibly be one to enforce a right to share in the property. As defendant 2 admitted that he was by arrangement in possession of the property in order to manage it on behalf of the heirs, the plaintiffs were constructively in possession through him and therefore a court-fee of Rs. 10 was sufficient on the plaint as framed.

A further line of argument put forward for the respondents was that as the plaintiffs had admitted their liability to pay the court-fee and had asked for time and obtained time to raise money to pay the court-fee, they could not now question the correctness of the demand for extra court-fee. This argument cannot be accepted. If the plaint was correctly stamped, no demand for further court-fee should have been made, and no possible question of estoppel can arise. If the plaint was correctly stamped, as I hold it was, the suit should not have been dismissed for failure to pay further court-fee. I would therefore set aside the decree dismissing the plaint for non-payment of court-fees and direct the Court to pass a preliminary decree for partition. The respondents will have to pay the appellants' costs; advocate's fee fifteen gold mohurs.

I would note that in the plaint in para. 10 the plaintiffs say that they reserve the right to file a separate suit against the defendants for accounts hereafter. There is no provision of law by which a plaintiff can reserve the right to split his claim arising out of the same cause of action. He may ask the Court to allow him to do so under O. 2, R. 2 (3), but the Civil Procedure Code gives no unilateral right to reserve a claim of this sort. Despite this definite refusal to sue for accounts, the Judge in his order proposed to appoint a commissioner to go into the accounts since the death of Ko Hla Gyi. This appears to be the only reasonable order to be passed, but it cannot be passed on the plaint as framed. If the plaintiffs wish to have a commissioner to go into the accounts, that will entail an amendment of the plaint which may require reconsideration of the court-fees to be paid.

**Sharpe J.**—In this suit the plaintiffs prayed that a decree might be passed directing partition of the joint family properties set out in the schedule annexed to the plaint (of which joint properties they alleged they were in possession jointly with the defendants) and that they might be given their separate shares by sale or otherwise as the Court thought fit and proper. Para. 2 of the plaint alleged that the plaintiffs and the two defendants were in possession of the joint estate and para. 12 stated that the plaintiffs' share in the joint properties would be valued at Rs. 20,400 for the purpose of jurisdiction and pay a court-fee of Rs. 10 under Art. 17, Cl. 4 of Sch. 2, Court-fees Act. In para. 1 of the written statement it was denied by the defendants that two of the properties mentioned in the plaintiffs' schedule belonged to the joint estate: they were alleged by the defendants to be their private property. Para. 19 of the written statement alleged that the plaint was insufficiently stamped.

The learned Judge found that the plaintiffs were entitled to the relief prayed, but held that the court-fee payable was not Rs. 10 but an ad valorem fee based upon Rs. 20,400. He accordingly directed that before the passing of the preliminary decree there must be deposited the full court-fee calculated upon the latter basis. The point for determination in this appeal is as to the amount properly payable for court-fees. To support the ad valorem fee, the case must be brought within either Cl. (b) or Cl. (c) of S. 7 (iv) of the Act; otherwise Sch. 2, Art. 17 (6) will apply and the Rs. 10 will suffice. The District Judge decided the issue of insufficient court-fees in this way: As regards the two items in dispute, he held that they did form part of the joint estate, but he was of opinion that to succeed the plaintiffs ought to make a formal amendment of their plaint to cover a claim for a declaration that those two items belonged to the joint estate. He was accordingly of opinion that the suit, to that extent, became one to obtain a declaratory decree with consequential relief, and came under S. 7 (iv) (c). As regards the five undisputed items, he was of opinion that the suit fell under S. 7 (iv) (b).

I will first deal with the case as if there had been no dispute between the parties as to items 3 and 6 in the plaintiffs' schedule. In my judgment it would then clearly not have been a "suit to enforce the right to share in any property on the ground that it is joint family property," within the meaning of S. 7 (iv) (b). The only relief sought is the partition of property which the plaintiffs say is family property and of which they say they are in possession jointly with others. The somewhat early Allahabad case in 28 All 340[5] is distinguishable, because it does not appear upon the face of the plaint here, as it did there, that the suit is in fact one to establish the plaintiffs' title to a one-third share in certain property and to recover possession of the same, with a claim for partition added to make the relief sought effectual. Here the plaintiffs say that they are already in possession of their share and all they want is to obtain partition, which is merely to change the form of their enjoyment of the property, or, in other words, to obtain a divided instead of an undivided share: see the judgment of Garth C. J. in 8 Cal 757.[1] The case in 12 C W N 37[2] is authority for saying that in such a case the plaint is sufficiently stamped if it bears a Rs. 10 stamp. That Calcutta decision was followed two or three years later in the North-West Provinces in 34 All 184.[6] Therefore upon the authorities it is clear that were it not for the defendants' plea in the present case that items 3 and 6 in the plaintiffs' schedule belong to the joint estate, a Rs. 10 stamp would suffice. The question then remains: What, if any, difference does that plea make? There was a similar plea in 12 C W N 37[2] which I have already cited. It was there held that mere denial on the part of the defendant as to the plaintiff's title and possession does not convert the suit into one for declaration of title and recovery of possession. The matter is very fully dealt with in the joint judgment of the Court at pages 40 and 41. The following passage appears on page 42:

> The plaintiff is admittedly in possession of what is joint property; that he is a co-parcener with the defendants is conceded, but it is denied that all the properties alleged by him to be joint properties have really that character. In our opinion, the suit as framed is one for partition;

and it was held that a Rs. 10 stamp was sufficient. Again, in the recent case in 59 Cal 315,[3] Sir George Rankin C. J. said, at page 318:

> The present case, in my judgment, is a case where the plaintiff is now claiming partition of a residential house on the footing that he is actually sitting there and living there and has been so doing for some time. That being so, it is entirely unnecessary to make him pay court-fee upon a claim to recover possession. In my judgment it is a clear case of partition and is not converted into a case of claim to possession because the defendant's brother or the defendant's mortgagees want to set up that the house is not joint property and that the plaintiff has no title to it.

There is a similar position here. As was pointed out as long ago as 1893, for the purposes of stamp duty the cause of action alleged in the plaint, and that alone, must be looked at, *see* 20 Cal 762,[11] which case was approved in 12 C W N 37.[2] There is therefore ample authority for saying that a plea by the present defendants that part of the property mentioned in the plaint does not belong to the joint estate, does not in any way prevent the present suit being one only to obtain partition. The recent Lahore Full Bench case in 15 Lah 531[7] is further authority for saying both (a) that only Rs. 10 is payable on a plaint in a partition suit where it is alleged by a plaintiff that he is in actual or constructive possession of joint-family property, and (b) that in determining such question the allegations in the plaint alone are to be considered and not the defendant's denial thereof. In that case all the main authorities were exhaustively examined.

The decision at which we have arrived is not only in accord with the views expressed by the High Courts of Calcutta, Allahabad, Madras and Lahore, but also follows the unreported decision of this Court in 1929 in First Appeal No. 10 of 1929[10] to which judgment my brother Baguley was a party. Accordingly I agree that the plaint in the present suit was sufficiently stamped by having a Rs. 10 stamp upon it. The appeal must be allowed, and the case remitted to the District Judge with a direction to him to pass a preliminary decree. I also agree with the proposed order as to costs.

R.W./R.K. *Appeal accepted.*

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[11] Mohendra Chandra v. Ashutosh, (1893) 20 Cal 762.

## A. I. R. 1938 Rangoon 81

BAGULEY AND SHARPE JJ.

*Ma Tin* — Appellant.

v.

*Ma E Nyun* — Respondent.

First Appeal No. 29 of 1937, Decided on 16th August 1937, against order of Dist. Court, Henzada, in C. R. No. 7 of 1936.

**(a) Evidence — Value of — Witnesses examined on commission — Commissioner subsequently examined as witness though not mentioned in witness list—Evidence recorded by Commissioner held could not be relied upon.**

A party got certain witnesses examined on commission but the commissioner who was appointed for examining them was subsequently examined as a witness by the party, though his name did not appear in the list of witnesses :

*Held* that the evidence of the witnesses recorded by the commissioner could not be relied upon as he was an interested person. [P 82 C 1]

**(b) Evidence—Value of — Entry in heading of deposition sheet of witness that he is Burmese Buddhist — Entry has no probative effect to prove his religion.**

The question was whether a certain person was a Burmese Buddhist. In a certain case the person was examined as a witness and the entry in the heading of the deposition sheet showed that he was a Burmese Buddhist :

*Held* that the entry being merely in the heading was of no probative effect and much importance could not be attached to such entry. [P 83 C 1]

**(c) Buddhist Law (Burmese)—Person burying his wife in house compound – Inference is that person is not Burmese Buddhist.**

The fact that a person buries his wife in his own house compound and also wishes that he should be buried there goes to show that he is not a Burmese Buddhist unless reasons are given for the extraordinary mode of burial. [P 82 C 2]

Ze Ya — *for Appellant.*

Po Han — *for Respondent.*

**Baguley J.**—This appeal arises out of an application for letters of administration. The application was filed by Ma Tin who claimed to be a niece of the deceased U Aung. In her application she states that the only relatives left were the deceased's nephews and nieces and they all agree to her getting letters of administration. She says the deceased left no wife or children and he was a Christian at the time he died. Her application was opposed by Ma E Nyun who claimed to be the wife of the deceased and she alleged that the deceased at the time he died was a Buddhist. It is clear beyond dispute that at the time he died he was living as man and wife with Ma E Nyun, but if he was a Christian the ceremony which is alleged to have taken place could not have married him legally to Ma E Nyun. In consequence the whole dispute turns on the question of whether U Aung was at the time he died a Buddhist or a Christian. It is proved beyond dispute that at one time U Aung had been a Christian. A copy of his baptismal certificate was filed showing that he was baptized into the Christian Church on 6th April 1912 and it is not really disputed that the Rev. A. Dilworth, the Missionary in charge of the S. P. G. Mission for the whole Delta division, used to visit him regularly up to March 1935 up to which time he had not formally broken with the Christian Church. He died in May 1936; so the burden of proving that he had reverted to the Buddhist faith lies upon Ma E Nyun.

A number of witnesses have been called on both sides who directly give the lie to each other and as the learned Judge who tried the case points out in his judgment it is a case of hard swearing both of parties and their witnesses. After digesting the evidence of all the witnesses in his judgment, the learned Judge takes the evidence of two pongyis, U Hada Yingata, the presiding pongyi of the Kukoelon kyaungdaik, and U Wa Ya Ma, the presiding pongyi of the Bawanagon kyaungdaik, and accepting their evidence decided that U Aung must be held to have been a Buddhist at the time he died. Had these reverend pongyis been examined by the learned Judge himself in Court, I should have felt that it was impossible to differ from the finding of the trial Judge who had the witnesses before him, but there is one very unpleasant feature about the evidence of these two pongyis. The case was fixed for hearing on 28th and 29th August: on 28th August Ma E Nyun had only three witnesses present. She had filed a witness list showing she was calling eleven witnesses of whom the first two were the two pongyis in question and an application was made that as the pongyis were old and could not come to Court they might be examined on commission. An application for issue of a commission was filed on 29th August, and it was stated that the parties agreed that U Thu Yein, Higher Grade Pleader of Myanaung, should be appointed the commissioner. He was duly appointed commissioner and the commission was returned executed and the Court began to examine the witnesses.

The first witness called by Ma E Nyun was U Thu Yein himself who was examined as a witness to prove of his own knowledge that U Aung was a Buddhist, and U Thu Yein was not named as a witness in the usual witness list. Had he been named as a witness, it would be impossible to believe that he would have been appointed a commissioner to examine the two pongyis as Ma E Nyun's witnesses as he has got to be impartial and unbiassed as a judge. This savours to me of sharp practice and the result is that implicit reliance cannot be placed upon the evidence as recorded of the two pongyis without in the slightest degree impugning the veracity of the pongyis themselves. It is the record of the evidence that cannot be relied upon. This point is not touched upon by the learned Judge in his judgment and it is quite possible that he never noticed it.

There is another point with regard to to Ma E Nyun's witnesses which is not noticed in the judgment and that is that one of her witnesses, Maung Po Kywe, is pecuniarily interested in Ma E Nyun's success because since U Aung died Ma E Nyun has transferred a house site to him which formerly belonged to U Aung and this transfer of course will be valueless if Ma E Nyun does not prove that U Aung died a Buddhist. In addition to this, another of her witnesses, U Lun Byaw, according to another of Ma E Nyun's witnesses, demanded Rs. 300 from Ma E Nyun as being the money which U Aung owed to him on behalf of some third party. U Lun Byaw denied that U Aung owed him any money but Ma E Nyun's own witness says that he made this demand; so the evidence of Po Kywe and Lun Byaw must also be regarded as suspect. For these reasons, it is impossible to accept the view of the learned Judge who tried the case in the way in which it would usually be accepted in a case which is obviously one which depends entirely on the credibility of witnesses who give evidence in Court, and it is necessary for this Court to examine the evidence afresh. In such a case the best plan I think is to take the evidence which is in the nature of admissions by the other side and the evidence which is beyond dispute. U Aung died of poisoning and an inquest was held upon his body. At that inquest Ma E Nyun was examined as a witness. In her deposition at the inquest as recorded by the Magistrate appears a passage:

> Since I was married to the deceased I held 'Nat-pwe' for the good health of the deceased although he had no faith in such ceremonies on account of his being a Christian.

This is a very definite admission by Ma E Nyun which she can only meet by saying that what she really said was that U Aung did not believe in Nats because he had once been a Christian. As her case is that U Aung had not been a Christian for many years and she had only been married to him for one year this explanation is poor. Next we have the definite statement recorded in the evidence of U Hada Yingata that although the house of U Aung had a shrine in it there was no image of Buddha in that shrine. The existence of a shrine is easily explained by the fact that the house was built before he became a Christian. The absence of an image of Buddha in it requires a good deal of explanation, for, had he reverted to Buddhism he would undoubtedly have had an image placed in it, and this admission casts a very grave doubt upon the allegation of the witnesses called by Ma E Nyun that for years U Aung had shikhoed the Buddha in the shrine in his house and made offerings to it night and morning.

Next we have the admitted fact that Ma Ngwe Nyun, U Aung's first wife, who only died a little more than a year before he did, was buried in U Aung's house compound and no reason for this extraordinary mode of burial is given by Ma E Nyun. Speaking for myself, I cannot recollect any case within my knowledge of a Burmese Buddhist being buried in the compound of his own house. A Buddhist of importance may be buried in a kyaung compound, otherwise he is buried in the ordinary village burial ground reserved for Burmese Buddhists and it seems to me most striking that Ma Ngwe Nyun should have been buried in the compound of U Aung's house and U Aung is said to have expressed the desire that he should be buried there also. I can only attribute this to a notion that as Ma Ngwe Nyun was a Christian she should not be mixed up even in death with non-Christians. As there were said to be only four Christians in Myanaung and there was probably no Christian burial ground available for interment, I would interpret this mode of burial as being a case of religious exclusiveness and definite evidence pointing to U Aung and his first wife being Christians at any rate at the time that Ma Ngwe Nyun died and this is quite inconsistent with Ma E Nyun's case that U Aung had been a Buddhist for many years before he died. As against this, we have the fact that U Aung himself once when examined as a witness a few months before he died is recorded in the heading of the deposition sheet as a Burmese Buddhist. In the ordinary heading form he is recorded as having said:

> My name is U Aung.
> My age is 55.
> I am by race } B. B.
> I profess the }

B. B. is of course the conventional abbreviation for "Burmese Buddhist," but I cannot attach any great importance to this record. I have filled up too many thousands of these forms myself to attach a great importance to statements of this nature. When a witness gets into the witness-box wearing Burmese clothes and looking like a Burman · the Kyansa is habitually put in his hands for him to be sworn on and frequently without a question a "B. B." is put against these two entries. Very rarely the witness protests and the Kyansa is removed and the Bible is put in his hands: a protest is made sometimes after the Buddhist form of oath has been taken and the man is resworn: but I have little doubt that frequently the whole thing is gone through as a matter of routine and no grave importance is attributed to the ceremony by the witness. Had the statement occurred in the body of the deposition, that would have been of course quite another matter, but the entry being merely in the heading I regard this as being of no probative effect. As I have said before, the case is one of hard swearing on both sides. The burden of proof that U Aung had reverted to Buddhism being upon Ma E Nyun, Ma E Nyun was guilty of sharp practice in getting the evidence of the pongyis recorded in the way she did. The evidence of the pongyis as recorded cannot be relied upon owing to the way in which it was recorded. Two of her witnesses are pecuniarily interested in the result and before the present dispute arose she very definitely admitted at the inquest that U Aung was at any rate during his last illness a Christian. U Aung's mode of burying his first wife would be incompatible with his being a Burmese Buddhist and his action in that respect supports the case of Ma Tin that he and his first wife were Christians. The evidence of Ma E Nyun's witnesses with regard to U Aung shikhoing and making offerings night and morning to the image of Buddha in his house shrine is negatived by the statement of U Hada Yingata to the effect that in the shrine at U Aung's house there was no image of Buddha and that discounts all the evidence on behalf of Ma E Nyun.

For these reasons I am bound to hold that Ma E Nyun has failed to prove that U Aung reverted from Christianity to Buddhism. It must be held that at the time he died he was a Christian and she is therefore not his legal wife and his estate will go to his nephews and nieces. For these reasons I set aside the order of the trial Court directing letters of administration to issue to Ma E Nyun and dismissing the application of Ma Tin. I direct that letters of administration do issue to Ma Tin on her furnishing security in the sum of Rs. 4000. Ma E Nyun must bear costs in both Courts and I fix the advocate's fee in this Court at five gold mohurs.

**Sharpe J.**—Ours is indeed a difficult task, for, in a case involving but a single issue and that issue one of pure fact, with six witnesses on one side as against nine witnesses on the other, an obvious case, as the learned trial Judge pointed out, of hard swearing of parties as well as witnesses—how are we, who have not the advantage of seeing those witnesses and of observing their demeanour, to decide on which side the truth lies? Were it not for one matter, I think it would be almost impossible for me to say anything more than that the appellant has not satisfied me that the learned trial Judge was plainly wrong. The one matter to which I refer is that set out in the first part of the appellant's second ground of appeal, namely that the lower Court has entirely ignored the fact that the respondent had recently made an admission before the Township Magistrate that her deceased husband was a Christian: *see* Criminal Miscellaneous Case No. 7 of 1936 of the Township Magistrate's Court of Myanaung. There is no doubt that the respondent did make such an admission; on 1st July 1936 she swore in that Township Magistrate's Court that the deceased continued a Christian after she married him (which she had done in June 1935). On 28th November last, less than five months later, she swore in the present suit, that the deceased was already professing Buddhism at the time of their marriage. An examination of the judgment appealed from reveals no reference whatever to this highly important admission on the part of the respondent. It is most unfortunate that the learned Judge did apparently overlook it, for I feel sure that if it had been present to his mind, it would have made his task easier, and that, almost necessarily, he would have decided this issue of fact against the respondent. This one omission on the part of the learned trial Judge, being of the nature it is, enables me to agree with my brother Baguley, that this appeal should be allowed with costs here and below, that the order appealed from should be set aside, and that letters of administration should issue to the respondent on her furnishing security in the sum of Rs. 4000.

Appellant's advocates should realise the necessity of having Bench copies made of all documents upon which they intend to rely and which it is necessary for the members of this Court to peruse. Here the appellant's advocate did not ask for any Bench copy to be prepared of the respondent's deposition in Criminal Miscellaneous No. 17 of 1936 of the Township Magistrate's Court of Myanaung, although such deposition was, as I have already mentioned, expressly referred to in the memorandum of appeal. It is because of this omission that I agree with my learned brother that the advocate's fee in this Court should be five gold mohurs; if the proper Bench copies had been bespoken I should have suggested to my brother Baguley that this was a case in which we ought to fix the advocate's fee in this Court at a larger figure than we are now doing.

K.B./R.K. *Appeal allowed.*

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## * A. I. R. 1938 Rangoon 84

BA U J.

*M. K. Kasiviswanathan Chettyar* — Plaintiff.

v.

*R. M. S. L. Lakshmanan Chettyar* — Defendant.

Suit No. 265 of 1936, Decided on 6th May 1937.

*** Limitation Act (1908), S. 19 — Acknowledgment need not be express — It may be implied—Definite admission of liability is not necessary.**

The word acknowledgment as used in S. 19 does not mean express acknowledgment or a definite admission of liability. The acknowledgment may be either express or implied and each case must be decided on its own merits. [P 85 C 2]

Where a promissory note for Rs. 12,500 admittedly executed by the debtor contained an endorsement on its back to the effect that a sum of Rs. 410 had been paid and the debtor had signed thereunder:

*Held* that the only reasonable inference that could be drawn was that the debtor had acknowledged his liability to pay the balance due on the promissory note and that the endorsement amounted to an acknowledgment within the meaning of S. 19: *A I R 1923 Bom 239 and A I R 1921 Cal 331, Rel. on*; *A I R 1930 All 453, Disting.* [P 86 C 1]

Doctor and Venkatram — *for Plaintiff.*

Hay and Bhattacharya—*for Defendant.*

**Judgment.**—This is a suit for recovery of Rs. 12,000 alleged to be due on a promissory note dated 20th August 1930. The suit was filed on 1st August 1936 and it is prima facie barred by time. The plaintiff claims exemption from limitation on the following grounds:

> That the defendant on the 19th Adi Sreemukha corresponding to 3rd August 1933 made an endorsement of payment of Rs. 410 towards the said promissory note on the back of the promissory note under his signature. The plaintiff claims exemption from limitation by reason of the said endorsement.

The defendant admits having executed the promissory note in suit for consideration but pleads that it is barred by time. Leaving out the unnecessary details, what the defendant avers as to how the suit is barred is that the payment of Rs. 410 was made on 23rd May 1932 but the fact of the payment was noted on the back of the promissory note only on 3rd August 1933. He therefore contends that time for the purpose of limitation should be reckoned not from the date of the endorsement but from the date of the actual payment, namely 23rd May 1932. The plaintiff by his reply admits that the payment of Rs. 410 was made on 23rd May 1932 and the endorsement was made only on 3rd August 1933 as alleged by the defendant. On these pleadings only one issue was framed and that issue is, "whether the suit is barred by lapse of time." No evidence has been led in the case, counsel having agreed to address the Court on the pleadings as they stand. The decision of the case thus turns upon the endorsement on the suit promissory note. The endorsement is in Tamil but the official translation of it is in the following terms:

> On the 19th Adi of Sreemukha year (3rd August 1933) and on 10th Vaigasi of Aungirasa year (23rd May 1932) paid towards this Rs. 410, this sum of rupees four hundred and ten only, through the account of Ko Pan of Ywabathalli Ywa.
>
> (Sd) R. M. S. L. Letchumanan Chettyar.

The submission made by Mr. F. S. Doctor on behalf of the plaintiff is that this endorsement amounts to an acknowledgment by the defendant of his liability to pay the amount remaining due on the promissory note within the meaning of S. 19, Limitation Act, and that therefore time should be computed from the date of the endorsement. If this endorsement amounts to an acknowledgment within the meaning of the aforesaid section, the suit is of course well within time. Mr. Hay on behalf of the defendant however contends that the word "acknowledgment" as used in S. 19, Limitation Act, means "a definite admission of one's liability" and as the endorsement as it stands, does not connote the admission of his liability by the defendant, time should be computed from the date of the payment of Rs. 410 as laid down in S. 20, Limitation Act. In support of his contention Mr. Hay relies on 55 All 632[1]. The facts of that case are entirely different from the facts of the present case. In that case the plaintiff sued for the recovery of a certain sum of money alleged to be due as the balance of the price of goods sold and delivered to the defendant. The defence of the defendant was that the suit was barred by time. In order to escape the bar of limitation, the plaintiff relied on a number of payments made by the defendant as noted in his peon book. On these facts Niamatullah and Rachhpal Singh JJ. made the following observations:

> Where a debtor pays a certain sum of money to his creditor there may be implied acknowledgment of the liability to the extent of the amount paid. It cannot however be said that the remaining liability shown by evidence aliunde should be deemed to have also been acknowledged.

The learned Judges accordingly dismissed the appeal. I entirely agree with the learned Judges in their observations on the facts as presented in that case. The mere endorsement of payments of certain sums of money in a peon book cannot be treated as being tantamount to an acknowledgment by a debtor of his remaining liability. If such an endorsement were made on the back of a promissory note or a bond different considerations would then arise. If the learned Judges in the aforesaid case, however meant to hold, as contended by Mr. Hay, that whatever the circumstances and the nature of the case may be, "if a debtor pays a certain sum of money to his creditor, there may be an implied acknowledgment of the liability to the extent of the amount paid, but it cannot be said that the remaining liability should be deemed to have been also acknowledged," then I would respectfully say that I do not agree. That would mean that the word "acknowledgment" as used S. 19, Limitation Act, means "express" acknowledgment. There is no warrant for restricting the use of the word "acknowledgment" in this way. It may be either express or implied. Each case must in my opinion be decided on its merits. In connexion therewith I may refer to the observations of Mookerjee J. in 48 Cal 1046[2] at p. 1049 wherein the learned Judge said:

> Whether a particular endorsement does or does not constitute an acknowledgment of the right claimed by the plaintiff must obviously depend upon its terms, and no useful purpose can be served by a meticulous examination of other endorsements made under different circumstances and expressed in different phraseolcgy.

In support thereof the learned Judge quoted the following observations made by their Lordships of the Privy Council in 33 Cal 1047=33 I A 165[3]:

> In a case of very great weight, the authority of which has never been called in question, Mellish L. J. laid it down that an acknowledgment to take the case out of the statute of limitation must be either one from which an absolute promise to pay can be inferred or, secondly, an unconditional promise to pay the specific debt, or thirdly, there

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[1] **Ram Prasad v. Binaek Shukul, (1933) 20 A I R All 458=144 I C 899=55 All 632=1933 A L J 930.**

[2] **Prasanna Kumar Ray v. Niranjan Ray, (1921) 8 A I R Cal 331=64 I C 988=48 Cal 1046=33 C L J 433=26 C W N 213.**

[3] **Maniram v. Seth Rupchand, (1906) 33 Cal 1047=33 I A 165=2 N L R 130=10 C W N 874=4 C L J 94 (P C).**

must be a conditional promise to pay the debt and evidence that the condition has been performed.

Now, if the present case is examined in the light of these observations what do we find? There is a promissory note for Rs. 12,500 admittedly executed by the defendant and on the back of which there is an endorsement to the effect that a sum of Rs. 410 has been paid and the defendant has signed thereunder; what inference can be drawn from this? The only reasonable inference that can be drawn from this is that the defendant has acknowledged his liability to pay the balance due on the promissory note. This is not without support: see the case in 47 Bom 632[4] at p. 635, the facts of which are almost similar to the facts of the present case. In that case the plaintiff sued for recovery of certain sums of money due on two promissory notes. The suit was contested in respect of one promissory note on the ground of limitation. Defendant 2 in that case made three payments of three different sums on three different dates, namely Rs. 90 on 2nd February 1913, Rs. 200 on 11th January 1916, and Rs. 381-12-0 on 21st April 1916. Then on 6th November 1916, defendant 2 endorsed on the note the three payments which had been made on the previous dates, added up the total, and signed underneath. On these facts Macleod C. J. observed:

> It is difficult to say that that endorsement can mean anything else than this, "I have paid so much on account of my liability on the note, and in consequence I am only liable for the balance remaining due."

This is exactly what has happened in this case, and for all the reasons given above I hold that the endorsement on the suit promissory not is an acknowledgment within the meaning of S. 19, Limitation Act, and the suit is consequently not barred by time. I grant a decree in the terms prayed for with costs.

R.M./R.K. *Suit decreed.*

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[4] Ganesh Narhar v. Dattatraya Pandurang, (1923) 10 A I R Bom 239=72 I C 249=47 Bom 632=25 Bom L R 144.

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## A. I. R. 1938 Rangoon 86

BAGULEY J.

*Tribeni Misser* — Applicant.

v.

*Jagarnath Bhagwandas* — Respondent.

Civil Revn. Appln. No. 60 of 1937, Decided on 28th June 1937, from judgment of Small Cause Court, Rangoon, in C. R. Suit No. 2461 of 1936.

**Master and Servant – Contract of service – Reasonable notice – Monthly servant leaving without notice is entitled to be paid down to the date when wages were last due but not for period since that date – Master claiming to retsin wages as damages can only claim them by way of set-off.**

In the absence of binding contract by which the servant agrees to forfeit wages if he withdraws without giving notice, a monthly servant who leaves without notice is entitled to be paid down to the date when the wages were last due, but not for the period he has served since that date. [P 87 C 1]

A master claiming to be entitled to retain the wages due to the servant as damages for leaving without notice can only claim that as a set-off or as damages and such a claim has to be stamped: *(1901-6) 2 U B R Master and Servant 1 and A I R 1915 L B 110, Rel. on.* [P 87 C 1]

Ahmed — *for Applicant.*

Rauf — *for Respondent.*

**Order.**—This is an application to revise a decree of the Small Cause Court of Rangoon dismissing a suit filed by the applicant for wages due. The plaintiff's case was that he was engaged on 10th October 1935, at Rs. 22 a month, and that he worked until 31st January 1936, and had not been paid. The defence was that he had been allowed to live in the mill premises as he was out of employment from 15th October 1935, that he was engaged from 5th December 1935, at Rs. 6 a month, while the mill was being repaired, the pay being in the nature of a subsistence allowance, and that when the mill started working on 10th January 1936, he was engaged at Rs. 14 a month. The third paragraph of the written statement is:

> The plaintiff is entitled to Rs. 12-6-3 as per following particulars:

| | Rs. | A. | P. |
|---|---|---|---|
| Food expenses from 5th December 1935 to 9th January 1936 ... | 7 | 2 | 0 |
| Pay from 10th January 1936 to 31st January 1936 at Rs. 14 per month ... ... ... | 10 | 4 | 3 |
| | 17 | 6 | 3 |
| *Less* paid ... | 5 | 0 | 0 |
| | 12 | 6 | 3 |

and the last paragraph of the written statement is:

> The defendant is not liable to pay the said sum of Rs. 12-6-3 as the plaintiff left without notice.

The learned Judge found on the facts that the engagement was at Rs. 6 a month from 5th December, and at Rs. 14 a month from 10th January. The second point for decision was as to whether the plaintiff had received Rs. 5 in advance, and he accepted the defendant's statement. The third point was whether the plaintiff left on 31st January without notice, and he accepted the evidence of the defendant on that point also. The last finding of the learned Judge was that the plaintiff was not entitled to get his wages for the month of January as he left without notice. In view of the fact that the written statement definitely admits that the plaintiff was entitled to Rs. 12-6-3 this can only be taken as an admission that that sum was due to him, unless he had forfeited it by leaving without notice. The trial Court found that because he left without notice, he was not entitled to get his wages for that month, although the month had been completed, and as authority for this proposition, the learned Judge quoted (1901-06) 2 U B R "Master and Servant[1]". This case hardly seems to support the finding of the learned Judge. The headnote to it is as follows:

> In the absence of binding contract by which the servant agrees to forfeit wages if he withdraws without giving notice, a monthly servant who leaves without notice, is entitled to be paid down to the date when wages were last due, but not for the period he has served since that date.

This is based on the quotation from Smith on Master and Servant :

> If a servant, whose wages are due periodically, absconds or is rightfully discharged, he is not entitled to be paid any wages for that portion of the time during which he has served since wages were last due.

In the last edition of Smith's "Law of Master and Servant" (Edition 8) on page 145 there occurs the passage :

> But default of the servant after the day on which a periodical payment of wages accrued due would not deprive him of his right to recover such periodical payment—would not divest a vested right.

It seems therefore that when he left, the plaintiff was entitled, on the defendant's own showing, to a sum of Rupees 12-6-3, wages. If the defendant wished to claim that he was entitled to retain that money as damages for leaving without notice, then he could only claim that either as a set-off or as damages: *vide* 8 Bur L T 15[2]. In that case it is laid down that such a claim would have to be stamped. Here there is no counter-claim made, nor was the written statement stamped. This particular defence therefore could not be allowed. I would alter the decree of the Small Cause Court, and give the plaintiff a decree for Rs. 12-6-3, with costs on that amount in both Courts, but the appellant will have to bear the respondent's costs on the balance of his claim, which has been dismissed.

R.M./R.K. *Decree altered.*

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[1] Raja Shew Bakhsh Bogla Ballab Das v. Pirumal, (1901-6) 2 U B R "Master and Servant" 1.

[2] P. H. Ripley v. R. Vaithanatha Iyer, (1915) 2 A I R L B 110=26 I C 270=8 Bur L T 15.

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## A. I. R. 1938 Rangoon 87

ROBERTS C. J. AND SHARPE J.

*Chattal Trading Co. Ltd.*—Applicant.

v.

*Babu Mahim Chandra Das and others* —Opposite Party.

Civil Revn. Appln. No. 343 of 1937, Decided on 5th July 1937, against order of Asst. Dist. Court, Akyab, D/- 21-8-1936.

**Revision — Case prima facie time-barred—Order of lower Court without adjudication of limitation—Order can be interfered with.**

High Court can interfere in revision in a case which is on the face of it time-barred and where the lower Court has made an order without adjudicating on the question of limitation : *A I R 1916 Cal 651, Rel. on.* [P 87 C 2]

S. C. Chowdhury — *for Applicant.*

**Roberts C. J.**—This is an application to set aside an order made by the Assistant District Judge of Akyab setting aside an ex parte decree and it appears that application was made before him to set aside the ex parte decree on 22nd June 1936. A preliminary decree had been passed on 4th July 1935 and by Art 164, Limitation Act, the period of limitation for an order to set aside a decree passed ex parte is 30 days. It also appears that on 23rd January 1936 his agent took time to file his objections and later made an application to make the Official Assignee of Calcutta a party as the defendant had been adjudged insolvent.

By reason of the decision in 19 C W N 970[1] we have reached the conclusion that the High Court can interfere in revision in a case which is on the face of it time-barred and where the Assistant District Judge has made an order without adjudicating on the question of limitation. Accordingly this order must be set aside with costs three gold mohurs.

**Sharpe J.**—I agree that this application is clearly barred by the Limitation Act and I have nothing else to add.

D.S./R K. *Order set aside.*

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[1] Tara Sankar Ghosh v. Nasaruddi, A I R 1916 Cal 651=29 I C 476=19 C W N 970=22 C L J 589.

## * A. I. R. 1938 Rangoon 88

MACKNEY J.

*Maung San U* — Applicant.

v.

*Maung Lu Gale* — Respondent.

Criminal Revn. Appln. No. 494-B of 1937, Decided on 28th October 1937, from order of Subdivisional Magistrate (1), Kyaiklat, D/. 19th July 1937.

*** Criminal P. C. (1898), S. 145 (4) — Appointment of Receiver — Court cannot appoint receiver with powers under Civil Procedure Code, but can attach property in dispute — Meaning of "attach" explained — Property so attached can be entrusted to some one who however will not have power of receiver under Civil Procedure Code — Person so entrusted is however entitled to be reimbursed — Purpose of S. 145 is speedy remedy—So appointment of proper receiver as such does not serve the purpose.**

Under S. 145 (4) a Magistrate has no power to appoint a receiver and to give in his charge the property in dispute. It can at the most attach it, but the Code does not make it clear by what method the attachment is to be effected. But if the analogy of S. 88 were to be followed, the Magistrate ought to attach the land through the Collector of the District. The word "attach" merely means to bring under the control of the Court, and the Magistrate is entitled to effect that object in any way which is within his power. The appointment of a receiver with the powers of a receiver under the Civil Procedure Code is not one of those ways because unless that power is expressly given, a Magistrate cannot exercise it. At the same time, if the Magistrate's attachment is to be effected, Magistrate must put some person into possession of the property, who will have authority to maintain his possession. However the word "receiver" should not be applied to such person because of possibilities of misunderstanding. The person so appointed can be reimbursed for the legitimate costs incurred by him in management of the property. Another reason for which a "receiver" endowed with powers under the Civil P. C. should not be appointed is that the proceedings under S. 145 are intended to be carried through without delay and the time during which the subject of the dispute needs to be under attachment is so short as certainly not to justify the appointment of a receiver having the powers of a receiver under the Civil Procedure Code : *A I R 1933 Lah 409 and 14 I C 759, Ref.* [P 89 C 1, 2; P 90 C 2]

Chan Htoon — *for Applicant.*

**Order.**—The respondent Maung Lu Gale is a village headman. Within his village tract, a dispute arose between the applicant Maung San U and his friends on the one hand and one Daw Thet and her friends on the other, as to the right to work a certain piece of land. Maung Lu Gale filed a petition in the Subdivisional Court of Kyaiklat stating that Daw Thet was cultivating the land that year and Maung San U forcibly entered thereon. As the parties were armed with dahs a breach of the peace was likely; hence he asked the Subdivisional Magistrate to take action under S. 145, Criminal P. C. The Magistrate considered that there was sufficient ground for his taking action under S. 145 and proceeded to do so. The parties appeared before him on the 25th June. The Subdivisional Magistrate then recorded the following note:

> From the written statement filed by Ma Thet and others that other party engaged bad hats armed with dahs and sticks to use violence. The pleaders for both parties to appoint a receiver. U Ba and U Tun Win (nominate) Maung Lu Gale to be appointed as a receiver. Maung Lu Gale is appointed as receiver.

This order is dated 25th June 1937. As a matter of fact, although Maung San U was present on this occasion he was not yet represented by a pleader. U Ba represented Maung Lu Gale himself although why it should have been necessary to engage a pleader in this matter is not at all clear to me. U Tun Win was engaged by Daw Thet and her party. On the 16th July the Subdivisional Magistrate passed orders declaring that San U was in possession of the land in suit and forbidding all disturbance of such possession until he was evicted therefrom in due course of law. The Subdivisional Magistrate then ordered the receiver to deliver up the land to San U and to produce his accounts. The receiver duly filed his bill, which amounted to no less than Rs. 304-12-0, a most preposterous bill for a receivership lasting barely three weeks. The Magistrate then recorded the following order:

> The receiver filed list of costs which was settled with the pleaders. Maung San U shall have to pay Rs. 137 to Maung Lu Gale.

How this sum of Rs. 137 was arrived at is not apparent. Maung San U now applies to this Court to revise this order on the ground that the Magistrate had no power to appoint a receiver under S. 145, Criminal P. C., that even if he had power he should not have passed the accounts filed by Maung Lu Gale without an opportunity being given to him to raise objections, and that it was not properly proved that Rs. 137 had been reasonably incurred. As regards the first point, S. 145, sub-cl. (4), proviso (2), reads as follows:

> Provided also, that if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

The Code does not explain by what method the Magistrate is to effect the attachment. S. 146, Cl. (2), which deals with the procedure of the Magistrate when he has decided that none of the parties is in possession or is unable to satisfy himself as to which of them is in possession, provides that he may attach the subject of dispute, and when he so attaches it, may, if he thinks fit, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Civil Procedure Code. It seems to me, in view of this express provision which we find in S. 146, that if it were intended that a Magistrate should have power to appoint such a receiver under sub-cl. (4) of S. 145 it would have been so stated and that the absence of such special provision precludes the Magistrate from appointing such a receiver. In S. 88 of the Code, which deals with the attachment of the property of persons absconding, sub-cl. (1) gives power to attach the property of such proclaimed person, and sub-cl. (4) explains that where the property attached is immovable and is land paying revenue to Government, the attachment is to be effected through the Collector of the district in which the land is situate, and in all other cases by four other methods, one of which includes the appointment of a receiver with the powers of a receiver appointed under Ch. 36, Civil P. C. In the present case, the land in dispute is land paying revenue to Government and if the analogy of this section were to be followed the Magistrate in the present case ought to have attached the land through the Collector of the district.

The word "attach" merely means to bring under the control of the Court, and the Magistrate is entitled to effect that object in any way which is within his power. Certainly, the appointment of a receiver with the powers of a receiver under the Code of Civil Procedure is not one of those ways, because unless that power is expressly given, a Magistrate cannot exercise it. In 14 Lah 615,[1] it was held that in attaching property under S. 145, Criminal P. C., the Magistrate was not limited to the issue of an order prohibiting alienation of the property. In 14 Lah 615,[1] it appears that the Magistrate had attached the property through the police, who were put in possession. The learned Judge who decided the case quoted with approval the remarks of Sankaran Nair J. in 13 Cr L J 295[2] that the right to attach property carries with it the right to take necessary steps for its custody and management and that a receiver can be appointed for the purpose under S. 145, Criminal P. C., just as he can be appointed under S. 146, Criminal P. C., though in the former case he acts merely as an agent of the Court and has not all the powers which are specifically conferred by S. 146, Criminal P. C., upon a receiver appointed under that section. Whilst I think it advisable not to employ the term "receiver" owing to the possibilities of misunderstanding that may arise, yet I think that it is clear that if the Magistrate's attachment is to be effected he must put some person into possession of the property, who will have authority to maintain his possession. The learned counsel who appears for the applicant has brought to my notice certain cases which are not reported in the authorised law reports, which seem to indicate a contrary opinion. I do not propose to discuss them as they have not been reported in the authorized reports and also because they appear to deal with instances where the Magistrate has purported to appoint a receiver having the powers of a receiver under the Code of Civil Procedure and to that extent these decisions are not in disagreement with the decision in 14 Lah 615.[1]

An additional reason against the appointment of such a receiver under sub-cl. (4) of S. 145, Criminal P. C. which has been put forward by the learned counsel for the applicant and which to my mind has considerable weight is this that the proceedings under S. 145 are intended to be carried through without delay and the time during which the subject of the dispute needs to be under attachment is so short as certainly not to justify the appointment of a receiver having the powers of a receiver under the Code of Civil Procedure. We find that where such power is given, as under S. 146, Criminal P. C., it is a case where the settlement of the dispute is likely to be postponed for a considerable time. The question has now to be determined, what are the costs which may be said to have been incurred by the parties owing to the attachment of the land by the Magistrate and which of the parties should be required to pay those costs. From the final order of the Magistrate, it would appear that the applicant, Maung San U, who was ordered to pay these costs, was the person aggrieved. He was the person who was in possession and he was the person whom the Magistrate has declared to be entitled to remain in possession. It appears to me quite clear that the costs incurred by the Magistrate in ousting San U from possession temporarily are costs which should be incurred by the other party, namely Daw Thet and her party. It has been urged on behalf of the respondent that he is at least entitled to claim from the applicant the costs of material purchased by him for the purpose of cultivating the land and other expenses which would have been incurred by San U himself if he had remained in possession of the land. The bill of costs put in by the respondent includes the following items :

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[1] **Prem Kaur v. Benarsi Das, (1938) 20 A I R Lah 409=1938 Cr C 650 = 142 I C 207 = 34 Cr L J 842=14 Lah 615=34 P L R 368.**

[2] **Srinivasa Pillay v. Sathayappa Pillay, (1912) 14 I C 759=13 Cr L J 295.**

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|---|---|---|---|
| Rs. | 150 | 0 | to two men "for cultivation;" |
| " | 20 | 0 | for hiring buffaloes ; |
| " | 30 | 0 | for cooking ; |
| " | 30 | 0 | for hire of cattle shed ; |
| " | 24 | 0 | costs of agricultural implements ; |
| " | 28 | 12 | for purchase of seed paddy ; |
| " | 22 | 0 | costs of feeding labourers. |

It does not appear to me that none of these charges are legitimate costs to be incurred by a person who was put in very temporary possession of the land merely as an agent of the Magistrate for the purpose of keeping disputing parties out of possession. On the other hand, if any of these costs were ocsts legitimately so incurred, then surely it is not San U who should be made to pay them, but the opposite party, namely Daw Thet and her friends. If as a matter of fact San U has taken the benefit of any of the expenditure of Maung Lu Gale, Maung Lu Gale might have his remedy in the Civil Court. Certainly he cannot ask the Magistrate to reimburse him for the expenditure in that direction if such expenditure was entirely unauthorized. It might be that if Maung Lu Gale had been obliged to incur expenses for matters necessary to be carried out for the immediate preservation of the property, Maung San U might be required to pay the costs thereof. However in the list of items to be found in Maung Lu Gale's bill I can find no item to answer this description. The only one which might possibly be held to have been of such a nature is the item for seed paddy, on the supposition that it was absolutely essential that the seed should be planted without delay. I cannot be convinced that a delay of three weeks would have been so material. In any case it appears to me that Maung Lu Gale was certainly not entitled to incur such expenditure without the sanction of the Magistrate. For these reasons, I set aside the order of the Magistrate directing Maung San U to pay Rs. 137 to Maung Lu Gale. As it is possible that certain costs incurred by Maung Lu Gale were costs which must inevitably be incurred if he were to carry out the purpose for which he was appointed by the Magistrate, as set out above, I direct the Magistrate to reconsider the bill of costs put in by Maung Lu Gale and to decide what amount of that bill can be attributed to such legitimate costs. Having ascertained the amount if any, he can then consider whether Daw Thet and her party should be directed to pay it or not.

B.D./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 90

MOSELY J.

*Ah Yan and another* — Appellants.

v.

*President, Wakema Municipal Committee*—Respondent.

Second Appeal No. 327 of 1936, Decided on 7th April 1937, from judgment of Dist. Court, Myaungmya, in C. A. No. 18 of 1936.

**Surety—Discharge—In order to discharge surety positive act on part of obligee to the prejudice of surety must be proved—Mere laches or acquiescence on obligee's part is not sufficient.**

Mere laches of the obligee, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a surety bond, is not sufficient of itself to relieve the surety. There must be some positive act done by him to the prejudice of the surety or such degree of negligence as to imply connivance and amounts to fraud. [P 91 C 2 ; P 92 C 1]

A person stood surety to the Municipality for a Tax Collector. It was not part of the conditions of surety bond that the Municipality should supervise the work of the Tax Collector and it was only for its own protection that bye-laws were passed prescribing the methods of doing so:

*Held* on defalcation of the Tax Collector, that in order to discharge the surety for the Tax Collector it was necessary to show that the Municipality was guilty of affirmative and not merely of negative misconduct: *Case law referred.* [P 92 C 1]

**Rauf**—*for Appellants.*

**Wellington**—*for Respondent.*

**Judgment.** — This second appeal is against a decree by which the appellants, who were sureties for one Maung Ba U, a Tax Collector for the Wakema Municipality, were ordered to pay Rs. 2378-6-6—the amount of the Tax Collector's defalcations—to the said Municipality. The only ground now argued is that the Municipality omitted to do certain acts which their duty to the sureties required them to do, and thereby impaired the remedy of the sureties against the principal debtor, thereby discharging the sureties (S. 139, Contract Act). It appears that the Municipal bye-laws require the Secretary to see that the Tax Collector did not keep more than Rs. 300 in his possession (R. 21). Some of the tax receipts in question had been entrusted to the Tax Collector on 1st April 1933, others in July, and others in October. The defalcation was apparent on 27th November 1933, when the Tax Collector made a false report of burglary. Some of the tax tickets were perhaps an unduly long time in his hands. The Municipality had passed a resolution as long ago as November 1923, deciding that all Tax Collectors should send in a return of the taxes collected once a week. This resolution appears to have been a dead letter until August 1933, when efforts were made to enforce it, but the Tax Collector in question failed to send in any statements, and from then on, it would appear from the Auditor's report, which has been put in in evidence (Ex. 1), that after the last credit of taxes by the Collector on 20th September 1933, the Secretary failed to check the assessment rolls and verify the outstandings with the tax tickets, (*vide* R. 17, *see* p. 4, Ex. 1). It would appear, too, from the evidence of the then President, Maung Than Kywe, (p. 34 of the record), that the Commissioner was warning the Municipality about the outstandings. It is argued for the appellants that these failures on the part of the Municipality to check the tax collections and to see that the receipts were promptly credited were responsible for the defalcation. There was nothing, of course, in the bond which bound the Municipality to supervise the work of the Tax Collector in this way or in any other way. As was said in the leading case in (1836) 3 Cl & F 525[1] at pp. 539, 540 by Lord Brougham:

> Now the main reliance of the respondent, and which view the Court below fully shared, is upon the supposed fact of the commissioners having been careless in calling on Jeffrey to render accounts, and in other respects to perform his duty under the statute. They say that it was the office of the Commissioners to see that he did properly discharge his duty; that the cautioner relied on their performing that office, and that their non-performance creates a case which he never contemplated, and to which his suretyship cannot apply. Was it of no moment to observe that the performance of the statutory duties by Jeffrey was one of the very things for which the obligation bound his surety ? Assuredly it is no argument against my being answerable for a man's not doing a certain thing that the party to whom I gave this obligation did not see that he did the thing. I had myself undertaken for his doing it, and it is no discharge of my voluntary obligation that the other party, the obligee, did not see to his proceedings. The statute and the bond have the very same object of giving the creditors a double security against malversation of the trustee, the superintendence of the Commissioners and the obligation of the surety. The argument of the respondent here, and by which he swayed the Court below, at once cuts off one of these securities, and leaves the creditors only protected by the other. The duty incumbent on the Commissioners, as a pledge to them, continues; but that security they had without the bond, and I do not see how the bond can avail them at all, or why it was to be taken if this argument prevails.

It is clear that mere laches of the obligee, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties : *see* on this (1888) 22 Q B D 394[2] at p. 417, (1836) 3 Cl & F 525[1] cited above, (1808) 10 East 34[3] and (1817) 3 Mer 272.[4] It is necessary to show, as was said in *Mactaggart's case*,[1] that the Municipality so conducted themselves as

> either by their conduct they prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened.

Denman J. said in (1889) 22 Q B D 394[2]:

> Lord Kingsdown's judgment in (1862) 6 L T N S (763),[5] puts the matter thus after referring to several other cases : 'From these cases it is clear that upon the point now in dispute the rule at law and in equity is the same ; that the mere passive inactivity of the person to whom the guarantee is given, his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him, does not discharge the security;

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[1] **John Mactaggart v. William Watson, (1836) 3 Cl & F 525=10 Bligh 618=6 E R 1534.**

[2] **The Mayor, Aldermen and Citizens of Durham v. Fowler, (1888) 22 Q B D 394.**

[3] **Trent Navigation Co. v. Harley, (1808) 10 East 34=113 E R 688.**

[4] **Samuell v. Howarth, (1817) 3 Mer 272=17 R R 81.**

[5] **Black v. Ottoman Bank, (1862) 6 L T (N S) 763=15 Moore P C 472=8 Jur (n s) 801=10 W R 871.**

that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence, as in the language of Wood V. C. in Kay 280[6]—to imply connivance and amount to fraud.' Here again the language must be understood to mean at least connivance in acts contemplating the probability of a defalcation, and so being guilty of a fraud upon the sureties, in the sense of assisting an act which must be detrimental to them.

I do not think it is necessary to go into the further point raised in (1889) 22 Q B D 394[2] where it was said:

> Still we think that where the parties taking the bond are mere trustees for ratepayers, as the corporation here were, and the Collector also a person who owed a duty to the ratepayers, the sureties who had guaranteed the proper discharge of his duties have no right to shelter themselves under the neglect of its duty by the corporation in not insisting on the fulfilment of the very conditions of the bond to which they are parties. The corporation may themselves be looked upon 'as public officers' as much as was the treasure in Ir R 7 C L 57.[7]

It appears to me in the present case that it has not been shown that the Municipality were guilty of affirmative but merely of negative misconduct. The case is very similar to (1889) 22 Q B D 394,[2] where as was remarked:

> If the Corporation had insisted on the regular weekly payments, as stipulated for, the Tax Collector could never have kept in his hands the sums which were found to have been received and not paid over by him, and which were sought to be recovered by the plaintiffs against the sureties in this action.

It was held there that the plaintiffs could not be held to have connived at the departure from the conditions of the bond in a sense amounting to more than mere passive inactivity. In the present case, as has been said, it was not part of the conditions of the bond that the Municipality should supervise the Tax Collector and of course it was only for its own protection that bye-laws were passed prescribing the methods of doing so. This appeal accordingly fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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6. Dawson v. Lawes, (1854) Kay 280=69 E R 119.
7. Lawder v. Lawder, Ir R 7 C L 57.

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## A. I. R. 1938 Rangoon 92

MACKNEY J.

*Nga Mya and another* — Appellants.

v.

*The King.*

Criminal Appeal No. 627 of 1937, Decided on 20th July 1937, from order of Sess. Judge, Meiktila, D/- 16th May 1937.

**(a) Evidence—Witness enemy of accused—No inference of falsity.**

Where a witness is on inimical terms with an accused, it does not necessarily show that he is giving false evidence, although it may explain why he is giving evidence at all. [P 93 C 1]

**(b) Confession—Admissibility—Corroborative value against co-accused—Tainted evidence — Meaning — Difference between approver's evidence against co-accused and that of confession—Confession is not tainted unless it is shown to be so—How confession should be considered—Confession can lend assurance to other evidence against co-accused.**

It is not quite clear as to what is the exact meaning of "tainted evidence"; whether it means that the person giving the evidence is tainted morally; or whether it means merely that he is a person on whose word reliance cannot be placed. As regards an approver, there is the fear that he is giving evidence in order to save his skin and therefore that he is liable to make statements which are not true if he thinks they will be for his benefit. But as regards the confession of a co-accused, one cannot call this, tainted evidence, for the same reason. A person making a confession does so deliberately and after having been warned solemnly by the Magistrate of the consequences of making a confession and knowledge that he may be convicted thereon, if he still persists in his purpose and makes a confession, the statements that he makes cannot be considered to be tainted statements unless it be that they are tainted because he is an immoral person who has committed a criminal offence. But all immoral persons are not necessarily and always liars. But it is not to be supposed that because the confession is admissible, therefore it must be believed. In such case it has to be considered whether the confession is a true one, whether there are any circumstances which suggest that it is false or that some of the statements made therein are also false: *A I R 1937 Rang 209 and A I R 1931 Rang 235, Ref.* [P 94 C 1]

The Court may take the confession of a co-accused person into consideration against the other co-accused; that is to say, the Court can only treat a confession as lending assurance to other evidence against a co-accused: *38 Cal 559, Rel. on.* [P 94 C 2]

Kale — *for Appellants.*

E. W. Lambert — *for the Crown.*

**Judgment.**—The two appellants have been convicted, Nga Mya under S. 395 read with S. 109 and Po Hlaing under S. 395, I. P. C. and sentenced each to suffer five years' rigorous imprisonment. The prosecution story is that Maung Mya induced an agent of Bombay Cotton Mill to go out into the country with a large sum of money and then instigated his friends to attack the cart in which the agent was travelling and remove the money from him. Po Hlaing is alleged to have been one of the actual dacoits. Maung Mya himself was in the cart when it was dacoited. The evidence for the prosecution included the evidence of Aung Baw to whom was granted a conditional pardon and who gave evidence on oath in the case. Aung Baw is the brother-in-law of Maung Mya. Maung Mya himself made a confession which was duly recorded by a Magistrate, although he has since retracted it. There was a certain amount of evidence to show that on the day before the dacoity Maung Mya had interviewed Po Hlaing and that on the night of the dacoity at lamp-lighting time Aung Baw and Po Hlaing were seen leaving the village together. There was no reason forthcoming as to why Aung Baw and Maung Mya should falsely implicate Po Hlaing. It was alleged that the witnesses who gave evidence as to the movements of Maung Mya and Po Hlaing were on bad terms with Po Hlaing and there seems to be a certain amount of truth therein.

The most relevant evidence however is that of Mg. Khon who saw Aung Baw and Po Hlaing leaving the village together. Although it is true that he is at enmity with Po Hlaing, this does not necessarily show that he has given false evidence, although it may explain why he has given evidence at all. The truth of his statement is to some extent confirmed by the fact that on hearing of the arrest of Maung Mya, he informed the headman, who happened to be his brother-in-law, of what he had seen. It would be very remarkable that in giving false information to the headman, he should have happened to give information which both Aung Baw and Maung Mya had given to the Magistrate. Maung Mya put up the usual plea that the confession had been extorted from him, but there is no evidence to support this allegation. Po Hlaing brought evidence of alibi which, as the learned Sessions Judge has pointed out, is quite unsatisfactory. As regards Maung Mya I can see no reason why he should not be convicted on his own confession. The approver stated that before Maung Mya and he made the confessions they were in custody together and they consulted together. He says:

> Maung Mya and I had a consultation before we made our confessions and Maung Mya suggested that we should make it. . . . . We had a consultation that night and we agreed to confess.

I can see nothing suspicious in this statement so far as the effect which Maung Mya's confession can have on himself, nor, in the circumstances of this case, do I see any reason why Aung Baw's statement against Maung Mya should not be believed. Aung Baw is Maung Mya's brother-in-law and if Aung Baw himself took part in the dacoity, which in view of the articles which were found in his possession, seems to be certain, I can see no reason why he should falsely implicate Maung Mya. It appears to me that Maung Mya was rightly convicted. As regards Po Hlaing, as I have already remarked, there is good corroboration of the statement of Aung Baw in the evidence of Maung Khon. It has not been shown that Aung Baw had any enmity against Po Hlaing and prima facie there is no reason why his evidence against Po Hlaing should be disbelieved. S. 30, Evidence Act, permits the Court to take into consideration against Po Hlaing, the confession of Maung Mya. It might have been (but not I think in the circumstances of this case), Maung Mya and Aung Baw being brothers-in-law and having consulted together before they made their confessions, that the confession of Maung Mya does not very considerably strengthen the case against Po Hlaing; but the fact that Maung Mya has made a confession does tend to show generally that there is truth in the evidence of Aung Baw.

I have been referred to certain cases relating to the effect of an accused's confession and the amount of corroboration, if any, which a confession can be considered to give to an approver's evidence. In the latest case, 1937 R L R 110,[1] it was pointed out that the evidence of one approver is not corroborated by the evidence of another approver as evidence which is tainted cannot be corroborated by further evidence which is also tainted. The consideration of the confession of a co-accused was however expressly omitted in this case. The only observation which was made is that it is governed by S. 30, Evidence Act, 1872.

In 9 Rang 404[2] it was pointed out obiter that S. 30, Evidence Act, plainly provides that a confession of a co-accused might be taken into consideration against the accused, but it was remarked that such evidence being derived from a tainted source equally as the evidence of the approver was open to grave suspicion. It is not quite clear to my mind what is the exact meaning of "tainted evidence"; whether it means that the person giving the evidence is tainted morally; or whether it means merely that he is a person on whose word reliance cannot be placed. As regards an approver, there is the fear that he is giving evidence in order to save his skin and therefore that he is liable to make statements which are not true if he thinks they will be for his benefit. But as regards the confession of a co-accused, I do not think we can call this tainted evidence for the same reason. A person making a confession does so deliberately and after having been warned solemnly by the Magistrate of the consequences of making a confession and knowing that he may be convicted thereon, if he still persists in his purpose and makes a confession I cannot see how the statements that he makes can be considered to be tainted statements unless it be that they are tainted because he is an immoral person who has committed a criminal offence. But all immoral persons are not necessarily and always liars.

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[1] **Nga Aung Pe v. Emperor, (1937) 24 A I R Rang 209=169 I C 705=1937 R L R 110=38 Cr L J 785.**

[2] **Aung Hla v. Emperor, A I R 1931 Rang 235 =1931 Cr C 875=135 I C 849=9 Rang 404= 33 Cr L J 205 (S B).**

I do not think it is possible to lay down any general rules which could bar out consideration of the confession of Maung Mya in the present case. It is only a matter of commonsense. No reasonable person ever would argue that because the confession is admissible, therefore it must be believed. In each case, it has to be considered whether the confession is a true one, whether there are any circumstances which suggest that it is false, or that some of the statements made therein are false. In the present case there is nothing to suggest that any of the statements made by Maung Mya in his confession are false and in my opinion there is no reason whatsoever why the confession should not be taken into consideration in conjunction with Aung Baw's evidence against Po Hlaing; and the existence of this confession does to my mind make the case against Po Hlaing stronger; or, as we may say, it corroborates the statement of Aung Baw.

In 38 Cal 559[3] a Special Bench of the Calcutta High Court laid down the principle that all that S. 30, Evidence Act, provides is that the Court may take the confession of a co-accused person into consideration against the other co-accused; that is to say that the Court can only treat a confession as lending assurance to other evidence against a co-accused. It seems to me, with great respect, that this is a fair interpretation of the wording of S. 30, and I believe that in my consideration of the present case I have not departed from that principle. The appeals are dismissed.

B.D./R.K. *Appeals dismissed.*

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## A. I. R. 1938 Rangoon 94

MACKNEY, J.

*Vasanji Khimjee* — Applicant.

v.

*Kanji Tokersey* — Respondent.

Criminal Revn. No. 337-B of 1937, Decided on 12th July 1937, against order of Sess. Judge, Arakan, D/- 30th April 1937.

**Criminal P. C. (1898), S. 181 (2) — *K* partner in firm *V* at Akyab agreeing to do business at Cochin on firm's behalf and to send money and accounts to Akyab — *K* failing to do so closing business and going away—Complaint by firm *V* for breach of trust lodged at Akyab — Court at Akyab held had no jurisdiction, offence being committed at Cochin.**

**The failure of a person to remit the money or to bring it to the place to which he had to bring it does not necessarily constitute the offence of criminal breach of trust although a person may have to account for money; it is not the failure to account, but the misuse of the money for dishonest purposes, which constitutes the offence.**
**[P 95 C 2; P 96 C 1]**

***K* was a partner in a firm *V* at Akyab and there was an agreement by which *K* was to go to Cochin and receive the consignment of rice sent by the firm and sell it there. He was required to submit accounts and pay the net cash balance resulting from the business to the firm at Akyab. *K* failed to remit money and accounts and closed the business in Cochin but instead of returning to Akyab went to his native place. The firm *V* filed a complaint for breach of trust before a Magistrate in Akyab but he held that he had no jurisdiction:**

***Held* that the Court in Akyab had no jurisdiction. If *K* had left the money in Cochin the offence of breach of trust was committed at Cochin and if he took the money elsewhere he must have misappropriated the money in Cochin because it was there that he failed to do which he was required to do; in any case the offence was committed at Cochin : *A I R 1936 All 193 Not approved.*** **[P 95 C 2; P 96 C 1]**

De — ***for Applicant.***

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[3] Emperor v. Lalit Mohan Chuckerbutty, (1911) 38 Cal 559=10 I C 582=12 Cr L J 286=15 C W N 593.

**Order.**— The applicants are a firm of merchants at Akyab. They filed a complaint in the Court of a Magistrate at Akyab against the respondent Kanji Tokersey. The complaint alleged that the respondent was an employee in the service of the firm at Akyab but was subsequently admitted as a partner. It was agreed that he should go to Cochin, there receive consignments of rice sent by the firm both from Akyab and Rangoon and sell it there. He was required to submit accounts and pay the net cash balance resulting from the business to the firm at Akyab but did not do so. Further, whilst he was in Cochin he realized a sum of Rs. 7000 on behalf of the firm in a Court of law. This sum also he failed to remit or account for. The total amount which was left in the respondent's hands was Rs. 31,980. The respondent then closed the business in Cochin but instead of returning to Akyab to submit his accounts and pay the money in, he proceeded at once to his native place in Cutch. The Magistrate held that he had no jurisdiction to try the alleged offence because it had not been committed in Akyab. An application to the Sessions Judge of Akyab to revise this order was also dismissed. The applicants have now come before this Court. The appropriate section of the Criminal Procedure Code is section 181, Cl. (2) which states that:

> The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.

Now, there can be no question that wherever else the alleged misappropriated property was received or retained by the respondent it was not so received or retained in Akyab, so that if the offence is to be tried in Akyab it must be held that it was committed in Akyab. A difficulty that arises is the fact that a person can hardly be said to commit an offence in a place which he never visits. The definition of "criminal breach of trust" is to be found in S. 405, I. P. C. which reads:

> Whoever being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust.'

Now it is quite clear that the respondent must have either left the money in Cochin or he must have taken it elsewhere. If he had left the money in Cochin then it would appear that he may have committed a breach of trust by so doing and obviously the offence was committed in Cochin. If he took the money somewhere else it is equally clear that he must have misappropriated the money in Cochin because it was there that he failed to do with the money that which it was required of him to do, namely send it to the firm at Akyab, but removed it elsewhere. I have been referred to the case in 58 All 644[1]. This is a case very similar with the present one. The complainant resided in Cawnpore and employed the accused to sell goods for him in Bengal, realize the price thereof and either personally bring the proceeds to Cawnpore or remit the money to Cawnpore. The accused failed to remit all the money that he collected and he absconded and could not be traced. It was held that the Court at Cawnpore had jurisdiction to try the case. The view taken was that the accused was not charged with having

> misappropriated or converted to his own use the money at any particular place and his offence consists in failing to carry out his contract and remit the money or bring the money to Cawnpore. He was guilty of an illegal omission. S. 43, I. P. C. lays down that a person is said to be 'legally bound to do' whatever it is illegal in him to omit. He was legally bound to remit this money to Cawnpore and he failed to do so.

The learned Judges then remarked:

> He therefore committed an offence within the jurisdiction of the Magistrate in Cawnpore by his illegal omission to send or bring the money to Cawnpore. We consider therefore that the Magistrate at Cawnpore had jurisdiction to try this case.

In an earlier part of the judgment at page 647 the learned Judges say:

> The accused may have been perfectly innocent when he collected this money and his criminal offence occurred later when he failed to remit the money or to bring it to Cawnpore.

Now, it seems to me that this is perhaps to state the matter too broadly, if I may say so with the greatest respect, because it might well be that a person might fail to remit the money, or bring it to the place to which he had to bring it, through causes beyond his control. The failure to remit the money or to bring it to the place to which he had to bring it does not necessarily constitute the offence of criminal breach of trust although a person may have to account for money; it is not the failure to account, but the misuse of the money for dishonest purposes, which constitutes the offence. The words used in S. 405 are "dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property." No doubt it will be a necessary part of the evidence against the accused that he failed to account when he should have accounted. As was remarked by the learned Judges in this same case at page 649:

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[1] Emperor v. Mohru Lal, A I R 1936 All 193=1936 Cr C 214=160 I C 3 6=37 Cr L J 284 = 58 All 644=1936 A L J 3.

> Where there is a violation of a direction of law or a legal contract, the proof of that violation may be by negative evidence that the direction of law or the contract has not been fulfilled.

But it is with the sentence which immediately follows this sentence, that I find myself unable to agree. They say:

> We are of opinion that where the direction of law or the contract requires that the accused should dispose of the property at a particular place, then the Court having jurisdiction at that place will have jurisdiction to try the offence of the second part of S. 405, I. P. C., where there is a charge that the accused has failed to comply with the direction of law or the legal contract and has failed to carry out his duty at that place.

But if the accused fails to remit or bring money where does that failure occur? It occurs at the place where the accused is, not in the place to which the money is to be sent or brought. So, even on this view of the law, it appears to me that as the omission to send the money has taken place in some other spot than Akyab, the Courts at Akyab cannot have jurisdiction. If it be said that the offence was constituted because the respondent failed to come to Akyab that omission to appear in Akyab cannot be said to have taken place at Akyab. The respondent omitted to come to Akyab in the place where he happened to be. Even a sin of omission cannot be committed by a sinner in a place where the sinner is not. This aspect of the matter does not appear to have presented itself to the learned Judges who decided the case in 58 All 644.[1] In my opinion, the view taken by the lower Courts in the present matter is correct and this application is dismissed.

S.C./R.K. *Application dismissed.*

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## A. I. R. 1938 Rangoon 96

SPARGO J.

*The King*

v.

*Tun Khin* — Accused.

Criminal Revn. No. 298.B of 1937, Decided on 10th June 1937, from order of Subdivisional (Special Power) Magistrate, Myinmu, D/- 19th March 1937.

**Criminal P. C. (1898), S. 471—Accused found guilty under S. 326, Penal Code, but acquitted as being insane—Magistrate ordering him to be handed over to relatives on their furnishing security—Order held one in contravention of S. 471—Accused held should have been kept in lunatic asylum.**

Where a Magistrate found the accused person guilty under S. 326, Penal Code, but acquitted him under S. 84, Penal Code as the accused was incapable of understanding the nature of his act due to insanity and ordered him to be handed over to the care of his relatives on their furnishing a security for his good behaviour:

*Held* that the order was in contravention of S. 471, Criminal P. C. and the accused should have been detained in safe custody in the lunatic asylum. [P 96 C 2]

**Order.** — The learned Subdivisional Magistrate in this case has come to the odd finding that the accused was both guilty and innocent of the offence under S. 326 with which he was charged. That is to say, he found that the accused was guilty of the offence but he acquitted him under S. 84, Penal Code. This is a contravention of S. 471, Criminal P. C., which should have been followed by the learned Magistrate. I regard the learned Magistrate's finding as equivalent to a finding that the accused Nga Tun Khin, son of Maung Aung Myunt alias Pongyi U Arsara, committed the act alleged. Under S 439 (1) read with S. 423 (1) (b), Criminal P. C. I set aside the order that the accused be made over to the care of his relatives on their executing a bond for his good behaviour; and in place thereof order that the accused be detained in safe custody in the Rangoon Lunatic Asylum.

The proceedings are returned to the learned Subdivisional Magistrate through the learned Sessions Judge, Sagaing Division, for preparation of the documents required under Para. 531 (6) of the Burma Courts Manual and for a report to be furnished to the Local Government of the action taken.

K.B./R.K. ***Order accordingly.***

## A. I. R. 1938 Rangoon 97

MACKNEY J.

*Maung Tun Khin and another*
Appellants.
v.
*The King.*

Criminal Appeal No. 493 of 1937, Decided on 3rd June 1937.

**Penal Code (1860), Ss. 279 and 279/114 — Car containing illicit pork chased by Pork Inspector's car — Inspector asking driver to keep chased car in sight — Cars going at speed alarming people and ignoring traffic signals — Chased car crashing but chasing car stopping at distance — Driver of chasing car held rightly convicted under S. 279 but held sentence of imprisonment not called for —Inspector held could not be convicted of abetment.**

To establish the abetment of an offence under S. 279, it is not sufficient to show that the person charged must have instigated the driver to drive fast; it must be shown at least that he instigated him to drive at a pace which was in itself, in all the circumstances, so rashly fast as to endanger human life. Looking at the commonsense view, it seems unlikely that a passenger in a car would explicitly tell any person to drive in a manner which is dangerous. The mere fact that the owner or an occupant did not insist on the driver driving at a moderate pace, does not show that he instigated his driving at a reckless pace. [P 99 C 1]

Car containing illicit pork was being chased by the car of a Pork Inspector of the Corporation. Both the cars were being driven so rashly and with such a speed as to cause alarm in the minds of people some of whom just escaped being knocked down and run over. Both the cars ignored the traffic signals. The Inspector had asked his driver to keep the chased car in sight but there was no evidence that he induced him to drive so rashly. The chased car ultimately crashed but the following car drew up at more than 100 feet from the scene of the crash. The driver of the chasing car was convicted under S. 279 and sentenced to six months' rigorous imprisonment and the Inspector was convicted under S. 279/114 of abetting the offence :

*Held* that the driver was rightly convicted but the sentence passed was not called for as, although he drove at an inordinate pace his car was not completely out of his control and he had the leading car acting as a kind of pilot. He would have more time than the chased car to pull up and avoid an accident. The sentence was reduced to a fine of Rs 100 : [P 98 C 2]

*Held further* that the Inspector could not be convicted of an abetment, there being no evidence that he induced the driver to drive so rashly. His mere asking the driver to keep the chased car in sight did not amount to instigation as the manner in which he had to keep the car in sight must have been left to the driver. [P 99 C 1, 2]

U Ba So (for No. 1) R. Clark and U Tun Aung (for No. 2) — *for Appellants 1 and 2.*

**Judgment.** — This appeal having been admitted on the day set down for hearing, only the learned counsel engaged on behalf of appellant 2, Maung Tun Maung, appeared. Appellant Tun Khin was not represented by his learned counsel and the hearing proceeded without the latter. Maung Tun Khin was however present in Court and his counsel was heard next day. Appellant 1, Maung Tun Khin, has been convicted under S. 279, I. P. C., for having driven a motor car in a manner so rash and negligent as to endanger human life; and the appellant, Maung Tun Maung, has been convicted under S. 279 read with S. 114, I. P. C., for having abetted the commission of the said offence by Maung Tun Khin. Maung Tun Khin was sentenced to suffer six months' rigorous imprisonment, and Maung Tun Maung was sentenced to suffer four months' rigorous imprisonment.

The facts of the case as regards the appellant, Maung Tun Khin, are scarcely in dispute. The appellant, Maung Tun Maung, is a Pork Inspector in the employ of the Rangoon Corporation. Maung Tun Khin was a driver of a car which had been lent to Maung Tun Maung for the occasion. In this car on the night of 23rd October last, besides the driver, Maung Tun Khin and the appellant, Maung Tun Maung, there was Pork Inspector Boon Whet who was examined as a witness for the prosecution, and there was also Maung Thu Daw who describes himself as a Municipal Constable, who was examined for the defence and another Municipal Constable, Tun Sein, who has not been cited as a witness. These persons having reason to believe that a motor car containing a pork which had been slaughtered in contravention of the rules of the Corporation made in regard to pork which is to be sold within the city would be entering the city waited on Prome Road. At about 8 o'clock in the evening a car which was ultimately found to contain illicit pork proceeded to pass them into the city. Maung Tun Maung followed this car in his car in order to see at which place the pork carried in the car would be unloaded, his intention being then to seize the pork.

The occupants of the pork car becoming aware that they were being followed put on speed but the appellant's car kept close at their heels. The route followed was down Tiger Alley Road, Upper Voyle

Road, Lake Road and Pagoda Road as far as the Shwe Dagon Pagoda, then south along Pagoda Road crossing Simpson Road and Commissioner Road. Just beyond Commissioner Road and close to the Out-Patients' Department of the General Hospital, the leading car swerved across the road on to the right hand side and crashed and in doing so three persons were killed. The following car was in no way involved in the crash. It drew up a little further along on the right hand side of the road. The place where the pursuing car drew up would be well over a 100 feet from the scene of the crash.

There is the evidence of a number of persons who saw the two cars proceeding along the road at such a pace as to cause alarm. At the corner of Simpson Road and Pagoda Road both of them ignored the traffic signals and crossed the junction when the signal was against them (but it was against cross traffic too). The constable on duty at this point says that the two cars came at "terrific speed". Dr. Broatch says they were driving "very fast". Aye Maung who was in the pork car says that his car was going at 50 miles per hour. Ba Wan states that when the two cars turned into Pagoda Road they were speeding at 30 to 40 miles an hour. There was a crowd of people on the road and there was a lot of excitement when the two cars passed. People just escaped being knocked down and run over.

Ah Yu, another occupant of the pork car, says that the pursuing car bumped them three times as they went along. Somewhere between Jubilee Hall and the railway bridge a person in the leading car threw out some pepper. It is said that this caused the pursuing car to slow down for a time, but Mr. Martin who had just entered Pagoda Road from Commissioner Road going north, says that he noticed the two cars speeding down one behind the other 20 yards apart. He stopped and looked over his shoulder as, he says, he realized that something was wrong for the two cars to have been driven so fast. He then saw the leading car edge towards its right gradually and crash into something, when there was a cloud of dust. The second car was still in motion behind the first car when the crash took place. So that, it is clear that at the corner of Commissioner Road and Pagoda Road both the cars were still being driven at an inordinate speed. Mr. Vrsalovich says he heard a buzzing noise when he was in Pagoda Road near the Diocesan Boys' High School and he saw the two cars race past him "very fast". He puts the distance between them at a 100 feet. And there are other witnesses who all state that the cars were driven at a furious speed.

Now, at this time of the evening there were plenty of people about and plenty of vehicles using the road. It is obvious that Maung Tun Khin drove the motor car at such a speed as to attract attention and to cause alarm wherever he went. Although we do not know the precise speed at which he drove his car, it is quite obvious that he was driving it at such a speed as was dangerous to life. To chase another car at such a high speed in such circumstances is, in my opinion, to drive in a manner so rash as to endanger human life. Maung Tun Khin, in my opinion, was rightly convicted under S. 279, I. P. C. However, it appears to me that the sentence which the Magistrate has inflicted upon him, which is the maximum sentence of imprisonment is not called for in the present case. It is obvious that although Maung Tun Khin drove at such an inordinate pace, his car was not completely out of his control, and he always had the leading car acting as a kind of pilot. He would always have more time than the man in front to pull up and avoid an accident. The observations of the learned Magistrate in regard to the methods adopted by the Corporation Pork Inspector for stopping the traffic in illicit pork may be justified to some extent.

But I do not think that it can be said that the occupants of Maung Tun Khin's car behaved like gangsters; they merely got carried away by the excitement of the chase. Allowance must also be made for the fact that we do not really know at what speed exactly these men were driving. A speed of 40 miles an hour may seem very fast to on-lookers, and while no doubt in certain circumstances it is a reckless speed, it may not be, taking all the facts into consideration, an excessively reckless speed. In these circumstances, I do not consider that a sentence of imprisonment was called for. I set aside the sentence of imprisonment of Maung Tun Khin and instead thereof he will be directed to pay a fine of Rs. 100; in default he shall suffer six weeks' rigorous imprisonment. The Commissioner of

Police will be requested to consider how his driving license had best be dealt with.

As regards Maung Tun Maung he has been convicted of abetment of the offence of Maung Tun Khin, that is to say it has been held that he instigated Maung Tun Khin to drive in a manner so rash as to endanger human life. To establish this offence, it is not sufficient to show that Maung Tun Maung must have instigated Maung Tun Khin to drive fast; it must be shown at least that he instigated him to drive at a pace which was in itself, in all the circumstances, so rashly fast as to endanger human life. It may be said at once that there is no evidence whatsoever to show that Maung Tun Maung did this. The learned Magistrate has simply presumed that he did, from the facts and probabilities of the case.

Boon Whet and Thu Daw gave somewhat contradictory evidence tending to show that Maung Tun Maung protested against the speed at which the car was driven. The learned Magistrate has rejected this evidence, and, I think, quite rightly. Maung Tun Maung was the person in charge. He wanted to keep the pork car within view in order to carry out his duty of seizing the pork. The only method of doing this was to drive as fast as the pork car did. There can be no doubt that he must have told Maung Tun Khin to keep the car in sight. But even so, that would not amount, in my opinion, to an instigation to drive dangerously. In fact, looking at the commonsense view, it seems unlikely that any passenger in a car would explicitly tell any person to drive in a manner which was dangerous. The fact that Maung Tun Maung did not insist on Maung Tun Khin driving at a moderate pace, again, does not show that he instigated his driving at a reckless pace. In my opinion Tun Maung could be convicted of abetment of an offence punishable under S. 279, I. P. C. only if it could be shown that he actually, in so many words, told the driver to drive regardless of what might happen, and, as I have said, there is no evidence whatsoever to show that he said this.

It may be that he told Maung Tun Khin to keep in touch with the leading car, but that would not necessarily involve a command to keep in touch with it at all costs. The manner in which he was to keep in touch with the car must obviously have been left to Maung Tun Khin, who was driving the car. If as a result of Maung Tun Maung's request to keep in touch with the car Maung Tun Khin in fact drove recklessly, that does not prove that Maung Tun Maung instigated the recklessness; no more would a man in a hurry to catch a train, who told the taxi driver to drive fast so as to get to the railway station in time, be liable for abetment of an offence under S. 279, I. P. C, because the taxi driver, in an effort to carry out his client's wishes, actually did commit the offence. For these reasons, I allow the appeal of Maung Tun Maung and set aside the conviction and sentence passed upon him. He will be acquitted and his bail-bond cancelled. The fine payable by appellant Tun Khin shall be paid in the Court of the District Magistrate, Rangoon, within seven days' time: the present bail bond will continue to have effect until that date. The order of the Magistrate cancelling the license of Maung Tun Khin for one year is confirmed.

S.C./R.K. *Appeal allowed..*

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## A. I. R. 1938 Rangoon 99

BRAUND J.

*National Carbon Co.* — Plaintiffs.

v.

*Sei Sin & Co.* — Defendants.

Civil Reg. No. 310 of 1936, Decided on 8th June 1937.

**Trade Mark—Infringement — Court must exercise judgment from impression obtained by looking at the two products—Proof of actual deception is not necessary.**

In a case of infringement of trade mark, the Court must exercise its own judgment from the impression which it obtains from looking at the two products in question. In a passing off action, proof of actual deception is not necessary. It is quite sufficient if the plaintiff can prove the probability of deception. [P 102 C 1]

(Injunction sought by an American "Eveready" torches and Batteries Manufacturing Company against a Chinese Firm trading in same goods in Rangoon under a "get up" calculated to pass off as former company's not granted.) [P 102 C 2]

C. N. Paget — *for Plaintiffs.*

C. H. Campagnac — *for Defendants.*

**Judgment.** — I do not propose to reserve my judgment. This is a case in which a company incorporated in America seeks an injunction against a Chinese firm trading in Rangoon to restrain the latter from importing into, and selling in Burma batteries for electric torches under a "get up" which, it is alleged, is calculated to pass off those batteries as and for the batteries of the plaintiffs.

The plaintiffs are manufacturers of electric torches and electric batteries which have become very well-known under the name of "Eveready." There is no dispute but that the plaintiff company is an old established company with a large business and it is conceded—at any rate it is not disputed—that the plaintiffs have imported electric batteries into Burma for at least ten years. Some conception of the size of its business can be obtained from the fact that in the first eight months of 1936 the plaintiff company sold eight and a half million batteries of one sort or another in Burma. One of the characteristics of the trade in electric batteries is—and there again is no dispute as to this—that all batteries or cells for electric torches are of much the same shape and size. Accordingly, there is no room for any passing off so far as shape or size is concerned. The electric batteries with which we are concerned are circular and, for the sake of convenience, may be described as being either in a small size or in a large size, the larger size being obtained merely by including two small ones in one cover. The get up of the plaintiffs' battery, which so far as I know has not altered throughout the period of ten years, is illustrated by Ex. A. Ex. A is a specimen of what I have called the large size battery, composed of two cells, one superimposed upon the other, contained in and held together by a wrapper designed in colours upon which is printed all those details as to the name of the manufacturer and so forth as to the article in question which one usually finds in the "get up" of articles of this description.

The groundwork of Ex. A is grey or smoke colour. At the top and at the bottom are two narrow bands of navy blue and, on each side—if a circle can be said to have a side—is what Mr. Paget neatly describes, if I may say so, is a panel. That panel is of a vivid red colour surrounded by a thin white line at its edges and enclosed outside that again by a series of thin blue lines. Across the red panel on each side, at about three-fourths of its height, is a bar of blue on which is printed in white letters the word "Eveready." Upon the rest of the red panel, there is printed either in white or in black lettering, a description of the battery in question. It is described as "No. 791 two cell extra long life battery" and there then follow certain instructions as to how it should be used. Finally comes the name of the plaintiffs as the manufacturers, with the address, I think, of their factory in the United States of America. That is a brief description of Ex. A.

Exhibit A is of importance not so much, I think, for its detail, but for the impression that it conveys, because it has been and truly said, that in matters of this kind what must be looked at as the important consideration is what catches the eye generally. And the impression that catches my eye, speaking generally, when I look at Ex. A is an impression of vivid red superimposed upon a grey blue back ground with certain touches of navy blue. That is the impression conveyed to my eye by Ex. A. I should perhaps say that other specimens of the plaintiffs' products have been exhibited as Ex. C which though they differ slightly in detail, do not, I think, differ in substance from the general 'get up' of Ex. A. That is the plaintiffs' article and that is the 'get up' under which it is marketed in Burma. I should perhaps notice in passing that upon Ex. A itself, there is no trace of any writing in Burmese but on certain other exhibits of the plaintiffs' batteries there is upon one side of the battery a description in Burmese characters, Ex. 9 on No. 950 and No. 935.

Now, the defendants are a firm of Chinese gentlemen carrying on business in Dalhousie Street. They started importing batteries into Burma from China in about the year 1935. There is another singular thing about the battery trade which is that there appear, at any rate so far as Burma is concerned, to be only two principal sources of supply of electric torch batteries. One is America in the form of the plaintiffs' 'Eveready' batteries and the other is China. It seems that China has made a speciality of producing cheap batteries so far as the Burma market is concerned. It is substantially true—at any rate it is not disputed in this case—that there are virtually only two classes of batteries, one the American 'Eveready' battery and, the other those various kinds of cheap Chinese batteries which I have mentioned. So that a Burman, or an Indian, or a Chinaman, or anybody else in Burma who wants a battery has his choice between the expensive American 'Eveready' battery or one of the many cheap kinds of Chinese batteries.

It was some of these cheap Chinese batteries that the defendants were minded to import into Burma in 1935. One of their partners has given evidence and has explained—and I see no reason at all to accept his explanation—that in 1935 he received from a firm in Hongkong which specializes in the manufacture of batteries for electric torches a catalogue showing the various kinds it produced. The catalogue is exhibited. He says that he decided to give a trial order and picked out some five or six kinds among which was the Ex. B kind which is the battery complained of by the plaintiffs in this suit. The catalogue sent was not a coloured catalogue and, so far as the catalogue itself is concerned, it would, I am quite satisfied, have been impossible for the defendants to know whether the batteries they were choosing were red, green, blue or any other colour. There is no evidence that they had any other source of knowledge. He has been pressed in cross-examination as to why he should have chosen the Ex. B battery and his answer was that the illustration of it in the catalogue showed that it had on it certain Chinese words, among which were the words 'full power battery'. This happened to take his eye and accordingly he included some batteries of that kind in his trial order.

He was cross-examined with a view, I suppose, to showing that he had deliberately contrived to get into Burma a battery of the same 'get up' as the plaintiffs' battery. But, for myself, I see no reason, in the absence of far more evidence on the point than there is in this case, why I should disbelieve the explanation that he has given. There is nothing whatever before me from which I can attribute to the defendants in importing these batteries —at any rate, in the first place—into Burma anything but a perfectly honest motive. That, of course, would not by itself be by any means conclusive of the matter, because they may yet be restrained from importing these batteries and selling them in Burma notwithstanding that in the first place they import them with a perfectly bona fide and honest motive. But I desire to put on record in view of the line the cross-examination has taken, that there is nothing at all, so far as I can see, from which it can be reasonably suggested that, at any rate in the first place, the defendants were actuated by anything but a perfectly honest motive in bringing these batteries to Burma.

I will now attempt to describe Ex. B. Ex. B, that is to say the defendants' battery imported from China which is complained of in this suit, is of precisely the same size as the "Eveready" battery, Ex. A. There is nothing in the least significant in that because it is conceded that batteries are of standard sizes. Its motive, or rather the motive of its colour scheme, is also red but it lacks what, to my mind, is certainly one of the distinguishing features of Ex. A, viz. the prominent distinctive grey or smoke coloured background and, if I may say so, that is an effect which seems to me to be quite artistic. On the other hand, while Ex. B has what possibly may be described as panels on either side, those panels are of a different shade of red much duller than the red on Ex. A and they are superimposed not upon a grey background at all, but on dark blue. It is true that round each panel there is a single white line while at the top and the bottom there are also thin white lines.

There is however another feature about Ex. B which is altogether lacking in Ex. A. While one of the panels contains a description of the battery in English characters the other one contains the same description in Chinese characters. Chinese characters are distinctive things whether you can read them or not. That, to my mind, is significant, not because the users of batteries in Burma can be expected to read Chinese but because it is a feature which is altogether lacking in Ex. A. To sum up therefore, my impression of Ex. B, I have the impression of a dull red (a different colour altogether from Ex. A) on a blue black ground and, speaking for myself, if I looked at Ex. B at all closely, I should have little doubt, having regard to the Chinese characters on the back that it was a Chinese product, bearing in mind that there are only two kinds of products that come into this country, viz. first the "Eveready" and all the rest Chinese.

I am asked by the plaintiffs to say that the importation into Burma of Ex. B is calculated to mislead purchasers of batteries throughout Burma into believing, or that there is grave danger that they will be mislead into believing, that, if they buy one of the Ex. B batteries they are getting an "Eveready" battery. I have observed before, that this is a matter upon which the Court must exercise its own judgment from the impression which it obtains from looking at the exhibits in question. That is the safest if indeed not the only guide that the Court can have in such a case as this. This is one of those cases in which no case of actual "passing off" has been proved at all. That of course is not in itself fatal to a "passing off" action. It is no part of what it is necessary to prove in a "passing off" action that there has actually been deception. It is quite sufficient if the plaintiffs can prove the probability of deception. It becomes then what is known as a *quia timet* action.

It is of course much easier for the Court if it has before it evidence upon which it can rely that cases of actual deception have taken place. That relieves the Court of a great deal of its responsibility. In this case there is no such evidence though one witness attempted to suggest that he was aware of one case of deception. I unhesitatingly decline to believe that witness. He was the second of the plaintiffs' witnesses, a man named Devchand Valjee, who said that he knew a case in which a man had once asked for an "Eveready" battery and had been given a Chinese battery without knowing the difference. But when he was pressed to give the name of the shop and the name of the purchaser or any particulars about it, he was quite unable to do so and I have not the slightest doubt that in that case that witness was drawing on his imagination. I can only treat this as a case in which there is no actual evidence of deception.

I have therefore to look at Ex. B and to ask myself if this is a case in which Ex. B is reasonably calculated to be passed off as Ex. A. I desire to make it clear that I am quite alive to the difference in the considerations one is entitled to apply in this country to those that one would apply in Europe. In this country the population in up-country districts which buys batteries is largely illiterate and perforce relies to a far greater extent than the purchaser in Europe upon either the trade-mark or the get up of the article he is proposing to purchase. I am fully conscious too, and it has been observed by many authorities that both the opportunity and the inclination to put a "get up" to dishonest purpose is far greater here than elsewhere and that one of those things that a trader is entitled to be protected against is having a mark put into circulation which is reasonably liable to be used for a dishonest purpose.

Bearing all these matters in mind, I come back simply to this, that I have Ex. A and I have Ex. B and I have to ask myself whether there is a reasonable liability to confusion between them. In my view there is not. I have already described them and I do not propose to attempt to do so again. The dominant characteristics of Ex. A are the vivid red upon the grey background. The colour scheme of Ex. B is to my mind a different red upon a dark blue background. I do not think that when that is considered, coupled as I say with the Chinese writing on Ex. B, any ordinary purchaser could reasonably be said to be liable to be confused. I should perhaps add that a good deal of evidence has been given to the effect that in the shops in which these batteries are sold they are, as a rule, displayed in show cases. Purchasers who are literate invariably ask for them by a name as "Eveready" batteries. Indeed, it is more than probable that the name "Eveready" is well known not only to literate purchasers but to illiterate purchasers as well. The question of literacy and illiteracy does not really arise so far as the name of the article is concerned. A name can gain currency both among "literate" or "illiterate" people. Where however there are persons who do not even know the name "Eveready" then the evidence is that they as a rule examine the various specimens in the show cases. I think that any ordinary individual with ordinary powers of observation who examined Ex. A side by side with Ex. B in a show case would not have the least difficulty in telling that they are entirely different products apart altogether from the fact that there is Chinese writing on one of them while there is none on the other. In the circumstances therefore, I have come to the conclusion that this suit must fail and be dismissed. It will be dismissed with costs to be assessed in the manner which the practice of this Court has established and for that purpose I fix the advocate's fee at 15 gold mohurs.

R.W./R.K. ***Suit dismissed.***

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## A. I. R. 1938 Rangoon 103

ROBERTS C. J.

*U Pandita* — Applicant.

v.

*Maung Tint* — Respondent.

Criminal Revn. No. 206-B of 1937, Decided on 15th June 1937, from order of Second Addl. Special Power Magistrate Tharrawaddy, D/- 6th March 1937.

**Criminal Trial — Revision—Magistrate on evidence more acceptable to him coming to finding of fact — Application in revision against such finding cannot be treated as appeal—Machinery of Court in criminal revision cannot be invoked to interfere with his decision.**

No doubt the revisional jurisdiction of the High Court can always be exercised in order to prevent a gross and palpable failure of justice. But this exercise of revisional jurisdiction refers to such an error of facts as is obvious upon the face of the record and is not in effect a mistake by the Magistrate as to the question of which set of facts should be deemed more acceptable but a blunder relating to the question as to whether some fact has been proved or not. [P 104 C 1]

But where there was evidence before the Magistrate which if he believed it would enable him to find as he did:

*Held* that the application in revision by the accused could not be treated as an appeal and the machinery of the Court in criminal revision could not be invoked: *A I R 1914 All 211, Rel. on.* [P 104 C 1]

U. Kyaw Zan — *for Applicant.*

G. N. Banerji — *for Respondent.*

**Order.**—This is an application in revision brought on behalf of one U Pandita who was convicted by the Second Additional Special Power Magistrate, Tharrawaddy, of an offence under S. 431, I. P. C. and was fined a sum of Rs. 30, or in default one month's rigorous imprisonment. The relevant section of the Code runs as follows, omitting words which are immaterial for purposes of the present case:

> Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road impassable or less safe for travelling or conveying property, shall be punished.

And what has to be proved against the defendant in a case of this description is, first that he has done an act which renders or which he knows to be likely to render a road impassable or less safe for travelling, and secondly that such road is a public road.

It is conceded here that if the applicant had done the act with which he was charged upon a public road he could not be heard to say that it was not likely to render it impassable or less safe for travelling. It is said that his intention was not to endanger the comfort of the public, but at the same time there can be no dispute that he dug two trenches on the place in question, and the only point is whether there was evidence before the Magistrate upon which he could find that this was a public road.

It is unnecessary to go through all the evidence; to do so would be to enter into an examination on the merits of the question. It is enough to say that the Revenue Officer Maung Hla Gyaw was called and he said in the course of his evidence that the two trenches fell on the public road itself. He was cross-examined and made certain admissions in respect to the accuracy of a map which he produced. But there was still this statement of his and the Magistrate chose to act upon it in conjunction with the other evidence. It is pointed out in the judgment of the learned Magistrate, which deals not only with the prosecution evidence but with the evidence for the defence very fully that several responsible people of the village state that the roadway upon which the accused dug the two trenches had been in existence for many years and cart traffic and conveyances were using the said roadway all the time: and although they might have been cross-examined and there might have been evidence that the roadway in question was a private roadway, it was entirely for the Magistrate to consider on the facts whether it was a public roadway or not.

It has been urged that because owing to the provisions of S. 413, Criminal P. C. there is no right of appeal against the present sentence, this Court should permit proceedings in revision to be utilized for the purpose in effect of bringing an appeal where no appeal properly lies. Assent cannot be given to such a proposal, and in this connexion I need only refer to the observation of Piggott J. in 36 All 403[1] at p. 405 in which he says:

> The question is whether the case is one in which this Court after examining all the records in question, should in its discretion exercise powers conferred on it by S. 439, Criminal P. C. The revisional jurisdiction of this Court can always be exercised in order to prevent a gross and palpable failure of justice. At the same time, it should not be so exercised as to make one portion of the Code of Criminal Procedure conflict with another, as would be the case were this Court to permit the

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[1] Ahsan-ullah Khan v. Mansukh Ram, A I R 1914 All 211=25 I C 850=15 Cr L J 598=36 All 403=12 A L J 511.

practice to grow up of invoking its interference in revision so as to give a right of appeal where such right is definitely excluded by other provisions of the Code of Criminal Procedure.

Now, when the learned Judge says that the revisional jurisdiction can be exercised in order to prevent a gross and palpable failure of justice, he must be taken to refer to such an error of fact as is obvious upon the face of the record and is not in effect a mistake made by the Magistrate as to the question of which set of facts should be deemed more acceptable but a blunder relating to the question as to whether some fact has been proved or not. In this case, it is clear that there was evidence before the Magistrate which, if he believed it, would enable him to find as he did and it is not for me to treat this application as an appeal. The machinery of the Court in criminal revision cannot be invoked in a case such as this, and the application is accordingly dismissed.

R.W./R.K. *Application dismissed.*

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## A. I. R. 1938 Rangoon 104

ROBERTS C. J.

*Maung Mon Bin* — Applicant.

v.

*The King.*

Criminal Revn. No. 161-B of 1937, Decided on 16th June 1937, from order of Township Magistrate (1), Kyaukkyi, D/- 2nd December 1936.

**(a) Burma Fisheries Act (3 of 1905) — Rules under — R. 45 — Meaning of.**

The meaning of R. 45 of rules framed under Burma Fisheries Act is that baling is not allowed. The bar placed by the rule upon baling may be lifted at any moment by the Deputy Commissioner with the Commissioner's sanction and baling thereafter, so long as it has been continuously permitted, can be practised without infringement of the law until the Deputy Commissioner again prohibits it. [P 104 C 2]

**(b) Burma Fisheries Act (3 of 1905), S. 21 (a) — Fishing in fishery by using engine for baling out water without permission is offence under S. 21 (a).**

Where a person fishes in a fishery in a prohibited manner by using an engine for pumping up and baling out water, the use of an engine must be deemed in all cases to be an offence except where the person against whom proof is given of having used such an engine is able to show the express permission which is indicated by the Proviso to R. 45 of Rules framed under the Act. [P 104 C 2; P 105 C 1]

U Kya Gaing — *for Applicant.*

**Order.** — This is an application in revision by Maung Mon Bin against his conviction for an offence under S. 21 (a), Burma Fisheries Act, 1905. He was originally convicted of two offences against different sub-sections but as the learned Sessions Judge rightly pointed out the facts disclosed one offence and he should be convicted only under one sub-section. Accordingly he was fined Rs. 75 for breach of S. 21 (a) of the Act which runs as follows:

> Any person who fishes in any fishery not having a right to fish therein or in a way in which he is not entitled to fish therein shall be punished.

It was alleged that the applicant fished in a fishery of which he had a lease in Kyaukkyi Township, Toungo, in a prohibited manner by using an engine for pumping up and baling out water. The facts are admitted but it is contended that in doing what he did the applicant was guilty of no offence. In order to see what methods of fishing are prohibited, it is necessary to look at R. 45 of the Rules made pursuant to the Burma Fisheries Act, and that Rule curiously states that "the following methods of taking fish are absolutely prohibited : (b) Baling except baling water from *tus* or *goks*" provided that the Deputy Commissioner may permit the method specified in Cl. (b), i. e. baling with the special sanction of the Commissioner, and provided also that in the case of any fishery in which baling has been continuously permitted such baling shall be deemed to be permitted until the Deputy Commissioner expressly states that it shall be prohibited. The meaning of this Rule is quite clear : it is that baling is not allowed. The ban placed by the Rule upon baling may be lifted at any moment by the Deputy Commissioner with the Commissioner's sanction and baling thereafter, so long as it has been continuously permitted, can be practised without infringement of the law until the Deputy Commissioner again prohibits it.

There is no kind of evidence in this case that the ban against baling was ever lifted by the Deputy Commissioner, but it is sought to say that the words "baling has been continuously permitted" cover a set of circumstances in which baling has taken place by different persons over a long period without let or hindrance. If this had been what the Legislature intended, it would have been easy to frame the Rule "has been continuously practised" instead of "has been continuously permitted"; but the rule was framed in the latter way and there is no doubt that the use of this engine must be deemed in all cases to be an offence except where the person against whom proof is given of having used such an engine is able to show the express permission which is indicated by the Proviso to R. 45. Accordingly, the applicant was rightly convicted. Technically it is a criminal offence as has been pointed out; but there may be in cases of this kind little, if any, moral stigma. This application for revision is therefore dismissed.

S.C./R.K. *Application dismissed.*

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## A. I. R. 1938 Rangoon 105

MACKNEY J.

*M. I. Mamsa and others* — Applicants.

v.

*The King.*

Criminal Revn. No. 286-B of 1937, Decided on 15th June 1937, against order of Dist. Magistrate, Rangoon, D/- 5th April 1937.

**(a) Criminal P. C. (1898), Ss. 443 and 446 (1)—Omission of District Magistrate to record finding on application under S. 443—Committal order implying that he had come to finding—Omission does not vitiate proceeding—It is sufficient that he decides under S. 443 and commits case under S. 446 (1).**

The omission of the District Magistrate to record his finding on the application under S. 443, does not vitiate his proceedings where he implies in his committal order that he has come to a finding. It is sufficient that he has decided under S. 443 that the case ought to be tried under the provisions of Ch. 33 and consequently has under S. 446 (1) committed the case for trial to the Court of Session. [P 106 C 2; P 107 C 1]

**(b) Criminal P. C. (1898), S. 215 — High Court Judge presiding over Sessions can quash commitment under S. 215.**

The Judge of the High Court presiding over the Sessions of the High Court, has power under S. 215 to quash a commitment made to him by a competent Magistrate: *A I R 1929 Cal 756, Rel. on.* [P 107 C 1]

Kyaw Din and Ba Han — *for Applicants.*

Jones for Tun Byu — *for the King.*

**Order.**—The three applicants were committed by the District Magistrate of Rangoon for trial by this Court on charges framed under Ss. 482, 483 and 485, I. P. C. It will be noted that one of these offences, namely that under S. 485, is triable by a Court of Session as well as by a Magistrate of the First Class. Ordinarily the District Magistrate, who is specially empowered to try certain cases triable by the Court of Session, could have tried this case. The maximum penalty which may be inflicted is three years' rigorous imprisonment, and the District Magistrate, Rangoon, may inflict imprisonment up to four years in such a case as the present. The District Magistrate has given his reasons for committing the case to the High Court in his committal order. He says that:

> The accused claimed a jury trial before the High Court of Judicature at Rangoon on the ground that the complainant is a European British subject and the accused are Indian British subjects. Hence this committal.

The application in question was filed on 23rd March 1937. The Magistrate recorded no order thereon save: "File in the proceedings". The applicants asked that the Court should record a finding that the case against them was one which ought to be tried under the provisions of Ch. 33, Criminal P. C. and that the case may be committed for trial by a jury by the High Court of Judicature at Rangoon. The Magistrate did not hold any inquiry. S. 443, Cl. (1), Criminal P. C., lays it down that when such a claim as this is made the Magistrate inquiring into or trying the case after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim is to record a finding. Apparently in the present case the learned District Magistrate did not think that any inquiry was necessary.

On the opening of the trial in the High Court, Dr. Ba Han, who appeared for two of the applicants-accused, stated that the procedure adopted by the District Magistrate on his application that the accused should be tried under the provisions of Ch. 33, Criminal P. C., was defective as no inquiry has been made as to the status of the complainant and the accused and no finding was come to as to their being or not being respectively a European British subject and British Indian subjects. He claimed that the accused could be tried by this Court only under those provisions, and he therefore asked that the proceedings might be sent back to the District Magistrate to have them regularized, or, alternatively, that an adjournment should be given to him to permit him to make an application to the Appellate Side of this Court to quash the committal. He also claimed, under the provisions of S. 275, Criminal P. C., to have a majority of Indian British subjects on the jury. Mr. Kyaw Din, who appeared on behalf of the remaining accused, supported the application. Mosely J. who presided over the Sessions held that the provisions of S. 275, Criminal P. C., could not be invoked unless there had been a finding under the provisions of the Code as to the status of the persons concerned. He does not say in so many words that there had been no finding on the point in the present case, but he seems to have proceeded from the accused's contention that there had been none. He remarked that this Court has no power to send the proceedings back to the committing Court to be regularized, and that as the committal was in any case a legal one (S. 485, I. P. C., being triable by a Court of Session), no adjournment should be allowed for an application to the Appellate Side of this Court to quash the committal. "Least of all" he said,

> would an adjournment have been justified at this late stage. Dr. Ba Han himself appeared for the accused in the committing Court, and it was for him, as well as for the Magistrate, to see that there was an inquiry into the claim to be tried under Ch. 33.

The applications were accordingly refused. The trial was held and the jury chosen in the ordinary way. At the close of the trial, the jury returned a divided verdict, which Mosely J. refused to accept, and he directed that all the three accused should be retried on all three charges. Taking advantage of this fresh opportunity offered them, the accused have now applied on the Appellate Side of the High Court for an order that the District Magistrate's order of committal was an order under the provisions of Ch. 33, Criminal P. C., or for an order remanding the proceedings to the District Magistrate to make the necessary inquiry and to come to a finding regarding the nationality of Mr. Pope, the complainant, and the applicants-accused, or again, for an order to quash the committal.

As regards the second prayer, I do not know of any provisions of the Code by which such a procedure could be adopted. It appears to me that the only course would be to ask for the committal to be quashed, if it is held that the District Magistrate's order was not an order under the provisions of Ch. 33, Criminal P. C. When this application was presented to me, I was at first in doubt whether it was open to me to go into the matter which appeared to have been decided by my learned brother sitting on the Original Side. On reflection, however, I have come to the conclusion that the matter has not really been decided by him in such a manner as to prevent the applicants raising the question before me. What my learned brother decided was (1) that he could not send the proceedings back to the committing Court to be regularized, and (2) that an adjournment should not be allowed for an application to be made to the Appellate Side of the Court to quash the committal. As for the first point, it is not now in question, and as for the second point, that also is not in question. I take it that my learned brother also did not decide whether or not the committal had been made under the provisions of Ch. 33, Criminal P. C., that is a question that he was not asked to decide, because the learned counsel who appeared for the accused assumed that no finding had been come to as to the accused being British Indian subjects, and the complainant a European British subject. It appears to me therefore that his decision does not prevent me from considering the matter now.

The learned counsel who appeared for the accused now say that the reason why they made no application prior to 17th May was because they were under the impression that their application to the District Magistrate had been granted: again on 17th May they wrongly came to the conclusion that their application had not been granted, and so they told the Court that the District Magistrate had come to no finding on the point: now they perceive that they were under another misapprehension at that time, and that the learned District Magistrate did in effect come to a finding on their application. It is admitted by all the parties that the complainant in this case is a European British subject and that the applicants-accused are Indian British subjects; these facts never were disputed, but were admitted in the District Magistrate's Court, and that is why, I take it, the learned District Magistrate held no inquiry. In the present case, it would obviously be a waste of time to quash the committal order in order that the District Magistrate should hold an inquiry, the result of which is a foregone conclusion.

It is true that the provisions of S. 443 would have been fully complied with had the learned District Magistrate recorded his finding on the application of the accused before proceeding further. However in the circumstances, it does not appear to me that his omission to do so invalidates his proceeding. It is sufficient that he did decide under S. 443 that the case ought to be tried under the provisions of this Chapter, and, consequently, that he did under S. 446, Cl. (1), commit the case for trial to the Court of Session. Although the learned District Magistrate did not record a separate finding, he did in his committal order in my opinion, imply that he had come to a finding that the applicants-accused are Indian British subjects and that the complainant is a European British subject and that the case ought to be tried under the provisions of Ch. 33 of Criminal P. C. He has expressed that finding in all too brief a manner, but the finding is there. His words, in effect, amount to this :

> The accused claim a jury trial before the High Court of judicature at Rangoon on the ground that the complainant is a European British subject and the accused are Indian British subjects. There is no dispute on this point. The accused are entitled to have their applications granted: hence I commit them.

But for such a finding, there would have been no occasion whatsoever to commit the case to the High Court. It cannot, in my opinion, be held that there has been no finding on the application of the accused; on the contrary, there has been a finding in their favour. I might add that had an application been made to the Judge presiding at the Sessions of the High Court to quash the committal, and had that application been refused, it would not, in my opinion, have been open to me to deal with this application. In fact, no such application was made, or thought of, although in view of the recent decision of a Full Bench of the Calcutta High Court, 57 Cal 1042[1] a Judge, presiding over the Sessions of the High Court, has power under S. 215, Criminal P. C. to quash a commitment made to him by a competent Magistrate. All that the learned Judge was asked to do was to return the proceedings to the Magistrate for regularization or to grant an adjournment in order that an application might be made to the Appellate Side. The application was made on the assumption that there had been no finding under S. 443, Criminal P. C., and the learned Judge's order proceeded on that supposition. The position would have been different if he had been asked to decide whether there had or had not been a finding, and had decided that there had been no finding.

The application, then to quash the committal order by the District Magistrate of Rangoon is rejected. There is, in my opinion, no reason for quashing it, as it was in order. Application was made to the Court under the provisions of Ch. 33, Criminal P. C., and the learned District Magistrate, Rangoon, has approved of that application and committed the applicants-accused to the Sessions of the High Court for trial under the provisions of Ch. 33 of Criminal P. C.

S.C./R.K. *Application rejected.*

## A. I. R. 1938 Rangoon 107

ROBERTS, C. J.

*M. Ulla* — Applicant.

v.

*The King.*

Criminal Revn. No. 263-B of 1937, Decided on 16th June 1937, from order of Fifth Addl. Magistrate (1), Rangoon, D/- 15th March 1937.

**Burma Suppression of Brothels Act (2 of 1921), S. 11 (a)—Sentence—Proper sentence is of imprisonment — Sentence of fine or in default imprisonment is entirely inadequate.**

Where a person is convicted of an offence of managing a brothel under S. 11 (a) of Burma Suppression of Brothels Act, a sentence of fine or in default imprisonment is entirely inadequate in such a case. To stamp out an offence of this kind it is proper that the offender should be sent to prison. [P 108 C 1]

Kyaw Zan—*for Applicant.*

**Order.**—This is an application in revision arising out of the order of the fifth Additional Magistrate, Rangoon, which was brought before the Sessions Judge of Hanthawaddy with a view to make a recommendation to this High Court, which he has refused to make, that the conviction and sentence of the applicant should be set aside. I am not surprised, having read the evidence, that the Sessions Judge refused to make any such recommendation, and it is clear that in effect the proceedings before the Magistrate have been reviewed with much the same thoroughness as they would have been reviewed in the case of an appeal.

The case for the prosecution, which was accepted in the trial Court, was that this man Ulla was living in one room and in the next room, which he had taken out in another name, he was managing a brothel, and there was a great deal of evidence to show that these premises were used as a brothel over quite a long period. The fine of Rs. 30 or in default 15 days' rigorous imprisonment is, to my mind entirely inadequate to pass in a case where a man has been convicted of the offence of managing an establishment of this kind, and accordingly I have to think what the proper penalty is. My own view is that offences of this kind will only be stamped out when a sentence of imprisonment is passed, but I am loth in this instance to give effect to that view without giving the applicant the option of a fine, since if he had not applied in revision he would have escaped with the penalty which the Magistrate thought fit to impose upon him. It cannot however be too widely known that the proper penalty for the offence of managing a brothel under S. 11, Brothels Act, is that the offender should be sent to prison, and I hope that in future where a conviction of this kind is recorded, that sentence will be passed. In this case the applicant will be fined Rs. 150 or in default three weeks' rigorous imprisonment.

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[1] Emperor v. Girischandra Kundu, A I R 1929 Cal 756= 1929 Cr C 468=123 I C 483=31 Cr L J 506= 57 Cal 1042=34 C W N 18 (FB).

A.L./R.K. *Sentence enhanced.*

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## A. I. R. 1938 Rangoon 108

LEACH J.

*Maung Chit Khin and another* — Appellants.

v.

*U Ba and another* — Respondents.

Special Second Appeal No. 380 of 1936, Decided on 17th June 1937, against decree of Asst. Dist. Court, Mandalay, D/- 27th August 1936.

**Buddhist Law (Burmese)—Mortgage—Equitable mortgage by Burman — Burman's wife dying leaving son — Decree passed on mortgage—Burman marrying again — Suit by son for declaration that mortgage decree did not affect his mother's share — Second marriage held did not affect mortgagee's rights—Even if first wife was not consenting party, husband became sole owner on her death and increase in property enured to benefit of mortgagee.**

An equitable mortgage was created by a Burman. His wife died afterwards leaving a son. A mortgage decree was passed. The Burman afterwards married again and the execution of the mortgage decree was stayed pending the decision of a suit which was brought by the son for a declaration that the mortgage decree did not affect his mother's share of the property :

*Held* that the second marriage of the mortgagor did not affect the rights of the mortgagee, the decree having been passed before the marriage and even if the first wife was not consenting party, on her death, her husband became absolute owner of the property subject to the mortgage he had created and his interest in property having increased, the increase enured to the benefit of the mortgagee : *A I R 1919 P C 14 and A I R 1927 Cal 665, Rel. on.* [P 108 C 2]

A. N. Basu — *for Appellants.*

E. Maung — *for Respondents.*

**Judgment.**—Maung Ba Din, the father of the appellants, borrowed Rs. 150 from the respondents, who are husband and wife, and as security for the loan deposited with them the title deeds of certain paddy lands by way of equitable mortgage. Mg. Ba Din married Ma Toe, who is the mother of the appellants. Ma Toe died in 1933 and subsequently, on 24th September 1934 Maung Ba Din married Ma Ohn Sein. On 18th June 1934 the respondents filed a suit against Maung Ba Din on the mortgage and on 17th September a preliminary mortgage decree was passed. A final decree followed on 17th June 1935 but the sale of the property was stayed pending the decision of the suit out of which this appeal arises. The suit was filed by the appellants for a declaration that they had a seven sixteenths interest in the property, on the ground that the mortgage decree did not affect their mother's interest. The trial Court (Township Court of Madaya) decreed the suit, but upon appeal to the Assistant District Court of Mandalay this decision was reversed and the suit was dismissed with costs.

The learned advocate for the appellants contends that as their father married again they are entitled to a half share. Whatever would have been the position if the marriage had taken place before the passing of the mortgage decree, it is quite clear that the second marriage does not affect the mortgagee's right to retain the full decree. The mortgage had been created during the lifetime of Ma Toe and, assuming that she was not a consenting party to it and her interest was not affected by it, on her death Maung Ba Din become the absolute owner of the property, subject to the mortgage which he himself had created. His interest in the property having increased, the increase enured to the benefit of the mortgagee, *see* 23 C W N 841[1] and 31 C W N 985,[2] and this was the position when the respondents obtained their mortgage decree. It is not necessary to discuss whether the position would have been different if Maung Ba Din had married Ma Ohn Sein before the legal proceedings were instituted and the decree obtained. Mr. Basu rightly concedes that the cases I have just referred to have application to the present case. It follows that the appeal fails and it is accordingly dismissed with costs.

S.C./R.K. *Appeal dismissed.*

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1. Basar Khan v. Leakat Hossein, A I R 1919 P C 14=50 I C 678=23 C W N 841 (P C).
2. Behary Lal Sen v. Indra Narayan Bandopadhya, A I R 1927 Cal 665=104 I C 206=31 C W N 985=45 C L J 571.

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## A. I. R. 1938 Rangoon 109

MACKNEY J.

*The King*

v.

*Nga Tok Hla* — Respondent.

Criminal Appeal No. 507 of 1937, Decided on 14th June 1937, against order of Sess. Judge, Thaton, D/- 2nd February 1937.

**(a) Criminal Trial—Appeal—Period allowed—Appeal by accused against conviction on one charge — Appeal against acquittal on another charge suggested in that appeal—Appeal by Crown from acquittal—Few days delay held could be excused.**

An accused was convicted on one charge and acquitted on another charge. On appeal from his conviction, High Court suggested that proper conviction should have been on charge on which he was acquitted. Hence, Crown filed an appeal from the original order of acquittal on that charge. The appeal was filed seven days later than the time that was allowed :

*Held* that although Government should file an appeal with all reasonable expedition, yet when the interim time had been occupied by another appeal from conviction by the accused and the appeal by Crown was filed on suggestion made in the order in appeal by the accused, few days delay in filing the Crown appeal was excusable : *A I R 1932 Rang 146, Rel. on.* [P 110 C 2]

**(b) Penal Code (1860), S. 414—Property removed from dead body—Accused voluntarily helping in disposing of it — Offence under S. 414 held committed.**

Where an accused misappropriated property from the body of a dead person and voluntarily helped in disposing of it :

*Held* that the property amounted to stolen property and offence committed fell under S. 414. [P 110 C 1]

Tun Byu — *for the King.*

Maung Lat — *for Respondent.*

**Judgment.**—Ma Kalema left her home on 10th May 1936, in the morning, and the same afternoon her dead body was found. She had been wearing a gold chain and a pair of earrings : these had disappeared. From the state of the body, there was reason to believe that Ma Kalema had met her death by violence. On 20th May, a boy named Nga Ban San found two pawn-tickets lying in front of the public house at Pa-an. He gave these to his father Maung We, who reported the matter to responsible persons in the village. It may be noted that the dead body was found at a place some few miles from Pa-an. On 9th June, the Police Station Officer came to know of the matter and took possession of the pawn-tickets. It was found that they related to the pawning of a gold chain and a pair of earrings by somebody called Kyaw Sein. It has been satisfactorily established that these gold chain and earrings were the gold chain and earrings belonging to Ma Kalema. On 12th June the respondent Tok Hla was arrested by the Circle Inspector of Police, who had information that he was the person who had pawned the articles. The next day Maung Toke Hla made a confession before a Magistrate, in which he stated that he had met with the actual murderers as they returned from the scene of crime; he pointed out to them that there was blood on the axe which one of them was carrying, and at last he was told that Ma Kalema, who is the cousin of his wife, had been murdered, and he was made to swear secrecy. Having taken an oath of secrecy, they gave him the gold chain and the pair of earrings and told him to pawn them: so after keeping them for ten days, he pawned them for Rs. 22, and took the money to Po Yon, one of the men whom he had met, handed it to him and received Rs. 5 back. Maung Tok Hla and the persons implicated by him were brought before a Magistrate with a view to committal for trial.

In his examination before the committing Magistrate, Tok Hla told a more elaborate story, giving many more details as to how Ma Kalema had met her death. In this version he stated that one Kyaw Shein had admitted that he had attempted to abduct Ma Kalema, but unfortunately when he shut her mouth and squeezed her throat she died. Tok Hla went with them to the place where Ma Kalema's dead body was, and it was then decided that the best thing to do would be to make injuries upon the body so that it might be thought that she was robbed of her property: this was done and they all drank her blood in taking an oath of secrecy. Tok Hla then received the chain and the earrings which he pawned. At the trial, Tok Hla was charged under S. 414, I. P. C., as well as under S. 302, I. P. C. Tok Hla pleaded not guilty to both charges, but when, after the case for the prosecution had been closed, he was called upon for his defence. Tok Hla denied that he had committed the murder, but admitted that he had committed an offence under S. 414, I. P. C. The learned Sessions Judge acquitted the other accused, but convicted Tok Hla under S. 302, read with S. 34, I. P. C. He further acquitted him of the charge under S. 414, I. P. C., giving no reasons therefor. On appeal to this Court the conviction of Tok Hla was set aside. In the opinion of the Bench he should have been convicted under S. 414, I. P. C.

The order of acquittal of an offence under S. 302, I. P. C., was passed on 23rd March 1937, the appellant having been convicted on 2nd February 1937. On 10th May 1937 the Local Government filed an appeal against the order of acquittal passed by the Sessions Judge in favour of Tok Hla in respect of a charge under S. 414, I. P. C. I have heard the learned Government Advocate and the learned advocate appearing on behalf of Tok Hla. There can be no doubt that Tok Hla has committed an offence punishable under S. 414, I. P. C., and that he ought to have been convicted thereunder. The charge was one which could be framed against him at the trial under S. 236, Criminal P. C. The property had clearly been misappropriated from a dead person, and therefore was stolen property which he voluntarily assisted in disposing of. It may be noted that the finger-print expert deposes that the finger-prints on the pawn-tickets relating to these articles are those of Tok Hla. I shall therefore allow this appeal and convict Maung Tok Hla of an offence punishable under S. 414, I. P. C. It was urged that some consideration should be given to the fact that the appeal was filed three months and eight days after the original order of acquittal. It was laid down in 10 Rang 312[1] that the Government should file an appeal against an acquittal with all reasonable expedition, and executive instructions have been issued to the effect that such appeals should be filed not later than three months after the date of the order of acquittal; in the present case that period has been exceeded only by eight days. In the interim there has been an appeal against his conviction by the respondent, and the present appeal appears to have been suggested by the order passed on the respondent's appeal. In the circumstances I am not prepared to hold that there has been an unreasonable delay in the filing of the appeal. Between 23rd March 1937 and 10th May 1937, there was an interval of about ten days, when the Courts were closed for the Easter holidays and the Burmese New Year.

Now, on his own admission, the respondent knew that his wife's cousin had met her death owing to violent treatment by other persons: instead of at once giving information to the police about the matter or even to the deceased's relatives, he took advantage of her death to his own profit. It would appear that he would never have given any information unless he had become suspected and arrested and it had become known that he was the person who pawned the jewellery: even then he does not appear to have told the truth about the matter — judging from the difference between his story as given to the Magistrate before whom he made the confession and the story as given before the committing Magistrate. He is a young man of 19 years of age. No previous convictions have been proved against him. The maximum sentence for such an offence as that for which he has been convicted is three years' rigorous imprisonment. The circumstances are about as bad as they could be, and in my opinion this is a case in which the maximum sentence ought to be inflicted. I therefore direct that Maung Tok Hla do suffer three years' rigorous imprisonment.

B.D./R.K. *Order accordingly.*

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[1] Emperor v. U San Win, A I R 1932 Rang 146 =1932 Cr C 709=138 I C 523=10 Rang 312 =33 Cr L J 701.

## A. I. R. 1938 Rangoon 111

LEACH J.

*S. Bulli Appana* — Appellant.

v.

*Subamal* — Respondent.

Second Appeal No. 6 of 1937, Decided on 11th June 1937, against the decree of Dist. Court, Amherst at Moulmein, D/- 21st December 1936.

**Hindu Law—Marriage—Taking of seven steps by bride and bridegroom is most essential thing for valid marriage—Marriage does not become invalid merely because more steps are taken.**

The essential thing for the performance of saptapadi ceremony in a Hindu marriage is that the bride and bridegroom must take seven steps. [P 111 C 2]

Where therefore the bride and bridegroom walked round the sacred fire seven times :

*Held* that the saptapadi ceremony was duly performed and the mere fact that they took more than seven steps did not make the marriage invalid : *A I R 1923 Rang 202, Dissent.* [P 111 C 2]

Chari — *for Appellant.*

K. C. Sanyal — *for Respondent.*

**Judgment.**—The appellant sued the respondent in the Township Court of Moulmein for a declaration that the respondent is not his lawful wife and therefore not entitled to demand that he should maintain her. The suit followed an application made by the respondent for an order for maintenance against him under S. 488, Criminal P. C. This application came before the Subdivisional Magistrate of Moulmein, who held that the respondent was the appellant's lawful wife, and directed that he should pay to her monthly the sum of Rs. 30. An application to this Court for the revision of the order followed, but the application was dismissed, and the appellant then instituted the suit out of which this appeal arises.

The parties are Sudras, and the Township Court held that all ceremonies essential for a valid marriage had been performed. Evidence was given to this effect by a Brahmin priest, Vythinatham Iyer, who officiated at the ceremony. The trial Court accordingly dismissed the appellant's suit. The appellant then appealed to the District Court of Amherst, which concurred in the decision of the trial Court. The appellant now asks this Court to reverse the decisions of the lower Courts on the ground that a ceremony essential to a valid marriage had not been performed. The defect alleged is that instead of the bride merely taking the seven steps required in the saptapadi ceremony, she and the appellant walked round the sacred fire seven times. The learned Judge held that as the respondent had taken seven steps in the course of carrying out this rite — the taking of seven steps being the essential part of the ceremony — the fact that she had taken more than seven did not invalidate the marriage. I am in entire agreement with this view which is supported by authority.

Mr. Chari, on behalf of the appellant, has relied on 1 Rang 129.[1] In that case MacColl J. held that there had not been a valid marriage because the performance of the saptapadi ceremony there consisted of merely walking round a receptacle five times. The learned Judge did not take into consideration the fact that more than seven steps had been taken by the bride and based his decision on the following passage to be found at p. 286 of Edn. 3 of Sir Hari Singh Gour's "Hindu Code ":

> Of all the ceremonies, the one which is most insisted on and which has outlived the rest is the saptapadi or advancing seven steps, consisting in the bridal pair facing and approaching each other step by step till they join hands on the completion of the seventh step which is then regarded as the final and irrevocable step.

It is quite clear however that it is not essential, when the saptapadi ceremony is performed, that the bride and bridegroom should face one another and the bride take seven steps in the direction of the bridegroom. Sir Hari Singh Gour makes this quite clear at p. 287 where he points out that whatever may be the variation in the mode of taking the seven steps, all agree that with the completion of the seventh step, marriage becomes irrevocably complete. In Sir Ernest Trevelyan's work on Hindu Law, no reference is made to the performance of the saptapadi ceremony by the bride taking seven steps in the direction of the bridegroom. At p. 64, Edn. 3, the ceremony is described as follows :

> The bride and bridegroom walk round the fire, and then comes the most material of marriage rites. The bride is conducted by the bridegroom, and directed by him to step successively into seven circles, a text being recited at each step.

Sir Gooroodass Banerjee observes in his work "The Hindu law of Marriage and Stridhana ":

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[1] **Rampiyar v. Deva Rama, A I R 1923 Rang 202=76 I C 475=1 Rang 129.**

> The bride is then made to walk seven steps. This is the most material of all the nuptial rites, as, according to the sages, marriage becomes complete and irrevocable on the completion of the seventh step.

I am not bound by the decision in 1 Rang 129[1] and with great respect to the learned Judge who decided it, I take a different view of what is essential for a valid performance of the saptapadi rite. The rite in this case was performed to the satisfaction of the officiating Brahmin priest, and it is quite clear that the bride did take the seven essential steps. The appeal must therefore be dismissed with costs, advocate's fee four gold mohurs.

K.B./R.K. *Appeal dismissed.*

## A. I. R. 1938 Rangoon 112

ROBERTS C. J.

*Maung Sein Hlaing and another*
Appellant.
v.
*The King.*

Criminal Appeal No. 483 of 1937, Decided on 16th June 1937, from order of Honorary Magistrate (Second Bench), Rangoon, D/- 8th April 1937.

**Penal Code (1860), S. 380—Accused young man of 19 years of good parentage and education convicted under S. 380 for stealing cycle and sentenced to whipping—Sentence of whipping held should be upheld even though accused was first offender.**

A young man who commits an offence for the first time may be given a fresh start in life and should not, unless it is imperatively necessary, be sent to prison; but because a young man has well-to-do parents and because no reason can be assigned for his breach of law he should not escape punishment altogether. [P 112 C 2]

Where therefore the accused who was a young man of 19 years of age, of respectable parentage and good education stole a cycle of one of the pupils from his High School and pawned it for a sum of money, was convicted under S. 380, and was sentenced to 20 lashes :

*Held* that the sentence of whipping should be upheld even though the accused was a first offender. [P 112 C 2]

J. B. Sanyal — *for Appellant.*

**Judgment.**—In this case Mr. Sanyal has made a very strong appeal on behalf of his client Maung Sein Hlaing who was convicted of stealing a bicycle and sentenced by the Second Bench of Honorary Magistrates, Rangoon, to suffer a penalty of 20 lashes under the Whipping Act of 1909; and it is said that the sentence is harsh and excessive and the proper course for the Magistrates to have employed was to have bound the offender over under the provisions of S. 562, Criminal P. C., having regard to his age, character and antecedents and to the circumstances in which the offence was committed.

The facts show that the appellant is a young man of respectable parentage and good education, who is 19 years of age, and certainly not only old enough to know better but of an age when his conduct can no longer be regarded as a mere boyish prank. The cycle which he stole had been left outside the Cushing High School by one of the pupils and it was only by a very lucky chance that its whereabouts was discovered. It was pawned for a sum of Rs. 60, or thereabouts, by the appellant, and his counsel explains to me that he was not in want; and there seems to be no reason assigned why he was in need of money. I am asked to say, first, that this is a case of sudden temptation, and, secondly, the fact that the appellant had not been convicted before renders it undesirable that he should be subjected to a penalty now. I think there is much to be said in favour of the view that a young man may be given a fresh start in life and should not, unless it is imperatively necessary, be sent to prison, but I entirely disagree with the view that because a young men has well-to-do parents or because no particular reason can be assigned for his breach of the law he should, in a case like this, escape punishment altogether. I am glad to hear it said that his parents propose to look after him carefully and to look after him in such a way that he is not likely to repeat this. I think one of the surest guarantees that can be given against the commission of offences of this kind by anyone is the certainty that when the offence is committed and detected the accused person will not go unpunished. I therefore think that the sentence passed by the Honorary Magistrate was right. The appeal is dismissed and the sentence of whipping will stand.

K.B./R.K. ***Appeal dismissed.***

## A. I. R. 1938 Rangoon 113

SPARGO J.

*Ma Shwe Tu and another* — Appellants.

v.

*Maung Ba San* — Respondent.

Second Appeal No. 271 of 1936, Decided on 3rd June 1937, against decree of Dist. Court, Shwebo, in C. A. No. 8 of 1936.

**Mortgage — Mortgage bond containing independent covenant to pay interest at regular intervals besides providing for payment of principal with interest on demand—Suit for personal decree on account of interest can be brought — Each breach gives fresh cause of action for limitation.**

Where a mortgage bond contains independent personal covenant to pay interest every month or every quarter or at some regular interval besides providing for payment of principal with interest on demand, a suit based on the covenant to recover interest personally from the mortgagor is open to the mortgagee. Failure to pay interest gives fresh cause of action to the mortgagee every time there is a breach and a fresh period of limitation has to be calculated from the date of each breach: *Case law referred.* [P 114 C 1, 2]

Basu — *for Appellants.*

K. C. Sanyal — *for Respondent.*

**Judgment.**—In Civil Regular Suit No. 41 of 1934 in the Township Court of Wetlet the plaintiff Maung Ba San sued for recovery of Rs. 1000 being interest due on a mortgage deed. He was granted a simple money decree. On appeal to the District Court of Shwebo the defence was raised that the suit was barred by limitation and the learned District Judge held that there was in the bond a personal covenant for the payment of the interest each month and on the failure of the mortgagors to pay this interest each month, the mortgagee had a separate cause of action for its recovery. He therefore held that the suit was not barred by limitation and dismissed the appeal.

In this Court Mr. Basu's argument has been to the effect that the definition of "mortgage money" in S. 58. T. P. Act, is "the principal money and interest of which payment is secured for the time being". The mortgagee may sue under O. 34, Civil P. C., or under S. 68, T. P. Act, but in no other way. If he sues under S. 68 for the interest alone, he is suing for part of the mortgage money and must therefore be held to have waived the rest and since he is not suing to enforce a security, his suit will be barred six years after the date of execution of the instrument. It is six years after the date of execution of the instrument because of the decision in 6 Rang 297[1]. The instrument contains the provision that "We will also pay the principal when required by the creditor". Therefore the principal was payable on demand, therefore the period of limitation runs from the date of execution of the instrument.

Mr. Basu therefore claimed that the suit was barred by limitation. He further argued that the plaintiff could not get a personal decree until the property has been sold and quoted 52 All 363[2] and 62 M L J 170.[3] Neither of these cases appears to me to be in point because what is referred to in these cases is a personal decree under O. 34, R. 6 and that is clearly not what is being sued for here. For the respondent, Mr. Sanyal argued that there was a special covenant in the deed regarding payment of interest. It reads "We will pay the interest due regularly every month". Then the mortgagee has every month a right of action to recover the interest on failure to pay. The definition of mortgage money does not mean that you cannot make a contract which will enable you to sue for the interest separately apart from the security. He referred to S. 67, T. P. Act, and said that such a contract would be "a contract to the contrary" in the opening words of that section.

I am of opinion that the appeal fails and must be dismissed. In 4 Lah 32[4] their Lordships of the Privy Council dealt with the case where there had been a previous suit for interest due. The question arose whether such a suit barred a subsequent suit for the principal. In that particular case their Lordships of the Privy Council held that it did, but in the course of their judgment there occurs this passage :

> If therefore the plaint originally brought came to be properly interpreted as claiming only a personal relief in respect of the unpaid interest, the appellant's case would be on surer ground

and then followed reasons why the appellant's case was not on such sure ground. But the point of the matter is that there is nothing there to suggest that a suit for a personal decree for interest apart from the security is something which cannot be permitted. It is suggested that the remarks made in this judgment are obiter in so far as they deal with the hypothetical case where the original plaint only claimed a personal relief in respect of the unpaid interest and perhaps this is true, but still it would be surprising to find such remarks in this judgment if it is true that personal relief in respect of unpaid interest is impossible to obtain, and this is the view taken by a Bench of the Madras High Court in 31 M L J 437,[5] the headnote of which reads:

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[1] T. C. Bose v. Obedur Rahman Chowdhury, A I R 1928 Rang 189=111 I C 132=6 Rang 297.

[2] Sahu Radha Krishna v. Tej Saroop, A I R 1930 All 69=123 I C 321=52 All 363=1929 A L J 1294 (F B).

[3] Sundermull v. J. C. Galstaun, (1931) 62 M L J 170=137 I C 672 (P C).

[4] Kishen Narain v. Pala Mal, A I R 1922 P C 412=72 I C 187=50 I A 115=4 Lah 32 (P C).

> In the absence of an absolute covenant prohibiting the mortgagee from suing before the principal becomes due, it is open to him to sue for the interest although the principal money may not become payable at the time.

Mr. Basu criticized this case saying that no reasons have been given for the decision, but the reason is there. It is distinctly given. It is said that there was a "contract to the contrary" and therefore S. 67, T. P. Act, does not affect the question. Then it was said that there was nothing to show whether in this particular case the suit for interest was brought against the mortgaged property or whether it was a personal decree that was sought. But that is not the point and that does not appear to me to matter very much. The point is that a suit for the interest is capable of being brought.

Numerous authorities were cited to show that where a mortgage bond contains an independent personal covenant to pay interest every month or every quarter or at some regular interval besides providing for payment of principal with interest on demand, a suit based on the covenant to recover interest personally from the mortgagor is open to the mortgagee: *see* 48 Mad 703[6] and 19 All 39[7] among others. It is clear therefore that a suit for a personal decree on account of interest in the present suit could be brought.

Then it was said by Mr. Basu that if it were brought it will be barred by limitation. This argument was based on the contention that the mortgage money consisted of the principal and interest but *Bose's case*[1] referred to above was one in which there was no separate agreement in the mortgage deed to pay interest regularly every month. The failure to do this in the present case gave a fresh cause of action to the mortgagee every time there was a breach of it: *see Mathura Das's case*[7] above; and indeed it is quite clear that a fresh period of limitation has to be calculated from the date of each breach. It is not necessary to decide in this case whether the period of limitation is three years or six because the suit only claimed interest for the three years preceding the suit and therefore it is within time whether the period is three years or six. The appeal is therefore dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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[5] Subbiah Chetty v. Kuppammal, A I R 1917 Mad 743=35 I C 104=31 M L J 437.

[6] B. R. Sawmy Rao v. Official Assignee of Madras, A I R 1925 Mad 1120=91 I C 403=48 Mad 703=49 M L J 474.

[7] Mathura Das v. Raja Narindar Bahadur, (1897) 19 All 39=23 I A 138=7 Sar 88 (P C).

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## A. I. R. 1938 Rangoon 114

MACKNEY J.

*Tan Aung Ba* — Appellant.

v.

*The King.*

Criminal Appeal No. 653 of 1937, Decided on 6th July 1937, from order of First Addl. Magistrate, Rangoon, D/- 12th June 1937.

**Penal Code (1860), Ss. 323 and 452 — Accused convicted under Ss. 323 and 452 for offences committed on same occasion – Separate sentences for each offence held legal.**

Where a person is convicted for the offences under S. 323 and S. 452 committed on one and the same occasion he can be sentenced separately for each offence. [P 115 C 2]

Kyaw Zan — *for Appellant.*

**Judgment.** — The appellant is employed by the Rangoon Corporation as an Inspector of illicit pork. It was his duty to prevent importation of pork into Rangoon Town which had not been slaughtered in accordance with the rules of the Corporation. In pursuance of his duty, he waited in a motor car with some companions near the shop of one Kyu Hlaing, a restaurant keeper. He noticed that Kyu Hlaing was descending from a bus with a parcel and on examination he found he had some pork with him. He actually seized from Kyu Hlaing the small quantity of pork that was found. For some reason he thought that Kyu Hlaing had somehow managed to get rid of a much larger quantity and that he had somehow or other concealed it in his shop. The appellant therefore marched into the shop in spite of the protests of Kyu Hliang and his friends and started a search. The evidence showed that the appellant behaved in a very outrageous manner taking no care of the property in the shop and doing a certain amount of damage by the rough manner in which he conducted the search. When Kyu Hlaing protested, the appellant became enraged and struck him on the head with a stick which he carried with him. For these acts the appellant was convicted under Ss. 452 and 323 I. P. C. Under the first Section he was sentenced to suffer four months' rigorous imprisonment and under the second charge he was sentenced to pay a fine of Rs. 50, in default to suffer two months' rigorous imprisonment.

The learned counsel who appeared for the appellant did not argue that he had been wrongly convicted, but contended that the appellant was acting on the assumption that Inspectors of illicit pork were authorized to enter into other persons' premises and search for pork which they might suspect to have been illicitly slaughtered. It may be that the appellant thought that he had this authority but I find it hard to believe that he could so have thought. Presumably, he must have been instructed in his powers when he entered the employment and he must have known that he had no such authority. His behaviour in conducting the search could not be excused. He produced some evidence to show that he himself was assaulted but the Magistrate has given adequate reasons for rejecting the evidence of these witnesses and for accepting the evidence of the prosecution witnesses and I see no reason to differ. I am of opinion that the appellant was rightly convicted. I am unable however to agree that this is a case in which a sentence of four months' rigorous imprisonment is appropriate. The Magistrate has not given any satisfactory reason why he should have awarded such a severe sentence in a case like the present one. The appellant does not appear to have had any directly dishonest and criminal intention. He did act in what he conceived to be the execution of his duty but he acted in a very reprehensible manner without any consideration for the persons with whom he had to deal and it is also clear that he lost his temper very badly.

Nevertheless, these circumstances do not, to my mind, constitute an offence for which a sentence of imprisonment is called for. The appellant spent a week in jail before he was released on bail, and he doubtless received a severe shock which I hope will be quite sufficient to prevent his misbehaviour on another occasion. I therefore reduce the sentence under S. 452, I. P. C. to the term of imprisonment which he has already undergone. As regards the sentence under S. 323, it was argued that he should not have received a separate sentence under this section in addition to the one under S. 452, I. P. C. I do not agree. It seems to me quite clear that an offence under S. 323, I. P. C. is not necessarily included in one punishable under S. 452. In the circumstances of the present case the offence under S. 323, I P. C. is an aggravation of the other offence, and the two sentences awarded should be awarded with reference to the episode as a whole. I am given to understand that the pay of the appellant is Rs. 60 a month. He has been fined very nearly one month's pay. I see no reason to interfere. I am of opinion that in the circumstances the order for payment of compensation to the complainant should stand.

S.C./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 115

ROBERTS C. J.

*U Tun Sein* — Applicant.

v.

*Ma San Myint* — Respondent.

Criminal Revn. No. 218-B of 1937, Decided on 15th June 1937, against order of 2nd Addl. Magistrate (1), Rangoon, D/- 23rd March 1937.

**Buddhist Law (Burmese) — Marriage — Proof of — Marriage is contract entered into by mutual consent and no ceremony is necessary—Consent may be inferred from conduct of parties or established by reputation in absence of direct proof — Intention of both parties to enter into married life must be proved by clear evidence.**

Among Burman Buddhists marriage is a contract entered into by mutual consent of the parties and no ceremony is necessary. In the absence of direct proof, consent may be inferred from the conduct of the parties or established by reputation. Generally in such circumstances, some open recognition of the wedded state is to be expected. Relatives and neighbours are usually asked to some form of entertainment in order to signify the occasion, and where this is dispensed with, evidence of the intention to enter into married life must be clear. Clandestine acts of sexual intercourse do not by themselves establish marital relationship and where there is no regular cohabitation under the same roof and the couple who resort to each other for purposes of intimacy are thought by some to be engaged, and by others to be cousins or mere friends, proof of marriage has not been established by reputation. Moreover, as it takes two persons to make a contract, in order to prove marriage there must be evidence not merely of a desire by one person to be considered as having married another, but of the consent of that other, express or implied, to the joint assumption of a status consistent only with the marriage bond : *39 Cal 492 (P C), Rel. on.* [P 118 C 1, 2]

Dr. Ba Han — *for Applicant.*

E. Maung — *for Respondent.*

**Order.**—This is an application for revision against the order of the Second Additional Magistrate, Rangoon, under S. 488, Criminal P. C. directing the applicant to pay Rs. 100 per mensem to the respondent as her maintenance from the date of the application, and costs. The applicant denies that he was ever married to the respondent: she says he was, and I have to decide a difficult question of mixed fact and law. I am not helped by the reflection that she had made a number of false statements in support of her claim : it is necessary to consider whether despite these, she is really married to the applicant. There can be no doubt that he has made untrue statements as well. The respondent's case was that she was married in March 1933. There was no ceremony but it is alleged that the marriage took place by mutual consent according to the custom of Burman Buddhists. Respondent says first that they lived together as man and wife from 1st March 1933, to 12th November 1936, at 159, 38th Street, Rangoon; they jointly engaged a room and deposited rent in advance. She produced a receipt signed by herself made out jointly to herself and one Tun Sein. But she admitted in cross-examination that in making her application for the tenancy another Tun Sein signed it as a guarantor. He is the Bench Clerk of the District and Sessions Court, Hanthawaddy whereas Tun Sein, the applicant in the present case, is an Assistant Engineer to the Rangoon Corporation. It appears from the evidence of Mr. Desai, clerk to the owner of the house, that when the guarantor Tun Sein of Hanthawaddy came with the respondent the other Tun Sein alleged to be her husband was not present. This also appears from the evidence of Mahomed Ahmed, the bill collector of the landlord. I see no reason to doubt their testimony.

It also appears, and is now uncontradicted, that all subsequent receipts for rent were given to respondent alone; that applicant was unemployed up to April 1934; he lived in Sule Pagoda Road in 1933, and this is now also admitted; he admits he seduced her and they carried on a secret intrigue, but he says he would never marry her. Secondly, respondent calls two neighbours, U Sein Hpo and U Nyun. The former says that when respondent came to live at 159, 38th Street, applicant came to live there too. The witness lives next door and saw them dining at the same table. Respondent told him he was her husband, and no doubt he believed her. U Nyun said he knew them both and from their conduct he inferred they were husband and wife. Though he has a flat in the same building he visited respondent's room only once. It was on a particular occasion to which I shall have to refer again. Respondent says :

> My aunt, two brothers and my brother's wife came to live with me at No. 159,38th Street, about two months after I started living there with Tun Sein.

Not one of these persons is called as a witness by her to say that she was married to the applicant or that he ever lived there as she suggests. This suggestion which was accepted by the learned Magistrate on the slender evidence that he was often seen there, and that there was a double bed in the house, was abandoned by her advocate during the course of the hearing before me. Thirdly, respondent says that in December 1935 they went together to the wedding of U Po U's son, and there she introduced applicant to Lt. Col. Quilter and to U Thein as her husband and he never protested that they were not so related.. She says they were both invited there as Mr. and Mrs. U Tun Sein. Lt. Col. Quilter, called as a witness to support this, says that the applicant was at this wedding and was introduced to him by name by the respondent, and not as her husband at all. U Thein, Assistant Postmaster-General, says he saw them there; he does not remember being introduced to the respondent by the applicant at all, but he thought they were an engaged couple or else related in some way: he would probably remember if she had introduced him, since he used to see applicant bring respondent to her work at the post office in the mornings in his car and take her away at night. Both these witnesses thus give the lie to the respondent's story.

Moreover, on the invitation card which is partly printed, with space for names, the words "Mr. and Mrs." are printed, and the respondent's own witness, Ma

Sein Mya, who gave the invitation to her brother's wedding, says she forgot to cross them out. She gave the card to respondent to give to U Tun Sein with his name filled in ink after the printed words "Mr. and Mrs." Much labour has been expended in trying to show that Ma Sein Mya sent another invitation to "Mr. and Mrs. U Tun Sein." She denies it. The writing on both invitations is of a kind common among school pupils and shows no marked originality though it is certainly not dissimilar. But even if this witness be not speaking the truth and really thought the parties were married, it would not be from the applicant that she would get her information on this point; and thus her evidence would not carry the matter much further. This witness said she never asked respondent if she was related to applicant at all.

Fourthly, the respondent said that two Barristers-at-Law, U May Thein and U Shu Maung, knew her by repute as the wife of the applicant; she does not call them; the applicant does call them, and each of them says he does not know anything of the kind, again contradicting respondent's story. U Mya Thein invited Tun Sein to his wedding but did not invite the respondent. The importance of this evidence is completely ignored by the Magistrate. Fifthly, respondent says that she went on several motor trips to Mandalay in October 1935, to Prome in the following February, and a long trip in April 1936. But they were always accompanied by her relatives as well. Her aunt and her two brothers went on the first trip, her aunt and one brother on the second, and on the third trip no less than seven other persons excluding two children. Ma Sein Mya did not know the parties were husband and wife when she went with them on the Mandalay trip. Mrs. Evangalista went on two of these trips and says they behaved as husband and wife. From her cross-examination, it appears that one night at Mandalay, Mrs. Evangalista found that respondent who was sleeping in her room, whilst the applicant slept outside, left her bed and went to sleep with the applicant. In other words, the relationship was a secret and not an open one, and there is nothing inconsistent in this with the applicant's story. When Ma Khin May's husband died in October 1936 it is agreed that the respondent and applicant both attended the funeral together; but her brother accompanied them. Ma Khin May thought they were man and wife and on two occasions let them sleep in the same room. She lived at Tharrawaddy, a considerable distance from Rangoon.

It is clear that the respondent was passionately fond of the applicant, and a letter was put to her which she had written to him. She said in it that she loved him, that her life was ruined and she had lost her status. It was a pathetic letter, but it is clear that it was not written by a wife to her husband but by a woman who had surrendered herself to a man because she loved him, and was then afraid she was going to lose him. It says she has had an anonymous letter to say he has secretly married. She encloses this letter and asks whether he is secretly married to another woman or not, and says "Please let me see you as if you, as a bachelor, were living together with Myint (her name) formerly." And she adds :

> When shall I be at ease? I think I shall be at ease either on the day on which you said to marry me or on the day of my death.

Respondent swore she wrote this letter before March 1933, that is before her marriage, so as to make it appear that they were married afterwards. It is however plain that she wrote it at a much later date. For one thing, it contains reference to applicant's illness and how she nursed him. There is evidence that he underwent an operation in November 1933 and was in bed; but no evidence of any earlier illness. But far more important than this, it has been shown that the respondent in her letter to applicant enclosed not only the anonymous letter but its envelope. This has been through the post; it is produced and is dated November 1934. Respondent's own advocate admitted in answer to a question which I put to him that this letter must have been written about the end of 1934 and not at an earlier date, thus admitting that in this respect at least the learned Magistrate came to a wrong conclusion. There was other internal evidence of the date of the letter, namely a reference to negotiations about a rich bride for the applicant; such negotiations only took place in the latter half of 1934.

Two other facts must be regarded as of some importance; applicant did not come to the funeral of respondent's father in March 1934: respondent puts forward as the reason that he could not get leave as a Corporation employee, but forgot she had previously sworn he was unemployed till April 1934, so this excuse will not bear examination. Then again respondent did not go to applicant's mother's funeral on 12th February 1934. She says she could not get leave: she could produce no proof that she ever asked for it. Moreover when this lady died respondent's name did not appear in the obituary notice in the newspaper which set out the names of immediate relatives. Respondent then tries to say that marriage must be inferred because applicant's father referred to her as "daughter" in a letter begging for a loan of money from her (which she did not lend). He explains that he called her "daughter" because she was of an age to be his daughter: in another letter on the same topic he describes himself as Bagyi or uncle. He denies she was ever regarded by him as his daughter-in-law.

Pausing at this point, there is no doubt that the respondent has by no means proved a marriage. On the contrary she has endeavoured to concoct evidence and has lied on many material matters. It is manifest from the evidence that the applicant seduced her, no doubt after he had declared his affection for her, and had subsequently been in close intimacy with her for several years. As soon as he saw a chance of marrying a rich woman, he seized the opportunity and deserted the respondent who had been living as his mistress, although when they were in polite company she passed off as his cousin or friend. It would be easy to find words to describe his conduct, but I have only to decide whether the parties were married. Marriage is a contract entered into by mutual consent of the parties: among Burman Buddhists no ceremony is necessary. As pointed out in 1 U B R 111[1] at p. 112:

> In the absence of direct proof consent may be inferred from the conduct of the parties or established by reputation.

Generally in such circumstances some open recognition of the wedded state is to be expected. Relatives and neighbours are usually asked to some form of entertainment in order to signify the occasion, and where this is dispensed with the evidence of the intention to enter into married life must be clear. Clandestine acts of sexual intercourse do not by themselves establish marital relationship, and where there is no regular cohabitation under the same roof and the couple who resort to each other for purposes of intimacy are thought by some to be engaged, and by others to be cousins or mere friends, proof of marriage has not been established by reputation. Moreover as it takes two persons to make a contract in order to prove marriage there must be evidence not merely of a desire by one person to be considered as having married another, but of the consent of that other, express or implied, to the joint assumption of a status consistent only with the marriage bond. Now in June 1936 when absent from Rangoon respondent had some of her clothing stolen from her house in Rangoon. Applicant saw a girl in the cinema wearing a longyi which he thought belonged to respondent. He informed the respondent: the girl seen wearing the longyi was arrested and charged. Both applicant and respondent gave evidence. She said:

> About 15 or 20 days ago one Maung Tun Sein came and informed me at the office that he saw a girl at the Plaza Cinema wearing a longyi resembling one of mine that had been stolen.

Applicant said: "I know Ma San Myint and have been to her house" and later said "Ma San Myint is my cousin." There is no record of any protest being made by the respondent at the suggestion in which she obviously concurred, that she was not the appellant's wife. A wife does not describe her husband as "one Mg. Tun Sein." It is clear from the evidence that by July 1936 the respondent was intensely eager to try and get evidence to prove that she was married to applicant though in reality she was merely a lover who was in danger of being discarded. Accordingly there is now evidence that in July 1936 U Zalin, presiding monk of the Laytha monastary, Pazundaung, went by invitation to respondent's house as early as 5.30 in the morning to perform a dedication ceremony of an image of the Buddha. There were ten monks altogether; they were fed and then U Zalin asked the donors to step forward. Applicant was there and came forward: U Zalin says he trembled and spilt some water by accident and respondent filled his cup and applicant then performed the ceremony.

U Zalin never knew these people before. It was on this occasion that U Nyun paid his only visit to respondent's flat. U Sein

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[1] Mi Me v. Mi Shwe Ma, (1912) 1 U B R 111=14 I C 475=39 I A 57=39 Cal 492 (P C).

Hpo was also there. I think it is true some such ceremony did take place, though the applicant denies it but it is to be observed that it was not a marriage ceremony, for there is no such thing as that. The point sought to be made is that the applicant would never have agreed to a ceremony of this kind at such an hour and in the presence of monks unless he and the respondent were really married. After most careful consideration I cannot think this is so. I think he was entrapped into the position and faced it with what grace he could muster. It is not surprising that he trembled on finding that guests had been invited at that hour. The nun who conveyed the invitation to U Zalin was not called and I have no doubt she obtained it from respondent. U Sein Hpo never asked respondent if they were married. There is no suggestion that respondent ever said they were married to U Zalin or any of the monks. I regard the whole incident as a desperate effort by the respondent to get some evidence of their relationship in order to bolster up a story which has broken down in all other respects. I think that this was the reason for inviting U Nyun who had only been in her flat on this one occasion.

It is now necessary in fairness to one of the witnesses, Rao Sahib Jegarow, who is Superintendent of the office of the Postmaster-General, to say a few words as to his evidence since the learned Magistrate has seen fit to rebuke him for committing perjury and has cast a grave slur on his character, for which I see not the slightest justification. He was called as a responsible officer in respondent's department to say that respondent told him that the car belonging to Tun Sein, which witness wished to borrow and thought was hers, was her cousin's. Just because he could not remember whether a car he tried to borrow a year ago was a saloon or a touring car or what colour it was, the Magistrate made an attack upon him which is much to be regretted. As regards the whole of the case I think the learned Magistrate allowed the conclusion, at which he arrived, to be unconsciously coloured by his natural disgust at the applicant's behaviour. Indeed he says :

> **It is not improbable that he had a dirty heart to conceal his actual relationship with petitioner (that is respondent in the present Court) from the very outset and that he had done so each time he had an opportunity.**

I agree that he concealed the fact that she was his mistress but there is no evidence that he ever acknowledged her as his wife. And though there is plenty of evidence that she tried to get him to do so I think he was most careful in his dealings with her to avoid anything which should elevate her from the position of mistress. To some she was his supposed cousin, which explained their association whilst moving in respectable society : to others, his friend, both of the parties have lied unashamedly. The applicant pretended respondent never asked him to marry her and that she had no attraction for him physically, and that no such incident as sworn to by U Zalin ever took place; the respondent pretended that a number of responsible persons knew they were married whereas four of the persons mentioned were called by the applicant and deny it; on the admission of her own advocate she lied about the date of her letter to him and I am satisfied that she has laid a series of unsuccessful traps for him because she realised she had been badly treated; she also lied about his having lived at the house with her in 1933 though he visited it frequently and no doubt sometimes spent the night there, possibly on the occasion when U Zalin had been invited as well as at other times. But there is no satisfactory evidence which shows that the applicant ever made the respondent his wife, and accordingly I am of opinion that his application in revision should be allowed. Each party must bear their own costs both here and in the Court below, and the order of the learned Magistrate will be set aside.

K.B./R.K. *Application allowed.*

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### A. I. R. 1938 Rangoon 119

BA U J.

*Joint Hindu family Firm of V. M. R. P.* —Plaintiff.

v.

*P. Nagoor Ganny* — Defendant.

Civil Regular. No. 324 of 1936, Decided on 23rd June 1937.

**Letters Patent (Rangoon) (1922), Cl. 10—Interpretation—High Court can pass mortgage decree not only in respect of lands situated within its original civil jurisdiction but also in respect of lands situated outside such jurisdiction where leave under Cl. 10 is obtained.**

As regards suits for land, the High Court can take cognizance, if the land is situate wholly within the local limits or, where the land is situate in part only within such limits, if leave has been first obtained; and as regards suits other than those for land, the High Court has jurisdiction, if the cause of action has arisen wholly within the limits or where the cause of action has arisen in part only within the limits, if leave of the Court should have been first obtained, or if the defendant dwells or carries on business or personally works for gain within those limits. The High Court can therefore pass a mortgage decree not only in respect of lands situated within its ordinary original civil jurisdiction but also in respect of lands situated outside its ordinary original civil jurisdiction when leave under Cl. 10 is obtained: *Case law ref.* [P 120 C 2; P 121 C 1]

Chari — *for Plaintiff.*

J. C. Ray — *for Defendant.*

**Judgment.**—This suit is for recovery of Rs. 9248 alleged to be due as principal and interest on an equitable mortgage. The case for the plaintiff is that the defendant executed a promissory note for Rs. 8000 on 18th March 1935 for value received promising to pay interest at the rate of fourteen annas per cent. per mensem and at the same time deposited the title deeds of his properties as set out in the plaint to secure the said amount. The plaint further alleges that nothing has been paid towards either the principal or interest. Some of the properties given as security are situated outside the ordinary original civil jurisdiction of this Court, and for that reason the plaintiff applied for leave under Cl. 10, Letters Patent to file this suit in this Court. Leave was granted. The defendant admits having executed the promissory note in suit but denies that he deposited the title deeds of his property as set out in the plaint in order to secure the loan. He says that he always kept his jewellery box and title deeds with the plaintiff for safe custody and in consequence thereof the plaintiff is now falsely claiming a mortgage lien on the property set out in the plaint. He also avers that he gave Rupees 3000 towards the principal and interest during the last paddy season but that the plaintiff has failed to give him credit for that amount. He denies that this Court has jurisdiction to try this suit and pleads that this Court cannot in any event pass a mortgage decree in respect of lands situated outside its ordinary civil jurisdiction.

The first part of this legal defence is in my opinion raised as it has been found by a Full Bench of this Court that a suit for mortgage is a suit for land: 12 Rang 370.[1] This legal defence involves the interpretation of Cl. 10, Letters Patent. It is in the following terms.

> 10. And we do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction shall be empowered to recevie, try and determine suits of every description if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original civil jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Rangoon Small Cause Court.

This Clause is an exact reproduction of Cl. 12, Letters Patent of the High Courts of Madras, Calcutta and Bombay. The construction which those High Courts put on Cl. 12 of their Letters Patents is that:

> As regards suits for land the High Court can take cognizance, if the land is situate wholly within the local limits or, where the land is situate in part only within such limits, if leave has been first obtained; and that as regards suits, other than those for land, the High Court has jurisdiction, if the cause of action has arisen wholly within the limits or where the cause of action has arisen in part only within the limits; if leave of the Court should have been first obtained, or if the defendant dwells or carries on business or personally works for gain within those limits.

*See* 19 Mad 448;[2] 56 Cal 940[3] at p. 949; 58 Cal 598[4] at p. 606; 4 Bom 482[5] at p. 487; 22 Bom 922;[6] 16 Bom L R 263[7] at p. 269; and 46 Bom 249[8] at pp. 253 and 260.

If I may say so with respect, this is the only sensible way in which this Clause should be read. If it were to be read in any other way, it would lead to an impossible result: it would mean that Courts subordinate to a High Court have more extensive jurisdiction in respect of a certain class of cases such as the one now under consideration than the High Court itself. Under Ss. 16 and 17, Civil P. C., a suit to obtain relief respecting immovable property can be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate, provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court. These are two of the three sections which are under S. 120, Civil P. C., not to apply to High Courts in the exercise of their ordinary original civil jurisdiction. By exempting these two sections from applicability to High Courts in the exercise of their ordinary original civil jurisdiction, it could not have been the intention of the Legislature to curtail the ordinary original civil jurisdiction of the High Courts. The reason for it must therefore be sought elsewhere.

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[1] V. E. R. M. N. C. T. Chettyar v. A. R. A. R. R. M. Chettyar Firm, A I R 1934 Rang 250=151 I C 519=12 Rang 370 (F B).

[2] Seshagiri Rau v. Rama Rau, (1896) 19 Mad 448=6 M L J 19.

[3] Manindra Chandra v. Lal Mohan Roy, A I R 1929 Cal 358=120 I C 577=56 Cal 940=49 C L J 212.

[4] C. L. Kiernander v. Benimadhab Khettri, A I R 1931 Cal 763=134 IC 561=58 Cal 598.

[5] Jairam Narayan v. Atmaram Narayan, (1879) 4 Bom 482.

[6] Balaram v. Ramachandra, (1898) 22 Bom 922.

[7] Bachoo Harkisondas v. Nagindas Bhagwandas, A I R 1914 Bom 38=23 I C 912=16 Bom L R 263.

[8] Govindlal Bansilal v. Bansilal Motilal, A I R 1921 Bom 328=77 I C 934=46 Bom 249=23 Bom L R 1049.

The reason, in my opinion, is that as the High Courts have been given jurisdiction under their respective Letters Patent to try suits of the present nature, the Legislature thought it would simply be superfluous to apply the aforesaid sections to them and, consequently, the Legislature had restricted the applicability to Courts subordinate to High Courts only. Again, if it were to be otherwise, it would mean splitting the cause of action into two and it would be contrary to the provisions of O. 2, R. 2, Civil P. C. Further, where procedure is concerned, it is in my opinion desirable that the practice of all High Courts in India and Burma in the exercise of their ordinary original civil jurisdiction should be uniform as far as possible in view of the fact that their Letters Patents which empower them to make rules and orders regulating the proceedings in civil cases require them to be guided as far as possible by the provisions of the Code of Civil Procedure. For these reasons, I hold that leave has been rightly granted, and this Court has jurisdiction to try this suit. It follows therefrom that this Court can pass a mortgage decree not only in respect of lands situated within the ordinary original civil jurisdiction of this Court but also in respect of lands situated outside its ordinary original civil jurisdiction. *See* 37 Cal 907[9] at p. 912; 38 Cal 824[10] and 47 Cal 770.[11]

The suit will proceed to trial on merits.

S.C./R.K. *Order accordingly.*

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[9] Sarat Chandra Roy v. Nahapeit, (1910) 37 Cal 907=8 I C 1142.

[10] Matigara Coal Co. Ltd. v. Shragers, Ltd., (1911) 38 Cal 824=13 I C 429.

[11] Krishna Kishore De v. Amarnath Khettry, A I R 1920 Cal 131=56 I C 532=24 C W N 683=47 Cal 770=35 C L J 272.

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## A. I. R. 1938 Rangoon 121

BAGULEY J.

*Maung Ohn Kin and another* — Appellants.

v.

*S. P. L. Palaniyappa Chettyar* — Respondent.

Second Appeal No. 61 of 1937, Decided on 28th June 1937, against decree of Dist. Court, Prome, D/. 21st January 1937.

**(a) Malicious Prosecution—Reasonable and probable cause—Whether question of law or fact** (*Quaere*).

Whether the prosecution was instituted without reasonable or probable cause is a matter of law or of fact: *28 Cal 591, Ref.*; *25 Bom 332, (P C), Considered.* [P 122 C 2]

**(b) Malicious Prosecution—Reasonable and probable cause and malice—Honest belief in plaintiff's guilt based on reasonable cause is good defence—Plaintiff expressly refusing to guarantee good title to land, sold by him to defendant—Plaintiff insisting on enquiries to be made before sale—No reasonable enquiry by defendant — Subsequent discovery of mortgage on suit land and defendant suffering loss in making it over — Defendant demanding loss suffered before instituting original action for cheating — Prosecution resulting in plaintiff's favour – Action by plaintiff for damages for malicious prosecution — Defendant held did not believe in plaintiff's guilt and prosecution was actuated by malice.**

An honest belief in the guilt of the plaintiff based on reasonable ground is the very essence of the defence to a suit for malicious prosecution. [P 123 C 1]

The plaintiff sold certain land to the defendant. The plaintiff expressly refused to guarantee good title with regard to anything which might have happened before the land came into his possession. Before the actual date of transfer he had told the defendant to make his own enquiries, but the defendant failed to make any reasonable enquiries. Subsequently it was discovered that there was an encumbrance and the defendant suffered some loss in making over the land to the mortgagee. Before filing a criminal case for cheating against the plaintiff, the defendant demanded from the plaintiff the loss of money he had suffered. After the criminal case terminated in his favour, the plaintiff instituted an action for damages for false and malicious prosecution :

*Held* that it was difficult to say that defendant had honest belief in the plaintiff's guilt and that the prosecution was due to the malicious intention of the defendant and for some subsidiary purpose: *A I R 1928 Rang 51 ; A I R 1932 Rang 80 and A I R 1926 P C 46, Rel. on.* [P 123 C 1, 2 ; P 124 C 1]

Ba Maung — *for Appellants.*
Hay — *for Respondent.*

**Judgment.** — This appeal arises out of a suit for damages for false and malicious prosecution. Both the lower Courts have concurred in awarding the plaintiff Rs. 750 damages, the appeal against the trial Court's decree having been summarily dismissed. The present appeal therefore lies only on points of law. The facts of the case are briefly as follows. The plaintiff had taken over in satisfaction of a mortgage debt a piece of land from one Po Htin. Po Htin in his deed of transfer stated that the land was free from incumbrances. After the plaintiff had taken possession of the land the defendants approached him with a view to buying it. There is ample evidence to show that the plaintiff told them how he had got it and told them to make enquiries in case there were any further incumbrances and a receipt for the earnest money was given with a special clause stating that if they found that there were incumbrances the earnest money was to be repaid in full. Some time later the defendants were satisfied and the transaction was carried through. When the deed of transfer was being written, the writer was going to put in the ordinary clause warranting that title was good but the plaintiff intervened and said that he would only guarantee that no incumbrance has been made on the land while it belonged to him. There is evidence that about this time the Chettyars in this locality were habitually putting in this form of title clause. It is well known that about this time the Chettyars in this district have been taking over large quantities of land from people who were unable to pay their debts and no doubt there were many cases in which there were encumbrances existing which were unknown to the Chettyars who took the land over.

Be that as it may, the plaintiff definitely refused to guarantee title with regard to anything which might have happened before the land came into his possession. Subsequently it was found that another Chettyar Firm in a different town had a mortgage over this land and in consequence the land had to be made over by the defendants to him in return for a sum of money less than what they had paid to the plaintiff. The result was that the defendants filed a complaint against the plaintiff for cheating. When examined before issuing process, Ohn Kin stated::

> S. P. L. Palaniappa Chettyar cheated me by selling that land to me for Rs. 670-8-0 saying that it was free from incumbrances whereas in reality it was not . . . . . . I can prove that the Chettyar had reason to know that the land at the time of the sale to me was not free from incumbrances.

This prosecution ended in the discharge of the plaintiff, the case being classified as mistaken. In consequence, the plaintiff sued the defendants for damages for false and malicious prosecution. The points which the plaintiff has to prove in a case of this sort are set out in 5 Rang 705.[1] There is no dispute with regard to whether the defendants prosecuted the plaintiff and that the proceedings terminated in his favour. The next point is whether the prosecution was instituted without reasonable or probable cause. Whether this is a matter of law or of fact is not very easy to decide.

In 28 Cal 591[2] it is stated that if the case is tried by a Judge with a jury, the question of reasonable and probable cause is a question for the Judge and not for the jury which suggests that it is a point of law ; but the report goes on to say " but here, where there was no jury, the Judge becomes himself the Judge of the law and the facts " and reference was made to the Privy Council case in 25 Bom 332.[3] This case I find very hard to understand. The passage in question is :

> It is quite true that according to English law it is for the Judge and not for the jury to determine what is reasonable and probable cause in an action for malicious prosecution. The jury finds the facts. The Judge draws the proper inference from the findings of the jury. In that sense the question is a question of law. But where the case is tried without a jury there is really nothing but a question of fact and a question of fact to be determined by one and the same person.

How a matter can be transferred from the realm of fact to the realm of law merely by reason of a change in the constitution

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1. U Soe v. Maung Ngwe Tha, A I R 1928 Rang 51=106 I C 654=5 Rang 705.
2. Harish Chunder Neogy v. Nishi Kanta Banerjee, (1901) 28 Cal 591.
3. Pestonji Muncherji Mody v. Queen Insurance Co., (1901) 25 Bom 332=2 Bom L R 939=4 C W N 781=10 M L J 300 (P C).

of the Tribunal which tried the case I admit I am at a loss to understand. When I found this ruling in the Indian Law Reports, Bombay Series, I suspected a misprint but I have referred to the same case in the Bombay Law Reporter, the Madras Law Journal and the Calcutta Weekly Notes and in every case the same wording appears. If there is a misprint it must have originated in the Privy Council Office. It is with great diffidence I suggest that such a thing could have happened, but the beginning of the quotation, distinguishing between the actual facts and the inferences to be drawn from them, coupled with the final words "to be determined by one and the same person," does suggest very strongly to me that the last passage was intended to be "there is really nothing but a question of fact and a question of law to be determined by one and the same person." If this be so, in an appeal, the actual facts with regard to the knowledge of the prosecutor and the circumstances under which the prosecution is undertaken being questions of fact cannot be challenged in second appeal; but the inference from those facts, which is a question of law at any rate when the case is tried by a Judge and jury, would be a question of law which could be challenged in second appeal. If I am wrong in this deduction as both Courts have found there was no reasonable or probable cause for prosecution, I am bound by their finding; but in this particular case the result is the same if I merely take it that I am bound by the facts found by the lower Courts.

Ohn Kin, defendant 1, in his cross-examination states:

> It is my own personal belief, without any ground whatsoever, that the plaintiff knew that there was a second mortgage over the land at the time of sale.

In 10 Rang 282[4] it is pointed out that an honest belief in the guilt of the plaintiff based on reasonable grounds is the very essence of the defence to a suit for malicious prosecution. When the defendant sues he has no grounds whatsoever for his belief although in some pig-headed way he really believed in the guilt of the plaintiff. It would be difficult to say that he has an honest belief in his guilt, and it has been held proved and I agree with the fining that at the time of the sale the plaintiff expressly refused to guarantee good title up to a certain point and refused to go further. Before the actual date of transfer, he had told the defendant to make his own enquiries. The defendant says he made some enquiries but the three most obvious lines of enquiry he omitted to pursue. He knew the plaintiff had bought the land from Po Htin and he knew Po Htin, but he did not ask him anything on this point. He knew that mortgages were usually made known to revenue surveyors: he did not ask the revenue surveyor. He was certainly aware that mortgages had to be registered and a search in the Registration Office would tell him with certainty: neither he nor his agent, who was helping him in the sale, made any enquiry at the Registration Office. Clearly after being told to make his own enquiries because the plaintiff would not guarantee good title he refrained from making any reasonable enquiry. I certainly agree that the plaintiff has shown that the defendant has no reasonable or probable cause for his prosecution.

Turning now to the question of malice in 5 Rang 705[1] beforementioned, there is an extract from the Privy Council case in 30 C W N 866=1 Luck 215.[5] The plaintiff has got to show that the prosecution was due to the malicious intention of the defendant and not to the mere intention of carrying the law into effect. I take this to mean that it was not a prosecution made in the interests of justice but for some subsidiary purpose. It has been shown in the present case clearly that before launching this prosecution the defendant went and demanded money from the plaintiff. The defendant himself admits that:

> After I had knowledge that there was a second mortgage over this land . . . . . I demanded from the plaintiff to pay me some money as I had suffered loss about Rs. 225 but the plaintiff refused to pay me anything.

His principal witness, Po Shwe, who acted with him during the pendency of the negotiations for the sale of the land, says:

> After delivering the land to P. N. M. M. Firm for Rs. 500 by the defendants, I and defendant 1 went to the plaintiff and asked the latter to give us something and demanded the money which Maung On Kin suffered. The plaintiff then told us that he could not give. It is true that as the

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[4] Sankara Iyer v. Ramaswamy Chettyar, A I R 1932 Rang 80=138 I C 693=10 Rang 282.

[5] Balbhaddar Singh v. Budri Sah, A I R 1926 P C 46=95 I C 329 = 1 Luck 215 = 29 O C 163=30 C W N 866 (P C).

plaintiff did not give any money the defendants filed a criminal case against the plaintiff.

It is manifest therefore that in addition to there being no reasonable and probable cause for prosecution the prosecution was launched with a view to getting money out of the plaintiff and not with a view to see that justice was done and the wrongdoer punished. The suit was therefore rightly decreed and the appeal is dismissed with costs.

V.B.B./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 124

BAGULEY J.

*Ah Po* — Appellant.

v.

*Maung Pan and another*— Respondents.

Second Appeal No. 68 of 1937, Decided on 5th July 1937, from decree of Asst. Dist. Court, Maubin, D/- 4th December 1936.

**(a) Practice — Pleadings — Suit for ejectment and suit for recovery of possession—Nature of pleadings in both stated.**

In a suit for ejectment all that the plaintiff has got to do is to prove that the defendant has attorned to him as lessee or licensee of certain land, that he is the owner of the land in question and that the lease or license has been properly determined or otherwise put an end to. In a suit for recovery of possession, the plaintiff has got to prove that he has a good title to the land and that the suit is not barred by limitation in any way. [P 124 C 2]

**(b) Practice—Relief — Possession—Suit for —Suit by owner for possession of house—One of opposite parties turning out to be owner of certain share in house—Decree for joint possession can be granted.**

Where an owner of a house brings a suit for possession of the house and it turns out that one of the opposite parties is owner of certain share in the house, a decree for joint possession can be granted. In such case the fact that plaint asks for possession and the Court does not see fit to pass the decree asked for in the plaintiff's prayer does not necessarily involve the plaint being dismissed. A decree for joint possession is of the same nature as a decree for possession but, of course, of lesser extent and there will be no harm in giving a decree other than the one asked for if it is of the same nature. In granting a decree for joint possession, considerations such as the danger of a riot or criminal proceedings have really nothing to do with the rights and interests of the parties inter se: *A I R 1928 All 472, Rel. on.* [P 125 C 1, 2]

H. Day — *for Appellant.*

Ze Ya — *for Respondents.*

**Judgment.** — This case is a trifle confusing as so often happens with possession cases. It starts with bad pleading. The plaint is in Burmese, its translation having a title "suit for ejectment from and for delivery of possession of a house." It goes on to say that the plaintiff bought a certain house, that after the purchase the defendants who were living in the house with the permission of the original owner promised the plaintiff saying that if they were allowed to live in the house they would vacate it when called upon; and that when called upon they refused to vacate: "Wherefore the plaintiff prays for a decree with costs directing the defendants to vacate and deliver the house with possession."

The man who drafted the plaint is obviously ignorant of the proper way of drafting and there is no comment on the drafting of the plaint in either of the judgments of the lower Courts. I would point out that in a suit for ejectment all that the plaintiff has got to do is to prove that the defendant has attorned to him as lessee or licensee of certain land, that he is the owner of the land in question and that the lease or license has been properly determined or otherwise put an end to. In a suit for recovery of possession, the plaintiff has got to prove that he has a good title to the land and that the suit is not barred by limitation in any way.

However, the case went to trial and the first two issues related to the plaintiff's title and the third as to whether the defendants had been in occupation as tenants. The trial Court found that the plaintiff owned a half share in the house and the other half share remained with Ma Sein Yin, defendant 2. As regards the tenancy, the trial Court found that the defendants had never been the tenants of the plaintiff, and went on to say: "It is also not possible for this Court to grant the relief prayed for by the plaintiff to the extent of half only," so that suit was dismissed. The plaintiff appealed to the Assistant District Judge at Maubin who agreed with the trial Court's view of the evidence that the plaintiff and respondent 2 were joint owners of the house. With regard to the question of tenancy the learned Assistant District Judge does not say anything. With regard to the relief which the plaintiff was entitled he says:

> He asked for ejectment of the respondents. It is clear respondent 2 having interest in the house cannot be ejected and the order of dismissal of the suit is correct.

Then he goes on to say that he was asked for a decree for joint possession and, after pointing out that a decree for joint possession was not asked for in the plaint, he refers to 38 Mad 1036[1]. In this case, he says, a decree for joint possession was directed for the parties were relatives, bound by ties of blood, but in the present case a decree for joint possession cannot be given because the parties are not related by any tie of blood. I do not quite understand the argument that relations never quarrel. I think it is common knowledge that some of the fiercest feuds known to the world have been between relations. The learned Judge dismissed the appeal but went on to say that this is not a fit case to grant a decree for joint possession when it is not asked for.

I do not quite see why so much stress was laid on the absence of prayer for joint possession. The plaint asks for possession and the fact that the Court does not see fit to pass the decree asked for in the plaintiff's prayer does not necessarily involve the plaint being dismissed. If a plaintiff sues for Rs. 10,000 and the Court finds that he is only entitled to Rs. 5000 I have never yet heard it argued that a decree for Rs. 5000 cannot be passed because it has not been asked for. A decree for joint possession is of the same nature as a decree for possession but, of course, of lesser extent, and there will be no harm in giving a decree other than the one asked for, if it is of the same nature.

An authority on joint possession is to be found in a Full Bench Reference of the High Court of Allahabad in 51 All 303.[2] This Bench referred to and explained the case in 18 Cal 10[3] and the finding was that a decree for joint possession may certainly be granted to one cosharer against another but that the Court has some discretion in the matter of granting a decree, as seems clear from the decision of the Privy Council in 18 Cal 10.[3] The Bench however found no authority for holding that in the exercise of its discretion, the Court is to be guided by any other consideration than the rights and interests of the parties concerned. Such considarations as the danger of a riot or criminal proceedings have really nothing to do with the rights and interests of the parties inter se.

A decree for joint possession would, of course, be little more than symbolic and I take it it, will be the foundation of another suit for partition which will most probably result in the house being sold and both parties being involved in costs totalling far more than Rs. 50 which is the value of the house. Still I must hold that the parties are entitled to their legal rights and if they have made out these rights to the satisfaction of the Court, the Court is bound to give them their rights. I set aside the decrees of the lower Courts dismissing the suit and give the plaintiff a decree for joint possession of the house in question. I direct that both parties bear their own costs.

D.S./R.K. *Decree set aside.*

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### A. I. R. 1938 Rangoon 125

BAGULEY J.

*U Naing and others* — Appellants.

v.

*Ko Sein* — Respondent.

Special Second Appeal No. 403 of 1936, Decided on 29th June 1937, against decree of Dist. Court, Yamethin, in C. A. No. 78 of 1936.

**Pleadings—Amendment—Suit for recovery of land based on unprovable usufructuary mortgage—Amendment to base suit on title cannot be allowed.**

Where a person brings a suit for recovery of possession of land but it is found that in fact his claim is for redemption of an unprovable usufructuary mortgage, such person cannot be allowed an amendment of the pleadings by basing his suit on his title, the causes of action for the two suits being different: *A I R 1935 Rang 230 (F B), Rel. on.* [P 126 C 1]

Sein Tun Aung — *for Appellants.*

Wiseham — *for Respondent.*

**Judgment.** — This appeal arises out of a suit which was in fact (although the pleadings did their best to conceal the fact) for redemption of an oral usufructuary mortgage. It is true that the plaint never used the word "mortgage" at all, but the facts set out show that it is a usufructuary mortgage that is the basis of the claim. Para. 5 says:

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[1] **Muthu Ramakrishna v. Marimuthu Goundan, A I R 1914 Mad 128=24 I C 363=38 Mad 1036=26 M L J 532.**

[2] **Hanuman Prasad Singh v. Mathura Prasad Singh, A I R 1928 All 472=112 I C 143=51 All 303=26 A L J 991 (F B).**

[3] **Watson and Co. v. Ramchund Dutt, (1891) 18 Cal 10=17 I A 110=5 Sar 535 (P C).**

> That during the month of Kason, 1290, B. E., the first plaintiff, U Naing . . . . delivered with possession the lands as per attached maps marked A B C D E and F . . . . . to the defendant for Rs. 490 . . . . without executing a deed with the understanding that the lands shall be returned on payment of the money.

The prayer with which the plaint ends reads :

> Wherefore the plaintiffs pray for a decree with costs directing the defendant to deliver with possession to the plaintiffs the land in suit . . . . . on payment of Rs. 250, by the plaintiffs to the defendant.

The trial Court passed a decree saying :

> The plaintiffs are directed to redeem the suit lands on payment of Rs. 250, within six months from date, i.e. on or before the 25th February 1937.

On appeal to the District Judge, the learned Judge pointed out that this case was exactly the same as the one dealt with in 13 Rang 274.[1] In this case, dealing with a suit of this nature, at p. 285 occurs the passage :

> With all due respect, in my opinion, a decree passed in favour of the defendant . . . . . or in favour of the plaintiff . . . . would operate as an obvious and substantial evasion of the law enacted under the Registration Act and the Transfer of Property Act.

The learned District Judge allowed the appeal and dismissed the suit. It is quite clear that if a decree passed in favour of the plaintiff would have been an obvious and substantial evasion of the law, the learned Judge was quite correct in setting it aside.

In appeal now Mr. Sein Tun Aung asks for an amendment of the pleadings. To allow an amendment of the pleadings now would result in a suit based on an unprovable mortgage being converted into a suit based on title and it is impossible to say that these two causes of action are in any way the same. He will, if he wants to get this land, have to file a suit on his title and if he wins it he will then probably have to stand having a suit filed against him for the recovery of the money, unless he arranges with the adversary to pay the money before the suit is filed. That is a matter for his own discretion. It is quite clear that the appeal must be dismissed, and it is dismissed with costs.

R.W./R.K. *Appeal dismissed.*

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[1] Ma Kyi v. Maung Thon, A I R 1935 Rang 230 =157 I C 565=13 Rang 274 (F B).

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## A. I. R. 1938 Rangoon 126

MOSELY J.

*H. Pin Sein* — Appellant.

v.

*Paungde Municipality and another* — Respondents.

Second Appeal No. 40 of 1937, Decided on 5th July 1937, against decree of Dist. Court, Prome, in C. A. No. 14 of 1936.

**Contract Act (1872), S. 133—Person standing surety for personal honesty of tax-collector of Municipal Committee in respect of monies received by him — Subsequently son of tax-collector collecting taxes on his father's name with consent and knowledge of President and Secretary of Municipal Committee but without notice to surety — Defalcation made by son—Surety held not liable.**

A person stood surety for the tax-collector of a Municipal Committee. The security bond provided that the surety was to be liable in case the tax-collector misappropriated any amount that came in his hands or in case any default in payment was made by him. Subsequently the son of the tax collector began to collect the taxes in his father's name with the consent and knowledge of the President and Secretary of the Municipal Committee. The President or the Secretary did not give any notice of this fact to the surety. On a defalcation being made by the son the surety was sought to be made liable :

*Held* that as the person had stood surety only for the personal honesty of the tax-collector and not of his son and as the kind of employment was such that it should have been conducted personally by the man for whom the surety had given security, the surety could not be bound to something for which he had not contracted : *A I R 1935 P C 21, Rel. on.* [P 127 C 1]

Hay — *for Appellant.*

Ba Maung — *for Respondent* 1.

**Judgment.**—The suit under appeal was one by the Paungde Municipal Committee against an ex-ward Headman, U Than Gyaung, and the present appellant H. Pin Sein who went surety for U Than Gyaung. The terms of the security bond (Ex. A) executed in 1929 are that it is a security bond for municipal taxes which go into the hands of the ward Headman, Than Gyaung. If Than Gyaung misappropriates any taxes which come into his hands, or defaults in payment, the surety shall be liable and the property pledged shall be taken by the Committee.

There is no dispute about the facts of this case. The defalcation was found out in July 1935 and was committed shortly before then, at all events between 1934 and 1935. It was committed not by Than Gyaung himself but by his son Po Toke. Than Gyaung was discharged and Po Toke was convicted of the embezzlement in a Criminal Court. It is admitted by the plaintiff Tun Nyun, the President in 1934 and 1936, and by U Po Pe (P. W. 4), the President in 1935, by the Secretary San Tha (P. W. 5), and by the clerks Mg. Tin (P. W. 8) and Maung Maung (P. W. 9) that since 1934, Po Toke has been collecting the bulk of the taxes and that Po Toke has taken out the tickets in his father's name, credited the receipts in his father's name, and drawn the commission in his father's name. It is clear that this was done with the knowledge and consent of the President and Secretary. The Secretary tried to make out this was only done in May and June, 1935; but it is clear from the other witnesses that it went on from 1933, if not earlier.

Both lower Courts decreed the plaintiff's suit. The trial Court found that the son was merely the agent of the father and that therefore there was no variation in the terms of the contract (S. 133, Contract Act). The lower Appellate Court found that if there was any variation it had not been approved of by the Committee as a body and that they were not responsible for the acts of their servants. The question whether Po Toke was an agent for his father is merely a matter between the father and the Municipality. As regards the surety he went surety for the personal honesty of the tax collector and not of his son, and this was an employment where it was essential that the employment should be conducted personally by the man for whom the surety had given security. This is not a case where the nature of the employment demanded that it should be done by servants of the person for whom security had been given.

I doubt very much whether on the terms of the bond the surety could in any case have been held liable for moneys which did not come into the hands of Than Gyaung. But apart from that, whether the President or the Secretary could vary the terms of the contract or not, (for there is no doubt that the contract was essentially varied), either the President or the Secretary is the executive officer and if they wanted to vary the terms of the contract they could not do so after giving notice to the surety and with his consent. It was the duty of one or other of them to give that notice. Under these conditions "the surety, like any other contracting party, cannot be held bound to something for which he has not contracted:" *Vide* 62 I A 23[1] at p. 33. This appeal will be successful and the plaintiff's suit dismissed with costs throughout.

K.B./R.K. *Appeal allowed.*

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[1] Pratapsing Mohalalbhai v. Keshavlal Harilal Setalwad, A I R 1935 P C 21=153 I C 700=62 I A 23=59 Bom 180 (P C).

## A. I. R. 1938 Rangoon 127

SPARGO J.

*Nga Aye Maung* — Applicant.

v.

*The King.*

Criminal Revn. Appln. No. 292-B of 1937, Decided on 22nd June 1937, from order of First Addl. Special Power Magistrate, Shwebo, D/- 8th April 1937.

**Evidence Act (1872), S. 8, Illus. (j) and (f) —Accusation by woman against man for attempt to ravish — Statements by her to witnesses – Silence of accused — Relevancy— Woman should have complained and not made mere statement—Silence of accused to be relevant as 'conduct' must come within Illus. (f) to S. 8.**

A woman brought an accusation against a certain man alleging that he tried to ravish her. Trial Court considered the statements made by the woman to her witnesses after the alleged attempt, narrating the story of attempt. The Court also considered that all the time the woman was accusing the man to her witnesses he kept silent and on these considerations lower Courts drew an adverse inference against the man. On revision :

*Held* that the statements by the woman were not relevant as according to S. 8, Illus. (j) the woman should have complained whereas all that she did was to make statements : [P 129 C 1, 2]

*Held further* that the silence of the accused to be relevant should have come under Illus. (f) to S. 8 i. e. it should have been proved that the accusations made by the woman against the man were made in his presence. [P 129 C 2]

K. C. Sanyal — *for Applicant.*

**Order.**—The applicant in revision has been convicted of an offence under S. 366 (1), I. P. C. I do not understand the reference to sub-s. (1) of S. 366, which so far as I can see, has no sub-section in it at all. The story told by the complainant was to the effect that the applicant came to her house and induced her to go with him on the pretext that he was going to give her some paddy in payment of a debt and when he had taken her a certain distance he embraced her from behind and told her that he had brought her not to pay the debt but to ravish her.

She said that he had a knife in his right hand and he threw her down on the ground on her back. He then lifted her longyi and straddled on her. Now, if those allegations are to bear the meaning that the complainant evidently intended them to bear that will mean nothing less than that an attempt to rape was committed, or at the very least an indecent assault, or in the language of the Indian Penal Code an assault committed with the intention of outraging her modesty. What need there was then to appeal to S. 366, I. P. C., I do not see. But in many Courts this section has become an obsession. Whenever a woman complains of anything that has been done to her, this is the section which is invariably applied, appropriate or inappropriate. The woman said in her account of what happened that when the applicant straddled on her she kicked him on the chest. At this moment she was lying on her back, and how she could contrive to kick him on the chest when he was straddled on her, I find it very difficult to understand. However she says that she kicked him on the chest and as a result he fell on his back and she shouted for help and then ran away. The complainant says that she ran to the accused's mother-in-law's hut where she found the accused's wife and some other persons. She says that on her way to the accused's mother-in-law's hut she met Maung Shin with Ma On Gyi and told them that the accused had tried to rape her.

The defence was a denial. The accused said that he met the woman that day but did not go to her house and call her from there. When he met her, she demanded a debt from him and when he said he could not yet pay there was some abuse and he lost his temper and kicked her and she went away weeping and made a false accusation against him. The learned Magistrate held that the accused by deceitful means induced Ma Pu Tu to go along with him with intent to ravish her against her wish. He based his conclusion on the fact that Ma Pu Tu made an immediate report to the effect that the accused attempted to ravish her. It was true he said that Daw Soe had exaggerated but that was probably due to using expressions in old fashioned ways and did not indicate that Daw Soe was telling what was untrue. The learned Sessions Judge agreed with this conclusion. He held that there was overwhelming evidence in the case that the complainant and the appellant were seen going together and that the complainant abused the latter saying that "she could not stand it" and then they parted going in different directions. He remarked also that there was clear evidence that as soon as the complainant arrived at the hut of the appellant's mother-in-law she definitely accused the appellant with having attempted to have sexual intercourse with her. Apparently the learned Sessions Judge was impressed with the alleged conduct of the accused "in keeping," as he puts in "absolutely silent," presumably at the time when the complainant was making accusations of attempted rape against him. He considered that the complainant had exaggerated her evidence ; it was not improbable, he said, that the appellant merely seized her and attempted to throw her down. But that, he remarked, was very common to witnesses of her type and not too much importance should be ascribed to it. The parties were cousins and he found difficulty in believing that she would make such a charge against him if it was not true.

This case strikes me as another instance of the cases in which a woman makes accusations against a man and they are believed and acted upon merely because she is a woman. There is practically no corroboration of her statement. Take for example the witness Maung Ngwe Daing (P. W. 4). He is referred to by the complainant as having seen the accused when he made an attempt to chase the complainant. In fact she says that he was only about 80 feet away. Maung Ngwe Daing, on the contrary, says that he heard a woman abusing and he looked in the direction and saw the woman going away northwards while the man was going southwards. There was not a word there about the accused having chased the woman and not a word about his having anything in his hand ; and further Ma Pu Tu tripped very badly when she said that she did not know this man's name at that time ; and that in fact she had only come to know U Ngwe Daing that year. U Ngwe Daing says he has known both the complainant and the accused since they were young. Maung Ba Tha is another witness who is spoken of by the complainant and he says that the complainant and the accused passed by him when he was cutting thorny branches and when they came near him complainant went eastwards and the accused went southwards.

There is therefore no corroboration of Ma Pu Tu as to the events which constituted the alleged transaction. What is there in the alleged corroboration by her conduct? Here again it is very nebulous. It consists of statements that Ma Pu Tu is said to have made after the occurrence. Take for example the evidence of Ma Ya. She is the complainant's sister. She said that at about 3 P. M. that day she went to Ma Shwe's house at Ma Shwe's request. There she met Ma Pu Tu and Ma Pu Tu there made a statement to her.

It is here necessary to refer to S. 8, Evidence Act and its Explanation. S. 8 lays down that the conduct of any party to any proceeding in reference to such proceeding or to any fact in issue therein or relevant thereto and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

With this must be read Explanation. 1.

> The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Illustration (j) to this section reads:

> The question is whether *A* was ravished.
>
> The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which, the complaint was made, are relevant.
>
> The fact that, without making a complaint, she said that she had been ravished, is not relevant as conduct under this section, though it may be relevant as a dying declaration under S. 32, Cl. (1), or as corroborative evidence under S. 157.

Both Courts have treated these statements by Ma Pu Tu as though they were complaints and not merely statements. The same remark applies to Maung Shwe's evidence and indeed all the evidence which was to the effect that Ma Pu Tu had gone about after the quarrel with Maung Aye Maung saying that he had attempted to rape her. There is nothing whatever to show that she made a complaint. All that is clear is that she made certain statements. It is clear that she was hurt by Maung Aye Maung because he said so; in fact he says he kicked her because she abused. And there was evidently a quarrel over this debt that he owed her. There being this debt and this quarrel and he having assaulted her on account of this quarrel it is quite likely that she made a false accusation against him that he had tried to rape her, whereas all the attack amounted to was to kick her and possibly insult her in some way such as by seizing her by the hand.

However that may be the fact that after the thing was all over she said that he had tried to rape her cannot be taken as proof that he did try to rape her. Neither is there any more force in the argument that the applicant kept absolutely silent when she was making these accusations. There is no proof whatever that any of these accusations were made in his presence. If so no doubt Expln. 2 to S. 8, would apply, namely:

> When the conduct of any person is relevant, any statement made to him or in his presence and hearing which affects such conduct is relevant.

An Illustration is given:

> (f) The buestion is whether *A* robbed *B*.
>
> The facts that, after *B* was robbed, *C* said in *A's* presence—'the police are coming to look for the man who robbed *B*'—and that immediately afterwards *A* ran away, are relevant.

But that all depends upon the statements being made to him or in his presence and hearing. It is noteworthy that most of the witnesses who described what Ma Pu Tu said after the quarrel with Maung Aye Maung say that she said that Maung Aye Maung insulted her or ill-treated her; the Burmese expression used has a variety of meanings. It would also bear possibly the meaning that he had assaulted and kicked her. The learned First Additional Magistrate said that Daw Soe was perhaps exaggerating when she said that Ma Pu Tu told her that Aye Maung had raped her. But it is quite probable that Ma Pu Tu used the same expression to her as to the others, namely, "* . . . ." and Daw Soe interpreted it as a rape.

Three witnesses gave evidence for the defence, the meaning of whose evidence was that Ma Pu Tu had first complained merely that the accused had kicked her and had insulted her by pulling her hand. The learned Magistrate expressed the opinion that these witnesses were not speaking the truth and his view, in my opinion, is entitled to be treated with very great respect. But for the reasons that I have given above I have formed the very definite conclusion that they were not giving false evidence. I believe that they were speaking the truth and that the facts were that the applicant did no more than what he says he did ; he kicked her because of a quarrel that had broken out between them and I am of opinion that there is no justification at all for this conviction and it is set aside and the applicant is acquitted and will be set at liberty so far as this case is concerned.

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* *Burmese words.*

B.D./R.K. *Conviction set aside.*

## A. I. R. 1938 Rangoon 130

### FULL BENCH

ROBERTS C. J., MYA BU AND DUNKLEY JJ.

*R. M. K. A. R. Arunachallam Chettyar* — Applicant.

v.

*R. M. K. A. R. V. Valliappa Chettyar* — Respondent.

Civil Revn. No 136 of 1937, Decided on 14th January 1938, against order of Sub-Divisional Court, Henzada, D/- 26th April 1937.

**(a) Civil P. C. (1908), S. 10 (as amended by Government of Burma Adaptation of Laws Order, 1937) - Courts in British Burma have no power to stay suits before them by reason of pendency of suits founded on same cause of action in British India — Amendment to S. 10 has retrospective effect.**

According to S. 10, as amended by the Adaptation of Laws Order, 1937, the Courts in British Burma have no power to stay suits before them by reason of the pendency of suits founded on the same cause of action in British India. The amendment to S. 10 being an alteration in the form of procedure has a retrospective effect. [P 134 C 1]

Where therefore a suit is instituted in a Court at Henzada in Burma on 28th April 1937 the Henzada Court has no power to stay it pending the decision of earlier suit brought in 1934 in a Court at Devakottah, Madras, although the issues involved in both the suits may directly and substantially be the same The Court at Devakottah, is a foreign Court within the meaning of S. 2 (5) as amended, and pendency of suit there would not preclude Court at Henzada from trying a suit founded on the same causes of action : *3 Mad 98 and 27 Mad 538, Rel. on* ; *21 Bom 832* ; *23 Cal 767 and English Case law referred.* [P 133 C 2]

**(b) Interpretation of Statutes—'Privilege' —Meaning of word 'privilege' when coupled with 'right' means right or advantage or immunity in law enjoyed by person or class of persons beyond common advantages of others Term must be construed strictly as having legal meaning.**

Where the word 'privilege' is coupled with 'right' in a statute it must be held to have a well defined meaning. It does not mean some advantage or boon which by reason of existing procedure a party may deem himself in fact to possess, but may be defined as a right, advantage or immunity in law enjoyed by a person or class of persons beyond the common advantages of others. The word must be construed in a strict sense as having a legal meaning when it is employed in a statute and not as having a loose or figurative meaning. [P 132 C 2; P 133 C 1]

**(c) Government of Burma Adaptation of Laws Order (1937), Cl. 10 - Words "right, privilege, objection or liability already acquired, accrued or incurred" have reference to rights, privileges etc., which are enforceable at law.**

The words "right, privilege, objection or liability already acquired, accrued or incurred" in the Government of Burma Adaptation of Laws Order, 1937, must have reference not to the mere enjoyment of what is in fact a boon or to the existence of being in fact under a disadvantage, but to rights and privileges, objections or liabilities which are enforceable at law. [P 133 C 1]

(Per *Dunkley J.*)—Cl. 10, Government of Burma Adaptation of Laws Order, 1937, must be construed strictly and the words 'right' and 'privilege' must be given their legal meaning. In law a 'right' is an advantage which can be enforced by appropriate action before a Court, and a 'privilege' is nothing more than a special right enjoyed by certain persons, beyond the rights which the public in general enjoy. Accordingly the right to have a suit stayed is in law neither a right nor a privilege. [P 134 C 2]

**(d) Civil P. C. (1908), S. 10 (as amended by Government of Burma Adaptation of Laws Order, 1937)—Direction in S. 10 for stay of suit until decision of earlier suit in which same matter is in issue, is mere rule of procedure —It confers no legal righton any party.**

(Per *Dunkley J.*)—The principle that a litigant cannot acquire a vested right in the course of procedure is well established. The direction in S. 10, Civil P. C., that a suit shall be stayed until an earlier suit in which the same matter is in issue is decided, is a mere rule of procedure ; it confers no legal right on any party. The Code of Civil Procedure is a Code of rules whereby rights may be enforced before Courts. The Code itself confers no legal right whatever. [P 134 C 1]

**(e) Interpretation of Statutes—Retrospective effect — Statutes effecting changes in procedure are retrospective.**

(Per *Dunkley J.*)—The statutes which effect changes in procedure are in their operation retrospective in the sense that the provisions of such statutes are applicable to proceedings already commenced at the time of their enactment. [P 134 C 1]

**Dr. M. A. Rauf** — *for Applicant.*

**P. K. Basu** — *for Respondent.*

**Roberts C. J.** — This suit comes before us by way of revision of an order passed by the Sub Divisional Judge of Henzada on 26th April 1937 staying Civil Regular Suit No. 5 of 1936 of his Court pending the decision of an earlier suit, No. 224 of 1934 of the Sub-Court of Devakottah, Madras. The suit in the Devakottah Court was brought by the respondent, who is one of the sons in a Hindu joint trading family, against the other members of the family and was for partition and his share of the joint family property. The later suit in the Henzada Court was brought by the father of the respondent as karta of the joint family for the recovery of a sum of money said to be held by the family in trust for an idol and deposited with the respondent. It is contended that the matters in issue therein are substantially and directly in issue in the prior suit brought in Devakottah. If it were competent to the Henzada Court to stay the action brought there we should have to see whether the issues in the two actions were substantially the same or not, but we have come to the conclusion that the action brought at Henzada cannot be stayed.

Section 10, Civil P. C., as amended by the Adaptation of Laws Order, 1937, runs as follows :

> No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British Burma having jurisdiction to grant the relief claimed, or before His Majesty in Council.
>
> Explanation. The pendency of a suit in a foreign Court does not preclude the Courts in British Burma from trying a suit founded on the same cause of action.

By the Adaptation of Laws Order, 1937, Cl. 2, this Order shall come into operation on the separation of Burma and India, that is, on 1st April 1937. By S. 2 (5), Civil P. C. as amended, "foreign Court" means a Court situate beyond the limits of British Burma which has no authority in British Burma and is not established by the Governor. The word "Governor" is substituted for "Governor-General in Council" by Cl. 5, Adaptation of Laws Order, 1937. After 1st April 1937 therefore the Courts in British Burma ceased to have power to stay suits in British Burma by reason of the pendency of suits founded on the same cause of action in British India. And the question we have to decide is : when does the section as amended come into operation ?

In (1878) 3 A C 582[1] at page 603, Lord Blackburn said :

> I think it is perfectly settled that the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way ; clearly these bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.

The case in (1876) 3 Ch D 62[2] was one in which new rules of Court, dated February 1876, had increased the amount of security which plaintiffs out of the jurisdiction might be called upon to give. The bill had been filed in 1874 and in May of that year an order was made that the plaintiffs, a foreign Government, should give security for costs; in accordance with the existing practice the sum of £120 was deposited. The new rule however stated that

> in any cause or matter in which security for costs is required the security shall be of such amount and be given at such time or times and in such manner and form as the Court or a Judge shall direct.

The Court of Appeal held that the new rule being one of procedure applied to the suit then pending and Mellish L. J. said:

> No suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed, provided, of course, that no injustice is done. Certainly there is no injustice in the rule that suitors who live abroad and have no property in this country should give security for costs. There seems to have been a practice in equity of limiting the amount but that practice has been altered during this litigation.

Again in (1861) 30 L J Ex 40[3] Pollock C. B. said:

> I think that where an Act of Parliament alters the proceedings which are to obtain in the administration of justice, and does not specially say that it shall not apply to any action already brought, but merely causing the operation to pause for a certain time and giving an opportunity for parties to retire from suits, it applies to actions already brought.

Baron Wilde declared the principle to be that :

> Where you are dealing with a right of action, and an Act of Parliament passes, unless something express is contained in that Act, the right of action is not taken away; but where you are dealing with mere procedure, unless something is said to the contrary, and the language in its terms applies to all actions, whether before or after the Act, there I think the principle is that the Act does apply without reference to the former law or procedure

In (1875) 1 Ch D 48[4] at p. 50 Jessel M. R. said :

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[1] James Gardener v. Edward A. Lucas, (1878) 3 A C 582.

[2] Republic of Costa Rica v. Erlanger, (1876) 3 Ch D 62=45 L J Ch 743.

[3] Wright v. Hale, (1861) 30 L J Ex 40=6 H & N 227=6 Jur N S 1212=3 L T 444=9 W R 157.

[4] Joseph Suche & Co. Ltd. In re, (1875) 1 Ch D 48.

> It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said there is one exception to that rule, namely that where enactments merely affect procedure and do not extend to right of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exception. I am of opinion that it is not. This is an alteration not merely in procedure.

In that case therefore, although the alteration was held not to be one in procedure merely, the existence of the exception, that where enactments merely affect procedure they have been held to apply to existing rights, was acknowledged. In a later case, (1916) 2 Ch 1[5], the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, suspended a particular form of remedy at the instance of a mortgagee. It was held that this did not take away rights but related to a matter of procedure only; in the present case the Adaptation of Laws Order lifts the suspension of a remedy by taking away from Cl. 10, Civil P. C., the provision that the Court shall stay an action where a suit in which the matter in issue is also directly and substantially in issue between the same parties, etc , in British India, and by making the direction to stay an action apply only to cases where there is such an earlier suit in British Burma, or before His Majesty in Council.

In (1916) 2 Ch 1[5] all the Judges were agreed and Phillimore L. J. drew attention to the case in (1905) 2 K B 335[6] where it was held that the extension of time during which a prosecution could be launched was a matter of procedure only though in fact the position of the accused person, when such a statute was made to operate so as to keep alive a criminal charge against him which would have been barred prior to its enactment, must have been prejudiced thereby. That a similar view has been entertained in the Courts in India is apparent from 3 Mad 98[7] and 27 Mad 538.[8] In 21 Bom 832[9] the plaintiff had brought a suit in a subordinate Court and was told he should have a certificate under S. 47, Deccan Agricultural Relief Act, because the defendant was an agriculturist. Now under S. 73 of the Act the Judge's decision on this point was final. The plaintiff however appealed, the appeal including other points of objection to the decree as well as that with regard to the status of the defendant. Whilst his appeal was pending S. 73 was repealed, and on the hearing of the appeal the Judge considered this question of status, held that the defendant was not an agriculturist and reversed the finding of the lower Court on that point, which at the time the appeal was filed and prior to the repeal of S. 73 he would have had no jurisdiction to do. It was held he was right in so doing. Faced with these difficulties Mr. Basu for the respondents draws our attention to Cl. 10 of the Adaptation of Laws Order, 1937, which runs as follows :

> Nothing in this order shall affect the previous operation of or anything duly done or suffered under any Burman-law, or any right, privilege, obligation, or liability already acquired, accrued or incurred under any such law or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law.

"Burma law" is defined by S. 149, Government of Burma Act 1935, read with Cl. 3 of the Adaptation of Laws Order 1937; and the Civil Procedure Code is such a law.

Mr. Basu points out that the Adaptation of Laws Order cannot affect any privilege accrued under any such law, and he contends that his client had such a privilege in that by being a litigant before 1st April 1937, he could ask the Court here to stay proceedings during the pendency of the suit at Devakottah. First he said that by filing the application before the law was changed this objection to the continuation of the suit at Henzada must be decided under the earlier law, and when it was pointed out that the cases I have cited were against him on that point, he fell back on the ground that he had a privilege which could not be removed. Now, where the word "privilege" is coupled with "right" in a statute it must be held to have a well defined meaning. It does not mean some advantage or boon which by reason of existing procedure a party may deem himself in fact to possess, but may be defined as a right, advantage or immunity in law enjoyed by a person or class of persons beyond the common advantages of others. The word must be construed in a strict sense as having a legal meaning when it is employed in a statute and not as having a loose or figurative meaning.

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[5] Welby v. Parker, (1916) 2 Ch 1=85 L J Ch 564=114 L T 876=60 S J 417=32 T L R 403.

[6] Rex v. Dharma, (1905) 2 K B 335=74 L J K B 450=92 L T 700=53 W R 431=69 J P 198 =21 T L R 353.

[7] Papa Sastrial v. Anuntarama Sastrial, (1881) 3 Mad 98.

[8] Vedavalli Narasiah v. Mangamma, (1904) 27 Mad 538=14 M L J 340.

[9] Gangaram v. Punamchand Nathuram, (1897) 21 Bom 832.

In (1859) 6 C B (N S) 388[10] the Thames Conservators were empowered by statute to grant to riparian owners or occupiers the license to make piers or jetties on payment of reasonable charges, but these powers were not to extend "to take away, alter or abridge any right, claim, privilege, franchise, exemption or immunity to which riparian owners were by law entitled." It was held that Conservators could grant to the owners of a wharf a license to construct a jetty though its erection might obstruct the enjoyment by adjoining riparian owners of the free navigation of the river, Cockburn C. J. (at p. 405) pointing out that the whole question turned on whether there was any public right which was being interfered with.

Again, in (1881) 7 Q B 690[11] at p. 696, Cockburn C. J. said:

> The word "rights," especially when taken in conjunction with the words "powers or privileges" must mean rights acquired adversely to the rest of the world and peculiarly to the individual.

Therefore the words, "right, privilege, obligation or liability already acquired, accrued or incurred," in the Government of Burma Adaptation of Laws Order 1937, must have reference not to the mere enjoyment of what is in fact a boon or to the existence of being in fact under a disadvantage, but to rights, privileges, obligations or liabilities which are enforceable at law. Mr. Basu says that if the suit in Henzada is stayed he will have the privilege of immunity or exemption from appearing as a defendant therein. This appears to me to be unduly straining the meaning of the words. Moreover, if His Majesty had intended to save the order for a stay in a suit when a prior suit had been filed in British India before the date of separation, the order would have said so in terms. It may be observed that in the Schedule to the Adaptation of Laws Order there has been added to S. 273, Succession Act, 1925, a new sub-section to the effect that:

> Probate and letters of administration granted in British India in proceedings commenced before the separation of Burma and India shall, if under this Act as in force in British India they have effect throughout British India, have effect also throughout British Burma unless otherwise directed by the grant.

Where therefore it was deemed right to order that part of a legal proceeding in British India before the separation should have effect throughout British Burma after it, this has been done. In the present case the Court at Devakottah has become a foreign Court, and the rule which affects the staying of a suit here, by reason of a suit pending in British India, has been altered as a matter of procedure. There is no vested interest in procedure, and no right or privilege of the respondent has been invaded. It does not therefore fall to be considered whether the issues to be tried in the two suits are substantially the same or whether the Court should have stayed the suit if S. 10, Civil P. C., had applied, for it does not apply at all. Accordingly, in my opinion, these proceedings must be returned to the learned Judge of the Subdivisional Court at Henzada with the ruling of this Court that he has no power to stay the suit pending the decision of suit No. 224 of 1934 of the Sub-Court at Devakottah, but must proceed forthwith to try it in accordance with the law. This application is therefore allowed with costs ten gold mohurs.

**Mya Bu J.**—I concur in the judgment of my Lord the Chief Justice.

**Dunkley J.**—I am of the same opinion as my Lord the Chief Justice. The principle that a litigant cannot acquire a vested right in the course of procedure is so well-established as to be axiomatic. My Lord has mentioned cases in which this principle has been applied by the Madras and Bombay High Courts and I may therefore be permitted to mention a unanimous decision of twelve Judges of the Calcutta High Court in which the same principle was applied, especially as the facts of this case appear to me to be similar to those of the matter now before us. By Act 5 of 1894, S. 310-A was added to the Code of Civil Procedure, Code of 1882, whereby a judgment-debtor, whose immovable property had been sold in execution of the decree against him, was given the option (which he did not previously possess) of having the sale set aside on payment into Court of the amount specified in the proclamation of sale plus a sum equal to five per cent. of the purchase money. In 22 Cal

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[10] Kearns v. The Cordwainers' Co., (1859) 6 C B (NS) 388=28 L J C P 285=5 Jur (NS) 1216.

[11] Fearon v. Mitchell, (1881) 7 Q B 690=41 L J M C 170=27 L T 83.

767[12] the full Court of twelve Judges, overruling a previous decision of a majority of a Bench of five Judges, held that this section did not confer any new right on the judgment-debtor or affect any existing right. They held that it was a mere rule of procedure, and was therefore applicable to execution proceedings pending at the time when Act 5 of 1894 came into force. The direction in S. 10, Civil P. C., that a suit shall be stayed until an earlier suit in which the same matter is in issue has been decided, is plainly of the same category; it confers no legal right on any party. Such rights, if they may be loosely so called, are in no manner different from the right to call witnesses, and in (1861) 30 L J Ex 40,[3] Pollock C. B. said :

> If an Act of Parliament were to say that in matters of mere opinion and judgment no person shall be allowed to call more than three witnesses, I think that would apply to all actions, whether then pending or thereafter to be brought.

The Code of Civil Procedure is a Code of rules whereby rights may be enforced before the Courts, the Code itself confers no substantive rights whatever. As Banerjee J. pointed but in 22 Cal 767,[12] it is not strictly correct to speak of such an alteration of procedure as having a retrospective operation, because its direct effect is prospective only although a part of the requisites for its action is drawn from time antecedent to its passing: per Lord Denman in (1848) 12 Q B D 120[13] at p. 127. With all due respect, I think that Farran C. J. put the matter more correctly in 21 Bom 822,[9] where he said that statutes which effect changes in procedure are in their operation retrospective in the sense that the provisions of such statutes are applicable to proceedings already commenced at the time of their enactment. Mr. Basu for the respondent has urged that because his application under S. 10, Civil P. C., was made before the alteration in the law he thereby "consolidated" the procedure in his favour. If the alteration of the law had come into force after the application had been heard and argued, but before judgment thereon was delivered, i. e. during the period in which judgment was reserved, I could have understood this argument on the ground that judgment is presumed to follow immediately on the conclusion of the hearing and that therefore the position of the parties should not be altered by anything which occurred during this interval; but even under those circumstances the decision in 21 Bom 822[9] would afford a complete answer to the argument.

Referring briefly to Cl. 10 of the Government of Burma (Adaptation of Laws) Order, 1937, I agree with my Lord the Chief Justice's definition of "privilege" as "a right, advantage or immunity granted to or enjoyed by a person or class of persons beyond the common advantages of others". The clause must be construed strictly and the words "right" and "privilege" must be given their legal meaning In law, a "right" is an advantage which can be enforced by appropriate action before a Court, and a 'privilege" is nothing more than a special right enjoyed by certain persons, beyond the rights which the public in general enjoy. A "privilege" also must be enforceable by action before a Court, or, as an immunity, be a complete answer in law to an action brought to enforce a general right. In accordance with this view, the right (again using the word in a loose sense) to have a suit stayed is in law neither a right nor a privilege.

R.M./R.K. *Application allowed.*

## ✲ A. I. R. 1938 Rangoon 134

ROBERTS C. J. AND SHARPE J.

*Captain C. R. Smith* — Appellant.

v.

*Mrs. Heptonstall*—Respondent.

First Appeal No. 102 of 1936, Decided on 13th July 1937, from order of High Court in C. R. S. No. 26 of 1934.

**(a) Contract Act (1872), S. 25 (3)—Agreement need not in terms refer to barred debt.**

Under S. 25 (3) it is not necessary that a new promise to pay a debt barred by the law of limitation need refer in terms to the barred debt: *A I R 1929 Rang 240, Rel. on.* [P 135 C 2]

**✲ (b) Civil P. C. (1908), O 34, R. 3 (4)—Equitable mortgage — Personal remedy — Cause of action for personal remedy is mortgage transaction itself—No separate cause of action arises on sale of mortgaged property —Suit on mortgage three years after mortgage—Personal remedy is barred—Execution of fresh promissory note for balance due after three years from date of mortgage does not operate as valid acknowledgment.**

An equitable mortgage was created on the same day when a promissory note was given for the

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12. Jogodanund Singh v. Amrita Lal Sircar, (1895) 22 Cal 767 (F B).

13. The Queen v. The Inhabitants of St Mary Whitechapel, (1848) 12 Q B D 120=17 L J M C 172=116 E R 811.

mortgage debt. Three years subsequent to this, the mortgagor gave a fresh promissory note for the balance due on the loan. Subsequently the mortgagee filed a suit on the mortgage and got the property sold. As the sale proceeds were insufficient, he filed an application for a personal remedy:

*Held* that the cause of action for the personal remedy arose on the date of the mortgage transaction and no separate cause of action arose on the sale of the property and that such remedy was barred as the suit was filed more than three years after the mortgage transaction: *30 All 388, Rel. on.* [P 135 C 2; P 138 C 1]

*Held further* that the fresh promissory note could not operate as acknowledgment under S 19, Lim. Act, as it was executed after the personal remedy was barred even though the plaintiff could have sued on the promissory note which was a new promise under S 25 (3), Contract Act. [P 136 C 1; P 138 C 1]

Talukdar — *for Appellant.*

Paget — *for Respondent.*

**Roberts C. J.** — This appeal arises out of an action which was brought by Mr. Charles Arthur Petley against the appellant for a declaration that the plaintiff was a mortgagee by deposit of title deeds, for the usual mortgage decree, and for a personal decree against the defendant. The mortgage arose, by way of security for a loan (originally of Rs. 35,000) and the plaint was filed on 13th January 1934. The mortgage by deposit of title deeds took place on 6th June 1929, and on the same day a promissory note was given by the defendant for the amount of the mortgage debt. After a preliminary consent decree there was a sale of the mortgaged property in November 1935, and as the sale proceeds were insufficient to repay the mortgage debt, the plaintiff desired to have recourse to O. 34, R. 3 (4), which runs as follows:

> Where the proceeds of the sale are not sufficient for the payment of the money due to the plaintiff or any other party to the suit and the balance due to the plaintiff or such other party is legally recoverable by him from the mortgagor the Court shall, on application made in this behalf by the plaintiff or some other party, pass a decree against the mortgagor personally for the payment of such balance.

On 14th June 1932, the defendant by his promissory note promised to pay to the agent of the plaintiff the sum of Rs 26,000 which sum (it is pleaded) was the balance due on the Rs. 35,000 formerly lent. This promissory note was not a renewal of the former note so as to keep the personal remedy alive. This remedy was barred by limitation on 6th June 1932, and thereafter, in my opinion, the balance due in respect of the mortgage suit ceased to be legally recoverable from the mortgagor by the plaintiff by reason of the provisions of S. 19, Lim. Act. But on 14th June 1932 there was (within the meaning of S. 25 (3), Contract Act) a new promise to pay a debt barred by the law of limitation. I agree with Mr. Paget's argument that it is not necessary that such an agreement should refer in terms to the barred debt. *See* 7 Rang 292.[1] This new promise could have been enforced within the time allowed by the Limitation Act, namely three years, it could have been sued upon, and the suit, if necessary, could have been stayed pending the ascertainment of the sale proceeds. But the only action taken by the plaintiff was to file the suit with which we are at present dealing; he then sought to say that the second promissory note was a promise to pay the mortgage debt and that after the sale proceeds proved insufficient there was a balance due to him which was legally recoverable from the mortgagor. The learned trial Judge thought that the cause of action on the mortgage and the cause of action on the deficiency were quite separate and distinct. But in my opinion no separate cause of action for the personal remedy accrued after the mortgaged property was found on sale to be insufficient to satisfy the mortgage debt: 20 All 512.[2] There was one cause of action only which accrued upon 6th June 1929, and I cannot agree that "another cause of action has emerged in the course of the mortgage suit" I hold therefore that at the date of institution of the suit the balance sought to be recovered had ceased to be legally recoverable in that suit, though it is doubtless true that the promissory note of 14th June 1932, might have been sued upon at that date. As was said by Aikman and Griffin JJ. in 30 All 388[3] :

> On an application under S. 90 "(T. P. Act, 1882)" it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant.

**A decree under O. 34 (which corresponds to S. 90, T. P. Act) cannot be obtained when at the date of filing of the suit the personal remedy in the mortgage suit is**

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[1] Abdullakin v. Maung Ne Duo, (1929) 16 A I R Rang 240 =119 I C 738=7 Rang 292.

[2] Chattar Mal v. Thakuri, (1898) 20 All 512= 1898 A W N 138.

[3] Jangi Singh v. Chandar Mal, (1908) 30 All 388=1908 A W N 161=5 A L J 670.

barred. The difficulty in which the respondent, the legal representative of the deceased plaintiff, finds herself appears to me to be this. The cause of action on the mortgage suit is all one and the same, and thus the personal remedy upon it was time-barred before action was brought. The giving of a promissory note not in renewal of the personal liability so as to save the mischief of limitation but so as to constitute a new promise under S. 25 (3), Contract Act, could not alter the pre-existing cause of action though it did give rise to a new one. But the plaintiff never sued upon it. Accordingly owing to his failure to keep the personal remedy alive by complying with the provisions of S. 19, Lim. Act, his cause of action arising on 6th June 1929, became, so far as it relates to an application under O. 34, barred by limitation: and in like manner his failure to bring an action on the new promissory note is fatal to his cause of action. What the respondent has sought to do is to try and set up the new cause of action as though in some way it had re-created the old one. But, for the reasons stated and in the light of the authorities cited, I am of opinion that she cannot do this and that the appeal must accordingly be allowed.

**Sharpe J.** — This case really lies within a very small compass, although the able arguments addressed to us on both sides have been somewhat lengthy. It is said, and I think it is rightly said, that the present appeal raises a point of considerable importance affecting the practice of the Court in the matter of mortgage suits generally. It is therefore desirable if this case is to be reported and our decision acted upon as laying down some new general principle, that the material facts of this case should be stated at the outset, so that when it is hereafter sought to apply our present decision to some other case, it may be readily ascertained whether the facts of such other case are sufficiently in agreement with the facts of this case to require this decision to be followed. The present case has unfortunately been through many vicissitudes, but the following are the only facts now material. On 6th June 1929 the plaintiff (who has since died and whose place upon the record has been duly taken by his legal representative Mrs. C. H. Heptonstall) through his agents Balthazar & Son Ltd. lent Capt. Clement Smith the sum of Rs. 35,000. On the same date Capt. Smith deposited with the plaintiff's said agents the title deeds of the Allandale Hotel, Rangoon, and he also on the same date gave Balthazar & Son Ltd. a promissory note for Rs. 35,000, for value received payable on demand, and bearing interest at the rate of 9 per cent. per annum. Capt. Smith repaid Rs. 9000 of the principal sum lent, and on 14th June 1932, he gave Balthazar & Son Ltd. a second promissory note, this time for Rs. 26,000 for value received, payable on demand and bearing interest at the like rate.

On 13th January 1934, the plaint in the present suit was presented, and by it the plaintiff alleged in para. 8 that there was then due to him "the sum of Rs. 26,000 by way of principal upon the said mortgage together with the sum of Rs. 585 by way of interest for three months to 31st December 1933." No mortgage had actually been referred to earlier in the plaint, but the implication undoubtedly was that there had been a mortgage by deposit of the said title deeds to secure an advance of Rs. 26,000, which was stated by the plaintiff in para. 1 of his plaint to have been made to Capt. Smith on 6th June 1929. That was an inaccurate statement of the position, but it was accepted as correct by the defendant in para. 1 of his written statement. The plaint concluded with a prayer for the following reliefs: (a) a declaration that he was a mortgagee by deposit of title deeds, (b) the usual mortgage decree, and (c) a personal decree against the defendant. By para. 13 (b) of his written statement, the defendant submitted that the plaintiff was not entitled to a personal or any decree in that the alleged debt if any was barred. The plaintiff by his further written statement in reply stated that the said mortgage debt was not barred by limitation by reason inter alia of the second promissory note for Rupees 26,000 given by the defendant on 14th June 1932.

On 13th December the suit came on for hearing before Leach J. and issue 3 then formulated was "Is the claim barred by the law of limitation?" On the following day, before the conclusion of the hearing, a preliminary mortgage decree in the usual form was passed by consent, in which decree it was declared that the amount due to the plaintiff by the defendant was the sum of Rs. 27,776 being as to Rs. 26,000 the amount due to the plaintiff for principal on the mortgage and as to Rs. 1776 for costs of suit. The amount so found due was not paid by the defendant within the time specified in the preliminary decree, and on 25th July 1935 a final decree for sale of the property was passed in the absence of the defendant. For reasons which do not appear, there was expressly excluded from the final decree the usual declaration as to extinguishment of the mortgage and the right to redeem the same, except as to the right to obtain a personal decree against the defendant for any balance unpaid On 23rd November 1935 the property mentioned in the final decree was sold; the net proceeds of that sale amounted to only Rs. 19,735. The sale was confirmed on 18th January 1936 and four days later the Court granted a certificate under O. 21, R. 94, of the Code of Civil Procedure. As the net proceeds of sale were found insufficient to pay the amount due to him, the plaintiff, on 27th February 1936, filed an application under para. 3 (4) of the Order substituted by this Court for O 34, (R. 6 of which had in its turn replaced S. 90, T. P. Act) for a personal decree for a balance of Rs. 8882-1.10 being the decretal sum of Rs. 27,776 plus further interest and costs and less the net proceeds of sale. The defendant filed his objection on 19th March 1936, and in para. 4 thereof, he submitted that the application for a personal decree was out of time. That application finally came to be heard on 7th April of the present year, by Braund J. who then granted the plaintiff a decree against the defendant for the said sum of Rs. 8882.1.10 with interest thereon at the Court rate from February 1936. The present appeal is from that decision, and the only ground now relied upon by the defendant-appellant is the fifth ground in his memorandum of appeal dated 6th July 1936, namely that the learned Judge should have held that the relief by way of personal decree is barred by limitation.

The point of law is in a nutshell. The whole appeal turns upon the meaning of the two words "legally recoverable" in what in this Court is para. 3 (4) of O. 34. The appellant has urged it upon us that there is only one cause of action here, giving rise both to the relief by way of final decree for sale and also to the additional remedy by way of a personal decree for the balance. That is a view which was rejected by the learned Judge below, who held that there were two separate causes of action. In the course of his judgment Braund J. said:

> The cause of action on the mortgage and the cause of action on the deficiency are to my mind quite separate and distinct. It does not follow that the latter will ever arise and at the commencement of a mortgage suit it does not exist. No money is recoverable from the mortgagor in this country until the security has been realized. I do not for a moment believe that the personal liability is part of the original cause of action in a mortgage suit, as a mortgage suit is understood and known in this country.

The learned Judge is there referring to the all important distinction, which he had pointed out at the beginning of his judgment, between the characteristic of a mortgage in this country, which divorces the remedy on the security from the personal remedy (for in India a mortgage does not necessarily import a peronal obligation to repay) and that characteristic of an English mortgage which gives a remedy by way of personal recovery from the mortgagor. Mr. Talukdar on behalf of the appellant submits that this conception in the mind of the learned Judge of a dual cause of action is wrong, and his authority is the joint judgment of Aikman and Griffin JJ. in 30 All 388,[3] where it was held that the right to such a personal decree as is here applied for was a part of and arose out of the original mortgage transaction and that it was the date of filing the suit which had to be looked at in considering the question whether the balance is legally recoverable from the defendant. It being conceded by both parties that the appropriate limitation of time in the present case is three years, it is therefore contended on behalf of the appellant that, as this suit was filed more than three years after the original mortgage transaction, the balance, for which a personal decree has now been passed, was not "legally recoverable." Mr. Paget on behalf of the respondent relies upon two grounds as entitling his client to retain the personal decree which has been passed by Braund J. In the first place, Mr. Paget takes up a position mid-way between Mr. Talukdar's standpoint of a single and complete cause of action arising at the date of the mortgage transaction and the learned Judge's decision that there are two distinct causes of action. He says that his client's cause of action, though a single one, was capable of being split into two parts and that that part of it which entitled him to a personal decree was not complete until after the actual sale of the property and the ascertainment of the deficiency: hence as the application under O. 34 was made within three years of the ascertainment of the deficiency it was not time-barred and the deficiency was legally recoverable from the mortgagor. Mr. Paget's second ground is that even if the date of filing the suit is the material date to be considered the second promissory note of 14th June 1932 was an acknowledgment by the defendant of his liability in respect of the balance of the mortgage debt and the present suit was brought within three years from the giving of the second promissory note.

In my judgment it is impossible to say either that there were two causes of action or that the single cause of action was divisible into two parts. To my mind the case in 30 All 388,[3] mentioned above, concludes the matter so far as concerns the first part of the respondent's case. The respondent's right to a personal decree was a part of, and arose out of, the original mortgage transaction. In the opening sentence of his judgment, Braund J. called attention to an all important matter which must be borne in mind, namely that the present proceeding is not a suit but an application in a suit. The latter words truly and correctly state the position that this is an application in an existing suit. A cause of action must be complete before the filing of a plaint. Nothing arising after action brought can either create a new, or complete a then incomplete, cause of action entitling the plaintiff to any relief in that same then existing suit. I therefore think that the respondent's first point must be rejected. I also think that the respondent's second point fails. By the terms of S. 19, sub-s. (1), Lim. Act, an acknowledgment in writing of a liability, to permit of a fresh period of limitation, shall be computed from the date of the acknowledgment only where the acknowledgment is made before the expiration of the period prescribed. In the present case the only acknowledgment upon which any attempt can be made to rely is the promissory note of 14th June 1932. That was made after the expiration of three years from the original mortgage transaction and is therefore of no assistance to the respondents by way of an acknowledgment. For these reasons therefore I agree with my Lord the Chief Justice that this appeal must be allowed and the personal decree by Braund J. set aside.

K.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 138

MOSELY J.

*Nga Paw Din* — Appellant.

v.

*The King.*

Criminal Appeal No. 813 of 1937, Decided on 16th August 1937, from order of Subdivisional (Special Power) Magistrate, Ahlanmyo, D/- 31st May 1937.

**(a) Penal Code (1860), Ss 378 and 403—Cattle turned out in jungle to graze—Taking of such cattle is theft and not criminal misappropriation.**

Cattle turned out to graze in the pasture or jungle are still in the possession of the owner unless the contrary is shown, and the taking of such cattle is theft and not criminal misappropriation: *(1892-96) 1 U B R 238, Rel. on.* [P 139 C 1]

**(b) Penal Code (1860), Ss. 378 and 425—Stealing bull and subsequently killing it—Accused is guilty both of theft and mischief and so may be sentenced separately.**

It is true that the element of dishonesty, that is to say the causing of wrongful loss or wrongful gain to some person, is a common element in both the offences of theft and mischief. The nature of the loss in both the cases is different and falls under the definitions of distinct offences. It is therefore possible to commit the offence of mischief in respect of the stolen property even though some loss has already been caused to its possessor by the offence of theft. [P 139 C 1]

Where therefore an accused steals a bull, and subsequently kills it for food, the accused is guilty both of theft and mischief and may be sentenced separately for each offence: *A I R 1936 Bom 172, Rel. on: Case law referred.* [P 140 C 1]

**Judgment.**—The appellant Paw Din stole a bullock from the jungle, where it was put to graze by its master, a cartman, and then killed it for food. He had three previous convictions, for theft, cheating and taking ransom, for which he served two years' rigorous imprisonment in each case. No doubt all three cases were concerned with cattle. In the present case he was sentenced by the Special Power Subdivisional Magistrate to three years' rigorous imprisonment on a charge under S. 379, Penal Code, and to two years' rigorous imprisonment on a charge under S. 429, Penal Code, the sentences to run consecutively. This appeal was admitted only for consideration of the question whether the separate sentences were legal or proper. In my opinion, the question is purely academic, as, if one was found to be illegal, the other would have to be enhanced to the extent of the combined sentences, in view of the previous convictions. It appears to me however that the sentences were legal and justified. I notice that in a former case where an accomplice of the present accused was tried and convicted of theft, (the present accused then having absconded), the conviction was altered in appeal to one under S. 403, Penal Code. This was incorrect. I agree with what was said in (1892-96) 1 U B R 238[1] that cattle turned out to graze in the pasture or jungle are still in the possession of the owner unless the contrary is shown, and the taking of such cattle is theft and not criminal misappropriation.

As to the combined charges, it was held in (1893-1900) L B R 633[2] that the law does not contemplate that a thief should be more severely punished because he rendered the recovery of the stolen property impossible. It was added that if the bullock had merely been maimed to prevent its recovery the conviction for both theft and mischief could be supported. The same view was taken in (1892-96) 1 U B R 241.[3] Here it was said that to constitute the offence of mischief the offender must act with intent to cause wrongful loss; that by stealing a bullock a thief had taken it dishonestly, according to the definition in S. 378, Penal Code, and to do a thing dishonestly is defined in S. 24 as doing it with the intention of causing wrongful loss: therefore it was said, the wrongful loss to the owner of the bullock was already caused and there could be no intention of causing him wrongful loss when the animal was slaughtered. It appears to me that, on the face of it, this ignores the fact that the theft might merely ensue in a temporary deprivation to the owner of the animal, and that the slaughter of it must ensue in a permanent deprivation of the animal, so that further or aggravated wrongful loss could be caused after the offence of theft, by a further offence of mischief. 1 Weir 497[4] is to the same effect. 17 Cr L J 239[5] is also to the same effect. The judgment is based on the curious ground that the object of the destruction of the animal was no doubt that of benefiting the offender, and not of injuring the complainant and therefore did not amount to the offence of mischief. It was overlooked that the offence of mischief by its definition (S 425, Penal Code), comprises not merely acts that were committed with intent to cause wrongful loss but also acts committed with the knowledge that they are likely to cause wrongful loss. 3 Pat 804[6] is a decision to the same effect. It is to be noted that when the earlier of these rulings were published (those before 1923), S. 35, Criminal P C., contained the word "distinct" which is omitted in the present Code. The section now reads:

> When a person is convicted at one trial of two or more offences, the Court may . . . sentence him for such offences. . . .

It is not necessary now in order to give separate punishments, that the two offences should be distinct and a man can be convicted of and separately punished for any two offences. subject to the provisions of S. 71, Penal Code: *See* on this 12 Rang 419.[7] In the present case not only are the two offences distinct but they are covered by two separate definitions and were committed at different times I would respectfully agree with what was said in 38 Bom L R 164[8] at p. 166 which is quoted here in extenso:

> That these two offences are distinct offences and constitute two different acts falling within the definitions of theft as well as of mischief. For the offence of theft what is necessary is 'the dishonest removal of moveable property out of the possession of any person without consent,' and the essence of the offence of mischief is the wrongful destruction or diminution in the value of any property so as to cause loss or damage to any person.
>
> It is true that the element of dishonesty that is to say, the causing of wrongful loss or wrongful gain to some person, is a common element in both these offences. But it cannot be said that simply because the accused has caused wrongful loss to another person by taking away his property without his consent, the subsequent act of destruction of that property would not be an offence because the wrongful loss is already caused by taking it away from its possessor. Wrongful

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1. Queen Empress v. Nga Theino, (1892-96) 1 U B R 238.
2. Queen Empress v. Nga Aung So, (1893-1900) L B R 633.
3. Queen-Empress v. Nga Paik Hmwe, (1892-96) 1 U B R 241.
4. In re Madar Saheb, (1889) 1 Weir 497.
5. Jairo v Emperor, A I R 1916 Sind 77=34 I C 655=9 S L R 204=17 Cr L J 239.
6. Hussain Buksh Mian v. Emperor, A I R 1925 Pat 34=84 I C 341=26 Cr L J 277 = 3 Pat 804=7 P L T 36.
7. Emperor v. Mi Hlwa, A I R 1934 Rang 338=1934 Cr C 1248=154 I C 75=12 Rang 419=36 Cr L J 460.
8. Emperor v. Bhawan Surji, A I R 1936 Bom 172=1936 Cr C 364 = 163 I C 288 =60 Bom 627=37 Cr L J 558=38 Bom L R 164.

loss to a person can be caused in a variety of ways. Wrongful loss to a person whose property is stolen may be a temporary loss so long as he is kept out of the possession without his consent, while the wrongful loss to a person whose property is destroyed is a permanent loss. The nature of the loss in both cases is different and falls under the definitions of distinct offences. It is therefore possible to commit the offence of mischief in respect of the stolen property even though some loss has already been caused to its possessor by the offence of theft. The explanations to S. 425 say that the offence of mischief may be committed with regard to any property, and against a person who may not be the owner of the property and it may be committed with regard to the offender's own property. This would show that the essence of the offence of mischief consists in the wrongful destruction or diminution in value of the property whether it is one's own, or somebody else's. It seems to me therefore on the wording of Ss. 378 and 425, Penal Code, that these two acts are distinct offences, and that the intention to cause wrongful loss by the destruction of property is different from the intention to cause wrongful loss by its mere removal from a person's possession.

It may be noted that Ss. 428 and 429 deal with certain aggravated forms of mischief one of which is killing certain animals and are made punishable with a higher sentence. Thus killing an animal in certain cases is made a distinct offence. A man may thus simply kill an animal without stealing it; and if his case falls under the definition of mischief he would be guilty of the offence of aggravated form of mischief in certain cases, or he may at first intend to steal it and thereafter intend to kill it in which case, there is no reason why the two acts which are both recognized as distinct offences should not be punished as such. Even if the animal is stolen with the intention of subsequently killing it and thereafter it is killed, the legal position would not be different.

There was ample evidence of the commission of the crime which I do not propose to discuss. The sentences passed were in my opinion proper ones. This appeal will be dismissed.

V.B.B./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 140

ROBERTS C. J. AND DUNKLEY J.

*U Po Hla and another* — Appellants.

v.

*Ko Po Swat and another*—Respondents.

Letters Patent Appeal No. 4 of 1937, Decided on 11th November 1937, from decree of High Court, D/- 25th May 1937.

**Execution — Decree-holder attaching crop of judgment-debtor on land of third person — Attachment and sale are subject to terms of tenancy whether decree-holder has knowledge or not.**

A judgment-creditor can in execution attach and bring to sale only the right, title and interest of his judgment-debtor in the property against which process in execution is issued at his instance. He obtains by the warrant of attachment the right to bring to sale the property of his judgment-debtor subject to all restrictions and equities which were binding on that property in the hands of his judgment debtor. He is just as much bound by those equities as was his judgment-debtor and it matters not whether he has knowledge thereof or not. Consequently where a judgment-creditor attaches crop grown by his judgment-debtor on the land of third person he is bound by the terms of the tenancy agreement between his judgment-debtor and that third person, whether he has knowledge thereof or not. *AIR 1929 Rang 293, Disting.* [P 140 C 2; P 141 C 1]

U Tun Tin — *for Appellants.*

Rahman — *for Respondents.*

**Roberts C. J.** — This appeal must be allowed and we must set aside the judgment of Spargo J. and of the Assistant District Judge and restore the decree granted by the Township Judge of Wakema with costs here and in the Courts below. The Township Court of Wakema dealt with this case clearly and fully except for an unfortunate clerical error in the judgment which it is easy to explain. The decree-holders in this case were landlords who had a decree for rent, and Mr. Rahman who appears for them says that they are as much entitled to rent from the tenants as the appellants are. The appellants are other landlords and they are also entitled to their rent, and they had a contract with their tenants that the paddy grown upon the land which they leased to them should be charged with payment of rent due to them before the tenants could reduce it into their own possession. It is quite clear from the decided authorities that a decree-holder who is attaching property under the process of execution cannot seize property which his judgment-debtor holds subject to restrictions and ignore those restrictions: he cannot, in other words, obtain a better title than the judgment-debtor has got. That has been made clear in a number of cases and is so elementary a proposition of law that I need not pause for authorities, but the two cases to which the learned High Court Judge has referred in his note granting a certificate of appeal are sufficient to establish the proposition in these Courts, and we follow them without hesitation.

The matter is really a simple one. It is not complicated by any question of agricultural custom, and it having been admitted that the respondents attached the whole of the paddy on the appellants' land without leaving any for the appellants to take in satisfaction of the charge which they held upon it that was alleged in the pleadings and admitted by there being no denial in the paragraph of the written statement corresponding to the paragraph in the plaint in which it was alleged, that was an end of the matter: they did that and they had no right to do it because of the equities subject to which the judgment-debtors held the paddy. As I say therefore this appeal must be allowed. Advocates fee in this Court six gold mohurs.

**Dunkley J.** — In the Township Court and on appeal to the Assistant District Court, and again on second appeal to this High Court, this case has been throughout fought on the question whether the present respondents (who were defendants in the Township Court) had knowledge of the terms of the agreement between the appellants (who were plaintiffs in the Township Court) and their tenant. The question of knowledge was entirely irrelevant. A judgment-creditor can in execution attach and bring to sale only the right, title and interest of his judgment-debtor in the property against which process in execution is issued at his instance. He obtains by the warrant of attachment the right to bring to sale the property of his judgment debtor subject to all the equities which were binding on that property in the hands of his judgment-debtor. He is just as much bound by those equities as was his judgment debtor, and it matters not whether he has knowledge thereof or not. Consequently the respondents, in attaching and bringing to sale the crop grown by their judgment debtor on the land of the appellants, are bound by the terms of the tenancy agreement between their judgment debtor and the appellants, whether they have knowledge thereof or not. All that was decided in 7 Rang 100[1] was that a purchaser of the crop who purchases for value in good faith without knowledge of the terms of the tenancy agreement is not bound by its terms, but is bound if he purchases with such knowledge. With the greatest respect, I am doubtful whether a purchaser for good consideration is bound by the agreement between the tenant and his landlord in any event, but that point does not arise in the present case, and the correctness of the decision in 7 Rang 100[1] must be left for future consideration when the point arises. The position of an attaching judgment-creditor is entirely different; he is always bound by the terms of the agreement between his judgment-debtor and the latter's landlord, whether he has knowledge thereof or not. I therefore agree that this appeal must be allowed with costs throughout.

V.B./R.K. *Appeal allowed.*

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[1] **Maung Po Lwin v. Maung Sein Han, (1929) 16 A I R Rang 93=116 I C 478=7 Rang 100.**

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## A. I. R. 1938 Rangoon 141

BA U J.

*Subhan Khan and another* — Appellants.

v.

*Mohamed Eusoof* — Respondent.

Reference made in First Appeal No. 57 of 1937, Decided on 14th September 1937.

**(a) Interpretation of Statutes — Fiscal statute—Doubt in language should be decided in favour of subject.**

A fiscal statute should be construed strictly and where there is a doubt about the language of the statute, it should be decided in favour of the subject as the subject cannot be taxed except by clear and unambiguous language: *Case law relied on.* [P 143 C 1]

**(b) Court-fees Act (1870), Sch. 1, Art. 1—Proceedings for letters of administration or probate of will—Art. 1 of Sch. 1 cannot apply.**

Art. 1 of Sch. 1 does not apply to a proceeding for letters of administration or probate of a will as the subject-matter in such proceeding being the right to represent the estate of the deceased, cannot be assessed in money value. Art. 1 cannot apply in view of Art. 11 of Sch. 1 : *AIR 1915 Cal 565, Rel. on.* [P 143 C 2]

**(c) Court-fees Act (1870), Sch. 2, Art. 1—Applicability — Proceeding for letters of administration or probate of will—Art. 1 of Sch. 2 applies only in initial stage and not at stage of appeal.**

Art. 1 of Sch. 2 does not apply to the proceeding for letters of administration or probate of a will when it reaches the stage of an appeal. It applies when the proceeding is at the initial stage because the proceeding has to be initiated with an application : *15 W R 40 and 21 M L J 481, Referred.* [P 143 C 2]

**(d) Court-fees Act (1870), Sch. 2, Art. 17 (vi)—Proceeding for letters of administration or probate of will—Sch. 2, Art. 17 (vi) cannot apply.**

Art. 17 (vi) of Sch. 2 cannot apply to proceedings for letters of administration or probate of a will as the proceeding is always commenced by an application and not by a plaint though the trial may take the form of a regular suit when it becomes contentious : *35 All 448, Dissent.* [P 144 C 1, 2]

**(e) Court fees Act (1870), Sch. 2, Art. 11— Applicability.**

The court-fee payable on a memorandum of appeal from an order refusing or granting letters of administration or probate of a will is Rs 2 under Art 11, Sch. 2. [P 145 C 1]

J. C. Ray — *for Appellants.*

Advocate General — *for the Crown.*

**Order** —This is a reference made by the Taxing Master under S. 5, Court-fees Act. The facts giving rise to this reference are these : The appellants in this case applied in the District Court of Insein for letters to administer the estate of one Hafiz Abdul Sattar Khan. Their application was opposed by the respondent. In spite of this opposition the appellants were granted letters with certain conditions attached thereto. Being dissatisfied with the conditions attached to the grant they came up to this Court on appeal. They stamped the memorandum of appeal with a two-rupee stamp. The office, following the decision of the Taxing Master in Civil Miscellaneous Appeal No. 212 of 1932, held that the fee payable on appeal from an order granting or refusing to grant letters was Rs. 10 under Art. 17 (6), Sch. 2, Court-fees Act, and demanded the payment of the deficit Rs. 8. The learned counsel for the appellants contended that the decision of the Taxing Master was incorrect and asked for a reference. The matter was accordingly referred to the Taxing Master and he in turn referred it to me. Though the matter is, in my opinion, of general importance, there is, strangely enough, a dearth of authorities directly bearing on this point. Only two cases have been brought to my notice, namely 35 All 448[1] and 21 M L J 481.[2] I have also made a search but have not been able to find any except a very old case, (1889) A W N 27.[3] In this case it was held that,

> The Court-fee payable on a memorandum of appeal presented to the High Court under S 263, Succession Act, from an order of the District Judge granting letters of administration, is Rs. 2, under Act. 7 of 1870, (Court-fees Act). Sch. 2, Art. 1 (d). Sch. 2, Art. 17, is not applicable to such a memorandum of appeal.

The Madras High Court held a similar view in the case quoted above where Sankaran Nair and Munroe JJ said:

> We do not think Art. 2 of Sch. 2, applies, for the order appealed against undoubtedly has the force of a decree as it decides the representative title and to this extent we agree with the decisions of this Court in Appeal No 94 of 1900 and Appeal 54 of 1900. In support of the contention that Art 1 of Sch. 2 applies, we are referred to the cases in 16 Bom 408[4] and 23 Cal 723.[5] These decisions undoubtedly support the contention. The question of the applicability of Art. 1 of Sch. 2 was not considered in Appeals Nos. 54 and 94 of 1900 already referred to, and we are prepared to follow the Calcutta and Bombay decisions.

The cases decided by the Calcutta and Bombay High Courts were decided under special Codes and so they do not, in my opinion, afford safe guides for the purpose of deciding the point now under discussion. The decisions of the Madras High Court given in Appeals Nos. 54 and 94 of 1900 have not been reported either officially or unofficially anywhere, but the learned author of the Court-fees and the Suits Valuation Acts by R Satyamurti Aiyar refers to these cases in his book, Edn. 3, p. 550, where he says :

> In Appeal No 94 of 1900 (unreported Benson and Bhashyam Ayyangar JJ.) It was held that the order of the District Judge under the Probate and Administration Act had the force of a decree, that therefore Sch. 2, Art. 11 was inapplicable, and that the appeal should be stamped ad valorem under Sch 1, Art. 1.

At p. 551 the learned author referring to Appeal No. 54 of 1900 says :

> The Court (Sir Charles Arnold White C. J., and Benson J.) held that the case was distinguishable from the above Appeals Nos. 94 and 194 of 1900, that only an application for probate but not one for revocation was a suit according to the concluding words of S. 83 (present S. 295), that the order appealed from was therefore not a decree as defined in S 2, Civil P. C and that Sch 2, Art 17 (6), Court fees Act was inapplicable to the appeal as that Article applied only in the case of suits and a proceeding to revoke a grant of probate was not a suit The Court however observed that when the Court fees Act was passed, the Civil Procedure Code of 1859 was in force and did not contain any definition of decree corresponding to that contained in S. 2 of the present Code, that the order therefore though not technically a decree for the purpose of the present Civil Procedure Code had the force of a decree, that is to say, in the words of S. 2, Civil P. C., it was a formal expression of an adjudication upon a right claimed and that Sch 2, Art 11, Court-fees Act, was therefore inapplicable. In the end the Court held that ad valorem stamp was payable under Sch. 1, Art. 1.

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1. Miss Eva Mountstephens v. Mr. Hunter Garnett Orme, (1913) 35 All 448=22 I C 98.
2. Rodrigues v. Mathias, (1913) 21 M L J 481=9 I C 538.
3. Lee v. Hardy, (1889) A W N 27.
4. Jamsang Devabhai v. Goyabhai Kirkabhai, (1892) 16 Bom 408.
5. Upadhya Thakur v. Persidh Singh, (1896) 23 Cal 723 (F B).

The Allahabad High Court differs from all these views in 35 All 418,[1] where the learned Judges, Tudball and Muhammad Rafiq, say :

> The point is really covered by decisions. S 261, Succession Act, says as follows: 'In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant'. So that it is quite clear that the proceeding in the Court below was actually in the form of a civil suit in which under the above section the person applying for the letters of administration was the plaintiff and the person who opposed that grant was the defendant. In 17 All 476[6] the point was decided, though for another purpose, and it was clearly laid down that the order contemplated under S. 86, Probate and Administration Act, was a decree. S 86 Probate Act corresponds in every way with S 263, Succession Act, just as S. 83, Probate Act, corresponds with S. 261, Succession Act.....
>
> In so far as the practice of this Court is concerned, appeals from decisions of a single Judge of this Court under the Probate and Administration Act have been treated as appeals from decrees, whatever may have been the practice in respect to appeals in similar cases from the decisions of the District Judges. We have therefore no hesitation in holding that the present appeal is a first appeal from decree.
>
> As regards court-fees, we have little hesitation in holding that the court fee payable is Rs. 10 under Art. 17, Cl. 6, Sch. 2, Court-fees Act. The subject matter in dispute is in our opinion impossible to estimate at a money value. Therefore the above article will apply.

The views thus expressed are so contradictory that it is almost impossible to know which one one is to follow with any degree of confidence. We get these divergent views as, in my opinion, the approach to the decision of this question has been made from wrong angles. What must always be borne in mind in interpreting a fiscal statute is that it should be construed strictly and that where there is a doubt about the language of the statute, it should be decided in favour of the subject as the subject cannot be taxed except by clear and unambiguous language: 8 Cal 259;[7] 34 Cal 257;[8] 31 Mad 408;[9] 8 All 282;[10] (1914) A C 877[11] at p. 897: 10 Cal 274[12] at p. 282 ; 4 Bom 515;[13] and 6 Pat L J 411.[14]

I propose to consider this question from this stand point. Under Art. 1, Sch. 1, court-fee is payable on the value of the subject matter in dispute according to the scale set out in Col 3 of the said article. The subject matter in dispute in a proceeding for either letters of administration or probate of a will is the right to represent the estate of the deceased : 19 C W N 205.[15] It is impossible to place a money value on such a subject matter and consequently this article does not in my opinion apply to a proceeding for letters of administration or probate of a will. In fact, it cannot apply because of Art. 11 of Sch. 1 under which fees according to the scale set out in Col. 3 have to be paid on the grant of either letters or probate, as the case may be. If Art. 1 were to apply it would mean taxing a subject twice over in respect of the same estate. This no Legislature would, in my opinion, have ever done. This aspect of the case was not considered in both the Madras cases (Appeals Nos. 54 and 94 of 1900). Art. 1, Sch. 2, does not also, in my opinion, apply to the proceeding for letters of administration or probate of a will when it reaches the stage of an appeal. It applies when the proceeding is at the initial stage because the proceeding has to be initiated with an application : 15 W R 40.[16] When an appeal is preferred from an order granting or refusing letters or probate of a will it must be in the form of a memorandum. See S. 299 Burma Succession Act, and O. 41, R. 1, Civil P. C.

A memorandum is entirely a different document from an application or petition. Application means a request, a motion to a Court or Judge, and a petition means a supplication made by an inferior to a superior having jurisdiction to grant the request. (Wharton's Law Lexicon.) Application and petition thus bear more or less the same meaning; whereas a memorandum, according to Murray's Oxford Dictionary, means, amongst others, a note to help the memory, or a mark, or sign, serving to identify. An application or a petition has therefore to be drawn up quite differently from a memorandum of appeal. Take, for instance, an application for letters. It has to contain all the particulars as set out in S. 278, Burma Succession Act, and winds up with a prayer for grant; whereas a memorandum of appeal from an order refusing or granting letters contains only the grounds of attack. Further, if a memorandum of appeal is used in the same sense as an application or a petition as held by the Madras High Court in 21 M L J 481,[2] the Legislature would not have, in my opinion, used the words 'application or petition' in this article and 'the memorandum of appeal' in Art. 11. All these words would have been used in both the articles. I am therefore of opinion that these words bear their natural meaning when used in these two articles, and that consequently this article does not apply to this case.

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[6] Umrao Chand v. Bindraban Chand, (1898) 17 All 476=1895 A W N 104.

[7] Empress v. Soddanund Mahanty, (1882) 8 Cal 259=10 C L R 365.

[8] Manindra Chandra Nandi v. Secretary of State, (1907) 34 Cal 257=5 C L J 148.

[9] Mylapore Hindu Permanent Fund (Limited) v. Corporation of Madras, (1908) 31 Mad 408 =18 M L J 349.

[10] Muhammad Salim v. Nabian Bibi, (1886) 8 All 282=1886 A W N 119.

[11] Lumsden v. Commissioners of Inland Revenue, (1914) A C 877=84 L J K B 45=111 L T 993 =58 S J 738=30 T L R 673.

[12] Anonymous Case, (1884) 10 Cal 274.

[13] Dayachand Nemchand v Hemchand Dharamchand, (1880) 4 Bom 515 (F B).

[14] Deputy Commissioner of Singhbhum v. Jagadish Chandra Deo, A I R 1921 Pat 206=62 I C 513=6 Pat L J 411=2 P L T 683.

[15] Nerode Barani Devi v. Chamatkarini Devya, A I R 1915 Cal 565=27 I C 617=19 C W N 205.

[16] In the matter of Juddoonath Shadhookhan, (1871) 15 W R 40.

Article 17 (vi) of Sch. 2 does not also, in my opinion, apply. Where the Allahabad High Court has gone wrong in 35 All 448[1] is in misconstruing S. 261, Succession Act (now S. 295). The said High Court construed the expression 'the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure,' as meaning that the proceeding shall become a suit. If the Legislature intended that the proceeding, when once it became contentious, should become a suit, it would, in my opinion, say so in clear and unmistakable language. And, besides, what the word 'suit' meant was explained in S. 25, Civil P. C., 1865, which was the Code that was in existence at the time the Court-fees Act was enacted in 1870. S. 25 said "All suits shall be commenced by a plaint." A proceeding for letters of administration or probate of a will was, and is, not commenced by a plaint. For that reason the Legislature said 'the proceedings shall take, as nearly as may be, the form of a regular suit'. In other words, what the Legislature meant was that when once a proceeding for letters or probate of a will became contentious it should be tried for the sake of convenience as if it were a suit. If this construction is wrong but that of the Allahabad High Court is correct what it will mean is this: A person can apply for letters of administration or probate of a will on payment of a court-fee of Rs. 2, but if he wants to appeal from an order refusing or granting letters or probate he must pay a court-fee of Rs. 10. This means denying justice to poor litigants. I do not think that this could have been the intention of the Legislature when they enacted the Art. 17 (vi), of Sch. 2. This article, in my opinion, applies only to properly constituted suits; i. e. proceedings commenced by plaints, such as a suit instituted under S. 92, Civil P. C.

That being so, the only article that is in my opinion applicable is Art. 11, of Sch. 2, which says in column one as follows: "Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree." Does an order passed on an application for letters of administration or probate of a will have the force of a decree? The Allahabad High Court answers this question in the case cited above in the affirmative. In doing so, it refers to the definition of the decree as given in the present Code of Civil Procedure. That is where the said High Court has, with due respect, again gone wrong. The Code of Civil Procedure that was in existence, as I have pointed out above, at the time the Court-fees Act was enacted was the Code of 1865 In that Code the word 'decree' was not defined. All it explained in S. 189 was how it should be drawn up, and in Chap 4 it set out the various methods of executing decrees. Therefore if an order could not be executed as if it were a decree, it could not have the force of a decree. In that light the word 'decree' as used in this article should, in my opinion, be considered. Now, can an order passed on an application for letters or probate be executed? I have no doubt in my mind that it cannot. It does not, as I have said above, decide the rights or liabilities of anybody. All it decides is as to who should represent the estate of a deceased person and the person in whose favour such an order is passed must still file a suit for recovery of the estate if the estate happens to be in the possession of another person. Therefore in my opinion, this article was specially designed and enacted to meet a case of this kind.

An order granting or refusing letters of administration or probate of a will is appealable not because it has got the force of a decree, but because there is a special provision, namely S. 299, Burma Succession Act, which confers the right of appeal. For all these reasons I hold that the court-fee payable on a memorandum of appeal from an order refusing or granting letters of administration or probate of a will is Rs. 2 under Art. 11, Sch. 2, Court-fees Act.

K.B./R.K. *Order accordingly.*

## * A. I. R. 1938 Rangoon 145

SPARGO J.

*U Lat and others* — Appellants.

v.

*U Pon Gaung* — Respondent.

Special Second Appeal No. 322 of 1936, Decided on 31st May 1937, against decree of Dist. Court, Lower Chindwin at Monywa, in C. A. No. 38 of 1935.

**(a) Compromise — Suit between parties compromised in accordance with terms in compromise deed — Suit allowed to be decreed for certain amount—Compromise not embodied in decree — Parties intending to define their rights under compromise deed and not under consequent decree—New suit based on compromise is maintainable as compromise did not merge in former decree.**

Where a suit was compromised by the parties in terms reduced to writing in a deed and they asked the Court to merely pass a decree for a certain sum only and did not get terms of the compromise incorporated in a decree, because the parties intended to get their rights defined in accordance with the terms of the compromise deed only without taking any notice of the decree passed:

*Held* that a new suit could be founded on the compromise deed which did not merge in the decree of the former suit: *A I R 1929 Lah 291 and A I R 1928 Cal 527, Disting.*; *3 L B R 243, Rel. on*; *A I R 1930 Lah 937, Ref.* [P 147 C 2]

*** (b) Charge — Charge to take effect on future contingency is valid.**

A charge on immovable property can be created to take effect on a future contingency: *Case law referred.* [P 148 C 2]

**(c) Principal and Agent — No formalities required for constituting agency—One person allowing another to do certain acts with his property, with his knowledge or consent—Such other person is agent.**

No particular formality would be required with the constitution of agency, and if one person allows or causes another man to do a certain act relating to his property with his consent or knowledge then the man who does the act must be taken to be acting as the other man's agent. [P 149 C 1]

**Ba Thaung** — *for Appellants.*

**Chan Htoon** — *for Respondent.*

**Judgment.** — In the year 1930, Maung Pon Gaung sued Maung Lat for the recovery of Rs. 1515 in Civil Suit No. 6 of 1930 in the Subdivisional Court of Yinmabin. On 25th October 1930 a written agreement was filed signed by both the parties and so far as the language of the document can be reduced to certainty reads as follows :

> In the abovementioned suit each party is to pay his own costs and the defendant is to pay Rs. 1000 to plaintiff within a year. If he cannot do that let the plaintiff take possession of the lands, houses, barracks, compounds, gardens and trees standing thereon in accordance with (our) written agreement. As the plaintiff is willing (for this to be done) let a decree be passed for Rs. 1000 in favour of the plaintiff against the defendant in pursuance of plaintiff's and defendant's agreement.

On the same day the Subdivisional Court passed judgment remarking : "Both parties then filed written agreement on the fixed date to decree the amount, Rs. 1000 without costs" and a decree was passed and signed on 26th October 1930, ordering that the defendant do pay to the plaintiff the sum of Rs. 1000 only. On 21st May 1935, Maung Pon Gaung sued U Lat and four others for recovery of Rupees 1500 being principal and interest due on a registered agreement and for a declaration that the plaintiff had a charge on the properties agreed to be delivered under the agreement and for sale of the said properties. In this suit the plaintiff produced a deed Ex. A. This is a registered instrument and is dated the 25th October 1930 and is the agreement referred to in the compromise petition filed in Civil Regular Suit No. 6 of 1930. Defendant 2 in this present suit is the wife of U Lat and the other defendants are persons into whose hands the property in question has passed. Ex. A reads as follows :

> On 5th October 1930 this deed of agreement is executed between the abovenamed plaintiff and defendant with mutual consent as follows :
>
> Whereas a suit was filed against the defendant by the plaintiff in Civil Regular Suit No. 6 of 1930 of the Subdivisional Court of Yinmabin for recovery of Rs. 1515 : Whereas it was agreed that the sum of Rs. 1000 should be paid to the plaintiff by the defendant each party bearing his own costs, whereas the defendant undertakes to pay the said Rs. 1000 in full within one year from this date, failing which the plaintiff may take outright possession of the paddy lands, measuring altogether 9.34 acres, as per the annexed true extracts from the register of land for 1930—31
>
> . . . . . .

and then follows a particular description of the lands now in question.

The plaint sets out that the plaintiff sued the defendant in Civil Regular Suit No. 6 of 1930 and that a consent decree for Rs. 1000 was passed in favour of the plaintiff against defendant 1. It proceeds to say that :

> In satisfaction of the above decree, defendant 1 executed with the plaintiff an agreement as per registered exhibit deed, dated 25th October 1930, whereby defendant 1 agreed to pay Rs. 1000 within one year from the date of execution and in default to deliver to the plaintiff the immovable properties mentioned in the deed . . . . .

The plaintiff sued the defendant for Rs. 1000 and Rs. 500 interest and claimed that he was entitled to a declaration that he had a charge upon the properties agreed to be delivered in default of the payment of Rs. 1000 and interest. For the defence, the deed Ex. A was admitted but it was argued that the plaintiff's claim for Rs. 1000 is barred by the decree passed in Civil Regular Suit No. 6 of 1930 of the Subdivisional Court of Yinmabin. It was suggested that the plaintiff was not entitled to a declaratory decree; the plaintiff's remedy was to sue for specific performance according to the Exhibit deed. As to defendant 2, it was stated that the original loan was not taken for her benefit ; the properties in question were the inherited properties of defendant 2 and not the joint properties of the marriage. In para. 8 of the written statement defendant 1 says that the plaintiff has no longer charge on the suit properties in view of the decision in Civil Regular Suit No. 7 of 1934 of the Township Judge, Yinmabin, and in appeal.

The Sub-divisional Court of Yinmabin framed eight issues and found that a charge was created on the properties mentioned in the deed Ex. A ; that defendant 2 was as much liable for the debt as defendant 1, her husband; that the transfers of the property by defendant 1 to defendants 3, 4 and 5 were not with intent to defraud the plaintiff; that defendants 3, 4 and 5 had notice of the existence of the deed Ex. A ; that the plaintiff was entitled to interest at the rate of Re. 1-4-0 per cent. per mensem from 25th October 1931 up to 25th May 1935; and accordingly the Court granted a preliminary decree for sale of the properties in dispute in the form of a simple mortgage decree for the amount sued for, six months time being allowed for redemption. On appeal to the District Judge, Monywa, the first matter that he had to deal with was whether the suit was maintainable or not. It was said that the agreement arrived at on 25th October 1930, which is the document Ex. A, was rendered nugatory and unenforceable by the decree passed in the suit. The learned District Judge found that Ex. A was executed before the decree in the suit : that the agreement was enforceable; that the intention of the parties was that the agreement should be valid and binding on both and that the decree passed in Civil Regular Suit No. 6 of 1930 should not be executed. The learned Judge answered the question whether the suit was barred by S. 47, Civil P. C. by holding that :

> As the plaintiff-respondent is basing his suit on a separate agreement, the question involved does not relate to the execution of the decree in Civil Regular Suit No. 6 of 1930 and therefore S. 47, Civil P. C., is inapplicable and the suit is not barred by the provisions of that Section.

The learned District Judge found that Ex. A created a charge as defined in S. 100, T. P. Act, over the properties mentioned in the deed. He also found that the agreement Ex. A was executed with the knowledge and consent of appellant 2 and therefore that she was bound by the charge created by Ex. A on the joint property. On the question of interest, the learned District Judge found that the learned Sub-divisional Judge was wrong in allowing interest at Re. 1-4-0 per cent. per mensem and he only allowed interest at Court rate from the date of institution of the suit. The decree was modified and became one in the form of a simple mortgage decree for the sum of Rs. 1000 over the properties mentioned in the deed Ex. A excluding the house which is no longer in existence. In this Court U Ba Thoung for the appellant pointed out that the date of Ex. A was 25th October 1930 and the date of the decree in Civil Regular Suit No. 6 of 1930 was 26th October 1930. Referring then to the application filed in Suit No. 6 of 1930 he pointed out that the language used in this application meant that the parties asked the Court to pass a decree according to the compromise. This the Court did not do; but Maung Pon Gaung did not do anything to set that right and the time for execution of this decree lapsed. Reference was made to A I R 1929 Lah 291,[1] part of the headnote of which case reads :

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[1] Attar Chand v. Chandu Lal, A I R 1929 Lah 291=117 I C 240=10 Lah 685=30 P L R 112.

Where not the whole but only one part of a compromise is recorded in the order of the Court, the compromise is not enforceable.

This case does not seem to me to be in point at all. It was a case in which a lessee had been sued by his lessor for rent calculated at the rate of Rs. 512 per mensem. The suit ended with a compromise between the parties, according to which the lessee agreed to pay rent at Rs. 600 per mensem from 1st November 1925 and the plaintiff lessor promised that he would let the lessee use a certain door. This compromise was verbal, but the Court took down the statements of the parties and then recorded an order embodying the lessee's promise and not that of the lessor. In a subsequent suit for rent of the same premises, the plaintiff sought to recover rent at the rate of Rs. 600 a month on the strength of the agreement reached in the previous case and it was held that because the whole of the agreement reached had not been recorded therefore it was not enforceable. This is intelligible but it does not throw any light on the present proposition. Mr. Chan Htoon for the respondent referred to A I R 1928 Cal 527.[2] This was a case in which a decree had been obtained and an appeal was preferred. During the pendency of this appeal, it was represented to the Court on behalf of the defendants that there had been an adjustment of the said decree and that therefore the appeal would not be proceeded .with. The Court thereupon disposed of the appeal by dismissing it for default. Subsequently the decree-holder sought to execute the decree which had been passed originally and the Court held that an executing Court could not take cognizance of the agreement that had been reached and that the judgment-debtors would have to institute a separate suit to restrain the decree-holder from executing the decree. This case does not throw much light on the problem before us.

3 L B R 243[3] seems to be a case more nearly in point. In that case there was a compromise which was not reduced to writing and recorded under S. 375, Civil P. C. now O. 23, R. 3. Apparently all that was done was that a petition was filed simply asking to withdraw the suit and in the written note the Judge recorded that there had been a compromise. Hartnoll J. held that there seems "to be no bar to a suit being brought on the terms of the compromise." Reference was also made to A I R 1930 Lah 937[4] wherein it was held that when a compromise merges in a decree and that decree is set aside the compromise does not become extinct. It is therefore said :

> The contract of the parties is nonetheless a contract and subject to the incidents of a contract because there is superadded the command of a Judge.

It was argued by Mr. Chan Htoon that the agreement between the parties was recorded in Ex. A and that it was not their intention that the suit that was then pending between them should be ended in the regular way by a decree being passed in accordance with their agreement. Accordingly they applied to the Court merely to pass a decree for Rs. 1000. This was not intended by them to be taken seriously. It was merely the means adopted by them to put a stop to the civil suit of which they did not intend to take any further notice; but their rights were to be defined by Ex. A. I think it is quite clear that that was the intention of the parties. If they had intended the matter that had been incorporated in Ex. A to be perused in the form of a decree they would certainly have asked for a decree in those terms to be issued. I think that that being the intention of both the parties, it is clear that a suit can be founded on Ex. A because Ex. A does not merge in the decree passed in Civil Suit No. 6 of 1930. The next point that arose for consideration was whether a charge was created by the document Ex. A over the property mentioned in it. Ex. A stipulates that a thousand rupees should be paid within a year, and if the defendant failed to do that, then the plaintiff was to be entitled to take outright possession of certain immovable property.

It was suggested that because the document Ex. A did not create a charge to take effect immediately but only at some future time, it did not create a charge within the meaning of S. 100, T. P. Act, and 14 Cal 687[5] was referred to in support of this contention. This was a case which was very similar to the present case, and the judgment of the Bench in that case was :

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[2] Azizur Rahman v. Aliraja Choudhry, A I R 1928 Cal 527=113 I C 9=32 C W N 434.

[3] Bi Ya v. On Gaing, (1905-06) 3 L B R 243.

[4] Shadi Ram v. Amin Chand, A I R 1930 Lah 937=130 I C 513.

[5] Madho Misser v. Sidh Binaik Upadhya, (1887 14 Cal 687.

> When the Legislature speaks of a charge under S. 100 it speaks of something which operates as a charge upon land immediately as it is executed.

Section 100, T. P. Act, does not appear to me to contain any words requiring that if a charge be created, it must be one to take effect immediately, and no reasons are given in 14 Cal 687[5] for the decision. The conclusion has been dissented from by the Lahore High Court in 16 Lah 137,[6] where Tek Chand J. comments on the passage from 14 Cal 687[5] that I have quoted above, and says as follows:

> But with all respect to the learned Judges who decided those cases, I feel bound to say that the broad proposition of law enunciated therein cannot be supported either on the wording of S. 100 or on general principles.

He goes on to say that the observations in 14 Cal 687[5] had been adversely commented upon by Ghosh in his standard work on the "Law of Mortgages in India" and by Mulla in his recently published "Commentary on the Transfer of Property Act"; and he expressed his agreement with Coutts-Trotter J.'s view that a charge to secure a liability which is not a liability existent in praesenti but is contingent and liable to arise in the future is valid under S. 100, T. P. Act. In 7 Pat 584,[7] 14 Cal 687[5] was not followed. In 78 I C 457[8] it has been held that a mortgage can be created for the discharge of a contingent liability and that

> a present hypothecation of property to secure a future liability to repay the mortgage money if the mortgagee should be deprived of possession of the mortgaged property amounts to a mortgage.

In 21 M L J 562[9] it was held obiter that a charge may be created on the happening of a condition where the condition itself is first stipulated and the condition happens afterwards. In that case Sir Charles Arnold White, Kt., Chief Justice, said:

> Moreover I feel some doubt as to whether I should be prepared to follow the decision of the Calcutta High Court (in 14 Cal 687[5]) based as it was upon the ground that the instrument did not create a charge at the time of its execution, but that it only operated so as to bring the charge into existence on non-payment of the principal money, that is on default. The contingency which the learned Judges had in view was the contingency of the mortgagor not fulfilling his convenant to pay. I should doubt, if on that ground alone, the instrument could be properly held not to create a charge within the meaning of S. 100, T. P. Act.

A similar view was taken in 33 M L J 58.[10] There is no support therefore for 14 Cal 687[5] in any of the other High Courts. It was suggested indeed that the Calcutta High Court had departed from the view which it had expressed in 14 Cal 687,[5] and reference was made to 55 C L J 198,[11] but I cannot find that there is any support for this view. In fact, this case itself lays down that a charge cannot be created on a future contingency. Taking into consideration the difficulty in interpreting the Section as it has been interpreted in 14 Cal 687,[5] and the cases in the other High Courts quoted above in which the opposite view has been taken, I find with the greatest respect that it is impossible to hold that a charge cannot be created to take effect on a future contingency. I therefore find that a charge was created by Ex. A over the properties mentioned therein. The final point which was argued for the appellants was that as Ma Khin Gyi, the wife of U Lat, did not sign Ex. A therefore her interest in the property charged was not affected. And it was said that Ma Khin Gyi had nothing to do with the original loans taken by U Let on promissory notes. The findings of the lower Courts were that the original loans taken by U Lat on the promissory notes were not for the wife's benefit but that Ex. A was signed by U Lat with the knowledge and consent of his wife. For Ma Khin Gyi, it was argued that because the original loans were not taken with her knowledge and consent therefore her interest is not bound by Ex. A. For the respondent, it is argued that Ex. A forms a new starting point and that Ma Khin Gyi is bound by that although she was not a party to the debts on the promissory notes.

In my opinion, Ex. A does form a new starting point. It was a new contract between the parties. The debts due on the promissory notes were put an end to when Ex. A was signed and the important point to be considered is whether, as Ex. A was signed with Ma Khin Gyi's knowledge

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6. Kesri Mal-Umrao Singh v. Tansukh Rai-Kidar Nath, A I R 1934 Lah 765=153 I C 1064=16 Lah 137.
7. Murat Singh v. Pheku Singh, A I R 1928 Pat 587=110 I C 526=7 Pat 584=9 P L T 748.
8. Nand Lal v. Dharamdeo Singh, A I R 1925 Pat 288=78 I C 457.
9. Balasubramania Nadar v. Sivaguru Asari, (1911) 21 M L J 562=11 I C 629.
10. Imbichi v. Achampat Avukoya Haji, A I R 1918 Mad 674=39 I C 867=33 M L J 58.
11. Mohini Debi v. Purnasashi Gupta, A I R 1932 Cal 451 = 138 I C 24 = 55 C L J 198 = 36 C W N 153.

and consent, her interest in the property charged by Ex. A will be bound. The point was not contested by the appellant Ma Khin Gyi. Her arguments were all directed towards showing that because she was not a party to the original debts and because they were taken without her knowledge and consent therefore she cannot be bound by Ex. A; and alternatively, to showing that Ex. A was signed without her knowledge or consent. But I have concluded that the fact that Ma Khin Gyi was not a party to the original loans does not prevent her interest being bound by Ex. A; and there are concurrent findings of fact that Ex. A was signed with her knowledge and consent.

Mr. Chan Htoon therefore argued that U Lat acted as Ma Khin Gyi's agent when he signed Ex. A. No particular formality would be required with the constitution of agency, and if one person allows or causes another man to do a certain act relating to his property with his consent or knowledge then the man who does the act must be taken to be acting as the other man's agent. With this conclusion I agree and therefore the appeal is dismissed with costs.

B.D./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Rangoon 149
### FULL BENCH

ROBERTS C. J., MYA BU
AND DUNKLEY JJ.

*K. L. C. T. Chidambaram Chettyar* — Appellant.

v.

*Aziz Meah and others* — Respondents.

Second Appeal No. 373 of 1936, Decided on 26th January 1938, against decree of Dist. Court, Amherst, D/- 2nd September 1936.

*** Transfer of Property Act (1882), S. 58 (f) —Creation of mortgage by deposit of title deeds - It is sufficient if deeds deposited bona fide relate to property or are material evidence of title or shown to have been deposited with intention of creating security thereon : *11 Rang 239=A I R 1933 Rang 299 =147 I C 1105, Overruled.***

**In order to create a valid mortgage by deposit of title deeds under S. 58 (f), it is not necessary that the whole, or even the most material, of the documents of title to the property should be deposited, nor that the documents deposited should show a complete or good title in the depositor. It is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title, or are shown to have been deposited with the intention of creating a security thereon :** *11 Rang 239=A I R 1933 Rang 299=147 I C 1105*, **Overruled**; *English and Indian case law discussed.* [P 150 C 1]

P. K. Basu — *for Appellant.*

Eunoose — *for Respondents.*

**Dunkley J.**—The suit out of which this second appeal arises has been brought on an alleged mortgage by deposit of title deeds, by the plaintiff-appellant against the defendants-respondents. Defendants-respondents 1 and 2 are the alleged mortgagors. Defendant-respondent 3 is a subsequent mortgagee by a registered deed. Admittedly, respondents 1 and 2 executed a promissory note in favour of the appellant and handed over to him certain documents, but they deny that any mortgage by deposit of title deeds was thereby created, and all three respondents contend that the documents in question are not "documents of title" within the meaning of S. 58 (f), T. P. Act. The suit was dismissed by the Sub-divisional Court of Moulmein on the preliminary issue that the documents relied upon by the plaintiff-appellant in support of his mortgage are not documents of title to immovable property, within the meaning of that expression as used in S. 58 (f), T. P. Act. This decision has been upheld on first appeal to the District Court. It is against these concurrent decisions on this point of law that the present appeal has been filed.

Both Courts relied upon the judgment of Page C. J. in 11 Rang 239.[1] The question for decision in that case was whether a receipt for payment of revenue, commonly called a "tax receipt" is a document of title, within S. 58 (f), T. P. Act, and that case is authority only for the proposition that a "tax receipt" by itself is not such a document of title. In the course of his judgment Page C. J. further made observations which appear to dissent from the judgments in certain English cases of high authority, and he concluded (at p. 256) that the document or documents of title deposited must not only relate to the mortgagor's title to the property but must disclose an apparent title in the mortgagor to the property or to some interest therein. It is upon this conclusion that the lower Courts have relied.

**These observations were obiter as being unnecessary for the decision of the point**

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[1] **V. E. R. M. A. R. Chettiar Firm v. Ma Joo Teen, (1933) 20 A I R Rang 299=147 I C 1105=11 Rang 239.**

before the learned Chief Justice, and from these dicta we are compelled with the greatest respect to express our dissent. In our opinion the correct statement of the law is that in order to create a valid mortgage by deposit of title deeds under S. 58 (*f*), T. P. Act, it is not necessary that the whole, or even the most material of the documents of title to the property should be deposited, nor that the documents deposited should show a complete or good title in the depositor. It is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title or are shown to have been deposited with the intention of creating a security thereon. The law in regard to these "equitable" mortgages is precisely the same in England as it is in India and there is ample English authority for this view : see (1805) 11 Ves 398,[2] (1856) 3 Drew 579,[3] (1857) 24 Beav 223[4] and (1872) 26 L T 752.[5] The decisions in *Roberts* v. *Croft*[4] and *Dixon* v. *Muckleston*[5] were upheld on appeal to the Lord Chancellor. In these appeals, it was pointed out that if the mortgagee was guilty of negligence in allowing the mortgagor to retain in his possession some of the documents of title and thereby enabled the mortgagor to commit a fraud by holding himself out as unincumbered owner of the property, although the mortgage would still be good, the mortgagee's interest might be postponed to an interest vested in another by a later transaction (per Lord Selbourne, L. C. in *Dixon* v. *Muckleston*[5]) but that point does not arise for decision in the present case. The correctness of these decisions have never been questioned in the English Courts, and they have been impliedly followed by their Lordships of the Privy Council in 43 I A 122,[6] an appeal from the Chief Court of Lower Burma, where the legality of a mortgage by deposit of title deeds was not even questioned although the documents deposited sufficed to show an apparent title to the mortgaged property in the mortgagor's parents only and not in the mortgagor. They have been followed by several Indian High Courts, 59 Cal 781,[7] 2 Pat L J 293,[8] 7 Pat 520[9] and 48 Mad 454.[10] Furthermore, our conclusion is in accordance with the decision of a Bench of this Court in 7 Rang 28,[11] a decision which was binding upon Page C. J., (13 Rang 570)[12] but which does not appear to have been brought to his notice.

Now for the purpose in hand, we must assume that the documents deposited with the plaintiff-appellant relate to the land in suit although this is denied by the defendants-respondents and is a fact which will fall to be decided by the original Court. The documents consist of a deed of grant of the land, dated 28th May 1903, in favour of one Ne Kyaw, a record by the revenue surveyor of a report made to him by the parties on 2nd October 1918, of an oral sale by Ne Kyaw to respondent 1, Aziz Meah, and a series of tax receipts showing that Aziz Meah has paid the land revenue on the land transferred since 1918, and therefore raising a presumption that Aziz Meah has been in occupation of the land since the date of the oral sale. The deed of grant is plainly a document which is material evidence of title. A deposit of this document alone with the requisite intention to create a security would, therefore, be sufficient to create a mortgage by deposit of title deeds. But I am prepared to go further in the present case and to say that when all these documents are considered together (and they must be so considered) they suffice to disclose an apparent title in the mortgagor to the property. The judgments and decrees of the Sub-Divisional Court of Moulmein and of the District Court of Amherst on first appeal

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2. Ex parte, Whetherell, (1805) 11 Ves 398.
3. Lacon v. Allen, (1856) 3 Drew 579=26 L J Ch 18=4 W R 693=106 R R 443=61 E R 1024.
4. Roberts v. Croft, (1857) 24 Beav 223=119 R R 1=53 E R 343 affirmed in (1857) 2 De G & J 1=44 E R 887=27 L J Ch 220=6 W R 144.
5. Dixon v. Muckleston, (1872) 26 L T 752=20 W R 619 affirmed in (1873) 8 Ch A 155=42 L J Ch 210=27 L T 804=21 W R 178.
6. Pranjivandas Jagjivandas Mehta v. Chan Ma Phee, (1916) 3 A I R P C 115=35 I C 190=43 I A 122=43 Cal 895=8 L B R 458 (P C).
7. Surendramohan Ray v. Mahendranath Banerji, (1932) 19 A I R Cal 589=140 I C 662=59 Cal 781=36 C W N 420.
8. Bhupendra Nath v. Mt. Wajibunnissa Begum, (1917) 4 A I R Pat 268=39 I C 564=2 Pat L J 293.
9. Elizabeth May Toomay v. Bhupendra Nath Bose, (1928) 15 A I R Pat 304=111 I C 57=7 Pat 520
10. Official Assignee of Madras v. Basudevadoss Badrinarayan Doss, (1925) 12 A I R Mad 723=88 I C 401=48 Mad 454=48 M L J 423.
11. V. E A. R. M. Chettyar Firm v. A. K. R. M. K. Chettyar Firm, (1929) 16 A I R Rang 65=116 I C 475=7 Rang 28.
12. Emperor v. Nga Lun Thaung, (1935) 22 A I R Rang 370=1935 Cr C 1088=158 I C 784=36 Cr L J 1487=13 Rang 570 (F B).

therefrom are therefore reversed, and the Suit (No. 31 of 1936) is restored to the file of the Sub-Divisional Court to be heard and decided on the merits on the remaining issues. These issues will, of course, include inter alia issues on the questions of fact (1) whether the documents in question relate to the property in suit, and (2) whether the documents were deposited with the intention of creating a security thereon. For the former issue, the Sub-Divisional Judge may, with the consent of parties, treat as evidence in the suit the evidence recorded by him on the remand order of this Court, dated 4th May 1937. The plaintiff-appellant is entitled to an order for refund of the court-fees paid by him on the memorandum of first appeal to the District Court and also on the memorandum of second appeal to this Court. The costs of both appeals will follow the result of the suit; advocate's fee of the appeal to this Court ten gold mohurs, which will include the sum of eight gold mohurs awarded by the remand order of 4th May 1937.

**Roberts C. J.** — I agree and I have nothing to add.

**Mya Bu J.**—The documents enumerated in my learned brother's judgment, in my opinion, show prima facie or apparent title of the mortgagors to the land covered by those documents. The grant shows that the original owner of the property was the mortgagors' vendor. The certificate of transfer shows the factum of the transfer having taken place about 14 years before the alleged mortgage. Although it is not a valid document of conveyance, yet it is useful as showing that a transfer as a matter of fact had taken place. Then there were tax tickets, or revenue receipts, which showed that during the years that elapsed between the transfer and the alleged mortgage, the mortgagors were paying the revenue as persons who owned the land. All these facts put together show, in the absence of anything to the contrary, that, under S. 28, read with Art. 144, Lim. Act, the original grantee's right of recovery of the land had been extinguished by lapse of time at the time the alleged mortgage was made. In these circumstances, in my opinion, the documents enumerated in my learned brother's judgment are sufficient to show that there was prima facie title in the mortgagors to the property mentioned in the documents. For these reasons, I agree with the orders proposed by my learned brother.

V.B.B./R.K. *Case remanded.*

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## * A. I. R. 1938 Rangoon 151

### SPECIAL BENCH

ROBERTS C. J., MYA BU AND DUNKLEY JJ.

*In re Commissioner of Income-tax, Burma* — Applicant.

v.

*N. S. A. R. Concern* — Respondent.

Civil Ref. No. 12 of 1937, Decided on 3rd February 1938, made by Commissioner of Income-tax, Burma.

*** (a) Income-tax Act (1922) Burma, S. 10 (2) (ix) — Business of assessee comprising both agricultural income and other taxable income — Assessee cannot deduct from such other income expenditure incurred for earning agricultural income.**

The expression 'such profits or gains', in Cl. (ix) of S. 10 (2) does not include 'agricultural income', and consequently, when the business of an assessee comprises both agricultural income, as defined in the Act, and other (taxable) income, the assessee is not entitled, under S 10 (2) (ix), to deduct from such other income the expenditure incurred for the special purpose of earning the agricultural income. [P 153 C 2]

**(b) Income-tax Act (1922) Burma — Value of English decisions.**

Extreme care must be taken in applying English decisions to cases under the Burma Income-tax Act, because the scheme of the English Income tax Act, 1918, and the scheme of the Burma Income-tax Act, 1922, are entirely different. [P 152 C 2]

A. Eggar — *for Applicant.*

Clark and Mootham — *for Respondent.*

**Dunkley J.**—In this reference, under the provisions of S. 66 (2), Burma Income-tax Act, the question referred for our decision by the Commissioner of Income-tax, Burma, is as follows :

> The assessee having a business which comprises both agricultural and other receipts, is he entitled under S. 10 (2) (ix) of the Act to deduction of all expenditure (including that incurred for the special purpose of realizing the agricultural receipts) after exclusion of the gross agricultural rents in accordance with Ss. 4 (3) (viii) and 2 (1) (a) ?

The material facts can be briefly stated. The assessees, N. S. A. R. Chettyar, a Hindu undivided family business, carry on the usual type of Chettyar banking business at various places in Burma. In the course of that business, they have taken over, in satisfaction of otherwise unrealizable debts considerable areas of agricultural land, and having become the owners of this land they lease it annually to tenants and receive as part of the profits of their business the rents realized from the tenants in respect thereof. The income-tax return of the business for the 1936-37 assessment showed on the credit side only the "non-agricultural" receipts, the rents and profits of the agricultural land owned by them being left out of account; but on the debit side, all expenses (except land revenue) were entered. The assessees themselves, in their return, deducted from the gross expenses a sum of Rs. 5500 as being that portion of their expenses which was attributable to the expenses of realizing the agricultural income. The Income-tax Officer increased the amount of this deduction by Rs. 9719, and thereupon the assessees appealed to the Assistant Commissioner of Income-tax against this decision of the Income-tax Officer. Meanwhile they had been provided with a new ground of objection by the decision of the High Court of Madras in I L R (1937) Mad 734,[1] and relying on this decision they contended that no part of the sum of Rs. 9719 ought to have been disallowed; in fact, it was part of their contention that they were in error in themselves making the original deduction of Rs. 5500. The Assistant Commissioner of Income-tax overruled this contention, but on a consideration of the facts, he reduced the deduction from gross expenses made by the Income-tax Officer by a sum of Rs. 2795. The question of law now before us for decision is whether, when the income of a business consists partly of rents and profits derived from agricultural land and partly of receipts from other and taxable sources, income-tax shall be payable only on the taxable receipts less the gross expenditure incurred in carrying on the whole business, including the expenditure incurred in carrying on that part of the business which is not subject to tax. In our opinion, the answer to this question is clearly in the negative, and that only that portion of the expenditure which is attributable to the "taxable" part of the business may be deducted.

The Section of the Income-tax Act under which the profits of a business are taxed is S. 10, and the part of this section which is relevant for the present purpose reads as follows:

> 10. (1) The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him.
>
> (2) Such profits or gains shall be computed after making the following allowances, namely:
>
> * * * * * * * *
>
> (ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains.

The Madras case in I L R (1937) Mad 734[1] was principally concerned with the application of the provisions of Clause (iii) of sub-s. (2) of S. 10 to a business of the kind which we are now considering, and the question of the extent to which Clause (ix) was applicable was merely incidentally considered in the last paragraph of the judgment, where the following sentence occurs:

> The answer to the second question will admittedly follow from the decision on the first and the answer to it therefore is also in the affirmative.

This is the only reference to Clause (ix) in the judgment, and no reasons for this decision are given, and plainly the decision went by default. We therefore refrain from further comment on the Madras case[1] beyond saying that we by no means agree with the admission made before the Madras Court, that the decision regarding Clause (ix) necessarily follows the decision regarding Clause (iii). Before us, on behalf of the assessees, great stress has been laid on an English decision of the Court of Appeal in (1936) 3 All E R 975,[2] which was referred to in I L R (1937) Mad 734,[1] as having been received in Madras after the arguments in that case had been heard. But extreme care must be taken in applying English decisions to cases under the Burma Income-Tax Act, because the scheme of the English Income-Tax Act, 1918, and the scheme of the Burma Income-Tax Act, 1922, are entirely different. In England a person is assessed to income-tax in respect of his income, while under the Burma Act it is the income which is taxed. Under the English Act, no class of income is outside the scope of the Act, whereas by S. 4 (3), Burma Act, the Act is made inapplicable to a number of classes of income; the English Act merely confers certain exemptions on a person in respect of his income up to a certain amount or of certain kinds, similar to the exemptions conferred on certain classes of income by the provisos to Ss. 8 and 9, Burma Act. Moreover the "expenses deduction" clause (if it may be so called) of the English Act is in different and far wider terms than that of the Burma Act. The rule in the English Act in respect of such deductions reads :

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[1] Chellappa Chettyar v. Commissioner of Income-tax, Madras, (1937) 24 A I R Mad 393=168 I C 160 =I L R (1937) Mad 734 =(1937) 1 M L J 351 (S B).

[2] Hughes v. Bank of New Zealand, (1936) 3 All E R 975.

> In computing the amount of profits or gains to be charged, no sum shall be deducted in respect of (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation.

The distinction between the expression "incurred solely for the purpose of earning such profits or gains" and the expression "expended for the purposes of the trade, profession, employment or vocation" is so manifest as to need no comment. The question before us for decision therefore has to be decided with reference to the provisions of the Burma Income-Tax Act and a reference to decisions under the English Act will afford no assistance.

Now "agricultural income" is defined in S. 2, sub-s. (1) of the Act, and so far as it is relevant for the present purpose means:

> (a) Any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in Burma or subject to a local rate assessed and collected by Officers of Government as such;
>
> (b) any income derived from such land by agriculture.

Section 4, sub-s. (3), Clause (viii), of the Act enacts that the Act shall not apply to agricultural income. In 14 Pat 623[3] their Lordships of the Privy Council held that by this Clause agricultural income is altogether excluded from the Act, howsoever and by whomsoever it may be received.

Section 6 of the Act enacts :

> 6. Save as otherwise provided by this Act, the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing, namely:
>
> * * * * * * * *
>
> (iv) Business.

Section 4, sub-s. (1) enacts :

> 4 (1) Save as hereinafter provided, this Act shall apply to all income, profits or gains as described or comprised in S. 6.

Their Lordships of the Privy Council held in 14 Pat 623[3] (at p. 632) that the effect of the saving words at the beginning of each of these two Sections is to exclude "agricultural income" altogether from the scope of the Act. Hence "business," as defined in S. 6 (iv), does not include the business of leasing agricultural land and receiving the rents, and the expression, "profits or gains of any business", as used in S. 10 (1), does not include "agricultural income." It therefore follows that the expression "such profits or gains," in Clause (ix) of S. 10 (2), does not include "agricultural income," and consequently, when the business of an assessee comprises both agricultural income as defined in the Act, and other (taxable) income, the assessee is not entitled, under S. 10 (2) (ix), to deduct from such other income the expenditure incurred for the purpose of earning the agricultural income.

Mr Clark, for the assessees, has sought to draw a distinction between S. 12 and S. 10 of the Act, and has urged that because the words "from every source to which this Act applies" are used in S. 12, but are omitted in S. 10, therefore S. 10 must be held to refer to profits or gains of every kind. The distinction is merely imaginary. It was necessary to insert these words in S. 12 for, otherwise, the words "every source" would include sources which are outside the scope of the Act, and if Mr. Clark's argument were to be accepted, then agricultural income would be taxable under S. 10 if it formed part of a business, a result which would be contrary to the decision in 14 Pat 623.[3] In my opinion, the case of agricultural income of a business is comparable to that of the profits of a foreign branch of a business (which profits are not brought into Burma); both are entirely outside the scope of the Act: 2 I T C 505[4] and 6 I T C 21.[5] It would never, I imagine, be contended that, where a business in Burma had a branch abroad, the profits of which branch were not assessable, the expenses of running the foreign branch could be deducted under S. 10 (2) (ix). The question referred must therefore be answered in the negative. The Commissioner of Income-tax is entitled to his costs of this reference; advocate's fee 20 gold mohurs.

**Mya Bu J.**—I agree.

**Roberts C. J.**—I agree.

D.S./R.K. *Answered in negative.*

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[3] Commissioner of Income-tax, Bihar and Orissa v Kameshwar Singh, (1935) 22 A I R P C 172=157 I C 289=62 I A 215=14 Pat 623 (P C).

[4] Somasundaram Chettiar v. Commissioner of Income-tax, Madras, (1928) 15 AIR Mad 487 =109 I C 369=54 M L J 486=2 I T C 505.

[5] Provident Investment Co. Ltd. v. Commissioner of Income-tax, Bombay, (1932) 19 AIR Bom 94=135 I C 810=56 Bom 92=33 Bom L R 1587=6 I T C 21.

## A. I. R. 1938 Rangoon 154

ROBERTS C. J. AND DUNKLEY J.

*Bansidhar & Sons* — Applicant.

v.

*Commissioner of Income-tax* — Respondent.

Civil Misc. Appln. No. 56 of 1937, Decided on 10th November 1937.

**(a) Income-tax Act (1922), Ss. 25-A, 26-A—Father and sons assessed for previous years as Hindu undivided family—Subsequent claim to be assessed as contractual partnership — Registration.**

Where a father and sons are annually assessed to income-tax under S. 3 as a Hindu undivided family in respect of the profits of a business and subsequently the father and sons claim that they form a contractual partnership in respect of and for the purposes of carrying on the business and not a Hindu undivided family, produce a partnership deed and apply for registration of the partnership, the application lies under S. 25-A and not S. 26-A. [P 154 C 2; P 155 C 2]

**(b) Income-tax Act (1922), Ss. 25-A and 26-A—Hindu undivided family, assessment as such — Claim for separate assessment as members of contractual partnership — Persons claiming must prove dissolution of joint family.**

The terms "Hindu undivided family" as used in the Income-tax Act has a wider significance than a Hindu joint family known to Hindu law; and before persons who have been previously assessed as a Hindu undivided family can claim to be separately assessed as member of a contractual partnership, they must establish that the joint family has been dissolved. Consequently, where such persons continue to be joint family for all purposes except the business assessed, evidence regarding the growth and origin of the business would plainly be useless: *A I R 1937 P C 36 and A I R 1930 Cal 449, Foll.* [P 155 C 1,2]

**(c) Income-tax Act (1922), Ss. 25 A and 66 (3)—Manner of enquiry is discretionary with Income-tax Officer—Decision cannot be canvassed before High Court.**

Under S. 25-A, when a claim is made, the Income-tax Officer shall make such enquiry thereinto as he may think fit; that is, he has a discretion to conduct that inquiry in such manner as may seem to him in his judgment to be best in the circumstances of the particular case and to hear such evidence, and such evidence only, as he may in his discretion consider it necessary to hear to enable him to come to a decision on the question whether a separation of the members of the family has taken place or not. His decision is a decision on a question of pure fact, and so long as his discretion is not exercised arbitrarily or fancifully, and there are before him some materials on which he can arrive at the conclusion at which he has arrived, his decision cannot be canvassed before the High Court on an application under S. 66, because no question of law can arise thereout. [P 155 C 2]

D. G. Daniel — *for Applicant.*

Advocate-General — *for Respondent.*

**Dunkley J.** — This is an application under S. 66, sub-s. (3), Income-tax Act, by one Bansidhar and his five sons, who admittedly form a Hindu joint family but it is now alleged that the business in respect of which they have been assessed to income-tax is not joint family property. From the year 1932 33 they were annually assessed to income-tax under S. 3 of the Act as a Hindu undivided family in respect of the profits of this business, but when the time came for the assessment for the year 1936-37, a claim was made that Bansidhar and his five sons formed a contractual partnership in respect of and for the purpose of carrying on this business, and not a Hindu undivided family. The deed of partnership between them was ultimately produced, although there was considerable delay in its production, and an application purporting to be under S. 26-A of the Act was made for the registration of this partnership for the purposes of the Income tax Act. The Income-tax Officer held an enquiry and came to the conclusion that the family still remained undivided and refused to register the partnership. His decision on this point was upheld on appeal by the Assistant Commissioner of Income-tax, and further on revision of the latter's order by the Commissioner of Income-tax. It is out of the final order of the Commissioner that the present application has arisen.

Now the question of law on which by their application the applicants desire us to require the Commissioner of Income-tax to state a case is propounded in para. 13 of the present application as follows:

> Is it legal in the circumstances of this case to hold that there is no partnership between Bansidhar and his five sons; or, in other words, is it legal for the head of a Hindu joint family who has no ancestral property to enter into a partnership with his sons in respect of his own self-acquired or separate business, which was built up by him individually without the employment of any ancestral funds, even though he and his sons live together as a Hindu undivided family?

But in the course of the argument it has been admitted by learned counsel for the applicants that this question does not cover the real grievance of the applicants and does not arise out of the order of the Commissioner of Income-tax. The real grievance of the applicants is entirely different and has arisen under these circumstances. By an order dated 11th January 1937, the Commissioner directed the Income-tax Officer, Magwe, to record any evidence called by the applicants to establish that this business was not created out of ancestral property; this evidence was to be heard at Taungdwingyi, where the business is carried on. Subsequently, on 16th March, on the representation of the applicants that several of the witnesses whom they desired to call resided in Rangoon, the Commissioner directed the Income-tax Officer to cause these Rangoon witnesses to be examined on commission. For some reason this was not done, and the proceedings were returned to the Commissioner without these Rangoon witnesses having been examined. The Commissioner before passing orders failed to examine these Rangoon witnesses. He declined to hear them on the ground that the applicants desired to adduce this evidence to show that the business was started without capital and was built up by the sole efforts of the head of the family, and even if these facts were established they would not assist the applicants in proving that they do not constitute a Hindu undivided family within the meaning of that term as used in the Income-tax Act. The grievance of the applicants is the refusal of the Commissioner to examine these witnesses. Their learned counsel now admits that the question which he desires to have referred ought to be framed in some such form as the following:

> Whether the order of the Commissioner of 23rd April 1937, is good in law in view of his refusal to examine all the witnesses tendered for the purpose of proving the alleged partnership.

Now in I L R (1937) 1 Cal 653[1] their Lordships of the Privy Council have pointed out that the term "Hindu undivided family" as used in the Income-tax Act has a wider significance than the Hindu joint family known to Hindu law; and in 57 Cal 1336[2] Rankin C. J., pointed out that before persons who have been previously assessed as a Hindu undivided family can claim to be separately assessed as members of a contractual partnership, they must establish that the joint family has been dissolved. In view of the admission of the applicants that for all purposes, other than this business, they continue to be a joint family, evidence regarding the origin and growth of this business would plainly be useless in this case. Apart from this consideration, this application fails on another ground. The application to the Income-tax Officer for registration of the firm has been treated throughout, by the Income-tax Officer, by the Assistant Commissioner and by the Commissioner of Income-tax, as an application under the provisions of S. 26-A of the Act although it did not comply with the provisions of this Section and the rules made thereunder. Clearly this application lay, not under the provisions of S. 26-A but under the provisions of S. 25-A, which has reference to a claim made by or on behalf of a Hindu family which has hitherto been assessed as undivided that partition has taken place among the members of the family. The provisions of this Section were plainly applicable to the original claim made by the applicants.

Now, under S. 25-A, when such a claim is made, the Income-tax Officer shall make such enquiry thereinto as he may think fit, that is, he has a discretion to conduct that inquiry in such manner as may seem to him, in his judgment, to be best in the circumstances of the particular case and to hear such evidence, and such evidence only, as he may in his discretion consider it necessary to hear to enable him to come to a decision on the question whether a separation of the members of the family has taken place or not. His decision is a decision on a question of pure fact, and so long as his discretion is not exercised arbitrarily or fancifully and there are before him some materials on which he can arrive at the conclusion at which he has arrived, his decision cannot be canvassed before the High Court on an application under S. 66, because no question of law can arise thereout. There is in the present case, in the admissions of the applicants alone, ample material on which the Income-tax Officer, and subsequently the Assistant Commissioner of Income-tax, could arrive at the decision at which they did arrive, and the applicants cannot be heard under the provisions of S. 66 to complain that in the exercise of his discretion the Commissioner of Income-tax declined to hear certain evidence. This application therefore fails and is dismissed with costs 10 gold mohurs.

**Roberts C. J.** — I agree.

V.B./R.K. *Application dismissed.*

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[1] Kalyanji Vithal Das v. The Commissioner of Income-tax, Bengal, (1937) 24 A I R P C 36 =166 I C 445=64 I A 28=I L R (1937) 1 Cal 653 (P C).

[2] In re Bissesswarlal Brijlal, (1930) 17 A I R Cal 449=128 I C 827=57 Cal 1336=34 C W N 363 (S B).

## A. I. R. 1938 Rangoon 156

MOSELY AND DUNKLEY JJ.

*Nga Aung Nyun* — Appellant.

v.

*The King.*

Criminal Appeal No. 1331 of 1937, Decided on 1st December 1937, from order of Sess. Judge, Myingyan, D/- 3rd November 1937.

**Criminal Trial — Murder — To establish murder fact that injury was in fact sufficient in ordinary course of nature to cause death is not enough Intention of accused to cause such injury must be proved.**

Cases of homicide cannot be decided by adherence to mechanical rules; the decision in each case must depend upon the knowledge and intention with which the injuries were inflicted, and the knowledge and intention of the culprit must be judged with reference to the particular circumstances of each case, and in arriving at a decision on this crucial point reported cases can be of very little assistance. To establish the offence of murder, it is not sufficient that the injury inflicted was in fact sufficient in the ordinary course of nature to cause death: it must further be proved that the assailant intended to cause an injury of this kind: *A I R 1937 Rang 396, Rel. on.* [P 157 C 1,2]

Where it is doubtful whether the accused had the intention of causing injury sufficient in the ordinary course of nature to cause death, death caused by a blow inflicted with a sharp-edged weapon with such violence as to sever completely the upper arm is the offence of culpable homicide not amounting to murder, under the first Clause of S. 304 of the Penal Code. [P 157 C 2]

Tun Shein — *for Appellant.*

Tun Byu, Govt. Advocate — *for the King.*

**Dunkley J.**—The appellant Aung Nyun was a stranger to Phettaw village. He came there about a year ago and, having been introduced to Ma Min Kalay (P. W. 1) by her brother, he stayed in the house of Ma Min Kalay and her husband Maung San Mya (P. W. 2) Ma Shwe U, whose death forms the subject-matter of the principal charge against the appellant, was their daughter. About three months after the appellant arrived at Phettaw, he eloped with one Ma Bein Ma but brought her back to her parents' house after a few days. Six months later he married Ma Bein Ma and went and lived in her parents' house, but he remained on intimate terms with Ma Shwe U's family. On 2nd July 1937 he eloped with Ma Shwe U, and as she was under 16 years of age, her parents made a report of kidnapping against the appellant, to the police, who recovered Ma Shwe U and arrested the appellant. Some days later the appellant was released on bail. On the evening of 13th July, about dusk, while Ma Shwe U was lying in bed in the inner room of her parents' house, Ma Min Kalay was sitting on the verandah smoking and Maung San Mya was in the kitchen cooking the dinner, a man came into the house by the front and cut Ma Min Kalay on her left upper arm with a da. He then entered the bedroom and cut Ma Shwe U on the upper third of her left arm as she lay in bed; and as he was leaving the house he was confronted by San Mya, who had come out of the kitchen on hearing the cries of his wife and daughter, and he cut San Mya also on the left upper arm. Then he made his escape followed by San Mya, who was brought back to the house by neighbours who came to the scene.

There can be no doubt as to the identity of the appellant as being the assailant who inflicted injuries with a da on these three persons. He was immediately denounced by Ma Min Kalay, Ma Shwe U and Maung San Mya. Their cries, stating that they had been cut by Maung Aung Nyun with a da, were heard by their neighbours, Ma Naing (P. W. 3), Ma Thein Me (P. W. 4), Maung Pan Nyo (P. W. 5) and Maung Phu Nyo (P. W. 6). These witnesses have all deposed that when they hurried to the scene on hearing the cries they saw and identified the appellant, carrying a da, running away from the direction of Maung San Mya's house. Ma Shwe U, Ma Min Kalay and Maung San Mya denounced the appellant to the headman when the latter made enquiries immediately after the occurrence, and at the same time the other witnesses informed the headman that they had indentified the appellant. The appellant's defence is that he has been denounced on suspicion because he had eloped with Ma Shwe U; but this elopement and the subsequent criminal charge against him form a motive for the crime. The only matter which can be alleged against the evidence of these witnesses is that they are related to the deceased, but one of the witnesses, Maung Phu Nyo, is not related. The evidence of the two witnesses called for the defence, one of whom is the appellant's own sister, does not help the appellant, because the witnesses are unable to depose with certainty that the events of which they speak occurred on the same evening as this attack on Ma Shwe U and her parents. It has been proved beyond doubt that the appellant was the assailant of these three persons. In regard to the injuries inflicted on Ma Min Kalay and Maung San Mya, the appellant has been convicted on two separate charges under S. 326, Penal Code, but the learned Sessions Judge wrongly refrained from passing any sentence in respect of these convictions. The medical evidence shows that the bones of the left upper arm of both Ma Min Kalay and Maung San Mya were cut, and therefore the convictions are correct. The appellant is sentenced to undergo rigorous imprisonment for a term of five years for each of these offences. The injuries on Ma Shwe U were more serious. There were two wounds caused by the same blow. Her left arm was completely severed, except for a small piece of tissue on the inner side. The weapon also penetrated the left side of the chest at the back and caused a superficial injury to the spleen. She was admitted into the Myingyan hospital at 3 o'clock in the morning on 14th July and died at 7-50 A. M. on the same day. For causing the death of Ma Shwe U the appellant has been convicted of the offence of murder and sentenced to death.

In my opinion the offence of murder was not committed by the appellant. I must not be understood to say that in no case could the causing of death by an injury of this kind amount to murder, for, it is easy to imagine circumstances in which the infliction of such an injury would clearly amount to murder. Cases of homicide cannot be decided by adherence to mechanical rules ; the decision in each case must depend upon the knowledge and intention with which the injuries were inflicted, and the knowledge and the intention of the culprit must be judged with reference to the particular circumstances of each case, and in arriving at a decision on this crucial point reported cases can be of very little assistance. In the present case, the girl Ma Shwe U was obviously attacked while she was lying in bed on her right side. She was at the mercy of her assailant. If he had intended to cause her death, or to cause to her bodily injury sufficient in the ordinary course of nature to cause death, surely he would have inflicted his blow on her head or neck, and would probably have repeated his blow several times ; whereas he actually cut her once only and aimed the blow at her upper arm. To establish the offence of murder, it is not sufficient that the injury inflicted was in fact sufficient in the ordinary course of nature to cause death : it must further be proved that the assailant intended to cause an injury of this kind : Per Roberts C. J. in 1937 R L R 384[1] at p. 390. In the particular circumstances of the present case it is doubtful whether the appellant had the intention of causing injury sufficient in the ordinary course of nature to cause death, and the appellant must be given the benefit of this doubt. The nature of the injury inflicted on Ma Shwe U does however make it clear that the appellant intended to cause such bodily injury as was likely to cause death; a blow inflicted with a sharp-edged weapon with such violence as to sever completely the upper arm could not be inflicted with any less intention. The offence committed by the appellant was therefore the offence of culpable homicide not amounting to murder, under Cl. 1 of S. 304, Penal Code The conviction and sentence under S. 302, Penal Code, are therefore set aside, and instead thereof the appellant is convicted of an offence under S. 304, Cl. 1. In view of the brutality of his attack on this defenceless girl, the appellant deserves the maximum punishment under that Section, and consequently he is sentenced to undergo transportation for life. It is directed that the three sentences shall run concurrently. The sentence of death is not confirmed.

**Mosely J.**—I agree. It may be instructive to give an example of a case where the intention was to cause an injury sufficient in the ordinary course of nature to cause death, but the injury was one which might not in some cases have caused death but happened to cause death. That is to say it is the intention which has to be looked to, as was said in 1937 R L R 384[1] at pp. 390 and 391. If, for example, a man is bound and lying helpless on a table with his arms outstretched, and the assailant says to a by-stander, "I will lop off his arms," and proceeds to cut the man severely on one arm, but is interrupted and prevented from achieving his full intention, and if the wound inflicted happens to cause death, for example by gangrene supervening, then the case will fall under Cl. 3 of S. 300, Penal Code and the assailant will be guilty of murder, though in many cases such an injury might not have proved sufficient in the ordinary course of nature to cause death.

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[1] King v. Abor Ahmed, (1937) 24 A I R Rang 396=171 I C 574=1937 R L R 384=38 Cr L J 1097.

D.S./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 158

ROBERTS C. J. AND DUNKLEY J.

*In the matter of U Po Aung, Higher Grade Pleader, Sagaing.*

Civil Misc. Appln. No. 48 of 1937, Decided on 10th November 1937.

**Legal Practitioners Act (1879), S. 13 — Advocate trustee undertaking responsibility for defalcations by co-trustee — No criminal responsibility—No disciplinary action called for.**

Where an advocate who is one of the trustees of an institution fails to give information to the police when he finds that a co-trustee of his has deprived the trust of money but rather prefers to deal with his co-trustee mercifully and makes himself morally responsible for the defalcation and undertakes responsibility for the defalcation which had arisen, there is no criminal responsibility and he cannot be held to be guilty of any kind of misconduct justifying disciplinary action, even though such advocate may have been negligent in his duties as trustee in the matter of the trust. [P 158 C 2; P 159 C 1]

A. N. Basu — *for Respondent.*

**Roberts C. J.**—In this case we have to consider the conduct of one U Po Aung, a Higher Grade Pleader of Sagaing, upon a report by the District Judge of Sagaing with a view to taking action under S. 13, Legal Practitioners Act, 1879, and although we think that the report is in many respects misconceived, we are glad, in view of the attitude which appears to have been adopted by persons occupying responsible positions at Sagaing, to have this opportunity of removing the stigma which has been unjustly cast upon a Higher Grade Pleader whose conduct seems to have been above reproach. It appears that he was the honorary treasurer of the Aungmyelawka Pagoda in Sagaing of which one U Tha Tun was the President, and it may be that with the other duties which U Po Aung had he was unable to give all the attention which he might have desired to give to his duties as honorary treasurer. U Tha Tun, the President, appears to have undertaken to collect certain rents and to have taken the accounts into his own hands, and at a date some three months before U Tha Tun's death he confessed to U Po Aung that he had not got the money to pay the rents which were supposed to have been collected, and he gave U Po Aung an acknowledgment for Rs. 358-3-0.

There is from first to last no suggestion that U Po Aung connived in any misappropriation about to be committed, by U Tha Tun. When he became aware of the circumstances he had two courses open to him: he might have informed the police and there would have then been a criminal prosecution of this man who, as it turned out, was practically on his deathbed, and the pagoda would have lost the money: he might on the other hand have hoped that the money would be paid and refrained from making any report and have made a mental resolve, afterwards implementing that resolve by his conduct, to consider himself morally responsible lest any loss should fall upon the pagoda. U Po Aung adopted the latter course and speaking for myself, I am far from saying that it is not the course I myself should have adopted under the same circumstances. When U Tha Tun died, he sued the estate upon the acknowledgment, and it is not for us to say why no decree was granted to him since that matter is not the subject of an appeal. However he has acknowledged moral responsibility for this sum of money and to that extent has protected the pagoda from loss: Rs. 138-3-0 has already been paid in part liquidation of the debt.

It was suggested in a letter to which our attention has been drawn that U Po Aung might have been criminally liable, but we fail to see what crime he could possibly be alleged to have committed; and it is not made clear by the learned District Judge in his report to us under what sub-section of S. 13, Legal Practitioners Act he suggests that the High Court should take action. Sub-s. (b) deals with misconduct in the discharge of a professional duty, and that is not alleged here; and we think that the learned District Judge, if he had brought his mind to bear upon the question under what sub-section action must be taken, would probably have been driven to suggest sub-s. (f), which says that the High Court may dismiss any pleader for any reasonable cause. The cause for which we are asked to take disciplinary action against U Po Aung is no more than that he failed to give information to the police when he found that a co-trustee of his had deprived the trust of money, but rather preferred to deal with his co-trustee mercifully and make himself morally responsible for the defalcation and undertake responsibility for the defalcation which had arisen. It is enough to say that if we were to take action of a disciplinary character against an advocate under circumstances like these, no advocate who had been swindled would be safe unless he criminally prosecuted the person who had swindled him, and there would be no room for forgiveness or forbearance to be shown by an advocate of the High Court because of his position, although such forgiveness and forbearance is universally considered to be a virtue when practised by other men. This is a position which of course is untenable, and we are glad to have the opportunity of saying that in our opinion U Po Aung behaved throughout so far as his professional duties are concerned with perfect propriety.

**Dunkley J.**—I agree. No doubt the last three years before U Tha Tun's death U Po Aung was negligent in carrying out his duties as honorary treasurer of this trust. He has not denied that he was negligent, and has admitted that because of his negligence he is responsible to make good the defalcations of U Tha Tun. The suggestion that he incurred any criminal responsibility is preposterous. When the defalcations were brought to his notice he did everything in his power to protect the trust funds from loss, and although in consequence of U Tha Tun's death the acknowledgment which he obtained from U Tha Tun has proved in the event to be worthless, he has now repaid a considerable portion of the amount due to the trust out of his own pocket, and will, without doubt, in due course repay the balance. In these circumstances I cannot understand how it can be said that U Po Aung has been guilty of any kind of misconduct which would justify disciplinary action being taken against him.

V.B./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 159

ROBERTS C. J. AND DUNKLEY J.

*In the matter of T. K., a Higher Grade Pleader, Taunggyi.*

**Civil Misc. Appln. No. 43 of 1937, Decided on 18th November 1937.**

**Legal Practitioners Act (1879), S. 13 (f)—Offence under S. 377, I. P. C. committed by pleader cannot be ordinarily condoned—Offence committed in early life—It should not debar person concerned who is making honest attempt to reform, from being admitted as pleader—Pleader concerned not disclosing facts about offence when applying for admission—He commits serious offence—High Court can take him to task for it.**

An offence of the character of one under S. 377, I. P. C. committed by a pleader or advocate cannot be ordinarily condoned. Where, however, the offence was committed very early in life, it ought not to debar the person, committing it, who is making an honest attempt to reform, from ever seeking respectable society or from being a member of an honourable profession. So also where the person committing the offence does not bring the fact to the notice of the High Court at the time of his admission as a pleader, when required to give all necessary information at the time of his enrolment, he commits another serious offence of deceiving the authorities and the High Court is entitled to take him to task for it. Persons applying for being admitted to be pleaders should fully and frankly disclose all the circumstances of their past career with this knowledge that the High Court would take into consideration every matter which ought properly to be dealt with by it. [P 160 C 1]

Rafi — *for Respondent.*

**Roberts C. J.**—This case comes before us for such action as may be necessary under S. 13, Legal Practitioners Act in respect of a higher grade pleader of Taunggyi. He was born in June 1911 and in April 1928 he committed an offence under S. 377, I. P. C., for which he was punished in July 1928 and received a sentence of whipping. It was an offence of a disgraceful character, but in view of the fact that he was only at about his 17th birthday the learned Magistrate dealt with him in a comparatively lenient way. Subsequently the pleader was at college at Mandalay and he was regarded as having reformed, and won for himself a position of respectability and was held in high esteem by the college authorities. Years later, he applied for admission as a pleader and believed that he had atoned during the years which had succeeded his offence for what he had done. He was however asked in making his application whether there were any facts which ought to be brought to the notice of the High Court before he could be admitted as a pleader, and he was tempted wrongly to say that there were none.

The information thus supplied by him was gravely misleading and he has only himself to blame for what subsequently ensued. He tried to deceive the authorities in making his application. The effect of it must have been that ever since he has been wondering whether this past incident in his life would come out, and sooner or later, as it happens with persons who engage in the practice of law and meet with persons who are dissatisfied or angry with them for one reason or another, he has found that complaint has been made about this past incident, and he finds himself in the position in which he is today. We think that, although any suggestion that an offence of this character committed by a pleader or advocate could be condoned, would, of course be impossible, the fact that the offence was committed so early in life ought not to debar a person, who is making an honest attempt to reform, from ever seeking respectable society, or from being a member of an honourable profession.

The other offence, that of deceiving the authorities in his application, is a serious one, and as a punishment (in a sense) for what he has done, the pleader has been brought here and has had to appear by an advocate to ask for leniency being extended to him in view of his conduct. We think that in the special circumstances, it will be wrong not to listen to that appeal, and that despite the past the pleader in question should have the opportunity to belong to the profession which he has so far not disgraced. We hope that the course which has been adopted will be a warning to other persons who apply for entrance into the ranks of the profession fully and frankly to disclose all the circumstances of their past career with the knowledge that the Court will take into consideration every matter which ought properly to be dealt with by it. We take no action therefore against this pleader.

**Dunkley J.**—I agree.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 160

ROBERTS C. J. AND DUNKLEY J.

*In the matter of U, a Lower Grade Pleader, Moulmeingyun.*

Misc. Appln. No. 40 of 1937, Decided on 15th November 1937.

**Legal Practitioners Act (1879), S. 13 (f)—Person convicted of offence of receiving stolen goods is not fit to be pleader.**

A person who is convicted of so serious an offence as of receiving stolen goods, even though the property may not be of very great value, is not fit to be a pleader. [P 160 C 2]

**Roberts C. J.** — In this case the Court has before it a conviction of *U*, a lower grade pleader of Moulmeingyun, who was convicted on 7th May last by the Second Additional Magistrate there of voluntarily assisting in concealing or disposing of four stolen gold buttons, contrary to S. 414, Penal Code, and was bound over to be of good behaviour and ordered to furnish security for a period of one year. He does not appear to have appealed against this conviction, and he must therefore be taken to have been rightly convicted. The circumstances were that on the morning of 14th February this year a lady named Ma Khin Swe had a jacket stolen whilst it was left to dry at the back of the house. On the jacket were four gold buttons, and these were found in the possession of the lower grade pleader who obtained them from the thief and the latter was prosecuted to conviction.

Mg Tun Bwint's defence was that he did not know the buttons were stolen, and that although they were in his possession he was so drunk at the time that it was not possible for him to consider whether they were stolen buttons. The Magistrate disbelieved this defence and there was no appeal. In sentencing him, the Magistrate said that his conviction would carry its effect upon his career, and he therefore treated him with leniency. We do not think that a man who was convicted of so serious an offence as of receiving stolen property, even though the property be not of very great value, (in this case Rs. 13), is fit to be a lower grade pleader. Accordingly the order of the Court is that his name be removed from the register of lower grade pleaders forthwith.

**Dunkley J.**—I agree.

R.M./R.K. *Order accordingly.*

## ✻ A. I. R. 1938 Rangoon 161

BAGULEY AND SHARPE JJ.

*The King*

v.

*Maung Thoung Shwe.*

Criminal Revn. No. 475-A of 1937, Decided on 27th August 1937, from order of Hony. Magistrates, Third Bench, Rangoon, D/- 16th June 1937.

**(a) Motor Vehicles Act (1914), S. 11, Rules under, R. 38-B (Rangoon)—Seizing license from offender is not act carrying into effect any provision of Act—Hence R. 38-B is ultra vires —** (Per *Baguley J.*)

The power to seize a license given under rules framed by Local Government from its owner and keep it for a certain time cannot in any way help to carry into effect the provisions of the Act. It is not even a temporary suspension of the license because it provides that a temporary substitute is to be given for it, and S. 18 only provides for a license to be cancelled or suspended by Local Government or by a Court trying the holder of a license for an offence. R. 38-B must therefore be held to be ultra vires. [P 163 C 1]

**(b) Motor Vehicles Act (1914), Ss. 5, 16 — Arrest of offender is illegal — Offender can be arrested only under S. 57, Criminal P. C. if conditions therein are satisfied**—(Per *Baguley J.*)

For the commission of an offence under the Motor Vehicles Act a person cannot be arrested. The power of arrest given under S. 57, Criminal P. C. will also be of no avail unless and until such offender fails to give his correct name and address. [P 163 C 1,2]

✻ **(c) Motor Vehicles Act (1914), S. 5 — Driving should be reckless having regard to all circumstances of case — S. 279, Penal Code, requires presence of some other person likely to be endangered — Difference between S. 5 and S. 279, Penal Code, explained —** (Per *Baguley J.*)

Section 5, Motor Vehicles Act, deals with reckless driving dangerous to the public having regard to all the circumstances of the case. S. 279, Penal Code, refers to driving in a manner so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person. The difference between these two sections seems to be this. A man may drive a motor vehicle in a manner 'dangerous to the public' even if there is no person actually on the spot to be endangered, the public being regarded as some kind of an all-pervading presence which may reasonably be expected to be at the place at the time. For instance, if a man drives out of a side-road and dashes across a main road into another side-road at sixty miles an hour he may not endanger any person at all because there happened at the moment to be nobody there to be endangered, but he is certainly driving in a manner 'dangerous to the public' having regard to the amount of traffic which may reasonably be expected to be there. Still his offence cannot come under S. 279, Penal Code, because there is not "any other person" who is likely to be hurt. For an offence under S. 279, Penal Code, there must definitely be some other person to be endangered. So, if in driving across the main road in this manner some passer-by only saves his life by a wild leap to safety, then the driver of the vehicle is driving in a manner so rash and negligent as at least to be likely to cause hurt to that person who only saved his life by his agility and an offence under S. 279, Penal Code has been committed. [P 164 C 1,2]

**(d) Criminal P. C. (1898), S. 250 — Magistrate must record reasons shown against order of compensation — Failure vitiates order of compensation.**

Where the Magistrate does not record any statement made by the complainant as showing cause against his being ordered to pay compensation, but merely states the points that he raises, that is not sufficient. The Magistrate must record the words used by the complainant when showing cause unless of course the complainant chooses to put his reason into writing. If this is done and the writing is filed, it will obviously be unnecessary for the Magistrate to record it again, and filing the written submission will in effect be recording the cause shown. Unless this is done order of compensation is invalid. [P 164 C 2; P 165 C 1]

**(e) Criminal P. C. (1898), S. 435 — Powers in revision — Court cannot express opinion on points beyond those provided within S. 435 —** (Per *Sharpe J.*)

It is doubtful whether it is within the province of High Court when acting under S. 435 to canvass and express opinions upon all topics however interesting may be the points of law or practice involved in them, which have arisen in the course of the proceedings before the inferior criminal Court. On revision inquiry is limited to "the correctness, legality or propriety of any finding, sentence or order recorded or passed" and to "the irregularity of any proceedings of such inferior Court." [P 165 C 2]

E. W. Lambert, Govt. Advocate — *for the Crown.*

**Baguley J.** — This case was originally sent for by the Court on its own motion. An examination of the record however shows that various important points arose in connexion with it, and as there seemed to be a considerable misapprehension both by the Motor Vehicles Department and by the Magistrates with regard to the powers of the police in connexion with making arrests under the Indian Motor Vehicles Act, it was thought advisable to have the case heard before a Bench and we have had the advantage of hearing the Government Advocate in connexion with it. The facts which gave rise to the present case are as follows: Sergeant Hill was on point duty at an important cross road in Rangoon. He had with him, acting under his orders, two constables, one of whom belonged to the Motor Vehicles Department. In the course of his duties he stopped the traffic from east to west. The accused was driving a bus and he ran past the traffic signal. According to the Sergeant he bumped into a water carrier : according to the accused he did not actually bump into the water carrier but hit the bucket of water he was carrying. On this, the Sergeant directed his motor vehicle constable to demand the accused's license. What happened immediately after this is in dispute but there is no doubt that the accused did not produce his license. He went to the Sergeant and some kind of an argument ensued. According to the two witnesses who were relied upon by the Magistrates as independent witnesses, after some argument the Sergeant put his hand on the accused's shoulder, demanded the license and said that he would take him to the police station if he failed to produce it. The accused tried to get away, ran towards his bus, the Sergeant ran after him, seized him again and a struggle ensued. The Sergeant says the accused kicked him in his private parts and he then hit him. According to the two witnesses, the Sergeant first hit the accused and then the accused kicked him with his knee between the legs. In the end the accused was overpowered and taken to the police station and the Sergeant made a report.

This it would seem was in accordance with the usual practice. In the report the Sergeant has stated his version of what happened and in the report no section of any kind is mentioned. It is a mere statement. According to the Superintendent of Police in charge of the Motor Vehicles Department, this is the proper procedure : the report is forwarded to him and he passes orders himself with regard to whether there should be a prosecution or not. In this particular case the accused was first of all prosecuted under Ss. 5 and 8, Motor Vehicles Act, for reckless or negligent driving and for failing to produce his license. He was acquitted on the charge of failing to produce his license because the license had already been taken away from him by the police in connexion with another case and he only had in his possession a temporary permit. On the charge of reckless and negligent driving he was fined. As soon as this case was over, fresh proceedings were opened against him under S. 353, I. P. C., for assaulting a public servant in the execution of his duty and it is this case which is now under revision. The Bench of Honorary Magistrates before whom the case went examined the witnesses for the prosecution consisting of the Sergeant, two independent witnesses, who were a tramway driver and a tramway line inspector, and the constables who were working under the Sergeant, and then after examining the accused they discharged the accused, directed the Sergeant to pay Rs. 20 compensation under S. 250, Criminal P. C., finding that the charge was false and vexatious and frivolous, and in the judgment it is also stated that the Magistrates proposed to take action against the two police constables through the proper channel because they had perjured themselves.

The first point for consideration is whether the Sergeant had any right to arrest the accused. He seemed to have been under the impression that he had the right to arrest the accused because he failed to make over his license, and reliance is placed on R. 38-B made by the Local Government under the provisions of S. 11, Motor Vehicles Act. The relevant part of Rule 38-B is :

> The Commissioner of Police in Rangoon . . . may empower any Police Officer attached to the Motor Vehicles Department to seize the license of a driver of a motor vehicle who has committed any offence punishable under the Motor Vehicles Act, 1914, within the view of the Police Officer so empowered and issue a receipt for the same which shall be valid in lieu of a license until the license holder's offence is called for trial.

It is of interest to note that this Rule says nothing about what is to happen if the offender is not sent up for trial, nor what is the position of the offender while the trial is proceeding. As the receipt is only valid in lieu of a license until the offence is called for trial the question of whether this Rule is ultra vires arises. S. 11 empowers the Local Government to make rules for the purpose of carrying into effect the provisions of the Act and regulating the use of motor vehicles or any class of motor vehicle in public places. The power to seize a license in this way is given by R. 38-B passed under the second portion of this section; so, we have to examine the question of whether it can be held to be a rule for the purpose of carrying into effect the provisions of the Act. It is clear, it has nothing to do with Part 1 of the Act. Part 2 of the Act is of general application. S. 3 deals with people under the age of 18 years driving a motor vehicle; the Rule has nothing to do with them. S. 4 places on the person in charge of a motor vehicle the duty of stopping and remaining stationary as long as may reasonably be necessary. R. 38-B has nothing to do with him. S. 5 provides the punishment for reckless driving.

Again R. 38-B cannot deal with this section. In Part 3, S. 6 deals with any one who drives without a license. S. 7 says that the holder of a license shall not allow it to be used by any other person. S. 8 says that the driver of a motor vehicle shall produce his license on demand by a police officer. Seizing would clearly come after production. S. 9 says a license shall be valid only within any area specified therein. S. 10 directs the owner of every motor vehicle to have it registered. R. 38-B cannot be said to help to carry into effect any of these provisions. S. 11 gives the rule-making power. S. 12 deals with the driving speed of motor vehicles and so on. S. 13 gives power to exclude any area specified from the operation of the Act. Part 4 deals with motor vehicles temporarily leaving or visiting British India and cannot have any connexion with R. 38-B. In Part 5, S. 16 provides the penalty for breach of the provisions of the Act or rules framed thereunder. S. 17 prescribes what sort of Courts shall try cases under the Act. S. 18 provides for cancelling and suspending licenses by the Local Government or by the Court which convicts the person. S. 19 is the general repealing section.

From this short survey of the Act, it is impossible to see how the power to seize a license from its owner and keep it for a certain time can in any way help to carry into effect the provisions of the Act. It is not even a temporary suspension of the licence because it provides that a temporary substitute is to be given for it, and S. 18 only provides for a license to be cancelled or suspended by the Local Government or by a Court trying the holder of a licence for an offence. R. 38-B must therefore be held to be ultra vires. **Offences under the Indian Motor Vehicles Act, if under S. 5, are punishable with fine which may extend to five hundred rupees and, if under S. 16, are punishable with a fine which may extend to one hundred rupees for a first offence or two hundred rupees for a second offence. Under Sch. 2, Criminal P. C. offences punishable with fine only are not cognizable and the police cannot arrest a person for such an offence only; so, for the commission of an offence under the Motor Vehicles Act a person cannot be arrested. It would appear, however, from the statements made in the Court by some of the police officers examined as witnesses that the police are under the impression that S. 57, Criminal** P. C., gives power of arrest for such offences. S. 57 runs as follows :

> When any person who in the presence of a Police Officer has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

In the present case there is no suggestion that the accused was asked to give his name and address, still less that he refused or gave one which the officer had reason to believe to be false. It is quite clear that if an offence under the Indian Motor Vehicles Act is committed in the presence of a police officer, the police officer could and should demand the name and address of the offender. If this is refused then under S. 57 an immediate right to arrest arises. If he gives his name and address it will not be unreasonable for the police officer to demand the production of his license under S. 8 of the Act because the license will bear the man's name and address, and frequently his photograph is in the license, so the police officer has an immediate chance of verifying from an official record the name and address of the person. If the name and address given by the person is the same as the name and address appearing in the license, then the police officer can have no reason for suspecting that the name and address given is false. If the name and address were not the same, unless there were some external circumstances supervening such as the name and address, say, of a driver vouched for by the owner of the car who is known to the police officer or something of that kind, the right to arrest might arise because the police officer would have reason to believe that the name or address given was false and a refusal to produce the license for no reason at all might also be to the same effect. **If the man makes a statement which is immediately verifiable in a simple manner and refuses to give that verification it might be argued that there are reasonable grounds for suspecting that the name and address were false; but unless these conditions arise, S. 57, Criminal P. C. will not give the police power to arrest merely for an offence under the Indian Motor Vehicles Act. It may seem elementary to labour this point, but in the course of this case the Magistrates examined not only the complainant but also the Superintendent of the Motor Vehicles Department,** Mr. H. C. Mills, and his predecessor, Mr. Gallaghar, and both these officers, according to their statements as recorded, would appear to be a little hazy on this point. It is not however possible for a policeman, who has to act immediately or not at all, to think out quietly all the possible rights of arrest he may have and it seems to me that in this particular case, although he did not know it, the Sergeant had the right to arrest the accused, for, there were prima facie grounds for believing that the accused had committed an offence not only under S. 5, Motor Vehicles Act, but also under S. 279, I. P. C. The wording of these two sections is slightly different and they have to be examined together. S. 5 says :

> Whoever drives a motor vehicle in a public place recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the place, and the amount of traffic which actually is at the time, or which might reasonably be expected to be, in the place, shall on conviction, be punishable with fine which may extend to five hundred rupees.

Section 279, I. P. C., runs as follows :

> Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished . . . . .

Section 5 therefore deals with reckless driving dangerous to the public having regard to all the circumstances of the case. S. 279 refers to driving in a manner so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person. The difference between these two sections seems to me to be this. A man may drive a motor vehicle in a manner "dangerous to the public" even if there is no person actually on the spot to be endangered, the public being regarded as some kind of an all-pervading presence which may reasonably be expected to be at the place at the time. For instance, if a man drives out of a side-road and dashes across a main road into another side road at 60 miles an hour, he may not endanger any person at all because there happened at the moment to be nobody there to be endangered, but he is certainly driving in a manner dangerous to the public having regard to the amount of traffic which may reasonably be expected to be there. Still his offence cannot come under S. 279 because there is not "any other person" who is likely to be hurt. For an offence under S. 279 there must definitely be some other person to be endangered. So if in driving across the main road in this manner some passer-by only saves his life by a wild leap to safety, then the driver of the vehicle is driving in a manner so rash and negligent as at least to be likely to cause hurt to that person who only saved his life by his agility and an offence under S. 279 has been committed. In the present case, on the accused's own admission he was driving recklessly or negligently because he says the momentum of his car was too great and he ran past the hand stretched out against him and hit the bucket of the waterman. According to the Sergeant he actually hit the waterman; but in any event he was either driving too fast or his brakes were not in sufficiently good condition to stop and he got into such close proximity, according to his own estimate, that he bumped against the bucket the man was carrying. There were prima facie grounds for believing that he had committed an offence under S. 279 and although Sergeant Hill might not have realized that he had the right to arrest him for that particular reason, once it is ascertained that he had the right to arrest him, he was correct in laying his hand upon him, as provided by S. 46, Criminal P. C., and as, according to the witnesses accepted by the Magistrates, the accused then tried to evade arrest, the Sergeant was entitled to use force to make him submit and the accused having then endeavoured to or succeeded in kicking the Sergeant on a man's most vulnerable portion, all force necessary to reduce him to submission was allowable and in kicking the Sergeant the accused did commit an offence under S. 353, I. P. C.

The whole affair however happened so long ago that further action is obviously undesirable against the accused, but it is manifest that the order for payment of compensation cannot be supported. It is moreover bad for other reasons. S. 250, Criminal P. C. lays down definitely that before ordering any person to pay compensation, the Magistrate must call upon him forthwith to show cause why he should not pay compensation and the Magistrate shall record and consider any cause which the complainant or informant may show. In the present case the Magistrates did not record any statement made by the complainant as showing cause against his being ordered to pay compensation. In their order they state the points that he raised, but that is not sufficient. The Magistrate must record the words used by the complainant when showing cause unless of course the complainant chooses to put his reasons into writing. If this were done and the writing was filed, it would obviously be unnecessary for the Magistrate to record it again, and filing the written submission would in effect be recording the cause shown. As I have said however there is no record of what the complainant said when called upon to show cause. Further in my view the complaint of the complainant was not false. At the utmost it could not be more than a mistake and the reasons for classifying it as frivolous and vexatious certainly are to my mind very far from convincing. For these reasons while no further action need be taken with regard to the accused the order for payment of compensation must be set aside. The learned District Magistrate should take steps to recover the amount from the accused and refund it to the complainant if it has already been paid to him.

**Sharpe J.** — In accordance with the powers vested in it by S. 435, sub-s. 1, Criminal P. C., this Court called for and has now examined the record of the proceedings in Criminal Regular No. 127 of 1937 in the Court of the Honorary Magistrates (Third Bench), Rangoon, for the purpose of satisfying itself as to the correctness, legality or propriety of the finding, sentence and order recorded and passed in that case. A perusal of that record reveals that the Honorary Magistrates in question acted in a materially irregular way. It is provided by S. 250, sub-s. 1, Criminal P. C. that, if the Magistrate acquits the accused and is of opinion that the accusation against him is false and either frivolous or vexatious, then the Magistrate may call upon the person, upon whose complaint or information the accusation was made, to show cause why he should not pay compensation to the accused. But, as my brother Baguley has pointed out, sub-s. 2 of S. 250 provides that the Magistrate must not only consider any cause which such complainant may show but must also record such cause. Further, if the Magistrate is satisfied that the accusation was false and either frivolous or vexatious he may direct compensation to be paid to the accused, but he must record his reasons for so doing. In the present case the Magistrate directed Sergeant Hill to pay Rs. 20 to the accused, but he failed to record the cause shown by the Sergeant as he should have done. This was such an irregularity that it is not possible for the order for the payment of compensation to stand, and it must be set aside. It is only fair however to the accused to point out that he never asked for this compensation to be awarded.

I have considerable doubt as to whether it is within our province, when acting under S. 435, Criminal P. C. to canvass, and express opinions upon, all topics, however interesting may be the points of law or practice involved in them, which have arisen in the course of the proceedings before the inferior criminal Court. On revision our inquiry is limited to "the correctness, legality or propriety of any finding, sentence or order recorded or passed" and to "the irregularity of any proceedings of such inferior Court". As at present advised, I do not think that either the question of a police officer's right of arrest for the commission of an offence under the Indian Motor Vehicles Act, 1914, or the validity of R. 38-B, Burma Motor Vehicles Rules, 1915, is a matter into which, in the particular circumstances of this case, I ought now to inquire. It is certainly unnecessary for me to do so in view of the opinion which I have already expressed as to the material irregularity under S. 250. But in case I am wrong in the view which I take as to the propriety of expressing my opinion on these two topics, I will add that, if it were a proper case for such expression of opinion, I would say that I agree with my brother Baguley both that there is no such right of arrest and also that R. 38-B is ultra vires. I think it a matter of so much doubt as to how one should distinguish the offence created by S. 5 of the comparatively recent Indian Motor Vehicles Act, 1914, from the offence created by the second limb of S. 279, I. P. C., that I prefer not to express an opinion now on that particular point ; and anyhow whatever I might say would be merely obiter. In the result however I agree with my brother Baguley that the Rs. 20 must be refunded to Sergeant Hill.

B.D./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 166

MOSELY AND DUNKLEY JJ.

*U Mye Din and others — Plaintiffs —* Appellants.

v.

*U Mya and others — Defendants —* Respondents.

First Appeal No. 38 of 1937, Decided on 2nd December 1937, against decree of Dist. Court, Mandalay, D/- 31st December 1936.

**Mahomedan Law — Wakf—Mutawalli—Dismissal — Mutawalli prosecuted for failure to publish accounts but acquitted on technical ground — Persistent disobedience of settlor's directions—No proper accounts kept of receipts and disbursements—Trust funds suffering great loss by his negligence — Objects specified by donor not receiving dues for years though trust income amply sufficient to meet them — Mutawalli held unfit to be administrator and should be removed—Lower Court, though finding him grossly negligent, retaining him for sentimental reasons—High Court held justified in interfering with lower Court's discretion.**

A mutawalli had persistently disobeyed the directions of the settlor. He failed to publish accounts and had, in fact, not kept proper accounts of the receipts and disbursements of the trust for which he was prosecuted and acquitted only on a technical ground. He had disobeyed the directions of the settlor regarding the disposal of the income of the trust property. He had a *locus pœnitentiæ* but had not profited by the warning which he received and failed to reform. His negligence resulted in great loss to the trust funds. The income of the trust was amply sufficient to meet the charitable objects specified by the donor and yet the charities had not received their dues under the trust deed for many years and payments were in arrears. The lower Court, while finding mutawalli grossly negligent, was influenced by sentiment and sympathy and merely warned him:

*Held* that the mutawalli had shown by his conduct to be entirely unfit to administer wakf and should be removed. The discretion of lower Court not being influenced by sound reasoning or exercised judicially, could be interfered with by the High Court. [P 168 C 1]

U Kyaw Zan — *for Appellants.*

K. C. Sanyal — *for Respondents.*

**Dunkley J.**—This appeal arises out of a suit under the provisions of S. 92, Civil P. C. in respect of a wakf created by the will of one Haji U Po Tha who died in 1919. The plaintiffs-appellants alleged mal-administration of the trust by the defendants-respondents, who are the trustees appointed under the terms of the deed creating the wakf, and asked for the removal of the present trustees, i. e. the respondents, appointment of new trustees by the Court, and settlement of a scheme for the management of the wakf, and for an order directing the respondents to file accounts of the trust and an inquiry into the accounts. The findings of the District Court were all in favour of the plaintiffs-appellants. The learned District Judge found that the respondents had been guilty of malfeasance and non-feasance in the administration of the trust, that they had persistently disobeyed the directions of the settlor as contained in his will, and that they had failed to publish accounts and had, in fact, not kept proper accounts of the receipts and disbursements of the trust and had disobeyed the directions of the settlor regarding the disposal of the income of the trust property. He therefore came to the conclusion that the directions of the Court for the proper administration of the trust were necessary, but he declined to order the removal of the present trustees, and merely ordered that the defendants-respondents should carry out explicitly the provisions of the trust-deed and that there should be an audit of the accounts. The report of the auditor appointed under this order is before us and is extremely illuminating, although the auditor has done his best to absolve the respondents, who are his employers, from blame. The respondents were ordered personally to pay the appellants' costs of the suit.

In this appeal only one point has been taken, namely that on the findings of the learned District Judge the removal of the defendants-respondents from their office as trustees should have been ordered. There is a cross-objection by the respondents on the grounds that the appeal is not maintainable, that nine of the respondents are newly elected trustees and therefore the findings of the learned District Judge in regard to mal-administration are not applicable to them, and that the respondents should not have been ordered personally to pay the costs. As regards the maintainability of the appeal, it is only necessary to remark that it is clear from the judgment and decree of the District Court that the removal of the respondents could not now be ordered in this suit, and could only be ordered in a fresh suit based on a cause of action arising since the present suit was filed, on a plaint alleging fresh acts of mal-administration. Consequently this appeal lies. The appellants really complain of only one paragraph in the learned District Judge's judgment, which is as follows :

> The only point that has now to be considered is what form this direction of the Court should take. The plaintiffs ask that the present trustees be removed and new trustees appointed. On the whole I do not think such drastic action is required at present. The trustees have been careless and have

> not shown a proper sense of their responsibilities. To a certain extent they have been hampered by circumstances beyond their control. On the evidence it is not possible to say that they have been criminally negligent and it does appear that they are trying to make amends now. I consider therefore that they should be given another chance.

For the appellants it is contended that under the circumstances the respondents should not have been given a further opportunity of carrying on their bad administration of this trust. The learned District Judge, it is pointed out, has not mentioned what are the circumstances beyond the control of the respondents which have hampered them in their administration of the trust, and in the evidence no such circumstances appear. Nor does the evidence show that the respondents are trying to make amends for the mal-administration which has taken place in the past, but all the circumstances of the case, as appearing in the evidence, point to the contrary conclusion. The trustees of this trust were prosecuted in the year 1931 for their failure to keep and publish proper accounts of the trust, but they were acquitted on a technical ground; since that year they have had a *locus pœnitentiæ*, but they have not profited by the warning which they received, and, so far from trying in the intervening years to reform and to observe and carry out the various provisions of the trust deed, they have only once since that year, that is in 1933, published any accounts of the trust. The recent auditor's report shows that even now the accounts are not properly kept. The report further shows that a sum of Rs. 1814 has been debited to the trust on account of legal expenses during the past three years, and yet no attempt has been made by the respondents to show that any part of that sum is properly debitable to the trust, and clearly at least that part of it relating to their defence against the criminal charge ought to have been borne by them personally. The arrears of rents of the wakf property on the 31st December 1936 were nearly Rs. 4000, and of this sum Rupees 2500 was due from a single tenant named Kishen Chand. In regard to the failure of the respondents to collect the rents of the property the learned District Judge has remarked as follows :

> The defendants also contend that there has been a fall in rents. This is possible and the evidence also shows this, but the evidence also shows that if the trustees had acted with a greater sense of their responsibilities, they might have managed to secure sufficient income from the wakf buildings to carry out all the wishes of the donor. In the case of the tenant Kishen Chand, the trustees allowed him to fall in arrears with his rent to the amount of Rs. 2500 and had to bring a suit for this amount. Their defence apparently is that this tenant and his father had been occupying the building for a period of nearly 50 years and they therefore did not wish to be hard on him. They should have remembered that their first duty was to carry out the wishes of the donor and not let sentimental considerations interfere with this duty.

With these remaks I am in entire agreement. Kishen Chand was actually called as a witness by the plaintiffs-appellants and his evidence is extremely illuminating. He is the tenant of six rooms in one of the wakf buildings. He stated in evidence that he was still residing in these rooms as tenant although he had not paid any rent for over a year. Previous to that he had, as I have said, got into arrears to the tune of Rs. 2500 before the year 1934, and in that year the trustees brought a suit against him and obtained a decree for this amount. He tried to frustrate the efforts of the trustees to obtain satisfaction of this decree in every possible way, and ultimately the trustees, at the expense of the trust, treated him so leniently that they compromised their decree for Rs. 1000 to be paid in instalments of Rs. 40 a month. Kishen Chand paid only three of these instalments and again he resisted execution when the trustees tried to recover the balance from him. Yet he is still permitted by the respondents to reside as a tenant of this building. The circumstances of this particular matter are, to my mind, highly scandalous. No excuse has been put forward by the respondents for not recovering the arrears of rent from him when they fell due, or from the other tenants who have long been in arrears, and it now appears clear from the evidence that practically the whole of this sum of Rs. 4000 has become a bad debt.

The learned District Judge says that the respondents have not been criminally negligent. On this point I prefer not to express any opinion, but they have been most grossly negligent and their negligence has resulted in great loss to the trust funds. The income of the trust ought to be amply sufficient to meet the charitable objects specified by the donor, and yet these charities have not received their dues under the trust deed for many years and payments are now heavily in arrears and the arrears never will be paid. The respondents have shown themselves by their conduct to be entirely unfit to administer this wakf and it is only too plain that they ought to be removed. It is urged for the respondents that we ought not to interfere with the learned District Judge's discretion in this matter; but the learned District Judge must exercise his discretion judicially and according to sound principles, and the paragraph of his judgment which I quoted at the beginning of this judgment shows that in his decision he was influenced, not by sound reasoning, but by sentiment and misplaced sympathy for the respondents, and consequently his decision cannot be upheld. It is further urged that nine of the respondents, being newly elected, cannot be held responsible for the acts of maladministration which have been proved against the trustees, but the facts are that no new trustees have been appointed since 1933. As showing the extent to which the respondents lack any sense of responsibility, it may be mentioned that, although the deed lays down that there must be 17 trustees of this trust and vacancies must be promptly filled by the continuing trustees, there have never been more than 14 trustees at any time since 1933, and two of these fourteen resigned in 1935, but their resignations are still, in 1937, under consideration. I have no doubt that the respondents ought to be removed from their office, and the order directing them personally to pay the costs of the suit was the only order in regard to costs which could be passed.

This appeal is therefore allowed, the judgment and decree of the District Court are varied by directing that the respondents be removed from their office as trustees of the Hajee U Po Tha Wakf as from this date, and further directing that the District Court do, under S. 92, Civil P. C., proceed to appoint as new trustees of the wakf suitable persons who are qualified to act as trustees under the provisions of the deed of wakf, and further directing that the District Court do immediately take such steps as may be deemed necessary, either by the appointment of a receiver or otherwise, to safeguard the property and the income of the trust until new trustees have been appointed. The respondents will personally pay the appellants' costs of this appeal, advocate's fee ten gold mohurs. The order of the District Court in regard to the costs of the suit will stand. The cross-objection is dismissed without costs. It is however not right that the two trustees who tendered their resignations in the year 1935, which resignations have not so far been accepted by the other trustees, should be called upon to pay either the costs of the suit or the costs of this appeal, seeing that the suit was brought after they had resigned their office. Consequently the order as to the personal payment of costs will not include the two respondents Hajee Yusoof and U Du La.

**Mosely J.** — I agree.

V.B.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 168

MOSELY AND DUNKLEY JJ.

*Ma Dun Mai, Defendant* — Appellant.

v.

*Maung San Tun, Plaintiff* — Respondent.

Second Appeal No. 215 of 1937, Decided on 14th December 1937, against decree of Asst. Dist. Court, Bassein, D/- 30th April 1937.

**Buddhist Law (Burmese) — Divorce—Penalties for adultery must be enforced by husband — Dissolution of marriage by desertion—Mere allegation of adultery on part of wife — Wife does not lose her share in hnapazon property.**

Under Burmese Budhhist law divorce is essentially a personal action and the penalties for adultery can be only enforced by the husband. [P 169 C 2]

When a marriage is dissolved by the desertion of the wife she does not lose her interest in the joint property of the marriage, and even if there is an allegation of adultery against the wife, the joint property must be divided on the footing that the marriage has become dissolved by desertion, unless the husband has proved the adultery in a suit for divorce brought by him. [P 170 C 1,2]

Consequently in such circumstances the wife does not forfeit her share in the hnapazon property: *A I R 1936 Rang 274 and (1892-96) 2 U B R 116, Dissent.; A I R 1927 Rang 294 (S B); (1897-1901) 2 U B R 34 and A I R 1929 Rang 196, Expl.; A I R 1927 P C 234, Foll.* [P 170 C 2]

U E Maung and U Tun Tin — *for Appellant.*

Kale — *for Respondent.*

**Dunkley J.** — The defendant-appellant was the wife of one U Khwe Ket, deceased. The plaintiff-respondent is the grandson and sole heir of U Khwe Ket. He sued for a declaration of title to a holding of agricultural land. The facts found by the lower Courts, whose findings of facts are binding on us, are that this holding was acquired during the coverture of the appellant and U Khwe Ket; that about 8 or 9 years ago the appellant left U Khwe

Ket and has since then been cohabiting with another man named Maung San Baw; and that 3 or 4 years after the appellant ran away with Maung San Baw, U Khwe Ket died. Relying on the decision of a Full Bench of this Court in 5 Rang 537,[1] the lower Courts rightly held that the marriage between the appellant and U Khewe Ket became automatically dissolved at the end of one year after she left U Khwe Ket, and, relying on the case in 14 Rang 329,[2] they have held further that the appellant forfeited all her right in the hnapazon property of her marriage with U Khwe Ket on account of her adultery with Maung San Baw, and have given the respondent a decree declaring his title to the whole of this holding of land. Before us, on behalf of the appellant, it has been urged that the decision in 14 Rang 329[2] is an incorrect statement of the law in so far as it lays down that, where a marriage is dissolved on account of the wife's desertion followed by her adultery, she forfeits her share in the hnapazon property to her husband. It follows a decision of the Judicial Commissioner of Upper Burma in (1892-96) 2 U B R 116,[3] where it was held that under Burmese Buddhist law a wife who is unfaithful to her husband forfeits whatever rights she had although there may have been no formal divorce. The case in (1897-01) 2 U B R 34,[4] another Upper Burma case, was also relied on in 14 Rang 329,[2] but in my opinion, (1897-01) 2 U B R 34[4] does not support such a wide interpretation of the law.

The principal texts of the Dhammathats relating to the consequences of divorce on the ground of adultery are set out in the judgment in 14 Rang 329,[2] and it is therefore unnecessary for me to repeat them in this judgment. What the rules in the Dhammathats really lay down is this, that if the wife is proved to be guilty of adultery, the husband shall have the right to divorce her and take the whole of the joint property of the marriage : vide Manygye, Book XII, S. 43, penultimate clause. This is the proposition laid down in (1897-01) 2 U B R 34,[4] and with this proposition I find myself in agreement. It seems to me that on the texts it cannot be denied that in a properly constituted action for divorce, where the cause of action is the adultery of the wife, the husband, if successful in establishing the adultery, has a right to a decree declaring him to be entitled to the whole of the hnapazon property. But the much wider contention, which, with all due respect, appears to me to be implicit in the judgment in 14 Rang 329[2] at p. 330, that because a woman leaves her husband and the marriage is dissolved at the end of one year on account of her desertion and the husband thinks her to be guilty of adultery, he can take the whole of the joint property of the marriage, is a startling proposition from which I must dissent. It makes the husband the judge in his own cause, and he cannot be permitted to decide that his wife has been guilty of a grave matrimonial fault and to enforce the consequences of that alleged fault of his own volition. The further proposition that when a husband has taken no steps in his lifetime to assert his rights in a Court of law, his heirs can be allowed after his death to make a claim before a Court to the whole of the joint property by bringing evidence of the wife's misconduct during her husband's lifetime, is even more startling. Burmese Buddhist law recognizes that divorce is essentially a personal action and the penalties for adultery can be enforced only by the husband : vide U Gaung's Digest, Vol. 2, Ss. 416 and 454.

With the greatest respect, in my opinion, the learned Judge in 14 Rang 329[2] misdirected himself by the use of the expression "automatic divorce," occurring in his judgment. His actual conclusion was that in the case of a divorce on account of the wife's adultery the wife loses all her right in the hnapazon property. I have no doubt as to the correctness of this proposition, but there was no divorce in the case which was before him. The expression "automatic divorce" is a contradiction in terms. Divorce is the legal dissolution of marriage by a Court or other competent body or according to forms recognized in the country, nation, or tribe. All that was decided in 5 Rang 537[1] was that on the expiry of a certain period after desertion by one party the marriage is dissolved, i. e. comes to an end; the marital state between the parties ceases to exist. That is a very different thing from divorce. With great respect, I think that the matter was rightly stated by Heald J. in 7 Rang 998,[5] the head-note of which case reads as follows :

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[1] **Ma Nyun v. Maung San Thein, (1927) 14 A I R Rang 294 = 105 I C 399 = 5 Rang 537 (F B).**

[2] **S. A. S. Chettyar Firm v. U Maung Gyi, (1936) 23 A I R Rang 274 = 163 I C 600=14 Rang 329.**

[3] **Maung Tok v. Ma Kin, (1892-96) 2 U B R 116.**

[4] **Maung Yin Maung v. Ma So, (1897-01) 2 U B R 34.**

> There is no authority for the view that adultery on the part of the wife ipso facto puts an end to the marriage.
>
> Except when put to an end by mutual consent or as a result of desertion for a certain period, marriage subsists until it is dissolved by the Court and village elders are, it seems, not competent to effect divorce against the will of one of the parties, on proof of such misconduct as may be sufficient to satisfy them.
>
> If a divorce by mutual consent is proved, partition of property must be on that basis, even if one of the parties had been guilty of misconduct.

In the present case, the husband not having brought an action for divorce against the appellant on account of her adultery, the marriage was brought to an end by the appellant's desertion and not by her adultery, and therefore the rights of the appellant and her deceased husband's heirs to the joint property of the marriage must be decided in accordance with the law for the division of that property on the marriage becoming dissolved by desertion. In 6 Rang 1,[6] a Bench of this Court, held that in the case of a divorce through desertion, the deserting party must forfeit all his or her interest in the property of the marriage, but it is clear that when the Bench pronounced their decision on 8th August 1927, they were unaware of the decision of their Lordships of the Privy Council in 5 Rang 841,[7] which was pronounced on 26th July 1927, and in view of this latter decision the decision of the Bench of this Court cannot be considered to be a correct statement of the law. In 5 Rang 841[7] their Lordships held that the view that as the appellant had been guilty of desertion, the respondent was entitled to the whole of his property, was not supported by any text or authority, and they dissented from this view and confirmed the decree of this Court dividing the property in accordance with justice, equity and good conscience, having regard to the general rules of Burmese Buddhist law.

The effect of the decision in 5 Rang 841[7] therefore is that when a marriage is dissolved by the desertion of the wife, she does not lose her interest in the joint property of the marriage, and, in my opinion, even if there is an allegation of adultery against the wife, the joint property must be divided on the footing that the marriage has become dissolved by desertion, unless the husband has proved the adultery in a suit for divorce brought by him. Consequently, in the present case the appellant is entitled to a half share of the holding in question. The judgments and decrees of both the lower Courts are therefore set aside, and instead thereof the plaintiff-respondent will be granted a decree declaring his title to a half share of the holding of land in suit. As the plaintiff-respondent has been partially successful each party will bear his (or her) own costs throughout.

**Mosely J.** — I agree.

V.B.B./R.K. *Appeal allowed.*

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[5] Ma Me Hla v. Maung Po Thon, (1929) 16 A I R Rang 196 = 117 I C 253 = 7 Rang 98.

[6] Ma Kin v. Maung Po Sin, (1928) 15 A I R Rang 125=109 I C 456=6 Rang 1.

[7] Maung Po Nyun v. Ma Saw Tin, (1927) 14 A I R P C 234 = 106 I C 17 = 54 I A 403=5 Rang 841 (P C).

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## A. I. R. 1938 Rangoon 170

BAGULEY J.

*Ma Thet Su and others* — Appellants.

v.

*Ma Kyi Dan and others*—Respondents.

Second Appeal No. 15 of 1937, Decided on 28th June 1937, against decree of Dist. Court, Minbu at Magwe in C. A. No. 3 of 1936.

**(a) Civil P. C. (1908), O. 41, R. 27 (1) and S. 100 (1) (c)—Applicability—Suit on documents —Documents referred by parties as well as by Court even in absence of documents or their copies—Plaintiff allowed to produce them at close of argument but offering them after close of case for judgment—Court refusing to accept them — Appellate Court refusing to admit them under O. 41, R. 27 (1)—Reference to documents in absence of copies, in trial, held irregular — Documents held could hardly be said 'new evidence' but were evidence before trial Court and used by it—Held, there was substantial error in procedure under S. 100 (1) (c) — Documents held could be produced in second appeal on account of such error.**

Order 41, R. 27 (1), does not forbid the production of additional evidence but states that the parties are not entitled to produce it, although the Court may in its discretion in certain circumstances allow it to be admitted. [P 171 C 2]

Certain documents filed in a former case between one of the parties to the suit in question and some third parties were all along referred to during the trial by the parties as well as by the Court, in the absence of the documents themselves or their copies on record. The Court allowed them to be produced even at the close of the arguments but still they were not filed. After the close of the case for judgment they were produced but the Court refused to accept them then and dismissed the suit. The Appellate Court refused to admit the documents as being additional evidence, under O. 41, R. 27 (1). In second appeal the plaintiff prayed for being allowed to produce the evidence :

*Held* that the reference made by the Court and the parties to the documents in the absence of their copies on record was certainly irregular. The documents were all along before the Court and used by it, and if it could be properly said, they were evidence de facto in the trial, though not evidence de jure. The documents that were so dealt with could therefore hardly be said to be "new evidence". The irregular reference to them in the trial caused substantial error or defect in the procedure of the Court which might have caused error in the decision of the trial Court. The point as to irregular procedure resulting in such error could therefore be raised in the second appeal under S. 100 (1) (c) and the documents could therefore be allowed to be produced in second appeal, as the refusal to allow them to be filed would simply perpetuate the substantial error or defect. [P 172 C 1]

**(b) Evidence Act (1872), S. 33—Deposition in previous suit—Subsequent suit between persons neither parties to former suit nor their representatives—Deposition cannot be admitted in subsequent suit.**

A deposition of a witness in a previous suit cannot be accepted as evidence in any subsequent suit when the parties to the subsequent suit are not the same as those to the previous suit nor are they representatives of the parties to the former suit. [P 172 C 2]

R. K. Roy — *for Appellants.*
Kin Maung Gyi — *for Respondents.*

**Order.**—This appeal arises out of a suit for redemption of land, the mortgage relied on being alleged to have taken place so far back as 1245 B. E. (1883-84). The trial Court dismissed the suit with costs and an appeal to the District Court of Minbu was also dismissed.

The present suit is between the legal representatives of the original mortgagor and the legal representatives of the original mortgagee. In a previous case in the Subdivisional Court of Minbu there had been litigation between one of the families now represented and some third parties, and in that case the question of whether this mortgage had or had not been proved was in dispute. At the time of the trial, the file of the former case was before the Court and was referred to in the course of the trial. This previous case is referred to in the plaint which forms the basis of the present suit, and according to para. 6 to the plaint, a copy of the judgment in that previous case and all connected papers were filed with the plaint ; but it would seem that only a copy of the judgment actually found its way on to the record. In the course of argument it would seem that the whole file was referred to and it would seem that the Judge expressed his willingness to allow copies of the maps and history sheet of the land to be put in. The case was fixed for argument on 18th September and arguments were heard. In a report with regard to what happened, made by the Subdivisional Judge and found in the file of the appeal in the lower Appellate Court, the Judge reports that either on the 15th or 18th U Ba Gyi said that he wanted to file some maps and the Judge told him that he could do so. The case was fixed for judgment on Monday, the 21st September. On the morning of 19th September, the Judge was apparently still prepared to allow these maps and history sheet to be filed, after the close of the argument; so obviously they must have been referred to in the argument. For some reason or another they were not tendered until after the Court had closed, and the Judge refused to accept them. In his judgment he states that no maps or history sheet of the land was filed before him and on the oral evidence available before him he would hold that the first issue regarding the mortgage had not been satisfactorily proved by the plaintiffs.

When the appellants appealed to the District Court they applied that the maps and history sheet should be admitted in evidence presumably under O. 41, R. 27. The learned District Judge refused to allow this evidence to be introduced, stating that O. 41, R. 27 (1), Civil P. C. forbade the parties calling additional evidence. This seems to be scarcely a correct interpretation of the Rule. The Rule does not forbid the production of additional evidence but states that the parties are not entitled to produce it, although the Court may in its discretion in certain circumstances allow it to be admitted.

In the present appeal the parties asked to be allowed to produce this evidence, and objection is raised on the ground that a refusal to allow additional evidence to be admitted cannot be questioned on second appeal. The point whether this question may be raised in second appeal is interesting and clearly can give rise to differences of opinion. In 42 Mad 737[1] a Bench of two Judges before whom the point arose differed and so referred the matter to a Full Bench and the Full Bench was not unanimous; although Wallis C. J. and Abdur Rahim J. and Ayling J. were of opinion that the Appellate Court could not interfere in second appeal in a matter of this nature. Sadasiva Ayyar J. and Kumaraswami Sastri J. were of opinion that the evidence could be allowed. I think however that it is not necessary for me to deal with this particular point, because in my opinion it is not really a question of introducing new evidence. From the affidavits and the report made by the Subdivisional Judge as to what happened, it seems to me quite clear that throughout the proceedings the maps and history sheet filed in the former case were used and referred to by the parties and the Judge. This reference was perhaps irregular, and had the case been tried with strict correctness, no reference would have been allowed to these documents until copies had been produced and placed on the file; but, in fact, the evidence was, and must have been, referred to in the argument, because the Judge was quite prepared to allow the position to be regularized by one of the advocates filing the necessary copies after the argument was closed. Documents which have been dealt with in this way can scarcely be described as new evidence. If the expression may be allowed, the papers were evidence de facto though perhaps not de jure in the trial Court, and it would, I think, be acting rather harshly in refusing to recognize the documents which were actually before the Court and referred to all through the trial; and this point may be allowed to be placed before the Court in second appeal under S. 100 (1) (c). There was certainly a substantial error or defect in the procedure in the trial Court which may have produced an error or defect in the decision of the case on the merits, and the lower Appellate Court's refusal to allow these documents to be filed simply perpetuated this substantial error or defect. It is true that the refusal by the lower Appellate Court to admit new evidence is not a substantial error or defect in the procedure, but, as I have pointed out, in this case the documents were not in the true sense of the word "new evidence"; they were documents which had been before the Court at the time of the trial and used by it. In view of this error, the appeal will have to be set down for rehearing with the documents which have been excluded before the Court and open to its consideration.

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[1] **Vaithinatha Pillai v. Kuppa Thevar, (1919) 6 A I R Mad 1166=53 I C 274=42 Mad 737=37 M L J 125 (F B).**

**Judgment.**—The handling of this case has not been particularly happy. The trial Court has allowed all sorts of irrelevant matters to go down in the evidence: for instance the first defendant is recorded as saying: "my mother-in-law Daw Htwe told me that over sixty years ago these lands were purchased by U Chan from U Hpa." How this can be admissible I fail to understand. Again Ko San Nyein says: "I learnt from my father Ko Sin who is now dead that the suit lands . . . belong to Po Chan." Recording statements of this kind is not what one would expect from a Sub-divisional Judge. Again the learned Judge permitted depositions of three witnesses to be put in because they have given evidence in a previous case and he said that the depositions were admitted under S. 33, Evidence Act. He overlooks the fact that S. 33 has a proviso: "Provided that the proceeding was between the same parties or their representatives-in-interest." The former suit was not between the same parties or their representatives. I have already dealt with the question of whether certain maps were to be admitted as evidence and have admitted them, and when the question is the exact ownership of the land somewhere about the time of the third Burmese War, I do not quite understand the remark of the District Judge when at the end of his judgment he says he does not require additional evidence (the maps of 1895-96), for pronouncing a fair judgment as the plaintiffs have already filed two maps of the holdings for the years 1935-36. Surely a map of 1895 is more likely to tell us something about the state of things in 1884 than is a map of 1935.

The present suit is between the descendants and representatives of U Hpa, Ma Pa Do and Ma Hmo on the one hand and the descendants and representatives of U Chan and Ma Ba Dun on the other. The former are the plaintiffs and the latter are the defendants. The land in question originally belonged to U Hpa and it was transferred to U Chan somewhere about 1883 or 1884. The question is whether that transfer was a sale outright or a usufructuary mortgage. The position of U Chan's representatives is to say the least a little delicate because they obtained possession of the land in question from certain other parties in Civil Regular No. 7 of 1930 of the Sub-divisional Court of Minbu, and the basis upon which they recovered possession of the land was that they were entitled to possession as usufructuary mortgagees from U Hpa: so when the representatives of U

Hpa sued them for redemption of this land it was a little difficult for them to put up the defence that they were not the mortgagees from U Hpa. However the former case not being between the same parties there is no question of res judicata, and the plaintiffs being out of possession they have got to prove that they are entitled to redeem the land.

To prove the existence of the mortgage, there is Ma Thet Su herself and her witness Po Maung who both depose to the mortgage. At the time of the mortgage Ma Thet Su must have been about 14 and Po Maung a bit older, say 20, and naturally their vagueness about details after this length of time is understandable, and I cannot subscribe to the remark made by the learned District Judge about Ma Thet Su. He says "she was about 14 years at the time of the mortgage. She was too young then to have known what actually took place." If the learned Judge thinks a girl of 14 too young to know what is happening about her he will have some surprises coming to him. With regard to Po Maung he discredits him partly because he was not examined as a witness in the previous suit. Now the present plaintiffs were no parties to the previous suit : so why their witness should be discredited because their opponents did not call him as a witness in the previous case I am at a loss to understand; so the reason for discrediting both these witnesses I am unable to subscribe to.

Then there is the question of these maps which I have already admitted in this case. These maps are extracts from the ordinary kwin maps of 1895-96. Both the holdings in question are shown as belonging to Ma Hmo deceased and being in the possession of Nga Chan and Ma Ba Dun as mortgagees. Ma Hmo was the second wife of U Hpa. I am aware that supplementary survey maps by themselves are not sufficient evidence of title, but it seems to me to be remarkable that these maps should bear the entries they do if the entries are not correct. It must be remembered that the original mortgage was made in Burmese times when there was no supplementary survey and no revenue surveyor. These maps, of which copies are on the record, must have been taken from the original settlement of the Minbu District. These were made at the time when life was perhaps simpler than it is now. The settlement officer went out into the village, camped in a zayat, had the villagers assembled and filled up his map with the names of the owners from what they said. Ma Hmo died after Ma Pa Do and clearly in 1895 U Hpa and both his wives were dead : so they could not claim the land as belonging to them, but apparently Maung Chan was quite prepared to let it go as he being in possession at the moment as mortgagee. The matter must have been common knowledge to everybody and this mortgage dating from Burmese times found its way on to the first revenue maps made by the British Government. These maps together with the oral evidence of Ma Thet Su and Ko Po Maung in my opinion form a case which requires rebutting, particularly as in these early days sales outright without a right of repurchase were comparatively few.

To rebut it there are the statements of the witnesses taken in the previous case, which as I have pointed out are not admissible. Ma Kyi Dan merely says what her mother-in-law Daw Htwe told her and it is noticeable that Daw Htwe did not give evidence in the previous case although she was alive, and her evidence would have been very valuable in that case. Maung Ngwe Hman knows nothing about the mortgage. Maung Pyu was told something about the land by his father Maung San. It says his father worked the land as tenant of U Chan, but U Chan as usufructuary mortgagee was in a position in any case to let out the land. Ko San Nyein tells the Court what his father told him, and that is all the rebutting evidence the respondents have. It seems to me that the appellants' case has been amply made out. I would therefore set aside the decree of the lower Appellate Court dismissing the suit and would give the plaintiffs a decree for redemption for a sum of Rs. 80; the respondents to bear the appellants' costs throughout.

A.L./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 173

ROBERTS C. J. AND DUNKLEY J.

*Municipal Corporation, Rangoon* — Appellant.

v.

*Sooratee Bara Bazaar Co. Ltd.* — Respondent.

**Special First Appeal No. 66 of 1937, Decided on 25th November 1937, against order of Small Cause Court, Rangoon, D/- 26th April 1937.**

**Rangoon City Municipal Act (6 of 1922), S. 80 (2)—In determining rent which hypothetical tenant would reasonably pay, rent actually paid by existing tenant is not conclusive test—Comparative method is valueless when there is direct evidence of letting value.**

In deciding the gross rental value by ascertaining the rent which a hypothetical tenant might reasonably be expected to pay the actual rent paid by an existing tenant is certainly not the final or conclusive test of what an imaginary tenant would pay. It is only prima facie evidence of value and the special circumstances in which it is paid and in which any collateral engagements are entered into between the parties must be taken into consideration in determining what is the rent a hypothetical tenant might reasonably be expected to pay for the hereditament. Moreover a comparison with the assessments in force of similar premises used for a similar purpose in the neighbourhood, that is, the "comparative method" is of little value when there is direct evidence as to the letting value of the hereditament in question : *(1932) 2 K B 679, Rel. on.* [P 174 C 2 ; P 175 C 1]

Rafi — *for Appellant.*

Clark — *for Respondent.*

**Roberts C. J.** — This is an appeal by the Municipal Corporation of Rangoon against the decision of the learned Chief Judge of the Small Cause Court, Rangoon, reducing the assessment of the respondents in respect of the Excelsior Picture Theatre, Montgomery Street, Rangoon, from Rupees 2450 to Rs. 2214 per mensem. The basis of the assessment is upon the annual value which is defined by S. 80 (2), City of Rangoon Municipal Act as being "the gross annual rent for which buildings and land liable to taxation may reasonably be expected to let from year to year." The only case in which appeal lies from the decision of the Chief Judge to the High Court is set out in S. 91 (3) of the same Act, and arises when any question arises as to the liability of any building or land to assessment or as to the basis or principle of assessment. In the present case it is agreed that the building was assessable and it was contended for the respondents that no appeal lay because no question had arisen as to the basis or principle of assessment within the meaning of the subsection. It was agreed by both parties and forms part of the judgment appealed against that the basis or principle of assessment was by finding out the rent which a hypothetical tenant might reasonably be expected to pay; the learned Judge also added that the gross annual rent may also be ascertained by finding out and comparing the annual value of other properties of a like nature in the district; and the appellants agreed with this view and contended that what has been called the method of comparison was, generally speaking, a safe guide towards the ascertainment of the gross annual rent but that it was later ignored by the learned Judge. It is urged on their behalf that he has erred both in this matter and in not taking into account a payment of Rs. 9850 by the lessees expressed in the lease itself to be made in consideration of granting it. This payment was to be made in addition to the rent reserved in the lease amounting to Rs. 2450 per month, and the appellants say it is in the nature of rent or, as Mr. Rafi put it, "disguised rent".

The total amount so payable was Rupees 12,250, but it is established that Rs. 2400 of the arrears of rent due from the tenant's predecessors was to be cancelled by the lessors appropriating the deposit of that amount which they held, and the balance Rs. 9850 ought, according to the appellants, to be regarded as a premium, and spreading this over three years, and taking into account repairs, an amount calculated as interest on a deposit made by the lessees, and deducting the tenant's taxes the calculated gross rental value if based upon these figures would be Rs. 2472. After a small reduction, apparently for tenant's chattels, the Commissioner fixed the value as Rs. 2450. The learned Judge reduced this assessment to Rs. 2214 per mensem disallowing the addition of the liability taken over of the former lessees' arrears of rent. He held that in fact it had not been shown that the payment stipulated for had any effect on the renting of the premises or the rent agreed on; in other words that it was not proved to be in the nature of disguised rent at all. One of the factors to be taken into account is that the lessors promised in cl. 12 of the lease to purchase and install and let and deliver to the lessee a new talkie equipment at a cost not to exceed Rs. 10,000 as soon as the arrears due should have been paid in full. It is said that when this promise was fulfilled, the assessable value of the hereditament would increase, but we have no evidence as to the fulfilment of the promise or otherwise. The learned Judge had to decide the gross rental value, and taking the rent which a hypothetical tenant might reasonably be expected to pay he found that it was Rs. 2214 per mensem. We cannot say he was wrong. The actual rent paid by an existing tenant is certainly not the final or conclusive test of what an imaginary tenant would pay. As Lord Buckmaster pointed out in (1922) 2 A C 93[1]:

> The actual rent paid is no criterion unless indeed it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances mentioned in the section.

In other words, it is only prima facie evidence of value and the special circumstances in which it is paid and in which any collateral engagements are entered into between the parties must be taken into consideration in determining what is the rent a hypothetical tenant might reasonably be expected to pay for the hereditament. These circumstances were examined with care in the lower Court. The learned Judge pointed out that the valuation made by the Commissioner is sought to be justified by comparison with other cinema theatres in Rangoon, but concluded that such a comparison was unhelpful and that all there was before him for guidance was the lease itself. In my opinion he was right because it is practically valueless to adopt the comparative method except in the absence of more direct evidence. As pointed out by Scrutton L. J. in (1932) 2 K B 679[2] at p. 690:

> Where the evidence as to the proper valuation of the particular hereditament is doubtful, evidence as to the assessment of other hereditaments may be of some weight, though as it will involve another investigation whether the assessment of the other hereditament is correct and whether the two hereditaments are comparable, it is of much less value than the direct evidence as to the hereditament whose assessment is in question.

In that case only one witness was called on behalf of the rating authority and he said that the rent which a hypothetical tenant would pay if he undertook to pay all tenant's rates, taxes and tithe rent charge, if any, the landlord bearing the cost of repairs and insurance and the expenses, if any, necessary to maintain the hereditament in a state to command that rent, was a sum at least equivalent to the gross value at which the hereditament had been assessed. In the face of his evidence, evidence based on the method of comparison with other hereditaments was held to be of no weight. In (1937) S C 360[3] the evidence based on comparison appears to have been the best evidence available, the hereditament having been the subject of extensive improvements and alteration in order to convert it into a picture-house subsequent to the date of the lease and the rent reserved therein to have afforded no guidance. There Lord Robertson described the method of valuation by comparison as the most satisfactory in the circumstances that existed. The case is no authority for saying that this method should be adopted where an actual rent for completed premises has been reserved. Lord Pitman did not himself decide that the comparative principle is the only proper principle to be applied in valuing a picture-house. He said that such a proposition was agreed on both sides in that case, and Lord Fleming agreed that the comparative method was the proper method of valuing those particular premises. The headnote is, with great respect to the learned author, too widely expressed.

In the present case after reviewing the material at his disposal and taking the actual payments stipulated for in the lease as prima facie evidence of the rent a hypothetical tenant would pay, the learned Judge considered all the circumstances and in particular he considered the effect of certain moneys payable by the lessee under clause 10 therein. The figure arrived at after this review may or may not be the same as the actual rent paid by the present tenants, but it is based on a consideration of the full terms of the contract which they have made with the lessors, and is expressed to be the gross annual rental as defined by the Act. Accordingly this appeal must be dismissed, with costs 20 gold mohurs.

**Dunkley J.** — For the respondent company it has been strenuously urged that no appeal lies to the High Court under the circumstances of this case. The right of appeal to this Court is provided by the provisions of S. 91 (3), City of Rangoon Municipal Act, which lays down that an appeal from the decision of the Chief Judge of the Rangoon Small Cause Court shall lie to the High Court

> when any question arises as to the liability of any building or land to assessment, or as to the basis or principle of assessment.

It is contended that the basis or principle of assessment is not in question in this case. The principle of assessment is the ascertainment of the annual rent which a

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1. Poplar Assessment Committee v. Roberts, (1922) 2 A C 93=91 L J K B 449=127 L T 99=86 J P 137=20 L G R 317=38 T L R 499=66 S J 386.
2. Ladies Hosiery and Underwear Ltd. v. West Middlesex Assessment Committee, (1932) 2 K B 679=101 L J K B 682=147 L T 390=96 J P 336=30 L G R 369.
3. Albert E. Pickard v. Assessor for Glasgow, (1937) S C 360.

(hypothetical) tenant might reasonably be expected, taking one year with another, to pay for the hereditament, and as regards this principle there is no dispute between the parties. But it is in regard to the method whereby this annual rent is to be ascertained that the difference between them has arisen. For the Corporation of Rangoon, it is contended that the correct figure is to be ascertained by a consideration of the true rent which is being paid by the actual lessee of the premises under the existing lease coupled with a comparison with the assessments now in force of similar premises used for a similar purpose in the neighbourhood, that is, the "comparative method"; and for the respondent company it is submitted that the learned Chief Judge of the Small Cause Court was right in rejecting the "comparative" method, and relying solely on the terms of the existing lease of the premises. The method of ascertaining the annual rent which the hypothetical tenant might reasonably be expected to pay is the basis of the assessment, and there is therefore a clear dispute as to the correct basis of assessment, and consequently an appeal to this Court does lie.

I however agree with my Lord the Chief Justice that this appeal fails. The case in (1932) 2 K B 679[2] is authority for the proposition that evidence as to the assessments of other hereditaments is of little value when there is direct evidence as to the letting value of the hereditament in question. The learned Judge of the Small Cause Court was therefore right in rejecting the "comparative method" in this particular case. The question for decision is therefore narrowed down to the true construction of the existing lease of this cinema. For the Corporation it is contended that the sum of approximately Rs. 10,000, which the lessee has contracted to pay under the terms of clause 10 of the lease, is in the nature of "disguised rent," but this contention is incorrect in view of the provisions of clause 12, whereby the lessor has contracted on payment of this sum in full to expend an equivalent amount in installing a new "talkie" equipment in the cinema. Clearly the consideration for payment of this amount is not the lease of the premises but is the instalment of a new "talkie" equipment. I therefore agree that this appeal must be dismissed.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 176

MOSELY J.

*U Te Zain, Plaintiff* — Appellant.

v.

*Daw Thaung* — *Defendant* — Respondent.

Special Second Appeal No. 109 of 1937, Decided on 28th August 1937, against decree of Asst. Dist. Court, Mandalay, in C. A. No. 62 of 1936.

**Registration Act (1908), S. 77—Suit under—Court is concerned not with validity but with genuineness of document sought to be registered.**

In a suit under S. 77 all that is required to be shown by the plaintiffs is whether the document was executed or not, or also in some cases whether certain requirements of the law as to presentation for registration have been complied with. In such cases the Court is concerned not with the validity but with the genuineness of the document sought to be registered, that is whether the document has been executed by the person by whom it is alleged to have been executed : *Case law referred.* [P 177 C 1]

A. N. Basu — *for Appellant.*

K. C. Sanyal — *for Respondent.*

**Judgment.** — The plaintiff-appellant brought a suit against the defendant-respondent under S. 77, Registration Act, for a decree directing that a deed of gift executed by the defendant in his favour be registered. The Sub-Registrar had refused to register it on the ground of denial of execution, and the appeal under S. 72 of the Act, to the Registrar had been dismissed. The defence set up in the written statement was that the plaintiff, who is a monk, obtained the defendant's signature to the deed of gift of the land in question when she was seriously ill, and that she made her thumb impression without knowing what she was doing. The trial Court correctly framed the two issues in the case which were merely as to whether the defendant intended to consent to the gift when she put her thumb impression on the document, and whether the plaintiff was entitled to the relief asked for. The trial Court found that the defendant knew perfectly well what she was doing, more particularly as she executed two other deeds of gift on the same day in favour of her grand-children. In appeal to the District Court the defendant-appellant raised the question of undue influence, which was never even pleaded in the trial Court, nor in issue, and the learned Assistant District Judge, though he agreed with the trial Court on the question of execution, found that the burden of proof in this transaction that undue influence had not been exercised was on the plaintiff, and that he had failed to discharge that burden, and the suit was accordingly dismissed.

Apart from the fact that such a defence was never raised, and could not have been raised for the first time in appeal, the defence set up in the District Court as a ground of appeal was one quite irrelevant to the suit. It is settled law that in a suit under S. 77, all that is required to be shown by the plaintiffs is whether the document was executed or not, (or also in some cases whether certain requirements of the law as to presentation for registration have been complied with). It has been pointed out repeatedly that in such cases the Court is concerned not with the validity but with the genuineness of the document sought to be registered, that is, whether the document has been executed by the person by whom it is alleged to have been executed: *see* 55 C L J 107[1] and the cases cited there: 14 C W N 12,[2] 24 Cal 668,[3] 18 Mad 255[4] and 29 All 284.[5] This appeal therefore must be allowed, and the decree of the trial Court restored with costs throughout.

S.C./R.K. *Appeal allowed.*

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[1] Abdul Gafur v. Badial Haque, A I R 1932 Cal 588=139 I C 234=55 C L J 107.

[2] W. W. Broucke v. Mohan Bikram Shah, (1910) 14 C W N 12=5 I C 20.

[3] Rajlakhi v. Debendra, (1900) 24 Cal 668=1 C W N 444.

[4] Balambal Ammal v. Arunachala Chetti, (1895) 18 Mad 255.

[5] Kanhaya Lal v. Sardar Singh, (1907) 29 All 284=1907 A W N 46=4 A L J 171.

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## * * A. I. R. 1938 Rangoon 177

### FULL BENCH

ROBERTS C. J., BAGULEY, MOSELY,
BA U, DUNKLEY, BRAUND
AND SHAW JJ.

*The King*

v.

*Nga Myo.*

Criminal Ref. No. 137 of 1937, Decided on 7th February 1938. Reference made by Baguley J.

*** (a) Evidence Act (1872), Ss. 4 and 114, Illus. (b)—Evidence of accomplice tendered—Court should not call for proof of presumption that he is unworthy of credit unless corroborated in material particulars.**

It is not desirable that in cases where the evidence of an accomplice is tendered, the Court should call for proof of the presumption that he is unworthy of credit unless corroborated in material particulars. Experience has shown that in the generality of cases it is unsafe to convict upon the uncorroborated testimony of an accomplice alone, although it is not illegal to do so. The Court should therefore regard an accomplice as prima facie unworthy of credit, but this presumption which it is open to the Court to draw is not a hard and fast presumption but one which may be displaced in the circumstances of a particular case. [P 178 C 1]

*** (b) Evidence Act (1872), S. 114, Illus. (b)—Two further illustrations given to Illus. (b) are not exhaustive.**

The two further illustrations given to Illus. (b) of S. 114 are not exhaustive. They are given by way of guidance only, and in order that a Court may test the facts of a particular case to see whether anything has emerged to show that the evidence of an accomplice need not be corroborated in material particulars. [P 178 C 1, 2]

**(c) Criminal Trial—Evidence—Corroboration.**

It is settled law that a person cannot corroborate himself. [P 179 C 1]

**(d) Evidence Act (1872)—Evidence Act is complete Code of law of evidence and not merely modification of English law of evidence.**

In questions relating to matters expressly provided for in the Evidence Act, it must not be dealt with as a mere modification of the law of evidence prevailing in England. The Evidence Act is, as it was intended to be, a complete Code of the law of evidence in British Burma. [P 179 C 2]

*** * (e) Evidence Act (1872), Ss. 133 and 114, Illus. (b)—Extraneous evidence showing that accomplices are not acting in collusion with one another—Cumulative effect of evidence of two or more of them may remove presumption of individual unworthiness of credit—Corroboration must proceed from source extraneous to person whose testimony it is sought to corroborate—Source must not prima facie be unworthy of credit : *9 Rang 404=A I R 1931 Rang 235=135 I C 849 (F B) and 1937 RLR 110 =A I R 1937 Rang 209=169 I C 705, Overruled.***

In dealing with a question which has to be decided under Ss. 133 and 114 and Illus. (b), thereunder, the following propositions should be noted. First : Provided it has been established by extraneous evidence or matters appearing on the record that the accomplices are not acting in collusion with one another, the cumulative effect of the evidence of two or more of them may be sufficient to remove the prima facie presumption of the individual unworthiness of credit of their statements, and if this be the case a conviction may legitimately be recorded upon their statements alone, if the Court is convinced of their truth. The same observation applies to the cumulative effect of the evidence of an accomplice and the confession of a co-accused where the presumption of their unreliability has, in the special circumstances, been rebutted. Secondly : that evidence from a source which is not prima facie unworthy of credit may prove a fact which displaces in a particular case the presumption that an accomplice is unworthy of credit. Thirdly : that corroboration must proceed from a source extraneous to the person whose testimony it is sought to corroborate. But it may consist of extraneous proof of a fact relating to that very person's prior conduct. The above conclusions apply to approvers also : *9 Rang 404=A I R 1931 Rang 235=135 I C 849 (F B) and 1937 R L R 110=A I R 1937 Rang 209=169 I C 705*, **Overruled**. [P 179 C 2; P 180 C 1]

Sir Arthur Eggar, Advocate-General — *for the Crown.*

Sir O'de Glanville and P. K. Basu — *for Accused.*

**Roberts C. J.** — In this case the judgment about to be delivered is the judgment of the whole Court. The questions referred to us deal with the nature of the corroboration and the circumstances in which it should be sought, when a person is accused of a crime and the evidence against him is partly or wholly that of an accomplice or accomplices. By S. 133, Evidence Act, an accomplice is a competent witness against an accusd person ; and a conviction is not illegal because it proceeds upon the uncorroborated testimony of an accomplice. Where the Court regards the evidence of an accomplice as trustworthy, it need not look further.

But by S. 114, Illus. (b) of the Act, the Court may presume that the evidence of an accomplice is unworthy of credit unless he is corroborated in material particulars. By S. 4 of the Act, whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. In our opinion, it is not desirable that in cases where the evidence of an accomplice is tendered the Court should call for proof of the presumption that he is unworthy of credit unless corroborated in material particulars. Experience has shown that in the generality of cases it is unsafe to convict upon the uncorroborated testimony of an accomplice alone, although it is not illegal to do so. The Court should therefore regard an accomplice as prima facie unworthy of credit ; but this presumption which it is open to the Court to draw is not a hard and fast presumption but one which may be displaced in the circumstances of a particular case.

Two further illustrations are given to Illus. (b) in the Act. They show circumstances in which the presumption normally to be drawn is capable of being displaced. In our opinion these Illustrations are not exhaustive. They are given by way of guidance only, and in order that a Court may test the facts of a particular case to see whether anything has emerged to show that the evidence of an accomplice need not be corroborated in material particulars. In the second Illustration given, it is supposed that a crime has been committed by several persons. *A*, *B* and *C*, three of the criminals, are captured on the spot. We will suppose for a moment that it has not been proved whether they have been kept apart from each other or not. Each gives an account of the crime implicating *D* and the accounts are in substance the same and agree in detail. Still they are accomplices and prima facie unworthy of credit. (In passing, it may be noted that the use of the word "tainted" in this connexion has given rise to misconception.)

If *A*, *B* and *C* say that their accounts ought to be believed because they were kept apart, such statements would also have to be viewed with suspicion. But if, from a source which is not open to suspicion at all, there is evidence which convinces the Court that *A*, *B* and *C* were really kept apart and had no opportunity of making up their stories together, then it is clear that a fact has been proved which may render the stories credible and may rebut the presumption that the accounts given by *A*, *B* and *C* are unreliable. In such a case the presumption having been displaced (or rebutted), the Court need not look for outside corroboration, but may act on the uncorroborated testimony of accomplices, and may convict if they believe the evidence, because of the provisions of S. 133 of the Act. It is not the mere fact that the accomplice's accounts corroborate each other, but the additional fact that they had no opportunity of collusion (which must be proved from a source which is not unworthy of credit) which may enable a Court to dispense with the need for corroboration of the accomplices. In the case of a co-accused, it will generally be found that his confession is even more open to suspicion than is the evidence of an accomplice. Nevertheless, it is a "matter" which the Court can take into consideration when deciding whether the guilt of an accused person has been proved beyond reasonable doubt. In most cases it can add little, if any, weight to the evidence of an accomplice or approver. But if the presumption of its unreliability has been rebutted by extraneous evidence, this fact may enable it to add weight to the evidence of an approver or an accomplice, and may even dispense with the necessity for corroboration in the particular case. The test in all these cases is whether the sum total of the matters before the Court has satisfied the Court that it is safe to record a conviction.

Again in the earlier Illustration given in the Act, it is supposed that *A* is tried for causing a man's death by an act of negligence in arranging certain machinery, and that *B*, who also took part in the arrangement, describes precisely what was done, and explains the common carelessness of *A* and himself. Here it is not enough for *B* to describe himself as a person of the highest character in order to displace the presumption that his evidence should be viewed with disfavour unless corroborated. But if some other person who is worthy of credit testifies to *B's* good character, proof of this fact may render it unnecessary to seek for corroboration of *B's* testimony, such good character being regarded as outweighing any moral stigma involved by the offence. Further, we are in agreement that it is settled law that a person cannot corroborate himself. By S. 157 of the Act,

> in order to corroborate the testimony of a witness any former statement made by such witness relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact, may be proved.

To take the simplest illustration, if a person, *A*, is giving evidence as to the commission of a crime and declares that he made similar statements about the time of its commission, he does not thereby corroborate himself, nor strengthen his own testimony. But if, in support of *A's* evidence, it is proved from another source that *A* did make statement of a kind similar to his evidence, about that time, then the fact thus proved may be taken as corroborative of *A's* statement in evidence that he did so, and as showing the consistency of his testimony and conduct. To pursue this matter a little further, we may take the instance of a first information report made by *A*. Its contents are not evidence of the truth of the matters stated therein ; but it may be proved in evidence that *A* made it, and the contents of the report may be proved in order to corroborate *A's* testimony when he is later called as a witness. We think that the phrase "independent" testimony used in this connexion has given rise to misconception. During the course of the elaborate arguments to which we have listened, a vast number of cases were cited to us from different parts of India and from England both before and after the passing of the Evidence Act. It has become apparent that words employed in one case in a wide sense have been employed in another in a restricted sense, and that similar difficulties have been approached from varying angles by the different Courts. We are of opinion that an exhaustive examination into all these interpretations of the law is not called for in our judgment, but that we should lay down clear propositions which interpret the Evidence Act and which are to be applicable to all Courts in British Burma for the future. We also desire to state that in questions relating to matters expressly provided for in the Evidence Act, it must not be dealt with as a mere modification of the law of evidence prevailing in England. The Evidence Act is, as it was intended to be, a complete Code of the law of evidence in British Burma.

From a consideration of all the matters to be dealt with it is apparent: First: Provided it has been established by extraneous evidence or matters appearing on the record that the accomplices are not acting in collusion with one another, the cumulative effect of the evidence of two or more of them may be sufficient to remove the prima facie presumption of the individual unworthiness of credit of their statements, and, if this be the case, a conviction may legitimately be recorded upon their statements alone, if the Court is convinced of their truth. The same observation applies to the cumulative effect of the evidence of an accomplice and the confession of a co-accused where the presumption of their unreliability has, in the special circumstances, been rebutted. Secondly : That evidence from a source which is not prima facie unworthy of credit may prove a fact which displaces in a particular case the presumption that an accomplice is unworthy of credit. Thirdly: That corroboration must proceed from a source extraneous to the person whose testimony it is sought to corroborate. But it may consist of extraneous proof of a fact relating to that very person's prior conduct. The above conclusions, in so far as they differ from dicta on the same point in either, 9 Rang 404[1] at p. 427 or 1937 R L R 110,[2] must be regarded as superseding the earlier dicta. What has been said of accomplices applies to approvers and vice versa.

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[1] **Aung Hla v. Emperor, (1931) 18 A I R Rang 235=1931 Cr C 875=135 I C 849=33 Cr L J 205=9 Rang 404 (S B).**

[2] **Nga Aung Pe v. Emperor, (1937) 24 A I R Rang 209=169 I C 705=1937 R L R 110=38 Cr L J 785.**

When a Judge charges a jury he should tell them what the law is, and should advise them to look for corroboration where the circumstances require it as a matter of caution; he should also direct them as to the nature of the corroboration, that it should come from a source extraneous to the person whose testimony it is sought to corroborate, and not prima facie unworthy of credit; and he should tell them that it should be in a material particular, and should implicate the accused person himself with the commission of the crime charged. But the jury are the sole judges of the facts, and once they have received a proper warning it is they who must consider the need for corroboration or the sufficiency of corroboration in each particular case. When there is no jury, the Judge or Magistrate should approach evidence which is prima facie unworthy of credit with suspicion, but if after due regard to the matters on which a jury would have to be directed if the case were being tried by a jury, he is convinced of the truth of the evidence for the prosecution and considers that the guilt of the accused has been proved beyond all reasonable doubt, he should convict. The test in reviewing all such cases in appeal is whether a conscientious and intelligent jury, properly cautioned, would have recorded a conviction; and if there is a doubt upon this matter then a conviction recorded by a Magistrate or Sessions Judge will not be supported. Finally, we are of opinion that, in all cases in which the prosecution relies upon the evidence of two or more accomplices or approvers and it is likely that the Court will be asked to convict upon their statements because the circumstances show that they were made without collusion, there must be on the record sufficient evidence from which the Court can arrive at a clear finding on this point; in such cases the evidence of the investigating officer will often be extremely useful. We have no doubt that in many cases such evidence will enable Courts to convict with safety a guilty person who might otherwise escape owing to the suspicion that the accomplices or approvers may have wickedly conspired to throw guilt upon an innocent person. We also have no doubt that in many cases the absence of such evidence may permit guilty persons to go unpunished, because the presumption that accomplices and approvers are unworthy of credit has not been, when in the particular case it might have been, satisfactorily displaced.

D.S./R.K. *Answer accordingly.*

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## A. I. R. 1938 Rangoon 180

MACKNEY J.

*The King*

v.

*Maung Kan Tun.*

Criminal Revn. No. 540-B of 1937, Decided on 28th September 1937, from order of Township Magistrate, Myittha, D/- 27th April 1937.

**Burma Village Act (6 of 1907), S. 12 — Person who did not pay thathameda tax asked by headman to appear at Township Office — Failure to appear is no offence.**

If a person who has not paid thathameda tax is directed by his headman to appear at a Township Office but fails to do so, he does not commit any offence punishable under S. 12, as the payment of such tax is not a public duty imposed upon a villager by the Act. [P 180 C 2]

**Order.** — If a person who has not paid his thathameda tax is directed by his headman to appear at a Township Office but fails to do so, he does not commit any offence punishable under S. 12 of the Village Act. S. 12 punishes a person residing in a village tract who refuses or neglects to perform any of the public duties enforced upon him by this Act, or by any rule thereunder. The payment of thathameda tax is not a public duty imposed upon a villager by the Village Act, nor is it any part of his public duties to betake himself to any spot which the headman chooses to order him to visit, nor can it be said that by attending a Township Office he was in any way assisting the headman in the execution of his public duties under the Village Act. When a villager pays his thathameda tax to his headman he does not assist the headman in collecting thathameda tax in the sense intended in Ss. 8 (1) (i) and 11 (d) of the Act. The conviction of Maung Kan Tun in the present case is therefore entirely illegal. As a matter of fact it now appears that Maung Kan Tun should not have been assessed to thathameda tax at all. The finding and sentence passed upon him are set aside and the fine paid by him shall be refunded to him.

S.C./R.K. ***Conviction set aside.***

## A. I. R. 1938 Rangoon 181

MOSELY J.

*Tun Ya* — Applicant.

v.

*The King.*

Criminal Revn. Appln. No. 376-B of 1937, Decided on 2nd September 1937, for review of order of the First Addl. Special Power Magistrate, Myitkyina, D-/ 29th May 1937.

**(a) Government of Burma Act (1935), S. 100 — 'Acts relating to the Police Forces' — Interpretation.**

The Acts relating to the Police Forces referred to in S. 100, Government of Burma Act, are the General Police Act and the Local Police Acts, such as the Rangoon Police Act (Burma Act 4 of 1899). [P 183 C 1]

**(b) Criminal P. C. (1898), S. 197 (1) — Delegation by Local Government of its power to appoint and consequently to remove subordinate officer—Power still remains vested in Local Government and its sanction to prosecute officer is necessary.**

The delegation by the Local Government of its power to appoint and consequently to remove an officer only means that the Local Government performs that act itself through the medium of a particular officer as the channel through which it is done, and it is an ordinary case of *qui facit per alium, facit per se.* It is no doubt done in accordance with the delegation, but nevertheless it remains the act of the Local Government and hence the sanction of the Local Government is necessary under S. 197 (1) for the prosecution of the officer : *A I R 1935 Rang 263 (F B), Foll.* [P 183 C 1, 2]

**(c) Criminal P. C. (1898), S. 197 (1)—Sanction is condition precedent.**

Under S. 197 (1) sanction is a condition indispensable to the taking of cognizance by a Magistrate who would otherwise be incompetent to try the case: *A I R 1917 Bom 33, Rel. on.* [P 184 C 1]

**(d) Criminal P. C. (1898), S. 197 (1)—Sanction to prosecute subordinate officers is necessary.**

Though it was not the intention of the Legislature when enacting S. 197, sub-s. (1) that the sanction of the Local Government should be requisite to the prosecution of subordinate officers, yet the effect of delegation by the Local Government of the powers of punishment of such officer must be to make that sanction a preliminary requisite to prosecution : *A I R 1926 All 271 and A I R 1935 Mad 442, Ref.* [P 184 C 2]

**(e) Police Act (1861), S. 7 — Delegation of disciplinary powers under S. 7 by Local Government is ultra vires.**

The General Police Act confers the powers of appointment (which connote punishment), on certain designated officers, and the Local Government cannot by any rule framed by it delegate disciplinary powers to those officers; such delegation of the powers under S. 7, General Police Act, is ultra vires of the Local Government. [P 184 C 2]

C. H. Campagnac — *for Applicant.*

A. Eggar, Advocate-General — *for the Crown.*

**Order.**—This is an application in revision against a sentence of eight months' rigorous imprisonment and a fine of Rs. 250 or, in default, two months' rigorous imprisonment, passed on the applicant Maung Tun Ya, a Sub-Inspector of Police, who was convicted under S. 384, I. P. C., of extorting a sum of Rs. 200 from the *ywagaung* of a village in Myitkyina district. The case was instituted in February 1937, on a complaint by the Assistant Superintendent of Police. The appeal was dismissed by the learned Sessions Judge. I see no reason for interfering in revision with either the conviction or the sentence on the facts. It has not been contended that the acts complained of were not committed by the officer while acting, or purporting to act, in the discharge of his official duty. The only ground on which this application has been heard was that the Magistrate acted without jurisdiction in taking cognizance of the case without the previous sanction of the Local Government as required by S. 197 (1), Criminal P. C. The relevant portion of this section is as follows :

> . . . When any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government.

It appears from his Service Roll that the applicant was appointed Sub-Inspector of Police on probation by the Deputy Inspector-General of Police, and was confirmed, again, by the Deputy Inspector-General of Police. The latest rules for the appointment and punishment of police officers of and below the rank of Inspector of Police are contained in Police Department Notification No. 44 of 15th March 1937 (Burma Gazette, Part I, 20th March 1937). These rules purported to be made in exercise of the powers conferred by S. 7, General Police Act, 1861. As regards Sub-Inspectors of Police, the authority by whom they are to be appointed is, in the case of Sub-Inspectors directly recruited, the Principal of the Provincial Police School, and in the case of Sub-Inspectors promoted from the ranks, the District Superintendent of Police with the previous approval of the Deputy Inspector-General of Police of the Range concerned. S. 4, General Police Act, 1861, refers to the offices of Inspector-General of Police and Deputy and Assistant Inspectors-General, and District and Assistant District Superintendents of Police. S. 7 of the Act says that the appointment of all police officers other than those mentioned in S. 4 of this Act shall, under such rules as the Local Government shall from time to time sanction, rest with the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendent of Police, who may, under such rules as aforesaid, at any time dismiss, etc., any police officer. The rules originally framed under this Act are contained in Judicial Department Notification No. 249, Part I, Burma Gazette, 17th June 1893. Para. 12 provides that promotions to and in the rank of Head Constable (now called Sub-Inspector of Police) shall be made by the Inspector-General on the recommendation of the District Superintendent of Police and the Deputy Commissioner.

Ordinarily, under S. 16, General Clauses Act (10 of 1897), the power to appoint any person to fill an office carries with it the power to dismiss. S. 16 of that Act, as amended by Act 18 of 1928, reads as follows:

> Where by any Act of the Governor-General in Council or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by himself or any other authority in exercise of that power.

However Notification 44 of 1937 did not leave the power of punishment to the authority by whom the appointment was made, nor direct that that power was to be exercised by superior authority, or how it was to be exercised, but purported to delegate to certain specified authorities the power of punishment including dismissal, and provided for the authority to whom an appeal against those punishments might be made. In the case of Sub-Inspectors of Police, (in all sections of the Force except the Flying Squads), the authority to whom the power of punishment has been delegated is shown as the District Superintendent of Police concerned (the appellate authority being the Deputy Inspector-General of Police of the Range concerned). The argument for the applicant is, in brief, that, as the authority to dismiss has only been delegated by the Local Government to District Superintendents of Police and not transferred outright to them, a Sub-Inspector of Police is not removable from his office save by or with the sanction of the Local Government, and, therefore, sanction to his prosecution is requisite under S. 197 (1), Criminal P. C.

The reply to this rests mainly on S. 100, Government of Burma Act of 1935, which is as follows:

> Notwithstanding anything in the foregoing provisions of this part (Part 9) of this Act, the conditions of service of the subordinate ranks of the police forces shall be such as may be determined by or under the Acts relating to those forces respectively.

The "foregoing provisions" are Ss. 97 and 98, which refer to the tenure of office, recruitment and conditions of service of civil servants in Burma. The argument for the applicant is as follows: S. 148, Government of Burma Act, provides that the existing law is to continue in force, and S. 128 of the Act provides for the continuance of provisions made under the Government of India Act until other provision is made under the appropriate provisions of this Act. By S. 96-B (2), Government of India Act of 1920, the Secretary of State delegated the power of making rules for regulating the conditions of service and discipline of the civil services in India to the Governor-General in Council or to Local Goverments. Rules made by the Government of India under S. 96-B (2) were published in the Gazette of India, Part I, p. 552, 1924, and classified the Burma Police Service as a provincial service. It was provided in para. 13 that the Local Government may dismiss any officer in the provincial service; and in para. 15 that the Local Government may delegate to any subordinate authority, subject to such conditions, if any, as it may prescribe, any of the powers conferred by R. 13, in regard to officers of the subordinate services.

On 27th April 1926, the Secretary of State, under rules passed on that date, prescribed [R. 4 (1)] that the rules regulating the conditions of service of provincial and subordinate services be delegated to Local Governments of Governor's provinces. On 19th June 1930, the Secretary of State made certain rules under the powers conferred by sub-s. (2) of S. 96-B, Government of India Act; but R. 4 of the Delegation Rules of 1926 still remained in force: 13

Rang 540[1] at pp. 546 and 547. Disciplinary Rules for the subordinate services, made in accordance with the Delegation Rules of 1926 by the Local Government, were published in General Department Notification No. 5 of 11th February 1926 (p. 19, Local Government Circulars, Vol. 2), and provided that the Local Government had delegated the power of punishment, including dismissal of Sub-Inspectors of Police to District Superintendents of Police (the appellate authority being the Deputy Inspector-General). As regards the power of punishment, this of course amounts to exactly the same thing as the last notification of 1937, except that the Local Government in the Notification made under the Delegation Rules of 1926 delegated the power of punishment under the rules framed under the Government of India Act, while in the Notification of 1937 they purported to delegate these powers in virtue of their powers under S. 7, General Police Act, under the authority of S. 100, Government of Burma Act, 1935. The learned advocate for the applicant wishes to construe S. 100, Government of Burma Act, as if it meant that the Act relating to the Police Forces was the Government of India Act. That argument, I conceive, is impossible. The Acts relating to the Police Forces referred to in S. 100, Government of Burma Act, are the General Police Act and the Local Police Acts, such as the Bombay District Police Act, the Calcutta Police Act, the Rangoon Police Act (Burma Act, 4 of 1899), etc.

**As to the meaning and consequences of "delegation", the learned advocate for the applicant relies on 12 Rang 530,[2] a decision of my own, the principle of which was approved by a Full Bench in 13 Rang 540.[1] In 12 Rang 530,[2] a Sub-Inspector of excise was prosecuted for a criminal offence, and it was held that the power to appoint Sub-Inspectors of excise was delegated by the Local Government under the rules framed under the Government of India Act by a notification of the Excise Department. The case in 17 Cr L J 168[3] was followed. In that case Coutts-Trotter J. held that the delegation by the Local Government of its** power to appoint, an officer only meant that the Local Government performs that act itself through the medium of a particular officer as the channel through which it is done, and he says ;

> It is an ordinary case of *qui facit per alium, facit per se*. It is no doubt done in accordance with the delegation, but nevertheless it remains the act of the Local Government.

It was there held that the sanction of the Local Government was necessary under S. 197 (1), Criminal P. C., for the prosecution of the officer. These observations of Coutts-Trotter J. were agreed in by the Full Bench in 13 Rang 540[1] which was a case where an Assistant Accountant of a treasury was prosecuted for embezzlement, but it was decided there that under the rules framed under the Government of India Act the Local Government had not authorized the Deputy Commissioner to act for them in appointing Assistant Accountants, that is to say, had not delegated the power of appointment to the Deputy Commissioner, but had transferred out-and-out to him the power to appoint Assistant Accountants within his district, and by implication the power to remove or dismiss them from their appointment.

The basis of the decision in 12 Rang 530[2] was approved ; but the ratio decidendi did not apparently commend itself to one of the Judges (*see* p. 552 ibid), who remarked that the decision in 12 Rang 530[2] should have been based solely on the special provisions of the Excise Act without reference to the rules under the Government of India Act. No reasons were given, and, with respect, that matter was not before the Bench. The Government of India Act is an Act of the British Parliament, and when it authorized the Secretary of State to frame rules or delegate the power to frame rules to the Government of India or to Local Governments, the rules so framed must be held to have over-ridden former legislation on the same subject, such as the Burma Excise Act passed by the local Legislature. The notification referred to in 12 Rang 530[2] purported to be made under S. 6, Excise Act, which itself gave the same power, that is to say allowing the Local Government to delegate to Commissioners the power of appointment of Sub-Inspectors of Excise; but, though that notification purported to be issued under the Excise Act, it was, I conceive, really issued or should have been issued under the authority conferred by the Government of India Act. The question was academical, as in each case the powers delegated were identical and to the same officer. It may be interesting to note that 17 Cr L J 168[3] was followed by Bardswell J. in 1934 M W N 370.[4] That case was not available when 12 Rang 530[2] was decided. 17 Cr L J 168[3] was also considered but dissented from in 48 All 264,[5] another instance where an excise officer was prosecuted, and that decision too, I may remark went on the provisions of R. 13 as published in the Gazette of India, 1924, though it was said that the Excise Act gave a similar power of dismissal and a similar power of delegation. 48 All 264[5] was followed in 58 Mad 787,[6] a judgment not available when *Bo Maung's case*[1] was heard. In both these cases it was held that there was no distinction between an act of delegation and an act of empowerment, and that S. 197 (1), Criminal P. C., was not intended to include, and did not include, public servants whom some lower authority had by law or rule or order been empowered to remove. In 48 All 264[5] it was put as follows :

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[1] Emperor v. Maung Bo Maung, A I R 1935 Rang 263=1935 Cr C 964=157 I C 1034=36 Cr L J 1272=13 Rang 540 (F B).

[2] Kyaw Htin v. Ahyoo, A I R 1934 Rang 238=1934 Cr C 1039=152 I C 366=36 Cr L J 77=12 Rang 530.

[3] In re Abdul Khadar Saheb, AIR 1917 Mad 344=38 I C 648=17 Cr L J 168.

> The authority which actually removes the public servant from office is not the authority of the Local Government, but the authority to whom the power is delegated.

I am bound however by the Full Bench decision of this Court, which is to the effect that where the power has been delegated the sanction of the Local Government is necessary.

For the Crown it is submitted that S. 12 of the Frontier Districts Criminal Justice Regulation, 1925 (Burma Code, p. 224-A) enacts (para. 12) that no sentence shall be reversed or altered on appeal or revision on account of any irregularity of procedure unless the irregularity has occasioned a failure of justice. It is however apparent on the face of it that sanction is a condition indispensable to the taking of cognizance by a Magistrate, who would otherwise be incompetent to try the case; and if any authority is necessary on the point, 42 Bom 172[7] may be referred to. The difficulty in the present case is that Notification No. 44 of 15th March 1927, directs that Sub-Inspectors of Police be appointed by certain officers—it is immaterial whom for this purpose—while the officers in whom the power rests to punish have not been nominated, nor has that authority even been conferred on them, but delegated, and I may remark in the case of a Sub-Inspector of Police directly recruited, delegated to an officer other than the one by whom he was appointed. It is argued for the Crown that, though the authority to punish has been delegated, yet that delegation was pure surplusage, and that it existed already under the Police Act in the officer by whom the appointment was made. I agree with what was said in 48 All 264[5] and 58 Mad 787[6] that it was not the intention of the Legislature when enacting S. 197, sub-s. (1), Criminal P. C., that the sanction of the Local Government should be requisite to the prosecution of subordinate officers, but the effect of delegation of the powers of punishment must be to make that sanction a preliminary requisite to prosecution.

The question however in the present case is whether the delegation of these powers under the General Police Act under the Notification of 1937 was ultra vires of the Local Government. I am of the opinion that it was ultra vires. The General Police Act confers the powers of appointment, (which connote punishment), on certain designated officers, and the Local Government cannot by any rules framed by it delegate disciplinary powers to those officers. It is conceivable that the Local Government might order such officers to exercise their disciplinary powers subject to its control or approval, but that has not been done, and I consider it to be a different thing from delegating such powers to be exercised on the Local Government's behalf. I must hold that the powers of punishment rest in the officers appointed in such behalf by S. 7, General Police Act. It follows that the delegation of these powers to them was ultra vires of the Local Government, which was not the authority empowered to punish, such authority being the officers designated. It ensues then that sanction of the Local Government to prosecute a subordinate police officer is not required, and this application in revision will be dismissed.

D.S./R.K. *Application dismissed.*

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4. Narayana v. Emperor, (1934) M W N 370.
5. Emperor v. Jalal-ud-din, A I R 1926 All 271 =92 I C 857=27 Cr L J 345=48 All 264=24 A L J 230.
6. Pichai Pillai v. Balasundara Mudaly, A I R 1935 Mad 442=1935 Cr C 619=157 I C 24= 36 Cr L J 1241=58 Mad 787=68 M L J 608.
7. Emperor v. Bhimaji Venkaji, A I R 1917 Bom 33=44 I C 454=19 Cr L J 342=42 Bom 172 =20 Bom L R 89.

## * A. I. R. 1938 Rangoon 185

### SPECIAL BENCH

ROBERTS C. J., MYA BU
AND DUNKLEY JJ.

*P. B. Bose* — Appellant.

v.

*M. R. N. Chettyar Firm and another* — Respondents.

Letters Patent Appeal No. 1 of 1937, Decided on 14th January 1938, from decree of High Court, D/- 18th August 1936.

*** (a) Damages — Suit for — Conversion — Piece of land belonging to *M* wrongly included in mortgage executed by *P* in favour of *B*—Fact brought to notice of *B*—Land let out by *M* to *P* and *P* cultivating land and paying rent to *M*—*B* bringing a suit on his mortgage and obtaining order of appointment of receiver for collecting produce of mortgaged land—Land belonging to *M* wrongly included in application —Receiver realizing produce of land belonging to *M* and disposing of sale proceeds in meeting expenses—*M* bringing suit to recover rent from the land impleading *P*, *B* and receiver as defendants—*Held* that *M* had no cause of action against *B* and receiver on ground of conversion nor any against *B* on ground of negligence.**

Negligence in law is the breach of duty to take care and want of care is only actionable at the suit of a person, who has suffered damage because the defendant has acted in breach of a common law duty towards him or of a statutory duty towards the public at large or a class of the public of which he is a member. [P 188 C 2; P 189 C 1]

A piece of land belonging to the plaintiff *M* was wrongly included in the property covered by a mortgage executed by one *P* in favour of *B*. The fact was brought to the notice of *B* who thereupon ceased to have any interest as a mortgagee in that piece of land. The land was let out by *M* to the mortgagor *P* who cultivated it and paid the rent. Later on *B* brought a suit on basis of his mortgage and obtained an order of appointment of receiver to collect the produce of the mortgaged land, wrongly including in it the piece of land belonging to *M*. The receiver collected the crop grown on that piece of land and sold it away, and the amount realized was spent in meeting his expenses. *M* then brought a suit to recover the rent in respect of that piece of land impleading *P* and *B* and the receiver as defendants. The High Court passed a decree against *B* and the receiver and dismissed the suit against *P*. *B* filed a Letters Patent appeal joining *M* and the receiver as respondents:

*Held* that if there was any right of action against the receiver, it was for conversion and the suit against him was liable to be dismissed on the simple ground that *M* was not the owner of the produce of the land, nor was *M* ever in possession of the produce or entitled to immediate possession thereof and *M* therefore could not maintain an action of conversion in respect of the produce. If any person had a cause of action on ground of conversion it was *P* who was the owner and in actual possession of the crop. On a strict construction of the pleadings, *M* having based his suit against *B* on ground of conversion was not entitled to claim a decree against him on a cause of action based on negligence. *M* could not base his action against *B* even on the ground of negligence. Negligence not being actionable per se although *B* had been negligent in making an incorrect application for appointment of receiver, yet before *M* could succeed on ground of negligence on part of *B*, *M* was bound to establish that *B* owed a duty to him to take reasonable care. *B* not having had any notice of the alleged agreement in the contract of tenancy between *M* and *P*, that *P* was not to dispose of any part of the produce until the rent had been paid, *B* owed no duty towards *M* to take reasonable care. The order of the High Court dismissing the suit as against *P* was made without jurisdiction and was of no effect and could not be acted on and the decree of the original Court against *P* subsisted: *A I R 1936 P C 34; (1932) A C 562 and A I R 1927 P C 252, Rel. on; A I R 1934 Rang 321, Ref.* [P 186 C 2; P 187 C 1, 2; P 188 C 1, 2]

*** (b) Civil P. C. (1908), O. 1, R. 3—Decree for damages for breach of contract against one defendant and for damages in tort against another in respect of damages arising in same transaction, can be passed in same action—There is no misjoinder of defendants.**

A decree for damages for breach of contract against one defendant and a decree for damages in tort against another defendant in respect of damages arising out of the same transaction can be passed in the same action. Defendants against whom damage is claimed on these two causes of action can be joined in the same suit. O. 1, R. 3 covers such a case and there is no misjoinder of defendants. [P 188 C 1, 2]

P. K. Basu — *for Appellant.*

P. S. Chari — *for Respondent No. 1.*

**Dunkley J.**—This is a special appeal under Cl. 13, Letters Patent of this High Court, on a certificate granted by Baguley J., in Second Appeal No. 84 of 1936. All parties are agreed that on this certificate the whole appeal is open to our consideration and in deciding the questions of law involved we are in the same position as was the learned Judge who heard the second appeal. I mention this point because it is of importance owing to the changes in the positions of the parties during the course of the various proceedings. One Po Tun, purporting to be the owner thereof, mortgaged by simple mortgage 154 acres of agricultural land to one P. B. Bose. After the execution of the mortgage deed, in litigation between Po Tun and the M. R. N. Chettyar Firm it was decided that the M. R. N. Firm was the real owner of 38 acres, out of the 154 acres mortgaged by Po Tun to Bose, and was entitled to possession thereof. This fact was brought to the knowledge of Bose, who ceased thereupon to have any interest as mortgagee in these 38 acres. A portion of the area mortgaged to Bose was cultivated by Po Tun himself and the remainder was leased by Po Tun to tenants. Po Tun remained in occupation of the 38 acres, to which the M. R. N. Firm had established its title, as the tenant of that firm.

Bose subsequently brought a suit on his mortgage (Civil Regular No. 15 of 1934 of the Assistant District Court of Pyapon) and at the same time applied for the appointment of a receiver to collect the produce and rental paddy of the mortgaged lands (Civil Miscellaneous Case No. 17 of 1934 of the Assistant District Court of Pyapon). Bose, by a careless error, brought his mortgage suit in respect of the whole area of 154 acres, and his application for the appointment of a receiver was made in respect of the crops and rents of the whole area, the 38 acres being treated in the application as land which Po Tun was himself working as owner. The application for appointment of receiver was granted and U Ba Shwe, Bailiff of the Township Court of Kyaiklat, was appointed receiver. He, in accordance with his order of appointment, proceeded to collect the whole crop grown on the 38 acres owned by the M. R. N. Firm. The agent of the firm protested to the receiver, who referred him to the Court, and the agent then approached Bose, who at once made an application to the Court to release the crops grown on these 38 acres from the custody of the Receiver, and an order was made accordingly. But when the order was communicated to the receiver he had already sold the whole of the crop and had, according to his own allegation, paid away the whole of the proceeds of the sale in meeting the expenses of collecting the crop. The M. R. N. Firm then brought a suit for the recovery of the rent of these 38 acres in Civil Regular No. 161 of 1935 of the Township Court of Pyapon. Three defendants were impleaded in this suit, Po Tun on his contract to pay the rent and P. B. Bose and the receiver in tort. The cause of action against Bose and the receiver is set out in para. 6 of the plaint as follows :

> That the plaintiff submits that defendants 2 and 3 had no right to the rents in respect of the aforesaid land and the realization and appropriation thereof by them amount to wrongful conversion on their part.

In the Township Court, the M. R. N. Firm obtained a decree against Po Tun for the amount of the rent due, but the suit against Bose and the receiver was dismissed. Po Tun did not appeal against the decree passed against him, but the M. R. N. Firm appealed in regard to the dismissal of the suit against Bose and the receiver, and Po Tun was joined as a respondent in this appeal (Civil Appeal No. 44 of 1935 of the Assistant District Court of Pyapon). The learned Assistant District Judge allowed the appeal on the ground that

> it is now settled law that a landlord has a sort of charge on the rental paddy and he can follow it in the hands of a third party who takes it with notice of the charge,

and he decreed the suit against Bose and the receiver. They, in their turn, then brought Second Appeal No. 84 of 1936 of this High Court against the judgment and decree of the Assistant District Court, and joined the M. R. N. Firm as the only respondent; Po Tun was not a party to this second appeal. Baguley J. in his judgment in the second appeal, with respect, rightly pointed out that, apart from a special contract, a landlord of agricultural land has no charge or lien of any kind on the crop grown by his tenant for the payment of his rent. The produce of the land belongs to the tenant, who is in occupation of the land and by his labour and skill grows the crop, and, unless there is an agreement to the contrary between the landlord and the tenant, the landlord has no right to require that his rent shall be paid before the tenant disposes of the produce. The learned Judge then proceeded to examine the liability of Bose and the receiver in tort, and came to the conclusion that both were liable in tort to the M. R. N. Firm, and confirmed the decree of the Assistant District Court against them, although on other grounds. Against this judgment, P. B. Bose obtained a certificate for further appeal, and joined the M. R. N. Firm and the receiver as respondents, and this is the appeal which is now before us for decision.

In the second appeal, the learned Judge did not specifically state the grounds on which he held that the M. R. N. Firm had a right of action against the receiver, but if I understand his judgment correctly, he held that the receiver was liable for conversion. Certainly the receiver was not guilty of any negligence and therefore if there is any right of action against him, it must be for conversion. The suit against the receiver must in consequence, be dismissed on the very simple ground that the plaintiff M. R. N. Firm was not the owner of the produce of the land, nor was the firm ever in possession of the produce or entitled to the immediate possession of it, and therefore the firm could not maintain an action of conversion in respect of the produce. If the pleadings were construed strictly, the above ground would be sufficient to dispose of the claim against P. B. Bose, also because the plaintiff as I have set out, specifically charged Bose with being guilty of conversion, and the plaintiff is not entitled to succeed on a cause of action based on negligence, which is an entirely different cause of action to that which he set up in his plaint. But the learned Judge in second appeal construed the pleadings with the utmost liberality and examined the liability of Bose on the ground of negligence and held that he was liable on this ground. It therefore behoves us to consider whether the M. R. N. Firm could maintain an action in negligence against P. B. Bose. That Bose showed want of care in making his incorrect application for the appointment of a receiver, and that it was owing to this want of care that the crop grown on the M. R. N. Firm's land was sold, and in consequence the M. R. N. Firm has been in fact unable to recover the rent from Po Tun, cannot be gainsaid; but negligence per se is not actionable. In the recent case in (1936) A C 85[1] at p. 103 their Lordships of the Privy Council stated the law as follows :

> The mere fact that a man is injured by another's act gives in itself no cause of action : if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists.

In (1932) A C 562[2] at pp. 618 and 619, a decision of the House of Lords which was discussed and adopted by the Privy Council in (1936) A C 85,[1] Lord Macmillan said in the course of his speech :

> The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. . . . . . The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty.

In order therefore that the M. R. N. Firm may succeed on the ground of negligence against Bose, it must be established that in the circumstances of this case Bose owed a duty to the firm to take reasonable care. The legal conception of the word "duty" has, no doubt, been widely extended by recent decisions. The most authoritative exposition of the present law is to be found in the speeches delivered in (1932) A C 562.[2] Lord Atkin in the course of his speech said at p. 580 :

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Lord Macmillan said (at p. 619) :

> What, then, are the circumstances which give rise to this duty to take care? In the daily contracts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other.

What are the facts of this case upon which it is said that Bose owed a duty to the M. R. N. Firm? There was an agreement of tenancy between Po Tun and the firm ; it is an incomprehensible document, but it might be construed as containing an undertaking by Po Tun not to dispose of any part of the crop until the rent had been paid. If Bose had had notice of this agreement it might be (although it must not be understood that I express any opinion on this point) that he would be under a duty to see that the rent was paid, before at his instance a receiver took possession of the crop ; but it is common ground that Bose did not have notice of this agreement. The only ground on which an attempt has been made to base the existence of such a duty is the assertion of the existence of a vague custom, of which there is no evidence, that landlords of agricultural land in Burma generally expect to be paid their rent out of the produce of the land. Adopting the language of Lord Atkin, does the existence of this general expectation on the part of landlords, if it does exist, cause the M. R. N. Firm to be so closely and directly affected by the act of Bose in applying for the appointment of a receiver that Bose ought reasonably to have had the firm in contemplation as being so affected when he was directing his mind to the making of his application? The answer to this question must clearly be in the negative; otherwise the result would plainly be that every purchaser from a tenant of the latter's crop would be liable to an action in negligence if, before making his purchase, he did not first satisfy himself that the tenant had paid his rent, a proposition which on the face of it is absurd. The conclusion therefore is that in the circumstances of this case Bose owed no duty to the M. R. N. Firm, and therefore the M. R. N. Firm could not maintain an action in negligence against Bose.

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[1] Grant v. Australian Knitting Mills, Ltd., (1936) 23 A I R P C 34 = 159 I C 667=(1936) A C 85.

[2] M'Alister (or Donoghue) v. Stevenson, (1932) A C 562 = 101 L J P C 119 =1932 S C (H L) 31=1932 Sc L T 317=147 L T 281=37 Com Cas 850=76 S J 396=48 T L R 494.

We have had cited to us certain unreported decisions of this Court regarding the rights of a judgment-creditor who attaches the crop of his judgment-debtor, who is a tenant of the land which he cultivates, but these decisions have no bearing on the present case. They proceeded on the ground that the judgment-creditor could attach only the right, title and interest of the judgment-debtor in the crop, and in this sense the judgment-creditor "steps into the shoes" of the judgment-debtor and is bound by the contracts entered into by the judgment-debtor in regard to the crop. An application for the appointment of a receiver is on an entirely different footing, for, the receiver holds the property subject to the orders of the Court and not for the benefit of any particular party: 12 Rang 437.[3] It has been brought to our notice that the learned Judge, purporting to act under O. 41, R. 33, Civil P. C., has in his judgment made an order affecting a person who was not a party to the second appeal, in that he has dismissed the suit as against Po Tun who, as I have said, did not appeal in respect of the decree which was passed against him. The learned Judge appears to have thought that there was a misjoinder of defendants in the original suit, and that a decree based on a breach of contract against one defendant and a decree for damages in tort against another defendant cannot be made in the same suit. With the greatest respect, this is a misconception of the law. There was no misjoinder of defendants in this case; the provisions of O. 1, R. 3, Civil P. C., cover the joinder of the three defendants in the suit in the Township Court. There is no reason why a decree for damages for breach of contract against one defendant and a decree for damages in tort against another defendant should not be passed in the same action; in (1936) A C 85[1] the Privy Council made a decree against the retailer of the underwear for breach of contract and against the manufacturer of the underwear in tort.

Our difficulty, however, is that Po Tun is not a party to the appeal before us; but it is, we think, necessary that we should point out that in 6 Rang 29[4] their Lordships of the Privy Council laid down that R. 33 of O. 41, Civil P. C., must be read together with R. 20 of the same Order and that a decree cannot be made by an Appellate Court affecting a person who is not before the Court. The order dismissing the suit against Po Tun was made without jurisdiction and we must therefore point out that it is of no effect and cannot be acted on; that is, the decree of the original Court against Po Tun stands. As regards P. B. Bose and the receiver U Ba Shwe, this appeal is allowed, the judgments and decrees of the Assistant District Court, Pyapon, on first appeal and of this Court on second appeal are set aside and the judgment and decree of the Township Court of Pyapon, dismissing the suit as against them, is restored with costs in their favour in all Courts. We assess the advocate's fee in this Court at ten gold mohurs.

**Roberts C. J.** — I have had the advantage of reading the judgment of my brother Dunkley in this case. It sets out the facts in detail and reaches conclusions with which I entirely agree. It is therefore necessary to say only a very few words. The respondents the M. R. N. Chettiar Firm were the landlords of Po Tun, but they had no lien or charge upon his crop, as has been pointed out by the learned Judge in second appeal. They had no right to its possession though it is true that in the normal course of events the tenant would be enabled to pay his rent out of his crop. Accordingly a seizure of the crop of which Po Tun was the undisputed owner, and of which he was in actual possession could give no one except Po Tun himself the right to maintain an action for damages for conversion.

Negligence in law is the breach of a duty to take reasonable care; and want of care is therefore only actionable at the suit of a person who has suffered damage because the defendant has acted in breach of a common law duty towards him, or of a statutory duty towards the public at large or a class of the public of which he is a member. The seizure of Po Tun's crops may have been a conversion actionable at his suit but it is mistaken law to say that a stranger who cannot maintain an action for conversion, can maintain an action for damages for negligence because the damages from a wrongful conversion results in the owner in possession being unable to fulfil his contractual obligations. To hold this would in effect be to enable third parties to sue for negligence upon the same facts as those on which an undisputed owner in actual possession can maintain an action for trover; since it would be said that whenever the seizure was wrongful there was a want of care in making it. It seems to me that a test to be applied is to examine the nature of the rights of the M. R. N. Chettyar Firm against Po Tun if there had been no seizure by the receiver and Po Tun had kept the paddy and not sold it. The firm might have had an action *ex contractu* for the rent, but not an action of detinue, because they had no right to the possession of the crop, nor was there any contract of bailment. I have examined the contract of tenancy, in this case with some care. It is in a printed form but its provisions are far from clear and it seems a pity that agreements of this kind should not, if they cannot be drawn up under legal advice, at least follow precedents from which the legal position can be ascertained clearly. The contract in this case does not state that any paddy shall be the property of the paddy land owners until the rent is paid, but it contains a covenant by the tenants to deliver good paddy measured in the baskets of the paddy land owners at such place as may please the latter and a covenant not to alienate or use any paddy till the rent is paid. Under it therefore the paddy belongs to the tenant and an actionable wrong suffered by Po Tun at the hands of third parties in respect of his paddy is thus no concern of the M. R. N. Chettyar Firm at all.

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[3] Ma Joo Tean v. Collector of Rangoon, (1934) 21 A I R Rang 321=155 I C 776=12 Rang 437.

[4] Chokalingam Chetty v. Seethai Ache, (1927) 14 A I R P C 252=107 I C 237=55 I A 7=6 Rang 29 (P C).

The learned trial Judge in second appeal thought that Bose should have had the firm in contemplation when he had notice that part of the land had passed to their possession and ownership. It had in fact passed into their ownership but Po Tun was their tenant in occupation and the crops belonged to him. I therefore agree with my learned brother Dunkley that this appeal should be allowed in the terms stated by him in his judgment. And I also agree that the order made in second appeal dismissing the suit against Po Tun was, for the reasons stated by my learned brother, without jurisdiction and is of no effect.

**Mya Bu J.** —I have had the advantage of reading the judgments of my learned brother, Dunkley J., and of my lord the Chief Justice. I concur in their conclusions and have nothing more to add.

R.M./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 189

MOSELY J.

*Rai Mahal Panday* — Applicant.

v.

*Maung Po Sein* — Opposite Party.

Criminal Revn. No. 515-B of 1937, Decided on 7th October 1937, from order of 4th Addl. Magistrate (1), Rangoon, D/- 28th August 1937.

**Government of Burma Act (1935), S. 124 (2) —Accused committed to Sessions irrespective of whether acts done were in good faith or not —Order is contrary to S. 124 (2).**

An order purporting to commit the accused Sub-Inspector to Sessions without any finding as to whether the acts complained of were done in good faith or not is contrary to S. 124 (2), Government of Burma Act. [P 189 C 2]

A. Eggar — *for the Crown.*

Soorma — *for Complainant.*

**Order.**—This application in revision was made by the Advocate-General against an order of the Fourth Additional Magistrate, Rangoon, passed in a committal proceeding. The case in question was one instituted by two chaprasis of the High Court against a Sub-Inspector of Police. The complaints were instituted on 20th March 1937. The Magistrate referred to S. 124 (2), Government of Burma Act, but in the order now under revision refused to come to a finding whether the acts complained of were not done in good faith. The order amounts to one purporting to commit the accused to Sessions irrespective of whether the acts were done in good faith or not. This is clearly contrary to the wording of the section. S. 124 (1) is as follows:

> **No proceedings civil or criminal shall be instituted in Burma against any person in respect of**

> any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the commencement of this Act, except with the consent of the Governor in his discretion.

It is clearly not applicable here as the complaints were laid and the proceedings instituted before the Act came into force on 1st April 1937. S. 124 (2) is as follows:

> Any civil or criminal proceedings instituted in Burma, whether before or after the commencement of this Act, against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the said date shall be dismissed unless the Court is satisfied that the acts complained of were not done in good faith, and, where any such proceedings are dismissed, the costs incurred by the defendant shall, in so far as they are not recoverable from the persons instituting the proceedings, be charged on the revenues of Burma.

It should be remarked that S. 124 purports to be a general indemnity to all servants of the Crown for acts committed in the execution of their duty as such before the commencement of the Act. The protection given by this section is in addition to the existing protection given by S. 197, Criminal P. C., referred to in the next section of the Government of Burma Act, S. 125, which prohibits any restriction of protection of public servants conferred by that section of the Criminal Procedure Code or of sections of the Civil Procedure Code without the previous sanction of the Governor. The learned Magistrate was correct when he said that all the available evidence which deals with the point should be taken before a finding is come to as to whether the act complained of was done in the execution of the Sub-Inspector's duty and in good faith or not. He should not have prejudged this point in the middle portion of his order, and it would appear that he has failed to consider whether the Sub-Inspector had reasonable ground to think or suspect that the chaprasis were committing an offence under S. 336, I. P. C. by throwing stones on the roof of Mr. Pinto's building. The Magistrate has only considered the effect of S. 426, I. P. C. His attention is directed to 5 L B R 100[1] and several previous rulings on the effect of S. 336, I. P. C., to be found in Dunkley's Digest under Penal Code — S. 336 at pp. 946 and 947. The Magistrate, in revision, will be directed to take the available evidence and come to a finding whether the acts complained of were done or not done in good faith before he decides whether to commit the accused. The proceedings will be returned with these remarks.

K.B./R.K. *Order accordingly.*

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## * A. I. R. 1938 Rangoon 190

BAGULEY AND SHARPE JJ.

*L. Ah Choy* — Appellant.

v.

*Maung Taung Gyaw and others* — Respondents.

First Appeal No. 3 of 1937, Decided on 16th August 1937, from order of Dist. Court, Amherst, in C. E. No. 25 of 1936.

*** Mortgage— Costs — Preliminary decree in form as amended by Rule Committee of Rangoon High Court declaring that amount due by defendant to plaintiff comprised principal, interest and costs — Appeal by defendant — Appeal dismissed—Appellate Court confirming preliminary decree and further directing defendant to pay costs incurred by plaintiff in Appellate Court—Property sold and purchased by decree-holder — Application for personal decree for costs—Personal decree as regards costs of trial Court held could not be granted but such decree could be granted in respect of costs of Appellate Court.**

In a mortgage suit a preliminary decree for sale was drawn up in the usual form as amended by the Rule Committee of the Rangoon High Court. The decree directed the defendant to pay the costs of the suit and declared that the amount due by the defendant to the plaintiff was certain amount comprising the principal and interest and costs. The defendant appealed. The Appellate Court dismissed the appeal, confirmed the preliminary decree and further directed the appellant-defendant to pay the costs incurred by the respondent-plaintiff in the Appellate Court. In due course the property was sold and was purchased by the decree-holder. In execution the decree-holder applied for personal decree for costs. The Court dismissed the application on the ground that costs could not be recovered if the original mortgage debt was barred and the mortgaged property was sold:

*Held* that as far as the costs of the trial Court were concerned, they merged in the mortgage money and personal decree could not be granted in respect of them. But the costs of the Appellate Court stood on different footing. The appeal was by unsuccessful defendant and the order for payment of costs of the Appellate Court must be regarded as a personal decree against the defendant. Hence as regards the costs of the Appellate Court the plaintiff was entitled to a personal decree. [P 192 C 1]

K. C. Bose — *for Appellant.*

Eunoose — *for Respondents.*

**Baguley J.**—The appellant sued Shwe Paing, whose heirs and legal representatives are respondents to the present appeal, on a registered mortgage. The amount originally advanced on the mortgage was Rs. 20,000 but apparently no interest was ever paid. The suit was filed only just before 12 years expired, so the total amount due at the time of filing the suit was Rs. 53,750 but only Rs. 50,000 was claimed. Shwe Paing defended the suit but the Court found against him and the judgment ends with the passage: "A preliminary decree for sale in the usual form is passed with costs. Items 1, 2 and 3 will be excluded," and in consequence a preliminary decree for sale of the mortgaged property in the form as amended by the Rule Committee of this Court was drawn up, the operative part running as follows :

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[1] Ma Nyein Gale v. Nga Sein, (1909) 5 L B R 100=4 I C 293=10 Cr L J 552.

> It is hereby ordered and decreed that the sum of Rs. 2400 being costs of this suit shall be paid by the defendant to the plaintiff and it is declared that the amount due to the plaintiff by the defendant is the sum of Rs. 52,400 being the balance account as shown in Sch. A hereto ;

and Sch. A is filled up with two items, Rs. 50,000 principal and interest and Rs. 2400 costs. Shwe Paing was not satisfied with this and he appealed to this Court. His appeal was dismissed and the decree of this Court, after stating that the appeal be and the same is, hereby dismissed, goes on to say that the preliminary mortgage decree "be confirmed as follows" and then the decree was exhibited in full, and after this it proceeds :

> And it is further ordered that the appellant-defendant aforesaid do pay to the respondent-plaintiff aforesaid the sum of Rs. 1200 (rupees one-thousand two-hundred only) being the amount of costs incurred by the respondent-plaintiff aforesaid in this Court.

In due course the property was brought to sale and it was bought in by the decree-holder for Rs. 18,400. The decree-holder applied under O. 34, R. 3 (4) for a personal decree for Rs. 21,600 being the sum total of interest that had accrued due during the six years immediately preceding the institution of the suit and the costs of the suit, i. e. Rs. 3600. This application was dismissed by the District Judge on 3rd November 1936 : "The application for personal decree is therefore dismissed with costs, advocate's fee Rs. 17". Meanwhile in execution case No. 25 of 1936 the plaintiff had filed an application for execution for costs alone, in the ordinary form in which applications for execution are made out. Under heading 7 he entered "amount decreed for costs, Rs. 2400 appellate costs, Rs. 1200" and then the costs of the application and so on. Objection was raised and on 3rd November 1936, the same day on which the application for a personal decree was dismissed, the learned Judge in Diary order after reference to 14 Rang. 538[1] stated that :

> Costs cannot be recovered if the original mortgage debt is barred and the mortgaged property has been sold. Under these circumstances the execution application is dismissed.

Against this Diary order the present appeal has been filed while the order refusing a personal decree has not been appealed against. The first case quoted is 9 Rang. 186.[2] The head-note of this case runs thus :

> In a suit between the mortgagee and the mortgagor only, costs are ordinarily to be regarded as part of the mortgage money and execution in respect of costs in such a suit can ordinarily be had only after a final personal money decree has been passed, the costs being included in the money payable under the decree on the mortgage and being recoverable only as part of that money and not as costs.

But in the judgment there is a passage in the nature of an obiter dictum at p. 200:

> I think therefore that a final personal money decree for costs may be given against the mortgagor in a case where the personal remedy of the mortgagee against the mortgagor for the mortgage money and interest thereon is time-barred.

But in 14 Rang 538,[1] a Judge of this Court sitting on the Original Side held that a preliminary decree framed in accordance with Form No. 5 followed the ordinary rule that costs in a mortgage suit form part of the mortgage debt and when the personal remedy of the decree-holder had become barred he could not claim a personal decree for costs alone. So far as the decree in the present case is concerned, it seems quite clear that the passage at the beginning of the decree which directs the defendant to pay certain costs to the plaintiff cannot be regarded as a separate personal order to pay costs. Taking the decree as it stands there are two orders with regard to Rs. 2400 costs. The initial order with regard to costs was intended to be used only when there was a special order for costs passed against one defendant or another, and the fact that costs are mentioned in two places, once in Sch. A as part of the amount due on the mortgage, and once as being ordered to be paid by the defendant shows there is a redundancy. In the judgment it is clearly expressed that the mortgage decree was one of the ordinary kind. The decree having been filled in this unfortunate way obviously requires explanation and explanation is to be sought in the judgment: so I am of opinion that the Rs. 2400 costs of the original Court must be regarded as merged in the mortgage money.

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[1] **Balthazar & Son v. Aga Ali Ramzan, (1937) 24 A I R Rang 71=167 I C 805=14 Rang 538.**

[2] **Maung Po Mya v. M. A. S. Chettyar Firm, (1931) 18 A I R Rang 153=133 I C 225=9 Rang 186.**

So far as Rs. 1200 costs in the Appellate Court are concerned, the matter stands on a different footing. The appeal was one by the defendant; the appeal was dismissed: the decree of the trial Court was confirmed exactly as it stood and there was a further order that the defendant should pay to the plaintiff Rs. 1200 more in the way of costs. One can well understand that costs of the trial Court may be regarded as part of the mortgage money when the mortgage is a simple mortgage because, in the event of the mortgagor defaulting on the simple mortgage, the only remedy which the mortgagee has is to file a suit. It has been laid down by the Privy Council that in the case of a simple mortgage the mortgagee gets a debt, with the right in the event of default, to bring the mortgaged property to sale through the agency of the Court; the assistance of the Court is, so to speak, always envisaged in the case of a simple mortgage. The ordinary expenses of a mortgage suit therefore have to be envisaged as a very frequent addition which may have to be made to the mortgage, and sometimes of course an appeal by the plaintiff may be necessary and the same rule possibly might apply. That an unsuccessful defendant should necessarily appeal is not so obvious. Unsuccessful defendants should not appeal when the appeals are going to be unsuccessful: also decree-holders' expenses are incurred by these appeals and when the mortgage security is insufficient this would mean that an unsuccessful defendant who makes an appeal unsuccessfully can inflict upon the successful plaintiff the costs which, if they are merely part of the mortgage money, he can never recover from the property, nor from the defendant personally in many cases. I think therefore that in this case, where the defendant's appeal was unsuccessful and where a decree is awarded, as it is in the present case, the order for payment of Rs. 1,200 costs in the appellate Court must be regarded as a personal decree against the defendant.

The cases quoted by the respondent on this point can all, I think, be distinguished. 35 Cal 431[3] can be differentiated from the present case because in this case it was the plaintiff who appealed to the High Court and the question before the Court was whether the decree for costs could be executed before the mortgaged properties had been sold. The question of costs in a plaintiff's appeal is on a different footing from the question of costs in a defendant's appeal. 40 All 109[4] was a case in which the defendant's first appeal was successful and it was only in the High Court on second appeal that the plaintiff got his mortgage decree. In this particular case the Court took into consideration the actual wording of the form of the decree and the practice of the Court and although the actual form of the order for costs is the same as the one in the present case the learned Judges said:

> If the decree of the High Court had expressly followed the judgment, we do not think it could be contended that Dambar Singh was personally liable for the costs.

This differs somewhat from the judgment passed in the present case. In 41 All 473[5] it is pointed out that in matters of this kind each case must depend on its own decree. 48 All 425[6] can easily be distinguished because in that case the suit was for redemption. In the present case the judgment of this Court in appeal makes it, I think, perfectly clear that the Court was of the opinion that the appeal should never have been brought. The respondent's advocate was not called upon and the judgment is about six lines. In actual form this decree makes the defendant personally responsible for the costs, and I see no reason to doubt that that was the intention of the Court, particularly in a case like this where the personal remedy for the balance of the money ordinarily due on the mortgage was barred, and unless there was a personal order for costs the respondent would have been brought to the Appellate Court for no good purpose whatever and with no possible chance of recovering his costs. For these reasons I would alter the order dismissing the application for execution and would direct that it proceed, but only for the purpose of recovering Rs. 1200 awarded in the appellate Court. The appellant has been only partly successful. I would pass no orders as regards costs of this appeal.

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[3] Raj Kumar Singh v. Sheo Narayan Sahu, (1908) 35 Cal 431=12 C W N 364=8 C L J 152.

[4] Dambar Singh v. Kalyan Singh, (1918) 5 A I R All 366=43 I C 557=40 All 109=15 A L J 914.

[5] Amina Bibi v. Rama Shankar Misra, (1919) 6 A I R All 297=50 I C 730=41 All 473=17 A L J 582.

[6] Sheo Darshan Singh v. Beni Chaudhri, (1926) 13 A I R All 424=94 I C 872=48 All 425=24 A L J 424.

**Sharpe J.**—The first point in this appeal is whether the opening words of the second paragraph of the decree passed on 22nd May 1935 by the District Judge of Amherst in Civil Suit No. 20 of 1934 can be regarded as a separate and special personal order directing the defendant to pay to the plaintiff the sum of Rs. 2400 for costs of suit. As my brother Baguley has pointed out, taking the decree as it stands there are two orders in regard to those Rs. 2400; therefore it is argued that the plain meaning of such repetition, especially when the decree opens, as it does, with a specific statement as to the payment of the costs, is that it amounts to a personal order. But regard must be had to Form 5 in Appendix D to the Code of Civil Procedure, as modified by the Rule Committee of this High Court, from a perusal of which form it appears that this present decree merely follows the prescribed form. If the decree is to follow the form, as it must do, how else can an order, where no personal liability is intended, be drawn up? This present decree is in the form in which it would be even were it agreed that no personal order was intended. Therefore the argument presented to us on this matter on behalf of the appellant must, in my judgment, fail.

A second point arises in regard to the Rs. 1200, being the costs of an unsuccessful appeal which this Court ordered the appellant-defendant to pay to the respondent-plaintiff. Those costs stand on an entirely different footing. Without examining the reasons for their doing so as my brother Baguley has done, (and I would add that I entirely agree with all he has said on that point) I will content myself with adding that, quite apart from the obvious good sense of the matter, the decree in Civil First Appeal No. 107 of 1935, in this Court, is, from its very form and terms, clearly a personal order against the appellant-defendant to pay the Rs. 1200 to the respondent-plaintiff. Therefore in my judgment the appellant in the present appeal should succeed on this second point. I accordingly agree with my brother Baguley that the order proposed by him is the one which we should pass. I also agree that each of the parties to this appeal should bear their own costs.

D.S./R.K. *Appeal partly allowed.*

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## A. I. R. 1938 Rangoon 193

MOSELY J.

*Ma Thaung* — Applicant.

v.

*Nandiya* — Respondent.

Criminal Revn. No. 439-B of 1937, Decided on 5th October 1937, from order of Addl. Sess. Judge, Maubin, D/- 19th July 1937.

**Criminal P. C. (1898), S. 439 — Appellate Court misdirecting itself on point of law—High Court can and should in proper cases direct re-hearing of appeal.**

Though the High Court should not, in revision, direct a re-hearing of an appeal on the ground that the Appellate Court had taken a mistaken view of the facts, yet the High Court can, and should, in proper cases where the Appellate Court has misdirected itself on a point of law, point out the error and direct the re-hearing of the appeal: *Case law referred.* [P 194 C 2]

S. T. Leong and Chan Tun Aung — *for Applicant.*

Kyaw Myint — *for Respondent.*

**Order.**—This is an application in revision against an order of acquittal by the Additional Sessions Judge of Maubin. The accused was convicted by the trial Court on a charge under S. 406, I. P. C. The application is on the ground, amongst others, that the order of acquittal in appeal was based on a misconception of law. What is prayed for is that the order of acquittal be set aside and a re-trial ordered. It is not stated whether a re-trial of the case in the trial Court was prayed for or merely a re-trial of the appeal. The power of the High Court to interfere in revision with an order of acquittal has been the subject of two fairly recent reported rulings of this Court. 7 Rang 538[1] was an application in revision against an order of acquittal by the trial Court. It was remarked that cases might well occur in which, owing to non-recording of evidence or improper recording of inadmissible evidence, a High Court interfering in revision might set aside an order of acquittal and direct a re-trial, which the Magistrate before whom the case came could deal with in a perfectly

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1. Ma Nyen v. Maung Chit Hpu, A I R 1929 Rang 321=1929 Cr C 497=120 I C 912=7 Rang 538=31 Cr L J 186.

impartial manner. 8 Rang 663[2] was an application for revision of an order of acquittal passed in appeal. The application was one to restore the conviction of the trial Magistrate—which is of course contrary to S. 439 (4), Criminal P. C. It was said there :

> It has been laid down in 42 Cal 612[3] that, though the High Court has jurisdiction to interfere on revision with an acquittal, it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interest of public justice. This decision was followed in 3 U B R 19[4] where the learned Judicial Commissioner of Upper Burma held that the only cases in which applications at the instance of private parties against orders of acquittal could be entertained are those in which there has been a failure of justice through want of jurisdiction or a failure to understand the law applicable to the case.

The question of interference in revision with an order of acquittal passed in appeal as opposed to such an order passed in the original trial was not dealt with there. The powers of a High Court in revision are the same as those conferred on a Court of Appeal by S. 423, Criminal P. C., except that a finding of acquittal cannot be converted into one of conviction : *vide* S. 439, sub-ss. 1 and 4, Criminal P. C. S. 423 (1) enacts that the Court may

> (a) In an appeal from an order of acquittal reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial. . . . .

The section does not in so many words allow of the re-hearing of an appeal, but as early as the case in 9 All 134[5] at p. 136, it was held that in such a case as the present one the Court of Appeal was the proper tribunal for re-trial of the appeal. It was said :

> . . . . it would be idle, as well as unreasonable, to direct a re-trial by the Magistrate, whose proceedings, the order of the Appellate Court having been reversed, so far stand good, and who would, presumably, as a matter of course, re-affirm the conviction.

The same conclusion was arrived at in 13 Bom 506,[6] where 24 W R Cr 41[7] was followed. This was also a case where the order of acquittal in appeal had been arrived at on an erroneous view of the law. The concluding words of that ruling are as follows :

> . . . . We are of opinion that the words relating to trial in the present Code, in S. 423, are used in a sense wide enough to include the trial of appeals as in Ss. 342, 344, 352 and some sections of Ch. 25.

Other cases, where, in revision, the High Court has directed a re-hearing or re-trial of the appeal on the ground that the accused was acquitted on a misconception of law, are 27 Cal 320[8] and 23 A L J 433.[9] It may be noted that the word "trial" is not defined in the Criminal Procedure Code. It has been held to include an appeal for the purposes of other sections also, e. g. for the purposes of S. 497 in 16 Cal 121[10] and of S. 555 in 23 Cal 44.[11] Other instances are collected in the note to S. 4 (k), Criminal P. C., at p. 22 of Sohoni's Commentary, Edn. 13. It is clear that, though this Court should not, in revision, direct a re-hearing of an appeal on the ground that the Appellate Court had taken a mistaken view of the facts, (for that would be tantamount to a direction to take the view that commended itself to this Court, and in effect to direct that an acquittal be turned into a conviction), yet this Court can, and should, in proper cases where the Appellate Court has misdirected itself on a point of law, point out the error and direct the re-hearing of the appeal. (His Lordship then dealt with the case on merits and dismissed the revision.)

S.C./R.K. *Revision dismissed.*

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[2] U Min v. Maung Taik, A I R 1931 Rang 94 = 1931 Cr C 382=132 I C 545=8 Rang 663=32 Cr L J 928.

[3] Faujdar Thakur v. Kasi Chowdhury, A I R 1915 Cal 388=27 I C 186 = 16 Cr L J 122 = 21 C L J 53=42 Cal 612=19 C W N 184.

[4] Nga Po Pyaw v. Nga Po Nwe, A I R 1917 U B 7=42 I C 330=3 U B R 19=18 Cr L J 970.

[5] Queen-Empress v. Balwant, (1886) 9 All 134= 1886 A W N 322 (F B).

[6] Queen-Empress v. Ganesh Khandergo, (1889) 13 Bom 506.

[7] Government of Bengal v. Gokool Chunder Chowdhury, (1875) 24 W R Cr 41.

[8] Queen-Empress v. Basant Lall, (1900) 27 Cal 320=4 C W N 311.

[9] Rameshwar v. Gobind Prasad, A I R 1925 All 473=87 I C 426=23 A L J 433 = 26 Cr L J 970.

[10] Madhub Chunder v. Novodeep Chunder, (1889) 16 Cal 121.

[11] Nistarini Debi v. Ghose, (1896) 23 Cal 44.

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## A. I. R. 1938 Rangoon 194

MACKNEY J.

*Abdul Sattar Abdul Aziz* — Appellant.

v.

*The King.*

Criminal Appeal No. 578 of 1937, Decided on 14th July 1937, from order of Fourth Addl. Magistrate, Rangoon, D/- 29th May 1937.

**Penal Code (1860), S. 471—Accused (plaintiff) mentioning certain document in affidavit of documents in his possession during pendency**

**of suit—Accused producing document at instance of defendant in his cross-examination—Document alleged to be forged—Circumstances held were not enough to establish charge under S. 471.**

The accused had filed a suit for dissolution of partnership in which he was required to file an affidavit of documents which were in his possession relating to any matter in question in the suit. The accused had mentioned in it a certain document, namely a delivery order relating to certain bags, but he did not produce it in Court nor make use of it. It was the defendants who in cross-examination of the accused required the document to be produced and the document was thereupon produced in Court at their instance The document was alleged to be forged and the accused was prosecuted under S. 471 :

*Held* that the circumstances were not enough to establish a charge under S. 471 as the accused was forced by the defendants to refer to this document in evidence. By mentioning the document in his affidavit of documents in his possession, it may be that he showed that at one stage he had made preparation for using the document, but no more than that could be inferred : *A I R 1925 Rang 191 and A I R 1926 Cal 89, Rel. on.* [P 196 C 2]

Clark and Williams — *for Appellant.*

**Judgment.**—In Civil Regular No. 303 of 1934 of the Original Side of this Court the appellant Abdul Sattar Abdul Aziz sued Yusoof and Noor Mohamed Haji Adamji for a declaration that the partnership between them should be dissolved and for taking of accounts and payment of the plaintiff of such sums of money as capital and profits as might be found due to him. The case was tried by Leach J. and he dismissed the suit. He found that there was no partnership. He also was of the opinion that the plaintiff had fraudulently or dishonestly used as genuine two documents, namely a delivery order authorizing the godown keeper to deliver to Yusoof and Noor Mohamed 43 bags of orpiment, and also a receipted bill dated 17th March 1934 purporting to have been issued to Hashim Suleman, father-in-law of the plaintiff, which document he knew or had reason to believe to be a forged document. Accordingly he directed that a complaint should be laid against Abdul Sattar Abdul Aziz in the Court of the District Magistrate, Rangoon, under S. 471, I. P. C. The Magistrate who tried the case examined the Assistant Registrar of the Original Side, the Interpreter who had interpreted during the civil proceedings, and the Inspector of Police of the Criminal Investigation Department, who had, in the course of the investigation of another case against the appellant, seized certain documents from his possession among them being the said delivery order. He having been summoned to produce this document had done so. Hashim Suleman gave evidence that he had produced the receipted bill in the civil suit on behalf of the plaintiff-appellant; and finally, Noor Mohamed Haji Adamji (this person was one of the defendants in the civil suit) was examined. He deposed that his firm did not get delivery of 43 bags of orpiment as was stated in the delivery order. He further stated that the said delivery order was written on a piece of paper which had originally formed part of the receipted cash bill issued by his firm to Hashim Suleman and signed on the back by his son Ebrahim Noor Mohamed. The top part of the paper which had contained the bill had been cut off and on the blank portion underneath was written the forged delivery order signed by the appellant. He further deposed that the cash-bill produced by Hashim Suleman was also a forgery. This was all the evidence for the prosecution.

The appellant was charged under three heads. First under S. 468, I. P. C. for having forged the delivery order intending it to be used for the purpose of cheating; secondly, under S. 471 read with S. 468, I. P. C. for having fraudulently or dishonestly used as genuine the delivery order which he knew, or had reason to believe, at the time he used it to be a forged document; and finally, under S. 471 read with S. 465, I. P. C. for having fraudulently or dishonestly used as genuine the cash bill which he knew or had reason to believe at the time he used it to be a forged document. The Magistrate's reasons for holding that the delivery order is forged are (1) that on placing it side by side with its alleged counterfoil (produced by Noor Mohamed) it had two parallel lines on the top like the other foils in the book to which the counterfoil belonged, (2) the right hand and bottom edges are coloured red like the other foils, and (3) the water-mark on the delivery order fitted in with the water-mark on the counter-foil. On the whole sheet of the paper comprising foil and counterfoil appears the water-mark "Radio Bond—Made in Norway;" on the counterfoil appears the portion "Rad" and "Made"; and on the delivery order appear the letters "O" and "In Norway". The original perforated edge of the delivery order had been cut off, thus cutting away the "I" of "Radio". Apparently the Magistrate accepted the bill book produced by Noor Mohamed as being a genuine one. I may say at once that there is no proof whatsoever that this book is a genuine one, and the Magistrate ought not to have assumed it to be such on the mere unsupported statement of Noor Mohamed who admittedly knows nothing personally about it.

The Magistrate pointed out that the signature on the anna stamp and the rubber stamp thereon, which appear on the back of the delivery order, are placed right on the upper edge thereof and not in the middle or somewhere lower down where one would have expected it to be. The Magistrate further held that the appellant had failed to account for 46 bags out of 170 bags of orpiment which were entrusted to him. There is no evidence whatsoever of this. The Magistrate then remarked that the appellant had had an opportunity of getting hold of a proof sheet of such bills as those on which Ex. Cl produced by Hashim Suleman, was written. The Ex. Cl bears a serial number, but it was written in ink, whereas the bills of the firm had the numbers printed. The receipt had further not been stamped with the rubber stamp. The Magistrate accordingly convicted the appellant under all the three charges and sentenced him to one year's rigorous imprisonment on each charge. Against this sentence Abdul Sattar Abdul Aziz has now appealed.

The first point I notice is that there is no evidence that Abdul Sattar Abdul Aziz used the delivery order for the purpose of cheating, and no evidence that he used the delivery order as genuine, and no evidence that he forged it. What happened was this. When his civil suit was filed, he was required under the provisions of O. 11, Rr. 12 and 13 to file an affidavit of documents which were or had been in his possession relating to any matter in question in the suit, and in his affidavit mention was made about the delivery order. Nevertheless the appellant did not produce it in Court, nor make any use of it. It was the defendants who, in cross-examining the appellant, required the production of the delivery order; and it was at their instance that the officer of the Criminal Investigation Department attended Court and produced it. The appellant said that it was a genuine document, and his father-in-law Hashim Suleman came to Court and produced the other alleged forged document (the receipted bill) in order to support the statement that the delivery order was a genuine document, and to meet the defendant's suggestion that the delivery order had been written on the genuine receipted cash bill given to Hashim Suleman, of which that produced by him was a forged substitute. In 3 Rang 36[1] (*see also* 52 Cal 881[2] at page 886) it was held that

> where during the pendency of a suit . . . . .the defendants disclosed in their affidavit of documents the documents in question and later produced them on being called upon by the plaintiff to do so, *held* that such circumstances did not constitute a deliberate user of the documents by the defendants and a charge under S. 196, Penal Code, would not, therefore, lie against them.

Much more than this would be required to establish a charge under S. 471, I. P. C. The appellant was forced by the defendants to refer to this document in his evidence. But for the defendants, it would not have been produced in Court or at least we do not know that it would have been produced. By mentioning the document in his affidavit of documents in his possession, it may be that he showed that at one stage he had made preparation for using the document, but no more than that can be inferred.

Of course, if it can be shown that the paper on which the delivery order was written was part of the receipted cash-bill issued to Hashim Suleman, then, inasmuch as the appellant admittedly wrote and signed that delivery order, it could be held that he had forged it.

It will here be convenient to remark that I am unable to see that there is any evidence that justifies the assumption that it was necessary to the appellant to make it appear that he had delivered 49 bags of orpiment to Noor Mohamed. Ex. 25, dated 8th June 1934 is a letter from the advocate of Yusoof Noor Mohamed to the advocate of the appellant. In this letter it is stated that out of 130 bags of orpiment entrusted to the appellant for sale he had failed to account for 43 bags. Now in all there is a question of the disposal of 170 bags of orpiment. Of these 40 were admittedly shipped direct to Bombay. 42 others are shown to have been sold to various persons. This letter Ex. 25 shows that appellant accounted, although he did not pay, for 80 bags, thus leaving only 8 bags to be accounted for and not 43 bags. A reference to Noor Mohamed's deposition, in which he refers to the accounts relating to these bags, shows that some 56 bags had been sold to various persons, that appellant had taken 55 bags, and that 40 bags had been sent to Bombay, making 151 bags in all, leaving only 19 bags to be accounted for.

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[1] Ma Ain Lon v. Ma On Nu, A I R 1925 Rang 191=85 I C 253=3 Rang 36=26 Cr L J 509 =3 Bur L J 349.

[2] Emperor v. Mohit Kumar, A I R 1926 Cal 89 =91 I C 993=27 Cr L J 177=52 Cal 881.

From Noor Mohamed's evidence the accounts seem to be in a very unsatisfactory state. Noor Mohamed himself did not keep those accounts and he was not in Rangoon on the dates material to this case. His evidence is mainly hearsay. At page 15 of his deposition he says :

> As the orpiment bags were sold we credited the sale proceeds in Mandalay branch account and sent intimation to Mandalay branch who make payment to the Chinaman. I have not brought the Mandalay branch book to Court; they are in Mandalay.

Since all the account books were not produced, it is obvious that it was impossible to know exactly what happened. These accounts should have been produced. This failure to explain why the appellant should wish falsely to account for 43 bags of orpiment is a vital defect in the prosecution case against the appellant.

The appellant says that the receipted cash-bill was receipted by one Abdul Majid and he has shown that a person of that name was employed during the month of April 1934 and other months by Habi Abdul Latiff and Sons and Abdul Latiff Shah Mohamed and Sons and that his wages were paid by Yusoof and Noor Mohamed, the amount being debited against these firms. These firms had their offices in the shop of Yusoof and Noor Mohamed. Two cash-bills of Yusoof and Noor Mohamed were produced purporting to have been signed by Abdul Majid. The person who produced them does not remember the name of the person who receipted the bills for him, but he said that he was an employee of Yusoof and Noor Mohamed and was a Hindustani. No attempt has been made to show that the signatures on Exs. 40 and 41 were not signed by the same man who signed Hashim Suleman's cash-bill.

The Magistrate has said that it was possible for the appellant to get hold of the proof sheet on which the forged receipted cash-bill was written. His only authority for this statement is the statement of Noor Mohamed, who states that appellant had ordered these bill books on behalf of the firm; but Noor Mohamed had to admit that he was not in Rangoon when the order was placed by the appellant. He does not know in which press these bill books were printed. It should have been quite easy to discover this, but apparently no attempt was made. There is absolutely no proof whatsoever that appellant ordered these bill books. Noor Mohamed says, referring to Ex. D the bill book which contains the alleged counterfoil of the original bill issued to Hashim Suleman, that he does not recollect where this and other similar books were printed. His partner Yusoof or his son Ebrahim must have got them printed. Neither of these persons has been cited as a witness.

It may here be remarked moreover that the delivery order is signed by Ebrahim. Ebrahim has not been called to prove that when he signed this document, it did not bear on the other side a delivery order signed by the appellant. This, in my opinion, is a very serious omission and throws grave suspicion on the prosecution case.

It is interesting to notice what Noor Mohamed has to say about the firm's account books. At page 5 he says :

> I pay income-tax. I have never submitted my stock book or account books to the Income-tax Authorities. It is the practice of the Income-tax Department to send notice for submitting account books. I always stated that our books were not ready. I have been assessed to income-tax since 1928-29. Since then we have not produced our account books.

Again at p. 2 he says : "We have only one cash bill book at a time, and when it is exhausted another book is started." Yet what do we find? We find that the cash books are not even used in serial order. Exs. D, 5, 6 and 29 all belong to the same series. Ex. 29 bears Nos. 1 to 250 and was in use from 10th March to 1st August 1934. Ex. 6 bears Nos. 251 to 500 and was in use from 5th June to 26th August 1934. Ex. 5 bearing Nos. 1001 to 1200 was in use from 11th January to 21st February 1934 and Ex. D bearing Nos. 1251 to 1500, but not all used, runs from 21st February to 31st March 1934. These figures show that bill books were not used in serial order, and that they do at times overlap because more than one was in use at the same time. Further, bills Nos. 501 to 1000 are apparently missing. The person who kept the Ex. D bill book has not been called. We have no explanation for these peculiarities. Apparently 1500 bill forms were purchased. Noor Mohamed admits that from 1st April 1933 to 28th March 1934 he could not find any entry about the purchase of 1500 bills.

As regards the absence of rubber stamp on the receipted cash-bills, at page 8 of his deposition Noor Mohamed admits that there was no hard and fast rule to put a rubber stamp on the bills received. Looking at the manner in which the firm's books are kept, I cannot see why it should not have been possible that a bill book should have been used in which the numbers were written by hand and not printed. It will be seen that the case against the appellant rests merely on the assumption that the firm's books are genuine and trustworthy. This is an assumption which I am unable to hold to be justifiable. I regard it as most suspicious that the person who could have proved the genuineness of these books has not been called. I have already remarked on the absence of other witnesses whose presence seems to be very essential to prove the case against the appellant. It has not been shown that Ebrahim did not receipt this delivery order; it has not been shown that the appellant has failed to account for 43 or more bags of orpiment; it has not been shown that Ex. D is a genuine bill book, and it has not been shown that the receipted cash bill put in by Hashim Suleman is not a genuine one. In fact, in my opinion, the whole prosecution has failed lamentably. I do not know if the Magistrate was influenced by Leach J.'s opinion expressed in the civil suit and in his order directing the prosecution of the appellant. He should not have allowed himself to be so influenced. The case was sent to him for trial on the evidence put before him.

The judgment of this Court in the civil suit should not have been put in evidence. I do not know under what section of the Evidence Act it was admitted or what it was supposed to prove. The Magistrate has referred to S. 13 (1), Evidence Act, but I am unable to see how it applies. Apparently the Magistrate thought that the judgment of this Court on the Original Side, and on appeal therefrom, estopped the appellant from proving that he had a partnership with Noor Mohamed Haji Adamji. I am unable to agree with him. However the point is not very material as I do not think it was necessary for the appellant to prove that there ever had been a partnership. This appeal is allowed, the finding and sentence of the lower Court are set aside, and the appellant is acquitted.

K.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 198

MACKNEY J.

*U Po Mya* — Applicant.

v.

*The King.*

Criminal Misc. Appln. No. 34 of 1937 for transfer, Decided on 6th July 1937.

**(a) Legal Practitioner — Duties of, while defending person stated.**

A pleader defending a person has to do more than go through the record. He has to go through all the prosecution evidence, find out what defence may best be set up and what means there exist for putting up that defence. [P 199 C 2]

**(b) Practice — Duty of Court— Justice must be imparted at all costs.**

Even if considerable expense is incurred by the State in the proper administration of justice, yet that expense must be incurred and injustice must not be perpetrated simply because justice is expensive. [P 199 C 2]

**(c) Criminal Trial — Transfer— Magistrate's display of unnecessary haste in trial of case — Magistrate's failure to give accused opportunity to engage legal assistance — Case should be transferred.**

Where the Magistrate has displayed far too much haste in the trial of the case and has wrongly failed to give the accused opportunity to engage such legal assistance as he thought proper, the conduct of the Magistrate, although not inspired by any unfair motives, is such as to fill the mind of the accused, not unreasonably, with an apprehension that he will not secure a fair and impartial trial before him, and the accused can get his case transferred from such Magistrate. [P 200 C 1]

Wellington — *for Applicant.*

Myint Thein, Offg. Govt. Advocate — *for the King.*

**Order.**—This is an application by U Po Mya for the transfer of Criminal Regular Trial No. 52 of 1936 of the Court of the Second Additional Magistrate of Kyaukpyu to the Court of the District Magistrate of Kyaukpyu or any other competent Magistrate at Akyab far trial.

In this case U Po Mya has been charged with abetment of dacoity, a very serious matter for anybody, and not less so for U Po Mya, who I understand, is a member of the House of Representatives. The charge has connexion with the removal of certain rice which had been collected for distribution to persons suffering from the effects of a cyclone which had visited those parts.

The case commenced on 8th August 1936 before the District Magistrate but it was transferred to the Court of the Second Additional Magistrate. U Po Mya had not yet appeared before the Court. He had on 22nd August 1936 applied to this Court for the transfer of the case to some other district than Kyaukpyu. This application was dealt with in Criminal Miscellaneous Application No. 35 af 1936 but that was dismissed as being withdrawn on the ground that the Magistrate in question had been transferred and there was no object in proceeding with it. This order was passed on 13th October 1936 and the proceedings which had then been before this Court were returned to Kyaukpyu. The Magistrate received them on 30th October 1936 and then issued summons for U Po Mya to appear on 17th November. At that time U Po Mya was engaged at Cheduba in the General Election which took place on 14th November. However he did appear before the Magistrate on 17th November. At Kyaukpyu it is stated there are no higher grade pleaders. Now, in a case of such a very serious nature the accused person is certainly entitled to the best legal assistance that he can get and in the circumstances every facility ought to have been given to U Po Mya to provide himself with such legal assistance as he reasonably deemed necessary. In view of the fact that adequate legal assistance could not be procured in Kyaukpyu, U Po Mya asked the Magistrate to give an adjournment in order to enable him to engage an advocate from Akyab. This request was refused, the Magistrate being of the opinion that U Po Mya had had plenty of time in which to engage such legal assistance as he desired to have, and that this request was only made with a view to delaying the proceedings. It appears to me that this was a very severe attitude to adopt. The case had not really started. No sooner had it been projected in the District Magistrate's Court than proceedings were taken in this Court for the transfer of the case. U Po Mya had not even appeared before the Magistrate. The proceedings were returned only towards the end of October and U Po Mya could not possibly know when the case was to be tried until he got his summons. He was then in what might be described as a remote island where it was quite impossible for him to make adequate arrangements, and he was engaged in a business which might be described as of a public nature. In these circumstances I think the Magistrate erred in not allowing time to U Po Mya to engage legal assistance as he desired. All the trouble which has arisen since then was caused by this failure to allow U Po Mya adequate time to engage legal assistance.

The Magistrate proceeded with the utmost expedition with the trial of the case. On 21st November a charge having been framed under Ss. 392 and 397 read with S. 109, I. P. C., U Po Mya was arrested and placed in custody. He again asked the Magistrate to give him time to enable two higher grade pleaders of Akyab, for whom he had telegraphed, to proceed to Kyaukpyu in order to defend him. Apparently there is only a bi-weekly steamer service between Akyab and Kyaukpyu. The Magistrate refused this request also. He further thought that a day's time was sufficient for a pleader to go through a record of the present nature. The Magistrate apparently did not realize that a pleader defending a person has to do more than go through the record. He has to go through all the prosecution evidence, find out what defence may best be set up and what means there exist for putting up that defence. It seems to me that in a case of this nature certainly more than a day would be required by even the most skilful and able lawyers in order to decide this matter.

U Po Mya was then asked to give the names of prosecution witnesses he wished to re-call. He decided to re-call all of the prosecution witnesses. Here again the Magistrate fixed 23rd November for this purpose. 23rd November was a Monday. It appears to me that the Magistrate acted with the most unseemly haste in this matter. His excuse was that it would have cost the State a great deal of expense if the prosecution witnesses had been sent away and ordered to appear at a later date. But it is not only the State which is to be considered in these matters; it is the administration of justice. Even if considerable expense is incurred by the State in the proper administration of justice, yet that expense must be incurred and injustice must not be perpetrated simply because justice is expensive. It appears to me that the Magistrate by his conduct entirely deprived U Po Mya of the means of adequately defending himself.

On 23rd November Po Mya had apparently engaged a lower grade pleader from Kyaukpyu. This pleader asked the Magistrate for time to study the proceedings but the Magistrate granted him only one day. Consequently he was not in a proper position to cross-examine the recalled prosecution witnesses effectively. On 25th November U Po Mya was required to file a list of his defence witnesses and he did so. More than half of these witnesses the Magistrate refused to summon as he did not think they were material. He fixed 30th November for the appearance of these witnesses. He could only do so by directing that a telegram should be issued to the Township Magistrate of Cheduba ordering him to summon the witnesses who were in Cheduba, and by sending a telegram to another witness at Akyab and even to a witness at Rangoon. This conduct on the part of the Magistrate was most improper. Doubtless he was inspired with the desire to dispose of the case quickly, but this was not promptitude but the most indecent haste.

On 30th November U Po Mya protested against the examination of these witnesses because one of the recalled prosecution witnesses had not yet been examined, and the case was adjourned till 9th December. Meanwhile the applicant had applied to the Sessions Court at Akyab asking that it should move this Court to transfer the case. The Sessions Judge did submit the proceedings to this Court but this Court declined to take action when so moved and recommended the applicant had first to move the District Magistrate of Kyaukpyu: in the event of the District Magistrate refusing to consent to his request, his proper course was to apply to this Court under the provisions of S. 526, Criminal P. C. The District Magistrate having refused to transfer the case the applicant has now come before this Court again. The learned District Magistrate took the view that as the proceedings had been pending since August 1936, U Po Mya was the only person who could be blamed for not having secured legal assistance. As I have already stated I do not think that this is a good argument.

In my opinion the conduct of the Second Additional Magistrate of Kyaukpyu, although I do not suggest that he has been inspired by any unfair motives, has unfortunately been such as to fill the mind of the accused, not unreasonably, with an apprehension that he will not secure a fair and impartial trial before him. The Magistrate has displayed far too much haste in the trial of the case and has, in my opinion, wrongly failed to give the applicant opportunity to engage such legal assistance as he thought proper.

The applicant asks that the case be tried either by the District Magistrate of Kyaukpyu or by some Magistrate at Akyab. I see no reason why the case should be transferred out of Kyaukpyu District. It seems to me that the District Magistrate at Kyaukpyu is the Magistrate who will most suitably try this case. I therefore direct that Criminal Regular Trial No. 52 of 1936 in the Court of the Second Additional Magistrate of Kyaukpyu be transferred to the Court of the District Magistrate of Kyaukpyu for trial by him in accordance with law.

R.W./R.K. *Case transferred.*

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## A. I. R. 1938 Rangoon 200

MACKNEY J.

*L. R. Abrol* — Applicant.

v.

*S. L. Sirpaul* — Respondent.

Criminal Revn. No. 258-B of 1937, Decided on 12th July 1937, from order of Senior Magistrate, Mandalay, D/- 4th January 1937.

**Criminal P. C. (1898), S. 250 — Compensation — Matter of awarding compensation in frivolous cases is discretionary with Magistrate — Appellate Court cannot set aside order of compensation except for cogent reasons.**

Once it has been decided that a case is a false one and frivolous and vexatious, then it is a matter within the Magistrate's discretion as to whether it is one in which compensation should be given or not : and the Appellate Court is not entitled to set aside an order for payment of compensation in such a case save for very cogent reasons. [P 201 C 1]

Where therefore the Appellate Court set aside an order for compensation on the ground that the accused's defence was not true in its opinion without giving any convincing reasons :

*Held* that there was no sufficient justification for setting aside the order. [P 201 C 2]

K. C. Sanyal — *for Applicant.*

B. C. Paul — *for Respondent.*

**Order.** — The applicant was the accused in a prosecution under S. 380, I. P C. initiated by the respondent S. L. Sirpaul in the Court of the Senior Magistrate, Mandalay. The Senior Magistrate in a very full and detailed judgment gave his reasons for believing that the prosecution was a false one and finding also that it was frivolous or vexatious. He has ordered the respondent to pay compensation of Rs. 100 to the applicant Abrol under S. 250, Criminal P. C. In default he was to suffer 30 days simple imprisonment.

Against this order the respondent appealed to the Sessions Court at Mandalay and the learned Sessions Judge, although he agreed with the Magistrate that the case was a false one, held that it was not one in which compensation ought to be given because Abrol had put forward a dishonest and untrue defence.

Against the order of the Sessions Judge, Abrol has now applied to this Court in revision on the ground that the learned Sessions Judge was not justified in holding that the applicant had not conducted his defence honestly and that he was not justified on this ground alone in setting aside the order of the Magistrate.

It appears to me that once it has been decided that a case is a false one and frivolous or vexatious, then it is a matter within the Magistrate's discretion as to whether it is one in which compensation should be given or not : and it appears to me that the Appellate Court is not entitled to set aside an order for payment of compensation in such a case save for very cogent reasons. In the present case I am unable to find them. He remarks :

> Further although the charge of theft may be a fantastic one, it seems too much to believe that complainant for no reason at all decided to involve a man who was never in his company on a charge of this nature. The first part of complainant's story about meeting the girls and all adjourning to his shop to drink does not appear to be a concocted one and I do not think taking the evidence and the probabilities of the case into question that it can be held that Abrol was not one of the party.

Now, it seems to me, with great respect, that the learned Sessions Judge was not entitled to alter the Magistrate's order because, in his opinion the accused's defence might not be a true one. Even as it is, the learned Sessions Judge cannot give any convincing reason why the defence evidence should be branded as false. Apparently he thought that Abrol ought to have called his witnesses before the police, and his failure to do so cast doubts on the alibi produced by him. I do not know that it is incumbent on an accused person to produce his witnesses before the police. I can quite conceive that an accused person might prefer not to do so. At any rate the fact that he did not do so does not necessarily show that his witnesses are false witnesses. The learned Sessions Judge considered that Ma Kyi, a woman originally called for the prosecution but who gave evidence in favour of the defence, was not telling the truth. His reason for saying so is that she denies having been examined by the police. He remarks : "This must be a deliberate falsehood as if she had not been examined the police would not have sent her up." But surely this is not alone a sufficient reason for holding that when she states that the accused was not present in the shop she is not telling the truth : nor do I think that the learned Sessions Judge was entitled to say that it would look as if she had been bought over by the defence. It is the fact that the learned Sessions Judge was inclined to think that Abrol was there in the shop where the theft is alleged to have taken place, that has caused him to take the view that this is not a case in which compensation should be awarded.

I am bound to say that I do not think that he had sufficient justification for differing from the Magistrate's finding on this point. He has merely expressed his own opinion on the matter, an opinion of the correctness of which he cannot possibly, in the circumstances, be absolutely sure.

Towards the end of his judgment the learned Sessions Judge has put forward a theory to explain how the charge of theft originated. This is entirely a theory of the learned Sessions Judge and admittedly is not directly based on the evidence before him. It is ingenious but it cannot be accepted as necessarily correct. When the learned Judge goes even further and suggests that the two witnesses for the prosecution, who could not be found, have actually been kept out of the way by Abrol, I think that he has gone far beyond the limits of reasonable conjecture.

The learned Judge has set aside the order of the Magistrate, which was a very carefully considered one, not because he differs from the conclusions of the Magistrate or thinks they are wrong, but simply because he has certain ideas of his own about the falsehood of the evidence produced by the defence. I do not think that such an opinion would justify setting aside the Magistrate's order.

This application is therefore allowed. The order of the Sessions Judge is set aside and the order of the Magistrate directing the respondent to pay the applicant a sum of Rs. 100, in default of payment to suffer 30 days' simple imprisonment, is restored.

K.B./R.K. *Application allowed.*

## ✻✻ A. I. R. 1938 Rangoon 202
### FULL BENCH

ROBERTS C. J., DUNKLEY AND
BRAUND JJ.

*A. N. A. R. Arunachallam Chettyar* — Applicant.

v.

*V. M. R. P. Firm* — Respondent.

Civil Ref. No. 9 of 1937, Decided on 25th March 1938, made by Baguley and Sharpe JJ.

**✻✻ Civil P. C. (1908), O. 21, R. 2—Decree can be adjusted by new contract that judgment-debtor will do something in future, if decree-holder accepts it—Agreement by decree-holder that upon conveyance by judgment-debtor of certain lands, he would accept them in full settlement — Agreement is not concluded and Court will refuse to record it.**

A promise to do something in future is legal consideration, and if the decree-holder chooses to accept such a promise by the judgment debtor there is nothing in law to prevent him from doing so, and such a promise by the judgment-debtor and acceptance thereof by the decree-holder is a legal adjustment of the decree. Thus if *A* holds a decree against *B* and *B* offers to transfer certain property to *A*, and *A* accepts that promise to transfer in whole or part satisfaction of his decree, that is a binding contract which constitutes an adjustment of the decree in whole or in part and can be pleaded by *B* in bar of execution. But if *A*, as is usually the case, agrees to accept the transfer of the property in whole or part satisfaction of his decree, at that stage there is no concluded agreement between the parties, but *A* has really made a counter-offer which can be accepted by *B* only by performance, i. e. by the actual transfer of the property. In this latter case there is no adjustment until the property has been actually transferred : *Case law discussed.* [P 203 C 1, 2]

P. B. Sen — *for Applicant.*

Clark — *for Respondent.*

**Dunkley J.** — The question which has been referred for the decision of the Full Bench is as follows :

> Can a decree be adjusted, within the meaning of R. 2 of O. 21, Civil P. C., by a new contract that the judgment-debtor will do something in future, if the decree-holder is willing to take such a promise instead of the decree which he has ; or is it in every case necessary that the judgment-debtor shall perform the promise which he makes to the decree-holder before adjustment can be regarded as complete ?

The answer to the first part of this question is plainly in the affirmative and the answer to the second part is in the negative. The law regarding executory contracts as adjustments of decrees has been clearly laid down by a Bench of the Madras High Court in 56 Mad 198,[1] and we respectfully concur in the judgment of Reilly J. in that case. This decision has subsequently been followed by the Madras High Court itself in 69 M L J 77.[2] It has been followed by the Patna High Court in 15 Pat 390[3] and by the Bombay High Court in 37 Bom L R 230.[4] There are also judgments of the Calcutta and Lahore High Courts to the same effect, in which judgments, 56 Mad 198[1] was cited with approval.

The decision of a Bench of the Allahabad High Court in 44 All 258[5] has been cited as being contrary to the Madras decision ; but when the facts of this case are considered with the judgments, it becomes clear that there is nothing in this decision which is opposed to the decision in 56 Mad 198.[1] The headnote of the report seems to be too broadly stated, for it appears from the judgment of Piggott J. (at p. 262) that the agreement under consideration was not an executory agreement, but was an inchoate agreement, in that a proposal made by the decree-holder for adjustment of the decree had not been legally accepted by the judgment-debtor. The decree-holder had proposed to the judgment-debtor that he would accept satisfaction of his decree in a modified form and would abandon the execution proceedings if the judgment-debtor fulfilled four specified conditions. Acceptance of this proposal by the judgment-debtor could be only by performance of these four covenants, and he had not performed any of them. There was therefore no new contract in adjustment of the decree. The words used by Piggott J. (at p 263), when he says

> it seems to me fairly clear that an oral agreement, not as yet performed by either party, could not successfully be set up so as to prevent a decree-holder from proceeding with the execution of his decree,

appear to be very wide ; but they must be read subject to the facts of the case, and the facts were that no agreement had been concluded between the decree-holder and the judgment-debtor. Walsh J. in his judgment (at p. 264) stated the real decision of the Bench when he said :

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[1] Ramanarasu v. Venkata Reddi, (1933) 20 A I R Mad 28=141 I C 429=56 Mad 198=63 M L J 598.

[2] Raghupathirayadu v. Garapati Pichayya, (1935) 22 A I R Mad 581=158 I C 961=69 M L J 77.

[3] Satyabadi Sahu v. Mani Sahu, (1936) 23 A I R Pat 619=165 I C 940=15 Pat 390=18 P L T 110.

[4] Kalyanji Dhana v. Dharamsi Dhana & Co., (1935) 22 A I R Bom 303 = 157 I C 646 =37 Bom L R 230.

[5] Lachmin Das v. Baba Kalikamliwala Ram Nath, (1922) 9 A I R All 13=64 I C 990=44 All 258=20 AL J 65.

> An inchoate contract, which if completed would bar execution of a decree, cannot be pleaded as a bar to execution under O. 21, R. 2, and the judgment debtor cannot claim that the contract should be completed and then be invoked in bar of execution.

With due respect, this is, in our opinion, a correct statement of the law. As stated by Reilly J. in 56 Mad 198,[1] there is no reason why a decree should not be extinguished by a new contract that the judgment-debtor will do something in future, if the decree-holder is willing to take such a contract instead of the decree which he has in his hand. A promise to do something in future is legal consideration, and if the decree-holder chooses to accept such a promise by the judgment-debtor there is nothing in law to prevent him from doing so, and such a promise by the judgment-debtor and acceptance thereof by the decree-holder is a legal adjustment of the decree. But, naturally, if a judgment-debtor comes into Court and alleges that his decree-holder has given up his decree, which he can execute at once, and accepted in its place a promise by the judgment-debtor that he will do something at a future date, and if that is disputed, then the evidence that the decree-holder has accepted such a promise must be carefully scrutinized. Cases in which a decree-holder has accepted a promise by his judgment-debtor to do something in the future as satisfaction of his decree must be rare, and what usually happens in cases of adjustment of decrees is that the judgment-debtor suggests terms of settlement and the decree-holder agrees to accept the performance of these terms by the judgment-debtor as a settlement. At that stage that is not a completed contract, but the settlement is still in the stage of negotiation. It is a counter-proposal by the decree-holder, which proposal can only be accepted by performance. That is what Piggott J. meant when in 44 All 258[5] he said that an oral agreement not as yet performed by either party could not successfully be set up so as to prevent a decree-holder from proceeding with the execution of his decree ; and that is what my brother Mya Bu and I meant in our short judgment in First Appeal No. 82 of 1933,[6] which has apparently given rise to this reference.

The reporting of this latter case in the All India Reporter exemplifies the danger of reliance on unofficial reports. The case before us was so plain and, in our view, of so little importance that we did not consider it necessary even to set out the facts in our judgment, and we certainly had no intention of enunciating any proposition of law. When the facts of that case are examined it becomes at once apparent that what we had before us was a suggestion for settlement of the decree which had not yet passed the stage of negotiation ; there was no completed agreement between the parties. The use of the words "executory" and "executed" was perhaps somewhat unfortunate, and it would have been better if we had described the agreement as inchoate ; but our judgment is not open to any possibility of misunderstanding if it is read, as it ought to be, in connexion with the facts of that case. The correct law regarding the adjustment of a decree by a new contract may perhaps be most plainly stated by means of an example. If *A* holds a decree against *B* and *B* offers to transfer certain property to *A*, and *A* accepts that promise to transfer in whole or part satisfaction of his decree, that is a binding contract which constitutes an adjustment of the decree in whole or in part, and can be pleaded by *B* in bar of execution. But if *A*, as is usually the case agrees to accept the transfer of the property in whole or part satisfaction of his decree, at that stage there is no concluded agreement between the parties, but *A* has really made a counter-offer which can be accepted by *B* only by performance, i. e. by the actual transfer of the property. In this latter case there is no adjustment until the property has been actually transferred. The question referred will be answered in the above sense. The costs of this reference to be costs in the appeal; advocate's fee 5 gold mohurs.

**Roberts C. J.** —I have had the advantage of reading the judgment about to be delivered by my learned brother Dunkley and I agree with it. I desire only to make a few observations with regard to the adjustment of a decree within the meaning of O. 21, R. 2. A new agreement between the parties may be certified to the Court whose duty it is to execute the decree; thereupon the Court shall record the new agreement and it takes the place of the decree. An uncertified adjustment cannot be recognized by any Court executing the decree. Now the adjustment, or new agreement, must fulfil the essentials of any other valid contract before it can be enforced as such. It may be reached by the offer of a promise for a promise and mutual acceptances; as for instance where the decree-holder agrees to accept a mere promise by the judgment-debtor to convey certain lands to him. The fact that the contract is executory on both sides does not mean that it is any the less a valid agreement and adjustment of the decree. On the other hand the adjustment, or new agreement, may be reached by the offer of a promise for an act: as for instance where a decree-holder agrees that upon the conveyance by the judgment-debtor of certain lands to him he will accept them in full settlement of the decree. In such a case a mere promise by the judgment-debtor to do so does not conclude the agreement for it is not his promise but his performance which is asked for and which is to form the basis of a contract.

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[6] N. P. L. Firm v. B. K. Bhanja, *reported in* (1934) 21 A I R Rang 190=149 I C 95.

It is therefore necessary to see, as in the case of every other alleged contract, whether the parties really came to terms and were *ad idem*, or whether the negotiations proceeded no further than proposals and counter proposals without the clear and definite acceptance of an offer, which is the necessary foundation of every concluded contract. If they came to terms it does not matter that the concluded contract was still executory. A contract is said to be executory when it is as yet not performed or only partly performed by both parties: when one party has completely fulfilled his obligations in respect of the contract he is then said to have executed the contract. If they did not come to terms there can be no adjustment, and the offer of promises which are not accepted in the precise terms in which they are made cannot be recorded as such.

**Braund J.**—I agree. The question, as it seems to me, is in each case whether the decree-holder has, in fact, agreed immediately to take the judgment-debtor's promise — to use the words of the reference itself — "instead of the decree which he has." If he has, then, even if the judgment-debtor's promise is executory, an "adjustment" has in fact been accomplished. If there has been no concluded contract between the parties by a definite offer and a definite acceptance of that offer, it should be evident upon the ordinary principles of contract that there can have been no concluded "adjustment". In my view however, that does not quite end the matter. For, there may well be a concluded contract that a decree shall be "adjusted" or "extinguished" in future without the stage of a present "adjustment" of the decree having been reached. If, for instance, the judgment-debtor agrees to transfer to the decree-holder a certain property upon a future date and, in consideration of that promise, the decree-holder agrees to release his decree when the property has been transferred, that is a contract. But it is not an "adjustment" within the meaning of O. 21, R. 2, Civil P. C. The decree for the time being stands and it does not become actually "adjusted" until the judgment-debtor's promise has been executed.

In short, there are I think two questions always to be considered. The first is whether there has been a concluded contract at all. The second is whether or not it is a term of that concluded contract that the decree shall be immediately extinguished or whether its extinguishment is made conditional upon the previous execution by the judgment-debtor of his promise. In the former case there has been an "adjustment". In the latter, there has not. I think that the reference, having regard to the terms in which it is framed, should, as to the first part, be answered in the affirmative; and, as to its alternative, in the negative.

V.B.B./R.K. *Reference answered accordingly.*

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## A. I. R. 1938 Rangoon 204
### FULL BENCH

ROBERTS C. J., DUNKLEY AND SHARPE JJ.

*Rev. Po Tun* — Applicant.

v.

*Ma Chit and another* — Respondents.

Civil Ref. No. 13 of 1937, Decided on 8th April 1938, made by Mya Bu and Sharpe JJ.

**Divorce Act (1869), S. 16—Decree for dissolution of marriage by High Court, whether in its appellate or Original Side, should be decree nisi.**

**A decree for dissolution of marriage, made by the High Court under the Divorce Act, whether in its appellate or in its original jurisdiction, should be a decree nisi and not a decree subject to the confirmation by the High Court under S. 17.** **[P 205 C 1]**

G. D. Williams — *for Applicant.*

U Thein Maung, Advocate-General as *Amicus Curiæ.*

**Dunkley J.**—The appellant filed a petition in the District Court of Pakokku for the dissolution of his marriage with respondent 1 on the ground of her adultery with respondent 2. The petition was dismissed, and the appellant thereupon appealed to this Court. A Bench of this Court has allowed the appeal and has decided that there must be a decree for dissolution of marriage; but the question then arose as to what should be the form of the decree, whether it should be a decree subject to the confirmation of three Judges of the High Court under S. 17, Divorce Act, or whether it should be a decree nisi. This question has been referred for the decision of a Full Bench.

In my opinion, the question is answered by the plain terms of S. 16, Divorce Act, which enacts :

> Every decree for a dissolution of marriage made by a High Court not being a confirmation of a decree of a District Court shall, in the first instance, be a decree nisi.

It is urged that this section applies only to High Courts in the exercise of their original civil jurisdiction, but this argument overlooks the fact that only four of the High Courts in India and Burma have an original civil jurisdiction, and if the Legislature intended to restrict the provisions of this section to the Original Sides of those four High Courts, it would have been specifically so stated. It is further argued that a decision that an appellate decree passed by the High Court shall be a decree nisi will affect the substantive rights of the parties, because in the case of a decree subject to confirmation only the officer appointed under S. 17-A, Divorce Act may intervene before the decree is confirmed, whereas in the case of a decree nisi a third party may intervene; but actually it is a mere matter of procedure whether the third party must move the King's Proctor or may intervene by direct petition to the Court, and does not affect any person's substantive rights.

In my opinion, the provisions of S. 16, Divorce Act are plain in themselves, and are subject to no qualification. The answer to the question propounded must therefore be that a decree for dissolution of marriage, made by the High Court under the Divorce Act, whether in its appellate or in its original jurisdiction, should be a decree nisi.

**Roberts C. J.** — I agree. The matter appears to me to fall expressly within S. 16, Divorce Act. No order as to costs.

**Sharpe J.** — When my learned brother Mya Bu and I referred this question to a Full Bench I had very considerable doubts as to whether the question should be answered in the way which is now being agreed upon by my Lord the Chief Justice and Dunkley J. These doubts have not been entirely resolved, but having regard to the very definite view which the other members of this Court now take, I am not prepared to dissent.

V.B.B./R.K. *Reference answered.*

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## A. I. R. 1938 Rangoon 205

MOSELY AND DUNKLEY JJ.

*Rambilas Saboo and others* — Appellants.

v.

*Gopiram Shewbuxroy and another* — Respondents.

Special First Appeal No. 105 of 1937, Decided on 16th December 1937, against decree of Small Cause Court, Rangoon, D/- 21st June 1937.

**Partnership—Suit against partners—Partnership business carried on by some members of joint Hindu family—Other members not interested in business cannot be made liable in respect of loan borrowed for partnership business on footing that business is joint Hindu family business — Determination in a cause must be founded on case to be found in pleadings.**

The determination in a cause must be founded on the case to be found in the pleadings involved in or consistent with the case thereby made. [P 206 C 2; P 207 C 1]

Where the plaintiff sues the defendants upon the footing that they are partners in a partnership business, he cannot be granted a decree on the footing that the business is a joint Hindu family business, in which the defendants are interested as members of the joint family ; the two cases are entirely inconsistent. The same business cannot be a joint family business and also a partnership business. [P 206 C 2]

Where therefore the business carried on by certain persons, is a partnership business carried on by only some members of the joint Hindu family as partners, the other members of the family who are not interested in the business as partners cannot be made liable in respect of a loan borrowed for the partnership business, on the footing that the business is a joint Hindu family business: *A I R 1936 Rang 160, Rel. on.* [P 207 C 1, 2]

P. K. Basu — *for Appellants.*

Kalyanwala — *for Respondents.*

**Dunkley J.**—This appeal arises out of a suit for the recovery of a cash loan of Rs. 1000 and interest due thereon. In the original suit there were seven defendants. Defendants 1 and 2, Ramchandar and

Manalal, were brothers and the remaining five defendants are their sons. Defendant 2 Manalal has died and the claim against him was waived. Defendant 1, Ramchandar, did not defend the suit, and is not appealing against the decree which has been passed against him. This is an appeal by the remaining five defendants in regard to the decree which has been passed against them. The facts which have been found by the learned Chief Judge of the Small Cause Court are that defendant 6, Kanialal Saboo, who is appellant 5 in this appeal, held a power of attorney executed in 1928 by defendants 1 and 2, and managed a business in Rangoon, which was carried on in the name of Ramchandar Manalal; on 13th July 1931, Kanialal borrowed from the manager of the plaintiff-respondent firm a sum of Rs. 1000 and executed a promissory note therefor. The promissory note was signed by him in the following manner: "Ramchandar Manalal-Kanaiyalal," and it is not disputed that his signature was intended to mean that he signed as agent of Ramchandar and Manalal. The plaintiffs-respondents have obtained a decree against the appellants and Ramchandar for the amount of this loan. The cause of action upon which their claim was based is set out in paras. 2 and 3 of the plaint, which read as follows:

> 2. That the defendants are the members of the undivided joint Hindu family and partners who carried on business in partnership as cloth merchants under the name and style of "Ramchandar Manalal" at No. 64/30th Street, Rangoon, and in Silver Street, Akyab, and the money was utilized for the benefit of the partnership business.
>
> 3. That defendant 6 to ensure payment of the aforesaid amount executed a promissory note on the same day on behalf of himself and the firm for the same amount.

It is a cause of action based upon the allegations that the defendants were all partners in a trading partnership, and that the money was borrowed for the benefit of the partnership. Consequently, the averment that they were members of a Hindu joint family was redundant and irrelevant. The business, which the defendants are alleged to have carried on together, cannot be at the same time a Hindu joint family business and a partnership business; the two things are inconsistent; this is plain from the provisions of S. 5, Partnership Act: *see also* 14 Rang 122.[1] Nevertheless, an issue in this suit was framed in the following terms:

> 2 (a). Are the defendants members of an undivided Hindu joint family and partners who carried on business in partnership as cloth merchants under the name and style of Ramchandar Manalal at 64/30th Street, Rangoon, and in Silver Street, Akyab?
>
> (b) Was the money lent and advanced to the defendants utilized for the benefit of the said partnership business?

If a meaning is to be given to the whole of Cl. (a) of this issue, it apparently must mean that the business was at the same time a Hindu joint family business and also a partnership business, and this is contradictory: as I have said, the same business cannot be a joint family business and a partnership business. However, on this issue the learned Chief Judge of the Small Cause Court found that all the defendants did constitute a Hindu joint family, and were liable as such; the question of partnership appears to have been entirely lost sight of. In spite of the finding that the family was a Hindu joint family, the business might still have been a contractual partnership belonging to some or all of them. The final finding of the learned Judge in his judgment was as follows:

> There will therefore be a decree as prayed with costs against defendant 1 and defendants 3 to 7 as members and co-parceners of the joint Hindu family of Ramchandar Manalal.

This finding must mean that the learned Judge had come to the conclusion that the business was a joint family business, and the terms of the decree which was drawn up are to the same effect, namely,

> .... it is ordered that defendants 1, 3, 4, 5, 6 and 7 as members and coparceners of the joint Hindu family of Ramchandar Manalal do pay to the plaintiff .....

It is implicit in this finding that the business was a joint family business, and it must therefore be held that the learned Judge found that the business was not a partnership business, and on this finding the suit as against the present appellants ought to have been dismissed. When the plaintiff sues upon the footing that the defendants are partners in a partnership business, he cannot be granted a decree on the footing that the business is a Hindu joint family business in which the defendants are interested as members of the joint family: the two cases are entirely inconsistent, and the determination in a cause must be founded upon the case to be found in the pleadings, or involved in or consistent with the case thereby made. On this ground the present appeal must be allowed. However, on the facts it is clear that the business was a contractual partnership between defendants 1 and 2, and that the appellants had no interest in this business. The learned Judge traced the history of the family, and came to the conclusion that the burden of proof that the original Hindu joint family had separated, which was upon the appellants, had not been discharged. As I have said, that was not a sufficient finding to dispose of the question whether the business was a joint family business, and the only evidence on this point is vague statements of witnesses for the plaintiffs-respondents, who had no knowledge or means of knowledge of the real facts. All that they knew or could possibly know was that the sons were working with their fathers in the business, as they would almost certainly do even if it was a partnership business belonging to their fathers.

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[1] Chidamvaram V. R. C. T. V. R. Chettyar v. Mutaya Chettyar, (1936) 23 A I R Rang 160 =162 I C 184=14 Rang 122.

The fact that it was a partnership business is proved, in my opinion, by the two powers-of-attorney which were granted to four of the sons of the appellants by their fathers (Exs. 16 and 18). Ex. 18 was executed by Ramchandar on 14th April 1916, and the power-of-attorney was granted to one Mahadevo and to the appellant Rambilas. It describes the business as a partnership business belonging to Ramchandar and his brother Manalal. This is, of course, an admission against Ramchandar's interest. Ex. 16 was executed on 4th April 1928. This power of attorney was granted to the appellants Gopilal and Kanialal; it is executed by both Ramchandar and Manalal, and the business is described as a firm belonging to them. If this power-of-attorney had been given by the karta of a Hindu joint family there could not have been two signatures upon it, for Ramchandar would, of course, be the karta of this particular family, and the two brothers would not have described themselves in the power as a firm : in that case Ramchandar alone would have executed it. At the times when these two powers were executed there was no dispute or any apparent possibility of dispute as to whether this business was a family business or a partnership business. The conclusion therefore is that the business was a partnership business, as it is described in the plaint, but that the partners were only the two brothers, Ramchandar and Manalal, and that the present appellants were not interested in the business as partners. The appellants therefore cannot be held liable for this loan, which was borrowed for the partnership business. This appeal is allowed, and, so far as the five appellants are concerned, the judgment and decree of the Small Cause Court is set aside and the suit as against them is dismissed with costs in both Courts.

**Mosely J.**—I agree.

R.M./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 207

MACKNEY J.

*Etbari* — Applicant.

v.

*H. Bellamy* — Opposite Party.

Civil Revn. Appln. No. 215 of 1937, Decided on 11th August 1937, against decree of Township Court, Maymyo, D/- 31st May 1937.

**(a) Master and servant — Domestic servant on monthly wage failing to do work properly, behaving improperly and leaving service without notice—He cannot claim payment for work done in fraction of month.**

A man who had undertaken work on a monthly wage as a domestic servant in a house and failed to perform his work properly, but behaved in an improper manner, and finally left the house without giving any notice whatsoever, should not be able to claim payment for the work that he may have done in the period from the beginning of the month up to the date of his departure, being less than a month: *23 M L J 680, Disting.* [P 208 C 1]

**(b) Contract Act (1872), S. 64—Word 'rescinds' implies express cancellation—Person employed as sweeper leaving master without notice—Master doing nothing except engaging another person—Contract with former servant is not rescinded.**

The word 'rescinds' as used in S. 64, Contract Act implies an "express and unequivocal cancellation of the contract." Where a domestic servant employed as sweeper of the house leaves his master without any notice and the master does nothing except engaging another person for doing the work the contract with the former servant is not necessarily rescinded by the master and hence the servant is not entitled to get the pay for the work done. [P 208 C 2]

*C. K. Ray* — for Applicant.

**Order.**—This is an application to revise the order of the Court of Small Causes at Maymyo in which it dismissed the suit of one Etbari against one Mr. H. Bellamy for recovery of Rs. 16-7-0 said to be wages due to Etbari. Etbari was a sweeper employed by Mr. H. Bellamy on a monthly wage. On 19th November 1936 he left Mr. Bellamy's house and ceased to do work without giving any notice whatsoever. The next communication received by Mr. Bellamy from Etbari was a lawyer's notice in which he claimed a sum of Rs. 12-8-0 for his pay from 1st November to 19th November and Rs. 3-5-0 being the cost of lawyer's notice. Mr. Bellamy very properly refused to comply with such a demand and consequently was subjected to this suit. In the suit Etbari alleged that he had been assaulted and that it was for that reason that he had left the house. The learned Judge held that the assault or ill-treatment had not been proved, that there had been a total disregard of orders, and that when reprimanded Etbari must have left without any notice leaving the house in a filthy condition. He therefore held that he was not entitled to any compensation or wages.

It is now urged before me that under the provisions of Ss. 39 and 64, Contract Act Etbari is entitled to payment for the days for which he worked. If this were so, the provisions of Contract Act would be entirely contrary to a well-known principle of English law applicable to this case and I can hardly believe this to be the case especially where such an inequitable result would be brought about. It would be intolerable that a man who had undertaken work on a monthly wage as a domestic servant in a house and failed to perform his work properly, but behaved in an improper manner, and finally left the house without giving any notice whatsoever, should be able to claim payment for the work that he may have done in the period from the beginning of the month up to the date of his departure, being less than a month.

The only authority which has been brought to my notice on this question is 23 M L J 680.[1] This is a decision of a single Judge. In this case a man engaged for a period of one year at a monthly salary left his master's service 10 days before the expiration of the year. It was held that he was entitled to his wages for the 11 full months he had been at work. (I think that case can be distinguished from the present case. The agreement was to pay a monthly salary although it was arranged that the payment should not be made till the end of the year.) The learned Judge relied on S. 64, Contract Act and Illus. (c) to S. 65. S. 64, Contract Act runs:

> When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Section 39 runs:

> When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.

Now, in the present case Mr. Bellamy has not rescinded the contract; he has done nothing except that he perforce engaged another person to perform the work of the sweeper in his house, and this is not necessarily a rescinding of the contract with Etbari. So far as I can see, he has not done anything at all about the contract. It seems to me that he does not allow Etbari to come forward to claim compensation from Mr. Bellamy for the work that he has done, when that contract has not been rescinded and he has not even offered to work out his contract because he could not offer to do so as he had made it impossible for him to do so.

It is quite clear, I think, that the word 'rescinds' as used in S. 64 implies 'an express and unequivocal cancellation of the contract'; otherwise, it would be impossible to understand the form of the sentence "the other party thereto need not perform any promise therein contained in which he is promisor". Obviously, a man who contracts to do something is bound to perform that contract so long as the contract has not ceased to subsist owing to the act of the other party and in this case it appears to me that it cannot be said to have ceased to subsist because Mr. Bellamy has rescinded it. It is only right that, where a party does expressly rescind a contract in the circumstances set out in S. 64, Contract Act, he should restore any benefit that he has received; but if he does not rescind the contract, I fail to see why he should restore any such benefit. Etbari is not entitled to claim restoration for the doubtful benefits of his service as a sweeper of Mr. Bellamy unless Mr. Bellamy expressly rescinded the contract. For these reasons I see no cause to interfere with the decision of the Small Cause Court at Maymyo, and this application is dismissed.

D.S./R.K. *Application dismissed.*

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[1] **Chokalinga Mudaliar v. Mohamed Sheriff Saib, (1912) 23 M L J 680=17 I C 894.**

## A. I. R. 1938 Rangoon 209

MACKNEY J.

*Maung Pan* — Applicant.

v.

*Maung Mya Din* — Opposite Party.

Criminal Revn. Appln. No. 322-B of 1937, Decided on 21st July 1937, from order of Township Magistrate, Singu, D/- 21st January 1937.

**Criminal Trial—Compensation — Parties on bad terms—Falsity of charge.**

The fact that the parties are on bad terms is not a sufficient ground for holding that a charge brought by one against the other is a false one. [P 209 C 2]

A. N. Basu — *for Applicant.*

Ba So — *for Opposite Party.*

**Order.**—This is an application to revise the order of the Township Magistrate of Singu directing applicant U Pan to pay Rs. 30 compensation to Maung Mya Din under S. 250, Criminal P. C. U Pan brought a complaint against Maung Mya Din under S. 409, I. P. C., alleging that when Maung Mya Din was temporarily acting as headman of the village he had given to him Rs. 20 to be paid into the treasury towards principal and interest on an agricultural loan taken by him : which money Maung Mya Din had embezzled. U Pan jointly borrowed Rs. 450 agricultural loan with Maung Chan Tha, Maung Po Chein, Maung Po Win and Maung Lu Se. Out of this Rs. 450, U Pan made himself responsible for Rs. 50. In December 1934 he handed over Rs. 20 to Maung Mya Din for payment into the treasury. He produced witnesses who corroborate this statement. He was further able to produce a witness, another village headman, who states that having received an order this year from the Township Office to attach the property of these borrowers for non-payment of the loan he attached U Pan's bullock. U Pan said that he had cleared the loan having paid Rs. 20 to Maung Mya Din. U Pan then took witness to Maung Mya Din's house and there Maung Mya Din said that "he got the money and he would re-pay the money if the others re-paid the loan to be given by them."

There was, in fact, very strong evidence to show that U Pan's complaint was a true one and it is somewhat strange that Maung Mya Din was not charged. The Magistrate discharged him, however, for reasons which appear to me altogether inconclusive. He points out that the parties are on bad terms, but this is not a sufficient ground for holding that a charge brought by one against the other is a false one. Then he says: "It is proved that Maung Lu Se credited due interest to be given by all the borrowers for 1934." But according to the Magistrate's judgment this money was paid in March 1934. In any case, so long as no money had been paid into the treasury, and this is U Pan's contention, the interest was due from all the borrowers. It matters not that in the diary of the revenue proceedings relating to the loan it is stated that the interest is paid by the borrowers. It would naturally be so stated because whatever money was paid in must be regarded as being paid towards the loan as a whole when no express stipulation is made that it is to be regarded as a contribution of one or other of the borrowers in particular. Even if some of the other borrowers on depositing the money in the revenue office omitted to say that it was on their own account and not on U Pan's, this would not necessarily prove that U Pan's story is a false one. Besides in any case, as U Pan borrowed Rs. 50 and had only re-paid Rs. 20, he still owed a major part of the loan taken by him.

The Magistrate says that the co-borrowers did not support U Pan's story. Neither do they give evidence to contradict it. Then the Magistrate relies on the fact that Maung Mya Din had filed two chalans showing that he had credited interest of Rs. 8-6-0 for his father U Ba La and Rs. 10-8-0 part of the interest to be given by U Pan and his co-borrowers. But this was done only in October 1936 after U Pan's complaint had been filed.

These were the reasons which induced the Magistrate to hold that the case is false, and consequently he called upon U Pan to show cause why he should not give compensation to the accused. The Magistrate failed to observe that it is also necessary for him to come to a finding that the case is frivolous or vexatious. Neither in his order of discharge nor in his order on U Pan's explanation does he come to any such finding. U Pan applied to the Sessions Court of Mandalay to revise this order. The learned Sessions Judge was of the opinion that although it was hardly a case where an order for compensation should have been passed, it was not for him to recommend to this Court that the order for compensation should be set aside, because it was not entirely without justification. Accordingly he rejected U Pan's application.

In my opinion, the order for payment of compensation was obviously entirely without justification. Certainly none of the reasons advanced by the Magistrate for holding that the complaint was a false one bears examination. The learned Sessions Judge remarks that the main point against the complainant was the fact that in 1296, i. e. 1934, Maung Lu Se asked for suspension of payment of the principal; and that if U Pan had paid his share of the principal and the interest for this year there was no reason for him to join in this application. But, in the first place at that time (March 1930) he had not yet paid Mya Din and, even if U Pan had paid off the whole of his share he would still have to join in any application by his co-borrowers for suspension of payment of the principal; since he had taken the loan jointly with them. The learned Sessions Judge pointed out that there was really no sufficient reason for discarding the evidence of the headman, U Ba Ko. Nevertheless, for the reasons which I have already set out above, the Sessions Judge did not feel empowered to recommend to this Court that the order should be set aside. In my opinion the order of the Magistrate was entirely unjustifiable. This application is allowed. The order of the Magistrate directing the payment of compensation by U Pan to Maung Mya Din is set aside. The money paid shall be refunded.

R.W./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 210

MACKNEY J.

*Ma Pan Bu and another* — Appellants.

v.

*Maung Lu Thant*—Respondent.

Special Second Appeal No. 130 of 1937, Decided on 19th August 1937, against decree of Asst. Dist. Court, Pakokku, in C. A. No. 37 of 1936.

**Civil P. C. (1908), O. 23, R. 1 (3)—Withdrawal of suit—Previous suit withdrawn without permission to bring fresh suit—Subsequent suit between same parties on same facts but on different basis — Meaning of O. 23, Rule 1 explained—Subsequent suit held not barred.**

The plain meaning of O. 23, R. 1 (3), is that if the subsequent suit is in respect of the same subject matter as the previous suit the subsequent suit must be dismissed. It matters not whether the defendant concurred with the plaintiff in the withdrawal of the suit. [P 211 C 2]

In a previous suit between *A* and *B*, the basis of the claim was alleged tenancy of *B* under *A*. It was alleged that *B* was holding over and it was prayed that he should be ejected. The suit was withdrawn by *A*, without permission to bring a fresh suit as being compromised. *A* subsequently sued *B* for being in wrongful possession of the same property in his own right and not as tenant of *A:*

*Held* that the subsequent suit of *A* was not barred by O. 23, R. 1 (3): *(1897-1901) 2 U B R 284, Dissent.; (1865) 2 Bourke 250 and 14 Bom 31, Expl.* [P 212 C 2]

L. H. Wellington — *for Appellants.*

E. Maung — *for Respondent.*

**Judgment.** — The plaintiffs-appellants, Ma Pan Bu and Ma Pan U, claim to be the owners of a piece of land forming a portion of holding No. 11 in Hnawgan Kwin in the township of Myaing. They claim that it belonged to their parents Po Paing and Ma Thi and that they obtained it on partition of their inheritance. The defendant-respondent, Lu Thant, is at present in possession of the land. Accordingly in Civil Suit No. 21 of 1936 of the Township Court of Myaing, the plaintiffs-appellants sued the defendant-respondent for delivery of possession of the land. Maung Lu Thant claims to be in possession in his own right, the land belonging to his father Tha Khaing who had got it from his father Po Naing. It may be noted here that Po Naing and Po Paing were first cousins. The plaintiffs-appellants had prior to this suit brought a suit, Civil Suit No. 44 of 1935 of the Township Court of Myaing, for ejectment of Lu Thant from the land. In that suit they claimed that they had inherited this piece of land; that Lu Thant was their tenant but refused to vacate. Lu Thant put forward the same defence as he has in the present suit. The suit however was not heard because on the date fixed for the hearing, the parties and their pleaders requested the Judge to "close the case as they had settled the dispute outside the Court amicably". The case was therefore "closed". Lu Thant in the subsequent suit pleaded that the plaintiffs were debarred from bringing the subsequent suit under the provisions of O. 23, R. 1, sub-r. (3), Civil P. C.

The learned Township Judge relied on the decision in (1897-1901) 2 U B R 284[1] and held that as there had been a mutual withdrawal of the first suit in order to have the matter referred to arbitration, which proved infructuous because the arbitrators declined to give a decision, there was no bar to the institution of a fresh suit on the same cause of action. As to the evidence the learned Judge professed himself unable to decide between the two sets of witnesses. He found that the evidence on the plaintiffs' side was no better and no worse than the evidence on behalf of the defence. In favour of the plaintiffs however was the fact that the disputed land formed a portion of a holding which had been for a great number of years shown in the records of the Land Record Department as belonging to Po Paing and Ma Thi. He argued that if the defendant's contention were true the name of Lu Thant or his father Tha Khaing or grandfather Po Naing would have appeared in the revenue maps. He found that the plaintiffs had a better title to the land than the defendant and decreed the suit. On appeal to the Assistant District Court, this decision was reversed and the plaintiffs-appellants' suit dismissed with costs. The learned Assistant District Judge agreed with the learned Township Judge that the oral evidence on both sides was of little value. As regards the evidence of the revenue records he pointed out that Lu Thant's name appears as a tenant only in the map of 1935-36 and the tax ticket for that year, although it is admitted that he had been working the land for the last four years. Apparently the learned Assistant District Judge thought that this omission detracted from the value of the documentary evidence and that the latter was not sufficient to prevail against the presumption in Lu Thant's favour which arose from the fact that he had been in possession for the last eight or nine years. (The learned Judge relied on the evidence of Maung Aung Lin, the ywagaung.) He thus found that it had not been shown that Lu Thant was in permissive occupation at the instance of the plaintiffs or their predecessors-in-interest: and the plaintiffs had failed to prove that the land was inherited from Po Paing and Ma Thi and to prove their superior title. Against this decision the plaintiffs-appellants have appealed.

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[1] **Ma Ko v. Maung Po Tun, (1897-1901) 2 U B R 284.**

In this Court a preliminary objection was taken that the suit was in any case barred under the provisions of O. 23, R. 1 sub-r. (3) which reads :

> Where the plaintiff withdraws from a suit or abandons part of a claim, without the permission referred to in sub-r. (2), he shall be liable for such costs as the Court awards and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

There can be no doubt that the plain meaning of these words is that if the subsequent suit is in respect of the same subject-matter as the previous suit, this subsequent suit must be dismissed. It matters not whether the defendant concurred with the plaintiff in the withdrawal of the suit. The learned Judicial Commissioner who decided the case in (1897-1901) 2 U B R 284[1] relied on the decision in (1865) 2 Bourke 250.[2] He further found that this decision had been referred to with approval in 14 Bom 31[3] and that it had not been altered or modified by any subsequent ruling. Accordingly he followed that decision. I have however referred to the full report of the case in (1865) 2 Bourke 250[2] which appears on p. 250 of Bourke's Reports of cases in the High Court of Fort William in Bengal for 1865. The relevant provision of the law which was applicable at that time was S. 97 of Act 8 of 1859 but the wording of that section was for our purposes substantially the same as the wording of O. 23, R. 1, sub-r. (3). What the learned Judge actually said was this :

> The provisions of the Civil Procedure Code as to withdrawing a suit are distinct. If a plaintiff, by permission of the Court, withdraws his suit under S. 97, he cannot subsequently institute a new suit for the same matter, unless leave to do so were granted to him by the Court on his withdrawing the first suit. Here the plaintiff withdrew without obtaining permission from the Court to bring a fresh suit for the same matter. So much therefore of this suit as is based on the same cause of action as that in which the first suit was based, is prima facie not maintainable under S. 97.

(In this case the plaintiff and the two defendants had in a previous suit executed a deed of submission to arbitration, but that deed of submission had not been acted upon although the plaintiff had withdrawn his suit.) The learned Judge then went on to say that it was possible that if the facts were as the plaintiff represented them they might afford grounds for an application by him to have the order of withdrawal in the original suit set aside, and to have the suit proceeded with ; and that if there were sufficient grounds shown for setting aside the original withdrawal and restoring the original suit he would be justified in allowing this present suit to proceed, although in fact a second and distinct suit for the same matter. He then went into the facts and found that the plaintiff was not entitled to have the original order of withdrawal set aside, and therefore the suit was barred so far as it related to the matters which constituted the subject of the previous suit. The learned Judge remarked :

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[2] Juggobundo Chatterji v. Watson & Co., (1865) 2 Bourke 250, digested in Woodman's Digest 6222.

[3] Thakore Becharji Ranaji v. Thakore Pujaji Vaktaji, (1890) 14 Bom 31.

> On the evidence, I am of opinion that the arbitration was the act of the plaintiff, and not of the defendants equally, and that the subsequent departure from the reference to arbitration was the act of the defendants as much as of the plaintiff. . . . . the withdrawal of the suit by the plaintiff was his own voluntary act, and there is no evidence that the plaintiff ever attempted to proceed with the reference . . . . . He withdrew of his own accord, without obtaining permission to bring a fresh suit. No force or fraud was used by the defendants to induce him to withdraw that suit ; and if the plaintiff chose to abandon his suit entirely, instead of making the submission an order of Court, he cannot now come to Court and ask to have his suit tried, without reference to the terms of S. 97, merely because the defendants have not acted towards him as he expected they would when he withdrew his first suit.

I am unable to see how this decision in any way supports the conclusion that the mutual withdrawal of a previous suit, on a reference to arbitration which proved infructuous because the arbitrators declined to give a decision is no bar to the institution of a fresh suit on the same cause of action. In the present case all that the plaintiffs state is as follows :

> At the Myaing Court it was agreed that the matter in dispute should be referred to arbitration of some arbitrators, and so the case was closed. The arbitrators however subsequently did not come to any decision. We have therefore filed the present suit.

The defendant did not make any remark in his evidence in regard to this matter. There is nothing to show that the defendant is responsible for the failure of the arbitrators to come to any decision. Again the case in 14 Bom 31,[3] in which, according to the learned Judicial Commissioner, the decision in (1865) 2 Bourke 250[2] in the sense taken by the learned Judicial Commissioner was referred to with approval, does not appear to justify this finding. What the learned Judges stated was this :

> It appears then that the Subordinate Judge so dealt with the pleadings as to prevent plaintiff raising the question, which was decided affirmatively in (1865) 2 Bourke 250.[2] . . . . viz. that the withdrawal of a suit without leave did not prevent a plaintiff suing to enforce the agreement to compromise

which is quite a different matter from stating that it was decided affirmatively that the withdrawal of the suit without leave did not prevent the plaintiff from bringing a fresh suit on the same subject-matter. I therefore must disagree with the learned Judicial Commissioner and hold that if it can be shown that the subject-matter of the present suit is the same as that of the previous suit, then the plaintiffs were debarred from bringing the subsequent suit : compare also 23 All 219.[4]

The first suit was labelled "suit for ejectment from a piece of land worth Rs. 50." The facts set out were practically identical with the facts set out in the present case but the relief asked for was ejectment of the defendants. A court-fee of Rupees ten was paid, although how that was calculated is not at all clear. At any rate it was not calculated on the value of the land, as has to be done in a suit for recovery of possession and as was in fact done when the present suit was instituted. The present suit is labelled "suit for delivery of land leased to the defendant as a tenant." In the course of the plaint it is stated that as the suit is a suit for recovery of land worth Rs. 50 court-fees are calculated on the valuation of Rs. 50, and the relief asked for is the "delivery of land by the defendant to the plaintiffs inasmuch as they are the heirs of the original owner Ma Thi." Both the plaints were drawn in Burmese and we cannot expect much technical accuracy. Nevertheless, I do think that it is clear that the basis of the first suit was the alleged tenancy. The defendant was regarded as a tenant holding over and the Court was asked to eject him. In the present suit the defendant is regarded as being in wrongful possession of the land which belongs to the plaintiffs, possession of which they are entitled to recover in virtue of their being the owners thereof and not in virtue of their predecessors-in-title having leased the land to Lu Thant, although this lease is one of the facts relied on. It appears to me therefore that the plaintiffs are not debarred from bringing the present suit.

It remains therefore to be considered whether the plaintiffs have established their title to this land. I find that I must agree with the opinion of both the learned Judges of the lower Courts that the witnesses on neither side have given convincing evidence. The evidence of the plaintiffs as to the ownership of this plot of land is vague and unreliable in the extreme. Ma Pan U, one of the plaintiffs who is now aged 70, states that she was told by her father Po Paing that he had purchased the whole holding from the Settlement Officer for Rs. 17. What this remarkable statement really means is hard to say : the most plausible interpretation to be put upon it is that there was a legend in the family that Po Paing had given a douceur of Rs. 17 to the Settlement staff in order to have his name inscribed as owner of the holding. If that is so, it would explain why Po Paing's name has appeared for so many years as the owner of the whole holding, and it also shows that that fact by no means establishes Po Paing's rights of ownership in regard to this particular plot of land.

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[4] Gulkandilal v. Mani Lal, (1901) 23 All 219= 1901 A W N 66.

It seems that Po Paing at no time worked this particular plot although he may have worked other plots in the same holding. Ma Pan U signally failed to prove the alleged leasing of the land to Lu Thant. A person who is alleged to have recovered rent from Lu Thant was not examined as a witness. We are asked to rely on the doubtful evidence of three witnesses who say that Lu Thant on one occasion admitted that he had taken a lease from Ma Thi. Tun E however does not state in what circumstances this admission was made. He is a neighbour of Lu Thant's, but he only once saw Po Nyut taking seven baskets of ground-nut away from Lu Thant's house as rent. As Po Nyut himself does not give evidence, I do not think that Tun E's statement is of any value. Similarly Paw U states that Lu Thant admitted that he had leased the land from Ma Thi but he also fails to say why Lu Thant should have made this admission to him. Maung Nyut (not the son of Ma Thee and brother of the plaintiffs who is alleged to have collected the rent) states that he was engaged by Lu Thant to work as his cooley on the land and that Lu Thant told him that he was working the plot as a tenant of Ma Thi. This witness however has had two convictions for theft. He was engaged for only one year by Lu Thant. He also refers to Ko Po Nyut son of Ma Thee, coming to inquire what the produce of the land was.

It appears to me that such evidence as this cannot aid the plaintiffs. On the other hand, as the lower Courts have pointed out, the defendant was able to produce similar evidence to show that he and his father and grandfather had been working this land for years and years. Most of the evidence for the defendant is on a par with that of the plaintiffs and of very little value. The only point on which the two sets of witnesses agree is that about 7 or 8 years ago the plot was left fallow for two years. The evidence of Aung Lin, the first witness for the defence and the ywagaung of the village, is perhaps entitled to more consideration. There does not appear to be any reason why this witness should be disbelieved. He is 64 years old and states that Lu Thant has been working the plot for the last 8 or 9 years but before him Tha Khaing, the father of the defendant, worked it and before Tha Khaing, Maung Naing, the father of Tha Khaing, used to work it. Ma Pan U admits that they have never paid revenue on the land because the tenants used to pay it.

As regards documentary evidence, all that we have is that for many years Po Paing has been shown as the owner of this land. In the circumstances of the case, having regard to the admission which shows by that means Po Paing had his name entered in the revenue records and to the fact that the parties are descended from two sisters, also to the fact that Lu Thant's name appears only once, and that for the years 1935-36, on the records as a tenant, I do not think that any reliance can safely be placed on the entry of Po Paing's name in the map. I agree with the learned Assistant District Judge that the plaintiffs have been unable to show sufficient reason to justify ousting Lu Thant. This appeal is therefore dismissed with costs, advocate's fee three gold mohurs.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 213

MOSELY J.

*Ma Pwa Zon and others* — Appellants.

v.

*Maung Chit Saya* — Respondent.

Special Second Appeal No. 62 of 1937, Decided on 21st July 1937, against decree of Dist. Court, Kyaukse, in C. A. No. 22 of 1936.

**Practice—Relief—Suit for possession—Plaintiff basing his claim as heir of original heir — Defendant denying it and setting up mortgage — Cases of neither plaintiff nor defendant**

**proved — But plaintiff found entitled to possession of suit land on different contention—Plaintiff held should be given decree for possession.**

In a suit for possession the plaintiff based his claim as the heir of the original owner and that he had leased the suit land to the defendant. The defendant denied the title of the plaintiff and set up a mortgage. Neither the plaintiff nor the defendant could prove their case, though the plaintiff was proved entitled to possession of the suit land on a different contention :

*Held* that the plaintiff should be given a decree for possession, and there was no need to refer the parties to another suit : *(1902-03) 2 U B R, Evidence p. 7, Disting.* [P 214 C 1, 2]

A. N. Basu — *for Appellants.*

P. N. Ghosh —*for Respondent.*

**Judgment.**—The lower Appellate Court was wrong in holding that the plaintiffs-appellants' suit was based solely on their having given the defendant-respondent permission to occupy the land in question. Their case, according to their plaint, was that they were the heirs of the original owner of the land, Daw Sabai, and that they allowed the defendant, Maung Chit Saya, to work the land and the toddy palms on it two years before the suit. They said that a year later he surrendered the lease of the toddy palms but retained the land. The defendant's case was that Ma Sabai's estate was divided: that her son, Paw La, deceased, got this land; and that the defendant leased the palm trees for 15 years from Paw La. Some seven years ago Paw La got him to clear the land for Rs. 35, and told him he could keep it by way of mortgage until that sum was paid. The trial Court found that the plaintiffs had not proved their contention that they let the land to the defendant, and that the defendant had not proved his contention of the mortgage, but it found that the plaintiffs were the heirs of Daw Sabai and therefore entitled to possession of the land, and gave a decree to them accordingly. In appeal the learned District Judge pointed out that plaintiff 1, Ma Pwa Zon, had admitted that the defendant had been working the land for four or five years in Paw La's time: and that, even if the plaintiffs had a title to the land, they must prove the alleged permissive occupation. 2 U B R Evidence 7,[1] was quoted in this connexion. That was a case however where the plaintiff failed to prove a subsisting title.

In the present case, on the defendant's own statement, the plaintiffs are entitled to possession of the land if not as heirs of Ma Sabai then as heirs of Paw La. I can see no point in referring them to another suit. I do not think that the defendant proved the mortgage set up by him. This appeal will therefore be successful, and the plaintiffs given a decree for possession of the land as claimed; but, in view of the fact that they succeeded on another contention from that in their plaint, the parties will pay their own costs throughout.

V.B.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 214

MACKNEY J.

*Kong Hip Lon & Co.* — Appellant.

v.

*C. A. M. A. L. Firm* — Respondent.

Second Appeal No. 141 of 1937, Decided on 6th August 1937, against decree of Dist. Court, Toungoo, in C. A. No. 52 of 1936.

**Limitation Act (1908), S. 5 — Appeal by counsel on behalf of *S*—Court doubting genuineness of power of attorney, directing personal appearance of *S*—*S* not attending on ground of personal inconvenience — After final hearing agent of *S* asking Court for permission to sign power of attorney — Permission refused on ground that it would defeat provisions of Limitation Act—*S* failing to attend Court dismissing appeal under O. 41, R. 17, Civil P. C.—Court held had discretion to direct personal appearance of *S* — Inconvenience of *S* to attend held not sufficient cause for applying S. 5.**

An appeal was filed by a counsel on behalf of one *S*. During the hearing of the appeal the signature on the power of attorney was doubted. The counsel filed certain affidavits the purport of which was that power of attorney had been signed by *S* in blank at the time he started the litigation, that he had handed the paper bearing his signature to his agent *W* and that it was *W* who had engaged the counsel. The Court doubting this and the signature of *S*, directed *S* to attend personally in the Court, but he did not attend as he thought it inconvenient to attend personally. After the final hearing *W* asked the Court that he might be permitted to sign the counsel's power of attorney. The Court could not allow *W* to sign it at that stage because to do so would defeat the provisions of the Limitation Act. As *S* did not appear the Court dismissed the appeal under O. 41, R. 17, Civil P. C.:

*Held* that the Court had discretion to direct the personal appearance of *S* in order to satisfy itself as to the genuineness of his signature. [P 215 C 2]

*Held further* that the non-appearance of *S* because it did not suit his convenience was not a reasonable cause for employing S. 5, Limitation Act : *A I R 1921 All 210, Disting.* [P 216 C 1]

J. R. Chowdhury — *for Appellant.*

E. Hay — *for Respondent.*

**Judgment.**—In Civil Miscellaneous Case No. 2 of 1936 of the Subdivisional Court of

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[1] Maung Tun v. Maung Pa U, (1902-03) 2 U B R Evidence 7.

Toungoo, Kong Hip Lon and Company by its partner Ah Soon made an application against C. A. M. A. L. Chettyar Firm for restitution in respect of certain properties sold in execution proceedings of the Court. This application was dismissed by the Subdivisional Court and Mr. S. Ghosh, a pleader, then filed an appeal on behalf of Kong Hip Lonand Co. in the District Court of Toungoo. Mr. Ghosh signed the memorandum of appeal and produced a power which purported to have been signed by Ah Soon. In the course of the hearing, the respondent Chettyar firm questioned the signature on the power of attorney. The Court then directed that the appellant himself, that is to say, Ah Soon, should appear in Court. Mr. Ghosh was unable to secure Ah Soon's attendance although many opportunities were given to him to do so. At length it being quite clear that the appellant would not attend Court, the District Court passed orders. Mr. Ghosh had filed certain affidavits the purport of which was that this power of attorney had been signed by Ah Soon in blank at the time he started the litigation, that he had handed the paper bearing his signature to his duly appointed agent Ah Woon and that it was Ah Woon who had engaged Mr. Ghosh. Ah Woon appeared after the final hearing but before orders were passed on 5th February 1937, the appeal having been originally filed on 25th September 1936, and asked that he might be permitted to sign Mr. Ghosh's power of attorney. The learned District Judge in his order says that he required the appearance of the appellant in order to find out whether the appellant had in fact granted this power of attorney in favour of Mr. Ghosh: the appellant having been ordered to appear but having failed to do so he must dismiss the appeal under the provisions of O. 41, R. 17; he could not allow Ah Woon now to sign Mr. Ghosh's power of attorney because to do so would be to defeat the provisions of the Limitation Act. The learned Judge pointed out that unless the appellant appeared he could not be sure whether he had signed the power or not and he considered that the only way in which this problem could be solved was by Ah Soon's appearance in Court to answer the questions put to him in regard thereto. Owing to the appellant's failure to appear, the learned Judge was unable to hold that Mr. Ghosh's appearances were appearances by the appellant. The learned Judge accordingly dismissed the appeal "under O. 41, R. 17, Civil P. C". Against this order Kong Hip Lon and Co. by its partner Ah Soon has filed this appeal.

The power of attorney which has been given to the learned counsel for the appellant is signed by Ah Woon authenticating the original signature of Ah Soon, but Mr. Chowdhury informs the Court that this power is also one of the powers signed in blank by Ah Soon. As Mr. Hay who appears for the respondent points out, Mr. Chowdhury originally appeared in the Subdivisional Court and consequently was entitled to appear in this Court without producing another power. It seems that the reason for Ah Soon's reluctance to appear in Court is that he has reason to believe that the respondent firm will take proceedings against him with a view to executing decrees which it holds against him. It is very difficult to understand why Ah Woon, the agent of Ah Soon in Toungoo, did not sign Mr. Ghosh's power from the outset; but the fact remains that he did not sign it, although it is said that he is the person who actually engaged Mr. Ghosh. Actually I do not myself see why Ah Woon could not use those forms signed by Ah Soon if indeed they have been signed by Ah Soon, in the same way as Ah Soon himself could use them seeing that Ah Woon is a properly constituted attorney of Ah Soon's.

It seems however that the District Court doubted that Ah Woon had engaged Mr. Ghosh, desired to be satisfied as to the genuineness of Ah Soon's signature, and felt that it could not be so satisfied, and could not be satisfied that Ah Soon had asked for Mr. Ghose to be engaged unless Ah Soon himself appeared in Court : and it cannot be said that the learned District Judge was not entitled to hold this opinion. If he held this opinion it seems to me that he was within the law in requiring the personal attendance of the appellant. O. 3, R. 1, Civil P. C., expressly provides for the case of the Court's directing that a party who had put in an appearance by an agent should appear in person. The only reason advanced for the failure of Ah Soon to comply with the order of the Court is that it did not suit his convenience to appear, and that is surely not a sufficient reason. Similarly in asking the Court to utilize the provisions of S. 5, Lim. Act, Ah Soon is really asking the Court to do so simply to suit his convenience, so that he should not be obliged to attend Court in person. This is surely not a reasonable cause for employing S. 5, Lim. Act. There is no reason why the Court should make itself an accomplice of Ah Soon's intention to keep out of the way of the process of the law.

It has been strenuously argued that the Court was bound to recognize Mr. Ghosh as a duly appointed agent of Ah Soon's in virtue of the fact that he was engaged by Ah Woon who held authority to do so: but this premise has not been established. The law requires that Mr. Ghosh must hold a power of attorney authorizing him so to act, and the District Court in the absence of the appellant was unable to find that Mr. Ghosh had such authority.

I was referred to the case in 43 All 392.[1] In this case two pleaders filed an appeal on behalf of a client; but after they had done so, it was discovered that their vakalatnamah, though duly accepted by both, did not contain their names in the body of the document. After many months a fresh vakalatnamah was filed with a petition by the client stating the facts and praying that the memorandum of appeal might be taken as having been presented on the date of the filing of the fresh vakalatnamah and the delay excused under S. 5, Lim. Act. The Court nevertheless dismissed the appeal. It was held that this was a reasonable case in which the Court should have exercised its discretion under S. 5, Lim. Act. It was also doubted whether the Court was right in refusing to recognize the original vakalatnamah.

It appears to me that the circumstances of that case are very different from those in the present. The omission was a very insignificant omission and did not in reality affect the validity of the power. In the present case the whole question is whether the appellant Ah Soon who purported to be making the appeal had in fact authorized Mr. Ghosh to appear for him. To hold that the District Court was wrong would be to hold that the District Court ought to have accepted the statement of Ah Woon that it was he actually who engaged Mr. Ghosh, although Ah Soon purported to have signed the power of attorney, and that Ah Woon's engagement of Mr. Ghosh was a proper authorization enabling Mr. Ghosh to appear for Ah Soon; and it ought not to have insisted on the appearance of the appellant. It may be that some other Judge might not have thought it necessary to insist on the appearance of the appellant, but as I have already remarked the learned District Judge had the discretion to require the appearance of the appellant and the appellant failed to appear at his own risk. He had his private reasons for not appearing, and he thought that they were more potent than the danger of losing his appeal. It seems to me that he must abide by that choice and he cannot now complain of the consequences of his failure to appear. For these reasons this appeal is dismissed with costs, advocate's fees two gold mohurs.

D.S./R.K. *Appeal dismissed.*

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[1] Shambhu Nath v. Badri Das, A I R 1921 All 210=61 I C 410=43 All 392=19 A L J 183.

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## A. I. R. 1938 Rangoon 216

MACKNEY J.

*Ma Yar Thein and another* — Appellants.

v.

*U Ta Te and another* — Respondents.

Second Appeal No. 103 of 1937, Decided on 4th August 1937, against decree of Dist. Court, Pakokku at Myingyan, in C. A. No. 3 of 1936.

**Buddhist Law (Burmese) — Gift — Burman Buddhist cannot make gift under guise of will —Gift affecting inheritance is invalid though deed is in accordance with Ss. 122 and 123, T. P. Act.**

No Burman Buddhist can, under the guise of making a gift, be allowed to make a will. He cannot set at naught the provisions of his personal law as to the inheritance of his property after his death. Where therefore his act in making a gift, owing to the circumstances under which it is made or the conditions attached thereto are such as to affect the succession to, or inheritance of, his property after his death, Buddhist law must be resorted to, to arrive at a decision as to whether his action can be maintained or is invalid. The deed of gift, affecting inheritance will be a nullity, in spite of the fact that it was otherwise made in accordance with Ss. 122 and 123, T. P. Act: *A I R 1924 Rang 13 and 3 Bur L T 107, Rel. on.*

[P 217 C 2 ; P 218 C 2]

Ba Maung — *for Appellants.*

Aung Gyaw — *for Respondents.*

**Judgment.** — The plaintiffs-appellants are the children of 1st defendant-respondent U Ta Te by his first wife, who died some fifty years ago. U Ta Te married 2nd defendant-respondent Ma Gyun about thirty years ago. In February 1936 U Ta Te who is now 83 years of age made a gift of certain lands to Ma Gyun. The gift sets out that these lands formed the quarter part reserved for U Ta Te's subsistence after partition of inheritance with the plaintiffs. U Ta Te admits that the lands were brought by him to his marriage with Ma Gyun. Normally therefore the plaintiffs would be entitled on his death to a three-quarter share therein. The gift further sets out that the properties mentioned therein were given to Ma Gyun as U Ta Te's heir, because she had not yet enjoyed any inheritance.

The plaintiffs then filed a suit in the Township Court of Pauk to declare the deed of gift null and void. They maintain that some fifteen years ago U Ta Te had agreed to a partition of his estate, that under that agreement Ma Gyun was to get properties valued at Rs. 2375, and that the plaintiffs were to get the properties in suit. They further alleged that when in December 1935, U Ta Te was very ill, he sent a letter to the Revenue Surveyor instructing him to transfer the lands to the names of the plaintiffs. The plaintiffs maintain that the gift was made with a view to prevent the plaintiffs from acquiring the lands and to allow Ma Gyun to enjoy the sole benefit thereof, that it was not in accordance with the Burmese Buddhist custom for a husband to transfer his property to his wife as his heir, and that the use of the expression "given to Ma Gyun as heir" in the deed converted the deed into a will and it was therefore not valid.

In their joint written statement U Ta Te and Ma Gyun deny that there had been any partition agreed upon as alleged by the plaintiffs. They deny that the properties, which it was alleged, were to be given to Ma Gyun, ever were owned by U Ta Te. They deny that instructions had been given to the Revenue Surveyor as alleged by the plaintiffs. They maintain that a Burman Buddhist before his death may partition and give his properties to his heir according to law "in order that there may not be a complication in the matter later." They further allege that certain properties which were atet properties had already been given to the plaintiffs. To the plea that the deed of gift was in reality a will the reply was made that if it were a will then there was no need to sue for a declaration of its nullity. This is surely a very inadequate reply. The Township Court framed three issues :

(1) Whether or not defendant 1 gave to defendant 2 properties to the value of Rs. 2375 ? (2) Whether defendant 1 transferred the lands in dispute in the names of the plaintiffs when he was indisposed by a letter of authority ? (3) Whether the registered deed of gift effected in favour of defendant 2 by defendant 1 should be declared null and void ?

The Court found that there had been no partition as set up by the plaintiffs. In regard to Issue 2 the Court held that the alleged instructions given by U Ta Te to the Revenue Surveyor were a forgery. As regards Issue 3 the Court held that it had not been shown that the deed had been executed under coercion and undue influence, and that U Ta Te was competent to transfer the properties and the deed was good. Accordingly the Township Court dismissed the suit with costs. On appeal the decree of the Township Court was confirmed. The learned District Judge agreed with the Township Court that there had not been any partition, and that the letter alleged to have been sent by U Ta Te to the Revenue Surveyor was a fabrication. He pointed out that the appellants have no vested interest in their father's estate, their interest having been extinguished by the law of limitation as no claim was made within a period of 12 years of their father's re-marriage.

The plaintiffs-appellants have now appealed to this Court against the decree of the District Court. The main ground taken is that a gift of all the (atet?) properties by a father to his second wife to the exclusion of his atet children is not valid in law, and that the deed of gift is in effect a will. It is to be noted that this latter contention, which was raised in the plaint, has not been discussed either by the original Court or by the District Court. It has been held in 1 Rang 351[1] at page 358 that :

> No Burman Buddhist can, under the guise of making a gift, be allowed, in effect to make a will. He cannot set at naught the provisions of his personal law as to the inheritance of his property after his death. Where therefore his act in making a gift, owing to the circumstances under which it is made, or the conditions attached thereto, are such as to affect the succession to, or inheritance of, his property after his death Buddhist law must be resorted to, to arrive at a decision as to whether his action can be maintained, or is invalid.

In 3 Bur L T 107[2] it was pointed out that the application of Buddhist law to gifts depends on the circumstances of each case, and that while there is nothing to prevent a man from making a gift to one

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1. Ma Thein Myaing v. Maung Gyi, A I R 1924 Rang 13=75 I C 166=1 Rang 351.
2. Maung Pan U v. Ma Kyi Nyo, (1909) 3 Bur L T 107=8 I C 1200.

or more of his children in the absence of others if it were made for the purposes of evading the ordinary rules of inheritance it would be governed by the Buddhist law.

The question then to be considered is, if the gift of U Ta Te to Ma Gyun is to be allowed to stand, will the result be to alter the rule laid down by the Buddhist law governing inheritance? Now, in the present case it is unfortunate that the original Court did not direct its attention to this aspect of the case. Had it done so, no doubt it would have determined what was the exact nature of the property thus transferred to Ma Gyun. It is not clear from the record whether this property is the whole of the property brought to the second marriage by U Ta Te or what proportion to the whole estate it forms. However, U Ta Te was cross-examined very closely as to the property which he alleged he had already transferred to the plaintiffs, which property, according to the statement in the deed of gift, must have amounted to three-quarters of the atet property. It is quite clear from U Ta Te's own admission that three-quarters of that property could not by any means have been transferred to the plaintiffs. It may then be concluded that the property gifted did represent the major part of the atetpa property. In this property the plaintiffs, on the death of U Ta Te will be entitled to a three-quarter share whereas Ma Gyun will be entitled to only one-fourth share. The effect of the gift will be undoubtedly to defeat the plaintiffs' rights and to interfere with the law of inheritance. That the deed of gift was made with this express purpose is clear from the words which I have already quoted from it, and this was made even clearer by U Ta Te's admission in Court. He says:

> I gave the lands in dispute as a gift to Ma Gyun because she is the person who will look after me till death. I do not know whether Ma Gyun will or will not inherit my estate. I have therefore made this gift.

That is to say, he is making sure that she will get all the property that he wishes her to have on his death, and that the plaintiffs shall not be able to claim it. Ma Gyun lives with U Ta Te and the gift will have no practical effect until U Ta Te dies. It appears to me that the contention of the plaintiffs-appellants that the deed is in effect a device to arrange for the devolution of U Ta Te's property after his death or on his death in a way which is contrary to the Buddhist law of succession, is correct. Following the decisions which I have quoted at the outset this fact renders the deed a nullity in spite of the fact that it was otherwise made in accordance with Ss. 122 and 123, T. P. Act. For these reasons, it appears to me that the decisions of the lower Courts were incorrect.

I set aside the decrees of the District Court of Pakokku and the Township Court of Pauk, and I direct that the plaintiffs' suit shall be decreed with costs in all Courts. Advocate's fee in this Court four gold mohurs. It shall be declared that the deed of gift dated 3rd February 1936 executed by U Ta Te in favour of Ma Gyun is of no effect.

V.B.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 218

MOSELY J.

*The King*

v.

*Ba Kyway and another* — Respondents.

Criminal Revision No. 455-A of 1937, Decided on 11th August 1937, from order of First Addl. Magistrate, Kungyangone, D/- 3rd April 1937.

**Criminal P. C. (1898), Ss. 395 (1) and 562—Sentence of whipping found inexecutable — Magistrate has no power to take bond under S. 562.**

Where a Magistrate finds that a sentence of whipping passed by him is inexecutable due to bad health of the accused, he can either remit the sentence altogether or sentence the offender in lieu of whipping to imprisonment or fine under S. 395 (1), but he has no power to take a bond under S. 562 from the accused. [P 218 C 2; P 219 C 1]

E. W. Lambert — *for the Crown.*

**Order.**—The respondent, aged 25, was found guilty of theft of a boat worth Rs. 10; he was sentenced to 25 lashes under S. 379, I. P. C., and as it was reported that owing to an enlarged spleen the sentence of whipping could not be executed, the Magistrate directed him to enter into a bond under S. 562, Criminal P. C., for one year. The bond was executed. This order was clearly beyond the Magistrate's powers. S. 395 (1), Criminal P. C., in such a case allows the Court to remit the sentence altogether or to sentence the offender in lieu of whipping to imprisonment or fine. The reason why a Court is not empowered to release an offender on his entering into a bond for good behaviour in lieu of whipping is obviously that if such a sentence was suitable, it should be imposed in the first instance. The order to execute the bond must be set aside in revision. The crime was committed in December 1936: judgment was passed in April 1937 and I do not propose to substitute imprisonment at this late stage. The sentence therefore will be remitted under S. 395, Criminal P. C., and the bond cancelled.

K.B./R.K. *Sentence remitted.*

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## A. I. R. 1938 Rangoon 219

MOSELY J.

*Nga Hpeik* — Appellant.

v.

*The King.*

Criminal Appeal No. 738 of 1937, Decided on 12th August 1937, from order of Sess. Judge, Meiktila, D/- 31st May 1937.

**Penal Code (1860), Ss. 302, 304 and 86 — Scope —Distinction between murder and culpable homicide stated — S. 86 does not make offender punishable as if he had same intent if not intoxicated, but only as if he had some knowledge —Intention ascribable to sober man in connexion with some act should not be ascribed to intoxicated man — If man is so intoxicated as unable to form intent to kill, offence is culpable homicide only.**

To constitute the offence of murder there must be the intention to kill or to inflict such bodily injury as is known to be sufficient in the ordinary course of nature to cause death. It is sufficient to constitute the offence of culpable homicide if the offender causes death by doing an act with the knowledge that he is likely by such act to cause death. S. 86, Penal Code, does not say that the offender shall be liable to be dealt with as if he had the same intent as he would have had if he had not been intoxicated, but only as if he had the same knowledge. Intoxication should be taken into consideration in cases where intention on the part of the accused is necessary to constitute the offence charged and the intention which would be ascribed to a sober man in connexion with that act must not necessarily be ascribed to an intoxicated man who does the same act. If the accused is intoxicated as to be unable to form the intent to kill, the offence would be one of culpable homicide only: *Case law referred.* [P 220 C 1, 2]

E. W. Lambert — *for the Crown.*

**Judgment.**—The appellant Nga Hpeik has been sentenced to transportation for life under S. 302, I. P. C., for the murder of Ma Bein and to two sentences concurrent with the above of three years' rigorous imprisonment under S. 326, I. P. C., for voluntarily causing grievous hurt to Ma Bein's daughter Ma E Lon, aged 15, and to her son Maung Ant. It is not denied that the appellant committed these offences. His plea is that he committed them under the influence of ganja and did not know what he was doing or that it was wrong or contrary to law. S. 86, I. P. C., is as follows:

> In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

It appears that the night before, the appellant, who is a young married man and bore a good character, his age has been found by the learned Sessions Judge as a little over 19, had some fowl curry in which it is said that there was only half a tola of ganja, but he seems to have got the most of it and to have been the only one to suffer any ill effects. According to the first defence witness Maung Sa, he came next morning at 8 A. M. and got some yam from him as an antidote for the ganja, as he said he was intoxicated. The crime occurred about noon. The appellant came to Ma Bein's house with a dama and cut Ma E Lon on the head and again on the hand when she covered her head with her hand. Then he ran in and cut Ma Bein down by a blow on the head $2\frac{1}{4}$ inches deep into the brain of which she died. Then the appellant went to Maung Ant's house which according to Maung Ant (P. W. 3), is 150 feet from Ma Bein's. It is to be regretted that the learned Sessions Judge has not indicated whether any other house was intervening. It would seem however that the appellant was determined to attack the members of this particular family, though no motive whatever is indicated. Maung Ant was lying in the bed and the appellant lifted up the blanket and cut him on the cheek.

Maung Ant says that the appellant said "what do you think of me" at the time and Ma E Lon said Ma Bein asked the accused why he cut her daughter, and he said "I am going to kill people" as he ran into the house and attacked her. But neither of these witnesses said this in the committal Court, and it cannot be taken as trustworthy proof that the accused knew what he was doing at the time. The accused went home then and cut his dog and two of his trees with the da. He then went to sleep, and was found soon after apparently asleep, no doubt from the ganja. The question in this case is whether the appellant can be presumed to have the same intent as a sober man. To constitute the offence of murder, there must be the intention to kill or to inflict such bodily injury as is known to be sufficient in the ordinary course of nature to cause death. It is sufficient to constitute the offence of culpable homicide if the offender causes death by doing an act with the knowledge that he is likely by such act to cause death. It is to be observed that S. 86 does not say that the offender shall be liable to be dealt with as if he had the same intent as he would have had if he had not been intoxicated, but only as if he had the same knowledge.

The learned Sessions Judge has merely assumed that the accused must have known what he was doing, and that he was doing wrong, and was therefore capable of forming the intent to cause death. This question was considered first in (1872-92) L B R 650,[1] where it was said that :

> The Legislature appears to me to have intended to make a distinction between the presumption as to knowledge and the presumption as to intention, and though ordinarily intention is to be inferred from knowledge I do not think it is to be inferred when the knowledge is merely a legal fiction.

Other rulings are discussed in (1910) U B R 2nd Qr 17[2] where it was said that voluntary intoxication may be considered in determining the intention wherein the intention is a fact which has to be proved and is not a mere presumption of law. The leading case on the subject is the Full Bench ruling in 6 L B R 100,[3] where it was held that it was left open to the Court to deal with the question of intention on the general principles of law; that intoxication should be taken into consideration in cases where intention on the part of the accused was necessary to constitute the offence charged and that the intention which would be ascribed to a sober man in connexion with that act must not necessarily be ascribed to an intoxicated man who does the same act. It was remarked that there was no reason to suppose that the framers of the Code proposed to introduce a different rule from that of the English law, and that it was clear that the English law in a case like the present one would be that if the accused was so drunk as to be unable to form the intent to kill the offence would be one of manslaughter only : vide the cases quoted (1909) 1 K B 895[4] and (1887) 16 Cox C C 306.[5] A recent case to the same effect is 55 M L J 228.[6] The only other case I am able to find on the point 27 C W N 290[7] is not I think of any assistance.

When the appellant was arrested there is evidence that he said that his mind must have gone wrong, and that he did not know whether he had cut human beings or animals or things. It appears to me that on the evidence the mere fact that the appellant attacked Maung Ant after he had attacked Maung Ant's sister and mother is insufficient to show that he had formed the requisite intention to kill Ma Bein, but merely shows that in his temporary deranged state he had some ill feeling against this family and was determined to attack it. The convictions under S. 326, of course, were justified, as the appellant must be held to have known himself likely to cause grievous hurt (S. 322, I. P. C.). For these reasons, the conviction under S. 302 will be altered to one under S. 304, I. P. C. I see no reason to mitigate the sentence; that is a matter of grace if the Government desires to exercise clemency. The concurrent sentences under S. 326, I. P. C., will be maintained.

A.L./R.K. *Order accordingly.*

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[1] Abdul Karim v. Queen-Empress, (1872-92) L B R 650.

[2] J. M. v. Emperor, (1910) U B R 2nd Qr 17=8 I C 469=11 Cr L J 659.

[3] Tun Baw v. Emperor, (1912) 6 L B R 100=17 I C 800=13 Cr L J 864 (F B).

[4] Rex v. Meade (No. 2), (1909) 1 K B 895=78 L J K B 476=73 J P 239=53 S J 378=25 T L R 359.

[5] Reg v. Doherty, (1887) 16 Cox C C 306.

[6] The Public Prosecutor v. Devasikamani, A I R 1928 Mad 196=106 I C 559=29 Cr L J 63=55 M L J 228.

[7] Emperor v. Tincouri Dhopi, A I R 1923 Cal 460=27 C W N 290=39 C L J 34.

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## A. I. R. 1938 Rangoon 220

MACKNEY J.

*Mohamed Cassim* — Applicant.

v.

*The King.*

Criminal Revn. Appln. No. 327-B of 1937, Decided on 20th July 1937, from order of 4th Addl. Special Power Magistrate, Bassein, D/- 28th May 1937.

**(a) Penal Code (1860), Ss. 307 and 337 — Shooting blindly with shot gun in dark, in direction of sound heard in distance — Offence comes under S. 337 and not under S. 307.**

If a man fires blindly in the dark with a shot gun, in the direction from which he has heard sounds coming from a distance away and injures a man, it cannot be held that his act must in all probability cause death or such bodily injury as was likely to cause death. Such person cannot possibly be convicted under S. 307 but should be convicted under S. 337. [P 222 C 1]

**(b) Burma Fisheries Act (3 of 1905), Preamble — Lease of fishery — Lessee does not buy fish nor does Government transfer them — Lessee gets possession only when he catches the fish — Putting of dams to fishery is only preparatory to catching — Members of public can fish in such fishery — No offence of criminal trespass or theft.**

Under the Preamble of the Burma Fisheries Act the Government merely claims to dispose of the right to fish when a person takes the lease of a fishery; he does not thereby buy the fish to be found therein from Government, nor does Government transfer the property in the fish to him. The fish come into the lessee's possession only when he catches them. It matters not that for his own convenience of catching them the lessee dams up the pond so that the fish cannot escape out of it. This operation is merely preliminary to catching the fish. Even after that has been done any member of the public may come to the fishery and, provided that he uses not more than four rods and lines, may catch fish therefrom without committing any offence of criminal trespass or theft : *A I R 1928 Mad 20; 10 Bom 193; 27 Mad 551 and 36 Mad 427, Disting.* [P 222 C 2; P 223 C 1]

**(c) Criminal Trial — Sentence — Moral indignation of offence should not be considered.**

In awarding sentence one need not take into consideration the moral indignation which may be felt on looking at the offence committed; all that is necessary to consider is what sentence is likely to prevent the offender from committing the offence again and to prevent other persons similarly situated from committing similar offences. [P 223 C 1]

Rafi — *for Applicant.*

Myint Thein Offg. Govt. Advocate — *for the King.*

**Order.**—The applicant, Mohamed Cassim, is the lessee of a fishery in the Bassein District. Having reason to believe that persons were poaching in the fishery, he went out one night in a boat in company with one Maung San Hein. Cassim was armed with a double barrelled gun. In the course of their patrol they noticed a fishing-line, to which several hooks were attached. Cassim flashed his torch about. Some splashing noise was heard about 30 fathoms away, but nobody could be seen in the bushes. Cassim said : "Is that a man. If it is a man don't run : I will shoot." The sounds of running ceased, and Cassim fired towards the bank, apparently in the direction from which the sounds had been heard. His gun was loaded with "S. G." shot, and one of the shot hit Maung Po Saing, a poacher. The slug entered the back on the right side, passing under the skin in a slanting position round the curve of the ribs and settled under the armpit about six inches from the entrance. Fortunately, the injury was not of a grievous nature.

The applicant was tried under S. 307, I. P. C., by the fourth Additional Magistrate, Bassein, and was convicted. The defence was that Cassim had fired at random, without aiming at any person in particular, in order to frighten away the thieves, and that he was justified in defending his property. The Magistrate held that there was nothing which could reasonably cause the apprehension that death or grievous hurt would be the consequence of Po Saing's conduct, and that Cassim was therefore not justified in shooting him with a gun. The Magistrate also thought that it was immaterial whether Cassim shot Po Saing because he saw him running away or without seeing him. He sentenced him to suffer 18 months' rigorous imprisonment.

Cassim appealed to the Sessions Court. The case had apparently been before the Court in Criminal Revision Case No. 101 of 1937, in which the learned Sessions Judge dealt with the point that when Cassim fired he was not aware of the proximity of Po Saing and had not deliberately fired at him. This point was not raised in the appeal. The point taken was that the appellant fired his gun in the exercise of the right of private defence. The learned Sessions Judge held that by fishing with hooks and line in the fishery, Po Saing committed an offence under the Fisheries Act, but he did not commit theft or criminal trespass. The appeal was summarily dismissed. Cassim now applies to this Court to revise the order of the learned Sessions Judge. It is argued that, as the fishery was at that time of the year enclosed by dams erected by the petitioner himself, the fish belonged to petitioner, because they were restrained of their natural liberty and liable to be taken out at any time according to petitioner's pleasure : they were therefore the subject of theft. Further, regard should be had only to the injury actually caused, which was simple hurt. The petitioner was entitled to protect his property against theft to the extent of inflicting simple hurt.

I have not the advantage of having read the order of the learned Sessions Judge in his criminal revision case in which he dealt with the point that the offence in any case could not fall under S. 307, Penal Code. It is quite clear from the evidence of Po Saing and Maung Khan that it was not possible for Cassim to see Po Saing when he fired his gun. The fact that only one slug hit Po Saing shows that he must have been a considerable distance away. It is quite obvious, I think, that Cassim fired at random in the direction from which he had heard the sounds. Supposing Po Saing had died as a result of this shot, could Cassim have been convicted of murder? To do so, it would have to be held that he fired the gun knowing that such an act was so imminently dangerous, that it must in all probability cause death or such bodily injury as was likely to cause death, and that he committed the act without any excuse for incurring the risk of causing death or such injury as aforesaid. Now, if a man fires blindly in the dark with a shot gun in the direction from which he has heard sounds coming from a distance away, I cannot see how it can be held that his act must in all probability cause death or such bodily injury as was likely to cause death. It appears to me that Cassim could not possibly be convicted under S. 307, I. P. C., and that on the findings of the trial Magistrate he should have been convicted under S. 337 thereof.

The learned counsel who appeared for applicant has cited before me several cases of the Indian High Courts to show that the fishery being an enclosed fishery, the fish are the subject of theft. I am unable to agree that the cases cited by the learned counsel are apposite. In 51 Mad 333[1] the fish were taken from a pond, which evidently belonged to someone, although the name of the owner is not stated in the judgment of the Court. In 10 Bom 193[2] the fish were taken from an enclosed tank belonging to the Municipality of the Town of Siri. In 36 Mad 472[3] the fish were taken from a Government irrigation tank in which the water had become so low as not to permit the fish leaving the tank. It was held that the capture of fish in such circumstances would amount to theft. Presumably it was held that the fish belonged to the owner of the tank and that there was an owner. In (1892-96) 1 U B R 234[4] the fish, taken from the moat at Mandalay, were held to be under the control of the owner, the Cantonment Committee. Again, in 27 Mad 551[5] it was held that "chanks" (a kind of large mollusc) found buried in beds of sand in Palk's Bay can be the subject of theft. The decision proceeded on the basis that chanks whilst still in the beds have always been taken to be the exclusive property of the Sovereign, that they were not *feræ naturæ* because their means of locomotion was much restricted, and that they belong to him on whose land they exist so long as they do not migrate therefrom.

None of the conditions as to ownership of the property on which the fish were found or as to the ownership of the fish themselves which are to be found in the cases above cited exist in the present case. It is not claimed that the pond over which Cassim has the fishery rights "belongs" to Government in the sense in which the tanks referred to in some of the cases cited above belonged to the owners therein mentioned; nor do the fish to be found therein "belong" to the Government. The Preamble to the Burma Fisheries Act, 1905, reads thus:

> Whereas the exclusive right of fishing in Burma in such fisheries as are hereinafter mentioned belongs by the custom of the country to the Government;
>
> And whereas it is expedient to declare and amend the law providing for the protection of this right, and for conceding the enjoyment of it to the public or to individuals, gratuitously or in consideration of fees or rent, and subject to suitable restrictions and conditions; It is hereby enacted etc.

Here is no claim put forward to property in the fishery or the fish. The Government merely claims to dispose of the right to fish. When a person takes the lease of a fishery, he does not thereby buy the fish to be found therein from Government; nor does Government transfer the property in the fish to him. The fish come into his possession only when he catches them. It matters not that for his own convenience of catching them he dams up the pond so that the fish cannot escape out of it. This operation is merely preliminary to catching the fish. Even after that has been done, any member of the public may come to the fishery and, provided that he uses not more than four rods and lines, may catch fish therefrom (S. 7, sub-cl. (1) of the Act). This could not be the case if the fishes were the property of the lessee. It has been argued that this is merely a restriction of the lessee's ownership; but if the lessee owned the fish nobody could have the right to take them away. It is obviously not a restriction of his ownership, but a restriction of his right to catch the fish. I agree therefore with the learned Sessions Judge that Po Saing did not commit theft, but an offence punishable under the Fisheries Act.

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[1] In re Nokolo Behara, A I R 1928 Mad 20=105 I C 826=28 Cr L J 1002 = 51 Mad 333 = 53 M L J 759.

[2] Queen-Empress v. Shaik Adain, (1886) 10 Bom 193.

[3] In re Subbiah Servai, (1913) 36 Mad 472 = 13 I C 278=13 Cr L J 38=22 M L J 184.

[4] Queen-Empress v. Masa, (1892-96) 1 U B R 234.

[5] Annakumaru Pillai v. Muthupayal, (1904) 27 Mad 551 = 14 M L J 248 = 1 Weir 386.

Further, inasmuch as the fishery cannot be said to be "property in the possession" of Cassim merely because he had leased the right to catch the fish therein, Po Saing could not be held to have committed criminal trespass. It appears to me that Cassim was not exercising his right of defence of property in firing in the direction of Po Saing. However as I have already indicated, I think that the offence properly falls under S. 337, I. P. C., and I alter the conviction accordingly. The maximum sentence which can be awarded for an offence under S. 337, I. P. C. is six months' rigorous imprisonment, together with fine which may extend to Rs. 500. In awarding sentence one need not take into consideration the moral indignation which may be felt on looking at the offence committed; all that it is necessary to consider is, what sentence is likely to prevent the offender from committing the offence again and to prevent other persons similarly situated from committing similar offences? It appears to me that neither of these considerations here call for the infliction of a long sentence of imprisonment. A very heavy sentence of fine will, in my opinion, be adequate, in addition to the imprisonment already suffered. I set aside the sentence which has been passed upon the applicant, and direct that he do suffer imprisonment for the term already undergone and pay a fine of Rs. 500; in default of payment he shall suffer six weeks' rigorous imprisonment.

B.D./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 223

MACKNEY J.

*Ko Po* — Applicant.

v.

*The King.*

Criminal Revn. Appln. No. 314-B of 1937, Decided on 19th July 1937, from order of Addl. Magistrate, Mogok, D/- 27th April 1937.

**Upper Burma Ruby Regulation (12 of 1887), Rr. 17 and 18—*G* and *P* having adjacent lu mines—*G* complaining against *P*—Inspector of Mines prohibiting *P* from allowing debris, etc. to fall in perennial stream—*P* disobeying order —Inspector of Mines held could not issue any such order under R. 17—Order in R. 18 means decision and not command—*P* did not commit offence under S. 188, Penal Code.**

Under R. 17 all disputes arising between native miners as to sites or other matters shall be decided by the Inspector of Mines, but there is nothing in the rules, or in the conditions of the license issued under the rules, which gives the Inspector of Mines authority to prohibit a person from digging his mine and allowing the debris to fall out. The "other matters" referred to in R. 17 do not appear to include matters of this kind, or else surely some provision would have been made for the enforcement of the Inspector's orders. According to R. 18 the orders are of the kind that a Revenue Officer can pass under the Upper Burma Land and Revenue Regulation, 1889, and the word "order" as here used does not appear to mean a command but a "decision." S. 188, I. P. C. could not possibly apply to orders of the Inspector of Mines passed under R. 17. [P 224 C 1]

*P* and *G* were each digging for precious stones by working mines of the kind called lu, and *G* complained that debris from *P's* lu dropped into his lu. The Inspector of Mines and Subdivisional Officer inspected the locality and came to the conclusion that *P* should be prohibited from passing sand or debris or kane into the perennial stream. The order so passed was disobeyed by *P* for which he was convicted under S. 188, I. P. C. On revision:

*Held* that the Inspector of Mines had no authority to issue such an order. There does not appear to be any provision under the Upper Burma Ruby Regulation or rules thereunder for punishing *P* for his alleged misconduct in this matter. Persons aggrieved by his acts must apply to a Civil Court. [P 224 C 1]

Shu Maung — *for Applicant.*

**Order.**—The applicant has been convicted under S. 188, I. P. C. of having disobeyed the order of the Inspector of Mines appointed under the Upper Burma Ruby Regulation for Mogok stone-tract, whereby he was directed to abstain from passing down sand or debris or kane from his lu into the natural perennial stream there. It appears that Maung Po and Maung Kan Gaung were each digging for precious stones by working mines of the kind called lu and that Maung Kan Gaung complained that debris from Maung Po's lu dropped into his lu. The Inspector of Mines and the Subdivisional Officer inspected the locality and came to the conclusion that Maung Po should be prohibited from passing sand or debris or kane into the perennial stream. I have examined the Upper Burma Ruby Regulation and the rules thereunder but I am unable to find that the Inspector of Mines had any authority to issue such an order. Under R. 17 all disputes arising between native miners as to sites or other matters shall be decided by the Inspector of Mines, but there is nothing in the rules or in the conditions of the license issued under the rules, which gives the Inspector of Mines authority to prohibit a person from doing what Maung Po has been doing in the present case. The "other matters" referred to in R. 17 do not appear to include matters of this kind, or else surely some provision would have been made for the enforcement of the Inspector's orders. According to R. 18 the orders are of the kind that a Revenue Officer can pass under the Upper Burma Land and Revenue Regulation, 1889, and the word "order" as here used does not appear to mean a command but a "decision."

It does not appear to me that S. 188, I. P. C. can possibly apply to orders of the Inspector of Mines passed under R. 17. There does not appear to me to be any provision under the Upper Burma Ruby Regulation or rules thereunder for punishing Maung Po for his alleged misconduct in this matter. Persons aggrieved by his acts must apply to a Civil Court. It appears to me that there was no justification for convicting the applicant Maung Po under S. 188, I. P. C. I do not know if this case is one of any importance in the district. Notice was issued to the District Magistrate but no steps have been taken to represent the Crown at the hearing of this application in revision. The application is allowed, the finding and sentence of the lower Court are set aside. The fine paid by the applicant shall be refunded to him.

B.D./R.K. *Application allowed.*

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## A. I. R. 1938 Rangoon 224

MACKNEY J.

*Y. M. Bholat* — Appellant.

v.

*M. E. Motala* — Respondent.

Second Appeal No. 125 of 1937, Decided on 5th August 1937, against decree of Dist. Court, Myingyan, in C. A. No. 4 of 1936.

**Accounts—Mutual accounts—Essentials of—Solitary instance of deposit by defendant to his credit — Deposit, only occasion giving defendant opportunity to make demand on plaintiff —Existence of such solitary instance of credit cannot make account mutual between parties.**

A mutual account does not mean merely where one of the two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account. In such an account there must be reciprocity of dealings between the parties. Each must enter into relation with the other in the same manner as the other enters into relation with him. Without this there can be no mutuality, no reciprocity. [P 225 C 2]

Where there is only a solitary instance of deposit made by the defendant to his credit in the account opened in his name by the plaintiff, and the deposit is the only occasion on which he is in a position of being able to make a demand on the plaintiff, the existence of this solitary credit is not sufficient to show that there were mutual and reciprocal dealings between the parties. The account cannot in such case be said to be mutual account: *A I R 1915 L B 148 ; (1852) 68 E R 596* and *A I R 1929 Cal 641, Rel. on.* [P 225 C 2]

F. S. Doctor — *for Appellant.*

K. C. Sanyal — *for Respondent.*

**Judgment.**—The defendant-respondent M. E. Motala was employed by the plaintiff-appellant Y. M. Bholat as manager in his business at Pakokku during the year 1932. In the accounts of the firm there was kept an account showing the transactions of M. E. Motala with the firm. The entries consist of debits against Motala where he has drawn money for his own use from the firm and credits consisting of Rs. 60 a month which was the salary paid to him by the firm with the addition of one credit of Rs. 615-4-0 on 11th May 1932. Between 11th May 1932 and 15th July 1932 the account showed a credit in favour of M. E. Motala. On no other occasion either before or after this did the account show such a credit. At the end of the year the debit against Motala was Rupees 462-10-0. It appears that the defendant-respondent Motala then left his employment and was succeeded by another manager or agent Mohamed Koliya. After he handed over, Motala desired Koliya to give him some money for his travelling expenses.

Koliya refused to do this and pointed out that Motala already owed over Rs. 400. On his arrival at Rangoon, Motala approached the plaintiff's father and obtained from him Rs. 200. The father wrote to the firm at Pakokku explaining what he had done, but no entry in the plaintiff's account was made in respect of this sum of money until 26th July 1933. Motala evidently returned from India somewhere about that time. It was found that his services were required by the plaintiff to explain the accounts to the Income-tax Officer, and the accounts show that Motala earned salary from 15th August 1933 until 30th September 1933. After that it seems Motala was employed by the plaintiff's father. The account of Motala with the plaintiff for the year 1933 shows two small charges dated February and April in addition to the Rs. 200 already mentioned, a sum of Rs. 25 cash taken on 28th August and further sums taken during October. The account ends with an entry for stitching charges of Motala's clothes, Rs. 8-4-0, and the balance said to be due from Motala on 31st December 1933 was Rs. 673-4-0. On 17th August 1936, the plaintiff-appellant filed a suit against Motala for recovery of this sum of money.

The defendant pleaded that the suit was barred under Limitation Act. He admitted that when the account was balanced at the end of 1932 there was shown to be an amount of Rs. 462-10-0 against him. He admitted that he worked for the plaintiff from 15th August to 30th September 1933 not in his former position as manager or agent but as a temporary clerk to settle the accounts before the Income-tax Officer. He denied that he had taken the other advances set out in the accounts of 1933 and admitted having received Rs. 200 from the plaintiff's father but alleged that that was a bonus due to him and he contended that there was nothing payable by him to the plaintiff. Actually he claimed that the plaintiff owed him a sum of money on account of some bonus, but this claim apparently was not pressed.

The Township Court of Pakokku which tried the case found that the suit was not barred by Art. 85, Lim. Act, as the account in question was a mutual, open and current account where there had been reciprocal demands between the parties. It further held that the account was not closed at the end of 1932 but continued throughout 1933. However it found that the only items proved against the defendant for the year 1933 were the sums of Rs. 200 and Rs. 30 shown as advances to him. Strangely enough however, it disallowed a credit of Rs. 70 shown by the plaintiff to be payable to the defendant and granted a decree for Rs. 602-10-6.

Against this decree, the defendant-respondent appealed to the District Court. The District Court found that the account was not such an account as is referred to in Art. 85, Lim. Act and that even assuming that it were such, it was quite clear that the account had been finally closed at the end of December 1932. Consequently the suit was barred by limitation. As regards the sum of Rs. 200, that had been paid in February 1933 and the claim therefore was barred. As regards the Rs. 30 the learned District Judge accepted the defendant-respondent's contention that it had been paid to cover his expenses to go to Pyinmana in connexion with the income-tax enquiry on behalf of the plaintiff. Consequently the appeal was allowed. The cross-objection in respect of the amount which the trial Court had not decreed out of the plaintiff's claim was dismissed. The plaintiff has now filed the present appeal in this Court and asks for a decree not for the amount for which he originally sued but for the amount decreed by the Township Court, namely Rs. 602-10-6.

The question arises whether the account referred to is a mutual, open and current account where there had been reciprocal demands between the parties. The question of what is such a mutual account was fully discussed in 8 L B R 149[1] where the dictum of Vice-Chancellor, Sir G. J. Turner in (1852) 68 E R 596[2] was quoted:

> I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account.

The dictum of Vice-Chancellor Turner was more fully quoted in 56 Cal 575.[3] It is quite clear that in such an account there must be reciprocity of dealings between the two parties. Each must enter into relation with the other in the same manner as the other enters into relation with him. Without this there can be no mutuality, no reciprocity.

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[1] Ebrahim Ahmed v. Abdul Huq, A I R 1915 L B 148=27 I C 879=8 L B R 149.

[2] Phillips v. Phillips, (1852) 68 E R 596=9 Hare 596.

[3] Tea Financing Syndicate, Ltd. v. Chandra Kamal, A I R 1929 Cal 641=120 I C 714=56 Cal 575.

Now, as I have already indicated, in the present case the only occasion on which the defendant-respondent had been in the position of being able to make a demand on the plaintiff was after the deposit of the Rs. 615-4-0. We do not know how that deposit came to be made or what were the circumstances. It is the only instance in which a deposit was made by the defendant and in my opinion this solitary instance is not sufficient to show that the account was a mutual account. It may have been, and probably was, a mere matter of convenience for the defendant to deposit this amount of Rs. 615-4-0 with the plaintiff. At that time he was very considerably in debt with the plaintiff owing nearly Rs. 400 and immediately after making this deposit which put him in credit to the extent of about Rs. 250 he very quickly withdrew Rs. 166, so that, even with the credit of salary for May, after a further withdrawal of Rs. 100 at the end of June, there was only a balance of Rs. 45-4-0 in his favour. It cannot be maintained that the existence of this solitary credit shows that there were mutual and reciprocal dealings between the parties. However, even if there were, I think that the learned District Judge was right in concluding that the account was finally closed at the end of 1932.

There can be no doubt that at that time the defendant finally vacated his position as manager at Pakokku. If he returned and worked during August and September, it was obviously for some temporary purpose. In fact the plaintiff's present agent Koliya strenuously denies that the defendant was ever engaged again and he explains the existence of the credits of Rs. 30 and Rs. 60 for August and September by saying that they were made because Motala was a relative and an old employee. M. H. Bholat, the father of the plaintiff, states that when the defendant took the Rs. 200 from him the defendant told him that he was coming back to work for the firm at Pakokku and that the Rs. 200 could be deducted from his wages later on when he came back. I find it very hard to believe this statement. The circumstances seem undoubtedly to show that there was no intention of re-employing the defendant. What does appear to be more likely was that the defendant was to work for the plaintiff's father on his return. In cross-examination M. H. Bholat says:

> The defendant said to me 'I will return in three months and enter your employ again.' .... With that I advanced him the Rs. 200. ...... After his return to Burma I sent the defendant back to Pakokku and after he had stayed at Pakokku, I sent defendant to Myingyan to supervise my business there.

We are informed by the agent of the plaintiff that after the account had been closed at the end of 1932 he refused to make any advances to the defendant. This surely definitely shows that the account was closed. Further, if it was still regarded as open, I cannot understand why the advance of Rs. 200 which was given to the defendant in February 1933 should not have been debited against him until July. The intermediate entries of February and April cannot be taken into account because as was pointed out by both the lower Courts they have not been proved. It was essential in the circumstances of this case to produce evidence explaining them and this the plaintiff has not done. Because the account has been re-opened we cannot assume that it was always open. In fact to re-open an account it must have been closed. It was quite natural, supposing that the defendant was employed temporarily for a short time in 1933, that the account should be re-opened to show the credit of the salary paid to him.

Another point is that whatever might be thought of the account of 1932 the account of 1933 could by no possibility be deemed to be a mutual account. There was here obviously no reciprocity. As regards the entries in the account on and from 28th August 1933, which is the date of the next entry after the entry in regard to the Rs. 200 the credits amount to Rs. 160 and the debits to Rs. 150 odd, so that there would be nothing payable by the defendant-respondent even if these entries are accepted. For these reasons I see no reason to interfere with the decree of the learned District Judge and this appeal is dismissed with costs.

A.L./R.K. *Appeal dismissed.*

## A. I. R. 1938 Rangoon 227

MOSELY J.

*R. M. V. R. Alagammai Achi* — Appellant.

v.

*P. L. P. R. P. R. Firm and others* — Respondents.

Special Second Appeal No. 48 of 1937, Decided on 20th July 1937, against decree of Dist. Court, Tharrawaddy, in C. A. No. 20 of 1936.

**Landlord and Tenant — Mere acknowledgment of landlord's title by tenancy does not estop tenant — Tenant can show that lease was executed in ignorance or through mistake.**

A tenant is not estopped merely because by the tenancy he acknowledges the title of his landlord, and a tenant may always explain and thereby render inconclusive acts done through mistake or misapprehension. It is permissible to a tenant to deny his lessor's title if it is shown that he executed the lease in ignorance : *Beng L R Sup Vol 588; (1837) 7 A & E 447 and A I R 1917 Mad 789, Rel. on.* [P 228 C 1]

P. K. Basu — *for Appellant.*

E. Hay — *for Respondent No. 1.*

**Judgment.** — This appeal must clearly be allowed. The plaintiff, P. L. P. R. P. R. Chettyar, sued the defendant-appellant, R. M. V. R. A. A. Chettyar, for possession of plot No. 226, 5.96 acres in extent, part of the plaintiff's holding No. 10 of which the plaintiff said his tenants had been dispossessed in 1935. The defendant is the owner of holding No. 64, immediately on the north of this plot, and of another holding on the south-east of it. Holding No. 10 is altogether 12.79 acres in extent. The plaintiff bought this holding together with some 90 other acres, all of which had been previously mortgaged to him in September 1929 (vide Ex. B), from Daw Se, her son, Ko Po Kye, and her daughter: the rents due under the current leases were included in the sale. Holding No. 10 for that year had been leased to Maung Mya Thin and three. Daw Se's husband, Ko Tun, bought this and other lands from Daw Hta, her deceased husband, Po Min, and Mya Thin, her son (vide Ex. C), in 1917. Daw Se had leased this holding, No. 10, in 1923, (*vide* Ex. B), to Ma Hta, Mya Thin and two others. Ma Hta and Mya Thin were the original owners not only of this holding, No. 10, but also of holding No. 64 belonging to the defendant, which, with other holdings, they transferred outright (*vide* Ex. 1) in 1934 to the defendant.

The trial Court found that the plaintiff had not proved that he was in possession of the land in dispute, but that, on the contrary, the defendants had proved that they and their predecessors-in-title had been in adverse possession of it for over twelve years. The lower Appellate Court seems to have held that the mere fact that the plaintiff and his predecessors-in-title had paid revenue on the land was in itself sufficient to confer title (in spite of the provisions of S. 7, read with S. 3, Land Revenue Act), and it was also held on the ground of estoppel which was raised for the first time only on appeal, that the defendant was estopped from denying the plaintiff's title by virtue of the two leases for the years 1923 and 1929 to Ma Hta and Mya Thin. There was not a shred of evidence adduced for the plaintiff to prove that he had ever been in possession of the disputed plot : he did not even cite his tenants to show dispossession. The only oral evidence in his favour, if it can be called so, was the statement of the Revenue Surveyor Maung Saw Hlaing (P. W. 2) that this plot, like plot 1796 (also belonging to holding No. 10), south-west of it, 'must have been' jungle in 1917-18, when the land was surveyed. This Revenue Surveyor was not posted to this jurisdiction until 1922 or so, and what he said was merely hearsay. It is admitted that the other plot, No. 1796, was only brought under cultivation seven or eight years ago.

The defendants, on the other hand. produced a great deal of evidence which, I think, is conclusive, and commended itself to the trial Court, to show that Ma Hta and her husband had acquired the plot in question some twenty years ago, and that it had always been cultivated as part of holding No. 64, that is to say, as part of the holding which Ma Hta sold to the defendant Chettyar, and not as part of the holding which Ma Hta sold to Daw Se, and which Daw Se later sold to the plaintiff Chettyar. I need hardly refer to the evidence of Ma Hta and her son, Maung Mya Thin (D. Ws. 1 and 2), and that of Thin Gyan and Po Nyan (D. Ws. 4 and 5), to this effect. Whether Ma Hta and her son were absolutely disinterested witnesses would depend on whether they sold their land to the defendant Chettyar by metes and bounds or not. They probably merely sold their revenue paying holdings, and were not concerned in the case. The other witnesses for the defence would seem to be disinterested. Daw Se and her son, Po Kye, had not been to the land, and apparently know nothing about the matter. As regards estoppel, there could clearly be no question of estoppel by a tenant (*see* S. 116, Evidence Act) at all. There was nothing whatever to show that Daw Se and her son, when they took a lease "of holding No. 10", 12.79 acres, knew that they were thereby purporting to take a lease of the disputed plot in question, which they now claim they were working in their own right as part of their holding, No. 64. A tenant is not estopped merely because by the tenancy he acknowledges the title of his landlord, and a tenant may always explain and thereby render inconclusive acts done through mistake or misapprehension: (1866) Beng L R Sup Vol 588[1] and 7 A & E 447[2] at p. 450. One of the cases cited by the lower Appellate Court, 40 Mad 561,[3] itself refers to the permissibility of a tenant denying his lessor's title if it is shown that he executed the lease in ignorance. It was also open to the defence to show, as they did, that it was never intended or understood that this plot passed at the sale by Ma Hta to Daw Se, oral evidence being relevant under S. 92, Evidence Act, as between the defendant Chettyar: vide 9 L B R 114[4] followed in 5 Rang 836[5] and 6 Rang 741.[6] That however is of little importance. The cardinal fact is that the burden was on the plaintiff, and they failed to show that they were ever in possession of this land. This appeal will be allowed and the decree of the trial Court restored with costs throughout.

K.B./R.K. *Appeal allowed.*

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1. Banee Madhub v. Thakoor Doss, (1866) Beng L R Sup Vol 588=6 W R Act 10 R 71.
2. Doe d.Plevin v. Brown, (1837) 7 A & E 447=2 N & P 592 = W W & D 677 = 8 L J Q B 49.
3. Venkata Chetty v. Aiyanna Gounden, A I R 1917 Mad 789 = 36 I C 817 = 40 Mad 561 = 31 M L J 712 (F B).
4. Maung Kyin v. Ma Shwe La, A I R 1917 P C 207 = 42 I C 642 = 44 I A 236 = 45 Cal 320 = 9 L B R 114 (P C).
5. Maung Than Gyaung v. Maung Pyu, A I R 1928 Rang 61 = 108 I C 734 = 5 Rang 836.
6. Mayakyi v. Po Po Nyein, A I R 1929 Rang 86 = 114 I C 676 = 6 Rang 741.

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## A. I. R. 1938 Rangoon 228

MOSELY J.

*The King*

v.

*Unoose* — Accused.

Criminal Revn. No. 541-A of 1937, Decided on 30th July 1937. Review of order of First Addl. Special Power Magistrate, Meiktila, D/- 2nd March 1937.

**(a) Burma Courts Manual, Para. 791 — Evidence only of year of birth — Optional with Court to fix date of birth other than 1st January of that year.**

Where there is evidence only of the year of birth it is at the option of the Court to fix the date other than 1st January under Para. 791 of Burma Courts Manual. [P 228 C 2; P 229 C 1]

**(b) Burma Prevention of Crime (Young Offender's) Act (3 of 1930), Ss. 16 (e) and 24 (b) (ii) — Offender between 15 and 16 years — Order detaining him in Training School for 4 years, illegal — Proper order is for detention till he attains 19th birthday.**

Where an offender of age between 15 and 16 years is ordered to be detained in the Training School under S. 16 (e), Burma Prevention of Crime (Young Offenders) Act for a period of 4 years, the order is illegal as the offender will have passed his 19th birthday by the time the period of 4 years expires. The proper order therefore in such a case is to detain him in the Training School, till he attains his 19th birthday: *A I R 1936 Rang 297, Rel. on.* [P 229 C 1]

**Order.** — In this case accused Unoose on his own plea was found guilty under S. 379, I. P. C. and was ordered to be detained in the Senior Training School at Thayetmyo for a period of 4 years under S. 16 (e), Prevention of Crime (Young Offenders) Act, 1930. His appeal was summarily dismissed by the Sessions Judge, Meiktila. The Magistrate definitely found the accused's age to be between 15 and 16 years and therefore the accused had not yet attained the age of 16: vide S. 2 (b) of the aforesaid Act. This finding was final under S. 14 of the Act. However, the Magistrate failed to fix the approximate date of birth of the accused. In this connexion his attention is invited to para. 791 Burma Courts Manual. He has merely put down in the detention order the year of birth of accused as 1921 and his finding that the year of birth of accused was 1921 must be taken to mean that the accused's birthday was some time in 1921 after the date of judgment, i. e. after 2nd March. Para. 791, Burma Courts Manual, says that if there is evidence only of the year of birth, the birthday may be fixed as 1st January. It is therefore at the option of the Court to fix a date other than 1st January. Since the Magistrate has fixed the year of birth as 1921 and has also found the accused's age to be between 15 and 16, I fix the accused's date of birth as 1st July 1921.

The maximum period of detention in a Senior Training School that can be ordered under S. 24 (b) (ii) of the abovementioned Act is a period not extending beyond the age of 18, which according to the decision in 14 Rang 327[1] means up to the 19th birthday. Since 1st July 1921 has been fixed as the accused's date of birth, in four years' time his age will extend beyond 18 as he will have passed his 19th birthday and consequently the order directing him to be detained for 4 years is illegal. I set aside the order of detention in the Senior Training School for a period of 4 years and direct that the accused be detained in the Senior Training School at Thayetmyo under S. 16 (e) read with S. 24 (b) (ii), Prevention of Crime (Young Offenders) Act, 1930 until he attains his 19th birthday, i. e. until 1st July 1940.

A.L./R.K. *Order accordingly.*

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[1] Emperor v. Nga Bala, A I R 1936 Rang 297=163 I C 1008=14 Rang 327=37 Cr L J 869.

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## A. I. R. 1938 Rangoon 229

MACKNEY J.

*Dr. A. Meah*—Applicant.

v.

*Steel Brothers & Co. Ltd.* —
Opposite Parties.

Criminal Revn. Appln. No. 316-B of 1937, Decided on 14th July 1937, reference made by Sess. Judge, Yamethin at Pyinmana, D/- 10th June 1937.

**(a) Criminal P. C. (1898), S. 145 (1)—Scope—No mention in application under S. 145 (1) of existence of dispute likely to cause breach of peace—Magistrate cannot take action under S. 145.**

Where in an application under S. 145 (1) for the issue of a prohibitory order against the non-applicant, the applicant does not make a mention of the existence of a dispute likely to cause a breach of the peace, the application does not justify the Magistrate's taking action under S. 145 of the Code. [P 229 C 2; P 230 C 1]

**(b) Criminal P. C. (1898), S. 145 (4)—Amendment to Cl. (4)—Effect of—Duty of Magistrate to obtain evidence to enable him to form opinion under S. 145—This procedure may entail summoning of witnesses cited by parties but he is not bound to summon witnesses whom he does not require.**

The duty of the Magistrate acting under S. 145 is to decide whether there is likely to be a breach of peace and whether one party although recently dispossessed, is to be regarded in possession. To do this, he must take such evidence as he finds necessary and it rests with him and not with the parties to decide what evidence is necessary to be called. [P 231 C 1]

In S. 145 there is no such provision as is to be found in Cl. 2 of S. 252 of the Code. The amendment to Cl. 4 of S. 145 does not mean anything more than that the Magistrate must receive evidence actually put before him by the parties but does not require him to summon witnesses at the instance of the parties who are unable to bring their witnesses to Court. It is the duty of the Magistrate to obtain such evidence as is requisite to enable him to form a reasonable opinion on the matter before him; it may be that this will entail his summoning the witnesses mentioned by the parties and if so, then it is certainly his duty to summon them. It does not however require of him that he should summon the witnesses whether or not he thinks he needs them : *38 Cal 24, Rel. on*; *A I R 1930 All 319, Dissent.*: *30 Cal 508, Ref.* [P 231 C 1, 2]

**(c) Criminal P. C. (1898), S. 145—Duty of Magistrate—No ground of Magistrate's being satisfied with existence of dispute likely to cause breach of peace— Also non-compliance with S. 145 (1)—Whole proceedings before Magistrate are vitiated and rendered illegal.**

The Magistrate, when making an order on an application under S. 145 must comply with the provisions of S. 145 (1) of the Code and he must make an order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed. Where there are actually no grounds whatever of the Magistrate's being so satisfied, in view of the facts and there is a failure on his part to comply with the provisions of S. 145 (1) of the Code, the whole proceedings before the Magistrate are vitiated and are rendered illegal as being without jurisdiction. [P 232 C 1]

K. C. Sanyal—*for Applicant.*

Foucar—*for Opposite Party.*

**Order.**—These proceedings come before this Court on a reference made by the learned Sessions Judge of Yamethin. On 24th April 1937, Dr. Ahmed Meah filed an application in the Court of the Subdivisional Magistrate, Pyinmana, in which he asked the Magistrate to issue a prohibitory order against Mr. T. O. Morris, the manager of Messrs. Steel Brothers at Pyinmana, on the ground that the latter had forcibly taken possession of land occupied by him under a mineral prospecting license, had forcibly asked the petitioner's coolies to work for him with the petitioner's tools and implements, and that the petitioner would suffer a heavy loss if no immediate action is taken against the respondent.

It is quite plain that such an application as this could not by any means justify the Magistrate's taking action under S. 145, Criminal P. C. The petition contains no information that a dispute likely to cause a breach of the peace existed. The petitioner himself lives in Pyinmana and on his own showing his coolies are not likely to object to the action of Messrs. Steel Brothers because they are now being employed by them. The petitioner's manager was further supplying rations to the coolies as required by Messrs. Steel Brothers. There is no suggestion that the petitioner's manager is likely to cause a breach of the peace. The Subdivisional Magistrate, however, without even examining Dr. Meah or requiring him to file an affidavit, at once drafted a notice stating that he was satisfied from information received from Dr Meah that a dispute likely to lead to a breach of the peace existed, and he called upon both Mr. Morris and Dr. Meah to appear before him on 5th May and to put in written statements of their claims in respect of actual possession of the subject in dispute. The notices made no mention of the fact that evidence would be heard.

On 1st May 1937, at the request of the learned advocate appearing for Messrs. Steel Brothers, an adjournment was granted until the 18th May. On that date Messrs. Steel Brothers appeared ready with witnesses. Dr. Meah however had no witnesses present. Both parties filed written statements. The Magistrate then recorded an order in which he stated that the area in question was a distant area in which the coolies were a rough and quarrelsome type and dispossession by violence would naturally lead to fear of retaliation and breach of the peace. What grounds the Subdivisional Magistrate had for forming this opinion is not stated. So far as can be seen there were no grounds whatsoever to justify such an opinion. He then went on to say that although the counsel for Messrs. Steel Brothers was ready with witnesses, Mr. Mitra who appeared for the petitioner had no witnesses ready and wanted a three weeks' adjournment to get his witnesses. The Magistrate held that the petitioner ought to have had his witnesses ready and he remarked :

> The leisurely attitude adopted by Mr. Mitra (for Dr. Meah) who has made no attempt to get his evidence down from the hills, but wants a further long adjournment, is in my mind not in keeping with the spirit of this section.

The Magistrate stated that he accepted Mr. Mitra's contention that it was possible that a breach of the peace should still be imminent seven weeks after the original alleged dispossession, one of his reasons being that in his view proviso 1 to S. 145 (4), Criminal P. C. contemplated that fear of a breach of the peace could be present two months after the originally wrongful dispossession. It does not appear to me that the existence of this proviso goes to show that in this particular case there was any danger of a breach of the peace. The circumstances of the case indicated peacefulness; there had been no breach of the peace, no person had been mentioned as likely to cause a breach of the peace, and it is not apparent that there are any persons who are likely to be tempted to cause a breach of the peace. The Magistrate went on to say that the proviso already referred to was a concession to assist those who have been unjustly treated, but the main object of the section, he said, was to prevent a breach of the peace and unlimited time could not be given to any party to prove their point. He went on to say :

> If the case is so lacking in urgency as this (that Dr. Meah can ask for three weeks' adjournment), he can easily file a civil suit and apply for the area to be attached. He has had ample time to do this.

The Magistrate accordingly refused to grant an adjournment, but as he thought that there was a likelihood of a breach of the peace he made an order declaring Messrs. Steel Brothers to be in possession. The order is in the terms of Cl. 6 of S. 145. Against this order Dr. Meah applied to the Sessions Court in revision.

The learned Sessions Judge has expressed his opinion that there would not seem to be any likelihood of there being a breach of the peace. Nevertheless, he thought that the Magistrate having the opinion that there was a likelihood of a breach of the peace, was bound to have given an opportunity to Dr. Meah to produce evidence to show that he had been forcibly and wrongfully dispossessed. He referred to certain decisions of the Calcutta High Court in support of his contention. He recommended that the order of the Magistrate should be set aside and that the case be returned to him with directions to decide it after taking evidence in the normal way because he thought that the applicant was entitled to have the application dealt with according to law.

I think that, in the circumstances of the case, especially as the Magistrate was of the opinion that there was a likelihood of a breach of the peace, he ought to have given Dr. Meah an opportunity of producing his witnesses. If three weeks seemed an unreasonably long time in which to secure the attendance of the witnesses, the Magistrate could have reduced the period as he thought fit. There is no doubt that Dr. Meah failed to produce his witnesses owing to a misunderstanding. It may be that the Magistrate acting under S. 145 is not bound to take steps to secure the attendance of such witnesses as the parties wish to call. His duty is to consider whether a dispute likely to cause a breach of the peace exists, and further if it appears that one of the parties had been forcibly and wrongfully dispossessed within two months of the date of his order under Clause 1 of the section, to consider whether he should be treated as being in possession. If he cannot form opinions on these points without calling evidence, then it is his duty to call that evidence but if he can form a reasonable opinion without taking certain evidence which the parties desire him to take, then it appears to me that there is nothing in this section which requires him to take such evidence. The position has been clearly set out in 38 Cal 24.[1] It was there pointed out that

> the Magistrate is the sole judge as to whether proceedings under S. 145, Criminal P. C. should or should not be set on foot . , . . . No private person has any right whatever to cause proceeedings under that section to be taken.

"Reading that section" the learned Judges say:

> we should have been prepared to hold that the section neither contemplated the summoning of witnesses at the instance of the parties nor rendered it obligatory on the Magistrate to compel the attendance of any witnesses unless he in his discretion thought it necessary to take the evidence of those witnesses,

and later

> we think that the law does not impose on the Magistrate a duty at the instance of a party to compel the attendance of witnesses at the hearing.

**It is quite clear that the Magistrate's duty is to decide whether there is likely to be a breach of the peace and whether one party, although recently dispossessed, is to be regarded as in possession. To do this, he must take such evidence as he finds necessary and it rests with him and not with the parties to decide what evidence is necessary to be called. The recent amendment to Clause 4 which requires the** Magistrate to receive all such evidence as may be produced by the parties and to consider the effect of such evidence, does not in my opinion mean anything more than that he must receive evidence actually put before him by the parties but does not require him to summon witnesses at the instance of the parties who are unable to bring these witnesses to Court.

Dalal J., in 52 All 91[2] has expressed his opinion that the clause as amended implies a duty on the Court to summon such witnesses as may be mentioned to the Court by either party. The learned Judge gives no reason for his opinion and, with great respect, I am not prepared to go so far as he does. I prefer to put it this way; that it is the duty of the Magistrate to obtain such evidence as is requisite to enable him to form a reasonable opinion on the matter before him, it may be that this will entail his summoning the witnesses mentioned by the parties and if so, then it is certainly his duty to summon them. It does not however, so it appears to me, require of him that he should summon the witnesses whether or not he thinks he needs them. In 30 Cal 508,[3] a decision which is quoted with approval by the learned Sessions Judge, the learned Judges do not go further than to say that the Magistrate has discretion as to whether he should summon witnesses or not. On the other hand, the wording of the section does not mean that the parties should produce their own evidence or absolve the Magistrate from the duty of assisting the parties in procuring the attendance of material witnesses when it is shown that their attendance cannot be enforced without such assistance.

In my opinion, it is significant that in S. 145 we find no such provision as is to be found in Cl. 2 of S. 252. If this had been a case in which it appeared to me that the provisions of S. 145, Criminal P. C. could be correctly invoked, I think that I must have held that the Subdivisional Magistrate acted wrongly in passing orders without hearing evidence. **His final order is in contradiction with the view that, apparently, he has taken. If Messrs. Steel Brothers are entitled to possession of the area in dispute, then it would appear that they have not forcibly and** wrongfully dispossessed Dr. Meah, and if there had been no forcible and wrongful dispossession, it is hard to see how there would be any likelihood of a breach of the peace arising because the whole case of the petitioner is that it was because of this forcible or wrongful dispossession that a breach of the peace was likely to arise.

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[1] **Harendra Kumar Bose v. Girish Chandra, (1910) 38 Cal 24=7 I C 798=11 Cr L J 530.**

[2] **Emperor v. Chakrapan, A I R 1930 All 819=1930 Cr C 432=125 I C 463=31 Cr L J 839=52 All 91=1930 A L J 484.**

[3] **Suriya Kanta v. Hem Chandra, (1903) 30 Cal 508=7 C W N 404.**

I take the view that the Subdivisional Magistrate ought to have complied with the provisions of S. 145, Cl. 1, Criminal P. C. and that he ought to have made an order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed. This failure, together with the fact that the Subdivisional Magistrate actually had no grounds whatsoever for being so satisfied, in my opinion, vitiates his whole proceeding and makes them illegal as being taken without jurisdiction. On this view, I can see no useful object to be attained in requiring the Magistrate now to take evidence. All that is necessary for me to do is to set aside the order passed by the Subdivisional Magistrate and to direct that Dr. Meah's application in Criminal Miscellaneous No. 21 of 1937 of the Subdivisional Magistrate, Pyinmana, be dismissed, and I order accordingly. If now, or at any subsequent time, there does appear to be grounds for believing that a dispute likely to cause a breach of the peace exists in regard to this matter, the Subdivisional Magistrate can, and ought to take the necessary action.

A.L./R.K. *Order accordingly.*

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## * * A. I. R. 1938 Rangoon 232

### FULL BENCH

BAGULEY, MOSELY AND BA U JJ.

*U Aung Pe* — Applicant.

v.

*The King.*

Criminal Revision No. 21-B of 1938, Decided on 8th April 1938, from order of Headquarters Magistrate (1), Insein, D/- 3rd December 1937.

*** * (a) Penal Code (1860), Ss. 500 and 182 —Complaint under S. 500 cannot be dismissed even if same facts also constitute offence under S. 182 and sanction required by S. 195, Criminial P. C., is not obtained :** *A I R 1935 Rang 163=156 I C 598, Overruled.*

There is no exception to S. 499 saying that when the defamation is made in a statement to a public servant or in court proceedings, by virtue of which the offence was punishable under S. 182 or S. 211, Penal Code or some other section, then no prosecution under S. 500 would lie. Hence a complaint under S. 500 cannot be dismissed even if the same facts constitute also an offence under S. 182 and sanction required by S. 195, Criminal P. C., is not obtained : *A I R 1935 Rang 163=156 I C 598,* **Overruled** ; *37 Cal 604 and A I R 1921 Cal 1, Approved.* [P 235 C 2]

**(b) Penal Code (1860), S. 499, Exception 10 —Good faith.**

When a man is charged with something and acquitted after trial, the man who repeats the charge has to be on very sure ground if he wishes to plead that he repeats this charge in good faith. [P 234 C 2 P 235 C 1, 2]

M. Ahmed — *for Applicant.*

U Ba Pe — *for Respondent.*

U Thein Maung, Advocate-General — *for the King.*

### Order of Reference

**Ba U J.** — U Po Lu, headman of Yegyaw village, Insein District, resigned, and his brother-in-law, Maung Po San, was appointed temporary headman pending an election. U Aung Pe who was a rival candidate of Maung Po San for the headmanship presented a petition to the Deputy Commissioner, Insein, praying that he might be appointed temporarily as headman. In the course of the petition, he stated that Taung Nga was illicitly selling opium in the village and that he was related to Maung Po San who would assist him in the illicit trade if he was appointed headman. Taung Nga took exception to this statement and prosecuted Aung Pe under S. 500, I. P. C. The case was tried by the Headquarters Magistrate, Insein, and Aung Pe was found guilty and sentenced to pay a fine of Rs. 50 or in default to undergo one month's simple imprisonment and also to pay costs Rs. 5-8-0 or in default to undergo seven days' simple imprisonment.

The case was taken up to the Sessions Judge, Insein, on revision, and the learned Sessions Judge has now referred it to this Court, recommending that the conviction and sentence may be set aside on the following two grounds ;

1. That the Magistrate should not have accepted the complaint under S. 500, Penal Code and tried it as the accused could have been prosecuted under S. 182, Penal Code: *vide* (1897-1901) 1 U B R 279,[1] A I R 1935 Rang 163.[2]

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1. Queen Empress v. Mi Gywet, (1897-1901) 1 U B R 279.
2. Swee Ing v. Koon Han, (1935) 22 A I R Rang 163=156 I C 598=1935 Cr C 626=36 Cr L J 970.

2. That the accused is on the facts alleged and proved entitled to the benefit of the tenth exception to S. 499, Penal Code.

The point raised in the second ground will arise if it is held that a person who has committed an offence under S. 500 as well as an offence under S. 182, Penal Code on the same facts can be prosecuted for the former, though he is not prosecuted for the latter. The cases relied on by the learned Sessions Judge dealt with S. 211, Penal Code ; but if the law expounded therein is correct, the principle would equally be applicable to the present case. In (1897-1901) 1 U B R 279,[1] the learned Judicial Commissioner said :

> The complainant made a complaint to the Magistrate that the accused, with the intent of causing injury to him, had instituted a criminal proceeding against him knowing that there was no just or lawful ground for such proceeding, and that she, the accused, had thereby defamed him. The Magistrate took action against her under S. 500, Penal Code, convicted her of that offence, and sentenced her to pay a fine Rs. 40 or, in default, to suffer rigorous imprisonment for 40 days, and awarded half of the fine to complainant as compensation.
>
> The proceedings were wholly illegal. The offence alleged was one under S. 211, Penal Code, and under S. 195, Criminal P. C. cognizance should not have been taken of it without sanction. A Magistrate cannot give himself jurisdiction to try an offence under S. 211 by treating it as one under S. 500, Penal Code.

This was approved by Mackney J. in A I R 1935 Rang 163.[2] The facts in that case are these :

> One Swee Ing made a report at a Police Station charging one Ah Shyan and other persons unknown with having confined and raped her. The police refused to take action as they found, after due inquiry, that the complaint was false ; thereupon Swee Ing made a direct complaint to the Court charging Ah Shyan and Koon Han with having confined and raped her. The complaint was thrown out under S. 203, Criminal P. C. Thereupon Ah Shyan and Koon Han filed two separate complaints against Swee Ing under S. 500, Penal Code. The two cases were amalgamated and tried together. Swee Ing was found guilty and convicted.

On appeal to this Court Mackney J. said :

> She defamed them again when she filed her complaint with the District Magistrate, but obviously, what she was doing was not defaming these persons but bringing a (possible false) charge against them. If her complaint is a false one, her object in making it was not to defame these persons so much as to harass them and cause them the inconvenience of being subject to criminal proceedings. For such an offence, S. 211, Penal Code, is the appropriate section, but the Court may not take cognizance of an offence under S. 211, Penal Code, committed in relation to any proceeding in Court except on a complaint in writing of such Court, or by some other Court to which such Court is subordinate. By assuming that the offence falls under S. 500, Penal Code, the Magistrate cannot avoid the effect of this provision of law.

The Calcutta High Court has however taken a contrary view. In 37 Cal 604[3] Harington J. said:

> The facts are that the accused gave a certain information to the manager of the Bettiah Raj which was untrue. He was prosecuted under S. 182, but acquitted on the ground that the person to whom he gave the information was not a public servant within the purview of that section. That information was, as a matter of fact, defamatory of the person who was aggrieved in the present case, and it is in respect of the defamatory statements which were made to the manager of the Bettiah Raj that the present charge under S. 500 was instituted.
>
> In my opinion, S. 403 is no bar to the present proceedings. . . . . . . The one is an offence committed against a public servant, which can only be prosecuted upon the complaint, or under sanction of the public servant injured, or of some one to whom he is subordinate. The offence under S. 500 can only be prosecuted on the complaint of the person aggrieved by the defamation. In one case the offence is committed against a person to whom false information is given: in the other case it is committed against a person about whom a defamatory statement is made. The two offences, to my mind, are quite distinct, and the charges under them would have to be prosecuted under the authority of the different persons who are injured by them.

Holmwood J. in a separate judgment agreed with this view and said :

> Although therefore the finding of the Magistrate in the S. 182 case cannot be in any way allowed to prejudice the accused in the S. 500, I. P. C. case, it is clear that the question of malice has not at all been tried, and the accused has not been acquitted of any charge involving malice. That is a question which has to be tried on evidence which would be irrelevant in a trial under S. 182, I. P. C.

In 48 Cal 388[4] though the point now under discussion was not directly involved, yet the observations of Mookerjee Ag. C. J. bearing thereon are worthy of great respect. The learned Acting Chief Justice said:

> Now, the maker of a single statement may be guilty of two distinct offences, one under S. 211 (which is an offence against public justice) and the other an offence under S. 499, wherein the personal element largely predominates. The Legislature has provided, in the Criminal Procedure Code, that the sanction of the Court where the offence is committed, is essential in the former case for the institution of criminal proceedings. In the latter case, the Legislature has omitted to make a similar provision. This diversity, for aught we know, may have been deliberate, and plainly affords no reason why the Court should struggle to hold that the statement does not fall within the

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[3] Ramsewak Lal v. Muneshwar Singh, (1910) 37 Cal 604=6 I C 352=12 C L J 15=14 C W N 839.

[4] Satish Chandra v. Ram Dayal, (1921) 8 A I R Cal 1=59 I C 143=22 Cr L J 31=48 Cal 388 =32 C L J 94 (S B).

mischief of the rule embodied in S. 499. The two offences are fundamentally distinct in nature, as is patent from the fact that the former is made non-compoundable while the latter remains compoundable; in the former case, for the initiation of the proceedings, the Legislature requires the sanction of the Court under S. 195, Criminal P. C., in the latter case, cognizance can be taken of the offence only upon a complaint made by the person aggrieved under S. 198, Criminal P. C. Whether every statement made by an advocate, by a party to a judicial proceeding, or by a witness therein should be excluded from the category of defamation, or, if included therein, should be made punishable in a proceeding instituted only with the sanction of the Court where the statement was made, are manifestly questions of policy which can be settled appropriately only by the Legislature. If, for reasons of public policy, the Legislature thinks fit to adopt the first alternative, as it is unquestionably competent to do, and to confer on advocates, parties and witnesses, not merely a qualified privilege as at present, but an absolute privilege as in the case of Judges, a new exception framed in suitable terms should be inserted in S. 499, I. P. C. If, on the other hand, the second alternative commends itself to the Legislature as more expedient, S. 500, I, P. C., may well be included in the list of sections contained in S. 195 (1) (b), Criminal P. C. It is, after all, the province of the statesman, and not of a Judicial Tribunal, to discuss, and of the Legislature to determine, what is best for the public good and to provide for it by proper enactments. But till the law has been amended, in one or other of the modes just indicated, or possibly in some other manner, it is incumbent upon us, if we are to avoid the greatest uncertainty and confusion to interpret the clear and unambiguous provisions of the statute in their plain natural sense, and not allow ourselves to be led into speculations as to their reasonableness or unreasonableness by reference to the ever captivating but often misleading ideals of public policy.

The Madras High Court took a similar view in 1 Weir 585 (5). The case is an old one but it does not appear that the view taken therein has since been dissented from. The headnote of the case is in the following terms:

> A complaint of defamation cannot be dismissed on the technical ground that the offence of defamation charged merged in an offence punishable under S. 182, Penal Code and that no sanction was obtained for prosecution under the latter section as required by S. 195, Criminal P. C.
>
> Where a public servant in the course of a departmental inquiry made a statement to the head of his department that the complainant, another public servant, borrowed moneys for his immediate superior; *Held*, that such statement would be defamatory, if it was untrue and if it was made under such circumstances as would lead the officer to believe that the complainant had borrowed money for his superior from persons connected with the department.

The view taken by the Calcutta and the Madras High Courts appears, to my mind, to be the correct view.

Section 235 (2) of the Criminal P. C. says:

> If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for each of such offences.

The present case, in my opinion, clearly illustrates what this section means. When U Aung Pe gave information to the Deputy Commissioner that the respondent Taung Nga sold opium illicitly, assuming that he knew that the said information was false or that he believed it to be false, he did so with the intention of influencing the Deputy Commissioner not to appoint his rival Po San as headman. He has thereby committed an offence under S. 182, Penal Code. As the said information has also apparently harmed the reputation of Taung Nga he has also committed an offence under S. 500. Therefore these two offences can be tried together in the same trial as permitted by the section or else separately as directed by S. 233, Criminal P. C.

As however the ingredients that constitute the offence under S. 182 are quite different from the ingredients that constitute the offence under S. 500, different kinds of evidence will be required to prove the two respective offences. If the accused is found guilty, the question of sentence, whether the offences are tried separately or in the same trial, will have to be considered with reference to S. 35, Criminal P. C. and S. 71, Penal Code. As there is a conflict of decisions, and as the point involved is of general public importance, I refer this case for decision by a Bench, full or otherwise, as the learned Chief Justice may direct.

### Judgment of Full Bench

**Baguley J.**—It is unnecessary to set out the facts in detail as they have been set out in the order of reference upon which the case has come before this Full Bench.

The learned Sessions Judge is of opinion that the Magistrate could not try the complaint under S. 500 because on the same facts the accused might have been prosecuted under S. 182, I. P. C. He points out that a prosecution under S. 182, I. P. C. by reason of S. 195, Criminal P. C. would not lie because there is no complaint in writing made by the public servant concerned, and he quoted two cases in which it had been laid down that when there was no complaint by the public servant

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5. Krishna Row v. Appaswami Aiyar (1889) 1 Weir 585.

concerned a Magistrate could not give himself cognizance of the case by making the case one under S. 500, I. P. C.

The first of these cases was (1897-1901) 1 U B R 279.[1] In this case, the learned Judicial Commissioner merely stated that the proceedings were wholly illegal. He said the offence alleged was one under S. 211, Penal Code and under S. 195, Criminal P. C., cognizance should not have been taken of it without sanction. No reason is given for this and the wording at the beginning of the judgment suggests that no real defamation was set out in the complaint. It is difficult to adduce anything very definite from this judgment without knowing the actual wording of the complaint.

The second case was A I R 1935 Rang 163.[2] A quotation from this judgment is given in the order of reference, and it seems to me there is fallacy apparent on the face of the judgment. It says :

> If her complaint is a false one, her object in making it was not to defame these persons so much as to harass them and cause them the inconvenience of being subject to criminal proceedings.

A reference to S. 499, Penal Code shows an obvious omission. No intent to defame is necessary, it is sufficient if the imputation is published intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of the complainant. On the other hand I find it difficult to add anything useful to the two rulings referred to, 37 Cal 604,[3] and the exhaustive judgment of Mookerjee Ag. C. J. in 48 Cal 388.[4] In this last judgment every case bearing on the matter is referred to.

Clause 29 of our Letters Patent says clearly that we have to deal with this case under the Penal Code, and any person who is charged with any offence for which provision is made by the Penal Code shall be liable to punishment under the said Act and not otherwise. It is therefore impossible to refer to the English law or to any questions of privilege whether absolute or qualified.

The relevant sections of the Penal Code are Ss. 499 and 500 and in these sections the word "privilege" is not to be found. S. 499 deals with, if I may say so, defamation per se, and says nothing about where, why, or when the imputation is made, so the law would appear to apply in exactly the same way whether the imputation is made in a Court of Justice or before some other public servant, or anywhere else. S. 195, Criminal P. C. lays down that a Court shall not take cognizance of certain offences under certain sections except on the complaint in writing of the public servant concerned, or on the complaint in writing of a Court, or some other Court to which the first Court is subordinate, and so on, but S. 500 is not mentioned in S. 195. To S. 499 there are ten exceptions; it would have been quite easy for the Legislature to have inserted an eleventh exception saying that when the defamation is made in a statement to a public servant or in Court proceedings, by virtue of which the offence was punishable under S. 182 or S. 211, Penal Code or some other section, then no prosecution under S. 500 would lie. But there is no such extra exception. In my opinion, as I have said, there seems an obvious flaw in the reasoning in A I R 1935 Rang 163[2] and it must not be regarded as good law.

This disposes of the point of law, but in addition to this, the learned Sessions Judge recommends that the conviction be set aside because the accused was entitled to the benefit of the tenth exception to S. 499, I. P. C. and, as the whole case has been referred to this Bench, it is necessary to deal with the evidence from this point of view.

The gist of the tenth exception is that the imputation must be made in good faith and the evidence has to be examined to see whether the accused has shown that he acted in good faith. What Aung Pe alleged was that Taung Nga was illicitly selling opium in the village and that Po San was related to Taung Nga

> . . . who is helping him to get appointed with a view that Taung Nga can trade in opium illicitly and as such the whole village tract is liable to be spoilt.

Now it is clear that within the last two years or so Taung Nga had been prosecuted under the Opium Law (Amendment Act) S. 3, and had been acquitted. When a man is charged with something of this sort and acquitted after trial, the man who repeats the charge has to be on very sure ground if he wishes to plead that he repeats this charge in good faith, and it is for Aung Pe to show that he acted in good faith as it is an exceptional defence which he is putting up. Examining the evidence for the defence, the first witness is Kyaw Zaw, who says he has no personal knowledge of Taung Nga. He gives evidence of reputation and hearsay but, as the ordinary rules of evidence apply to this trial, hearsay evidence is inadmissible. (After stating the evidence of some witnesses his Lordship proceeded further.) As I have said before, it is for Aung Pe to show that the charge was made in good faith and that if he has some definite evidence either not put before the Court when Taung Nga was under trial, or which has come into existence since his acquittal. I do not consider that Aung Pe has brought himself within the tenth exception to S. 500. I would therefore dismiss this application for revision.

**Mosely J.**—I agree.

**Ba U J.**—I have already given my view on the question of law in the order of reference and I have nothing to add thereto. I agree that this application should be dismissed.

D.S./R.K. *Application dismissed.*

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## A. I. R. 1938 Rangoon 236

MYA BU AND SHARPE JJ.

*A. R. M. N. A. Chettyar Firm* — Appellant.

v.

*R. M. V. S. Chettyar Firm and others* — Respondents.

Letters Patent Appeal No. 3 of 1937, Decided on 1st December 1937, against decree of High Court in Special Second Appeal No. 390 of 1936, *reported in A I R 1937 Rang 531.*

**Practice—New plea—Letters Patent Appeal—Suit to set aside security bond executed by guardian ad litem—Plea taken up by plaintiff till the stage of second appeal one of collusion and fraud — In Letters Patent Appeal power of guardian ad litem to execute such bond questioned — Material on record insufficient to determine question—Plea held could not be allowed at such late stage.**

When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But that course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. [P 238 C 1]

In a suit for a declaration that the charge created by the guardian ad litem of the minors to secure postponement of the decretal amount in favour of the decree-holder was null and void against the plaintiff, the case set up was one of collusion and fraud. The matter up to second appeal was dealt on the same basis. In second appeal though it was suggested for the plaintiff that the guardian had no power to alienate the minor's property, still the matter was only decided on the basis of collusion and fraud. In the Letters Patent Appeal the plaintiff wanted to question the guardian's power to execute that bond :

*Held* that as the validity or otherwise of the security bond depended upon certain state of facts which the materials on the record were insufficient to enable the Court to determine definitely one way or the other, the plaintiff could not be allowed to raise it : *(1892) A C 473 ; A I R 1932 P C 118 ; 35 All 211 (P C) and A I R 1923 All 176, Rel. on.* [P 239 C 1]

P. B. Sen — *for Appellant.*

Bhattacharyya — *for Respondents.*

**Mya Bu J.** — After a lengthy hearing of the arguments of the counsel in this case we find that the question for decision lies within a narrow compass. The proceeding before us is a Letters Patent Appeal lodged upon a certificate granted by the learned Judge who decided the second appeal arising out of Civil Regular No. 4 of 1936 of the Sub-divisional Court of Insein. The suit was one under O. 21, R. 63, Civil P. C. instituted by the appellant against the four respondents, the first of whom had on 30th August 1935 obtained a money decree against respondents 2, 3 and 4 as heirs and legal representatives of their deceased father in Civil Regular No. 61 of 1935 of the Township Court of Hlegu. At the time of the passing of the decree, these three judgment-debtors were minors who were represented in Civil Regular No. 61 of 1935 by their guardian-ad-litem Muthuswamy. Respondent 1, on 2nd September 1935, made an application for execution of the decree in Civil Execution No. 94 of 1935. The mode in which the execution was sought was stated in the petition :

> By attachment and sale of the following properties belonging to the judgment-debtors, as per particulars given below :
>
> A piece of house site, known as holding No. 8 of 1934-1935, situated at Kangyi Ward, Block No. 7 Dabein Myoma, Hlegu Township, measuring 0.088 of an acre ; together with two storeyed dwelling house, built of plank walling and flooring containing 4 rooms, corrugated iron sheet roofing with kitchen attached and in the front of the house it contains a guest room: yearly revenue for the land is Rs. 10, both house and site are valued at Rs. 1000. Latest map is filed herewith.

On the filing of this application the Court ordered issue of notice returnable on 13th September. At the time of the passing of the decree there were two other suits, one by the appellant, and the other by K. A. R. K. Chettyar Firm, instituted before the filing of Civil Regular No. 61 of 1935, pending in the same Court. There was also pending in the same Court another suit being Civil Regular No. 77 of 1937 which was filed by the respondent firm after the institution of Civil Regular No. 61 of 1935. In each of these suits a money decree was claimed against the estate of the deceased father of respondents 2, 3 and 4, and in all of them these respondents were represented by the same guardian-ad-litem, Muthuswamy. In Civil Execution No. 94 of 1935 two applications were filed by Muthuswamy in his capacity as guardian-ad-litem of the minor on 10th September 1935. In one of them, he asked for time for payment of the decretal amount, till 15th March 1936, stating that he was willing to give the property mentioned in the application for execution as security for the due payment, while in the other he prayed that leave might be granted to him to give that property as security. When these two petitions were presented to the Court, the learned Judge ordered them to be put up with the case on 13th September. On 13th September the application for time for payment of the decretal amount till 15th March 1936 was allowed while on the application for leave to give the property as security the word "Granted" was written. The result was that on the very day, namely 13th September, a security bond was executed by Muthuswamy as guardian-ad-litem of the judgment-debtors creating a charge upon the property mentioned in the application for execution and the bond was duly registered. This was admittedly the only asset of the estate of the deceased.

On 13th September, respondent 1 obtained a decree in Civil Regular No. 77 of 1937, and on the next day, 14th September, respondent applied for execution of that decree in Civil Execution No. 97 of 1935 by attachment of the same property which is the subject-matter of the security in the aforesaid bond, and for sale thereof, subject to the incumbrance created by the bond. By that time, the appellant firm and the firm of K. A. R. K., having obtained their decrees, applied for execution thereof by attachment and sale of the same property and lodged their objection to respondent 1's prayer in Civil Execution No. 97 for sale of that property subject to incumbrance. In so doing, they challenged the validity of the incumbrance created by the security bond on various grounds, but their objections were overruled and consequently the appellant firm filed the suit from which this appeal has arisen, under O. 21, R. 63, Civil P. C. The suit was based upon allegations tending to show the fraudulent and collusive nature of the transaction culminating in the execution of the security bond, the validity of which transaction was therefore attacked as being a fraudulent and collusive transaction. The main and the only idea underlying the appellant's case as made out in the plaint was that the transaction was of the nature voidable under S. 53, T. P. Act. No doubt, there are many suspicious elements in the transaction and if only S. 53, T. P. Act applied to the case, there would have been little difficulty in the appellant's way of getting the transaction avoided. The appellant succeeded upon that footing in the Court of first instance, namely the Subdivisional Court of Insein, but on appeal by respondent 1, the learned District Judge pointed out that S. 53, T. P. Act did not apply, inasmuch as the transaction was between the debtor and the creditor. The learned District Judge accordingly reversed the decree of the Court of first instance.

Thereafter the appellant lodged the second appeal in this Court. One of the grounds raised in the memorandum of second appeal was that the security bond was void as being a transfer of property of the minors by a person who had no authority to convey the minors' property. In the course of the argument before the learned Judge who decided the second appeal, the learned advocate did not abandon the points on which the District Court had given its decision against him. Consequently, there appears to have been considerable amount of discussion upon those points which, in the circumstances of the case, would only help to confuse the main issue before the learned Judge, but would not be sufficient to enable the Court to come to the conclusion that S. 53, T. P. Act would be of avail in favour of the appellant in the case. When the learned Judge dismissed the second appeal, the appellant made an application for a certificate under Cl. 13, Letters Patent, stating as his main ground that the security bond was void inasmuch as it was executed by the guardian-ad-litem who had no authority to dispose of the minors' property. In granting the leave the learned Judge observed that the learned advocate for the appellant in the course of his argument in the second appeal touched upon this point, which, to our mind, suggests that although the learned advocate argued the point before the learned Judge in the course of the second appeal, yet he did not press the point as definitely and precisely as he should, but gave greater prominence to the other grounds which he raised in that appeal.

Be that as it may, the point for our consideration is whether the question of the validity of the security bond as being a transfer of the minors' property by the guardian-ad-litem could be properly raised in the second appeal, and, consequently, in this Letters Patent Appeal. This question was not raised anywhere, or at any time, from the institution of the suit under O. 21, R. 63, up to the time that it came before this Court on second appeal. In support of his contention that this point could be raised in the second appeal although it was not raised in any of the prior stages of the proceedings initiated by the plaint in the suit, the learned advocate for the appellant relies on the principle enunciated by Lord Watson in (1892) A C 473,[1] in the following words:

> When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea.

This principle was adopted in the Privy Council case in 10 Rang 242.[2] In this case a claim was made by the respondent against the appellant company which was in liquidation for damages for breach of contract to purchase immovable property. The only question in issue in the Courts in India was whether the agreement for sale (on the face of which the purchaser was one M. E. Moolla) had been entered into by Moolla on his own account or whether the company was an undisclosed principal of Moolla in respect of the agreement. Upon an appeal to the Privy Council by the liquidator he contended for the first time that the agreement was inoperative as it was unregistered. The facts before the Board indicated, but were insufficient to determine definitely, that there had been a course of conduct, or an agreement, on the part of the liquidator precluding him from raising any point in the proceedings except that as to the respective positions of the Company and Moolla in regard to the agreement in question, which had been dealt with by the Courts in India. In those circumstances, their Lordships held that the contention as to non-registration should not be considered by the Board.

The principle therefore is that a question of law raised for the first time in a Court of last resort should receive consideration only if it is based upon facts whether admitted or proved beyond controversy. If the conveyance which is created by the security bond was in the nature of a private alienation, there can be no dispute of the want of authority in the guardian-ad-litem merely as such to convey the minors' property and the conveyance would, upon that ground, be void and of no effect whatever; but in the circumstances in which the security bond was executed, the question as to its validity or not must depend upon circumstances which had not been brought out to light in the course of the proceedings. Under O. 32, R. 7, sub-r. (1):

> No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

And under sub-r. (2):

> Any such agreement or compromise entered into without the leave of the Court so recorded should be voidable against all parties other than the minor.

It is therefore contended on behalf of respondent 1 that the proceedings leading to the execution by the guardian-ad-litem of the security bond was in the nature of a compromise, and the state of the facts before the Court is such that it cannot be definitely determined that the proceeding was not in the nature of such a compromise. The learned advocate for respondent 1 urges that the two applications of 10th September 1935 should be taken together and not separately and that they were before the Court at the same time when the order of 13th September was recorded in the diary and the word "granted" written on the application for grant of leave to give the property as security. It is true, as pointed out by the learned advocate for the appellant, that these documents and the orders passed thereon do not definitely show that the whole proceeding was in the nature of a compromise and the Court has nowhere expressly recorded that it was sanctioning an agreement or compromise on behalf of the minors; but if these documents and the orders passed thereon are taken together a state of affairs is produced which will at least make it impossible for us to assert definitely that the proceeding was not in the nature of a compromise, and the word "granted" was not written in the way of granting leave to the guardian-ad-litem to enter into the compromise, namely the obtaining of postponement for payment of the decretal amount upon furnishing security of the very property which was made the subject-matter of the security.

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[1] Connecticut Fire Insurance Co. v. Kavanagh, (1892) A C 473=61 L J P C 50=67 L T 508=57 J P 21.

[2] M. E. Moolla Sons, Limited v. Burjorjee, (1932) 19 A I R P C 118=136 I C 737=10 Rang 242=59 I A 161 (P C).

In these circumstances, the question as to the validity or otherwise of the security bond executed by the guardian-ad-litem depends upon certain state of facts which the materials on the record are insufficient to enable us to determine definitely either one way or the other. That being the case, it follows, in my opinion, that the appellant should not be permitted in the second appeal, and much less now, to raise the question of law upon which he has founded the present appeal. This appeal therefore fails and it is dismissed. The appellant will pay the respondents' costs in this appeal. Advocate's fee eight gold mohurs.

**Sharpe J.** — It is necessary in this case to examine quite briefly the history of the proceedings. The appeal arises out of Civil Regular No. 4 of 1936 in the Court of the Sub-divisional Judge, Insein. The relief there claimed by the plaintiff was for a decree declaring that the charge created on a certain house in favour of R. M. V. S. Chettyar Firm, who are first respondents before us, was null and void against the plaintiff, namely A. R. M. N. A. Chettyar Firm, who are the appellants before us, and other creditors of one Swaminathan deceased. The plaint makes it quite clear that the case there set up was one of fraud and collusion. The written statement of the present respondent 1 denies that fraud and collusion and of the four issues framed Issue 3 was:

> Whether the security given by the guardian-ad-litem Muthuswamy in C. E. No. 94/35 of the Township Court of Hlegu at Insein is fraudulent preference to defendant 1 over all other creditors? If so, what is its legal effect?

The learned Sub-divisional Judge, in the course of his judgment, dealt with Issue 3 very fully and came to the conclusion that the intention to defeat or delay the creditors of the transferor was clearly apparent from the conduct of Muthuswamy. I am quite satisfied that before the Sub-divisional Court the question of fraud and collusion was the only question that was really raised. Then the matter went on appeal to the District Court and there the learned District Judge said in the course of his judgment "the main point in this appeal is whether S. 53, T. P. Act can be applied," S. 53, T. P. Act being the section dealing with fraudulent transfers. That, so far as the District Judge was concerned, was the main point in the appeal before him and he dealt with it on that basis. Then the matter came in special civil second appeal to the High Court from the decision of the District Judge. It is true that the first ground of that appeal alleged that the guardian had no power to transfer or deal with the immovable property in question but in other grounds of appeal appeared again the allegation of fraud and collusion. In the course of his judgment in the second appeal, Spargo J. said "the transaction is now attacked merely on the ground that it is a preference"; and he also said:

> For the appellant Mr. Sen was at pains to point out what he described as the suspicious nature of the manœuvres adopted by the R. M. V. S. Firm.

He also said "Mr. Sen claimed that his client is entitled to avoid the security bond because it preferred one creditor to another," and Spargo J. added:

> He (that is to say, Mr. Sen) also referred to 4 Cal 897.[3] This case does not seem to me to afford much help either, because the point for decision in the present case is whether the security bond can be declared null and void under S. 53, T. P. Act.

So there in the second appeal, it has clearly been stated that the real contest was on the question of whether the security bond was null and void under S. 53, T. P. Act. In his judgment Spargo J. said first "That S. 53, T. P. Act does not apply to this case is abundantly clear" and later on:

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[3] Greender Chunder Ghose v. Mackintosh, (1879) 4 Cal 897=4 C L R 193.

> It is therefore abundantly clear that no relief can be granted to the plaintiff in this suit, which claims relief under S. 53, T. P. Act. Mr. Sen asked for permission to amend his plaint into a plaint asking for administration, having come round to the view that that was the proper form of the suit during the course of the argument. This I could not allow, because it is a suit of a totally different nature from the suit already filed.

So it appears that right up to that stage, the second appeal, in all three Courts the main decision sought was on the question of fraud and collusion. Spargo J.'s judgment was delivered on 31st May 1937, and it was not until almost a month later, that is to say on 26th June, that Mr. Sen on behalf of the appellant filed an application for leave to appeal under Cl. 13 of the Letters Patent. On the hearing of that application Spargo J. made this entry in the diary when he gave leave to appeal.

> Mr. Sen says that the point that he wishes to take up is that a guardian-ad-litem has no power to dispose of the minors' property as Muthusami is said to have done in this case by giving it as security for the benefit of a creditor (R. M. V. S.). He touched upon this point in argument but has, he says, found other authorities since the case was argued. Leave to appeal under Cl. 13, Letters Patent granted.

And then for the first time, as it seems to me, namely four weeks after the disposal of the second appeal, the point which is really sought to be pressed before us crystallizes, for the first time, as I say. In these circumstances, we must first of all consider whether it is right that the point brought up at this stage should be allowed to be argued. The first authority to which I would refer is the case in (1892) A C 473[1] in which case, at page 480, Lord Watson, delivering the judgment of their Lordships' Board, said:

> When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient. in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea.

In 35 All 211,[4] a Privy Council decision Lord Shaw, delivering the judgment of their Lordships, said at pp. 220 and 221:

> The Board has experienced considerable difficulty in permitting the alternative to be the ground of judgment now; and it is only because, in their view, it may be possible, out of a large wreckage of procedure, to construct the material for a just decision of the true rights of the parties and because upon the whole this may be in the parties' own best interests that their Lordships refrain from simpliciter sustaining the appeals and dismissing the suits.

And in 45 All 59[5] in the joint judgment of Kanhaiya Lal and Sulaiman JJ., this sentence appears at page 65:

> It is not possible to say whether before the lower Appellate Court the title derived by inheritance was urged; but the facts established are so plain that prima facie it would be doing injustice to deny to the plaintiff a right to which he is entitled on that basis.

From these authorities it is very easy to see upon what principle this Court should act in deciding whether a point can be raised in a Letters Patent Appeal which has not really been made before. The facts must be plain, so plain that there can really be no doubt about them. The evidence must establish beyond doubt that the facts, if fully investigated, would have supported the new point taken. In this case there is not what is referred to in 35 All 211[4] as a large wreckage of procedure, but for reasons appearing in the judgment which my learned brother has just delivered, I am bound to say that here, in my judgment, the facts are not so plain that prima facie it will be doing injustice to deny the appellants the right to which they claim to be entitled on the present point. I am not satisfied that the evidence, from which we are asked to decide this new point, establishes beyond doubt the facts, which if fully investigated would have supported that point. I am not satisfied either that there is here all the necessary material for the giving of a proper decision in this case. For these reasons I agree with my learned brother that it is now too late for this appellant to seek to take this point, and this appeal will be dismissed.

V.B.B./R.K. *Appeal dismissed.*

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**[4] R. R. Skinner v. Naunihal Singh, (1913) 35 All 211=19 I C 267=40 I A 105 (P C).**

**[5] Chhote Lal v. Chandra Bhan, (1923) 10 A I R All 176=80 I C 1041=45 All 59.**

## A. I. R. 1938 Rangoon 241

BAGULEY AND MOSELY JJ.

*Maung Tha Tun* — Applicant.

v.

*Brajahori Waddader* — Respondent.

Civil Misc. Appln. No. 93 of 1937, Decided on 25th January 1938, from order of Asst. Dist. Court, Akyab, D/- 22nd November 1937.

**Civil P. C. (1908), Ss. 151, 115 — Objection by party that pleader engaged by opposite party should not be allowed to appear as he had been previously engaged by him in same litigation—Parties heard and objection accepted in lower Court—Application to set aside the order does not lie.**

Where in a suit a party objects that a pleader engaged by the opposite party should not be allowed to appear, as he had been previously engaged by him in connexion with the same litigation, and the lower Court after hearing both the parties, accepts the objection, an application by the pleader to set aside an order does not lie either under S. 151 or S. 115, Civil P. C. or under S. 85, Government of Burma Act : *A I R 1930 Rang 355 and A I R 1930 Rang 185, Disting.* [P 241 C 2 ; 242 C 1]

Sein Tun Aung — *for Applicant.*

Dr. Ba Han and Zakaria — *for Respondent.*

**Baguley J.**—In the suit out of which this application arises, on 22nd November 1937, the Assistant District Judge of Akyab passed an order directing that a certain member of the Bar of Akyab, Maung Tha Tun, should not be allowed to appear on behalf of the plaintiffs. The order was passed in the following circumstances: The parties to the case had been having disputes for some time and the matter had been referred to arbitration. Before orders had been finally passed by the arbitrators, Waddader asked Maung Tha Tun to write a letter for him to the arbitrators, or to the opposite party. Subsequently, the arbitrators made an award, and the suit out of which the present application arises is a suit to file that award. In the course of the proceedings, Maung Tha Tun appeared on behalf of the plaintiffs, and Waddader, as a defendant, objected to him appearing on the ground that at the time that he asked Maung Tha Tun to write this letter he had to give him instructions, and those instructions or his recollection of the instructions, he fears, may be used by Maung Tha Tun to his detriment if he appears in the case. The application was supported by an affidavit, to which Maung Tha Tun filed a reply, unsupported by any affidavit. Waddader filed another affidavit, after which Maung Tha Tun filed an affidavit, and it is noticeable that the affidavit says very much less than was said in the original reply. In the original reply he says that Waddader consulted him merely as a friend, and he says he received no fees, either as consultation or as retaining fees. Waddader definitely says that he paid him Rs. 12 as fees for drafting the letter, to which Maung Tha Tun, when he had to file an affidavit in reply, makes no answer. In any event the learned Assistant District Judge, on a consideration of the affidavits and arguments, decided that Maung Tha Tun should not appear on behalf of the plaintiffs. It is in consequence of this order that the present application has been filed. The first thing that we have to consider is whether an application of this nature lies. The application is headed as one under S. 151, Civil P. C. Sec. 151 is, of course, the section which retains the Court's inherent powers, or what are generally described as such. It reads:

> Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

This order passed by the learned Assistant District Judge cannot, I think, by any stretch be one which will affect the ends of justice. Maung Tha Tun is not the only capable member of the Bar at Akyab. The Bar there is fairly large, or used to be when I knew it, and to say that justice is being denied to a party because one particular lawyer is prevented from appearing for him is absurd. It is said that this application was headed as being under S. 151, because the office had held that it could not lie under S. 115, the section under which the applicant's counsel wished to file it. I can, however see no grounds for holding that an application of this sort would lie under S. 115, on the allegation made by the defendant, namely that Maung Tha Tun who was appearing for the other side had previously been engaged by him in connexion with the same litigation. If this allegation was made out, the Court had complete jurisdiction to deal with it, and if necessary to debar Maung Tha Tun from appearing, and the Court was exercising a jurisdiction vested in it. Both sides were heard, affidavits were filed by both sides and an order was passed in the regular way. I see no reason for supposing that the Court acted illegally or with material irregularity in the exercise of its jurisdiction. Whether it acted rightly or wrongly is quite another matter. As a last resource, the general powers of supervision of this Court have to be appealed to. These are under S. 85, Government of Burma Act. It is quite true that under the corresponding section of the Government of India Act (namely, S. 107,) Courts have interfered in cases like this, and one of these cases appears in the published reports, namely 8 Rang 446.[1] At the time however that that judgment was passed, the old S. 107 of the Government of India Act was in force, and the powers of interference given by S. 107, Government of India Act are much wider than the powers given by S. 85, Government of Burma Act. The first part of S. 85 is the same as the old S. 107, but the second part of it runs as follows:

> Nothing in this section shall be construed as giving to the High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision.

This sub-clause, in my opinion, prevents the High Court from dealing with applications of this nature although they were certainly dealt with under the old section. Another case was quoted to us, 8 Rang 44,[2] but this case is not on all fours with the present case, because in that case the question was whether a certain advocate should be allowed to appear before this Court in an appeal arising out of a regular suit in which he had formerly appeared on the other side. I would hold, for these reasons, that the present application does not lie. It is dismissed with costs, advocate's fee five gold mohurs, to be paid by the present applicant personally.

**Mosely J.**—I agree.

V.B.B./R.K. *Application dismissed.*

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[1] U Ko Ko Gyi v. U San Mya, (1930) 17 A I R Rang 355=1930 Cr C 1233=128 I C 354=8 Rang 446=32 Cr L J 115.

[2] Maung Sein Gyi v. J. Maneckjee, (1930) 17 A I R Rang 185=125 I C 262=8 Rang 44.

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## A. I. R. 1938 Rangoon 242

MACKNEY J.

*Ismail Peer Mohamed* — Appellant.

v.

*The King.*

Criminal Appeal No. 997 of 1937, Decided on 9th September 1937, from order of Second Addl. Magistrate, Rangoon, D/- 14th August 1937.

**Penal Code (1860), S. 421 — Shop-keeper with stock of goods obtained on credit selling goods without making payment to his creditors —No offence under S. 421.**

The property of a debtor cannot be distributed according to law save after the provisions of the relevant enactments have been complied with. It cannot be held, without further proof, that a shopkeeper who has stocked his shop with goods obtained on credit and who sells these goods without making any payment to his creditors has committed an offence punishable under S. 421, Penal Code. In selling these goods, which are his own in spite of the fact that he has not yet paid for them, he is not causing wrongful gain to himself; neither is he causing wrongful loss to anybody, because unless the creditors have obtained some legal right over the property he is not by his action depriving them of any right of theirs. [P 243 C 1]

Beecheno — *for Appellant.*

**Judgment.**—The appellant Ismail Peer Mohamed was a piecegoods retailer. In March 1936 he had two stalls in the Soortee Bazaar but the goods in those stalls had not been paid for by him and he felt himself unable to satisfy all his creditors. Accordingly he offered to make over to four of them all his books, his outstanding bills and the goods in his stalls: the intention was that they should arrange with his creditors for a settlement of all their dues by realizing the stock and the outstandings. This took place on 10th March. In pursuance of this arrangement, a deed of agreement was drafted wherein it was stated that the appellant handed over all his goods and outstandings to the creditors, that the creditors were to realize the value thereof and then proportionately distribute the amount realized between them all in complete settlement of their dues. On 12th April, the appellant signed this agreement with the express stipulation that all his creditors should sign. Obviously the arrangement would be of no use to the appellant unless all the creditors did sign. On 17th April the appellant opened his stalls and subsequently removed all the goods, which he has evidently somehow disposed of by now. One of the creditors, being one of those to whom the goods had been entrusted, then prosecuted the appellant under S. 421, I. P. C. This section or the relevant portion thereof reads:

> Whoever dishonestly or fraudulently removes any property intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The learned Magistrate who tried the case was of the opinion that the appellant had committed such an offence. He had taken possession of goods worth between Rs. 3000 and Rs. 2500 but he had not settled his debts more than to the extent of a few rupees. By removing his goods to an unknown place and disposing of them at his pleasure he had deprived his creditors of their right to attach them and realize their debts out of the proceeds of the sale thereof: so he had caused wrongful gain to himself and wrongful loss to his creditors.

I am unable to agree with the learned Magistrate's view. It is clear that the handing over of the goods to four selected creditors was done merely as a preliminary to the formulation of a scheme of composition with all his creditors. It is clearly proved in evidence that there were some creditors who did not agree to this arrangement.

It appears to me that the appellant was, on finding that to be the case, entitled to take back his property and proceed as if the scheme had never been thought of. He had not absolutely handed over his property to his creditors. That could take place only on completion of the agreement. The creditors had not obtained any right or title to the appellant's goods. Consequently it cannot be said that they had any right to the distribution of the appellant's property according to law, and appellant's actions could not be said to prevent the distribution of that property according to law.

The property of a debtor cannot be distributed according to law save after the provisions of the relevant enactments have been complied with. It cannot be held without further proof that a shop-keeper who has stocked his shop with goods obtained on credit and who sells these goods without making any payment to his creditors has committed an offence punishable under S. 421, I. P. C.

There can be no question of fraudulent conduct here. It has to be shown that the debtor acted dishonestly: but in selling these goods, which are his own in spite of the fact that he has not yet paid for them, he is not causing wrongful gain to himself; neither is he causing wrongful loss to anybody, because unless the creditors have obtained some legal right over the property he is not by his action depriving them of any right of theirs. It is not sufficient to show that his action may deprive them of a recourse of which if they had acted in time they might have availed themselves. It is not shown in the present case even that any of the creditors were about to bring suits to recover their debts. There is further nothing to show that by pretending to be willing to come to an agreement he had staved off any suits.

In these circumstances I hold that the appellant ought not to have been convicted. His appeal is allowed, the finding and sentence of the lower Court are set aside and the appellant Ismail Peer Mohamed is acquitted.

D.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 243

MACKNEY J.

*Ah Cheung and another* — Applicants.

v.

*Ah Wain* — Respondent.

Criminal Revn. Appln. No. 385-B of 1937, Decided on 6th September 1937, from order of Dist. Magistrate, Rangoon, D/- 31st May 1937.

**(a) Contract Act (1872), S. 182 — Person employed to sell unredeemed articles from pawn shop is agent.**

The definition of an agent in S. 182, is wide enough and covers a person employed to sell unredeemed articles from a pawn shop on behalf of the employer. Such a person although a servant or a shop assistant, is an agent of the employer in the matter of selling such goods. [P 244 C 1]

**(b) Contract Act (1872), S. 178—Object—Agent referred to is agent whom pledgee knows to have power to pledge — Pledgee taking goods from person of whom he knew nothing — Pledge turning out to be offence and pledgor agent — Pledgee cannot retain property.**

Section 178 has been enacted in order to protect those persons who in good faith deal with persons whom they know to be mercantile agents, but of the details of whose agency they are not and cannot be expected to be aware. It is relied upon only in cases where the pledgee is aware that the pledgor is a mercantile agent. The agent referred to is an agent such as the pledgee might well suppose had power to pledge, but if the pledgee did not know him to be an agent at all he cannot have any reason to suppose that he had power to pledge. If he takes goods from a person of whom he knows nothing whatsoever and if it turns out that the person's pledging of the goods with him was a criminal offence and that the pledgor was a mercantile agent, then he can have no claim to retain the property: *(1875) 10 C P 354, Ref.* [P 244 C 2; P 245 C 1]

Maung Kyaw (1) — *for Applicants.*

S. B. Leong — *for Respondent.*

**Order.** — One Ah Wain, a pawn shop-keeper, employed a person called Man

Tuck on a salary of Rs. 30 a month in order to sell on his behalf unredeemed articles from the pawn shop. The articles were sold in premises separate from the pawn shop. Man Tuck had to keep two account books, one called the stock book in which were entered the articles entrusted to Man Tuck with their description and value, and the other a sale book. It was discovered that Man Tuck had been pawning several articles entrusted to him in this manner. The present applicants, Ah Cheung and Koon Hain, are two persons to whom Man Tuck pledged the articles belonging to Ah Wain which had been entrusted to him for sale. He was prosecuted in the Court of the Eastern Subdivisional Magistrate, Rangoon, and convicted under S. 408, Penal Code. The Magistrate directed that the articles pledged should be returned to Ah Wain and not to the pledgees. He held that S. 178, Contract Act did not apply because Man Tuck had no authority to make a valid pledge of the articles. The order of the Magistrate was reviewed by the learned District Magistrate of Rangoon. He held that Man Tuck was not an agent and so S. 178, Contract Act would not apply. The two pledgees have now applied to this Court to revise the order of the lower Court. An agent is defined in S. 182, Contract Act as a person employed to do any act for another, or to represent another in dealings with third persons. It appears to me that this definition is wide enough to cover Man Tuck's relationship with Ah Wain. It is true that he was the servant or shop assistant of Ah Wain, but he was also Ah Wain's agent in the matter of selling these goods. S. 178 of the Act reads as follows :

> Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the pawnee acts in good faith, and has not at the time of the pledge notice that the pawnor has not authority to pledge.

It is claimed that as Man Tuck was with the consent of Ah Wain in the possession of these goods, any pledge made by him when acting in the ordiary course of business of a mercantile agent was as valid as if he had been expressly authorised by Ah Wain to make the same. It is a little difficult to understand how S. 178, Contract Act can be applied when there are no facts before me which would show that Man Tuck had purported to act in the ordinary course of business of a mercantile agent in pledging these goods, or that the applicants had any idea that he was so acting or was a mercantile agent of Ah Wain. It has not been alleged before me that the applicants were aware of this fact. Indeed, if they were aware, they must also have been aware that he had no authority to pledge. I understand that they took pledges of these articles from Man Tuck as they would from any other person who walked into their shop with articles to pledge and about whom there were no suspicious circumstances. It appears to me obvious that pledgees can plead the benefit of S. 178 only when they know the pledgor to be a mercantile agent, otherwise I can see no meaning in the proviso that the pawnee must act in good faith and must not have at the time of the pledge notice that the pawnor has no authority to pledge. These words would be meaningless if a pledgee, having taken on pledge an article from a person whom he did not know, who, it afterwards appeared, had committed a criminal offence in thus pledging the article but whom the pledgee subsequently discovers to be a mercantile agent of the person to whom the goods really belonged, can escape the liability to return the article merely on the strength of that fortunate coincidence. The section has been enacted in order to protect those persons who in good faith deal with persons whom they know to be mercantile agents but of the details of whose agency they are not and cannot be expected to be aware. I do not think that this section has ever been otherwise applied. It is relied upon only in cases where the pledgee is aware that the pledgor is a mercantile agent.

In (1875) 10 C P 354,[1] in discussing the effect of 5 & 6 Vict. C. 39 S. 1, which laid down a rule not dissimilar from that which we find in S. 178, Contract Act, Baron Bramwell pointed out that the persons whom it is intended to protect are those who deal with agents known to be such, who in reason may pledge because they usually make advances to those who have intrusted them with the goods. The agent referred to is an agent such as the pledgee might well suppose had power to pledge, but if the pledgee did not know him to be an agent at all he cannot have any reason to suppose that he had power to pledge. If he takes goods from a person of whom he knows nothing whatsoever and if it turns out that the person's pledging of the goods with him was a criminal offence, then he can have no claim to retain the property. I see no reason to interfere with the order of the lower Court and this application is dismissed.

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[1] Cole v. North Western Bank, (1875) 10 C P 354=44 L J C P 233=32 L T 733.

S.C./R.K. *Application dismissed.*

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## A. I. R. 1938 Rangoon 245

SHAW J.

*Solomon David* — Appellant.

v.

*The King.*

Criminal Appeal No. 887 of 1937, Decided on 7th September 1937, from order of Second Addl. Magistrate, Rangoon, D/-2nd August 1937.

**(a) Provident Funds Act (1925), S. 3 (1) — Money to credit of undischarged insolvent in Provident Fund of District Council, until protection of S. 3 (1) is extended to such fund, is not compulsory deposit — Official Assignee can claim it.**

Money to the credit of an undischarged insolvent in the Provident Fund of a District Council is not a compulsory deposit within meaning of S. 3 (1) Provident Funds Act unless and until the protection of S. 3 (1) has been extended to such fund by the Local Government. Before the extension of the protection to such fund, the Official Assignee has claim to such deposit : *A I R 1933 Rang 148, Disting.* [P 246 C 1]

**(b) Criminal Trial — Mistake of law no excuse.**

No mistake of law can be claimed by any person to exonerate him from blameworthiness for an act committed by him which is an offence. [P 246 C 2]

**(c) Presidency Towns Insolvency Act (1909), S. 52 (2) (a) — Provident Fund—Non-intervention by Official Assignee before it reaches insolvent may affect vesting — But when it reaches insolvent it is property divisible among creditors.**

The absence of intervention by the Official Assignee before Provident Fund money reaches the insolvent's hands might affect the vesting of the money, but when it comes into the possession of the insolvent it is nevertheless his property, the property of an insolvent divisible among his creditors within the meaning of S. 52 (2) (a), Presidency Towns Insolvency Act. [P 247 C 1]

**(d) Insolvency — Property acquired after insolvency — No intervention by Official Assignee — Bona fide transactions with such property are valid.**

When the Official Assignee does not intervene, all transactions in respect of property acquired after the insolvency with any person dealing with the insolvent bona fide and for value are valid against the Official Assignee. [P 247 C 1]

C. H. Campagnac — *for Appellant.*

**Judgment.** — On 7th April 1937, the Insolvency Judge of this Court directed that a complaint should be laid against the appellant before the District Magistrate, Rangoon, of offences under Ss. 102 and 103 (b) (ii) of the Presidency Towns or Rangoon Insolvency Act. When called upon to show cause against his prosecution as regards the offence under S. 103 (b) (ii) Rangoon Insolvency Act, he stated that the Provident Fund money did not form part of his property so long as it remained in the hands of the District Council of Insein and was not therefore taken into account in his first insolvency proceedings, and when such money was withdrawn it became after-acquired property of the insolvent and did not vest in the Official Assignee unless and until he intervened, and there was no such intervention. He stated that when he was adjudicated insolvent a second time on 9th December 1935, the Provident Fund money had been withdrawn by him and fully expended, but, as will be seen later on, that was not correct. At the time of his second adjudication he was still an undischarged insolvent on his first adjudication which was made on 23rd August 1932. It was in regard to both the insolvencies that he was charged with the offence under S. 103 (b) (ii) Rangoon Insolvency Act.

I notice that the Official Assignee was under the impression that the decision in 11 Rang 93[1] applied to the contributions of the appellant in the Provident Fund of the District Council of Insein. S. 3 (1) Provident Funds Act, 1925, as it stands, applies only to Government and Railway Provident Funds. By S. 8 (1) of that Act the protection afforded by S. 3 (1) may be extended by the Local Government to a Provident Fund established for the benefit of its employees by any local authority within the meaning of the Local Authorities Loans Act, 1914. I asked the learned advocate for the appellant if the Provident Fund established by the District Council of Insein was one of the funds to which the provisions of the Act had been extended, and he has been able to find only a notification dated 30th January 1936, being Finance (Audit II) Department Notification No. 12, whereby in exercise of the powers conferred by S. 8 (1) Provident Funds Act, 1925, the Governor-in-Council extended the provisions of the Act to the Provident Fund established by the District Council of Insein under S. 22 (1) (b) Burma Rural Self-Government Act, 1921. The protection given by S. 3 (1) Provident Funds Act did not therefore cover the contributions to the Provident Fund of the District Council of Insein before 30th January 1936. The law laid down in 11 Rang 93[1] can accordingly have no application to the present case.

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[1] **In the matter of Walter Edward Shead, A I R 1933 Rang 148=148 I C 771=11 Rang 93.**

But that will not dispose of the matter. There is still the further question whether because the money received by the appellant was after-acquired property, within the meaning of S. 52 (2) (a) Rangoon Insolvency Act, and was governed by the rule relating to after-acquired property that it did not vest in the Official Assignee until he intervened, as has been laid down by this Court in 8 Rang 665,[2] that would assist the appellant. There is no dispute as to the facts. The appellant was removed from service as a District Engineer in the employ of the District Council of Insein with effect from 25th June 1935. He was given four months' leave before that date. He was a subscriber to the Provident Fund of the District Council and the amount at his credit on his removal in the fund was Rs. 4866-11-10, according to a letter to the Official Assignee from the Chairman and the evidence of the Secretary of the District Council of Insein. He drew Rs. 2928-1-11 on 26th July 1935, Rs. 730 on 10th October 1935, Rs. 682-13-11 on 13th November 1935, Rs. 203-8-0 on 16th January 1936 and Rs. 322-4-0 on 20th February 1936. In addition to those amounts he also drew Rs. 42-15-6 on 29th July 1936 by way of interest from the Fund. The Secretary of the District Council produced receipts showing the payments on five different dates, Exs. F-1 to F-5, and the total Rs. 4909-11-4. Ex. F-4 is presumably for the two payments of Rs. 203-8-0 and 322-4-0 made on 16th January 1936 and 20th February 1936 respectively.

It will therefore be clear that as regards the amounts received by the appellant on 26th July 1935, 10th October 1935 and 13th November 1935 they were received by him long after his first adjudication, but the amounts received by him as witnessed by Exs. F-4 and F-5 totalling Rs. 568-11-6 were obtained by him in February or January and February 1936 and in June 1936 after his second adjudication. The amount at his credit in the Provident Fund had become payable to him on the termination of his service with the District Council, so that as far as the amount of Rs. 568-11-6 was concerned, it had vested in the Official Assignee under S. 17, Rangoon Insolvency Act because it was already payable to the appellant though not yet withdrawn when he was adjudicated on 9th December 1935. As regards this amount, the argument based on the rule relating to after-acquired property cannot avail the appellant at all. His conviction to the extent of Rs. 568-11-6 drawn in 1936 cannot, I think, be questioned.

The appellant's plea that it was Provident Fund money and he could spend it as he liked was said to be based on a mistaken notion of the law. Because others shared the same mistake with him is not in itself a sufficient ground for holding that he could have had no fraudulent intent. No mistake of law can be claimed by any person to exonerate him from blameworthiness for an act committed by him which is an offence. But, it was urged that because of an honest mistake of law the appellant cannot be imputed with an intention to defraud, and so he could not be held to have acted fraudulently. But what is it that the appellant himself set up? Only this, that he did not pay the money to the Official Assignee for the benefit of his creditors or to his creditors because it was Provident Fund money. In answer to the general question put to him by the learned Magistrate, what else he had to say, he stated: " B. C. Van Wingerden gave false evidence in that I did not pay him out of the Provident Fund money ", suggesting that he paid B. C. Van Wingerden something out of his Provident Fund money. It amounts to this therefore that he imagined he could use his Provident Fund money as he pleased merely because it was such money, a plea founded on nothing substantial. He knew that on his adjudication all his property wherever situate vested in the Official Assignee and became divisible among his creditors under S. 17, Rangoon Insolvency Act. The balance of his Provident Fund account which was not yet withdrawn and at his credit with the District Council of Insein having vested in the Official

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**2. Choung Taik v. Ma Thein Nu, A I R 1931 Rang 74=131 I C 504=8 Rang 665.**

Assignee, his action in withdrawing it to be used by himself was making away with property which diminished the sum to be divided among his creditors, and he must be taken to have intended the necessary consequence of his action. His omission to disclose the existence of this balance at his credit was deliberate and must be assumed to have been made with intent to defraud, and it follows from that that his withdrawal and use of it was also with intent to defraud.

Regarding the earlier amount withdrawn by the appellant, it is true that as after-acquired property it had not vested in the Official Assignee who had not intervened ; but when it reached his hands was it not the property of the insolvent and as such divisible among his creditors? The absence of intervention by the Official Assignee before it reached the insolvent's hands might have affected the vesting of the money, but when it came into the possession of the appellant, in my opinion, it was nevertheless his property, the property of an insolvent divisible among his creditors within the meaning of S. 52(2)(a), Rangoon Insolvency Act. In making away with that money, instead of handing it over to the Official Assignee for the benefit of his creditors, he was therefore dealing with money which should have been divided among his creditors even if it had not vested in the Official Assignee. His action necessarily resulted in diminishing the sum to be divided among his creditors, and he must have therefore intended it. As the Official Assignee did not intervene, upon the principle laid down in (1890) 25 Q B D 262,[3] all transactions in respect of property acquired after the insolvency with any person dealing with the insolvent bona fide and for value are valid against the Official Assignee. The money cannot now be realized even if it were possible to trace it. But that is not to say that the insolvent had no duty himself with regard to the money. The money drawn by the appellant was his property and instead of using it to be divided among his schedule creditors he spent it otherwise. His schedule creditors in the earlier insolvency were deprived of the money received by him and he intentionally caused that. Therefore his action must be taken to be fraudulent and with intent to diminish the sum to be divided amongst them. The conviction is therefore upheld. The sentence is not unduly severe. The appeal is dismissed.

D.S./R.K. *Appeal dismissed.*

## A. I. R. 1938 Rangoon 247

BAGULEY J.

*Ma E Myaing* — Applicant.

v.

*The King.*

Criminal Revn. No. 578-B of 1937, Decided on 25th November 1937, from order of First Additional Magistrate (1), Nyaunglebin, D/- 27th August 1937.

**Criminal P. C. (1898), S. 250—Cause shown by a complainant must be recorded before directing payment of compensation.**

It is only after recording any cause shown by the complainant against an order under the section being made and after considering the cause so shown that an order can be passed directing him to pay compensation. Unless and until the directory provisions of this section are complied with, a Magistrate has no power to order payment of compensation : *A I R 1932 Sind 156, Rel. on.* [P 248 C 1, 2]

Tha Kin — *for Applicant.*

**Order.** — Ma E Myaing, the present applicant, filed a complaint against Ma Mya Thin and Maung Kala charging them with offences under Ss. 323, 324 and 511, I. P. C. The case was dealt with by the First Additional Magistrate of Nyaunglebin who after hearing the witnesses for the prosecution wrote an order on 22nd August 1937 in which he discharged the accused and stated that the case was false and highly vexatious and therefore a fit case in which the provisions of S. 250, Criminal P. C., should be utilized, and he directed the complainant Ma E Myaing to pay Rs. 25 each to the accused as compensation or in default to undergo thirty days' simple imprisonment. All this is contained in the order of discharge and so far as the record shows the complainant was never called upon to show cause why an order for payment of compensation should not be made. It seems quite clear that the learned Magistrate did not refer to S. 250, Criminal Procedure Code, or if he did, he entirely failed to grasp its provisions.

The section if read carefully is quite simple and there should be no difficulty about applying it. The present sub-sections (1), (2), (2) (a), (2) (b) and (2) (c) were substituted for the old sub-sections (1) and (2) in 1923 and perhaps some difficulty may arise by reason of the fact that rulings are often quoted which date from earlier than 1923 and are therefore inapplicable. There seem to be very few published rulings on this section which date from after 1923 and difficulties may have arisen from the Courts being asked to follow rulings of an earlier date. Great care in this respect is necessary and I notice that in my edition of Sohoni's Criminal Procedure Code (Edn. 13 of 1931), the annotated book which is most frequently used, there are many rulings still quoted which are directly at variance with the law as it now exists. I would mention as examples 25 All 315[1] 34 All 354,[2] and 38 Cal 302.[3] None of these rulings are now good law, and there may be many others. The section is really simple. The Magistrate in the order in which he discharges or acquits the accused, if he is of opinion that the accusation is false and either frivolous or vexatious, may in his order of discharge or acquittal call upon the complainant, or the person on whose information the accusation was made, to show cause why he should not pay compensation. The Magistrate shall record and consider any cause which the complainant may show, and having considered that cause he may for reasons to be recorded, if he is still satisfied that the accusation is false and either frivolous or vexatious, direct compensation to be paid.

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[3] Cohen v. Mitchell, (1890) 25 Q B D 262=59 L J Q B 409=63 L T 206=38 W R 551=7 Morrell 207.

In the present case the Magistrate made no attempt to comply with the provisions of the section and in particular he did not record any cause shown by the complainant against an order under the section being made. This is of particular importance because as has been pointed out in 33 Cr L J 644[4] by Mehta A. J. C., when an order for payment of compensation is passed under S. 250, the virtual effect of an order of compensation is that it amounts to a summary conviction of the complainant and it is a fundamental rule of criminal law that no person shall be convicted without being given an opportunity of meeting the charge framed against him. The section does not provide that his examination shall be recorded like that of an accused person, but if he shows cause verbally what he says should be written down in the words used by him, in order that a Court of appeal or revision may know exactly what he really meant or, if he prefers to show cause by filing a written statement, that written statement must be placed on the record and it is only after considering the cause so shown that an order can be passed directing him to pay compensation. Unless and until the directory provisions of this section are complied with a Magistrate has no power to order payment of compensation and therefore this Court has power to deal with the matter in revision. I set aside the order directing payment of compensation. The record does not show clearly whether the money has been realized from the applicant or not: if it has been realized it must be refunded to her.

D.S./R.K. *Order set aside.*

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## A. I. R. 1938 Rangoon 248

MYA BU AND SHARPE, JJ.

*John Hugh St. Clair Rorke* — Appellant.

v.

*Gwendoline Myra Rorke and another* — Respondents.

First Appeal No. 89 of 1937, Decided on 21st December 1937, against decree of High Court in C. R. No. 372 of 1936.

**Practice—Witness — Credibility — Judge sitting on Original Side of High Court coming to particular conclusion about credibility of witness after seeing him and hearing his evidence — High Court would not ordinarily interfere with his finding — Judge need not comment upon demeanour of witness although he may record it.**

Where a Judge, especially a Judge on the Original Side of the High Court, has seen a witness and heard his evidence and comes to a conclusion about his credibility, it requires circumstances of an exceptional character to justify the High Court sitting in appeal from the decision in coming to a different conclusion. It is not a question of the weight of the evidence but that of the attitude and the trustworthiness of the witness and the effect of his whole demeanour in the witness-box. It is not necessary that a Judge should always comment upon the demeanour of the witnesses in the box but he may record the demeanour of the witness. [P 249 C 1, 2]

Cowasjee and Moore — *for Appellant.*
Surridge — *for Respondent No. 1.*

**Sharpe J.** — My learned brother has asked me to deliver my judgment first.

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[1] In the matter of Safdar Husain, (1903) 25 All 315=1903 A W N 57.

[2] Ram Singh v. Mathura, (1912) 34 All 354=14 I C 599=9 A L J 308.

[3] Haru Tanti v. Satish Roy, (1911) 38 Cal 302=9 I C 45=13 C L J 425.

[4] Saleh v. Emperor, (1932) 19 A I R Sind 156=1932 Cr C 692=138 I C 685=33 Cr L J 644 =26 S L R 299.

We have listened to everything that Mr. Cowasjee so very ably urged on behalf of the appellant in this case and Mr. Cowasjee could not have said anything more than he did say but, in my judgment, this appeal must be dismissed. On 19th November 1936 the appellant John Hugh St. Clair Rorke presented a petition in the High Court under S. 10, Divorce Act, praying that his marriage with respondent 1, Gwendoline Myra Rorke, might be dissolved on the ground that she had, since the solemnization of their marriage, been guilty of adultery with the co-respondent Ba Gyi. The petition alleged that adultery had been committed by the respondent and the co-respondent on diverse occasions at Monkey Point since about September 1935 up to 3rd May 1936, and also again at Monkey Point from 17th July 1936 up to the date of the filing of the petition, which as I have just mentioned, was 19th November 1936. Both the respondent and the co-respondent denied the adultery alleged and the question whether that adultery was or was not committed has been the sole question in the case, both before the learned Judge on the Original Side and before us. The adultery charged was in two periods as I have indicated. In respect of the earlier period, the case really rests on the subsequent birth of a child, the paternity of which the petitioner disputes. As regards the second period a number of witnesses were called in support of the petition.

Two main matters stand out in Mr. Cowasjee's able argument before us; the first is that Ba U J. who tried this case, approached it with what he, Mr. Cowasjee, calls a pre-conceived notion that such things as the witnesses on behalf of the petitioner were deposing to could not possibly have happened, and therefore, said Mr. Cowasjee, if the learned Judge approached it in that frame of mind no evidence in the world would have shaken him; and he says that his client has had, what he calls, no proper adjudication of his rights. The second main point, Mr. Cowasjee makes, is in regard to the functions of this Court when reviewing a pure question of fact on appeal. There are a number of authorities on this latter point, some of them, Privy Council decisions, and some of these Privy Council decisions in cases from this Court; but I think the principle is now fairly clearly established that where a Judge, especially a Judge on the Original Side of this Court, has seen a witness and heard his evidence, and comes to a conclusion about his credibility, it requires circumstances of an exceptional character to justify this Court in coming to a different conclusion. It is not a question of the weight of evidence but that of the attitude, and the trustworthiness of the witness, and the effect of his whole demeanour in the witness-box. The petitioner himself gave evidence and denied that he had intercourse with his wife between February 1935 and 4th may 1936, which is really the basis of the first part of the charge of adultery, and Ba U J. says in the clearest possible terms that he does not believe the petitioner when he says that he had no intercourse with his wife during that period. He points out that sometimes he took his wife out and had an opportunity of having intercourse with her. I see no exceptional circumstances in this case which cause me to disturb the learned Judge's finding on the first charge of adultery.

Now I pass to the second charge of adultery about which a number of witnesses were examined in the Court below. (His Lordship then discussed the evidence and proceeded.) Now, I cannot see any exceptional circumstances in this case which justify me in saying the learned Judge on the Original Side was wrong in the view which he formed as to the non-credibility of these three important witnesses. It is not necessary that a Judge should always comment upon the demeanour of the witnesses in the box—that appears in one of the cases cited to us this morning—but he may record the demeanour of the witnesses. The burden of proof is upon the petitioner, and here is a set of witnesses not one of whom the learned Judge is able to believe. I think as I said, there are no exceptional circumstances here warranting me in disagreeing with the learned trial Judge. I will now deal with "the pre-conceived notion" of the learned Judge that Mr. Cowasjee has put before us. As I read the judgment of the learned Judge, it is not that he started his examination of the evidence in this case with that pre-conceived idea at all, but that, having seen the witnesses, having had an opportunity of observing what sort of people they were, and having heard their evidence, in the light of these circumstances, he could not believe that such things happened with these people as were alleged to have taken place. That is as I understand his judgment when we read it as a whole. I have already pointed out that the learned Judge approached his examination of the evidence in this case with great care and caution and I think that he did get at the truth. The words on the last page of his judgment, to my mind, accurately set out the situation in this case as they so often accurately set out similar situations in other divorce cases. The learned Judge said :

> Want of circumspection in this matter created a wrong impression in the minds of Loader and Adams, and that wrong impression, when imparted to the petitioner, assumed a different shape altogether. He began to imagine all sorts of things about his wife and the co-respondent.

The learned Judge says just before that passage that he does not propose to reject their evidence entirely because, he says, it may be true that these witnesses saw the respondent and the co-respondent on the balcony together, possibly chatting with each other and there may well be some slight substratum of truth in what they said, but I think that a wrong impression was created in the minds of these witnesses, and unfortunately, it did not stop there because they allowed the wrong impression which was created in their minds to be passed on by them in a deliberately highly coloured way. Such slight incidents as they had seen were the basis in the end of the evidence which they gave but it was so completely distorted that it was not possible for the learned trial Judge to accept their testimony. In my judgment, this appeal must be dismissed and I would award seven gold mohurs as advocate's fee.

**Mya Bu J.** — I agree.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 250

BAGULEY AND MOSELY JJ.

*A. L. A. Chettyar Firm* — Appellant.

v.

*Maung Po Taw and another* — Respondents.

First Appeal No. 126 of 1937, Decided on 14th February 1938, against order of Asst. Dist. Court, Hanthawaddy, D/- 10th August 1937.

**(a) Buddhist Law (Burmese) — Partition — Father remarrying—Orasa son by first wife is entitled to his share in estate as existing at the time of remarriage.**

Where after the death of his wife the widower marries a second wife, his orasa son by the first wife is entitled to his share in the estate as it existed at the time of remarriage: *A I R 1929 Rang 155 and A I R 1935 P C 16, Rel. on.* [P 251 C 1]

**(b) Civil P. C. (1908), S. 47—Mortgage by *U* to firm—Suit by *U's* son for partition—Subsequent suit by firm on mortgage — Decree for sale—Property purchased by firm—Decree for partition in suit of *U's* son—Execution—Objection by firm that it had purchased the property —Firm held came within S. 47 and objection held ought to have been decided in execution and not by separate suit.**

One *U* executed a mortgage in favour of a firm. On remarriage of U his son filed a suit for partition. Later on, the firm filed a suit for sale of the property mortgaged to it, obtained a decree and purchased the property. Meanwhile the son of *U* got a decree in the partition suit and applied for its execution. When the Commissioner went on to make the division the firm objected pointing out that it had purchased the property. The Court disallowed the objection by asking the firm to file a separate suit :

*Held* that by buying the title of *U* in execution arising under the mortgage suit, the firm stepped into the shoes of *U* and thereby became his representative. The firm, as the representative of *U* was entitled to come for settlement of the question whether the partition decree left anything at all to the partition as between *U* and his son. The firm therefore came under S. 47 and the executing Court should not have referred the firm to a separate suit. [P 251 C 1, 2]

Basu — *for Appellant.*

Ba So — *for Respondents.*

**Baguley J.**—This case is really very simple. U Khet and his wife Ma Shwe were a married couple. Ma Shwe died in 1927 leaving joint debts and joint properties. In 1929 to satisfy the joint debts U Khet executed a mortgage in favour of the A. L. A. Firm. Next year he re-married and in 1932 U Khet's eldest son Po Taw filed a suit for a quarter share in the estate. Later on the A. L. A. Firm filed a suit for sale of the property mortgaged to it, joining Po Taw and the other descendants of Ma Shwe as legal representatives of Ma Shwe to give them a chance of redeeming the property. The A. L. A. Firm got a decree, Po Taw having put in an appearance and then withdrawn from the case, and the property was put up for sale and the firm bought it. Meanwhile Po Taw's suit for a quarter share of the estate had been proceeding: the usual preliminary decree for accounts had been passed and a commissioner appointed who, although he took an account of the properties and the mesne profits etc., completely ignored the evidence of debts due by the deceased, although evidence was given about them and a final decree was passed giving Po Taw a one quarter share in the assets left by Ma Shwe. No word whatever is said with regard to the debts which she left. This of course is entirely wrong, as an orasa son could only get a one quarter share in the net estate left by Ma Shwe (*vide* 7 Rang 240[1]) which was approved by the Privy Council in 13 Rang 69[2] as it existed at the time of the remarriage. In due course, Po Taw applied for execution of his decree for partition. When the commissioner went on the land to make a division, the A. L. A. Firm filed an application pointing out that they had bought in the property left by U Khet in execution of their mortgage decree and asking that the Inspector of Land Records should refrain from making a partition. Po Taw objected and the learned Assistant District Judge passed the order against which the present appeal has been filed. The learned Judge says:

> In the circumstances of the case it is advisable for A. L. A. Firm to file a suit against Po Taw. I disallow the objection of the A. L. A. Firm. The partition made by the Inspector of Land Records is confirmed.

The learned Judge then passed a formal order: "It is ordered that the partition made by the Inspector of Land Records be confirmed." This formal final order does not embody the terms of that partition, nor has it been engrossed on a stamp paper, thereby offending the provisions of the Stamp Act, because it is an instrument of partition as defined by S. 2 of that Act. The learned Judge gives no particular reason as to why the A. L. A. Firm should not come in under S. 47, Civil P. C. Section 47 says:

> All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

By buying in the right, title and interest of U Khet through the execution proceedings arising under the mortgage suit the A. L. A. Firm stepped into the shoes of U Khet and therefore became his representative. U Khet is the judgment-debtor in Civil Execution No. 16 of 1936 which arises from Suit No. 32 of 1932, and the question arises as between the A. L. A. Firm and Po Taw as to whether the partition decree leaves anything at all to partition as between U Khet and Po Taw. The A. L. A. Firm as the representative of U Khet, is entitled to come in for settlement of this question under S. 47, and the executing Court should have dealt with the matter in its execution proceedings and not have referred the A. L. A. Firm to a separate suit. The appeal is allowed, the order dismissing the A. L. A. Firm's petition in the execution proceedings will be set aside and the Court must go into it on its merits and decide in the execution proceedings; the respondents to pay the costs of the appellant in this Court, advocate's fee three gold mohurs.

**Mosely J.**—I agree.

D.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 251

BAGULEY AND MOSELY JJ.

*Saw Yaw Ba and others* — Appellants.

v.

*Saw Ba Maung and another* — Respondents.

First Appeals Nos. 80 and 81 of 1937, Decided on 13th January 1938, against decree of Dist. Court, Henzada, D/- 4th June 1937.

**Will — Validity — Court of probate is not Court of probity — If bona fides of transaction is proved and there are no circumstances suggesting suspicion probate can be granted.**

A Court of probate is not a Court of probity, and the Court has not to ask whether the testatrix bequeathed her property as they think she ought to have done. If the propounders prove the bona fides of the transaction and there are no circumstances suggesting suspicion, probate can be granted: *(1894) C R P 151, Expl.* [P 254 C 1]

The testatrix had gone for treatment and was residing in a house in the same compound in which her cousin to whom she bequeathed the property in question and other people were living. Though she was suffering from consumption she was quite sane and capable of making a will. It was found that though the cousin was a pastor, his connexion with the testatrix was rather that of a cousin than of a spiritual father. She had other properties also not disposed of by the will. The other relatives, brothers, sisters, and nieces, challenged the will:

*Held* that there was no suspicion attaching to the transaction and probate should be granted: *38 Cal 355, Rel. on.* [P 254 C 1]

Cowasjee — *for Appellants.*

Ba Han and Tun Maung — *for Respondents.*

**Baguley J.**—This appeal arises out of an application for probate of a will of one Daw Lucy, deceased. The application was made by Saw Ba Maung, who is said to be the only Karen Barrister-at-law in the

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[1] Ma Shwe Yu v. Ma Kin Nyun, (1929) 16 A I R Rang 155=118 I C 630=7 Rang 240.

[2] Maung Sein Shwe v. Maung Sein Gyi, (1935) 22 A I R P C 16=153 I C 679=13 Rang 69=62 I A 1 (P C).

Henzada District, who was appointed executor of the will. Daw Lucy was a Karen Christian, and under her will she left all her landed property to one Saya Po Myine, who was her first cousin, thereby defeating the expectations of her brothers, sisters and two nieces, children of a deceased brother. The application was opposed by relations, who alleged that Daw Lucy was not of disposing mind at the time the will was executed, or if she was of disposing mind, then they say the will was obtained by undue influence or coercion or importunity: they denied the signature on the will; they denied proper attestation of the will, and they said that the legatee and the administrator have colluded to deprive them of their otherwise unassailable right of succession. The trial Court pronounced in favour of the will. It is argued before us that the signatures on the will differ so much from the admitted signatures of Daw Lucy that the genuineness of the signatures on the will is doubtful, but most of all it is argued that Po Myine was in a position to dominate the will of Daw Lucy, and as he was a pastor of the church the will must be regarded with the same suspicion that many wills made by elderly ladies in favour of ministers of a church are regarded.

There is no particular dispute with regard to the main history of the case. Daw Lucy was a Karen Christian, as I have said, who lived at Daunggyi, where no skilled medical attention is procurable. She was suffering from tuberculosis; she was brought in to Henzada in February, and received treatment, from which she appeared to benefit to such an extent that after a comparatively short stay she went back to Daunggyi. The cure however was clearly too rapid to be lasting, and in May she came back again to Henzada. Po Myine lived at Henzada in the A. B. Mission compound, and he was her first cousin, and she went to stay with him. After staying in his house for a few days she moved to a smaller building in his compound, he says, in order that she might have more quiet and rest there. This may have accounted for the move partly, but partly also he may have recognized that it was not good for his family to have somebody living in the house in an advanced stage of consumption. The out-house to which she went is said to have been three fathoms to two and a half fathoms away and had before been rented to a Forest Ranger. The allegation that she was turned out to live in a goat-shed is obviously unfounded, because according to the appellants' witnesses there were up to a dozen people living with Daw Lucy in this house at times and so it must have been of a fair size. She arrived in Henzada in May, and according to the applicant this will was executed on 20th June. She got into touch with Saw Ba Maung, the local Karen Barrister. He said he had some printed will forms, and taking two of these the will was executed in duplicate and attested by Maung Zan and Po Yin, both teachers of the American Baptist Community. Daw Lucy did not die until September, nearly three months later: so there is no question of the will having been executed *in extremis.*

There is a mass of evidence given by both sides with regard to Daw Lucy's condition at the time. According to one side she was perfectly capable of making a will. According to the appellants, she was in a terrible condition, unable to do anything but lie down, and they attempted to accuse Po Myine of having caused her death by administering poison. Yaw Ba has already been convicted for defamation in making this charge, but he repeats it in his evidence. The evidence on both sides being a matter of hard swearing, I prefer to judge Daw Lucy's condition solely by the evidence of two independent witnesses, the medical attendant who was looking after her (Dr. Das) and Mrs. Phelps, Assistant Superintendent of the A. B. M. Karen High School at Henzada. Dr. Das, being a Hindu, may be regarded as quite impartial between the two sides. He says definitely that in June 1936, Daw Lucy retained her full consciousness, and she retained full consciousness even in July and August. He says that a person who is suffering in the way that Daw Lucy was suffering is affected physically but not affected mentally: the only way in which his mental condition is affected is that he is unable to concentrate his mind for a long time. No great concentration of mind was required for giving instructions for the will which was put forward, which is in one of the simplest forms bequeathing certain immovable property to Saya Po Myine. The description of the properties was taken from the tax-tickets, and all that the testator had to do was to hand over the tax-tickets and say: "I want to leave all these to Saya Po Myine." Mrs. Phelps, the

Assistant Superintendent of the Karen High School, is also equally impartial. Saya Po Myine was a boy at school under her, and so was the chief defendant, Yaw Ba. She knew the family well, and it was in her motor car that Daw Lucy was first brought to Henzada in February. While Daw Lucy was in the annexe of Saya Po Myine, Mrs. Phelps used to visit her constantly, to see how she was and to pray with her, and she says:

> On all occasions when I visited her, she talked with me well and she understood well what was said to her by me and she gave me sane answers. She never lost her reason on any occasion I visited her.

On the evidence of these two witnesses I would hold that Daw Lucy at the time the will was made was perfectly sane and perfectly capable of making a will in the terms in which this will is made. It is quite possible that she might have been unable to concentrate long enough to give full instructions for a long and complicated settlement or anything of that sort, but a simple will of this kind would require very little concentration. The next point to be dealt with is that of undue influence. This is not a case of an elderly lady leaving her property to her father confessor, or anybody who is in a similar position to dominate her. Po Myine is a pastor of the church, but there is nothing to show that he has had any particular connexion or spiritual domination over Daw Lucy. His connexion with her seems to be rather that of a cousin than of a spiritual father. The will, as I have said, does not leave everything to him. Daw Lucy had some other moveable property; there is a suggestion that she had jewellery, and there is evidence that she had cattle: it is only the immovable property that has gone to Po Myine. Po Myine did not get her into a position in which he could dominate her will. She was not living in his house with him, but was living in a house of his and there is no evidence that he was constantly visiting her. Other people came freely to see her, including, as I have said, Dr. Das and Mrs. Phelps, and the defendants according to their own story, were constantly going and staying with her in this annexe where she was living. She was in no way shut up, and no evidence has been adduced to show that Po Myine ever had a chance of getting at her.

The defendants say they knew nothing about this will, but Mrs. Phelps says she knew about the existence of this will although she had never actually seen it, and she knew about it long before Daw Lucy's death. There was no secrecy about it, and in my opinion the will bears nothing of the ordinary stigmata of a will obtained by undue influence by some one who is placed in a position to dominate the will of the testator. Not very many years ago Daw Lucy had had a violent quarrel with some of her relations, and after all, a first cousin is very nearly, particularly in this country, as near a relation as a brother or a sister. There is evidence that Daw Lucy had been taking particular care of one Tha Aung, son of Yaw Ba, and paid his school fees, and we are asked to hold that a will leaving him nothing at all is so unnatural that it must be regarded as having been obtained by undue influence. I note however that Tha Aung is now 19 years old and he may be regarded as having finished his schooling, and there is no need for Daw Lucy to make any further provision for paying his school fees though Mrs. Phelps in her evidence does suggest that his schooling was going to be continued by Saya Po Myine, but neither Saya Po Myine, nor Tha Aung was asked any definite questions on this point.

With regard to the actual handwriting on the will there is the evidence of Saw Ba Maung, Barrister-at-law, Saya Po Myine and the two attesting witnesses, and, without professing to be an expert in handwriting, there is nothing in the formation of the letters which, in my opinion, gives rise to suspicion in itself. It is true that the "ma" of Ma Lucy is written in a different way to the way in which Daw Lucy was in the habit of writing it on promissory notes, but the difference is between writing the "ma" with two separate strokes of the pen, lifting the pen off the paper between making the two strokes, and writing in one stroke of the pen that which consists of the other two strokes and a drag of the pen over the paper between them. Other points were raised in argument, but they scarcely deserve serious consideration.

We are asked to deduce bad faith on the part of Ba Maung, because as a legal practitioner he says he drafted the will without payment. His wife is, it would seem, some kind of relation of Daw Lucy, and there is nothing to prevent a lawyer acting out of the kindness of his heart in this way, and also at that time he was engaged in trying to secure votes at the elections. We are asked to be suspicious of this will because it was made in duplicate, but Ba Maung says he had five of these printed forms of will, two of which he used for Ma Lucy's will, and the other three were used for drawing up the will of Saya Tun Wa, one of the defence witnesses: he has made this will in triplicate, which should have made it far more suspicious. This Saya Tun Wa appears to be a strange kind of a teacher. He says he asked Ba Maung to draw up his will though he had no confidence in him. He has no confidence in most people, including himself, according to his evidence; and in any event he has torn up the will, so he seems to have no confidence in that either. For these reasons I think that the learned Judge was quite correct in allowing probate of the will, and I would dismiss these appeals with costs; advocate's fee ten gold mohurs for both cases.

**Mosely J.**—I agree. To use the words in 38 Cal 355,[1] there were no circumstances in the present case to suggest suspicion. It would seem that Saya Po Myine, who was a travelling pastor, would have had no opportunity of exercising undue influence on Daw Lucy had he wished to do so, ten or twelve people being in the hut with Daw Lucy at different times, nor was there any evidence whatever that Saya Po Myine could have done so, much less that he attempted to do so. Nor was there any evidence to show that the illness of the testatrix affected her mental faculties. We have been referred by the appellants to the case in (1894) L R P 151,[2] where the concluding words were that a Judge has to ask himself whether the propounders of the will had discharged themselves of the onus of showing the righteousness of the transaction. This word "righteousness" I presume means only bona fides, for with all due deference, a Court of probate is not a Court of probity, and we have not to ask ourselves whether the testatrix bequeathed her property as we think she ought to have done.

K.S./R.K. *Appeals dismissed.*

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[1] Bur Singh v. Uttam Singh, (1911) 38 Cal 355 =9 I C 33=38 I A 13=21 P R 1911=13 C L J 72=15 C W N 177 (P C).

[2] Tyrrell v. Painton, (1894) L R P 151 = 6 R 540=70 L T 453=42 W R 343.

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## A. I. R. 1938 Rangoon 254

MOSELY AND DUNKLEY JJ.

*Oon Chan Thwin and another* — Appellants.

v.

*Khoo Zun Nee and another* — Respondents.

First Appeal No. 114 of 1937, Decided on 4th January 1938, against decree of Dist. Court, Tavoy, D/. 24th April 1937.

**(a) Buddhist Law (Chinese)—Succession to estate of Chinese Buddhist in Burma — Son takes whole estate to exclusion of daughter.**

The succession to the estate of a Chinese Buddhist in Burma is governed by the Chinese Customary law. Under this law the son is entitled to the whole of the deceased's estate to the exclusion of daughter : *A I R 1932 Rang 59, Foll.* [P 255 C 2]

**(b) Administration — Suit for — Fact that plaint claims less share than actually due does not prevent plaintiff's proper share being awarded to him in judgment.**

In a suit for the administration of the estate, the parties are entitled to obtain the shares of the estate to which they are entitled under the law, and the fact that the plaintiff may in his plaint have claimed a less share than is actually due to him does not prevent his proper share being awarded to him in the judgment. [P 255 C 2; P 256 C 1]

**(c) Civil P. C. (1908), O. 26, R. 15—Order directing party to pay commissioner's costs cannot be made part of decree.**

The commissioner is not a party to the suit, and an order directing one of the parties to pay a certain sum to the commissioner cannot be made a part of the decree. If at the end of an enquiry there is money due to the commissioner, then that is due to non-observance of the provisions of O. 26, R. 15 by the Court and the failure of the commissioner to look after his own interests, because a sum sufficient to cover the commissioner's expenses ought to be deposited in the Court before the commission is taken. [P 256 C 1, 2]

E. Hay — *for Appellants.*

Kyaw Din and C. C. Khoo — *for Respondents.*

**Dunkley J.** — This appeal arises out of Civil Regular Suit No. 5 of 1931 of the District Court of Tavoy which was a suit for the administration of the estate of one Ma Sein Daing, a Chinese Buddhist of Tavoy, who died on 16th September 1928. The plaint was filed on 22nd July 1931, and there has already been one appeal to this Court, and the final judgment was delivered on 24th April 1937, after a prolonged enquiry before a commissioner, and in the result it is found that the parties have been litigating for nearly six years at very considerable expense about nothing at all. Plaintiff-appellant 1 is the son and elder child of Ma Sein Daing, and plaintiff-appellant 2 is his wife. Defendant-respondent 2 is the daughter of Ma Sein Daing, and defendant-respondent 1 is her husband, and he was apparently managing all Ma Sein Daing's affairs for some years before her death. The plaint set out that Ma Sein Daing died possessed of considerable property, both moveable and immovable, and that the whole of this property was in the hands of the defendants. It further alleged that in the year 1926 Ma Sein Daing transferred the whole of her immovable property to defendant-respondent 2, and this transfer was attacked on the ground that it was fraudulent and without consideration and was made while Ma Sein Daing was of unsound mind and was executed by her through the coercion and undue influence of the defendants-respondents. The written statement alleged categorically that Ma Sein Daing had left no estate to be administered. The respondents set up that the transfer to respondent 2 of 1926 was a sale for good consideration, and they denied the allegations of Ma Sein Daing's unsoundness of mind and coercion or undue influence by them. They denied that any moveable property had been left in their possession: and, in the alternative, they pleaded that certain moveable property had been left in the possession of the appellants because certain articles of jewellery had been borrowed by appellant 2 from Ma Sein Daing in February 1926, and had never been returned by her.

Plaintiff-appellant 1 claimed a half share in the estate of Ma Sein Daing. At that time the authority on this question was 8 Rang 57,[1] in which it was held that the law applicable to the estate of a Chinese Buddhist in Burma was the Succession Act, or the principles embodied in that Act as being in accordance with justice, equity and good conscience. This decision was promulgated on 7th January 1930, but, before judgment in this suit was passed, the judgment in 10 Rang 97[2] had been delivered on 14th January 1932, and by this judgment the law as it was understood prior to 8 Rang 57[1] was re-affirmed, namely that the succession to the estate of a Chinese Buddhist is governed by the Chinese Customary law. It is common ground that under this law plaintiff-appellant 1 is entitled to the whole of Ma Sein Daing's estate to the exclusion of his sister. In the long contest before the Commissioner, and subsequently in the arguments before the learned District Judge, the main dispute centred round the validity of the transfer of the immovable property by Ma Sein Daing to respondent 2, and there was a minor contest regarding the jewellery which came into the possession of the plaintiffs in 1926. The decision of the District Court was that the transfer of the immovable property by Ma Sein Daing to respondent 2 was a valid transfer, either as a sale or as a gift, but that the articles of jewellery which came into the possession of the plaintiffs in 1926 were only lent to them by Ma Sein Daing, and therefore formed part of Ma Sein Daing's estate at the time of her death—in fact, the conclusion of the learned District Judge was that Ma Sein Daing's estate consisted only of five articles of jewellery to the gross value of Rs. 19,900, the net value of the estate, after deducting the debts and funeral expenses, being held to be Rs. 13,018-13-0. The decision of the learned District Judge regarding the validity of the transfer of the immovable property has not been attacked in this appeal, and it is admitted that in view of the evidence given by Mr. L. H. Wellington, an advocate of this Court, before the commissioner, the transfer must be held to be valid, either as a sale or as a gift. Mr. Wellington drew up the deed and saw it executed by Ma Sein Daing. This property, therefore, does not form part of Ma Sein Daing's estate.

As regards the jewellery, the contest was really purposeless. As I have said, under the law as it apparently stood when the plaint was filed, the appellant was entitled only to a half share of the estate, and framed his plaint accordingly, but under the law as it has stood since the beginning of 1932 he is entitled to the whole of the estate. He could have amended his plaint accordingly, and, if necessary, we should give him permission to amend it now. But, amendment of the plaint is unnecessary, because the suit is a suit for the administration of the estate and in such a suit the parties are entitled to obtain the shares of the estate to which they are entitled under the law, and the fact that the plaintiff may in his plaint have claimed a less share than is actually due to him does not prevent his proper share being awarded to him in the judgment. Consequently, the decree of the District Court is wrong in so far as it states that plaintiff 1 and respondent 2 are entitled to a half share each in the estate. The decree must be varied by declaring that plaintiff-appellant 1 is entitled to the whole of the estate. The result, therefore, is that whether this jewellery, which has been found to comprise the whole estate, was given to the plaintiffs as they assert, or was merely lent to them as the respondents have pleaded in the alternative, the plaintiffs are in either case entitled to it. The practical effect of this result is that the averment of the respondents in their written statement, to the effect that Ma Sein Daing did not leave any estate to administer, is correct. Hence, the whole of this litigation undertaken by the plaintiffs was unnecessary. The result of this appeal, therefore, is that clause 4 of the decree of the District Court is varied by declaring that plaintiff-appellant 1 is entitled to the whole estate.

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[1] Phan Tiyok v. Lim Kyin Kauk, (1930) 17 A I R Rang 81=124 I C 849=8 Rang 57 (F B).

[2] Tan Ma Shwe Zin v. Tan Ma Ngwe Zin, (1932) 19 A I R Rang 59=137 I C 211=10 Rang 97.

It has been contended on behalf of the appellants that as they have been successful in regard to the jewellery, although they have been unsuccessful in regard to the immovable property, they should not be made to pay the costs of the litigation; but, this is a contention which cannot be accepted, for the reason that their plaint was silent about this jewellery and its existence was brought to the notice of the Court by the defendants-respondents, and it has been found that this jewellery did form part of Ma Sein Daing's estate. But this was only an alternative pleading by the defendants-respondents, who pleaded first that there was no estate left to be administered, and if the appellants had accepted this contention the litigation would have been unnecessary. The plaintiffs-appellants have been responsible for the litigation, and they must pay the costs of the defendants-respondents in the original suit. As regards this appeal, the plaintiffs-appellants have been in part successful and therefore the parties must each pay their own costs of the appeal.

There is one other matter however arising out of the decree of the District Court, and that is that portion of the decree which orders that the plaintiffs shall pay a sum of Rs. 1396 as costs to the commissioner. The commissioner is not a party to the suit, and an order directing one of the parties to pay a certain sum to the commissioner cannot be made a part of the decree. If at the end of an enquiry there is money due to the commissioner, then that is due to the non-observance of the provisions of the Civil Procedure Code by the Court and the failure of the commissioner to look after his own interests. R. 15 of O. 26, Civil P. C. lays down that before issuing any commission, the Court may order such sum as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued. The commission in the present case was issued for the benefit of both parties, and therefore the parties ought to have been ordered to deposit the expenses of the commission in equal shares before the commissioner began his enquiry. This is specifically laid down in Para. 289 of the Burma Courts Manual, which says that a commission for any purpose should in no circumstances be issued until the party at whose instance the commission is issued has deposited with the Bailiff a sum sufficient to cover the expenses of the commission. It was the duty of the commissioner in his own interest, to draw the attention of the Court to these rules, and to request that the parties be ordered to deposit from time to time sums sufficient to cover the expenses which were likely to be incurred in the enquiry before him. The original order for the appointment of a commissioner was made on 5th March 1932, and the learned District Judge then decided that the commissioner's fee should be fixed at Rs. 300, to be paid in equal shares by the parties. This sum of Rs. 300 was duly deposited.

Subsequently however after an appeal to this Court, the learned District Judge, on 24th April 1933, passed a fresh order directing that the fees of the commissioner should be in accordance with the prescribed scale. After that order had been passed, the commissioner, during the course of his enquiry, apparently received some sums, not specified, from the respondents, but received nothing from the appellants. After the judgment of the District Court had been delivered, the commissioner presented his bill, which amounted to Rs. 5117. The learned District Judge taxed this bill and reduced it to a sum of Rs. 1696. This is a reasonable amount. The amount which has been entered in the decree is apparently this amount less the sum of Rs. 300 which was deposited by the parties in 1932, and as part of the decree the plaintiffs-appellants have been ordered to pay a sum of Rs. 1396 to the commissioner, and in the tabulated costs of the suit a commissioner's fee of Rs. 150 has been shown on each side. No allowance appears to have been made in regard to the further sums which the commissioner admits that he has received from the defendants-respondents. This is a wrong method of dealing with the matter. As I have said, a party cannot be ordered to make a payment to the commissioner as part of the decree; a sum sufficient to cover the commissioner's expenses ought to have been deposited in Court before the commission was undertaken. The correct method of dealing with the matter is to divide this sum of Rupees 1696 into two parts, and to show one-half, that is, Rs. 848, under the costs of the plaintiffs and one-half under the costs of the defendants in the tabulated costs of the suit, and to calculate the costs accordingly, and then to direct the plaintiffs, in the decree to pay the whole of such calculated costs to the defendants. It will then be left to the commissioner to recover the sum of Rs. 848 from each party, credit being given to each party for payments already made to the commissioner. The commissioner should be ordered to state howmuch he has received from each party, and when each party agrees as to the amount still remaining due by him, the Court should pass an order that the balances remaining due shall be paid by each party respectively to the commissioner. I express no opinion as to whether the commissioner will be able to execute that order as a decree, or whether he must be left to any other remedy which may be open to him. He has placed himself in his present position by his failure to see that the necessary sums to recover his expenses were deposited before the commission was undertaken in the manner required by the rules.

**Mosely J.**—I agree.

D.S./R.K. ***Order accordingly.***

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## A. I. R. 1938 Rangoon 257

BAGULEY J.

*Jagdeo Panday and another* — Applicants.

v.

*N. C. Hill, Assist. Superintendent of Police, Myitkyina* — Respondent.

Criminal Revn. No. 493-B of 1937, Decided on 22nd November 1937.

**Child Marriage Restraint Act (1929), S. 9 — Complaint — Case under Section 5 sent by Magistrate to Police Officer for investigation — Letter by Police Officer to Magistrate is not complaint.**

When a Police Officer investigates a non-cognizable case under orders of a Magistrate, the report which he makes at the end of his investigation is of the same nature as a report made under S. 157, Criminal P. C. and such a report being a police report is not a 'complaint' though if a police officer, acting without instructions from a Magistrate, reports a non-cognizable offence to a Magistrate with a view to the Magistrate taking action, this is a complaint : *26 Bom 150, Ref.* [P 258 C 2]

An offence under S. 5, Child Marriage Restraint Act being punishable only with simple imprisonment up to one month or a fine of Rs. 1000 or both, under Sch. 3, Criminal P. C. is not cognizable. Hence, when, such case is forwarded to an Assistant Superintendent of Police for investigation a letter written on behalf of the Assistant Superintendent of Police to the District Magistrate is a 'Police Report' and not a 'complaint'. [P 258 C 2]

K. C. Sanyal — *for Applicants.*

Tun Byu, Govt. Advocate— *for Respondent.*

**Order.** — This is an application to quash the proceedings pending against the applicants under S. 5, Child Marriage Restraint Act (Act 19 of 1929). The proceedings originated in the following manner. (I base this on the report made by the District Magistrate and certain police papers which have been sent up.) An anonymous petition was sent to the Superintendent of police through the Deputy Commissioner, Myitkyina dated 15th May 1937, which was received in the Deputy Commissioner's office on 17th of May. The petition stated that certain people were going to marry their son and daughter on 17th May 1937. It was not, therefore, a petition stating that an offence had taken place, but that an offence was going to take place. The petition reached the District Magistrate on the 27th May, and he forwarded it to the Assistant Superintendent of police. The Assistant Superintendent of police reported that he could not get any witnesses to give evidence, but he discussed the matter with the District Magistrate and agreed to make a formal report. A letter was then sent in to the District Magistrate purporting to have been from the Assistant Superintendent of police, but it was signed by some other person on his behalf. The learned District Magistrate regarded this as a complaint made by the Assistant Superintendent of police and initiated proceedings, sending the matter for enquiry by the Subdivisional Magistrate, Myitkyina, under S. 202, Criminal P. C.

It is argued that, as there is no complaint, the proceedings are bad by virtue of S. 9 of Act 19 of 1929, which states that no Court shall take cognizance of any offence under this Act save upon complaint made within one year of the solemnization of the marriage. The question then arises as to whether the letter written on behalf of the Assistant Superintendent of police to the District Magistrate is a 'complaint' or not. The word 'complaint' is not defined in the Act 19 of 1929 : but as this is a criminal Act, and the matter is one relating to procedure, the definition of "complaint" given in S. 4, Criminal P. C. must, I think, be applied. S. 4 (h) Criminal P. C. says :

> 'Complaint' means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer.

As the anonymous petition referred to an offence which was contemplated, the anonymous petition, or a petition of this nature, even if it had been signed, would not be a "complaint" within the terms of the definition : so the only thing which can be regarded as a complaint is the letter. Is this a "complaint" or is it a "report by a police officer"? "Report by a police officer" is not defined in the Code, but "police reports" are dealt with in Ch. 14 of the Code. This chapter deals with information given to the police, and S. 157 states that when an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under S. 156 to investigate, that is to say, of a cognizable offence, he shall send a report of the same to a Magistrate, and that report is undoubtedly the report upon which a Magistrate can take cognizance of a case under S. 190 (b), Criminal P. C. and this report is a type of allegation which is expressly stated in S. 4 (h) not to be a complaint within the meaning of that definition.

Section 155 (2) Criminal P. C. says that no Police Officer shall investigate a non-cognizable case without the order of a Magistrate, and S. 155 (3) says that when a Police Officer has received an order from a Magistrate to investigate a non-cognizable case, he may exercise the same powers in respect of the investigation as may be exercised in the case of an investigation of a cognizable case. It seems to me therefore, that when a Police Officer investigates a non-cognizable case under the orders of a Magistrate, the report which he makes, at the end of his investigation is of the same nature as a report made under S. 157, and such a report being a police report is not a "complaint", though if a police officer acting without instructions from a Magistrate reports a non-cognizable offence to a Magistrate with a view to the Magistrate taking action, this is a complaint : *vide* 26 Bom 150.[1] An offence under S. 5 of Act 19 of 1929, being punishable only with simple imprisonment up to one month or a fine of Rs. 1000, or both under Sch. 3, Criminal P. C. is not cognizable : so the letter written on behalf of the Assistant Superintendent of police to the District Magistrate is a "police report" and not a "complaint". The present proceedings not having originated on a "complaint" are bad by virtue of S. 9 of Act 19 of 1929. The proceedings will, therefore, be quashed, as not having been legally initiated.

D.S./R.K. *Proceedings quashed.*

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[1] King Emperor v. Sada, (1902) 26 Bom 150 = 3 Bom L R 586.

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## * * A. I. R. 1938 Rangoon 258

### FULL BENCH

ROBERTS C. J., BA U AND DUNKLEY JJ.

*S. A. A. Anamalai Chettyar* — Appellant.

v.

*N. M. Cowasjee and others* — Respondents.

First Appeal No. 5 of 1938, Decided on 9th May 1938, against decree of High Court, D/. 3rd January 1938.

*** * (a) Limitation Act (1908), Art. 90—Starting point—Starting point is knowledge of all facts—Once plaintiff is acquainted with all facts, he must judge their legal consequences—Ignorance of their legal consequences cannot extend time.**

Where cattle are wholly stall-fed and not pastured upon the land at all, doubtless it is trade and no agricultural operation is being carried on: where cattle are being exclusively or mainly pastured and are nonetheless fed with small amounts of oil-cake or the like, it may well be that the income derived from the sale of their milk is agricultural income. But between the two extremes there must be a number of varying degrees, and the task for the Income-tax Officer is to apply his mind to the two distinctions and to decide in any particular case on which side of the fence, if I may use the term, the matter falls.

In the case cited before us, (1926) 10 Tax Cas 341,[1] at p. 346, Lord Cullen said that he proceeded on the footing that the case, which was one dealing with poultry-farming, was one in which the poultry derived sustenance to a material extent from the produce of the ground. Applying that principle to this case, in my opinion, the Income-tax Officer has to see whether the cattle derived sustenance to a material extent from the produce of the ground, and whether they did so or not is entirely a question of fact for him and one which cannot be reviewed by this Court. It is not necessary for us to say whether we agree with the decision at which he arrived or not: it is sufficient to remark that he had before him one piece of material certainly, namely, the evidence of the disbursement by the assessee of substantial sums of money upon oil-cake, which led him to the conclusion to which he arrived. It follows that the application must fail with costs against the Kokine Dairy, ten gold mohurs.

I desire to add that, whilst reluctant to disagree with one of the learned Judges who made the reference, I do not accept the view put forward by my learned brother Sharpe that the Advocate-General should always attend in these cases, and it appears to me that the Commissioner of Income-tax has set out the situation with fairness in the statement which he has made in this behalf.

**Dunkley J.**—I agree. As regards the appearance of the learned Advocate-General in applications under S. 66 (3), Income-tax Act, to this Court for a mandamus, in my own view it would be wrong to require his appearance in the first instance, because most of these applications plainly do not raise any questions of law and they can be dismissed in limine without hearing the learned Advocate-General on behalf of the Commissioner of Income-tax. If, after hearing the applicant, the Bench considers that the case for the Commissioner of Income-tax should be placed before them at that stage, then it is simple to adjourn the case in order to obtain the appearance of the learned Advocate-General for the Commissioner of Income-tax. That is the practice which, in my opinion, should be adopted in such applications.

**Spargo J.** — I agree with the order passed by my Lord, the Chief Justice, and I have nothing further to add.

V.B.B./R.K. *Application dismissed.*

## ** A. I. R. 1938 Rangoon 261

### FULL BENCH

ROBERTS C. J., DUNKLEY AND BRAUND JJ.

*Eusoof Ahmed Seema* — Appellant.

v.

*Ismail Ahmed Seema and others* — Respondents.

Civil Ref. No. 7 of 1937, Decided on 25th March 1938, made by Baguley and Spargo JJ.

**** Succession Act (1925), S. 283 — Citation—Issue of—Citation ordered but not issued—Absence not by itself sufficient cause for revoking probate — Person claiming issue of citation and its service must show prima facie case for revocation — Citation ordered but not served —Executor must show that there was no defect in substance — When citation is not ordered, party impugning will must show necessity for citation :** *14 Rang 146=A I R 1936 Rang 105=161 I C 629, Overruled.*

**The absence of citations in a case in which they are ordered but did not issue does not by itself constitute just cause for revocation of probate, though it may do so, if the party, claiming that citation should have been ordered and served upon him, can show a prima facie case for revocation which the executor is unable to rebut. In cases where citations have been ordered but not served, the burden of proof is then shifted to the executor to show that there was no defect of substance in the proceedings in which probate was granted. In cases where citations have not been ordered, the party impugning the will on the ground of his non-citation must first show that he ought to have been cited, before the burden of proof is shifted to the executor to show that the defect in the proceedings was not one of substance and that no just cause for revocation exists :** ***14 Rang 146=A I R 1936 Rang 105=161 I C 629*, Overruled; *A I R 1928 P C 2, Disting.*; *18 Cal 45, Rel. on.***

**[P 262 C 1; P 263 C 1, 2]**

F. S. Doctor — *for Appellant.*

**Dr. Ba Han**—***for Respondents 2 and 3.***

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**[1] Lean v. Ball, (1926) S C 15=10 Tax Cas 341=(1925) Sc L T 617.**

**Roberts C. J.** — The question referred for determination by a Full Bench is as follows :

> Does the absence of citations in a case in which citations are ordered, but did not issue, necessarily constitute such a defect in substance as will involve revocation of the probate ; or is the Court at liberty to determine in the light of all the circumstances of the case whether the proceedings in which probate was granted were defective in substance ?

By S. 263, Succession Act, 1925, the grant of probate or letters of administration may be revoked or annulled for just cause; and just cause shall be deemed to exist where the proceedings to obtain the grant were defective in substance. The illustration to the section relevant to the present reference is "(ii) the grant was made without citing parties who ought to have been cited." S. 283 of the Act empowers a District Judge, if he thinks proper, to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate of administration. It has been pointed out that it is not only desirable but necessary for the ends of justice that this power should be exercised when the interest of any party is likely to be affected, and especially in the case of minors. There may well be cases in which neglect to issue the proper citations may constitute such a defect in substance as to render just cause for revocation of probate. On the other hand it is clear that the Act gives a discretion to the District Judge. And if it is said that when probate in common form is granted without citations having been ordered to issue, any person can come forward at a much later date to challenge the will upon the ground that he ought to have been cited and that revocation of probate should then follow as a matter of course; no grant of probate unless in solemn form could ever be of any substantial value.

In 18 Cal 45,[1] it was held that the mere absence of a special citation did not necessarily amount to a just cause for revocation of probate as making the proceedings substantially defective. It was contended that a minor who was interested in the estate should have been specially cited but the Court held that the persons under whose care she had been living were aware of the previous proceedings and that the party who opposed the grant though nominally appearing on his own behalf really did so on behalf of the minor. In 55 I A 18,[2] the plaintiff (appellant) set up as the first ground for revocation that the proceedings to obtain the grant were defective in substance in that the grant was made without citing parties who ought to have been cited. The plaintiff was an infant residing with her mother, the widow of the testator. A general citation was affixed to the house of the deceased and another to the Court house ; notices were issued to the widow and to the plaintiff and a report was made by the serving officer showing that the service of the notice was acknowledged on the widow's behalf "for self and guardian of Ramanandi Kuer" by one Awadh Bihari Singh. Probate was accordingly granted, but some years later proceedings were instituted on the appellant's behalf alleging that citations were not served either on her or on her mother. The District Judge found himself unable to come to any conclusion whether the notice was actually served or not. Their Lordships held that, even if some kind of formality were gone through on the occasion when service of notice was said to have been effected, it was not such as would give to the person alleged to have been served an opportunity either to oppose the grant of probate or to require the will to be proved in her presence. In the peculiar circumstances of the case the service, if any, was of no greater effect in law than personal service on an infant of tender years. They therefore held that Issue 1 must be decided in favour of the plaintiff. There was a just cause for revoking probate, and the executrix would then have to prove the will, and if she had succeeded, the probate would have stood.

If, on the other hand, plaintiff had failed on Issue 1 this would not have precluded her from proving as a second ground for revocation that the will was forged, but the burden of proof on the issue would rest upon her, and not upon the executrix. It is clear from this case that where citations have been ordered and there is a subsequent complaint that the order was never complied with, proof of this fact may disclose a defect in substance in the proceedings to obtain the grant. I can conceive of cases where it might not do so; as where in the absence of service of citations as ordered, the heirs directed to be cited nevertheless appeared in Court on the day fixed for their return: plainly this would be a defect in form merely and not in substance. All that can be said is that a prima facie case for revocation appears where it is shown that persons ordered to be cited were not cited in fact. Now in 14 Rang 146[3] the learned Chief Justice observed that the exact questions which arose there had already been raised and determined in 55 I A 18.[2] With great respect I think there is this distinction that in 55 I A 18,[2] citations were ordered but were shown not to have been properly served and the onus thereafter lay on the executrix to show that this did not constitute a defect of substance in the proceedings to obtain a grant; she failed to do so and probate was accordingly revoked.

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[1] Nistariny Dabya v. Brahmomoyi Dabya, (1891) 18 Cal 45.

[2] **Mt. Ramanandi Kuer v. Mt. Kalawati Kuer, (1928) 15 A I R P C 2=107 I C 14=55 I A 18 =7 Pat 221 (P C).**

In 14 Rang 146[3] no citations were ordered to be issued but the appellant came forward and complained that he had not been cited. In these circumstatces, in my opinion, the burden of proof lay upon him to show that he ought to have been cited, that is to say, that failure to cite him constituted in all the circumstances of the case a prima facie defect of substance in the proceedings to obtain a grant. I feel bound to say, with due deference to the judgment in the appellate Court, that I respectfully agree with the following statement of Leach J., who tried the case upon the Original Side:

> When a will is proved in common form, as this will was, it is not necessary that the Court should order citations to issue and I consider that the fact that no citations were issued in this case does not in itself constitute a ground for revoking the probate which had been granted.

**Each case must be examined on its merits and the absence of citations in a case in which they are not ordered does not by itself constitute just cause for revocation of probate, though it may do so if the party claiming that citation should have been ordered and served upon him can show a prima facie case for revocation which the executor is unable to rebut. I am unable to agree with the observations to the contrary made by the Appellate Court in 14 Rang 146.[3] Accordingly I would answer the first question propounded in the negative; as to the second question (i) in cases where citations have been** ordered but not served the burden of proof is then shifted to the executor to show that there was no defect of substance in the proceedings in which probate was granted, (ii) in cases where citations have not been ordered, the party impugning the will on the ground of his non-citation must first show that he ought to have been cited, before the burden of proof is shifted to the executor to show that the defect in the proceedings was not one of substance and that no just cause for revocation exists. We assess the advocate's fee in this reference at ten gold mohurs; costs of the reference to be costs in the appeal.

**Dunkley J.** — I agree.

**Braund J.**—I agree. I respectfully think that the case in 14 Rang 146[3] as decided in this Appellate Court can no longer be taken to represent the law. For the essential difference between a case (such as that in 55 I A 18[2]) in which special citations had been ordered but not served, and a case (such as that in 14 Rang 146[3]) in which no special citations were ever ordered, appears to have been overlooked. The difference is all important. For, in the one case there never came into existence a probate which was formally perfect, while in the other case there did. And consequently in the former case the onus lay upon the executor to defend his imperfect probate; while in the latter case the onus of showing grounds for revoking an apparently perfect probate lay upon the person challenging it. But in either case the probate originally granted stands until it is revoked by an order of the Court. And no such order can in my view be properly made except as the result of a judicial proceeding in which according to where the onus lies, either the executor has failed to defend, or the third party has failed to upset, the existing probate. It is I think desirable that that should be made clear, in view of the premature order of the Appellate Court in 14 Rang 146[3] revoking the probate in that case before it had been determined whether there were any grounds for its revocation or not. I agree that the reference should be answered in the sense in which my Lord the Chief Justice suggests.

B.D./R.K. *Answer accordingly.*

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**[3] A. B. Neogi v. B. B. Neogi, (1936) 23 A I R Rang 105=161 I C 629=14 Rang 146.**

## A. I. R. 1938 Rangoon 264

ROBERTS C. J. AND DUNKLEY J.

*Rahima Bibi* — Appellant.

v.

*S. Mustafa and others* — Respondents.

First Appeal No. 100 of 1937, Decided on 7th March 1938, from decree of High Court, D/- 25th May 1937.

**(a) Mahomedan Law—Wakf—Deceased during his life time on several occasions expressing his intention to build mosque but not reserving any particular piece of land for it, nor directing that expenses of its erection should be met from particular fund—Wakf held not created.**

Whether a dedication was made or not is a question of fact, to be proved in the same way as any other fact, and it is for the Court to decide in each case whether the evidence adduced suffices to prove the fact. One thing is absolutely certain, and that is that in order to create a wakf, there must be a dedication of specific property to the charitable purpose. [P 266 C 1]

Where the deceased on several occasions during his lifetime expressed an intention of building a mosque some day and then on his death-bed expressed the pious hope that, if he did not recover so as to be able to carry this intention into effect himself, his son would do so, but never declared that any particular piece of land should be reserved for the site of the proposed mosque and building, or that the expenses of their erection should be met from any particular fund:

*Held* that there was no declaration of wakf by the deceased. [P 266 C 1, 2]

**(b) Contract Act (1872), Ss. 17, 18 and 19—Joint owner on attaining majority executing deed accepting partition made during his minority—Deed executed under misrepresentation and undue influence of person standing in fiduciary relation—Deed is voidable.**

It is true that there is nothing in law to prevent a joint owner of the property, on reaching majority, accepting and agreeing to a partition of the joint property which was made during his (or her) minority. But when such person is persuaded to execute a deed accepting the partition by misrepresentation and undue influence of person standing in fiduciary relation by concealing material facts, such deed is voidable at the instance of such person under S. 19. [P 266 C 2; P 267 C 1]

**(c) Limitation Act (1908), Art. 91—Burden of proof—Suit by lady to set aside deed executed by her under misrepresentation and undue influence of person standing in fiduciary relation —Burden to prove that suit is time-barred is upon that person.**

Where a suit is brought by a lady to set aside a deed executed by her by misrepresentation and undue influence of a person who stood in a fiduciary relation to her and was thus bound to safeguard her interest, the burden lies heavily upon him to prove that the lady's suit is out of time, and that she had definite knowledge of the facts constituting the fraud or misrepresentation at a date beyond the statutory period : *17 Bom 341 (P C) ; A I R 1921 Cal 131 and A I R 1921 Cal 251, Rel. on.* [P 267 C 1]

Dr. M. A. Rauf — *for Appellant.*

D. V. Irvine Jones — *for Respondents 1, 2, 3 (a), 3 (b) and 3 (c).*

S. N. Sastry — *for Respondent 4.*

**Dunkley J.** — One Mahomed Yusuf, a Sunni Mahomedan, died at Rangoon on 9th February 1928, possessed of a considerable estate. He left no written will. His heirs were the appellant Rahima Bibi, a daughter, respondent 1, S. Mustafa, a son, respondent 2, Zohara Bibi, a daughter, and respondent 4, Ma Ohn Khin, a widow. The three third respondents are the trustees of a mosque which respondent 1 has built out of the funds of his father's estate on land belonging to the estate. The Advocate-General has been joined pro forma as a public trust appeared to be in question in the suit. He has not taken an active part in the suit. Rahima Bibi brought a suit against the respondents for the administration of her father's estate by the Court. She was a minor when her father died, there is evidence on record to show that she was born on 26th September 1913, and we are prepared to accept that evidence; consequently, she came of age on 26th September 1931. Zohara Bibi is, and always has been, a person of unsound mind. One of her aunts, Amina Bibi, was appointed guardian of her person and property on 15th June 1931; prior to that her estate was unrepresented. On the death of his father, S. Mustafa appointed himself administrator de son tort of the estate and proceeded to partition it among the heirs in accordance with his will and pleasure. He took out letters of administration only on 1st May 1930, and in the proceedings for letters, the appellant, who was a minor, was inadequately represented. I notice that he has filed no accounts in that proceeding, although he did file an inventory.

In 1929 Mustafa caused a number of deeds to be prepared, and these were executed by himself and Ma Ohn Khin. He executed them on behalf of his lunatic and minor sisters, purporting to act as their guardian. They are Exs. A, B, C, D and E on the record on the original suit. Admittedly all these documents are void as against the appellant and respondent 2. Ex. A, dated 28th February 1929, is an agreement which purports to convey certain immovable properties, shares and cash deposits to a lawyer named S. Dhar in order that he should partition these properties among the heirs according to their respective shares under Mahomedan law. The importance of this deed consists in a recital to the effect that the deceased Mahomed Yusuf had left a direction that a certain piece of land in Botataung and a sum of rupees one lakh out of his cash deposits should be set apart for the erection of a mosque and a three storeyed building, and a direction in the body thereof that this land and this money should be kept apart for this purpose and not divided among the heirs. Ex. B, dated 30th April 1929, is the award of S. Dhar made in accordance with the directions contained in Ex. A. Dhar did keep apart the piece of land in Botataung and the one lakh of rupees for the projected mosque and building. Ex. C, dated 15th July 1929, is a deed of release executed by Ma Ohn Khin, acknowledging the conveyance to herself of the properties given to her under Dhar's award, and releasing the estate from all claims by her. Ex. D, dated 15th July 1929, is a deed of partition in accordance with Dhar's award. Both Exs. C and D recite that the piece of land in Botataung and one lakh of rupees had been set aside for the erection of the mosque and building. Ex. E, dated 15th July 1929, is a transfer by the four heirs to S. Mustafa, as mutawalli of the land in Botataung and the sum of one lakh of rupees.

Then follows a series of deeds executed on 30th November 1931, that is, two months after the appellant attained her majority. Ex. F refers to the purchase of Ma Ohn Khin's share in the estate by Mustafa (which purchase was made for a sum of Rs. 45,000) and agrees that the purchase price shall be paid out of the estate. It is executed by the appellant and the guardian of the second respondent. The deed whereby Ma Ohn Khin transferred all her interest in the estate to S. Mustafa for Rs. 45,000 is Ex. 3. It is dated 7th February 1930. Ex. G is a mere ratification of the transfer of the alleged wakf property, which was made by Ex. E, and is admittedly void as against the appellant. Ex. H is a release by S. Mustafa, as mutwalli, granted to S. Mustafa, as administrator. Exs. J and K are affidavits regarding the age of the appellant, one sworn by the appellant and one by Mustafa. Ex. L is a conveyance of the alleged wakf by S. Mustafa as administrator to S. Mustafa as mutwalli. Ex. M is a conveyance by S. Mustafa as administrator, to S. Mustafa as heir, of the latter's share in the estate. Ex. N is styled a release. It is executed by the appellant. By it she acknowledges that the properties falling to share under Dhar's award have been conveyed to her, and she accepted them in full satisfaction of her claims to the estate. This important document will have to be referred to again. Ex. R is a deed of trust of the proposed mosque and buildings, executed by S. Mustafa. Clearly, no valid wakf was created by the heirs after Mohamed Yusuf's death, for all the deeds relating thereto are void. Therefore the first question for consideration is whether the deceased Yusuf created a valid wakf prior to his death. For the respondents, it is now contended that the deceased made an oral will declaring this wakf. Learned counsel has been forced to adopt this standpoint because of the failure of the deceased to divest himself of any property in favour of the proposed charity during his lifetime. The evidence as to this alleged oral will, or death-bed declaration, is given by three persons, who are all highly interested. They are S. Mustafa himself, his brother-in-law Samad, who is a trustee of the wakf, and Amina Bibi who is his mother-in-law and the mother of Samad. Even if their evidence is accepted, it falls far short of proof of declaration of a wakf. S. Mustafa's evidence is that in 1926 and 1927 his father caused 2 pieces of land to be vacated, one in Thompson Street and one in Botataung, for the purpose of building a mosque. Then he goes on to say:

> Before he died and while he was ill, he told me in the presence of my aunt Amina Bibi and my cousin to build a three storeyed pucca building near the mosque—the mosque and that building at a costs of Rs. 1 lakh.

When asked in cross-examination to repeat the words used by his father in directing a wakf to be made, he said:

> My father said, 'I have deposited money with the Chettyar. If I recover from my illness, I will build a mosque and a three storeyed house in Botataung. If I die you build that mosque.'

Further on he said:

> For the last ten years before his death he kept on saying that he intended to build a mosque and that I should build a mosque if he died. When my father said this on his death-bed, my aunt Amina Bibi and my elder brother Samad and Ma Ohn Khin were present.

Ma Ohn Khin, of course, denies that the deceased ever made any such statement, but at its highest this alleged statement of the deceased is nothing more than a statement of a pious intention. He also said in examination-in-chief, "the suggestion to set aside a certain sum for the waqf was made by me," thus showing that the deceased never made a dedication by way of wakf of the sum of one lakh.

There is also nothing in Mustafa's evidence to suggest that the deceased ever dedicated any specific immovable property by way of wakf. Samad's evidence is even more vague. He says:

> Mahomed Eusoof told his son to make a wakf about 2 or 3 years before his death. I heard him say so on several occasions. The last occasion on which Mahomed Eusoof told this to his son was at his death-bed. He told his son to build a mosque.

Further on he says, "I heard the deceased say that Rs. 1 lakh was set apart for a wakf," a flat contradiction of Mustafa's evidence. In cross-examination he stated:

> Owing to a lapse of time I do not remember exactly what Mohomed Eusoof said to his son.

Amina Bibi says:

> I last heard Mahomed Eusoof speak about building a mosque about half an hour before his death. He then told his son and family to build a mosque."

Further, "at that moment he did not say how much money should be set apart." In cross-examination she said, "he used to talk about building a grand mosque at a cost of over a lakh of rupees."

This is all the evidence regarding the alleged creation of a wakf. The learned Judge who tried the suit has cited the judgment of a Bench of this Court as authority for the proposition that the declaration of a wakf can be established by vague evidence, but what is meant by this? I regret that I am unable to understand. Whether a dedication was made or not is a question of fact, to be proved in the same way as any other fact, and it is for the Court to decide in each case whether the evidence adduced suffices to prove the fact. One thing is absolutely certain, and that is that in order to create a wakf, there must be a dedication of specific property to the charitable purpose. In the extremely vague evidence called in this case to establish the wakf there is not the slightest suggestion that the deceased ever declared that any particular piece of land should be reserved for the site of the proposed mosque and building, or that the expenses of their erection should be met from any particular fund. This is fatal to the assertion that there was a declaration of wakf by the deceased. From the evidence it is, in fact, clear that what really happened was that on several occasions during his lifetime the deceased expressed an intention of building a mosque some day and then on his death-bed expressed the pious hope that, if he did not recover so as to be able to carry this intention into effect himself, his son would do so. After his death Mustafa invented the figment of a dedication of the Botataung land and one lakh of rupees in order to be able to carry his father's wishes into effect at the expense of the estate. It was easy for him to accomplish his design as the three other heirs were a lunatic, a minor, and a Burmese woman who knew nothing of Mahomedan law or customs; and subsequently, when Ma Ohn Khin began to be obstructive regarding the building of the mosque, he took advantage of urgent need for cash to buy up her interest in the estate. In my opinion, it is abundantly clear that no wakf, as alleged by respondents 1, 2, and 3 was ever created.

The real case of these respondents rests upon the so-called deed of release, Ex. N. The appellant, first of all, asserts that it is void because it is a mere ratification of the deed of partition Ex. D, which is void. For respondent 1 it is contended that Ex. N is more than a mere ratification, and that it is really an acceptance by the appellant of the partition of the joint property which was made during her minority, and it is urged that there is nothing in law to prevent a joint owner of the property, on reaching majority, accepting and agreeing to a partition of the joint property which was made during his (or her) minority. This is undoubtedly true as long as the statement was made fairly and honestly, without misrepresentation and without concealment of material facts, and, as a matter of fact, the appellant is still prepared to abide by the partition made in the deed Ex. D, to the extent to which it deals with the estate. The appellant really relies on para. 2 of her amended plaint, which avers that she was persuaded to execute this deed, Ex. N by the fraud of respondent 1 who concealed material facts and falsely alleged the existence of a wakf. It is, in reply, contended on behalf of respondent 1 that fraud was not alleged in the original plaint, but this point is immaterial, for the original plaint alleged misrepresentation and undue influence, and on either ground the deed Ex. N must be set aside. Respondent 1 was acting in a fiduciary capacity to the appellant. He was her elder brother. During her minority he administered their father's estate without authority, and by purporting without legal authority to act as her guardian he partitioned the estate and gave the other heirs shares in it, but set apart a very large portion of the estate without partitioning it. He set apart this portion by persuading a Burmese woman, a lunatic and a minor that his father had made a declaration of wakf in regard thereto, although he was well aware that his father had done nothing of the kind. Within a little more than two months after the appellant had attained her majority, he persuaded her to execute the deed Ex. N although he well knew that she was under the false impression that her father had created this wakf, which false impression had been deliberately induced by him. However pious may have been respondent 1's motive in setting apart this portion of his father's estate for the erection of a mosque and another building, his action was plainly fraudulent, within the meaning of S. 17, Contract Act, and also amounted to misrepresentation within the meaning of S. 18: *see* 13 Bom 61[1] at p. 66. The deed, Ex. N is therefore voidable at the instance of the appellant, under S. 19.

It is claimed on behalf of the respondents (except the fourth, Ma Ohn Khin), that before she can succeed in her suit for administration the appellant must get this deed Ex. N set aside and this contention is correct. It is further urged that before the deed can be set aside the burden is upon the appellant to show that her suit is in this regard within time, under the provisions of Article 91, Limitation Act. This last contention is wrong. As I have said, respondent 1 stood in a fiduciary relation to the appellant; he was bound to safeguard her interest, and he deliberately forfeited them. Under the circumstances, the burden lay heavily upon him to prove that the appellant's suit was out of time, and that she had definite knowledge of the facts constituting the fraud or misrepresentation of respondent 1 at a date beyond the statutable period: 20 I A 1[2] at p. 5, 26 C W N 517[3] at p. 528 & 48 Cal 119[4] at p. 122. The so-called deed of release, Ex. N must therefore be set aside. It is necessary to deal with the case of respondent 4, Ma Ohn Khin. It is now urged on her behalf that she is entitled to her share in that part of the estate which has not yet been administered but this argument cannot prevail. By the deed Ex. 3, she sold all her right, title and interest in her late husband's estate to Mustafa for a sum of Rs. 45,000. She has received the consideration. She entered into this agreement with her eyes open and she was a woman of full age. She was in urgent need of cash at the time, and she allowed herself to be bought out and her objections to the proposed wakf to be silenced by this cash payment. She cannot now receive anything. She is therefore dismissed from the suit, but as she was a necessary party to the original suit in order that all the matters in issue might be decided, her taxed costs of the suit and this appeal will be paid out of the estate.

The share of the estate which she received under the deed of partition Ex. D, and also the share which (but for the deed of sale Ex. 3) she would have received out of the unadministered portion of the estate, will be divided among the other three heirs in accordance with their respective shares. As it has been decided that no wakf was ever established, the question, which has been raised, whether the sum of Rs. 45,000 was paid to Ma Ohn Khin out of the sum of one lakh set apart for the building of the mosque or out of the rest of the estate, becomes of no importance. All the cash of which the deceased died possessed, less the sum of Rs. 45,000 paid to Ma Ohn Khin, will have to be divided among the other three heirs. The Advocate-General is an unnecessary party to this suit, and he is dismissed from the suit without costs. The judgment and decree of the Original Side of this Court are set aside. The appellant is entitled to a decree for administration against all the remaining respondents, and these respondents must personally pay her costs of this appeal and the original suit. As the appellant was permitted to sue in forma pauperis and to appeal in forma pauperis, the court-fees payable on the plaint and on the memorandum of appeal will be recoverable from these respondents and will be a first charge on their shares of the estate. There will be a preliminary decree in the usual form for the administration by the Court of the unadministered portion of the estate of the deceased Moha-

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1. Toolseydas Ludha v. Premji Tricumdas, (1889) 13 Bom 61.
2. Rahimbhoy Habibbhoy v. C. A. Turner, (1893) 17 Bom 341=20 I A 1=6 Sar 256 (P C).
3. Nibaran Chandra Mukerji v. Nirupama Debi, (1921) 8 A I R Cal 131=69 I C 476=34 C L J 563=26 C W N 517.
4. Bhusan Mani Dasi v. Profulla Kristo Deb, (1921) 8 A I R Cal 251=60 I C 801=48 Cal 119.

med Yusuf. The unadministered portion comprises the whole estate, except that portion dealt with and partitioned by the deed of partition Ex. D. It includes inter alia (1) the land in Botataung and the sum of one lakh of rupees set apart for the mosque and three storeyed building, (2) jewelleries, cash and investments and other moveables not partitioned by Ex. D (3), the rents and profits received, or which ought to have been received but for his own default, by respondent 1 from the unadministered portion of the estate and from the administered portion during the period when it was in his possession, (4) the share of Ma Ohn Khin which she received under Ex. D and which she might have received in the administered portion of the estate, which share is to be divided among the other three heirs in accordance with their respective shares. In the estate now to be administered, the appellant Rahima Bibi is entitled to a quarter share, respondent 2, Zohara Bibi, is entitled to a quarter share, and respondent 1, S. Mustafa, is entitled to a half share. The suit will be remanded to the Original Side, for the necessary accounts and inquiries to be made by the Official Referee and for his report, and for a final decree to be passed and for the delivery of possession of their respective shares to the three remaining heirs.

**Roberts C. J.**—This is an appeal from a judgment of Ba U J., dismissing a suit brought by one Rahima Bibi for administration of the estate of her father Mohamed Yusuf, and for consequential relief. Mohamed Yusuf died in Rangoon in February 1928, when the plaintiff-appellant was about 13 years old. He left a widow, Ma Ohn Khin, who is respondent 4 and by whom he had children, S. Moostafa, respondent 1, a son, and Ma Bi, otherwise known as Zohara Bi, a lunatic daughter, of whose estate her paternal aunt Amina Bibi was appointed guardian by order of the Court. The appellant is a daughter by another wife who predeceased Mohamed Yusuf. On the death of Mohamed Yusuf respondent 1 took possession of the estate and on 28th February 1929 there was an agreement between Ma Ohn Khin and Moostafa, both for himself and as younger brother of Ma Bi, and also as natural guardian of the appellant, to refer to Mr. S. Dhar all matters respecting the administration of the estate. This is Exhibit A. The agreement set out that a piece of freehold land in Botataung Street, measuring 57½ feet by 100 feet and known as fifth class Lots Nos. 2 and 3 in Block J. and valued at Rs. 25,000 be set apart for the purpose of erecting a musjid on 57½ feet by 75 feet out of the said land and a three-storeyed pucca house on the remaining 57½ feet by 25 feet and that a sum of rupees one lakh be taken out of the estate of the deceased for the erection thereof. Accordingly, there was an award by Mr. Dhar, which is Ex. B.

In pursuance of the award there was a deed of partition of 15th July 1929, (Exhibit D) and a deed of conveyance of the same date (Ex. E) reciting the existence of a wakf, and the heirs conveyed to Moostafa as mutwalli thereof the land to erect the said masjid. Moostafa did not take out an Originating Summons in order to have the existence of a wakf declared by the Court but he obtained letters of administration to the estate of his deceased father.

Exhibit C is also dated 15th July 1929. It is a release by Ma Ohn Khin of all claims on the estate in consideration of receiving certain lands, valued at Rs. 54,000 and a sum of Rs. 426-14-0 in cash, and a declaration that after having provided for the wakf any residue from the lakh of rupees shall be divided amongst Ma Ohn Khin and the other heirs pro rata. The appellant now says that no wakf was ever created, but the learned Judge has held that it was. By various other deeds executed on 30th November 1931, it was agreed that the sums expended in buying out Ma Ohn Khin and on the masjid should come out of the estate. Moostafa as mutwalli released himself as administrator from all claims relating to the wakf, and as administrator he conveyed the lands in respect of which a wakf was alleged to have been created to himself as mutwalli; and the lands due under the partition to him, to himself as heir. On the same date the appellant executed a deed, which is Ex. N. She acknowledged the receipt of her share and released Moostafa from all further claims. She must be held to have been at maturity on this date. According to her own affidavit (Ex. J), there was a note in her father's handwriting to say she was born on 26th September 1913. This date was noted in an account book by Mohamed Yusuf in 1913 and the date of her birth is recited in Ex. A, dated 28th February 1929, and in the deed of partition dated 15th July 1929, so that it is clear that the note was already in existence on those dates. The plaintiff pleads that in 1935 she realized for the first time that in the deed which she signed on 30th November 1931, the existence of a wakf had been taken into consideration. Her husband gives evidence that in 1935 she said on being told that there was a wakf that no wakf had ever been made. The learned trial Judge has rightly held that the purported agreement of 28th February 1929 is null and void. I agree with him and it follows that the supposed award and deed of partition are of no effect. He has then held that Ex. N entered into by the appellant on maturity is a valid release and not a mere purported ratification of void agreement made during minority. The first question we have to consider is whether a valid wakf was created by the deceased. Moostafa's account of it is as follows :

> My father said by word of mouth to make a wakf. He said, 'I have deposited money with the Chettyar. If I recover from my illness I will build a mosque and a three-storeyed house in Botataung. If I die you build the mosque.' My father said this several times during his lifetime: I cannot say how many times. Even on the night on which he died he said this in his death bed. My father did not say this during his last illness. He used to be ill off and on. I do not remember when he said this. He used to say this even ten years before his death. For the last ten years before his death he kept on saying that he intended to build a mosque and that I should build a mosque if he died.

At another point in his evidence he says:

> Before my father died and while he was ill he told me in the presence of my aunt Ameena Bibi and my cousin Samad to build a mosque there.

Then he says :

> In 1929 a number of deeds were signed. I, Rahima Bi and Ma Ohn Khin made over the matter to Mr. Dhar. We three went to Mr. Dhar and I left the matter to Mr. Dhar to do what he should in the way of legal documents. The plaintiff and Ma Ohn Khin knew about the wakf and they both agreed to it. The suggestion to set aside a certain sum for the wakf was made by me. As the other two were women they did not know anything about it. They agreed to what was suggested by me. Before going to see Mr. Dhar, they knew about the wakf.

In his cross-examination he said : "I created the wakf because my father had left word with me." It seems clear from this that no specific sum was ever mentioned by the deceased, who could have made the appropriation complete in his lifetime. Mustafa's own evidence falls short of establishing the fact that he did so. It is admitted that Mr. Dhar, who has the misfortune to be blind, took all his instructions from Mustafa and he said in his evidence that the recital stating that the late Mohamed Yusuf left directions for the transfer of the property for the purpose of a wakf was inserted by him on instructions which he received from respondent 1. Rahima Bibi said in her evidence that she did not know that her father had made a wakf during his lifetime. Ma Ohn Khin, the widow, said that she knew her husband had never dedicated any property for religious purposes. Ameena Bibi says that she heard a conversation which took place about half an hour before Mohamed Yusuf's death and that at that moment he did not say how much money should be set apart, but that on previous occasions he had said he would build a mosque at a cost of over a lack of rupees. Samad was called as a witness and said he was present at the death-bed and heard the deceased say that a lakh of rupees was set apart for the wakf. In cross-examination he said that owing to the lapse of time he did not remember exactly what Mohamed Yusuf said to his son. The mosque was completed in 1932. Samad claimed to be a trustee of the mosque but there was never any meeting of the trustees which he attended. In re-examination he said that there had been two or three meetings of the trustees but nothing was recorded by them.

Bearing in mind the decisions in 10 Cal 533[5] where it was held that the "appropriation must be at once complete in order to satisfy the requirements of a valid wakf" and in 11 Pat 288[6] (see p. 324 where the above case was followed), I have come to the conclusion, in agreement with my learned brother, that no valid wakf was ever here created. I have had the advantage of reading his judgment and I agree with him that the deed Ex. N must be set aside both by reason of misrepresentation on this point and also by reason of undue influence. The judgment and decree of the Original Side of this Court must be set aside. The appellant is entitled to a decree for administration, as there will be a preliminary decree for the administration by the Court of the unadministered portion of the estate of the deceased. In all respects I agree with the order proposed to be made by my learned brother.

D.S./R.K. *Case remanded.*

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[5] Jugatmoni Chowdrani v. Ramjani Bibee, (1884) 10 Cal 533.

[6] Muhammad Kazim v. Abi Saghir, (1932) 19 A I R Pat 33=136 I C 417=11 Pat 288=12 P L T 817.

## A. I. R. 1938 Rangoon 270

MOSELY AND DUNKLEY JJ.

*Bhimbai Morarji & Co.* — Appellants.

v.

*Hargovind Mohanlal Firm and others* — Respondents.

First Appeal No. 42 of 1937, Decided on 14th December 1937, against decree of Dist. Court, Amherst, D/- 2nd March 1937.

**(a) Civil P. C. (1908), O. 26 — It is not open to Court to refer to Commissioner for accounts, an issue as to whether there was mutual, open and current account between parties — Such procedure is unwarranted by O. 26.**

It is not open to a Court to refer for decision to a Commissioner for accounts, an issue as to whether there was a mutual, open and current account between the parties. Such procedure is unauthorized by O. 26. All that can be referred to the commissioner is an enquiry into the nature and course of dealings and the amount, if any, due. The further question whether the dealings constituted in law a mutual account is one of law and cannot be referred to a Commissioner. [P 270 C 2; P 271 C 1]

**(b) Limitation Act (1908), Art. 85— Mutual account — To constitute mutual account there must be transactions on each side creating independent obligations on other— Test of mutuality is that dealings between parties should be such that balance is sometimes in favour of one party and sometimes in favour of other — It is sufficient if dealings are such that balance might have been in favour of either party — Account between parties showing for sufficient length of time repayments by defendants to plaintiffs to reduce indebtedness — Account although starting as mutual account cannot be said to continue as mutual account.**

To constitute a mutual account, there must be transaction on each side creating independent obligations on the other and not merely transactions which create obligations on the one side being merely complete or partial discharges of such obligations. The test of mutuality is that the dealings between the parties should be such, that the balance is sometimes in favour of one party and sometimes in favour of the other. If the balance is always in favour of one party in the very nature of the transactions, then the case is one in which there are not separate mutual dealings. On the other hand, the mere fact that the defendants have been debtors throughout does not show that the accounts were not mutual. Whether an account is mutual or not depends upon the nature of the dealings between the parties. It is sufficient for an account to be mutual, if the dealings are such that the balance might have been in favour of either party and it is not essential that the balance should in fact have been in favour of the defendants at some stage. Article 85 applies where the nature of the business between the parties is such as to give rise to reciprocal demands, that is to say, where the dealings are such that sometimes the balance is in favour of one party and sometimes in favour of the other. [P 271 C 2; P 272 C 1]

Although the criterion of shifting balance is not conclusive to show that the account did not start as or did not continue as a mutual one, yet when an account has started as mutual one, and thereafter one side is always indebted to the other and the course of dealings between the parties consists merely of partial repayments of that indebtedness and incidental and passing small transactions creating independent obligations on one side, but insignificant in amount and never such as would by their nature be likely to result in that party being able in a position to make a demand on the other, the account ceases to retain its character of mutuality. [P 272 C 1]

Where therefore the accounts between the parties for a sufficient length of time merely show repayments on account by defendants to the plaintiffs to reduce their indebtedness, it cannot be said that the account continues to be a mutual one at all : *A I R 1923 Bom 82 ; A I R 1936 Rang 495 and A I R 1937 Rang 340, Rel. on.* [P 272 C 1]

Anklesaria — *for Appellants.*

Rafi — *for Respondents.*

**Mosely J.** — In the suit under appeal instituted on 14th March 1936, the plaintiff-appellants, Bhimbai Morarji & Company by their managing partner B. Morarji, sued the firm of Hargovind Mohanlal which appears to have been dissolved in 1935, and three partners in that firm, Hargovind Dullabdass, Mohanlal Mathurdas and one other, for Rs. 8100, the balance due after waiving some Rs. 2500 or more, on what the plaintiffs said was a mutual, open and current account which had started on 7th November 1916. The defendants in their written statement said that they commenced dealing on the date in question with the plaintiff firm and dealt in partnership in teak timber. They went on to say (para. 3) that their late firm continued dealings with the plaintiffs on the basis of "an account" up to 22nd July 1935, the course of dealings between the parties being that the defendants generally borrowed further sums from the plaintiffs and from time to time made payments, and that they were given credit for any brokerage earned by them etc. They said, para. 10, that there was never an open, mutual and current account between them and the plaintiffs at least as from the end of Samvat 1978 of the Gujarati Era equivalent to 1921-22, and that from then on, the transactions merely represented the amount previously due to the plaintiffs and their repayments on account and to interest due. Two issues were framed: (1) as to whether there was a mutual, open and current account between the parties, and (2) if so, how much was due to the plaintiffs.

The trial Court took the course of referring both these questions to a Commissioner for accounts. This procedure is clearly unauthorized by O. 26, Civil P. C. What could have been referred to the Commissioner was an enquiry into the nature and course of the dealings and the amount, if any, due. The further question, whether the dealings proved constituted in law a mutual account, is an inference to be drawn from the fact, and therefore a question of law. However, the parties consented throughout to the course taken. The Commissioner reported that the account was a mutual, open and current account and that the amount claimed by the plaintiffs was due from the defendants. Both parties submitted accounts to him: the plaintiffs' accounts were filed with the plaint and the defndants' with the written statement. The Commissioner proceeded further to examine evidence tendered by the plaintiffs as to their accounts. The defendants did not adduce any evidence before the Commissioner barring that of the accounts. The trial Court found (in my opinion wrongly) that the account was not an open one, and (in my opinion rightly) that the account was not a mutual one. From this finding, the plaintiffs have now appealed. It is contended on behalf of the plaintiffs-appellants that an account which has once started as a mutual account does not cease to retain its character of mutuality until that is abrogated by a settlement or agreement between the parties. The learned advocate however had in the course of the argument to abandon this contention and admit that an account which once started as a mutual account could cease to be mutual account ipso facto by the conduct of the parties and the actual cessation of any mutuality in the course of their dealings. The trial Court dismissed the suit as barred by limitation. The article of limitation applicable to this suit is Art. 85, which reads:

> For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.

**The limitation fixed is three years from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account. It may be added that the "year" is the year according to which accounts were kept between the parties, that is to say in this case the Gujarati year which ends some time either in October or in November of our calendar year. I do not propose in this judgment to go into the numerous authorities in England and in India on the subject of mutual accounts, many of which** have been recently dealt with in 1937 R L R 240[1] and in 1937 R L R 254.[2] The judgments in those cases, as it happens, were by my brothers Dunkley, and myself. The plaintiffs, of course, based their claim in suit on the accounts filed by them evincing that claim. Looking through these accounts I should find considerable difficulty myself in holding that there was any real mutuality in the accounts after the very first year in which they were opened. This first year deals with two kinds of transactions in which large sums were paid by one firm to the other. It would appear that the plaintiffs were financing shipments of timber to Bombay, which timber was bought in partnership with the defendants. This year's accounts close with a credit in favour of the defendant firm of over Rs. 6000. That credit was more than extinguished the next year, 1917-18, by a payment in favour of the defendants of Rs. 15,000 which left them in debt to the plaintiff firm to the tune of over Rs. 9000, and the defendant firm continued to be largely in debt to the plaintiff firm from that day on.

To constitute a mutual account, there must be transactions on each side creating independant obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. It has often been said that the test of mutuality is that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other. If the balance is always in favour of one party in the very nature of the transactions, then the case is one in which there are not separate mutual dealings. On the other hand it has been said—and said, I think, consistently by the Bombay High Court, for example in 47 Bom 128[3] at p. 134—that the mere fact that the defendants have been debtors throughout does not show that the accounts were not mutual; whether an account is mutual or not depends upon the nature of the dealings between the parties. It is sufficient for an account to be mutual if the dealings are such that the balance

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1. **Ramaswamy Chettyar v. M. S. M. Chettyar Firm, (1936) 23 A I R Rang 495=166 I C 184 =1937 R L R 240.**
2. **Bengal Burma Trading Co. v. Burma Loan Bank, (1937) 24 A I R Rang 340=172 I C 837 =1937 R L R 254.**
3. **Satappa v. Annappa, (1923) 10 A I R Bom 82 =76 I C 115=47 Bom 128=24 Bom L R 1284.**

might have been in favour of either party, it is not essential that the balance should in fact have been in favour of the defendants at some stage. Then again, it has been said that the Article applies where the nature of the business between the parties is such as to give rise to reciprocal demands, that is to say, where the dealings are such that sometimes the balance is in favour of one party and sometimes in favour of the other.

While the criterion of a shifting balance is not conclusive to show that an account did not start as, or did not continue as, a mutual one, yet where an account has started as a mutual one, and thereafter one side is always indebted to the other and the course of dealings between the parties consists merely of partial repayments of that indebtedness and incidental and passing small transactions creating independent obligations on one side, but insignificant in account, and never such as would by their nature be likely to result in that party being able to be in a position to make a demand on the other, then, in my opinion, the account ceases to retain its character of mutuality. The present case however is, I think, far simpler, for there can be no doubt — and it is not disputed now — that if the accounts between the parties for a sufficient length of time merely show repayments on account by the defendants to the plaintiffs to reduce their indebtedness, then it cannot be said that the account continues to be a mutual one at all. (The judgment then discussed the evidence and proceeded.) I fail entirely to see how when a request for payment is not made, and must be presumed to have been waived as a trifling sum not worth claiming, (for there is no evidence whatever nor is it even claimed by the plaintiffs that the defendants intimated in any way their intention to them to claim this sum or credit of this sum in their books), the plaintiffs can of their own volition create an element of mutuality in accounts, which have long ceased, probably for nine or more years and in any case certainly for four or more years, to bear the character of mutuality, merely by making an entry in their accounts at the close of the year, obviously for the purpose of creating a "mutual" transaction. For another reason too I should hold that such a transaction must be ignored on the doctrine that it is merely a passing and incidental one, just as it has frequently been held that a passing and incidental overpayment of an overdraft by a customer of a bank to the bank does not constitute a loan to the bank, or ipso facto make the dealings between the bank and customer mutual.

I think it will be useful here to give as illustration of what I mean a *reductio ad absurdum*. This sum of Rs. 9-9-0 is, of course, trivial in comparison to the amount of the sum claimed by the plaintiffs as due to them. Let us take a sum a little less, and imagine that the plaintiffs had sent a letter understamped to the defendants at Moulmein and that the defendants had to pay an anna or two postage on that letter: the defendants made no claim on the plaintiffs for payment in cash of that anna or two, nor even indicated in the course of business to the plaintiffs that they desired to be credited that sum of an anna or two in the accounts, but the defendants' clerk accidentally met the plaintiffs in Rangoon and mentioned it to them, and then the plaintiffs of their own volition and without consulting the defendants credit the defendants in their account the sum of one or two annas for postage underpaid; I do not think it could conceivably be said in this case that such an entry made by the plaintiffs could restore to the accounts the element of mutuality which it had lost, and I think that argument equally applies to the item of Rs. 9-9-0 now in question. For these reasons I am of the opinion that the District Court was right in dismissing the plaintiffs' suit, and this appeal will be dismissed with costs.

**Dunkley J.** — I agree. At the end of October 1925 the plaintiff-appellant expressed his intention of closing the account with the defendant firm by sending a notice demanding payment of the balance due in cash or in the form of a promissory note, and unless mutuality was restored by subsequent transactions, the account would cease to be mutual from that date. After that date there are in the accounts no items which could by any stretch of imagination be called mutual items except a few very small items which, although they may possibly have created independent obligations, fall within the category mentioned by my learned brother, namely that they were of such a minor character that there was no possibility of the account ever reaching that state in which the defendant firm might have a reciprocal demand against the plaintiff.

R.M./R.K. *Appeal dismissed.*

## * * A. I. R. 1938 Rangoon 273

### FULL BENCH

ROBERTS C. J., DUNKLEY AND BRAUND JJ.

*Soonoiram Ramniranjandas* — Appellant.

v.

*Junjilal and others* — Respondents.

Civil Ref. No. 8 of 1937, Decided on 25th March 1938 made by Mosely J.

*** * Partnership Act (1932), Ss. 69 and 74 (b)—Suit instituted by unregistered firm after 1st October 1933 for debt accruing before that date—Suit is not barred by S. 69 but is saved by S. 74 (b).**

The Act must be construed in its plain terms, and where its terms admit of no doubt, anything in the nature of speculation as to the intention of the Legislature should be avoided. S. 74 (a) says that nothing in the Act shall affect any right acquired before the commencement of the Act; and S. 74 (b) extends this saving clause to any legal proceeding or remedy in respect of any such right; that is, any such right as is mentioned in sub-s. (a) and has accrued before the commencement of this Act. It would be wrong to say that S. 74 (b) saves only suits which are pending at the time when the Act comes into force. It saves a remedy, which connotes the right to institute a suit as well. Hence when a suit has been instituted after 1st October 1933, by a firm not registered under the Partnership Act for recovery of a debt accruing before that date, the suit is not barred by S. 69 of the Act but is saved by the provisions of S. 74 (b): *Observations of Sulaiman C. J. in A I R 1936 All 3, Approved ; A I R 1934 Cal 754, Dissent.; 163 I C 703 and 64 C L J 554, Expl.; A I R 1935 Lah 893, Disting.* [P 273 C 2; P 274 C 1, 2]

Clark — *for Appellant.*

Paget — *for Respondents.*

**Roberts C. J.** — The questions referred to the Full Bench of this Court for decision are as follows:

**1. When a suit has been instituted after 1st October 1933, by a firm not registered under the Partnership Act (9 of 1932) for recovery of a debt accruing before that date, is the suit barred by S. 69 of the Act, or is it saved by the provisions of S. 74 (a) or S. 74 (b), Partnership Act (Act 9 of 1932)?**

**2. In any case, if a suit is brought by a firm not registered under the Act, can such a defect be cured by subsequent registration of the firm before the decision of the suit or the appeal from the suit?**

**The matter arose in the following way: The appellants-plaintiffs, a firm of merchants, sued the respondents for the sum of Rs. 2712-10-0 due on a promissory note dated 7th March 1932. The suit was filed on 28th February 1935, and at this date the plaintiff firm was not registered under the Partnership Act. S. 69, sub-ss. (1) and (2) of that Act run as follows:**

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

By S. 1, sub-s. (3) of the same Act, the Act came into force on 1st October 1932, except S. 69, which came into force on 1st October 1933. S. 74 runs as follows:

Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of this Act, or (c) anything done or suffered before the commencement of this Act.

The remaining sub-sections are not material. In my opinion, there is no ambiguity in S. 74 of the Act. It was pointed out by Baron Parke in (1852) 21 L J Ex 161[1] at page 191 that in interpreting a statute

words which are plain enough in their ordinary sense may, when they would involve any absurdity, or inconsistency or repugnance to the clear intentions of the Legislature, to be collected from the whole of the Act or Acts in pari materia to be construed with it, or other legitimate grounds of interpretation, be modified or altered so as to avoid that absurdity, inconsistency or repugnance, but no further.

It is argued that the intention of the Legislature was not to enforce the provisions of S. 69 till 1st October 1933, but that after that date it was to apply to all suits which an unregistered firm desired to bring, and that the words in S. 74 in their ordinary sense are repugnant to that clear intention and must be read as though they were "any legal proceeding or remedy taken before the commencement of this Act."

I respectfully agree with the judgment of Sulaiman C. J. in 58 All 495[2] at p. 500 which is alluded to in the order of reference. We must construe the Act in its plain terms, and where its terms admit of no doubt anything in the nature of speculation as to the intention of the Legislature should be avoided. S. 74 (a) says that nothing in the Act shall affect any right acquired before the commencement of the Act; and S. 74 (b) extends this saving clause to any legal proceeding or remedy in respect of any such right; that is, any such right as is mentioned in sub-s. (a) and has accrued before the commencement of this Act. It appears that as the case cited came before a Bench in Allahabad by way of revision only, the learned Chief Justice was reluctant to interfere, but the force of his reasoning remains unimpaired. It seems unnecessary to me to repeat all his observations upon the matter before us now; they clearly set out the law as I understand it to be. In 62 Cal 213[3] a contrary decision was arrived at, the Judges being of opinion that the words "before the commencement of this Act" might be taken as referring to the legal proceedings or remedy in respect thereof. The matter was approached from an angle which, with all respect, I cannot help regarding as dangerous; for having first imputed an intention to the Legislature, the Court then endeavoured to interpret the Act as expressing that intention, instead of construing its plain words in their ordinary and natural meaning. In my opinion in so doing the use of the phrase "any such right" in S. 74 (b) was lost sight of; it must refer to a right under S. 74 (a), namely a right which accrued before the commencement of the Act. There is nothing in the Act which says when the legal proceeding is to be taken or the remedy to be enforced. According to Wharton's Law Lexicon, a remedy is "the legal means to recover a right," and if a remedy exists in respect of a right accrued before the commencement of the Act, the section says in the clearest possible language that it shall not be affected either by S. 69 or any other section.

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[1] **Miller v. Salomons, (1852) 21 L J Ex 161.**

[2] **Dalmal Parshotamdas v Baburam Chhotelal, (1936) 23 A I R All 3=160 I C 277=58 All 495=1935 A L J 1245.**

In 39 C W N 1080,[4] which was cited in argument, the effect of S. 74 (b) was not considered. In 40 C W N 1180,[5] Mitter J. said that sub-s. (b) only dealt with legal proceedings already commenced before the Partnership Act came into force and followed the two previous decisions, but he appears not to have considered the word "remedy". I do not find it easy to see how there can be a "pending remedy," though a legal proceeding may be "pending". Thus in my judgment, it would be wrong to say that S. 74 (b) saves only suits which are pending at the time when the Act comes into force. It saves a remedy, which connotes the right to institute a suit, as well. The case in 17 Lah 275[6] was referred to: it is however distinguishable because the cause of action was there held to have arisen after the date of the commencement of the Act and upon that ground the saving clause would have no application. Put shortly, then the appellants had a remedy in respect of a right accrued before the commencement of the Partnership Act, 1932. They could institute a suit and this remedy is not affected by the Act, by reason of the express provisions of S. 74 (b). In these circumstances, I would answer the first question propounded in the affirmative; in my opinion the second question thereupon becomes academic and it is therefore unnecessary to answer it because it does not directly arise. We fix the advocate's fee in this reference at ten gold mohurs; costs of this reference to be costs in the appeal.

**Dunkley J.**—I agree with the answer proposed by my Lord the Chief Justice. In the decisions to the contrary which he has mentioned, the learned Judges have, with the greatest respect, apparently overlooked the fact that the provisions of S. 74, Partnership Act, are of general application and apply to the whole Act, and not merely to Ch. 7. The interpretation which they have placed on S. 74 would have a curious effect if applied to certain other sections outside Ch. 7, e.g. S. 42 (d). The terms of S. 74 (b) are to my mind perfectly plain, and how the adverbial phrase 'before the commencement of this Act' can be held to qualify the nouns "proceeding or remedy" I am unable to understand. Set out in full, S. 74 (b) would read as follows:

> Any legal proceeding or remedy in respect of any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or in respect of anything done or suffered before the commencement of this Act.

When set out in this way, the provisions of the clause are so plain as hardly to give room for comment. As my Lord has said, even if the word "pending" be introduced (quite unjustifiably) before "legal proceeding," it is difficult to understand what could be meant by a "pending remedy". I agree that the answer to the first question should be that the suit is not barred, but is saved by the provisions of S. 74 (b) of the Act; and I also agree that the second question does not then arise.

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[3] Surendranath De v. Manohar De, (1934) 21 A I R Cal 754=153 I C 671=62 Cal 213=39 C W N 67.

[4] Basanta Kumar v. Durgadas, (1935) 163 I C 703=39 C W N 1080.

[5] Ram Sundar Bhowmick v. Madhu Sudhan Deb Nath, (1936) 40 C W N 1180=64 C J L 554.

[6] Krishnan Lal Ram Lal v. Abdul Ghafur Khan, (1935) 22 A I R Lah 893=160 I C 513=17 Lah 275=38 P L R 633.

**Braund J.**—I agree and have nothing to add.

D.S./R.K. *Answer accordingly.*

## A. I. R. 1938 Rangoon 275

MOSELY AND DUNKLEY JJ.

*Fatima Bibi and others* — Appellants.

v.

*Ma Toke* — Respondent.

First Appeal No. 46 of 1937, Decided on 2nd December 1937, against decree of Dist. Court, Sagaing, in Civil Suit No. 12 of 1935.

**Civil P. C. (1908), S. 11—Suit for letters of administration—Order while affirming claimant's legal status, finding that rival claimant was heir of deceased—Finding held incidental and unnecessary and could not act as res judicata.**

In a suit for letters of administration, an order while affirming the claimant's status as the legal son of the deceased and granting him letters of administration, also incidentally contained a finding that the rival claimant was the legal wife and heir of the deceased. But as the claimant was entitled to 14 annas share and rival claimant to only 2 annas share, the former was entitled to the letters:

*Held* that the finding regarding claim of rival claimant was merely incidental and unnecessary to arrive at and was therefore not res judicata. All that the Court should have done was to express an opinion that the evidence proved the rival claimant to be the legal married wife of the deceased: *A I R 1923 Rang 257, Disting.* [P 275 C 2]

K. C. Sanyal — *for Appellants.*

K. C. Bose — *for Respondent.*

**Mosely J.** — This is an appeal by the successful claimant for letters of administration, Ahmed Ali Khan, against an order which while affirming his status as the legal son of the deceased Abid Ali, which was in dispute, also incidentally contained a finding that the rival claimant, Ma Tok, was a legal wife and heir of the deceased. The finding went on the principle that Ahmed Ali Khan was the son of the first wife Fatima, and entitled to a fourteen annas share in the property, whereas Ma Toke was only entitled to a two annas share and therefore Ahmed Ali Khan had better claim to letters of administration. In my opinion the finding that Ma Toke was a legal wife of the deceased was a finding at which it was unnecessary to arrive. It is clear that that finding was only arrived at because Ma Toke's status was discussed in the judgment before Ahmed Ali Khan's status was discussed, and that again appears to have been merely the case because Ma Toke filed her application for letters a little earlier than Ahmed Ali Khan The finding as to Ma Toke's status was unnecessary. The Judge's proper course should have been merely to say, if necessary, that in his opinion on the evidence Ma Toke had proved her claim to be a legally married wife of the deceased, but that it was unnecessary to come to a definite finding on that point, once Ahmed Ali Khan had proved his status. It is possible, of course, that the Judge did this *ex majore cautela* in case his decision was reversed, but in any case I think it was unnecessary to come to a definite finding, and an expression of opinion would have been enough. S. 11, Civil P. C. which deals with res judicata, necessitates as a criterion for that that an issue decided should be one necessary for decision and should be heard and finally decided by the Court. As the issue proved to be merely an incidental one and unnecessary for decision, it cannot be said to have been heard and finally decided, or to be res judicata in case there is a subsequent suit for a share of inheritance by Ma Toke against Ahmed Ali Khan.

The decision in 1 Rang 258[1] is, of course, easily distinguishable from the present case, because there the rival claimants were mutually exclusive, and there was a decision in favour of one of them alone in the letters of administration proceeding, and that was held, of course, to be res judicata in a subsequent suit for a share of the whole inheritance. This appeal must be dismissed on this preliminary point with costs, advocate's fee two gold mohurs.

**Dunkley J.**—I agree. It is clear, as my learned brother has said, that the decision as regards Ma Toke's status was unnecessary, and therefore it cannot be said to have been heard and finally decided. Consequently there was no ground upon which this appeal could be brought.

V.B.B./R.K. *Appeal dismissed.*

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[1] Maung Hmat v. Ma Htay, (1923) 10 A I R Rang 257=76 I C 494=1 Rang 258.

## A. I. R. 1938 Rangoon 27

MOSELY AND DUNKLEY JJ.

*Ma Hla Mra Khine* — Applicant.

v.

*Ma Hla Kra Pru* — Respondent.

Civil Revn. No. 142 of 1937, Decided on 21st December 1937, against order of Asst. Dist. Court, Akyab, D/- 10th May 1937.

**Civil P. C. (1908), O. 11, R. 14—Application under O. 11, R. 14 by defendant praying that plaintiff be directed to obtain certified copies of income-tax returns submitted by him is not maintainable — Court has no jurisdiction to grant such application—S. 54, Income-tax Act, makes such returns confidential — Copies of return even if obtained by defendant are inadmissible in evidence — They do not come within provisions of S. 76, Evidence Act.**

An application under O. 11, R. 14 by a defendant in a suit praying that the plaintiff should be ordered to obtain certified copies of the income-tax returns submitted by him, from the Income-tax Officer, is not maintainable and the Court has no jurisdiction to grant such an application. The object of S. 54, Income-tax Act, is to make such returns confidential between the assessee and the Income-tax Department and against the whole world except for certain limited purposes provided by the section itself. It would be clearly an evasion of the provisions contained in S. 54, were the defendant in a Court of law entitled to force the plaintiff to obtain and furnish any information from the Income-tax Office against his interest which the defendant is unable to obtain for himself. Even if copies of such documents are obtained by the defendant, they are inadmissible in evidence unless the plaintiff himself desires their retention. Such copies do not come within the provisions of S. 76, Evidence Act: *A I R 1925 Rang 84; 26 Cal 281; 32 Mad 62 and A I R 1922 All 37, Ref.* [P 277 C 2]

Tun Aung — *for Applicant.*

Sein Tun Aung — *for Respondent.*

**Mosely J.**—This is an application in revision by the plaintiff in Suit No. 2 of 1936 of the Assistant District Court of Akyab, Ma Hla Mra Khine, trading under the name of U Maung Tha Nyo and Company, against an order of the Court made on the application of defendant-respondent 9, Ma Hla Kra Pru, that the plaintiff be ordered, under the provisions of O. 11, R. 14, Civil P. C., to obtain certified copies from the Income-tax Officer of an assessment of U Maung Tha Nyo and Company for the years 1927-28 and 1928-29, and also of the statement of the plaintiff's agent made before the Income-tax Officer for the assessment of 1927-28. The present suit is one by the plaintiff on a mortgage bond in favour of U Maung Tha Nyo and Company executed by defendants 1 and 2 the mortgagors. Defendants 3 to 8 are the legal representatives of a person who bought the mortgaged properties in execution of a simple money decree obtained by him against the mortgagors and defendant 9, and present respondent is added as a subsequent purchaser of the properties in suit from defendants 3 to 8. The application by the respondent was made on the ground mentioned in her written statement as well as in the application that the plaintiff was not the sole proprietress of the firm of U Maung Tha Nyo and Co., that it was a partnership firm consisting of the plaintiff and ten other partners, (her children), and that the plaintiff had not the sole right to sue.

There was a previous suit between the parties in 1927 (it would not appear from the records in this Court that the present respondent was a party there), the appeal from which to this Court is reported in 7 Rang 296.[1] It appears from the judgment in that case that the plaintiff had registered the business under the Burma Registration of Business Names Act erroneously under the names of her children as well as herself; she then sued the respondents in the name of the business, and her suit was dismissed on a technical ground that she had furnished wrong particulars in registration and therefore could not enforce her rights by suit under S. 5 of the Act. It was there said that she had, before judgment was passed in that appeal, effected a new registration of the business showing herself as the sole proprietress, and this is apparent from Ex. M in the present suit, which is a certified copy of the new registration which was effected on 29th March 1928. That being so, I totally fail to see how the information required by the respondent could be in any way relevant for the purposes of this suit. It is naively explained by the learned advocate for the respondent that the information in question might be available for the purpose of prosecuting the plaintiff under S. 193, I. P. C.: vide S. 54, Proviso (a), Income-tax Act 11 of 1922. It may be remarked here that this application was made, and granted, before any evidence whatever had been taken in the suit. The plaintiff had not been asked any questions on this subject, even had it been relevant, and so the respondent's argument is that this was a fishing application to supply materials to prosecute the plaintiff in case she might subsequently commit perjury ! The learned Assistant District Judge remarked in his order that the only authority on this subject was 1 Bom 496.[2] The most cursory search in any commentary under the relevant provisions of the Evidence Act, Ss. 123 and 126, would have revealed at least three later authorities 26 Cal 281,[3] 32 Mad 62[4] and 44 All 360.[5] These cases were decided under the Income-tax Act of 1886, where rule 16 issued under S. 38 of that Act was as follows :

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[1] **Maung Tha Nyo and Co. v. Ma Un Ma Pru, (1929) 16 A I R Rang 260=119 I C 742=7 Rang 296.**

> All public servants are forbidden to make public or disclose, except for the purpose of the working of Act 2 of 1886, any information contained in documents delivered or produced with respect to assessments under Part 4 of the said Act and any public servant committing a breach of this rule shall be deemed to have committed an offence under S. 166, I. P. C.

It was held there that the object of that provision was to secure the interests of those making the returns under the Act, and that that rule was not directed against their production in a Court of law. S. 54, Income-tax Act of 1922 is totally differently framed, and for a different purpose. It says that all particulars contained in any statement made, return furnished, or accounts or documents produced under the provisions of this Act, or in any evidence given in the course of any proceedings under this Act, other than proceedings under Ch. 8, which refers to prosecutions for offences, or in any record of any assessment proceeding, etc., shall be treated as confidential, and, notwithstanding anything contained in the Evidence Act, 1872, no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents, etc., or to give evidence before it in respect thereof. This section, of course, in terms prohibits any Court from requiring such evidence to be given by the Income-tax Officer.

So far from no authority being available, there is a ruling of this Court published in 1924, 2 Rang 391,[6] where it was explicitly held that income-tax returns, being made confidential by S. 54, Income-tax Act and the disclosure of their contents, (by the public servant), being a punishable offence, certified copies of such return do not come within the meaning of Ss. 65, 74, 76 and 77, Evidence Act and are therefore not admissible in evidence. That was a case where the defendant (not the plaintiff) obtained from the Income-tax Officer copies of income-tax returns made by the plaintiff. It was held that S. 76, Evidence Act, itself did not authorize the issue of certified copies of income-tax returns to the defendant, as no private person (presumably other than the plaintiff) had the right to inspect them, and issue of these copies was clearly unlawful under S. 54, Income-tax Act. In the present case it is the defendant who seeks to obtain disclosure of these returns through the medium of the plaintiff, and, of course, exactly the same principle applies. It may be that the plaintiff has the right to obtain certified copies of these returns for her own purposes, but the object of S. 54 was to make these returns confidential as between the assessee and the income-tax department, and against the whole world, except for certain limited purposes provided by the section itself. It would clearly be an evasion of the prohibition contained in the section were the defendant in a Court of law entitled to force the plaintiff to obtain and furnish any information from the income-tax office against her interest which the defendant was unable to obtain for herself. For these reasons it is clear that this application must be allowed.

I note that the respondent has already been successful in obtaining one document, a copy of an order of the Assistant Commissioner of Income-tax in appeal, dated 25th April 1927, marked Ex. 3. That document is inadmissible in evidence unless the plaintiff desires its retention. This application will be allowed, and the order of the Assistant District Court set aside with costs, which, in view of the nature of the application sought to be revised I assess at ten gold mohurs. This application has succeeded in delaying the suit for nearly a year. It is to be hoped that it will now be speedily disposed of.

**Dunkley J.**—I agree.

R.M./R.K. *Application allowed.*

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[2] Jakaria v. Haji Casim, (1875-1877) 1 Bom 496.

[3] Jadobram Dey v. Bulloram Dey, (1899) 26 Cal 281.

[4] Venkatachella Chettiar v. Sampathu Chettiar, (1909) 32 Mad 62=1 I C 705.

[5] Collector of Jaunpur v. Jamna Prasad, (1922) 9 A I R All 37=66 I C 171=44 All 360=20 A L J 140.

[6] Anwar Ali v. Tafozal Ahmed, (1925) 12 A I R Rang 84=84 I C 487=2 Rang 391.

## A. I. R. 1938 Rangoon 278

BAGULEY J.

*Maung Pu Tu and another*—Applicants.

v.

*The King.*

Criminal Revn. No. 509-B of 1937, Decided on 15th November 1937, from order of Sess. Judge, Prome, D/- 14th September 1937.

**Criminal P. C. (1898), Ss. 517 and 520 — Case under S. 380 read with S. 411, Penal Code — Accused and stolen articles sent by police to Magistrate under S. 190, Criminal P. C. — No witnesses examined and accused discharged — Order of disposal of stolen articles—Order held passed under S. 517, Criminal P. C., and could be interfered with under S. 520.**

In a case under S. 380 read with S. 411, Penal Code the accused and the stolen articles were sent by the police to the Magistrate under S. 190 (b), Criminal P. C. No witnesses were examined and the accused was discharged. The Magistrate then passed order with regard to the disposal of the stolen articles :

*Held* that the inquiry had been initiated and concluded and hence the order of the Magistrate with regard to the stolen articles was under S. 517 and therefore the Sessions Judge could deal with the application filed before him under S. 520, Criminal P. C. : *A I R 1937 Rang 42; 29 Mad 375 and A I R 1931 Cal 455, Discussed.* [P 279 C 2]

Dr. Ba Han — *for Applicants.*
Clark — *for the Crown.*

**Order.** — This case comes before the Court under the following circumstances: Ma Kyin Hla made a report to the police at the Paungde Police Station complaining that Pu Tu and Ko Ko Gyi had committed an offence under S. 380, I. P. C. The police investigated the case and sent both these persons up for trial, the charge sheet mentioning S. 380, I. P. C., read with S. 411, I. P. C. The papers were transferred to First Additional Magistrate, Paungde, who entered the case in his Register, directed summonses to issue to witnesses and released the accused on bail on their furnishing security. The case was then transferred by the District Magistrate, Prome, to the Second Additional Special Power Magistrate. On 25th June 1937, both the accused appeared before him with their pleader: the complainant and her pleader were also present. For certain private reasons, he asked them whether they objected to his dealing with the case and on their saying they had no objection he fixed three days for the trial and summoned ten witnesses for each day. Before the date fixed for hearing the witnesses however the complainant presented an application for permission to withdraw the case. The Magistrate told her she could not do so but in the end the case was withdrawn by the Court Prosecuting Inspector on instructions from the District Magistrate and with the permission of the trying Magistrate. This withdrawal, under S. 494, Criminal P. C., operated as a discharge of the accused.

When the case was sent up for trial there were certain exhibits, mainly jewellery sent up with the case. After the case had been withdrawn, the question arose as to the disposal of these exhibits. The learned Magistrate heard the pleaders who appeared for both parties with regard to the disposal of the exhibits which had been seized by the police and produced in Court, and after hearing them he passed orders with regard to the disposal of the exhibits purporting to act under S. 517, Criminal P. C. The two erstwhile accused filed an appeal under S. 520, Criminal P. C. against the order passed by the Magistrate with regard to the disposal of the exhibits. It was accepted by the learned Sessions Judge as an appeal but after hearing both sides he came to the conclusion that he was not satisfied that there had been any inquiry or trial in the case, so the order passed could not have been passed under S. 517, Criminal P. C., and therefore in his opinion it was not "a valid and appealable order". He therefore dismissed the appeal on the ground that no appeal lay. It is against this order of dismissal that the present application in revision has been filed.

The first point for decision is whether the learned Sessions Judge had power to deal with the so-called appeal. Strictly speaking in my opinion it could not have been an appeal in the proper sense of the word. If the original order had been passed under S. 517 then the application to the Sessions Judge would be under S. 520. S. 520 is not in the Chapter of the Criminal Procedure Code which deals with appeals, but S. 520 gives the Sessions Court in a case of this nature power to "modify, alter or annul" the order passed under S. 517. This is a statutory right of revision, or it may be said of interference with any order passed under S. 517 by a Magistrate subordinate to the Court of Session and the applicants merely wanted the Sessions Judge to interfere with the order passed by the Magistrate. If the order was passed under S. 517 therefore the Sessions Judge had power to deal with the application whether this application was strictly an appeal or not. If therefore the original order was passed under S. 517, the learned Sessions Judge was in error in deciding that he had no power to deal with it.

It is argued before me that as orders can only be passed under S. 517 with regard to property when an inquiry or trial in any Criminal Court is concluded, it must be shown that there was an inquiry or trial before the Court regarding these exhibits and that the inquiry or trial had been concluded. It is argued that as no evidence had been recorded, there was no inquiry held and therefore no inquiry concluded and reference is made to the case in 14 Rang 633[1] in which it is pointed out that there may be judicial proceedings which are not inquiries or trials and property produced before the Court in such judicial proceedings cannot be dealt with under S. 517 : it must be dealt with under S. 523, Criminal P. C. The case which gave rise to that report was one in which property had been seized and was made an exhibit in the proceedings under S. 512, Criminal P. C. In my opinion however in the present case it must be held that there had been an inquiry before the Court. The accused and the exhibits were sent up by the police to the Magistrate under S. 190 (b) and S. 190 comes under the Chapter headed "Jurisdiction of Courts in inquiries and trials" and Cl. (b) is one of the conditions requisite for the initiation of proceedings. Proceedings therefore in my opinion, had been initiated and although no witnesses had as yet been examined, the proceedings having been initiated, an enquiry must be held to have begun. It was suggested that in any event it had not been concluded and reference was made to 29 Mad 375.[2] This was a case in which a person had been sent up for trial by the police for an offence under S. 406, I. P. C. The accused however was unable to attend Court and he died before any witnesses had been examined. Sir Arnold White C. J. agreed with the Magistrate that although the preliminary steps for a trial were taken, it could not be said that "the trial has been concluded, the real value of that word in that connexion is 'to make a final judgment or determination of'". It was held that the trial had really abated, but it does not seem to have been suggested that no inquiry or trial had been begun.

Reference was also made to 35 C W N 198.[3] That was a case in which a complaint was made of theft and certain property was seized. The complaint was made to the Chief Presidency Magistrate. After the property had been seized it was made over to the complainant. The complainant thereafter took no further steps to prosecute the criminal case but the Court let the property remain in his custody. It seems quite clear that in this case even if an inquiry or trial had started it had not concluded; it had simply been abandoned and the only specific order passed was "let the car remain with the complainant. File." It seems to me quite clear that this was a case in which the proceedings had not concluded in any sense of the word. In the present case it seems to me that the inquiry had been concluded because the accused had appeared before the Court, the inquiry which comes before the trial proper (beginning when a charge is framed) had been initiated, and the proceedings terminated finally in the discharge of the accused. Every trial which is concluded before a Magistrate must end either in acquittal, conviction or discharge: any other termination is merely 'abatement'. Holding therefore as I do that an inquiry had been initiated and had been concluded, the order of the Magistrate with regard to the exhibits was passed rightly under S. 517 and therefore the Sessions Judge could deal with the application filed before him under S. 520.

I have been asked to pass final orders with regard to the exhibits in revision in any case as the parties do not wish to go back to the learned Sessions Judge for considerations of time, trouble and expense. I am unable to accede to this request. If there are local Courts competent to deal with matters those matters must be dealt with by them: it is not for the High Court to do their work for them. I therefore set aside the order of the learned Sessions Judge holding that he had no power to deal with the application. The proceedings will be returned to him for him to deal with the application and dispose of it on its merits.

D.S./R.K. *Order set aside.*

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[1] **U Ba Hlaing v. Balabux Sodani, (1937) 24 A I R Rang 42=167 I C 245=14 Rang 633=38 Cr L J 358.**

[2] **In the matter of Kuppammall, (1906) 29 Mad 375=4 Cr L J 233.**

[3] **Brojendra Chandra De v. K. S. Sama, (1931) 18 A I R Cal 455 = 1931 Cr C 607 = 132 I C 902=32 Cr L J 983=35 C W N 198.**

## A. I. R. 1938 Rangoon 280

ROBERTS C. J. AND DUNKLEY J.

*Khan Sahib* — Applicant.

**v.**

*Uchil Ahmed Lebbay* — Respondent.

Civil Revn. No. 278 of 1937, Decided on 17th February 1938, from decree of Small Cause Court, Rangoon, D/. 13th August 1937.

**Limitation Act (1908), S. 20 as amended in 1927—Debtor making payment intends payment either towards interest or towards principal—Payment, if argued not to be towards interest as such, must be towards principal and saves limitation.**

The provisions of S. 20 when they speak of a payment of interest or principal, refer to the intention of the debtor in making the payment; payment of interest means that the debtor intended to pay towards interest; payment of principal means that the debtor intended to pay towards the principal. When the debtor makes a payment he must intend to pay either towards interest or towards principal; he must have one or other of these two intentions. Consequently, if the argument be that the sum was not paid towards interest as such, then it must have been paid towards principal, and therefore the endorsement brings the payment within the scope of the section : *AIR 1929 Rang 339, Expl.* [P 280 C 2]

Joseph — *for Applicant.*

Jeejeebhoy — *for Respondent.*

**Roberts C. J.** — This is a case which has reached this Court from the Small Cause Court by reason of an order passed by my learned brother that it was desirable, in view of the decision of Baguley J. in 7 Rang 522,[1] to consider the question whether a payment of Rs. 15 by a debtor at a time when the Statute of Limitation was running against him took the case out of the operation of the Statute or not. Prior to S. 20, Limitation Act, as altered by the Limitation Amendment Act, 1927, payment of interest required no endorsement in order to take the debt out of the statute, but it had to be proved that payment of interest was made as such. That was the question before Baguley J., and the payment which he had to consider was a payment on 3rd March 1927, before the amending statute came into operation on 1st January 1928. Since 1928 there is no difference between payment towards principal and payment towards interest: both, payments towards interest and payments towards principal must be endorsed on the instrument. We are asked to say in this case that the payment was not made towards interest as such: and the short answer is that the debtor must have had one of two intentions: either he must have intended to pay and paid the money towards interest as such, in which case the respondent's contentions fall to the ground, or else he must have intended to pay and have paid the money towards principal, in which case he is equally protected by S. 20, Limitation Act. The only way in which any attempt could be made to say that the Act did not apply would be by way of a contention that though the debtor intended to pay the money as part of the principal, the creditor, in exercise of his rights, appropriated the sum so paid towards interest, and that therefore it was not a payment, either of part of the principal or of interest as such. I think, speaking for myself, that such a contention could find no favour in any Court of justice and that it is clear that the case in 7 Rang 522[1] has no application to payments after 1st January 1928. Accordingly, the judgment dismissing the suit is set aside and the claim is decreed for the sum as prayed with costs, five gold mohurs.

**Dunkley J.**—I agree. It seems to me to be clear that the provisions of S. 20, Limitation Act, when they speak of a payment of interest or principal, refer to the intention of the debtor in making the payment; payment of interest means that the debtor intended to pay towards interest; payment of principal means that the debtor intended to pay towards the principal. When the debtor makes a payment, he must intend to pay either towards interest or towards principal; he must have one or other of these two intentions. Consequently, if the argument be that the sum was not paid towards interest as such, then it must have been paid towards principal, and therefore the endorsement brings the payment within the scope of the section. In my opinion, it is clear that the only reason why the words "as such" have been retained in the third line of sub-s. (1) of S. 20, or why a distinction between payments of interest and payments of principal was preserved after the amendment of 1927, is with reference to payments of interest made before 1st January 1928, because a payment of interest made before that date will save limitation even if no endorsement on the instrument is made.

D.S./R.K. ***Judgment set aside.***

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[1] **U Ba Gyi v. U Than Kyauk, (1929) 16 A I R Rang 339=120 I C 897=7 Rang 522.**

## A. I. R. 1938 Rangoon 281

BAGULEY J.

*Maung Ba and others* — Applicants.

v.

*The King.*

Criminal Revn. No. 517-B of 1937, Decided on 15th November 1937, from order of Township Magistrate, Chaung U, D/- 6th July 1937.

**Criminal P. C. (1898), S. 238 (1)—Fracas—Charge under S. 353, Penal Code—Magistrate taking cognizance finding ordinary person assaulted—He can convict for that assault.**

Where a fracas is the basis of police charge sheet charging a person of assaulting or using criminal force to a public servant, and the Magistrate after he has taken cognizance of the case finds that the transaction which was reported to him as assault on a public servant was committed on some other person not mentioned in the original complaint or that the person was not a public servant, the Magistrate is not debarred from dealing with that assault and he can convict the person guilty of that assault for that assault or alter the conviction to one under S. 352, Penal Code: *6 C W N 202, Dissent.* [P 281 C 2; P 282 C 1]

K. C. Sanyal — *for Applicants.*

**Order.**—I have taken the facts as given by the lower Courts. I see no reason for interference with these findings of fact in revision. Aung Dun, a villager of Kinmun village, got drunk. He had an iron fork in one hand and a dah in the other, and he was going about the village shouting abuse, cutting fence posts, and in general making a thorough nuisance of himself. He abused the headman and performed certain indecent acts in front of his house; so the headman, as he was entitled to, called a posse of villagers, disarmed Aung Dun, arrested him and proceeded to take him to his house with a view to sending him and his weapons to the police station. He was perfectly entitled to do this. Before they got to his house, they had to pass the compound of the house of Maung Ba. Maung Ba and his son and daughter, Thein Pe and Ma Thein Tin, came out, asked what it was all about and proceeded to try to snatch the dah out of the hands of Po Set, the villager who was carrying it. A struggle ensued and in the end Po Set let them have the dah and they took it away. About half an hour later, before the party had started to the police station with Aung Dun, Ma Thein Tin came to the headman's house and threw the dah into his compound saying, "Here is the dah". Arising out of this the police sent up the three accused with a charge sheet showing that they had committed an offence under S. 353, I. P. C. The Magistrate heard the prosecution witnesses and framed a charge against the three accused charging them with having used criminal force

to Maung Ngwe Gaing, a public servant and his party while they were bringing the accused Maung Aung Dun and exhibit dah with intent, etc.

He found them all guilty and sentenced the men to three months' rigorous imprisonment each and Ma Thein Tin to pay a fine of Rs. 51. They all appealed and the learned Sessions Judge altered the convictions to convictions under Section 352 and reduced the sentences to a fine of Rs. 45 in the case of Maung Ba and Rs. 40 in the case of each of his children. The main point on which he reduced the sentence was that although the headman was a public servant, Po Set, from whose possession the dah was forcibly seized, was not a public servant. Against this order passed by the learned Sessions Judge the present application for revision has been filed. The main ground argued was that when the Sessions Judge found the applicants not guilty under S. 353 he had no jurisdiction to alter the conviction to one under S. 352. This argument was based upon an extract from Gour's "Penal Law of India," (Edn. 4, p. 1746) and the case in 6 C W N 202.[1] I have studied 6 C W N 202[1] and I must say that I cannot understand it, that is, not if the words used have their correct meanings. It seems to me that in the statement of the facts of the case the editor is using the word "charge" in its police sense and not in its Criminal Procedure Code sense. There is a passage. "On the complaint of Ahmed four persons were sent up for trial .... who were charged under Ss. 353 and 352". Apparently, this does not mean "against whom charges were framed under Ss. 353 and 352". In any event, it is not clear from this judgment whether a charge was framed against the accused under S. 353 for assaulting a police officer, in which case, of course, the accused could not be convicted under any section at all for an assault on somebody else; or whether a separate charge was framed against him for assaulting the witness. If this reported case really bears out the interpretation put upon it in Gour's work, namely, that when there is a charge of assaulting a public servant which comes properly before a Magistrate and after he has taken cognizance of the case he finds that in the transaction which was reported to him as assault was committed on some other person not mentioned in the original complaint, he is debarred from dealing with that assault, I respectfully dissent from it. When a fracas is the basis of a police charge sheet, and in the course of that fracas, when the Magisterial inquiry is complete, the fact emerges that some ordinary villager has been assaulted, I see no reason why the Magistrate shall not convict the person guilty of that assault for that assault.

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[1] In re Akbar Momin (1902) 6 C W N 202.

In the present case the original charge was not satisfactory. The charge was of using criminal force to Maung Ngwe Gaing, a public servant, and his party, but the parties were perfectly aware of what they were charged with, namely using criminal force to Maung Po Set, one of the headman's posse of villagers. The evidence was all with regard to the struggle for the dah which he was holding, and after they have been convicted under S. 353 for assaulting Po Set whom the Magistrate thought to be a public servant, when the Appellate Court finds that he was assaulted, but that he was not a public servant, there is no bar under the Criminal Procedure Code to the conviction being altered to one under S. 352. That is a simple and logical deduction which must be made from S. 238 (1) Criminal P. C. In my opinion, these convictions are quite correct. As the case however is before me, I think that one alteration might be made in favour of the accused Ma Thein Tin. She cooled down quickly and brought the dah back to the headman. I think this gesture might be counted in her favour. I would therefore halve her fine. My order is therefore that the sentence passed against Ma Thein Tin will be that she will be fined Rs. 20, or in default ten days rigorous imprisonment. Any excess fine which she may have paid will be refunded to her. The convictions of all the three accused will stand and the sentences passed on Maung Ba and Maung Thein Pe will be left unaltered.

V.B./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 282

BAGULEY AND MOSELY JJ.

*The King*

v.

*Maung Po Thi* — Accused.

Criminal Appeal No. 1494 of 1937, Decided on 19th January 1938, against order of of acquittal passed by Addl. Sess. Judge, Tharrawaddy, D/- 15th September 1937.

**(a) Criminal Trial— First information report —Not admissible unless informant dies.**

The first information report, unless the man who made it dies, is not admissible evidence of any fact which is contained in it : it merely proves that this was the original story which set the police in motion. [P 283 C 1]

**(b) Criminal Trial — Dying declaration may be sufficient for conviction.**

It is of course a fact that for an accused person to be convicted on a dying deposition alone the Court must be quite satisfied that the dying deposition bears all the marks of truth, and it must be examined with care remembering that the statement is an ex parte statement, made as a rule in the absence of the accused without the accused having any chance of cross-examining the person who made it; but where the Court is satisfied that the man who made the dying deposition had a good opportunity of recognizing the person who attacked him, that he did recognize him, and that he was telling the truth when he made his dying deposition, a conviction can be passed solely on such confession. [P 283 C 1, 2]

**(c) Criminal Trial — Dying declaration — Magistrate must ask simple questions and not merely record statement.**

An injured man who is waiting to be operated on should not be subjected to anything like a third degree cross-examination by the Magistrate who records his dying deposition; but the Magistrate should not content himself with merely recording the statement made by the injured man: he should ask him such simple questions as may occur to his mind in order that the dying deposition may be an account of some value. [P 284 C 1, 2]

Tun Byu, Govt. Advocate— *for the Crown.*

A. Loo Nee — *for Accused.*

**Baguley J.**—This is an appeal filed by the Local Government against the acquittal of Maung Po Thi who was tried by the Additional Sessions Judge of Tharrawaddy on a charge of murder. The case is not an easy one to deal with, as the record bears obvious signs of witnesses having been tampered with and false witnesses put up to give false evidence : for instance, the chief witness Nga Maung is quite obviously not speaking the truth on almost all the important points for determination and anyone who has had any experience of criminal cases will recognize the defence witnesses Po Kya, Ward Assistant, Maung Shein, insurance agent, and Ma Sein E, Maung Shein's wife, as false witnesses of one of the commonest types. As this is an appeal it depends solely on the evidence. The Crown normally would have an exceedingly difficult task, which at times would verge on the impossible. As the learned Judge who tried the case had most of the witnesses before him, he was able to observe their demeanour and in that way has had assistance in assessing the value to be placed upon their evidence. His judgment, however contains one passage which shows that he went entirely on the wrong lines in considering the evidence. The passage I am referring to is as follows :

> In criminal trials prudence dictates that it is unsafe to convict a person solely on the accusation or denouncement by the informant and without corroboration from an independent source. This rule of prudence would extend to dying declarations also where the accused persons do not even get a chance of cross-examining.

Where the learned Judge got this so-called 'rule of prudence' from, I have not the least idea : I have never seen it before myself; and Judges would be well advised not to compose for themselves rules and then term then "rules of prudence" and follow them. A case of this kind has got to be determined under the Evidence Act, and if a Judge wishes to superimpose upon the Evidence Act anything which he may truly term "a rule of prudence", he will be well advised to discover first the source of this "rule of prudence" and quote some recognized authority for its existence, and then to satisfy himself that the "rule of prudence" applies to this country and has become in some way or another a part of the law of evidence which is applicable to this country. The "rule of prudence" which the learned Judge lays down appears to me to controvert itself. The word 'informant' is usually taken to mean the person who lays the first information report. If the "rule of prudence" means that a person cannot be convicted merely on something stated in the first information report, no "rule of prudence" is necessary, because the first information report, unless the man who made it dies, is not admissible evidence of any fact which is contained in it : it merely proves that this was the original story which set the police in motion. On the other hand if the words "the accusation or denouncement by the informant" are meant to include the evidence given by the informant in Court, it is equivalent to saying that a person cannot be convicted on the evidence of a single witness, a statement for which no support can be found in the Evidence Act. In the Evidence Act there is no trace whatsoever of the old rule of the Canon law that nothing can be proved against another person save by the evidence of two or more witnesses. It is, of course, a fact that for an accused person to be convicted on a dying deposition alone the Court must be quite satisfied that the dying deposition bears all the marks of truth, and it must be examined with care, remembering that the statement is an ex parte statement, made as a rule in the absence of the accused without the accused having any chance of cross-examining the person who made it ; but, very many people have been convicted solely on a dying deposition where the Court was satisfied that the man who made the dying deposition had a good opportunity of recognizing the person who attacked him, that he did recognize him, and that he was telling the truth when he made his dying deposition. In view of the fact that the learned Judge has approached the case and considered the evidence from a point of view which, in my opinion, has misdirected him, this Court will have to look at the evidence and come to its own conclusion from it.

The story for the Crown is that the deceased San Yin had been making a day of it : he had been drinking liquor and smoking opium, and he was undoubtedly quarrelsome. He is described in the judgment as "a bully, a drunkard, an opium-smoker and a brothel-keeper," and I think this may be regarded as a fair summing-up of his character. The day before his death he had had words with Lan Tin Nga, an influential Chinaman, who was the brother-in-law of the accused Po Thi, and Lan Tin Nga had reported the matter to the Assistant Station Writer, Maung San U, at two o'clock on the day that San Yin was murdered. It has merely been noted in the general diary as a report of a non-cognizable offence. On the day of his murder, as I have said, the deceased had a quarrel with one Kakabu at three o'clock and struck him ; at four o'clock he had a quarrel with another man also, called Po Thi of Mawya and struck him and kicked him, and at five o'clock he met Nga Maung and they had a drink together. Nga Maung says that he was already under the influence of liquor before he met him. Then they had some opium, and San Yin had another quarrel, this time with Kyaw U, and after that they went across to an opium-den in a house which belonged to Lan Tin Nga. The case for the Crown is that the two of them went into a small opium-den of Pwela, a Chinaman who has since been expelled from Burma, and who was not therefore examined as a witness in the Sessions Court.

While they were there, the accused Po Thi, who was Lan Tin Nga's brother-in-law, came in and some kind of an altercation arose, as a result of which Po Thi cut

San Yin with a dah. The injuries which San Yin received were : a clean-cut wound in the head six and a half inches long and cutting into the brain; a wound four and a half inches long and bone deep on the left forearm, and a similar wound on the back and the outer side of the first phalanx of the left index finger. In spite of the brain being injured San Yin was not disabled, but he rushed out of the opium-den and went first to a bazaar-seller, who lived close by, named Daw Gauk. He was apparently on very friendly terms with Daw Gauk, and he asked her to have a look at him and to come away with him, presumably to the hospital, but she refused to do so. He told her that he had been cut by Po Thi (this, of course, does not necessarily indicate the accused, as there were several other 'Po This' living in the neighbourhood). He left her and went to a Pinman's shop kept by Po Chit. Po Chit was saying his prayers inside, but he spoke to his wife, Ma Hla. Her attention was called by San Yin calling to her husband Po Chit, and he told her that he had been cut with a dah by Po Thi. She did not ask him which particular Po Thi, although she herself knew of three Po This, who were all in the neighbourhood. Ma Hla is supported by Chit U, who was present at the time. Maung Chit emerged from the room where he was saying his prayers, and was told by his wife what San Yin had told her, and he found San Yin at the police-station. He says he heard San Yin say to the Guard-Writer that Po Thi had cut him, and he says that San Yin was more specific this time and said that he had been cut by Lan Tin Nga's brother-in-law Po Thi. This directly indicated the accused.

Without waiting to take the first information report in full, the Guard-Writer, Tun Sein, hurried him to the hospital, and the 2nd Additional Special Power Magistrate was sent for. He arrived and recorded San Yin's dying deposition. The dying deposition shows that San Yin directly accused Po Thi of cutting him, but it does not indicate which Po Thi, and the learned Magistrate, who seems to have performed his duties somewhat perfunctorily, never asked which Po Thi. He says that he did not think it was his duty to ask him which Po Thi it was. The learned Magistrate would do well in the future when recording dying depositions to show a little more curiosity. I would not suggest that an injured man who is waiting to be operated on should be subjected to anything like a a third-degree cross-examination by the Magistrate who records his dying deposition ; but the Magistrate should not content himself with merely recording the statement made by the injured man: he should ask him such simple questions as may occur to his mind in order that the dying deposition may be an account of some value.

However, as soon as the dying deposition had been completed, the Guard-Writer proceeded to take down the first information report, and he being, I suppose, more accustomed to investigating matters which had not previously been investigated, asked him definitely which Po Thi had cut him, and he elicited from San Yin that it was Po Thi, the brother-in-law of Lan Tin Nga, who had cut him. At this time the Special Power Magistrate was still present, and he testifies to remembering having heard San Yin make this statement ; so, this strong accusation of the accused by San Yin is vouched for by both the Special Power Magistrate and the Guard-Writer, and also by the Sub-Assistant Surgeon who had questioned San Yin as soon as he arrived and before the Magistrate had come upon the scene, and that San Yin did indicate the accused is perfectly clear from the fact that the police immediately went off and arrested him. Had the name "Po Thi", without further description, been given, it seems to me that the police would in all probability have gone off and arrested the man Po Thi with whom the deceased had quarrelled late the same afternoon, and if not him, there was another Po Thi who would probably have been suspected immediately, namely the fourth prosecution witness Po Thi, who works in the seinye shop nearly opposite the opium-den in which San Yin had been assaulted, and who admits to having been convicted under S. 325 once, for assault with a stick once, and in a stabbing-case once, and who had also once been tried for murder but acquitted. A record of this kind and the fact that he was employed close to where the murder was committed would naturally have made the police think of him as the possible murderer and not a man who was merely a relation of the owner of the house in which the offence was committed and which had been let out to somebody else. It is proved beyond all possible doubt that the deceased, who, according to the medical evidence, was assaulted from the front, was quite convinced that the man who assaulted him was the accused.

We now have to look for support of this statement, if any. As I have said, the principal witness relied on by the Crown has made statements which show that he was not telling the truth. What the truth may be we cannot find from his statements, but we do know that what he has stated is not the truth. (His Lordship then examined the evidence and concluded.) The defence is a bald alibi, apart from the evidence of what I term the spoiling witnesses. This very clear and definite dying deposition, with the corroboration given by Po Thi, is enough to warrant the conviction. The nature of the wound shows that the offence committed must be murder. So far as the sentence is concerned, I think that our discretion might be exercised in favour of the accused. We do not know exactly what happened before the fatal injuries were inflicted, but if San Yin was behaving in some way in which he had been behaving that afternoon, it is certain that he was under the influence of liquor to some extent, and it is most likely that he was exceedingly offensive. He had quarrelled and struck several people in the course of that afternoon. I would therefore set aside the order of acquittal and convict the accused Po Thi under S. 302, I. P. C. for the murder of San Yin, and would direct that he do suffer transportation for life.

**Mosely J.**—I agree.

K.S./R.K. *Accused convicted.*

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## ✲ A. I. R. 1938 Rangoon 285

BAGULEY AND MOSELY JJ.

*U Po Thin and others* — Appellants.

v.

*Official Assignee* — Respondent.

**First Appeal No. 118 of 1937, Decided on 11th January 1938, against decree of District Court, Myaungmya, in C. S. No. 10 of 1935.**

**✲ Registration Act (1908), Ss. 17 and 49 — Agreement to reduce interest on mortgage is compulsorily registrable.**

**Any document which reduces the mortgagee's right to receive interest at the rate given in the mortgage deed affects his "interest in immovable property". Hence the agreement to reduce the rate of interest is compulsorily registrable under S. 17, and if not registered cannot be received in evidence : *A I R 1934 Rang 316; 26 Cal 707 (P C) 35 All 48 and 31 All 13, Discussed.* [P 287 C 1]**

Doctor — *for Appellant.*

Janganathan — *for Respondent.*

**Baguley J.** — This appeal arises out of a suit brought on a mortgage by the Official Assignee as receiver in insolvency of the estate of V. E. R. M. V. Ramanathan Chettyar. The mortgage was created by a registered deed. Defendants 1 and 2 put in an evasive defence to the effect that they had not borrowed Rs. 15,000 and they denied the validity of the registration and its attestation. As a matter of fact, the Rs. 15,000 was the balance of the purchase money of certain land. The written statements of the remaining defendants admits execution of the mortgage deed, but pleads certain payments and also an agreement that the rate of interest was reduced from the figure Rs. 10-10-0 per cent. mentioned in the mortgage deed to as. 12 per cent. They prayed that a decree for Rs. 8337-8-0 might be passed instead of for the Rupees 24,000 claimed. Issues were framed with regard to the attestation and registration of the mortgage deed, with regard to the payments alleged to have been made by the defendants and denied by the plaintiff, and with regard to the rate of interest for which the defendants were liable. The learned Judge found against the defendants on all points : hence the present appeal.

The points argued in the appeal were with regard to the fact of the payments alleged by the defendants and with regard to the agreement said to have been made by the mortgagee to reduce the rate of interest. No other points were argued before us. The question of the payments alleged is, of course, purely a matter of fact, the burden of proving the payments lying upon the defendants and a very heavy burden lay upon them in view of the fact that they produced no account books, no receipts for any payments and no endorsements on any documents. All that is produced is one small diary book with many blank pages and a few figures dotted here and there about it. This book has no probative value of any kind whatsoever. (His Lordship then examined the oral evidence and came to the conclusion that the defendants had not proved the payments. The judgment then proceeded.) Turning now to the more interesting part of the case, the defence produced Ex. 2, an unregistered document on a one rupee stamp paper, which sets out that the five debtors had borrowed Rs.

15,000 from the V. E. R. M. V. firm under registered deed and had failed to pay any interest and in consequence of that the creditor agreed and received Rs. 2250 in full satisfaction of the interest due up to the date of the document and from that date forward interest to be at the rate of as. 12 per cent. per month, Rs. 7500, and interest due thereon at the rate of 12 annas per cent. per mensem to be repaid in Tagu, 1295, as first instalment and the remaining Rs. 7500 and interest due thereon to be paid in Tagu, 1296. It was also agreed, should there be any breach of the above terms, that the creditor may take steps to recover the principal and interest due, which he was entitled to enjoy. On this agreement a case is sought to be made out that the interest due on the mortgage was reduced to twelve annas per cent. per month. It is agreement in writing, but not registered. The trial Judge, following 13 Rang 22,[1] held that the agreement was inadmissible in evidence owing to lack of registration. This is a single Judge ruling and therefore not binding upon us, and it was argued that the authorities relied upon in that ruling do not support it. In the ruling, the authorities are not analyzed. The facts in that case were that a suit was brought for interest on a registered mortgage deed, the defendants pleaded a verbal agreement subsequent to the date of the mortgage, by which the time for repayment was extended and a certain mode of repayment was agreed upon. The judgment goes on :

> On behalf of the applicants it is urged that, because this agreement was not by a registered document, evidence thereof is inadmissible and it cannot be proved, and this contention must, in my opinion, prevail.

The authorities named in support thereof are 26 I A 97,[2] 40 I A 31[3] and 31 All 13.[4] Dealing with these cases seriatim, I note that in 26 I A 97[2] the suit dealt with certain mortgages which had been created by registered deeds, the deeds stating that interest was to be 15 per cent. per annum, and in each case the borrower gave an unregistered written promise to pay 6 per cent. more. It was held that these unregistered written promises could not be proved in evidence because they varied the terms of the registered document, and if admitted would make the mortgage really carry interest at 21 per cent. This case is not one like 13 Rang 22,[1] where a subsequent agreement was sought to be proved. 40 I A 31[3] was a case in which there was a registered mortgage which provided that the mortgagee should be entitled to the profits of the mortgaged property in lieu of interest. In other words, the mortgage was a usufructuary mortgage. Four days after the mortgage had been executed the mortgagee leased the property back to the mortgagor at an annual rent of Rs. 4200 which happened to be 6 per cent. on the amount of the mortgage money. The mortgagor sought to prove that the mortgage was really one carrying interest at six per cent. and was not a usufuctuary mortgage at all. It was held that the express and unambiguous stipulation could not be varied or contradicted by reference to preliminary negotiations, and it was also held that a written unregistered agreement made after the mortgagor had given up possession under the lease by the mortgagee as to the mode in which the rents and profits were to be dealt with was inadmissible in evidence. This case is also not quite the same as the Rangoon case cited,, because it really sought to put in evidence that the original mortgage had not been as set out in the original mortgage deed.

31 All 13[4] is a Full Bench ruling of the Allahabad High Court. In this case a registered mortgage was executed for a term of 25 years. After registration had been compulsorily effected, the mortgagees applied for a mutation of names and an outsider objected, claiming a share in the mortgaged property. Finally, some settlement was arrived at and the revenue authorities allowed mutation of names. Less than 25 years from the date of the mortgage the mortgagor sought to redeem it, and set up a compromise which had been arrived at during the mutation proceedings, whereby the third party became a mortgagor, his interest was mortgaged, and an alteration was made in regard to the terms on which redemption would be allowed. It was held that this compromise could not affect, modify or alter in any way the terms of the registered mortgage. This case is more in line with 13 Rang 22.[1]

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1. Maung Ba Kyaw v. Nanigram Jaganath, (1934) 21 A I R Rang 316=154 I C 189=13 Rang 22.
2. Tika Ram v. Deputy Commissioner of Bara Banki, (1899) 26 Cal 707=26 I A 97=7 Sar 520=3 C W N 573 (P C).
3. Abdullah Khan v. Basharat Husain, (1913) 35 All 48=17 I C 737=40 I A 31 (P C).
4. Sadar-ud-din Ahmed v. Chajju, (1909) 31 All 13=1 I C 558=5 A L J 717=1908 A W N 264.

In my opinion, however, the matter can really be settled from first principles and the actual wording of the Statute. S. 17 (1) (b), Registration Act says that among other documents which have got to be registered are

> other non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property ;

and unless such a document is registered under S. 49, Registration Act, it will not affect any immovable property or confer any such power. When the V. E. R. M. V. firm got their mortgage executed and registered, they got an interest in immovable property, and one part of that interest was the right to receive interest at Re. 1-8-0. per cent. The word "interest" here is used in two senses but this is unavoidable. Any document which reduced their right to receive interest at the rate given affects their "interest in immovable property". The agreement to reduce the rate of interest was compulsorily registrable under S. 17, and not having been registered it cannot be received in evidence. For these reasons I think that the decision of the trial Court was quite correct and I would dismiss this appeal with costs.

**Mosely J.**—I agree.

K.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 287

ROBERTS C. J. AND DUNKLEY J.

*N. A. Concern* — Applicant.

v.

*Commissioner of Income-tax, Burma* — Respondent.

Civil Misc. Appln. No, 90 of 1937, Decided on 7th February 1938.

**Income-tax Act (1922), S. 22 (4)—Income-tax Officer fastening on one particular default and saying that he might accept explanation regarding others — Recommencement of whole proceeding directed — Subsequent Revenue Officers need not bind themselves with obvious facts.**

**There is no foundation for the suggestion that because an earlier Income-tax Officer was disposed to fasten on one particular default and said that he might possibly accept the explanation given in regard to others, it means that when a recommencement of the whole proceedings has been directed the subsequent revenue officers are to bind themselves to the obvious facts when the case is taken up again : *A I R 1931 Rang 98, Referred.***
**[P 288 C 1]**

P. K. Basu — *for Applicant (Assessee).*

U Thein Maung, Advocate-General — *for Respondent (Commissioner of Income-tax).*

**Roberts C. J.** — This is an application for a mandamus made under S. 66, sub-s. (3), Income-tax Act, 1922 requiring the Commissioner to state a case on the following question :

> Could the Income-tax authorities go behind the findings of the Income-tax Officer dated 6th April 1935 in which he accepted the submission of the applicant that he did not keep any accounts at the headquarters and which was not set aside either by the Assistant Commissioner in appeal or by the Commissioner in revision, and could that finding be over-ridden by his successor in office ?

The question was raised before us on two grounds, the first being that there were no materials upon which the Income-tax Officer, who has made the present assessment, could find that headquarters books of account were actually in existence, or that the money withdrawn by the assessee had been re-invested. I think there were ample materials upon which the Income-tax Officer could so find, and he has set them out very succinctly in his order, and the question whether we should have come to the same conclusion is not one which need be considered ; speaking for myself, if I had the same facts before me, I feel that I should not have had any doubt in coming to the conclusion arrived at by the Income-tax Officer. The second point which has been raised is that the Commissioner, in his order dated 30th October 1935, directed that fresh proceedings should be taken under S. 22, sub-s. 4, and that steps to produce the books should be taken, and that the previous proceedings under S. 23 of the Act should be cancelled : and it is suggested that because the Commissioner said that the Income-tax Officer had abandoned the principal default, namely, the failure to keep headquarters accounts, this matter should not be re-opened again. I am of opinion that the Commissioner merely meant that the whole of the circumstances were to be re-examined. The Income-tax Officer, in his order of April, 1935, had said :

> I can accept the possibility of the non-maintenance of accounts at headquarters ; but I am not prepared to accept the explanation given in regard to the two vatti chittais in question.

And the Commissioner, in referring to this matter, said that since in his order under S. 27, the Income-tax Officer abandoned the principal default, the issue narrowed down to a simpler question. In my opinion, what the Commissioner meant to do and did was to ensure that the whole matter should be taken up again from the beginning and there is no foundation for the suggestion that because an earlier Income-tax Officer was disposed to fasten on one particular default and said that he might possibly accept the explanation given in regard to others, it means that when a re-commencement of the whole proceeding has been directed the subsequent revenue officers are to bind themselves to the obvious facts when the case is taken up again. Accordingly, in my opinion, there is no ground on which the assessee could succeed upon either footing. In 9 Rang 25,[1] it was expressly held by a Full Bench that the only question of law that can arise in such a case as this is whether there was evidence upon which the Assistant Commissioner could have based his order, and the question whether the assessment as made was valid is not a question of law that could arise out of the order of the Assistant Commissioner. For these reasons, I am of opinion that no question of law has arisen in this case, and therefore the application for a mandamus must be dismissed with costs, ten gold mohurs.

**Dunkley J.**—I am of the same opinion. It seems to me to be clear that when the Commissioner, in his order of 30th October 1935, said that the Income-tax Officer abandoned the principal one of the grounds namely, the question of the existence of headquarters accounts, all that he meant was that there was no decision upon that question. For that reason he set aside the assessment and ordered the whole proceedings to commence de novo.

V.B.B./R.K. *Application dismissed.*

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[1] A. K. R. P. L. A. Chettyar Firm v. Commissioner of Income-Tax, Burma, (1931) 18 A I R Rang 98=132 I C 718=9 Rang 25 (S B).

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## A. I. R. 1938 Rangoon 288

ROBERTS C. J. AND DUNKLEY J.

*In the matter of U, a Higher Grade Pleader, Ngazun.*

Civil Misc. Application No. 69 of 1937, Decided on 26th January 1938.

**Legal Practitioners Act (1879), S. 12 — Pleader convicted under S. 409, I. P. C., held should be struck off from register of pleaders.**

A pleader was convicted under S. 409, I. P. C. for embezzlement of client's money. It was found that he was a man of 60 years and had till then an unblemished character :

*Held* that though the above circumstances made the case distressing, the Courts have a duty to the public and to the profession itself, and that that duty could only be exercised, painful as it may be to do so, by striking the pleader off the register of pleaders.

A. A. Darwood — *for Respondent.*

**Roberts C. J.** — This case comes before us under the provisions of S. 12, Legal Practitioners Act, 1879, to take whatever steps may be necessary thereunder. The respondent in the case was convicted by the Township Court of Ngazun on 6th July 1937, of an offence under S. 409, Penal Code and sentenced to imprisonment till the rising of the Court and to pay a fine of Rs. 150 or in default to suffer four months' rigorous imprisonment, and the facts are that he had drawn out a sum of Rs. 98 which, subject to proper deductions for his fees, should have been made over to his client. Much time was expended in the trial Court and in the Court of Session in endeavouring to show that there were various sums due from his client to him which he was entitled to deduct, but the effect of this evidence was that the Magistrate disbelieved it, and although it may be open to question whether in fact the amount which he embezzled was accurately checked, there can be no question that as the case comes before us now we can only deal with it upon the footing that he has been convicted of embezzlement, be it of a large or a small sum of money. And the appeal which he brought in the Sessions Court was dismissed and the matter was pursued so far as it could be pursued by an application in revision, but when all is said and done, there stands this conviction for embezzlement. It is said that the respondent is a man of over sixty years of age, who has had hitherto an unblemished character, as this makes the case all the more distressing; but we have a duty to the public and to the profession itself, and we think that that duty can only be exercised, painful as it is for us to do so, by striking the respondent off the register of pleaders.

**Dunkley J.** — I agree.

K.S./R.K. *Order accordingly.*

## * A. I. R. 1938 Rangoon 289

BAGULEY AND MOSELY JJ.

*Maung Ba Tun* — Appellant.

v.

*Maung Ohn Khin* — Respondent.

Civil Misc. Appeal No. 61 of 1937, Decided on 13th January 1938, against order of Commissioner for Workmen's Compensation, Mandaley, in Workmen's Compensation Case No. 2 of 1937.

**(a) Interpretation of Statutes—English precedents.**

It is often dangerous to cite English cases quoted in Indian commentaries without ascertaining whether the English law applicable is the same as the Indian law. [P 289 C 2]

*** (b) Workmen's Compensation Act (1923), S. 3 (1)—Workman wilfully disobeying rule is not entitled to compensation.**

Under the Indian Act, the sole question is whether the workman wilfully disobeyed a rule devised for the purpose of securing the safety of workmen, and not whether that disobedience amounted to misconduct, serious or otherwise as in English law. Hence where a workman gets an accident as a result of wilful disobedience of a rule he is not entitled to compensation. [P 290 C 1]

K. C. Sanyal — *for Appellant.*

A. N. Basu — *for Respondent.*

**Mosely J.**—The appellant, Maung Ba Tun, claimed Rs. 500 from the respondent, U Ohn Khin, his employer, under the Workmen's Compensation Act 8 of 1923. Maung Ba Tun was employed in an oil-mill owned by U Ohn Khin. He was in charge of one of the oil-presses, all of which were worked by an oil engine. The presses were rotated by a wooden beam fixed to a horizontal wheel enmeshed with a vertical wheel placed upon it and connected by a belt with the engine. The beams on which the wheels are fixed are from about eleven to twelve feet from the ground. The applicant climbed up as he thought that there was a screw loose in a wheel, put his arm between two wheels and perhaps after slipping, his hand was crushed, and he had to have his arm amputated. The defence was that when the power was changed from electricity to oil shortly before the accident, a notice (a copy of which is Ex. A) was put up, warning all the employees that "they were strictly prohibited from going up the machine when it was working and from doing any work other than theirs." The relevant provisions of the Act as amended by Act 15 of 1933 (Sec. 3 (1) and proviso (b) to it) are that the employer shall be liable for personal injury caused to a workman by accident arising out of and in the course of his employment . . . provided that the employer shall not be liable in respect of any injury and resulting in death caused by an accident which is directly attributable to . . . (ii) the wilful disobedience of the workman to an order expressly given or to a rule expressly framed, for the purpose of securing the safety of workmen . . .

I can see no reason whatever on the merits to interfere with the order of the learned Commissioner. The applicant adduced practically no evidence in support of his own statement that it was part of his duty to effect slight repairs to the machinery to prevent stoppage of work. His first witness, Maung Thein, did not work in that mill; he claimed to be an occasional visitor there, but said that it was the driver's duty to repair any such defect as a loose screw, and not the duty of a workman of the oil-press. The second witness, Maung Tun Ngwe, claimed to have worked for two days in this mill, though that was denied by the respondent, probably when, as the Commissioner thought, it was worked by electric power. He said that he was told by the other workmen that they had to go and effect petty repairs, but that he had no knowledge himself. His last witness, Maung Ba Mu, worked in another mill, but claimed to have constantly visited this mill. He says that the man in charge of the press had to look after the machinery above his press if anything went wrong, and that he had seen witness Maung Din doing some repairs. That was the only man he mentioned. He really could have had no knowledge that it was part of the press-man's duty. The learned Commissioner held that there was reliable evidence for the respondent to show that the employees were forbidden to meddle with the machinery, and as I have said, I see no reason to interfere with his finding.

One thing, however must be commented on, and that is the cases which have been cited to us in support of the appellant's contention that the accident arose while performing part of his duty, or that even if he was not repairing the machinery in the course of his employment he was entitled to compensation. It is often dangerous to cite English cases quoted in Indian commentaries without ascertaining whether the English law applicable is the same as the Indian law. In the present instance the English law is radically different from the Indian law, and the cases quoted are therefore entirely inapposite. Under the English Act of 1897 [S. 1, sub-s. (2) (c)] the

**employer** is liable to pay compensation, provided that if it is proved that the injury to a workman is attributable to serious and wilful misconduct of that workman, any compensation claimed in respect of that injury has to be disallowed, and the English Acts of 1906 [S. 1, sub-sec. (2) (c)] and 1925 [S. 1 (1), proviso (b)] also disallow any compensation for injury attributable to serious and wilful misconduct of a workman, but except cases where the injury results in death or serious disablement. The case in (1901) 2 K B 48,[1] which was decided under the Act of 1897, was a case where a carpenter had as part of his duty to sharpen his tools on a grindstone rotated by machinery. He had received orders not to touch the machinery, but tried to replace the band that rotated the machinery despite those orders, and in doing so was injured. It was found that his forgetting the order as to not touching the machinery was not unnatural, and might well be regarded as a venial act, and not as serious and wilful misconduct, and that therefore he was entitled to compensation. 5 Butterworth 80[2] was a case decided under the Act of 1906, where the workman died, and therefore the question of wilful misconduct did not arise. Other similar cases cited need not be discussed. Under the Indian Act, the sole question is whether the workman wilfully disobeyed a rule devised for the purpose of securing the safety of workmen, and not whether that disobedience amounted to misconduct, serious or otherwise. For the reasons given this appeal must be dismissed with costs.

**Baguley J.**—I agree. Had the appellant in a moment of forgetfulness put out his hand and touched some machinery he had been forbidden to touch, then it might have been regarded as something less than wilful disobedience; it might perhaps have been something more in the nature of momentary forgetfulness. In the present case the man had to climb up a matter of 11 or 12 feet. Such a climb cannot be done instantaneously, and doing that must be regarded as showing that his meddling with the machinery he had been forbidden to touch was wilful disobedience,

K.S./R.K. *Appeal dismissed.*

## A. I. R. 1938 Rangoon 290

MOSELY J.

*A. S. Chettyar Firm* — Applicant.

v.

*P. R. S. Meera Pillay and another* — Respondents.

Civil Misc. Appln. No. 33 of 1937, Decided on 21st September 1937, from decision of High Court, in S. A. No. 402 of 1936.

**(a) Civil P. C. (1908), O. 2, R. 2—Suit for specific performance of contract of sale—First cause of action is execution of registered sale deed—Claim for possession is distinct cause of action arising from deed itself.**

In a suit for specific performance of a contract of sale the cause of action that first arises is one for performance of that contract by execution of a registered deed of sale. It may be that possession will be handed over after a decree for specific performance has been granted, and the question of possession is a contingency that need not necessarily arise until a decree for specific performance has been passed and is then a new and distinct cause of action arising from the deed itself. [P 291 C 2]

**(b) Civil P. C. (1908), O. 2, R. 2—Failure to claim relief for declaration and possession — Subsequent suit for those reliefs is barred.**

Where a person failed to include in his suit the whole of the claim which he was entitled to make in respect of a cause of action and also omitted to claim the relief of a declaration and restoration of possession in respect of the land sold in execution, and failed to obtain the leave of the Court to sue for such relief, a subsequent suit for those reliefs is barred by the provisions of O. 2, R. 2, Civil P. C. : *A I R 1916 L B 43; 5 C W N 559; A I R 1931 Mad 705* and *33 All 244, Ref.* ; *A I R 1933 Bom 398, Disting.* [P 292 C 2]

N. K. Bhattacharyya — *for Applicant.*

E. Hey — *for Respondents.*

**Order.** — This is an application for review of an order summarily dismissing the appeal in second appeal of the plaintiff-appellant, the A. S. Chettyar Firm by its managing partner Annamalai Chetty.

The facts of the litigation in question are as follows: Defendant-respondent 1, P. R. S. Meera Pillay, obtained a decree for nearly Rs. 2500 against A. S. Swaminathan Chettyar in Civil Regular No. 295 of 1927 of this Court. The decree was executed in the Sub-divisional Court of Yandoon, Maubin District, in Civil Execution No. 25 of 1928, by the attachment of the property now in suit said to belong to Swaminathan. The M. R. M. S. Firm by its partner, the same Annamalai Chetty, filed an application for removal of the attachment and a suit for a declaration of its title to the property attached, both of which were dismissed,

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1. White-head v. Reader, (1901) 2 K B 48=70 L J K B 546=2 K B 48=84 L T 514=17 T L R 387=65 J P 403=49 W R 562.
2. Mawdsley v. West Leigh Colliery Co. Ltd., 5 Butterworth 80.

and the property was sold on 11th March 1929 to Meera Pillay. Over a year later in May 1930 the same Annamalai Chetty filed Suit No. 246 of 1930 of this Court, this time as managing partner of the A. S. Chettyar Firm against Meera Pillay and A. S. Swaminathan Chettyar for a declaration that the decree in Suit No. 295 of 1927 of this Court was not a decree against the A. S. Firm, but one against Swaminathan personally. A decree was given accordingly in August 1932. During the pendency of this last suit Meera Pillay conveyed the property in suit to second defendant respondent here, the S. R. M. C. T. M. Chettyar Firm, on 7th April 1932. Over three years later the A. S. Firm brought the suit now under appeal against P. R. S. Meera Pillay and the S. R. M. C. T. M. Chettyar Firm for a declaration of its title to the property in suit, for possession of the same, and for a declaration that the sale and purchase in the execution proceedings in the Subdivisional Court did not affect the property which belonged to it.

The trial Court dismissed the suit on the finding inter alia that O. 2, R. 2 applied and that as the plaintiffs had neglected to sue in Civil Regular No. 246 of 1930 of this Court for the present reliefs, they were debarred from doing so in this suit. This contention was upheld by the lower Appellate Court.

The lower Courts remarked that it was difficult to see what the plaintiffs' cause of action was in Suit No. 246 of 1930 unless it was an infringement of their rights to the property by the execution proceedings, for as was said in the decree in Civil Regular No. 246 of 1930, the previous decree in Civil Regular No. 295 of 1927 was clearly one against A. S. Swaminathan Chettyar personally, and it cannot be said that that decree was an infringement of the plaintiffs' rights. Had the execution proceedings been brought to the notice of the Court in the course of Civil Regular No. 246 of 1930, doubtless the plaintiff would have been directed to sue for further relief than a mere declaration.

It is argued for the plaintiff in this case that his cause of action in Civil Regular No. 246 of 1930 was the decree in Civil Regular No. 295 of 1927 only, irrespective of the execution proceedings, which of course had culminated in the sale of the property prior to the institution of Civil Regular No. 246 of 1930. The authority relied on by the appellant is 57 Bom 456.[1] That was a case where a widow got an order from the High Court for the guardianship of the person and property of her minor son, and for permission to sell a certain piece of land to Sanghani. Some years later the minor's uncle as next friend of the minor sued to revoke the widow's appointment as guardian, and for a declaration that the sale was not binding on the minor. He obtained a decree for both reliefs. Sanghani then sued in the Thana Court to recover possession of the property, and it was contended that the decree of the High Court which declared that the sale was not binding was without jurisdiction as the property was situate outside the limits of the original jurisdiction of the High Court, and it was also contended that the suit was barred by the provisions of O. 2, R. 2.

It was there held that the plaintiff could not have asked for possession in the suit on the Original Side of the High Court until the sale was set aside, and that the cause of action was therefore different. Cases were relied on in this connexion where it had been laid down that though a claim for possession might have been made it was not obligatory upon the plaintiff to make a claim for possession in a suit for specific performance; but those cases, I consider, can be differentiated on the ground that in a suit for specific performance of a contract of sale the cause of action that first arises is one for performance of that contract by execution of a registered deed of sale. It may be that possession will be handed over after a decree for specific performance has been granted, and the question of possession is a contingency that need not necessarily arise until a decree for specific performance has been passed, and is then a new and distinct cause of action arising from the deed itself. In 57 Bom 456[1] however where the property had already been sold, the right to get a declaration that the sale was not binding, and the right to claim possession were in my opinion reliefs in respect of the same cause of action.

It was also said in that case that the plaintiff could not have been granted the relief for possession, and that therefore no question arose on account of the Court not having granted leave under O. 2, R. 2, sub-rule (3); but here again I must differ with respect, for, it has been held in a series of cases that the competency of the Court to grant such leave does not affect the question: *see* for example 9 Bur L T 93,[2] A I R 1931 Mad 705[3] and 33 All 244.[4] The question which arises is what was the plaintiff's cause of action, for he cannot be allowed arbitrarily to split what is in essence one and the same cause of action. O. 2, R. 2, Civil P. C., is as follows;

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[1] **Keshavlal Sakhidas v. Amarchand Somchand, A I R 1933 Bom 398=148 I C 116 = 57 Bom 456= 35 Bom L R 680.**

> (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Where a plaintiff omits to sue in respect of or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
>
> *Explanation.*—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

The classic definition of "cause of action" by Brett J. in 8 C P L R 107[5] is

> every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.

That is to say a cause of action consists of the facts upon which the plaintiff is entitled to base his claim (in respect of the cause of action), and therefore this definition cannot be helpful in the present instance. Another definition given by Lord Buckmaster in 49 I A 9[6] is as follows:

> The "cause of action" is the cause of action which gives occasion for, and forms the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings.

It appears to me to be impossible to hold that the decree in Civil Regular No. 295 of 1927 of the High Court and the execution proceedings of that decree in Yandoon were separate or distinct causes of action, and that would have perhaps been even clearer if the execution proceedings had been in the same Court as the original decree. This was not even a case where other execution proceedings might subsequently have followed in other districts of Burma in execution of the same decree, for the decretal amount was fully satisfied by this one execution. The appellant's proper course would have been to file a suit not in the High Court but in the Mofussil Court, for a declaration that the decree of the High Court was one against A. S. Swaminathan Chettyar personally and that the property of the firm was unaffected by it and by the execution proceedings: *see* on this 5 C W N 559[7] and other rulings cited in Mulla's Commentary at page 122.

It appears to me therefore that the appellant failed to include in his suit Civil Regular No. 246 of 1930 of the High Court the whole of the claim which he was entitled to make in respect of the cause of action in the execution proceedings: O. 2, R. 2, sub-rule (1). He also omitted to claim the relief of a declaration and restoration of possession in respect of the land sold in execution, and failed to obtain the leave of the High Court to sue for such relief: O. 2, R. 2, sub-rule (3). I agree therefore that the suit under appeal is barred by the provisions of O. 2, R. 2, and this application in review will be dismissed with costs; advocate's fee five gold mohurs.

B.D./R.K. *Application dismissed.*

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[2] Maung On Gaing v. Ma On Sin, A I R 1916 L B 43=33 I C 135=9 Bur L T 93.

[3] Rama Rao v. Venkayamma, A I R 1931 Mad 705=134 I C 803.

[4] Mohammad Fayaz Ali Khan v. Kallu Singh, (1911) 33 All 244=8 I C 689=7 A L J 1201.

[5] Cooke v. Gill, (1895) 8 C P L R 107 = 42 L J C P 98=28 L T 32=21 W R 334.

[6] Muhammad Hafiz v. Muhammad Zakariya, A I R 1922 P C 23=65 I C 79=49 I A 9=44 All 121 (P C).

[7] Kedar Nath Mukerjee v. Prosonna Kumar Chatterjee, (1901) 5 C W N 559.

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## A. I. R. 1938 Rangoon 292

MOSELY AND DUNKLEY JJ.

*S. T. R. M. Firm* — Appellant.

v.

*Andathal and others* — Respondents.

First Appeals Nos. 87 and 88 of 1937, Decided on 7th December 1937, against order of Asst. Dist. Court, Hanthawaddy, D/- 24th April 1937.

**(a) Civil P. C. (1908), S. 47 — Application under O. 21, R. 22 falls under S. 47.**

Application under O. 21, Rule 22 falls under S. 47 and can be enquired into by the executing Court. [P 293 C 1]

**(b) Civil P. C. (1908), O. 21, R. 90, Proviso (b)—Rangoon Amendment — Application under O. 21, R. 90—Deposit is not necessary.**

Proviso (b) to Rule 90, O. 21, as amended in Rangoon requiring deposit is ultra vires. Further

Schedule Notification No. 44 of 27th January 1937 has removed the necessity of such a deposit: *A I R 1937 Rang 419, Rel. on.* [P 293 C 2]

P. B. Sen for D. R. Mitter — *for Appellant.*

R. A. R. Aiyar — *for Respondent 1.*

Kalyanwalla—*for Respondents 2 and 4.*

**Mosely J.**—These two appeals, Nos. 87 and 88 of 1937, are against two orders of the Assistant District Court of Hanthawaddy, dated 24th April 1937, and 14th June 1937. There was an application for execution of a decree against a firm and partners in it. It is said by the appellant in this case that two of the partners had been adjudicated insolvents, and the Official Receiver had been appointed receiver of their estates. Whether that is so or not is apparently in dispute: at all events, the second judgment-debtor, R. M. S. M. Somasundaram Chettyar, put in an application on 23rd March 1937, purporting to be under O. 21, R. 90, Civil P. C. in respect of certain properties, apparently properties of the firm which had been sold in these proceedings in execution. The first ground appears to have been misunderstood by the Court—it is said to have been made under O. 21, R. 22 (b), Civil P. C.—that an application for execution was made, or should have been made, against the Receiver as the legal representative of two of the partners in their personal capacity who were parties to the decree, and that therefore the Court executing the decree should issue notice to the Official Receiver. The learned Additional District Judge in refusing to go into this appears to have been under the misapprehension that the application was made under O. 21, R. 22 (a), which refers to applications for execution made more than three years after the date of the decree. Secondly, the application set out a ground under O. 21, R. 54, to the effect that no attachment by prohibitory order had been made or proclaimed. Lastly, the applicant's application fell under O. 21, R. 90. He applied to set aside the sale on the ground of fraud and material irregularity in conducting the sale.

The learned Additional District Judge in his first order, as I have said, wrongly refused to go into the application under O. 21, R. 22, which admittedly fell under S. 47, Civil P. C. He went into the application so far as it dealt with matters falling under O. 21, R. 54, and in his second order dismissed the application as groundless. He refused to go into any question falling under O. 21, R. 90, on the ground that no deposit had been made as required by proviso (b) to that Rule. The learned Judge, and also the advocates engaged on both sides, appear to have been in ignorance of the fact that Schedule Notification No. 44 of 27th January 1937 had removed the necessity for such a deposit. It may incidentally be remarked here that in 1937 R L R 268,[1] which dealt with a similar case occurring before the date of the Notification in question, which had to be decided as Notifications are not retrospective, it was held that that proviso is ultra vires. It is admitted in this case by the advocates on both sides that it is necessary to set aside both orders of the learned Additional District Judge, as the matter under O. 21, R. 54 may also fall under O. 21, R. 90, and has to be considered when enquiry is made into those matters. For these reasons these two appeals will be allowed and the orders in question set aside and the learned Additional District Judge will be directed to enquire into the three matters mentioned in the application by the second judgment-debtor specified there as falling variously under O. 21, Rr. 22, 54 and 90, Civil P. C. In the circumstances, there will be no order as to costs of these appeals, as clearly the appellant's advocate was in default in the trial Court in not drawing the attention of the Judge to the Notification in question.

**Dunkley J.**—I agree.

V.B.B./R.K. *Appeals allowed.*

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[1] O. N. R. M. M. Chettyar Firm v. Central Bank of India Ltd., (1937) 24 A I R Rang 419 =172 I C 102=1937 R L R 268 (F B).

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## A. I. R. 1938 Rangoon 293

MOSELY AND DUNKLEY JJ.

*Ma E Nyun*— Appellant.

v.

*Daw Ma Get and another* — Respondents.

Special Second Appeal No. 143 of 1937, Decided on 8th December 1937, against decree of Dist. Court, Amherst at Moulmein, D/- 26th February 1937.

**Buddhist Law (Burmese) — Inheritance — Share of children of first marriage in payin property brought to the second marriage as against second wife is three-fourths.**

**Where a Burman Buddhist leaves surviving him his children by a former marriage and also his**

second wife and his children by her, the children of the first marriage are entitled to three-fourths of the payin property, brought by their parent to the second marriage, as against their step-mother on their father's death : *A I R 1924 Rang 298 and A I R 1929 Rang 253, Foll. ; A I R 1925 Rang 340 (F B), Disting. : A I R 1919 L B 58, Dissent.* [P 294 C 1, 2]

U. E. Maung — *for Appellant.*

U. Tun Tin for Eunoose — *for Respondents.*

**Dunkley J.** — This appeal arises out of a suit for the administration of the estate of one Maung Shwe Zo, deceased. He was twice married. The first defendant-respondent Daw Ma Get is his second wife, and the second defendant respondent is one of the children of his first marriage. The plaintiff-appellant is another child of the first marriage. There were six children of the first marriage and two children of the second marriage. Four of the children of the first marriage claimed partition on the second marriage and therefore have no further claim in the estate. The only children who now have a claim are the appellant and respondent 2. Now, the sole point which has been argued before us, and which was the principal point in dispute before the lower Courts was the share to which the appellant and, of course, respondent 2 equally are entitled in the payin property of U Shwe Zo which was brought by him to the second marriage. The learned Subdivisional Judge, who tried the suit originally, held that the share of the children of the first marriage in this property was three-quarters. The learned District Judge on appeal has held that their shares are only five-eighths. In coming to this decision he relied on the case in 10 L B R 10.[1] Apparently the fact that this case was dissented from by a Bench of this High Court in 2 Rang 123[2] was not brought to his notice.

In this latter case, 2 Rang 123,[2] it was held that where a Burman Buddhist leaves surviving him his children by a former marriage and also his second wife and his children by her, the children of the second marriage do not upon his death become his heirs. Furthermore, in 7 Rang 578[3] it was held that the children of the first marriage are entitled to three-fourths of the payin property, brought by their parent to the second marriage, as against their step-mother on their father's death; and although it is not specifically stated in the judgment that there were children of the second marriage, it is clear that there must have been, because it was held that the share of the children of the first marriage in the hnapazon property of the second marriage was one-eighth, in accordance with the Full Bench ruling in 3 Rang 549.[4] In this last case it was held that where there are children of the second marriage the widow's share is increased, but that is the only case in which a larger share has been given to the second wife in consideration of the fact that there were children of the second marriage and it refers only to lettetpwa property, and different considerations must arise when the property is property of the second marriage to those which arise in the case of payin property. In the Section 10 of the Manugye, Vol. 10, it is stated that where a man and a woman, each having children, marry and have a common family, then on the decease of one parent the property of that parent shall be divided in the ratio of three shares to the children of that parent and one share to the step-parent.

Learned counsel for respondent 1 has been unable to support the decision of the learned District Judge, and it is clear from the judgments of this Court in 2 Rang 123[2] and 7 Rang 578[3] that the share of the plaintiff-appellant in the payin property of her deceased father is one-sixth of three-fourths, and not one-sixth of five-eighths as held by the learned District Judge on first appeal. This appeal is therefore allowed, and the judgment and decree of the District Court on first appeal are varied to this extent. By consent, there will be no order as to the costs of this appeal.

**Mosely J.**—I agree.

V.B.B./R.K. *Appeal allowed.*

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[1] **Ma Lay v. Tun Shwe, (1919) 6 A I R L B 58 =51 I C 588=10 L B R 10.**

[2] **Ma E Hmyin v. Maung Ba Maung, (1924) 11 A I R Rang 298=83 I C 426=2 Rang 123.**

[3] **Ma Nwe v. Ma Sai Da, (1929) 16 A I R Rang 253=121 I C 774=7 Rang 578.**

[4] **Ma Nyein E v. Maung Maung, (1925) 12 A I R Rang 340=90 I C 341=3 Rang 549 (F B).**

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## A. I. R. 1938 Rangoon 294

ROBERTS C. J. AND DUNKLEY J.

*In the matter of P, a lower Grade Pleader, Kyaukse.*

Misc. Appln. No. 81 of 1937, Decided on 26th January 1938.

**Legal Practitioners Act (1879), S. 13—Pleader bribing witnesses who are likely to give**

**evidence into swearing false affidavits and also trying to tamper other witnesses during hearing of petition—His conduct disentitles him to continue as a pleader.**

Where a pleader bribes certain witnesses who are likely to be summoned by the opposite side in connexion with an election petition, into swearing affidavits to the effect that they do not know anything about the matter and also tries, during hearing of the petition, to tamper with other witnesses by offering them bribes, his conduct is such as disentitles him to remain on the roll of pleaders. [P 295 C 1, 2]

U Twa Aung — *for Respondent.*

**Roberts C. J.** — This matter comes before us under S. 13, Legal Practitioners Act to take such action as we may deem fit in the case of one P, a lower grade pleader of Kyaukse, by reason of a report made, on 9th July of last year, by the Election Petition Commissioners of Mandalay. On this report it appears that the Commissioners were satisfied that the pleader in question had been guilty of grave irregularities in connexion with an election petition. His enthusiasm for politics was such that he joined with another person in obtaining affidavits from witnesses, who were about to be called by the opposite side, saying that they knew nothing about the matter. He paid Rs. 15 each to them for swearing such affidavits. It is quite clear that buying of documents of this character, by which a witness should be afterwards confronted, is striking at the very root of the principles upon which any judicial proceeding is carried on. And if these incidents had stood alone I do not think it would have been possible to hold that a pleader who was a party to such a thing could be allowed to continue as such. But whilst the hearing was in progress this pleader tried to tamper with other witnesses and offered them bribes ; and we are satisfied that his conduct on these two occasions cannot be put down to a mere momentary lapse, but was part of a systematic endeavour to interfere with the course of justice. When the Commissioners asked him for an explanation, he declined to give one. That may have been wise on his part since it may be that he could only have exonerated himself by saying something on oath which was untrue. Be that as it may, the course that we have to take in a case of this nature is clear, and if we did not take it the amount of corruption which takes place at elections would undoubtedly be increased. Responsible persons must realize that, in order to keep elections, whether municipal or to the House of Representatives, clean, those who interfere with the course of justice by giving bribes cannot expect to receive lenient treatment. Accordingly, we feel obliged to strike the pleader P off the register of pleaders.

**Dunkley J.** — I agree.

R.M./R.K. *Order accordingly.*

## A. I. R. 1938 Rangoon 295

MACKNEY J.

*Nga Ta Te and others* — Appellants.

v.

*The King.*

Criminal Appeals Nos. 1048 and 1097 of 1937, Decided on 1st November 1937, from order of 2nd Addl. Special Power Magistrate, Kyaukpyu, D/. 2nd August 1937.

**(a) Criminal Trial — Evidence — Believing defence witnesses does not imply that prosecution witnesses are liars.**

To believe the evidence of the defence witnesses does not imply that the prosecution witnesses are deliberately lying, for, they may be speaking in good faith but in error; whereas if Court accepts the evidence of the prosecution witnesses, the Court must also find that the defence witnesses are definitely lying and for this there is no justification. [P 296 C 2]

**(b) Criminal Trial—Defence witness.**

A Court is not entitled to decide before-hand that a witness cited by the defence is unworthy of credit. [P 296 C 2]

Zakaria — *for Appellants.*

**Judgment.**— The four appellants all belong to the village of Daingbon which is three hours' journey from Pinkha. The appellant Shwe Zan is the son of the headman of Daingbon who is the possessor of a single barrelled gun. In the early hours of the night of 25th April 1937, Kheik Ke's house in Pinkha was attacked by four robbers one of whom was armed with a gun. Another robber armed with a dasho inflicted severe injuries therewith on two of the inmates of the house Maung Daung and Ma Mein Ma. The four robbers made good their escape although the villagers came round and watched them. It is I think apparent that the villagers did not dare to go very close because one of the robbers was armed with a gun which he fired. Another inmate of the house, Pa Bon, says that it was We Pho Aung that was armed with a da and cut Ma Mein Ma and Maung Daung. She appears to have mentioned this from the outset. Ma Mein Ma and Maung Daung became unconscious for a time and it was not until after the headman Maung Tauk had arrived that they were able to speak. Maung Tauk says that they told him that it was We Pho Aung that had cut them. Ma Mein Ma at that time did not mention Shwe Zan's name. In Court she not only does mention Shwe Zan's name but she says that he was armed with a gun and that she noticed the gun to be a single barrelled gun and had a brass plate on the stock. This, of course, is merely to fasten the crime more securely on to Shwe Zan, for his father's gun is single barrelled and the stock is said to have been repaired recently. I am afraid that this is an instance of the exaggeration which is noticeable in this case. Three other villagers state that they recognized all four appellants : they are Nga Lin, Taung Bauk Ke and Nga Lwe. They say that they recognized them by the light of the moon. It was the 2nd lazok of Kason. Now Taung Bauk Ke and Nga Lwe were about 100 feet away from the house. I do not think it is possible that anybody could recognize with certainty an individual at that distance.

Maung Kan, Taung Bauk Ke's son, who was with Taung Bauk Ke, professes to have recognized only Shwe Zan and Ta Te. Having gone so far, he would go no further and he cannot even remember the names of the other two men whom his father recognized. Nor can he even remember the name of the robber whom Ma Pa Bon accused. Nga Lin says that he recognized the men from a distance of about 50 feet away. In cross-examination he stated first that he did not tell anyone that he knew the names of these persons until the headman came. He then retracted this statement and said that when Ma Pa Bon told them that she recognized We Pho Aung he mentioned the names of the others. I do not think that he is speaking the truth. Maung Pin who himself says that he recognized We Pho Aung from a distance of 50 feet states that neither Lin nor Lwe mentioned the names of the robbers although they said they recognized the men. He does, however, say that Taung Bauk Ke mentioned their names. I have grave doubts that these witnesses can really be certain as to the identity of the robbers. It appears to me very probable that they are merely making a guess. As regards Ma Pa Bon, she admits that she had never spoken to We Pho Aung before, although she knew him, and that the man who she says is We Pho Aung had a cloth tied round his head and under his chin. There were two tin lamps in the house. In the excitement of the moment it does not appear to me at all improbable that she might have made a mistake. Ma Mein Ma has been shown not to be worthy of credence. Maung Daung, it is true, says that he recognized We Pho Aung, but the same criticizm can be applied to his identification as to Ma Pa Bon's.

On the other hand, the evidence offered by the appellants to show they could not have taken part in the robbery is particularly strong and especially strong in the case of Shwe Zan, Ta Te and We Pho Aung. The Magistrate has dismissed the evidence far too airily. There are a number of witnesses who state definitely that Shwe Zan was in Daingbon village late that evening. The evidence of the prosecution witnesses can be believed only on the supposition that all these witnesses are deliberate liars. The mere fact that they give evidence that Shwe Zan was in the village and that Shwe Zan is a son of the headman is not a sufficient reason for disbelieving them. I do not see how it is possible to reject their evidence. The same applies to the evidence offered on behalf of We Pho Aung and Ta Te which is equally strong and definite. I do not see why these witnesses are not entitled to be believed just as much as the prosecution witnesses. At least to believe the evidence of the defence witnesses does not imply that the prosecution witnesses are deliberately lying, for they may be speaking in good faith but in error; whereas if we accept the evidence of the prosecution witnesses we must also hold that the defence witnesses are definitely lying, and for this we have no justification whatsoever.

An attempt was made to show that the gun which was used was the gun of Shwe Zan's father. An empty cartridge was found in Kheik Ke's house and was sent with the gun to the expert for examination. The prosecution did not produce the expert's report, from which it may be concluded that it was against the prosecution. I have in fact referred to the police papers and I find that the expert reported that the cartridge was not fired from the headman's gun. Before leaving this point I must notice that the Magistrate erred very greatly in refusing to call Shwe Zan's father who was cited by Shwe Zan as a witness. A Court is not entitled to decide before-hand that a witness cited by the defence is unworthy of credit. It was the duty of the Magistrate to have summoned

Shwe Zan's father and to have examined him. Had this appeal not been allowed on other grounds it would have been necessary for me to direct that this witness be examined. As regards Gaung She it is true that there are some discrepancies in the evidence of the witnesses, but even so their evidence does hold together to a considerable extent and is in my opinion sufficient to counter-balance the evidence of the prosecution against this appellant. In all the circumstances of the case it appears to me that it would be unsafe to uphold the convictions of these appellants. Their appeals are therefore allowed, the finding and sentence passed upon them set aside and they are acquitted.

B.D./R.K. *Sentence set aside.*

## A. I. R. 1938 Rangoon 297

MACKNEY J.

*U Ba Hla and others* — Applicants.

v.

*Maung Tun Sein* — Opposite Party.

Criminal Revn. Appln. No. 484-B of 1937, Decided on 23rd September 1937, from order of 4th Addl. Magistrate (2), Pyinmana, D/- 1st September 1937.

**Criminal P. C. (1898), S. 476—Duty of Court — Magistrate must give fair opportunity to party against whom enquiry is directed to present his case — Magistrate should allow him to cross-examine any witnesses which are not examined before.**

Where a Magistrate decides to hold a preliminary enquiry under S. 476, the Magistrate should give an opportunity to the party against whom the enquiry is directed to cross-examine the witnesses produced by the applicant. If he refuses to allow such party to cross-examine the witnesses which were not examined before, the order cannot stand: *A I R 1937 Rang 62, Rel. on ; A I R 1926 Mad 1008, Explained.* [P 298 C 1]

Beecheno — *for Applicant.*

**Order.**—The respondent Maung Tun Sein was the principal accused in Criminal Trial No. 16 of 1936 of the Fourth Additional Magistrate of Pyinmana for charges under Ss. 420 and 420 read with S. 144, Penal Code, the prosecution having been instituted on information given by applicant 1, U Ba Hla, A. T. M. U Ba Hla, at the time this case was instituted, was the Subdivisional Police Officer at Pyinmana in the Yamethin District. The other three applicants, Maung Po Sin, Maung Po Nyi and Maung Aung Kin, are members of the Yamethin District Police Force who gave evidence for the prosecution against Maung Tun Sein. The Magistrate acquitted Maung Tun Sein as well as his co-accused, and as he was of the opinion that the case was, as he called it, a case of "plant", he classified it as false. His judgment was passed on 25th August 1936.

On 9th September 1936 Maung Tun Sein filed applications in the Court of the Fourth Additional Magistrate of Pyinmana, being Criminal Miscellaneous Nos. 34, 35, 36 and 37 of 1936, requesting the Magistrate to order the prosecution of U Ba Hla, A. T. M., Maung Po Sin, Maung Po Nyi and Maung Aung Kin in respect of certain offences said to have been committed in relation to this trial, Ss. 211 and 193, Penal Code being specified in particular. The enquiry has been most unduly prolonged. I should have thought it was most desirable for the sake of the discipline of the police force of the district that an enquiry of this nature should have been treated with the utmost despatch. It has now been pending for over a year and the Magistrate has reached no conclusion whatsoever. The Magistrate having decided that it will be necessary for him to hold a preliminary enquiry, the respondent has asked him to examine a certain number of witnesses who were not examined in the trial against him—Criminal Trial No. 16 of 1936. He further requested the Magistrate not to permit the applicants to cross-examine these witnesses on the ground that they have no right to do so. The Magistrate has passed an order granting this application, that is to say, declaring that he will not allow the applicants to cross-examine the witnesses whom he may think fit to examine in the course of this preliminary enquiry. He has relied principally on the case in 50 Mad 660.[1] In that case it was said :

> In order to arrive at a decision, in such a matter as the present, the Court may, if it thinks fit, hold such preliminary enquiry as it considers necessary. The nature, method and extent of the preliminary enquiry are, it seems to me, entirely at its discretion. The enquiry need not be such as to satisfy the Court that an offence actually has been committed, but merely that an offence appears to have been committed. . . . . I cannot believe that the law intends that a Court which has complete discretion to refuse to hold any enquiry at all must, if it holds an enquiry, issue notice to the party and give him the equivalent of a full dress trial.

The learned Judges accordingly disallowed the objection of the applicants before them that they were not allowed to cross-examine the witnesses who gave evidence against them at the preliminary enquiry. It will be noticed that the learned Judges did not say that it would be illegal for the Magistrate to permit cross-examination of the witnesses, but that the matter is entirely at the discretion of the Court. I do not think that they go so far as to say that in no case would the Court be justified in allowing the respondents before it to cross-examine the witnesses. At the time he passed his order the learned Magistrate did not have the advantage of having before him the decision of this Court in 1937 R L R 276.[2] At page 283 Dunkley J. in discussing the nature of the preliminary enquiry which the Court may hold under S. 476, Criminal P. C. says:

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[1] Raja Rao v. Emperor, A I R 1926 Mad 1008=97 I C 669=27 Cr L J 1149=50 Mad 660=51 M L J 331.

> It is a fundamental principle of justice that no order to the prejudice of a person shall be made without his being heard, and therefore before an order directing the filing of a complaint against a person is made, that person must be heard and must be given full opportunity of showing cause against the making of such an order. As I have said when the order depends upon matters already on record no preliminary inquiry is necessary; but when it depends upon evidence of other facts which are not to be found on the record in fairness to the person accused a preliminary inquiry must be held, and in that preliminary inquiry he must be made aware of the allegations which are made against him and of the materials upon which those allegations are based. If the order is to depend upon additional evidence, then he must be made aware of what that additional evidence is and although in some cases it may not be necessary that the evidence should be recorded in his presence or that he should be given an opportunity of cross-examining the witnesses who gave that evidence, yet I have no hesitation in saying that when the additional evidence is procured as a result of an application by a private party, it is essential that if justice is to be done, the evidence should be recorded in his presence and he should be given an opportunity of cross-examining the witnesses; otherwise how can he be in a position to rebut the allegations which are made against him in the application?

With these remarks I respectfully agree. I think that in the present case the Magistrate gravely erred in the exercise of his discretion in refusing point blank to allow the applicants to cross-examine any of the witnesses whom the Court may think it desirable to question. The Magistrate's order is therefore to be regarded as withdrawn and he is directed to allow the applicants to cross-examine the witnesses that may be examined by the Court in its preliminary enquiry. However in allowing such cross-examination the Court will do right to bear in mind the object for which it is conducting the enquiry. Its object is to decide whether it is expedient in the interests of justice that an enquiry should be made into the offences alleged: it is not to decide whether in fact these offences have or have not been committed. As a matter of fact I do not suppose that the learned counsel who appears for the applicants will in the interests of his clients find it necessary to cross-examine the witnesses as thoroughly as he might do at the trial of his clients if that trial be instituted.

The Magistrate whether in a preliminary enquiry of this nature or in any other enquiry or trial under the Procedure Code, must endeavour to conduct the proceedings is such a manner as not to create any impression in the minds of the parties against whom the proceedings are directed that they are not being given a fair opportunity of presenting their case. With these remarks the proceedings shall be returned to the Fourth Additional Magistrate of Pyinmana. He is directed to proceed with the preliminary enquiry with the utmost despatch: and if possible the proceedings should be continued from day to day until they are concluded, and no other work should be given precedence to this unless it be of a particularly important and urgent nature. My remarks as to the delay which then ensued in the disposal of this matter do not apply to the present Fourth Additional Magistrate of Pyinmana but are made on a consideration of the progress of the case from the beginning.

K.B./R.K. *Case remanded.*

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## A. I. R. 1938 Rangoon 298

MACKNEY J.

*Maung Ba Yin*

v.

*The King.*

Criminal Appeal No. 878 of 1937, Decided on 21st September 1937, from order of Sessions Judge, Bassein, D/- 3rd July 1937.

**Penal Code (1860), S. 376—Rape cannot be inferred from mere existence of injury to vagina.**

**The mere existence of the injury to the vagina does not necessarily and inevitably justify the inference that there had been rape. [P 300 C 2]**

**Judgment.—Ma Sit To, a girl not yet 13 years of age, was employed by the appellant Maung Ba Yin and his wife to look**

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[2] Mohamed Kaka v. District Judge Bassein, A I R 1937 Rang 62=168 I C 632=1937 R L R 276=38 Cr L J 615.

after their children. One day in the early morning Ma Sit To returned to her mother Ma Thein Hla's house saying that she had fever. About ten days later, that is to say, on 1st December 1936, Ma Sit To died. The appellant has been convicted under S. 376, Part 1, I. P. C. for raping the girl Ma Sit To, and has been sentenced to suffer transportation for life. The conviction rests on the alleged accusation made by Ma Sit To some 3, 4 or 5 days after she had returned to her mother's house. This accusation was held to have been confirmed by the evidence of the medical officer who conducted the post mortem examination on Ma Sit To's body on 5th December 1936 when the body was already decomposed : and further by certain circumstances which the learned Sessions Judge held to have been proved, showing that Maung Ba Yin had the opportunity of committing the rape the night before the girl returned to her mother's house and showing that on learning of the girl's accusation the appellant took steps to pacify or control her mother Ma Thein Hla and step-father Po Hmat. I do not propose to examine the evidence in detail. The learned Judge has already dealt with this evidence very fully in his judgment. It is unfortunate that practically all the witnesses are untrustworthy as was manifest in the course of the trial. There is one passage in the judgment of the learned Sessions Judge which I think may usefully be quoted. He says :

> Now conceding that Ma Thein Hla and Po Hmat are liars and devoid of the rudiments of principle, that Aung Gyi and his son are unscrupulous, and determined to destroy the accused, that Pan Yi was smarting under a sense of resentment, that Ma Aung Byu is Aung Gyi's sister, Ma E Yon, Ma Thein Hla's sister, and Ma Thaung Pan Yi's wife, there is one admitted circumstance in this case, which makes it clear that the evidence of these witnesses who say that, before her death, Ma Sit To had denounced the accused as her ravisher, cannot be rejected as a fabrication of malicious minds, and that is the accused's own admission and Ma Thein Hla's evidence that on his return from Bassein (which might have been as early as 26th November) he went to Ma Thein Hla's house and asked Ma Sit To why she was making a false statement against him. In this Court the accused's wife Ma Hla Sein endeavoured to deny that she had heard that her husband had been accused of the rape, but was compelled to admit that, on her husband's return, she told him about the accusation, but endeavoured to explain this away by saying that Ma Thein Hla had told her that Maung San had advised her to send Ma Thein Hla to hospital, and make a statement implicating the accused.

I agree with the learned Sessions Judge that this reasoning does justify the conclusion that the girl did accuse the appellant Maung Ba Yin of having raped her. It may be noted here that the evidence seems to show that Maung Ba Yin left the village on the afternoon of 17th November in the company of Maung Pan Yi, uncle of the deceased girl, in order to go to Bassein where Pan Yi had to appear before a Court on 19th November. Ba Yi was surety for Pan Yi's appearance. Ba Yin on this occasion declined to continue to be surety for Pan Yi and the latter was accordingly remanded to custody. Pan Yi did not return to the village till the evening of 1st December, the day on which Ma Sit To died. He made his report to the headman the next day. Ba Yin however must have returned earlier than this. His wife states that he returned some three or four days before Ma Sit To died. So far as can be gathered from other hints in the evidence this appears likely to be the case. The appellant must have been away from his house for seven or eight days at least. Now the first point which attracted my notice was that practically all the witnesses seem to suggest that the girl was ill for about ten days before her death. The witnesses are somewhat vague as to the exact period : but most of them do seem to agree that the period was about ten days. Now if Ma Sit To left Ba Yin's house on 17th November she would have been ill for 15 days. Ma Hla Sein states that it was some day or two after Maung Ba Yin had gone to Bassein that Ma Sit To left her house, and so far the evidence seems to suggest that this statement is true.

The prosecution witnesses sought to show that on the afternoon and evening of 16th November Ma Hla Sein together with Ma Thein Hla and another woman Ma Mai Han went to the neighbouring village of Hainggyi, where there is a market, leaving Ba Yin alone in the house with Ma Sit To. They did not return till late in the evening. Ma Thein Hla states that on reaching Ba Yin's house she found it in darkness and called out to her daughter to take her basket. Then the appellant called back "Ma Sit To cannot come as she has cut her leg with a broken bottle," and he opened the door and showed the light. She went into the room and saw her daughter lying asleep but did not speak to her or awaken her. The next morning when her daughter came home she complained to her that she was not feeling well : she had a blanket over her (suggesting fever), but she had no cut on her leg. As the learned Sessions Judge has observed, the witnesses are untrustworthy and it seems to me a little difficult to hold that it has been certainly proved that it was on the evening of 16th November that the party went to Hainggyi: and that it was next day that Ma Sit To came home.

Even if it be conceded that Ma Sit To did make this accusation some days after leaving Ba Yin's house, it has first to be shown that this statement is admissible in evidence under S. 32, Evidence Act. It has to be shown that the statement is a statement made by Ma Sit To as to the cause of her death or as to any of the circumstances of the transaction which resulted in her death, that is to say, it has to be shown that she was raped and that the rape resulted in her death. On reading the medical evidence which is on record in the case, I was quite unable to see how it could be held that this evidence established the fact that Ma Sit To's death was due to rape or indeed that she had been raped. There were certain points in the medical evidence which struck me as being peculiar and for greater certainty I secured the further evidence of Lieut.-Colonel Treston M.C., I.M.S., a well-known expert in gynæcology. His evidence more than confirms my distrust of the correctness of the inference which has been drawn from the state of Ma Sit To's body as to the ultimate cause of her death. (After discussing the medical evidence the judgment proceeded further.) According to Ma Thein Hla it was only three days after her return home that she said that Ba Yin had raped her. It was then only that her mother found, she says, blood dripping from her vagina which was swollen. Now I think this shows conclusively the falsity of the case. If it were true that the girl had been violently raped on the night before she came home, the mother must have seen the blood before three or four days had elapsed. It was only after the report of rape had been made and when the witness came round to see the girl that it was noticed that her longyi was stained with blood. The learned Sessions Judge has rightly observed that this woman Ma Thein Hla is a woman of no character at all. To my mind it is not at all inconceivable that she herself caused the injury to her daughter's vagina. She may have thought that this treatment was necessary for whatever ailment she conceived her daughter to be suffering from: and it is even possible that her daughter may have told her some story about having sexual intercourse with someone. (Subsequently the idea may have come into her head, as it often comes into the head of persons of her character, to seek to gain advantage from a false accusation of rape and in this she may have been abetted by her daughter.) These however are mere surmises. I mention them merely to emphasize the point that the mere existence of the injury to the vagina does not necessarily and inevitably justify the inference that there had been rape. So far from this being so in the present case I think that the medical evidence and such details of the course of the illness as we have, show that the injury was not due to rape.

It is significant that after the complaint of rape had been made the Burmese Doctor Po Aung was summoned. Ma Thein Hla says that he did not examine the deceased's body but merely rubbed a little powder on the upper part of her body and treated her thus for two or three days, and then told Ma Thein Hla that owing to frequent hæmorrhages he could not cure her; so that it was only several days after the girl left Ba Yin's house that we hear of frequent hæmorrhages. I have said that Ma Thein Hla does not appear to have noticed that her daughter could not walk properly when she returned home. I say this because in her first account given in her examination-in-chief she omits to say that she noticed that. It is only in cross-examination that she says that when the deceased came home she could neither walk nor eat. Now if this were true it is inconceivable that Ma Thein Hla would not have closely questioned her daughter as to the reason why she could neither walk nor eat. Po Hmat, the step-father, says that the deceased came home at about 7 or 8 A. M. next morning (after the visit to Hainggyi): her mother questioned her and she said that she had come home because she was ill. The deceased could not walk properly: she would not eat any solid food. He says:

> After she had been home for nine days, I heard her mother ask her 'what is the matter with your abdomen? Your glands appear swollen.' Then the girl said 'Mother, uncle Ba Yin did me wrong and had intercourse with me.'

I do not know whether the mother's question suggested the answer to the girl and the mother really believed the intercourse had taken place only so recently (although she professed to do so for the purpose of establishing the charge) and she suspected the reason for the swelling of the abdomen. If so, the remark of the Colonel Treston in regard to his experience of the cause of rents in this particular part of the vagina is of great interest.

I think I have said enough to show that far from it being clear that the peritonitis was due to the rent in the vagina which was caused by rape, on the contrary it would appear that the rent in the vagina was not caused by rape — supposing the rape to have taken place on the date fixed by the prosecution witnesses — and therefore that rape was not the cause of Ma Sit To's death and consequently her statements as to the rape are inadmissible; and if the peritonitis was caused owing to an infection introduced through the rent in the vagina, then that rent was made long after the girl had left Ba Yin's house, and her story that she was raped cannot be believed in any case. The learned Sessions Judge considers it significant that the appellant tried to stop the girl making this accusation against him, and did succeed in stopping Ma Thein Hla from doing so, even before the girl died. Considering that the appellant was well aware that he had bitter enemies who were taking interest in the matter, it appears to me not at all unnatural, if he were innocent, that he should try to get the girl to stop making such statements. The learned Sessions Judge further observes that when she died the appellant endeavoured to dispose of her body before it should be examined by a surgeon. I do not however find that the evidence goes so far as this. The appellant does appear to have offered to bury the body and give the girl a good funeral; but he might well do this even if he were innocent, owing to his anxiety to propitiate his enemies who he thought were fabricating a case against him; and that explains his entertaining Ma Thein Hla and Po Hmat in his own house for a few days immediately after the girl's death. Pan Yi says: "I obtained information that the deceased's body would be cremated early next morning;" but we have no corroboration of this information.

I have not referred at length to the evidence of Maung Po Aung, the Burmese Doctor, as although he calls himself a doctor he is obviously a very ignorant man. He says that when he saw the girl she had delirium and quick pulse, was unable to speak and was in a state of coma. He says that Ma Thein Hla told him that the girl had eaten 'zibyuthi' and 'thabyuthi' while menstruating and had got high fever in consequence. This witness denies having told the headman Po Seik that when he went to treat her she was menstruating excessively and that the girl died because of this and because of fever. The headman avers that he did tell him this. Possibly Maung Po Aung misunderstood the question. There was no reason why he should not have admitted having made the statement to the headman as it seems to be not inconsistent with all that he admits what Ma Thein Hla told him. The curious point in connexion with this witness is that his wife Ma Kyu Ma has given evidence very strongly in favour of the prosecution. She it was who questioned the girl most closely as to the details of the rape. Yet Po Aung says that his wife told him nothing at all about this. However I do not think that Ma Kyu Ma could be held to be a reliable witness. She improved considerably on the evidence that she gave in the committal Court and even went so far as to swear that she had made the same statements in the committal Court as in the Sessions Court. If Ma Kyu Ma is an unreliable witness then at least there is a suggestion that Po Aung is telling the truth. If the charge of rape is unsustainable, then also the charge under S. 325, Penal Code (in respect of the injury to the vagina) cannot be sustained. The appeal is allowed, the finding and sentence of the lower Court are set aside and the appellant is acquitted.

D.S./R.K. *Sentence set aside.*

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## A. I. R. 1938 Rangoon 301

MACKNEY J.

*Maung Ba Thwin and another*
Appellants.
v.
*The King.*

Criminal Appeals Nos. 1041 and 1064 of 1937, Decided on 12th October 1937, from order of Fourth Addl. Magistrate, Rangoon, D/- 9th August 1937.

**Penal Code (1860), S. 420—Organizers of loan company charged for cheating public by dishonestly inducing people to purchase tickets—It must be definitely shown that there was dishonest failure to pay amounts mentioned in lists—It must also be shown that purchasers purchased tickets under guarantee of good faith—Evidence showing that people understood concern to be lottery and applying for loan as mere camouflage—Conviction for dishonestly**

**running lottery by not paying loans held was unsustainable.**

Before a charge under S. 420 of dishonestly running a lottery, could be established against the organizers of the company it must be shown definitely that the company dishonestly failed to pay the amounts to the persons shown in the list. It must also be shown that the persons who purchased the tickets purchased them under the influence of the apparent guarantee of good faith held out by these lists in regard to the higher 'prizes.' [P 303 C 1]

The organizers of a certain loan company offered to give loan to persons who applied for them on special forms or tickets for which they had to pay two annas. There was no guarantee to grant loans. The company published lists of persons to whom loans were granted from time to time. There was evidence that when persons bought these tickets they understood that they were taking part in a lottery. The business of applying for loans, etc. was understood by the people as a mere camouflage. The organizers were charged for dishonestly running a lottery by not paying the loans mentioned in the lists and convicted under S. 420 :

*Held* that under the circumstances the conviction was unsustainable. [P 303 C 2]

Kyaw Zan and Eunoose — *for Appellants.*

**Judgment.**—The appellant Maung Ba Thwin was the organizer of a company calling itself the Wuntha Kalyana Loan Company. During the latter half of 1935 the office of the company was at Nyaunglebin and during the early part of 1936 it was at Rangoon. The appellant Lat Pan was in close association with Ba Thwin. Both the appellants have been convicted under S. 420, I. P. C. The charge against them is that during the period between August 1935 and February 1936 at Rangoon they cheated the general public of Burma including persons like Maung Thaw, Maung Thein Aung, Maung Han Tin, Maung Po Thein, U Pwa Gyi, Maung Po Yin, Maung Tin and others mentioned in the Ex. C series of lists by dishonestly inducing them by sale of tickets like Ex. T to deliver money to them through their agents at two annas per ticket and which money was the property of the persons to whom such tickets were sold. It may be said at once that this charge does not satisfactorily set out by what means the appellants are supposed to have cheated the general public, and the appellants must have been gravely prejudiced in their defence by this failure. The prosecution set out to prove that the appellants caused a large number of books of tickets to be printed : each ticket bore a distinct number and contained words to this effect :

> **I agree to abide by the rules of the Wuntha Kalyana Company of Nyaunglebin and hereby** apply for any loan that the said company may deem fit to grant to me.

These tickets were sold for two annas each. The professed object of the company was to grant loans at a low rate of interest. Persons purchasing these tickets were considered to have applied for loans and the company reserved the right to grant loans of such amount as it thought fit to such persons as it thought fit. The purchasers of the tickets did not specify any particular amount of loan which they required and they evidently purchased tickets whether they required loans or not. From time to time, lists were published showing the persons to whom loans were granted. There would be 3 or 4 loans of Rs. 1850 to, say, Rs. 150 and smaller loans of Rs. 30 and Rs. 25. The persons who drew these loans had to sign promissory notes for the amount. Evidence was led to show that although the persons who were shown in the list as having been granted small loans do appear to have received these loans, several persons mentioned in the list as having received larger amounts did not receive the amounts specified but only smaller amounts such as Rs. 50 or Rs. 40 although they signed promissory notes for the larger amounts. They say that when they signed these promissory notes they were blank. There is some difficulty in deciding whether these witnesses can be believed. It does not seem very likely that they would have signed promissory notes in blank in such a manner, and if they knew that their names appeared in the list as entitled to loans of the larger amount, it is not in all cases apparent why they should have been content with taking so much smaller amounts. On the other hand for the defence it has been shown that some persons did receive the larger amounts shown in the list against their names.

Of course in a case like the present where these tickets were sold all over Burma, it is not at all surprising that even with the best of intentions the organizers of the company were unable to trace all the persons who had bought the "winning" tickets, and it is not surprising that the Criminal Investigation Department also has not been successful in tracing all these persons. It is very difficult to see in what way the Magistrate thought the appellants could be said to have cheated the general public of Burma. Ostensibly they offered to give loans to persons who applied for them on special forms for which they had to pay two annas. There was no guarantee to grant loans and presumably persons who did not want loans would not buy the tickets. Those who did want loans and bought the tickets could not complain if they did not get a loan. However, it is quite obvious from the mouths of the witnesses themselves that when they bought these tickets they understood that they were taking part in a lottery. This business of applying for loans and of signing promissory notes and so forth was understood by them to be a mere camouflage. Indeed no intelligent person could possibly have supposed that the business was what it professed to be. That being so, it is hard to see how the appellants can be said to have dishonestly induced the witnesses to purchase tickets at two annas each. The persons who purchased these tickets knew quite well that in all probability they would get nothing at all for their two annas but they were prepared to take the risk in the hope of making greater gain. It might be argued that if in fact the appellants failed to pay out the amounts set out in their lists, but published these lists as an inducement to people to buy the tickets they deceived the purchasers of tickets, who might not have bought the tickets if they had known that the "lottery" was not being run in a straightforward manner.

This however is not the offence with which the appellants have been charged. Moreover, before such a charge could be established it would further have to be shown definitely that the company dishonestly failed to pay the amounts to the persons shown in the list. It would moreover have to be shown that the persons who purchased the tickets purchased them under the influence of the apparent guarantee of good faith held out by these lists in regard to the higher "prizes". Whether this can be done or not is not at all clear in the evidence. In effect the appellants have been convicted for not running a lottery in an honest manner. Such a charge as that would in any case be extremely difficult, if not impossible, to establish, and I would have thought that it would have been better for the prosecution to have been content with establishing an offence punishable under S. 294-A, Penal Code. However the Court cannot take cognizance of such an offence save on complaint made by order of, or under authority from, the Governor or some officer empowered by the Governor in this behalf: S. 196, Criminal P. C. In these circumstances it appears to me that the convictions of the appellants are clearly unsustainable. Their appeals are allowed, the finding and sentences passed upon them are set aside, the fines paid by them shall be refunded and they shall be set at liberty. I refrain from passing an order of acquittal as I am of the opinion that further investigation should indicate that the appellants have committed possibly an offence punishable under S. 420, Penal Code, such as I have indicated in my judgment, or more probably an offence punishable under S. 294-A, Penal Code. I think it is desirable that if the authorities concerned find that such offences can be established the appellants should again be prosecuted.

S.C./R.K. *Appeals allowed.*

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## A. I. R. 1938 Rangoon 303

MACKNEY J.

*Daw Sein and another* — Defendants— Appellants.

v.

*Ma Mai Ma* — Plaintiff — Respondent.

Special Second Appeal No. 121 of 1937, Decided on 15th October 1937, against decree of Dist. Court, Sagaing, in C. A. No. 44 of 1936.

**(a) Court-fee—Suit for possession—Property intended to be dedicated is not tantamount to dedication—Court-fee should be ad valorem.**

A mere intention to dedicate property for religious purposes is not sufficient to convert that property into religious property. Court-fee to be paid for recovery of possession of such property will be ad valorem. [P 304 C 2]

**(b) Buddhist Law (Burmese)—Dedication of property to nuns—Modern nuns do not die civil death — Property cannot be dedicated to nuns—If it is gift it must conform with S. 123, T. P. Act which applies to Buddhist religious gift.**

Buddhist religious gifts are not excepted from the operation of S. 123, T. P. Act since that Act has been enforced : *A I R 1918 L B 11 and A I R 1924 Rang 309, Rel. on; 7 B L T 63, Not followed.* [P 306 C 1]

Modern nuns are little more than lay devotees : they do not undergo any ordination and are not regarded as dying a civil death : they are under no disabilities with regard to money and property. Hence there could be no possible dedication to nuns as such and if it is to be a gift, then it must conform to the provisions of the Transfer of Property Act. [P 306 C 1]

**Hla Tun Pru** — *for Appellants.*

**A. N. Basu** — *for Respondent.*

*(19th August 1937)*

**Order.**—The appellants were the defendants in a suit brought by the respondent.

plaintiff, Ma Mai Ma, in the Subdivisional Court of Sagaing, for a decree directing them to deliver up possession of a zayat of which they were in occupation. The respondent-plaintiff is the widow of one U Ba Maung, of whose estate she has obtained letters of administration. She claims that the land upon which this zayat is built was bought by her husband and herself for the purpose of erecting thereon a building to be used for religious purposes, that they did erect the existing zayat, but that before it was definitely dedicated to religious purposes U Ba Maung had died. The present appellants were in temporary occupation of the zayat by permission of herself and her husband. The plaintiff however now wishes to convert the zayat into a pongyi kyaung and dedicate it for use as such with a view to her deceased husband's acquiring merit therefrom. The defendants refused to vacate the zayat and give up possession because they claimed that the property had already been dedicated for religious purposes and that they had been entrusted with its care with a view to that purpose. The property has been valued at Rs. 3500. The Subdivisional Court heard evidence as to the value of the property and came to the conclusion that its value was between Rs. 3500 and Rs. 4000 which amounted to an acceptance of the valuation which the plaintiff mentioned. On her plaint the plaintiff paid a court-fee of Rs. 10 only, because it is property which the plaintiff wishes, according to Buddhist custom, to offer as a kyaung (monastery) for religious purposes in order to gain merit.

The learned Subdivisional Judge seems to have assumed that this meant that the property was religious property and he accordingly held that the court-fee of Rs. 10 was correct. After hearing the evidence on the merits of the case he came to the conclusion that the property had been dedicated for religious purposes and the plaintiff had no right to sue under the letters of administration obtained by her. He therefore dismissed the suit with costs. Against this decision the plaintiff appealed to the District Court, again paying a court-fee of Rs. 10 only. The District Court found that there was no evidence whatsoever that the zayat had been dedicated by U Ba Maung as religious property, and that even if there had been a gift or dedication of the zayat to the defendants, such gift or dedication was invalid for want of registration. The plaintiff was therefore entitled to recover possession and to eject the defendants. He therefore set aside the order of the trial Judge and granted a decree for ejectment of the defendants from the zayat in suit. The learned District Judge overlooked the effect of his finding on the amount of court-fees payable; for if the property which was the subject-matter of the suit was not religious property, the plaintiff was not exempted from paying the full court-fee on her own valuation of the property at Rs. 3500. The original defendants have now appealed to this Court against the decree of the District Court.

I have heard the arguments of the learned counsel for the appellants and for the respondent. After considering these arguments and the proceedings in the case I have come to the conclusion that I must first proceed under S. 12, sub-cl. 2, Court-fees Act. It appears to me that a mere intention to dedicate property for religious purposes is not sufficient to convert that property into religious property, nor can this possibly have been the real contention of the plaintiff, for to admit that the property was already religious property would have been to stultify her suit entirely. The claim seems to have amounted to this: that because the zayat had been built with the intention of dedicating it for religious purposes and because the plaintiff still has that intention, that destroys all valuation that the property would normally have. I am unable to see any logic in this reasoning. So long as the property has not yet been dedicated, the owner thereof can change her mind and use it for any purpose which she thinks fit. This zayat has not been built on religious land. She herself admits that she and her husband had only recently bought the site and paid a good price therefor. It is still open to her, if her contentions are correct, to sell the property to somebody else whether that somebody else wishes to use the building as a zayat, or to pull it down and remove the materials, or whatever purpose the supposed purchaser may have. In these circumstances I hold that the learned Subdivisional Judge wrongly decided the amount of fee correctly chargeable on the plaint, and the revenue has thereby suffered detriment. Under sub-cl. 2, S. 12, Court-fees Act, I therefore require the plaintiff Ma Mai Ma, within six weeks from this date, to pay the difference in court-fee between Rs. 200 being the correct court-fee for a suit the value of the subject-matter of which does not exceed Rs. 3500, and Rs. 10, the value of the court-fee stamps already paid by her on her plaint. I do not direct her to pay the difference between such court-fees on her memorandum of appeal in the District Court because that appeal proceeded on the basis of the decision of the original Court. This appeal shall be stayed until a date six weeks from the present date. If the court-fees have not been paid on that date Ma Mai Ma's suit must be held to be dismissed.

**Judgment.** *(15.10.1937)* — The facts involved in this appeal have been briefly set out in my order dated 19.8.1937, by which I directed the plaintiff-respondent Ma Mai Ma, under S. 12, sub-cl. (2), Court-fees Act, to pay into Court the difference in court-fees, namely Rs. 190, between the correct court-fee for such a suit as she has filed and the value of the court-fee stamps already paid by her on her plaint. Ma Mai Ma has now paid in the required amount of court-fees. The question arises in this appeal as to whether the zayat which is the subject-matter of the appeal had by the act of U Ba Maung become religious property. In her amended plaint, Ma Mai Ma maintained that although it had been intended to use the zayat for the occupation, lodging and use of Rahans and laymen, and although the defendant-appellant had been granted permission temporarily to occupy the zayat, yet she (the plaintiff) now desired to dedicate the building as a kyaung. In my previous order I have pointed out that this is not an admission that the zayat had become religious property; nor does the fact that the plaintiff claimed to be exempted from paying court-fees to the full value of the property on the ground that she wished to dedicate it as a monastery amount to such an admission. It is true that the learned Subdivisional Judge appears to have been under the impression that the property concerned was a religious one, and that both parties had admitted this to be the case. The learned advocate for the appellants urges that his clients must have been misled by the view taken by the learned Subdivisional Judge and therefore did not offer evidence to prove that the property was religious property. He goes so far as to suggest that at this late stage of the litigation the proceedings should be returned to the trial Court in order that his clients might now offer evidence that the property was religious property.

As a matter of fact the appellants did offer all the evidence they could in order to show that the property had been dedicated as religious property. All the facts relevant to the case were put before the Court in spite of the erroneous opinion of the learned Subdivisional Judge. The learned counsel for the appellants now wishes to state that he is informed that the land on which the zayat was built was actually religious property. This is entirely contradictory to the fact which has been proved, namely that the land was bought by U Ba Maung from some other person. It is far too late to put forward such a plea as this. The learned Subdivisional Judge could not possibly have meant what he said when in the first issue he framed, he referred to the property as religious property; for, obviously if that were so, there was no need for him to hear any evidence in the case at all : he should have at once proceeded to pass judgment dismissing the suit. It seems to me that he cannot have meant more than that the property was property which it was intended should be used for religious purposes. I am of the opinion that the parties could have been by no means misled by the words used by the learned Subdivisional Judge, and it does not appear to me that the appellants have been in any way prejudiced by them, or prevented from producing evidence which was available to them at the time of the suit. In their written statement the defendants stated that U Ba Maung bought the land on which the zayat is built for the sole purpose of dedicating the same for religious purposes, that he built a zayat thereon and entrusted the same to the care and management of these defendants who with the express consent and desire of the deceased U Ba Maung took possession of the same and have been living thereon ever since. These statements do not to my mind set out any definite claim that the property had been dedicated to religious usage. It appears to me that on the pleadings the plaintiff was entitled to her decree for ejectment and delivery of possession. However in the course of their evidence the defendants set up the plea that U Ba Maung had actually dedicated the zayat by a formal religious ceremony. The learned trial Judge believed the evidence which was offered in this behalf but the learned District Judge has rejected it for reasons which appear to me to be conclusive.

In the first place it is quite clear, as the learned District Judge has pointed out that in letters both before and after U Ba Maung's death the defendant Ma Nanda Sayi, who claims to be the principal nun in occupation of the zayat, used language which by no means suggests that she considered the zayat to be her own or dedicated to her as religious property. Furthermore her conduct on receiving an injunction on behalf of Ma Mai Ma's mother-in-law, Daw Ngwe Hnin, in regard to this zayat does not indicate that she claimed to be solely entitled to reside therein. The alleged dedication ceremony must have been performed in a very hole and corner fashion. Evidence was not offered in regard to the matter by persons whom one would have expected to have been present. The ceremony is supposed to have been performed in the presence of a pongyi from Monywa (not called), and the only guest was U Po Aung, the brother of Ma Rusawadi, one of the witnesses for the defence and one of the nuns who was living with Ma Nanda Sayi in the zayat. This U Po Aung has given evidence to the effect that he was present when the yesetcha ceremony was performed: the ceremony is said to have been performed in May-June of 1934: U Ba Maung died in 1935. As the learned District Judge has pointed out, Ma Nanda Sayi's subsequent actions are not consistent with the truth of the story of the dedication. I might further add that it is not at all clear to me how a dedication to nuns could possibly be made, for, as U May Aung has pointed out in his book on Buddhist Law, p. 197, the modern nuns are little more than lay devotees: they do not undergo any ordination and are not regarded as dying a civil death: they are under no disabilities with regard to money and property. In these circumstances it is quite clear to my mind that any gift to a nun must certainly conform to the provisions of the Transfer of Property Act. In the present case there is no question that they have been complied with.

It has always been held that Buddhist religious gifts are not excepted from the operation of S. 123, T. P. Act, since that Act has been enforced: *see* 2 Rang 131,[1] 3 U B R 207[2] and 9 L B R 258.[3] The case in 7 Bur L T 63[4] which has been cited contra, is not authority as it is not reported in the recognized law reports and furthermore it is not at all clear that the Transfer of Property Act would have applied in that particular case (dated 3rd March 1913). I have no doubt that it was U Ba Maung's intention when he bought the site on which the zayat is built and when he built the zayat that Ma Nanda Sayi and her friends should reside in it; but there is nothing on the record to show that it was his intention to abandon all rights of possession over the zayat and the site. There is no proof that he had set this property aside in perpetuity for the use of Buddhist nuns. It may be that Ma Nanda Sayi herself contributed Rs. 500 to the building of the zayat as against U Ba Maung's Rupees 6000. It does not appear under what conditions this money was contributed, and certainly the mere fact even if it be taken to be a proved fact that such a contribution was made cannot affect U Ba Maung's rights of property over the zayat. I hold therefore that the zayat and its site remained part of U Ba Maung's estate and that Ma Mai Ma, his widow, in virtue of the letters of administration which she holds is entitled to possession thereof. This appeal is therefore dismissed with costs. It may be that Ma Nanda Sayi may be able to put forward some claim to compensation for the contribution that she has made to the building of the zayat, if she has made any such contribution, but in the present case we are not concerned with this matter.

B.D./R.K. *Appeal dismissed.*

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[1] U Pandawun v. U Sandima, (1924) 11 A I R Rang 309=83 I C 557=2 Rang 131.

[2] U Ne Mein v. Ma Hnin On, (1920) 7 A I R U B 47=57 I C 809=3 U B R 207.

[3] U Zayanta v. U Naga, (1918) 5 A I R L B 11 =45 I C 926=9 L B R 258.

[4] Yeo Kyew Sum v. U K Tu, (1914) 1 A I R L B 193=24 I C 465=7 Bur L T 63.

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## * * A. I. R. 1938 Rangoon 306

### FULL BENCH

ROBERTS C. J., DUNKLEY AND SPARGO JJ.

*Bank of Chettinad Ltd.* — Appellants.

v.

*Maung Aye and others* — Respondents.

First Appeal No. 148 of 1937, Decided on 9th May 1938, against decree of Asst. Dist. Court, Bassein, D/- 9th July 1937.

*** * (a) Transfer of Property Act (1882), S. 92 (as amended by Act 20 of 1929)— S. 92 is not retrospective.**

The general principle is that very clear words must be discoverable before retrospective effect can be given to a statute so as to take away a vested right which accrued before the date of its commencement : *Case law referred.* [P 308 C 2]

It cannot be inferred that because in S. 63 of the Amending Act some sections were stated expressly not to be retrospective, the remainder are so : *A I R 1932 Mad 734 and A I R 1936 Mad 171, Approved.* [P 309 C 1]

Section 92 is not retrospective in its effect by reason of the lack of such clear words contained in the Act as would be necessary to lead to a contrary decision : *A I R 1936 Rang 152, Approved ; A I R 1937 All 588, Dissent.; Dictum in A I R 1932 All 489, held obiter and dissent.* [P 310 C 1]

**✲ ✲ (b) Subrogation— Equitable doctrine of subrogation existed prior to 1st April 1930— Lender advancing money to mortgagor to pay off prior mortgage—Mortgage discharged by mortgagor with money so borrowed—Lender is subrogated to rights of prior mortgagee :** *14 Rang 494=A I R 1936 Rang 152=163 I C 645, Overruled.*

The equitable doctrine of subrogation existed in India prior to 1st April 1930. [P 311 C 1]

Where a person lends money to a mortgagor for the purpose of paying off a prior mortgage and the mortgagor with the money so borrowed discharges the mortgage, the lender is subrogated to the rights of the mortgagee whose mortgage is so redeemed. He is subrogated to the rights of the mortgagee not by means of assignment at all. He acquires, notionally, a position analogous in every way to that of prior mortgagee without an assignment having been effected. There is no privity of contract between him and the mortgagee and his rights arise by virtue of an equitable doctrine extending as a matter of law to India before the Act : *14 Rang 494=A I R 1936 Rang 152=163 I C 645,* **Overrlued** *; 10 Cal 1035 (P C) ; 29 Cal 154 (P C) ; 39 Cal 527 (P C) ; 9 Cal 961 (P C) and A I R 1924 P C 36, Rel. on ; A I R 1931 P C 79 ; A I R 1933 P C 29 ; A I R 1934 P C 235 and A I R 1935 Rang 230 (F B), Disting.* [P 310 C 2; P 311 C 1]

P. K. Basu — *for Appellants.*

K. C. Sanyal — *for Respondents 1 to 3.*

**Roberts C. J.** — This is an appeal against a decree granted by the learned Assistant District Judge of Bassein in the following circumstances : The first three respondents (the second and third of whom were infants and sued by their brother, respondent 1, as their next friend) were the sons of one Maung Tun Gyaw, a Burmese Buddhist, who was possessed of a house and its site in Zegyaung Road, Bassein. In the year 1920 or 1921, the said property was mortgaged by Maung Tun Gyaw and his wife, Ma Hla May, jointly, to the S. R. M. M. R. M. Firm. In 1923 Maung Tun Gyaw died, and on 26th August 1926, Ma Hla May, his widow, and the mother of the plaintiffs (the first three respondents just mentioned), again mortgaged the property to the firm for Rs. 700, which was made up of a cash advance of Rs. 300 and the sum of Rs. 400 being the balance of the debt due on the earlier mortgage, which was thereby redeemed. Some time after 1926 Ma Hla May remarried, and thereupon her children became entitled to a half share in their father's property subject to whatever incumbrances subsisted upon it. In 1929 Ma Hla May borrowed from the Bank of Chettinad a sum of Rs. 700 and redeemed the mortgage effected by her in favour of the S. R. M. M. R. M. Firm in 1926. The question which arose was whether the Bank of Chettinad was subrogated to the rights of the first mortgagee. In order to answer the question, it is necessary first to see whether S. 92, T. P. Act, 1882, as amended by the Amending Act 20 of 1929, is retrospective in its effect, and secondly, whether it was rightly held by a Bench of this Court in 14 Rang 494[1] that the equitable doctrine of subrogation could not be applied in India in cases arising before 1st April 1930, on which date the Amending Act of 1929 came into operation. Accordingly, these questions fall to be decided by a Full Bench. The learned Assistant District Judge, as he was bound to do, answered the first question in the negative and held that S. 92 was not retrospective; and as he was also bound to do, he followed the decision in 14 Rang 494,[1] held that the doctrine of subrogation could not be applied in India, and granted a decree declaring that a half-share of the property in dispute, which belonged to the plaintiffs, was not liable to be sold in execution of the mortgage decree which the bank had obtained against Ma Hla May.

As regards the first question, S. 63 of the Amending Act enacts that nothing in a group of sections shall be deemed to affect anything done before the Act came into force, or any right, or any remedy in respect of such right, acquired or accrued before that date; and that any such remedy may be enforced as though the Act had not been passed. These are the material words, and they plainly show that the twenty-two named sections are not retrospective in character. It was argued before us on behalf of the appellants that, by implication, all the other sections of the Act were to be regarded as retrospective; but the concluding words of sub-section (d) of S. 63 appear to me to have every remedy in respect of a vested right. In deciding whether S. 92, of the Act is to have retrospective effect or not, regard must be had to the principle laid down for the construction of statutes where a right of action is being dealt with and an Act has been passed which does not expressly deal with it. It is only recently that in 1938 R L R 176,[2] I had occasion to refer to the case in (1861) 30 L J Ex 40[3] in which Baron Wilde said:

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[1] **Bank of Chettinad, Ltd. v. Ma Ba Lo, (1936) 23 A I R Rang 152 = 163 I C 645 = 14 Rang 494.**

> Where you are dealing with a right of action, and an Act of Parliament passes, unless something express is contained in that Act, the right of action is not taken away ;

and again to the case in (1875) 1 Ch D 48[4] at p. 50 where Jessel M. R. said:

> It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them.

In (1846) 3 C B 540[5] at p. 550 Baron Wilde said :

> The general principle that a statute is not to be construed so as to have a retrospective operation is a just one; for, persons ought not to have their rights affected by laws passed subsequently.

In 5 M I A 109[6] it was held that the Act of the Indian Legislature No. 21 of 1848, which enacts,

> that all agreements, whether made in speaking, writing or otherwise, by way of gaming or wagering, shall be null and void, and no suit shall be allowed in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won on any wager, or entrusted to any person to abide the event of any game, or on which any wager is made,

contained no words sufficient to show the intention of the Legislature to affect existing rights. The judgment of the Court was delivered by Baron Parke and was in agreement with the judgment of the majority of the Court of Exchequer on the construction of the corresponding Act of Parliament of the United Kingdom in (1848) 2 Ex 22.[7] In (1861) 10 C B (N S) 179[8] at page 191 Erle C. J. said :

> Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the Legislature that it should be so construed is expressed in clear, plain and unambiguous language; because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

Again, in (1877) 2 Q B D 269[9] Cockburn C. J. said :

> It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act.

In (1878) 3 A C 582[10] there was an agreement for a lease which had been entered into but not in proper form in the year 1873: the Conveyancing (Scotland) Act 1874, by Ss. 38 and 39, dispensed with several requirements as to form, but it was held not to be retrospective and to have no power to remedy the defects of a deed executed before the date of its operation and void in Scotland by virtue of the Statute of 1696. The case in (1878) 3 A C 582[10] is instructive since the Act laid down that nothing contained therein was to affect pending proceedings. Moreover, there was one clause which said that it should not have any effect upon any matter anterior to the passing of the Act. With respect to this matter Lord Hatherley said :

> I can only say, in the language of conveyancing, it was *ex majore cautela* that that should be put in.

*See* also (1898) A C 469.[11] There are, of course, cases in which a statute is retrospective in its nature, for example, an act of indemnity: *see* (1876) 6 Q B 1.[12] But the general principle to be deduced is that very clear words must be discoverable before retrospective effect can be given to a statute so as to take away a vested right which accrued before the date of its commencement. When the Indian authorities fall to be examined, it is clear from the case in 10 Rang 465[13] (though it dealt

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2. Arunachallam Chettyar v. Valliappa Chettyar, (1938) 25 A I R Rang 130 = 175 I C 275 = 1938 R L R 176 (F B).
3. Wright v. Hale, (1861) 30 L J Ex 40 = 6 Jur (N S) 1212 = 3 L T 444 = 6 H & N 227 = 9 W R 157.
4. In Re Joseph Suche & Co. Ltd. (1875) 1 Ch D 48.
5. Thompson v. Lack, (1846) 3 C B 540 = 16 L J C P 75.
6. Doolabdass Pettamberdass v. Ramloll Thackoorseydass, (1851-54) 5 M I A 109 = 1 Sar 403 (P C).
7. Moon v. Durden, (1848) 2 Ex 22=12 Jur 138.
8. Midland Railway Co. v. Annie Pye, (1861) 10 C B (N S) 179=30 L J C P 314=4 L T 510 =9 W R 658.
9. The Queen v. Guardians of Ipswich Union, (1877) 2 Q B D 269.
10. Gardner v. Lucas, (1878) 3 A C 582.
11. Young v. Adams, (1898) A C 469=67 L J P C 75=78 L T 506=14 T L R 373.
12. Phillips v. Eyre, (1876) 6 Q B 1=40 L J Q B 28=10 B & S 1004=22 L T 869.
13. Ko Po Kun v. C. A. M. A. L. Firm, (1932) 19 A I R Rang 197=140 I C 156=10 Rang 465.

with S. 101, T. P. Act) and the cases therein cited that the law is the same; and, indeed, the Court in 14 Rang 494[1] has so held. I have however thought it desirable to examine the authorities at considerable length in view of the decision of a Full Bench of five Judges in I L R (1937) All 880.[14] In this case it was expressly held that S. 92, T. P. Act, had retrospective effect and was applicable even though the transactions in question came into existence prior to that date. The learned Chief Justice said :

> No doubt the ordinary rule of interpretation of a statute is that it should not be considered to have a retrospective effect so far as substantive rights are concerned unless it expressly says so.

And later on in the same page he adds :

> We must give effect to the language of the Act as it stands and hold that the sections of the Transfer of Property Act not dealt with in the sections enumerated in S. 63 have a retrospective effect.

The conclusion at which he arrived was reached by a reference to the "obvious intention" of the Legislature, and the fact that there was an express reference to certain specified sections which were not to be retrospective and an express reference to all the other provisions of the Act which were not to be retrospective in a certain contingency. The learned Chief Justice says:

> It seems to follow that barring that contingency the other provisions of the Act were intended to have a retrospective effect.

I find myself reluctantly unable to reach this conclusion. It seems to me that to arrive at the decision that the statute is to have a retrospective effect it should be possible to point to clear and unambiguous words; I cannot infer that because some sections were stated expressly not to be retrospective the remainder are so.

In S. 63 a number of sections were set out which it was apparently thought might affect a right acquired or accrued before 1st April 1930, and in sub-s. (d) the concluding words enacted that any such remedy might be enforced as if that Act had not been passed. These words " any such remedy " seem to me to refer directly to " any remedy in respect of such right " mentioned in sub-s. (d), and such right is " any right acquired or accrued before 1st April 1930 ": [sub-s. (c)]. In my opinion therefore sub-s. (d) saves every remedy in respect of a right already vested. I do not find the section easy to construe, but it appears to me that the reference to the twenty-two sections enumerated, in effect, concludes at the word "liability" in S. 63 (d), after which all pending proceedings and all remedies where there is a vested right already accrued are saved.

Some further cases on this point have been cited to us. Thus in 54 All 897[15] a Full Bench of Allahabad also held that S. 92, T. P. Act had a retrospective effect; and I have examined carefully the judgment of the Full Bench. It is stated therein that there is no remedy or proceeding as is referred to in Act (20 of 1929) which is being affected by the new 'provisions' of S. 92. It would therefore appear to have been unnecessary to decide whether S. 92 had a retrospective effect or not. An opinion contrary to that held in 54 All 897[15] was expressed by a Bench of the Madras Court in 56 Mad 169,[16] and in 59 Mad 359[17] at p. 365 Varadachariar J. criticized the Allahabad authority in terms to which I would lend my respectful concurrence. In the earlier case it was held that S. 53-A, T. P. Act was not retrospective though this was a section not dealt with by S. 63 (d) of the Amending Act. The question of retrospectivity with regard to S. 53-A however must be deemed to me somewhat different from that which is involved by other sections, because it set up the doctrine of part performance in India for the first time and was, no doubt, framed under the impression that a number of rulings laid down by various Courts in India, which held that this doctrine existed was good in law. The new section was doubtless framed to restrict its operation. The case in 58 I A 91[18] swept away the presupposed applicability of the equitable doctrine of part performance to India, save of course that S. 53-A, T. P. Act was left. It would not be retrospective, but is available as a defence in respect of a contract entered into before the date of the enactment since the new enactment gave a right

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14. **Hira Singh v. Jai Singh, (1937) 24 A I R All 588=171 I C 153=I L R (1937) All 880=1937 A L J 659 & 840 (F B).**

15. **Tota Ram v. Ram Lal, (1932) 19 A I R All 489=139 I C 107=54 All 897=1932 A L J 627 (F B).**

16. **Kanjee and Mooljee Brothers v. Shanmugam Pillai, (1932) 19 A I R Mad 734=139 I C 870 =56 Mad 169=63 M L J 587.**

17. **Lakshmi Amma v. Sankara Narayana Menon, (1936) 23 A I R Mad 171=160 I C 137=59 Mad 359=70 M L J 1 (F B).**

18. **Ariff v. Jadunath Majumdar, (1931) 18 A I R P C 79=131 I C 762=58 Cal 1235=58 I A 91 (P C).**

available to a defendant to protect his position.

The question might also arise in connexion with S. 53-A as to whether it deals with a right of action or with a matter of procedure only. For my own part, I am content to reach the conclusion that S. 92 is not retrospective in its effect by reason of the lack of such clear words contained in the Act as would be necessary to guide me to a contrary decision. Having reached the conclusion that S. 92 is not retrospective, we have next to enquire whether the equitable doctrine of subrogation could be applied in India in cases arising before 1st April 1930. And I would first observe that our attention has been drawn to a number of authorities which were apparently not cited before the Court in 14 Rang 494.[1] First of all, in 11 I A 126[19] it was held that where the purchaser of an equity of redemption in reference to immovable property paid off the first mortgage thereon with notice of the second mortgage, he must be assumed, according to the rule of justice, equity and good conscience there applicable, to have intended to keep the first mortgage alive, and that therefore he was entitled to stand in the place of the first mortgagee. Sir Richard Couch asked: "What was the intention of the party paying off the charge?" and stated that if there were no express evidence of it the ordinary rule was that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. Then, in 29 I A 9[20] the Privy Council followed their previous decision and adopted as accurate the summing up of the question as stated by the Subordinate Judge in the following words:

> When the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. The intention may be found in the circumstances attending the transaction, or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot.

Again in 39 I A 68[21] the two preceding cases were followed. I am persuaded that some difficulty has arisen in this matter through regarding it from the point of view of the mortgagee and in the light of an assignment. When a mortgagee desires to transfer his rights he must, of course, use a registered instrument in order to do so. But we are dealing with cases in which he is being paid off by the mortgagor and is not himself assigning his rights at all. His rights are brought to an end when he is paid off, and there is no assignment. The equitable doctrine is that the person enabling the mortgagor to discharge his obligations is subrogated to the rights of the mortgagee, but this is not by assignment at all. He acquires notionally a position analogous in every way to that of the prior mortgagee without an assignment having been effected. There is no privity of contract between him and the mortgagee and his rights arise by virtue of an equitable doctrine extending as a matter of law to India before the Act. Turning to 14 Rang 494,[1] I observe that Sen J. remarked:

> Now as an interest in immovable property of the value of Rs. 100 and upwards can only be transferred by a registered instrument, it is impossible to apply this doctrine consistently with and not in violation of the provisions of the Indian statute,

and he cited the case in 58 I A 91[18] to which I have previously referred. But this decision is one which deals with the equitable doctrine of part performance and has no express reference to subrogation; whilst it is clear from the decisions of the Privy Council, which were not cited to the Court, that the equitable doctrine of subrogation was already in existence and applicable to India before the passing of the Act, in the case of part performance the Courts in India believed that the doctrine of part performance existed, but 58 I A 91[18] shows that they were wrong.

Mr. Sanyal, in the course of his able argument, endeavoured to impress upon us the view that the existence of the equitable doctrine of subrogation prior to 1930 would be in conflict with S. 74 of the old Act. This is a section whereby puisne mortgagees could be subrogated to the rights of prior mortgagees on tender of the amount due to them. But under the old S. 91 they were not the only persons who might redeem or institute a suit for redemption of the mortgaged property. Moreover, it is quite true that a transfer can only be effected by a registered instrument as pointed out by Sen J. in 14 Rang 494.[1] But, with great respect to the learned Judge, I cannot agree (as stated by him at p. 504 of the report) that the basis of the doctrine of equitable subrogation is a fictional agreement by the quasi-lender with the debtor or creditor that he should receive and hold an assignment of the debt and security. The present case is clearly one which is governed by 11 I A 126,[19] and I must hold that the Bank is subrogated to the rights of the original mortgagee. Accordingly, in my opinion, the case in 14 Rang 494,[1] though it was rightly decided so far as it held that S. 92, T. P. Act (Act 20 of 1929) is not retrospective in effect, proceeded to a wrong conclusion in relation to the equitable doctrine of subrogation, which existed in India before the provisions of the statute to which reference has been made. Accordingly, this appeal must be allowed, and the suit of the plaintiffs-respondents must be dismissed with costs in both Courts, advocate's fee in this Court 20 gold mohurs.

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[19] Gokaldoss Gopaldas v. Puranmal Premsukhdas, (1884) 10 Cal 1035=11 I A 126=4 Sar 543 (P C.)

[20] Dinobundhu v. Jogmaya, (1902) 29 Cal 154 = 29 I A 9=6 C W N 209 (P C).

[21] Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh, (1912) 39 Cal 527=14 I C 496 =39 I A 68=16 C W N 505=15 C L J 411 (P C).

**Dunkley J.**—Two contentions have been raised on behalf of the appellant Bank in this appeal, namely: (1) That S. 92, T. P. Act, as added by S. 47 of Act 20 of 1929, is not retrospective in its effect; (2) That, on the facts which have been set out in the judgment of my Lord the Chief Justice, and which are not now in dispute, the appellant Bank is entitled to be subrogated to the rights of the first mortgagee of the property in suit. I am clearly of opinion that the provisions of S. 92, T. P. Act, as amended by Act 20 of 1929, do not have retrospective effect, and that the decision in 14 Rang 494[1] is correct on this point. The Allahabad High Court alone has held that S. 92 is retrospective in its operation. 54 All 897[15] is not a decision that S. 92 is retrospective, for, the provisions of the amended section were applied to a transaction prior to 1st April 1930, as "a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of Act 20 of 1929". The opinion expressed by the Full Bench that S. 92 has retrospective effect was therefore merely obiter. The argument on which this opinion was based was that no remedy or proceeding was affected by the new provisions of S. 92, and Varadachariar J. exposed the fallacy of this argument in his judgment in 59 Mad 359[17] at p. 365. The question was considered again by a Full Bench of five Judges of the Allahabad High Court in I L R (1937) All 880,[14] and their conclusion was that S. 92 is retrospective. The judgment of the Full Bench was delivered by Sulaiman C. J., and it is only after the fullest consideration and with the greatest diffidence that I feel compelled to differ from his conclusion. The learned Chief Justice stated the rule of interpretation (at p. 899) as follows:

> No doubt the ordinary rule of interpretation of a statute is that it should not be considered to have a retrospective effect so far as substantive rights are concerned unless it expressly says so.

He then said, referring to S. 63 of Act 20 of 1929:

> There is an express reference to certain specified sections (of which S. 92 which is equivalent to S. 47 of Act 20 of 1929 is not one) which are not to be retrospective and there is an express reference to all the other provisions of the Act which are not to be retrospective in a certain contingency. It seems to follow that barring that contingency the other provisions of the Act were intended to have a retrospective effect.

Consequently, although the learned Chief Justice correctly stated the rule that the provisions of a statute are not to be considered to have retrospective effect unless there is express provision in the statute to the contrary, he nevertheless based his conclusion upon an inference drawn from other provisions. It does not follow that, because an Act says that certain provisions are not to have a retrospective effect, or that all the provisions are not to have a retrospective effect in certain circumstances, the converse is true and the provisions not specifically mentioned are to have a retrospective effect except in those circumstances. This has been held by the House of Lords in (1878) 3 A C 582,[10] in which case the saving provisions of the statute in question were closely similar to the provisions of S. 63 of Act 20 of 1929. Certain sections of the statute were specifically made retrospective and certain others were specifically made prospective only, and there was a provision that pending proceedings should not be affected by any provision of the statute. Their Lordships repelled the argument that in consequence of these provisions the inference arose that the remaining sections of the statute were intended to have a retrospective effect. The decision of their Lordships may be summarized, in the words of Lord O'Hagan, that unless there is some declared intention of the Legislature — clear and unequivocal — or unless there are some circumstances rendering it inevitable that the other view should be taken, it ought to be presumed that an Act is prospective and is not retrospective, in so far as it affects vested rights.

I am however prepared to rest my decision on the plain words of S. 63 of Act 20 of 1929. With the greatest respect, I think that the learned Chief Justice in I L R (1937) All 880[14] failed to give proper effect to the words "any such remedy" occurring in the last sentence of the section. The sentence stands by itself, and, when the reference to proceedings is omitted, reads as follows :

> Any such remedy as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

To discover what is meant by "such remedy as is herein referred to" we must refer back to the last use of the word "remedy" in S. 63, and that occurs at the beginning of Cl. (d) of the section, which reads "any remedy or proceeding in respect of such right, title, obligation or liability," and "such right, title, obligation or liability" plainly refers back to Cl. (c) which reads "any right, title, obligation or liability already acquired, accrued or incurred before such date" (i. e. 1st April 1930). Hence, in my opinion, when the last sentence of S. 63 is set out in full it reads as follows :

> Any remedy in respect of any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1930, may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

There is no justification whatever for holding that in this sentence the expression "such remedy" means and includes only a remedy in a pending proceeding. Consequently, the conclusion would appear to be that S. 63 specifically provides that no provision of Act 20 of 1929 shall affect vested rights which were acquired or accrued before 1st April 1930. If that is not the correct interpretation of the last sentence of S. 63, then the meaning of the sentence is extremely obscure and very ambiguous, and therefore there is no "declared intention of the Legislature—clear and unequivocal"—that these provisions of the Act are to have retrospective effect. For this reason, following the decision in (1878) 3 A C 582,[10] it must be held that the provisions of S. 92 are not retrospective. Some argument has turned upon cases in which it has been held that S. 53-A, which was also added by Act 20 of 1929, is retrospective in its operation, in the sense that it applies to contracts entered into before 1st April 1930, but these decisions turned upon the provisions of the section itself, and they are not really decisions that the section is retrospective, for the date to be looked at is not the date of the contract of sale under which the defendant entered into possession but the date on which the defence of possession under the contract is set up; the questions of the date of the contract and the length of time the defendant has been in possession are immaterial.

Turning now to the second point, when Ma Hla May obtained the return of the title deeds of the suit property from the S. R. M. M. R. M. firm, she executed a promissory note in favour of the appellant Bank for the sum of Rs. 700 and deposited the title deeds with the Bank with the intention of creating a security over the property. She, in fact, mortgaged the property to the Bank by deposit of title deeds. It is common ground that the intention of the parties (i. e. Ma Hla May and the Bank) was by this procedure to transfer the mortgage from the S. R. M. M. R. M. firm to the appellant Bank. The Bank in 1935 obtained a mortgage decree over the whole property. Then the first three respondents brought the suit out of which this appeal arises for a declaration that the Bank's mortgage decree is not binding on their interest in the property, and their suit has been decreed. The contention of the appellant Bank is that by providing the money by which the mortgage of the S. R. M. M. R. M. firm was discharged they "stepped into the shoes" of that firm and became subrogated to all the rights of that firm under its mortgage, and that, as the mortgage of the S. R. M. M. R. M. firm was valid over the whole property, so also must their mortgage of 1929 be valid over the whole property. In my opinion, this contention is sound. In a case the facts of which were exactly similar to those of the present case and to which the appellant Bank was a party, 14 Rang 494,[1] a Bench of this Court held that even prior to the amendment of the Act in 1930, apart from the provisions of the Transfer of Property Act, the doctrine of subrogation could not be applied in India. The ratio decidendi of this decision is contained in the following passage from the judgment of Sen J. :

> **It is to be observed that the basis of the doctrine of equitable subrogation is a fictional agreement by the quasi-lender with the debtor or creditor that he should receive and hold an assignment of the debt and security.**

Starting from this standpoint of a fictional transfer, the learned Judges, following the decisions of the Judicial Committee in 58 I A 91[18] and certain other recent cases, held that as by Indian statutory law an interest in immovable property of the value of Rs. 100 and upwards can only be transferred by a registered instrument it was impossible to apply the doctrine of subrogation consistently with and not in violation of the provisions of the Transfer of Property Act and the Registration Act. With the greatest respect, the whole argument proceeds upon this notion of a fictional transfer, the authorities quoted for which are dicta of Fry L. J. in (1887) 19 Q B D 155[22] and Vaughan Williams L. J. in (1899) 1 Ch D 440,[23] to the effect that a subrogee is to be looked upon as the transferee of the securities. Subrogation means merely the substitution of one party for another as creditor, and these dicta do not mean that the subrogee is in reality a transferee of the security, but merely that he has the same rights and is placed in the same position as if he had taken a transfer of the security from the original mortgagee. Clearly, a third party advancing money to pay off the mortgage debt cannot be regarded as a transferee of the mortgage, because there is no privity of contract between him and the original mortgagee. The notion of a transfer is at most a mere legal fiction, imagined for the sole purpose of defixing the rights acquired by the lender, and such a fictional transfer cannot be subject to the same incidents and formalities as a real transfer ; otherwise it would not be a fiction. Learned counsel for the first three respondents, realizing that he could not support the argument in 14 Rang 494,[1] was compelled to assert boldly that under Indian (and Burma) statutory law a person cannot acquire any right of the value of Rs. 100 and upwards in immovable property except by a registered instrument but this contention is refuted by the manner in which his clients obtained their interest in this property, namely by inheritance followed by the remarriage of their mother.

Now the only provision regarding subrogation in the Transfer of Property Act prior to 1930 was contained in S. 74, and this section dealt only with the right of subrogation acquired by a second or subsequent mortgagee who discharges a prior mortgage by direct payment to that mortgagee. The question whether a person, who lends to a mortgagor money with which the mortgagor discharges an incumbrance, is subrogated to the rights of the mortgagee whose mortgage is thereby discharged, was not dealt with in the Act, and was therefore left to be dealt with by the Courts as a matter of "justice, equity and good conscience." It has been so dealt with by their Lordships of the Privy Council in at least four cases, which were apparently not brought to the notice of the Bench. They are 10 I A 62,[24] 11 I A 126,[19] 29 I A 9[20] and 39 I A 68.[21] The last two of these cases dealt with transactions which took place after the Transfer of Property Act came into force. The effect of these decisions is stated in a passage in 11 I A 126[19] at page 133 :

> The obvious question to ask in the interests of justice, equity, and good conscience is, what was the intention of the party paying off the charge ? He had a right to extinguish it and a right to keep it alive. What was his intention ? If there is no express evidence of it, what intention should be ascribed to him ? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest.

This passage was quoted with approval in 39 I A 68[21] at p. 81. These rulings have been followed in numerous cases of the Indian High Courts; they have been affirmed in 51 I A 140[25] at p. 144 and they are binding on us. The decision in 14 Rang 494[1] has been dissented from in 41 C W N 472[26] at p. 479. The cases cited by the Bench in 14 Rang 494,[1] namely 58 I A 91,[18] 60 I A 297,[27] 61 I A 388[28] and 13 Rang 274,[29] are with the greatest respect entirely beside the point. So far as this point is concerned, 14 Rang 494[1] must be held to have been wrongly decided and must be overruled. In the present case it was clearly the intention of the appellant Bank to keep alive for its benefit the mortgage in favour of the S. R. M. M. R. M. firm.

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[22] Wenlock (Baroness) v. River Dee Co., (1887) 19 Q B D 155=56 L J Q B 589=57 L T 320=35 W R 822.

[23] In re Wrexham, Mold and Connah's Quay Railway Co. No. 1, (1899) 1 Ch D 440=68 L J Ch 270=80 L T 130=47 W R 464=15 T L R 209=6 Manson 218.

[24] Mohesh Lal v. Mohunt Bawan Das, (1883) 9 Cal 961=10 I A 62=13 C L R 221=4 Sar 424 (P C).

[25] Malireddi Ayyareddi v. Gopalakrishnayya, (1924) 11 A I R P C 36=79 I C 592=47 Mad 190=51 I A 140 (P C).

[26] Paramatha Nath Roy v. Janaki Prasad Roy, (1937) 24 A I R Cal 194 = 171 I C 747 = 41 C W N 472=65 C L J 115.

[27] Currimbhoy and Co., Ltd. v. L. A. Creet, (1933) 20 A I R P C 29 =141 I C 209=60 Cal 980=60 I A 297 (P C).

[28] Pir Bux v. Mahomed Tahar, (1934) 21 A I R P C 235=151 I C 326=58 Bom 650 = 61 I A 388=29 S L R 74 (P C).

[29] Ma Kyi v. Mg. Thon, (1935) 22 A I R Rang 230 =157 I C 565=13 Rang 274 (F B).

Consequently the appellant Bank became subrogated to the rights of the S. R. M. M. R. M. firm, and by its mortgage of 1929 obtained a valid mortgage over the whole property. I therefore agree that this appeal must be allowed, and the suit of the plaintiffs-respondents dismissed with costs.

**Spargo J.** — The facts found by the learned Assistant District Judge were that a house and its site were mortgaged by Ma Hla May to the S. R. M. M. R. M. firm on 26th August 1926 by deposit of title deeds for the sum of Rs. 700, Ma Hla May at that time being a widow with three children. Some time towards the end of the year 1926 Ma Hla May re-married. On 20th November 1929, Ma Hla May borrowed Rs. 700 from the Bank of Chettinad Limited with which sum she redeemed the mortgage which she had made in favour of the S. R. M. M. R. M. firm and made a fresh mortgage by deposit of title deeds in favour of the Bank of Chettinad. On 1st April 1930, Act 20 of 1929 came into force and contained in that Act was S. 47. It is said that in this new section the first mention in the Transfer of Property Act of the subject of subrogation was made. When Ma Hla May re-married it is common ground that her three children by the former marriage became entitled to a share in the property of the marriage, of which the house and its site now in question formed a part. Their claim is that the mortgage entered into by Ma Hla May in 1926 was paid off or extinguished and that the mortgage in favour of the Bank of Chettinad, since it was executed in 1929 by Ma Hla May alone, must be taken as affecting her share alone. The case for the Bank of Chettinad is that since the mortgage of 1926 was paid off with money borrowed from the Bank of Chettinad in the year 1929 the Bank of Chettinad is entitled to use the mortgage made in favour of the S. R. M. M. R. M. firm in 1926 as a shield against the plaintiffs' claim, or as it is sometimes expressed the Bank claims to to subrogated to the S. R. M. M. R. M. firm's rights under their mortgage.

Mr. Sanyal for the plaintiffs in this case contends that the new S. 92 added by S. 47 of Act 20 of 1929 to the Transfer of Property Act by Cl. (3) requires that before the Bank of Chettinad could be subrogated to the rights of the S. R. M. M. R. M. firm under their mortgage of 1926 a registered instrument be executed by the mortgagor agreeing that the Bank shall be so subrogated. Although the transaction in question took place in 1929 and the Act adding S. 92, T. P. Act only came into force on 1st April 1930, he contends that S. 92 is retrospective. He also argued that even though S. 92 be held not to have retrospective effect, still the old S. 74, T. P. Act dealt with the subject of subrogation and therefore there could not be equitable subrogation before 1st April 1930 for that would be to allow an equitable relief in a matter governed by statute.

One argument in favour of regarding S. 92 as having retrospective effect is that in S. 63, Transfer of Property Amendment Act, a certain number of sections are mentioned and it is said that nothing in any of those sections shall be deemed in any way to affect (inter alia) any right, title, obligation, or liability already acquired, accrued, or incurred before 1st April 1930. Among those sections mentioned the section which inserts S. 92 is not included. If, then, 22 sections are selected and it is said of these that they are not to have retrospective effect, the argument is that the other sections must have retrospective effect or else there is no meaning to be assigned to the drafting. And in I L R (1937) All 880[14] it was held that S. 92, T. P. Act has a retrospective effect. At p. 899 there occur the words :

> It seems to follow that barring that contingency the other provisions of the Act were intended to have a retrospective effect.

But further up on the same page it is stated :

> No doubt the ordinary rule of interpretation of a statute is that it should not be considered to have a retrospective effect so far as substantive rights are concerned unless it expressly says so. In India there is the provision in the General Clauses Act, S. 6, to a similar effect.

Mr. Sanyal suggests that to the words "unless it expressly says so" should be added "or unless it can be deduced by necessary implication". In my opinion, it cannot be said that it has been expressly stated that S. 92 has retrospective effect, nor does it follow by necessary implication:

*see* (1878) 3 A C 582,[10] (1890) 15 A C 384[30] and (1898) A C 469.[11] With great respect I am of opinion that S. 92, T. P. Act has no application to transactions which took place before 1st April 1930. Then as to equitable subrogation which is claimed by the Bank of Chettinad, it is suggested that S. 74 of the Act prevents the operation of the equitable rule. S. 74 dealt with one class of persons who might become entitled to the rights of subrogation and I cannot find that the action of this section excludes equitable subrogation in favour of other parties. We were referred to a number of decisions of their Lordships of the Privy Council in which mortgages which had been paid off were regarded as still in existence where it was to the advantage of the persons who provided the funds whereby they were paid off so to regard them. I am of opinion that of these decisions 29 I A 9[20] very closely resembles the present case. I am of opinion that S. 74, T. P. Act did not operate to prevent the Bank of Chettinad from being entitled to the right of subrogation in respect of the mortgage made in favour of the S. R. M. M. R. M. firm. It is quite clear that the money lent by the Bank of Chettinad was lent for the purpose of redeeming the prior mortgage in favour of the S. R. M. M. R. M. firm and the Bank of Chettinad is entitled to rely on the prior mortgage to that firm to resist the plaintiffs' claim. I agree that the judgment and decree of the lower Court must be set aside and the plaintiffs-respondents' suit must be dismissed with costs, advocate's fee in this Court 20 gold mohurs.

D.S./R.K. *Appeal allowed.*

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[30] Main v. Stark, (1890) 15 A C 384=59 L J P C 68=63 L T 10.

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## A. I. R. 1938 Rangoon 315

### SPECIAL BENCH

ROBERTS C. J., MYA BU AND SHARPE JJ.

*Commissioner of Income-tax, Burma* — Applicant.

v.

*B. B. Jubb* — Respondent.

Civil Ref. No. 5 of 1937, Decided on 14th January 1938, made by Commissioner of Income-tax, Burma.

**(a) Income-tax Act (1922), S. 66 (2) — In reference High Court is competent only to see whether there is evidence to support finding — That High Court might have come to contrary decision on same evidence is immaterial.**

The High Court is not competent to investigate matters of fact in a reference under S. 66 (2). Whether or no in any particular case there is any evidence to support the finding of fact arrived at below is, of course, a question of law; but such question of law is entirely limited to whether there was any evidence and if there was any evidence, then the finding of fact must stand, although the appellate tribunal might itself have found the facts in a contrary way. [P 316 C 2]

**(b) Income-tax Act (1922), S. 4 (3) (vii) — Profit made out of single transaction—Capital assets or gain—Test.**

Where a profit is made out of a single transaction the test to be applied in deciding as to whether it is capital assets or gain is to see whether there was a gain made in an operation of business in carrying out a scheme for making profits : *(1929) 13 Tax Cas 396, Foll.* [P 316 C 1,2]

**(c) Income-tax Act (1922), S. 66 (2)—Correct principle of law applied—No misdirection.**

When the Assistant Commissioner applies the correct principle of law to facts and comes to a certain conclusion, there is no misdirection and it is immaterial to consider whether the High Court applying the same principle to the question of fact to be decided would have arrived at the same conclusion. [P 316 C 2]

Advocate-General — *for Applicant.*

Foucar — *for Respondent.*

**Roberts C. J.**—The following questions have been referred to this Court for determination in Civil Reference No. 5 of 1937:

1. Was it impossible for the Assistant Commissioner to infer from the primary facts in record before him that the assessee's surplus arising from sale of the '(Yemone) Island Mine' was a profit of his business?

2. Did the Assistant Commissioner misdirect himself in principle and law in reaching the said inference?

The only point of law which could arise in the determination of these two questions is the proper legal effect of the facts as proved. The assessee, Mr. B. B. Jubb, bought a rubber estate in 1924 which he sold two years later. In 1928 he obtained a license of the Kywekayan area by way of prospecting, but having later abandoned it he brought his plant to Mergui. In 1932 during the earlier part of the year, he was employed in the Shan States, but he went to Mergui in the month of April and stopped on his way at Rangoon in order to see the Official Assignee. The Mergui Tin Dredging Company, which had originally owned the Yemone Tin Mine, had just gone into liquidation, and Mr. Jubb arranged to work the mine with his own money under an agreement with the Official Assignee by which 10 per cent. of the gross price realized from the sale of the tin obtained from the mine should be paid to the Official Assignee. Under this agreement he worked it from June to November 1932, and in March 1933, Mr. Jubb entered into a contract with the Government whereby the lease should be taken over in his name on his liquidating all outstanding arrears of rent and other debts owing to the Government. At this date, in May 1933, it appears he was making an offer to pay by instalments as it is said, for a rubber estate which he ultimately purchased and the purchase money for which was obtained by the sale of the Yemone Tin Mine in June 1934. In all these circumstances the Assistant Commissioner of Income-tax found that it was clear the sale of the mining areas acquired from the Mergui Tin Dredging Company Ltd. was not a capital transaction, nor as such outside the scope of the Income-tax Act, but that it was the appellant's business to secure mining areas with a view to their resale. His rights in the Kywekayan area had been sold for Rs. 15,000 to a man named Milne, and the Assistant Commissioner has found as a fact that he entered early into negotiations for resale of the tin mine which showed definitely that he proposed to dispose of it as soon as he could obtain a suitable buyer. It was said that the reason he was anxious to sell was to obtain money for the purchase of a rubber estate. But all these questions appear to me to be questions of fact which it was for the income-tax authorities to decide, and although we do not necessarily say that we should come to the same decision upon the facts as they have done, it is in our opinion clear that there was evidence upon which they could arrive at the conclusion they did.

Mr. Foucar has been driven to contend unless there was a primary intention at the time of his acquiring the Yemone Tin Mine to enter on an adventure in the course of trade it cannot be found that such an adventure was subsequently entered into unless there were a series of transactions. We think this view of the law is based upon a misconception and that, in the words of Lord Buckmaster in (1929) 13 Tax Cas 396,[1] the real question is whether there was a gain made in an operation of business in carrying out a scheme for profit making. In applying this test we are satisfied that the Assistant Commissioner in no way misdirected himself in principle or law, and that there was evidence upon which he could conclude that the assessee's surplus arising from the sale of the mine was a profit of his business. I would accordingly answer both questions in the negative. We assess the advocate's fee for this reference at ten gold mohurs.

**Mya Bu J.**—I agree.

**Sharpe J.**—This Court is not competent to investigate matters of fact in a reference such as the present one. Whether or no in any particular case there is any evidence to support the finding of fact arrived at below is, of course, a question of law; but such question of law is entirely limited to whether there was any evidence, and if there was any evidence, then the finding of fact must stand, although the appellate tribunal might itself have found the facts in a contrary way. Here, in my judgment, there was clearly evidence to support the finding arrived at and it is immaterial to consider what decision we in this Court would have arrived at, if we had been the judges of fact, which we are not. The first question submitted must accordingly be answered in the negative. As to the other point referred, a case such as the present is governed by the principles laid down in the House of Lords in (1929) 13 Tax Cas 396[1] to which my Lord the Chief Justice, has referred. I cannot see that the Assistant Commissioner in arriving at the decision which he did, acted in any way contrary to the principle there enunciated. It is immaterial to consider whether we in this Court, applying those same principles to the question of fact to be decided, would have arrived at the same conclusion. Therefore the second question submitted must also be answered in the negative. I agree with the proposed order as to costs.

K.S./R.K. *Answers in the negative.*

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[1] Rees Roturbo Development Syndicate, Ltd. v. Commissioner of Inland Revenue, (1929) 13 Tax Cas 396.

## A. I. R. 1938 Rangoon 317

BAGULEY AND MOSELY JJ.

*K. M. C. T. Chidambaram Chettyar* — Appellant.

v.

*R. M. S. M. Somasundaram Chettyar*— Respondent.

First Appeal No. 133 of 1937, Decided on 8th February 1938, from order of Asst. District Court, Pegu, D/- 27th September 1937.

**Civil P. C. (1908), S. 47 — Order refusing to stay execution does not come within purview of S. 47—Appeal does not lie.**

When an Amending Act changes the phraseology of the old Act it must, as a rule, be assumed that the Legislature was intending to make some change. Questions relating to stay of execution are no longer within the purview of S. 47. Hence no appeal lies from an order staying or refusing to stay execution of a decree : *A I R 1931 Rang 221 ; A I R 1920 Cal 71 and A I R 1921 Bom 208, Approved ; A I R 1930 Lah 187, Dissent.* [P 317 C 2 ; P 318 C 1]

Chakravarti — *for Appellant.*

P. B. Sen — *for Respondent.*

**Baguley J.** — This is an appeal against an order passed by the Assistant District Judge of Pegu refusing to stay certain execution proceedings under O. 21, R. 29, Civil P. C. Orders under O. 21, R. 29 are not mentioned in O. 43, R. 1. So, if appealable at all, it can only be appealable under S. 47. A preliminary point has been taken that this appeal does not lie. S. 2 (2), Civil P. C. defines a decree and all decrees are appealable. The definition of a decree is deemed to include the determination of any question under S. 47. S. 47 deals with questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree. The question is whether an application for stay is a matter relating to the execution, discharge or satisfaction of the decree. There is authority in this Court, 9 Rang 354,[1] that no appeal lies from an order staying or refusing to stay execution of a decree. It is argued that this is incorrect, and in the judgment (which is that of a single Judge) authorities are quoted from Calcutta and Bombay: 25 C W N 555[2] and 45 Bom 241.[3] We are asked to hold that this Rangoon ruling is incorrect and that the contrary view taken by the High Court of Lahore in 11 Lah 402[4] is correct. I have studied this Lahore ruling and it seems to me to make it perfectly clear that the Calcutta and Bombay view is correct.

Section 47, Civil P. C. corresponds with S. 244 of the former Code. S. 244, as it first appeared in this Code, referred only to questions "relating to the execution, discharge or satisfaction of the decree." There was a conflict of opinion between the Courts as to whether this phrase included questions relating to stay of execution. So the Legislature took a hand, and in 1888 added the words "or to the stay of execution thereof." It was then perfectly clear that questions relating to stay of execution did come under S. 244. When the Code of 1908 was drafted, the Legislature definitely removed these words "or to the stay of execution thereof" from S. 47 which took the place of the old S. 244. Now the Code of 1908 is not merely a consolidating Act which may be presumed to leave the law unchanged. The Preamble states that it is expedient to consolidate and amend the laws relating to the procedure of the Courts, and when an amending Act changes the phraseology of the old Act it must, as a rule, be assumed that the Legislature was intending to make some change. The passage at page 406 of the Lahore case which suggests that "after the law had been well settled and the right of appeal generally acknowledged, it was no longer considered necessary to retain the words, which were really superfluous" is one to which I cannot possibly assent. When the phraseology of the law is changed by an Amending Act, the presumption will be that some change in the law is intended. Had the words "or to the stay of execution thereof" never been in the Act I would have been inclined to the view that questions as to stay of execution would be questions relating to the execution, discharge, or satisfaction of the decree. But once it was found necessary to put in special words to make it clear that questions of stay were included in the section and afterwards it is found that these words have been removed, it seems to me clear beyond all doubt that questions relating to stay of execution are no longer within the purview of S. 47. I would therefore hold that no appeal lies in this case and I would dismiss the appeal with costs; advocate's fee three gold mohurs.

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[1] U San Wa v. U Chit San, (1931) 18 A I R Rang 221=133 I C 491=9 Rang 354.

[2] Rajendra Kishore v. Mathura Mohan, (1920) 7 A I R Cal 71=55 I C 228=25 C W N 555.

[3] Janardan Trimbak v. Martand Trimbak, (1921) 8 A I R Bom 208=59 I C 523=45 Bom 241=22 Bom L R 1212.

[4] Mt. Durga Devi v. Hans Raj, (1930) 17 A I R Lah 187 = 124 I C 349 = 11 Lah 402 = 31 P L R 617.

**Mosely J.** — I agree.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 318

ROBERTS C. J. AND DUNKLEY J.

*P. Hasanar* — Appellant.

v.

*L. T. Kandan Chettyar* —Respondent.

First Appeal No. 138 of 1937, Decided on 17th February 1938, against order of High Court, D/- 23rd August 1937.

**Limitation Act (1908), S. 14 (2) — Time spent in prosecuting unnecessary applications cannot be excluded under S. 14 (2).**

In order that the period of time which the applicant has spent in prosecuting another proceeding may be excluded under S. 14 (2), the proceedings must be prosecuted with due diligence and must also be prosecuted in good faith. Where the applicant prosecutes certain applications which are entirely unnecessary, it cannot be said that the applications were prosecuted with due diligence or in good faith and the time spent in the prosecution of such applications cannot be excluded : *A I R 1932 Lah 531, Disting.* [P 318 C 2; P 319 C 1]

Jaganathan — *for Appellant.*

N. Bose — *for Respondent.*

**Dunkley J.** — The appellant is the judgment-debtor and the respondent the decree-holder. The decree was passed by the District Court of Prome on 8th October 1932 and was transferred to this Court for execution. Application for execution was made in the early part of 1933, but on 25th March 1933 the appellant was adjudicated insolvent under the Presidency Towns Insolvency Act, with the result that the execution application was closed on 27th March 1933. On 16th August 1933 the appellant filed his schedule, in which he showed this decree as a liability. Consequently, time for the execution of this decree began to run from that date. On 23rd August 1934 the respondent made a petition to the Insolvency Court for permission to execute his decree. It was then pointed out to him that no leave to execute the decree was required. Consequently, he withdrew his petition on 25th July 1935. Then, on 14th March 1936, the respondent made a fresh petition to the Insolvency Court asking the Court to cancel the protection order which had, so he said, been granted to the appellant. Actually, no protection order had ever been granted to the appellant at any time. However an inquiry was held into this matter, and, by an order of 7th April 1936, the Insolvency Court purported to cancel the protection order which was non-existent. Having obtained this order, the respondent then made a fresh application for execution on 8th March 1937, and he applied for execution by arrest and imprisonment of the appellant. In his objections to this application the appellant contended that the application was barred by limitation. In order to bring his application within time, the respondent desires to exclude the period of the insolvency proceedings from the date of the adjudication until 7th April 1936.

On behalf of the appellant we have been referred to the cases in 42 Mad 319[1] and 47 Bom 244[2] as authorities for the proposition that the pendency of insolvency proceedings does not stop the running of time in respect of applications for execution of decrees. The original application to execute the decree was rejected by the Deputy Registrar on the ground that the application was time-barred, but on a reference to the learned Judge on the Original Side it was held that the time, amounting to something more than eleven months, during which his petitions in the insolvency proceedings were being prosecuted by the respondent ought to be excluded under the provisions of S. 14 (2), Limitation Act. The learned Judge as authority for this proposition, referred to the case in 14 Lah 106,[3] but, with the greatest respect, this case is not authority for the conclusion of the learned Judge, as it refers to an execution application made in a wrong Court and not to an insolvency proceeding. Moreover, under S. 14 (2), in order that the period of time which the applicant has spent in prosecuting another proceeding may be excluded, the proceeding must be prosecuted with due diligence and must also be prosecuted in good faith. The term "good faith" i sdefined in Cl. (7) of S. 2 of the Act as follows :

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[1] Ramaswami Pillai v. Govindasami Naicker, (1919) 6 A I R Mad 656=49 I C 625=42 Mad 319=36 M L J 104.

[2] Sidhraj Bhojraj v. Ali Haji, (1923) 10 A I R Bom 33=67 I C 757=47 Bom 244=24 Bom L R 509.

[3] Kala Singh v. Gahna Singh, (1932) 19 A I R Lah 531=138 I C 646=14 Lah 106=33 P L R 740.

> "Good faith" : nothing shall be deemed to be done in good faith which is not done with due care and attention.

For more than eleven months the respondent prosecuted applications which were entirely unnecessary because he was under the impression that there existed an order which actually was non-existent; and if the insolvency record had been consulted it would readily have been discovered that no protection order had been issued in favour of the appellant. Consequently, it cannot be said that the applications were prosecuted either with due diligence or in good faith, and therefore in any view, the time spent in the prosecution of these applications cannot be excluded. In my opinion, the order of the Deputy Registrar, dismissing the application for execution as time-barred was correct. This appeal is therefore allowed and the order of the Deputy Registrar is restored, with costs in both Courts, advocate's fee in this Court three gold mohurs.

**Roberts C. J.** — I am of the same opinion.

R.M./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 319

ROBERTS C. J. AND DUNKLEY J.

*T. K. Roy Chowdhury and others* — Applicants.

v.

*J. Biharilal and others*— Respondents.

Civil Revn. Nos. 17, 18 and 19 of 1938, Decided on 6th April 1938, against order of Asst. District Court, Pyapon, D/- 24th September 1937.

**Revision — Dismissal of objections to attachment under O. 21, R. 58, Civil P. C. — High Court would not interfere in revision as objector has conclusive remedy by filing suit under O. 21, R. 63.**

**High Court will not, save in most exceptional cases, exercise its revisional jurisdiction in favour of a party to whom there is open another certain and conclusive remedy. [P 320 C 2]**

**Hence the High Court would not interfere in revision against the dismissal of objections of a party to attachment under O. 21, R. 58, Civil P. C. as such party has a conclusive remedy by filing a suit under O. 21, R. 63. [P 320 C 2]**

Clark — *for Applicants.*

Hay, B. C. Paul and P. B. Sen — *for Respondents.*

**Dunkley J.**—In these three applications in revision the applicants are the same, although the respondents are different, and the three applications arise out of similar facts, and therefore can be disposed of in one judgment. There was a Chettyar firm at Dedaye known as the R. M. P. M. firm. It is alleged in the plaint in the administration suit (No. 2 of 1936 of the Sub-divisional Court of Kyaiklat) that the firm was a joint Hindu family business and the karta and manager was Muthuverappa Chettyar. After his death one of the creditors of the firm brought a suit in the Sub-divisional Court of Kyaiklat (No. 2 of 1936) for the administration of the estate of R. M. P. M. Muthuverappa and obtained a preliminary decree. A receiver was then appointed to take over the administration of the estate with full powers. He has collected a sum of about Rs. 28,000 out of the assets of the estate, and this sum has been deposited in the Subdivisional Court of Kyaiklat. The receiver is Mr. T. K. Roy Chowdhury, the first applicant. The second and third applicants are alleged to be other creditors of the R. M. P. M. firm, but as they have not applied to be joined as parties to the administration suit it is difficult to understand how they have any locus standi in the present applications. The three respondents are other creditors who had obtained decrees against the R. M. P. M. firm. They then applied to execute their decrees, two of them in the Assistant District Court of Pyapon, and one in the Subdivisional Court of Kyaiklat. The execution applications were brought against the R. M. P. M. firm. This would appear not to be the right form in view of the death of Muthuverappa, but however that is not a point which is now before us.

In the two execution proceedings before him the learned Assistant District Judge issued notices to the Subdivisional Court under R. 52, O. 21, Civil P. C. The receiver, i. e. the first applicant, then applied to the Assistant District Court to have these notices recalled, alleging that as there were numerous other creditors the attachments on behalf of these particular creditors could not be made. His objections were obviously made under R. 58, O. 21, but they were dismissed by the learned Assistant District Judge in the most summary manner and without any reasons being given. The receiver has, up to date, taken no further action, except to prosecute, at the instance of the other two applicants, these applications in revision. After the objections of the receiver had been dismissed, the Assistant District Judge ordered the Subdivisional Judge to deposit in the Assistant District Court sufficient funds, out of the moneys collected by the receiver and deposited in the Subdivisional Court to the credit of the administration suit, to meet in full the claims of these two judgment-creditors-respondents, and this was done, and these two respondents have received payment of their claims in full. The execution proceedings in the Subdivisional Court followed exactly the same course, and in fact the Subdivisional Judge followed closely every step and order of his superior Judge, the Assistant District Judge, with the result that this judgment-creditor-respondent has also received payment of his claim in full.

It is difficult from the three applications themselves to ascertain which of the orders of the learned Assistant District Judge and the learned Subdivisional Judge in the execution proceedings are now called in question, but apparently the orders about which the main complaint is made are the orders dismissing the objections of the receiver made under R. 58, O. 21. Mr. Clark for the applicants has referred to the provisions of R. 13, O. 20, and has quoted authorities for the proposition that the principle of sub-r. (2) of R. 13 is applicable whether the estate of the deceased is insolvent or not. He has urged that the three respondents could not execute their decrees by applications under R. 52 of O. 21 and that their proper course was to come in under the preliminary decree in the administration suit and make their claims; and that therefore the execution proceedings were without jurisdiction. No doubt, serious irregularities have been committed by the Assistant District Court and the Subdivisional Court in these execution proceedings, and it is admitted on behalf of the respondents that they cannot be entitled to have their claims met in full unless the estate is found to be sufficient to meet in full all the debts and liabilities of the firm; but whether these execution proceedings were undertaken without jurisdiction is a matter which will fall to be decided in subsequent proceedings under the order which we now propose to pass, and we therefore refrain from expressing any opinion on this point.

The applicants seek to invoke the revisional jurisdiction of the High Court, and it is fundamental that the High Court will not, save in the most exceptional cases, exercise this jurisdiction in favour of a party to whom there is open another certain and conclusive remedy. Mr. Clark urges that these present cases are exceptional cases in that the procedure of the executing Courts was so manifestly wrong that it would be merely multiplying litigation and causing unnecessary expense to the applicants if they are driven to file separate suits to which there could be no defence, and he quotes 5 Rang 742.[1] He has further urged that there is no certain and conclusive remedy open to the applicants if these applications in revision are dismissed. With these contentions I find myself unable to agree. As I have said, it is difficult to understand how the second and third applicants have become parties to the present applications, and so far as the first applicant is concerned he has a certain and conclusive remedy still open to him by filing suits against the respondents under O. 21, R. 63 arising out of the dismissal of his objections to the attachments. That as receiver he has authority to file such suit is clear from the terms of his order of appointment. All the material facts have not been brought before the Courts, such as, for instance, whether the estate of the deceased is insolvent or not, or whether for any other reason the respondents are not entitled to execute their decrees in the ordinary manner, and all these necessary facts can be pleaded in suits under O. 21, R. 63; it is therefore expedient that such suits should be brought and all questions in issue between the receiver and the respondents decided after full hearing. On this short ground I am of opinion that these applications in revision cannot be allowed and must be dismissed with costs, advocate's fee three gold mohurs in each application.

**Roberts C. J.**—I agree.

D.S./R.K. *Applications dismissed.*

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[1] **Administrator-General of Burma v. C. R. V. V. S. Chettyar Firm, (1928) 15 A.I R Rang 83=109 I C 444=5 Rang 742.**

## A. I. R. 1938 Rangoon 321

MOSELY AND DUNKLEY JJ.

*Shwe Khoon* — Appellant.

v.

*Ma Sein Nu* — Respondent.

First Appeals Nos. 106 and 110 of 1937, Decided on 21st December 1937, from Judgments of Dist. Court, Bassein, in Civ. Reg. Suits Nos. 3 of 1937 and 8 of 1936.

**Buddhist Law (Chinese) — On Chinaman's death, whether Buddhist or non-Buddhist, widow alone is proper person to obtain letters of administration.**

So far as applications for letters of administration to the estate of a deceased Chinaman are concerned, when the applicants are a widow and a son, it does not matter whether the deceased was a Buddhist or a non-Buddhist, that is, whether the succession to his estate is governed by the Chinese Customary law or by the Succession Act, for in either case the proper person to obtain letters of administration to his estate is his widow, and other persons having claims to the estate must, if necessary, prosecute those claims in the form of a separate suit against the widow, either for their share or for the administration of the estate by the Court : *A I R 1923 Rang 180, Rel. on.* [P 321 C 2]

U Kyaw (1) — *for Appellant.*

Kyaw Myint — *for Respondent.*

**Dunkley J.** — These two appeals arise out of opposing applications for letters of administration to the estate of a deceased Chinaman named Eik Seik Whet alias Ko Po Nyun. One application was made by his Burmese Buddhist widow, Ma Sein Nu, and the other by a person who alleged that he was an adopted son, Shwe Khoon. The main contest at the hearing of the applications centred round the question whether the deceased was a Chinese Buddhist or a Confucian. The learned District Judge held that the deceased was not a Chinese Buddhist, and that therefore the succession to his estate was governed by the provisions of the Succession Act: that consequently the widow was entitled to a one-third share of his estate, and therefore was the proper person to obtain letters of administration. He declined to go into the question whether the present appellant, Shwe Khoon, was an adopted son of the deceased or not. Before us it is contended that on the evidence it should have been held that the deceased was a Chinese Buddhist; that consequently the succession to his estate was governed by the Chinese customary law, and therefore if there was a son, the widow would be entitled to maintenance only out of the estate and the son would oust the widow; hence letters of administration could not, under those circumstances, be granted to the widow. It was urged that for these reasons it was essential that the question of Shwe Khoon's adoption should be decided by the learned District Judge in the proceedings on the contested applications for letters. The matter however appears to be covered by the judgment of a Bench of this Court in 1 Rang 161.[1] At p. 168 of the judgment of Heald J. in that case there appears the passage :

> If there are sons or daughters the widow has only a right to administer the estate and to be maintained out of it and a claim on the estate for provision for her funeral, but the property vests not in her but in the children.

Reference, with approval, has been made to this case in at least two subsequent Bench decisions of this Court, and the correctness of this judgment of Heald J. never appears to have been doubted. The effect of it is that, so far as contested applications for letters of administration to the estate of a deceased Chinaman are concerned, when the applicants are a widow and a son, it does not matter whether the deceased was a Buddhist or a non-Buddhist, that is, whether the succession to his estate is governed by the Chinese customary law or by the Succession Act, for in either case the proper person to obtain letters of administration to his estate is his widow, and other persons having claims to the estate must, if necessary, prosecute those claims in the form of a separate suit against the widow, either for their share or for the administration of the estate by the Court. Hence in the particular appeals which are now before us the question whether the deceased was a Buddhist or not was really immaterial, so also was the question whether Shwe Khoon was an adopted son or not, for, whatever may be the facts regarding these two matters, the respondent is the person who is entitled to letters of administration. These appeals therefore fail and are dismissed with costs, advocate's fee five gold mohurs. There will be one set of costs for both appeals.

**Mosely J.**—I agree.

D.S./R.K. *Appeals dismissed.*

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[1] Maung Po Maung v. Ma Pyit Ya, (1923) 10 A I R Rang 180=74 I C 983=1 Rang 161.

## A. I. R. 1938 Rangoon 322

ROBERTS C. J. AND DUNKLEY J.

*Eusoof Ahmed Sema* — Appellant.

v.

*Ismail Ahmed Sema and others* — Respondents.

First Appeal No. 178 of 1936, Decided on 7th April 1938, against order of Dist. Court, Mandalay, in Civil Misc. No. 35 of 1935.

**(a) Will — Grant of probate—Onus of proof.**

The onus *probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased : *(1894) L R P D 151, Foll.* [P 322 C 2]

**(b) Will — Will made by sick and dying person — Degree of understanding required explained.**

Wills are too frequently made by the sick and dying; the degree of understanding therefore which the law requires is such as may reasonably be expected from persons in that condition. It is not enough that a testator is able to answer familiar and usual questions. He must be able to exercise a competent understanding as to the general nature of the property, as to the state of his family, and as to the general condition and claims of the objects of his bounty, as to the nature of the instrument which he executes, and as to the general nature and general objects and the provisions which it contains; if he can do that, though he may be very feeble and debilitated in understanding, and be at the point of death, it is enough: *21 Cal 279 and (1858) 1 F & F 584, Rel. on.* [P 323 C 1]

Doctor — *for Appellant.*

Dr. Ba Han—*for Respondents 2 and 3.*

**Roberts C. J.**—This is an appeal against an unsuccessful attempt to secure the revocation of probate to the will of one Suleman Ahmed Sema, who died at Mandalay on 13th December 1932. And it is alleged by his brother, the appellant Yusoof Ahmed Sema, that the will propounded, dated 11th December—two days before his death—is invalid for lack of testamentary capacity on the part of the testator. There has been in the case a great conflict of evidence as to the circumstances in which the alleged will came to be made, and we have to bear in mind the rule as to the burden of proof which is concisely expressed, among other places, in (1894) L R P D 151[1] at page 157 by Lindley L. J. He says :

> These rules are two : The first, that the onus *probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

And the circumstances in which this alleged will came to be made were that the testator, who had been in his usual health to within about ten days preceding the will, had become ill and was in fact in the course of his last illness of which he died. And he was visited during the course of that illness on two or three occasions by Dr. Jones. We have also the evidence of a number of persons, mostly interested on one side or the other, and their evidence is extremely at variance and cannot be with safety accepted on account of the bias which they have obviously shown. Those who are anxious to say that the will propounded was a good one suggest that the deceased was hale and hearty up to within the time of making it and only suffered from some slight soreness in the legs and was unable to walk about. One witness goes so far as to say that he could dictate for 15 minutes or more a concise statement of his wishes to anyone who would take it down. The witnesses called on the other hand to impugn the will say either that the deceased was unconscious or, that he was quite incapable of understanding anything that was put to him. And in this mass of conflicting evidence we have to take, in my opinion, as the only reliable standard the evidence of Dr. Jones of Mandalay who came to see him on these three or four occasions. Now, the evidence of this medical witness is not very conclusive, for, it is extremely guarded in character. He says in effect that the deceased was in a very ill and feeble state, that he might have been able to mumble assent to simple instructions and to have agreed to a simple will which had been prepared for him; and that to the best of Dr. Jones' knowledge he died within a day or two of the doctor's visit.

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[1] Tyrrell v. Painton, (1894) L R P D 151=6 R 540=70 L T 453=42 W R 343.

We then turn to look at the will, and it is true that it is a will of a simple character. It was prepared by his clerk, Mr. Desai, who came and wrote out the will: at the time Ma U alias Mariam Bibi, the wife, was in the room, and the will was prepared, in my opinion, by Mr. Desai and the testator was asked to assent to it. One cannot believe that in all the circumstances of the case the testator dictated the paragraphs of the will, and it is necessary to bring to mind the circumstances in which one should consider the preparation of a will, which is made by a person whose mental capacity is challenged. In 21 Cal 279[2] at page 290 it is said:

> But where the mental capacity of the testator is challenged by such evidence as there is in the present case, the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will.

And later on a dictum of Byles J. in (1858) 1 F & F 584[3] was quoted with approval:

> Wills are too frequently made by the sick and dying; the degree of understanding therefore which the law requires is such as may reasonably be expected from persons in that condition. It is not enough that a testator is able to answer familiar and usual questions. That has always been laid down. He must be able to exercise a competent understanding as to the general nature of the property, as to the state of his family, and as to the general condition and claims of the objects of his bounty, as to the nature of the instrument which he executes, and as to the general nature and general objects and the provisions which it contains; if he can do that though he may be very feeble and debilitated in understanding, and be at the point of death, it is enough.

What the doctor says is clear to this extent: he could if a document of a simple character were placed before him in circumstances which did not give rise to any suspicion, assent to it so as to be able to make a valid will. But here in addition to lack of testamentary capacity, undue influence was pleaded; and the circumstances are such, in my opinion, as to show that the paper placed before the testator, which had been prepared by Mr. Desai, was a paper which those who seek to propound the will have not satisfied me that the deceased fully understood. Haji Moot and Bafatia, the two witnesses who were supposed to be attesting witnesses, were called; and Haji Moot said he did not see anyone else sign the will and did not see Bafatia sign it. He then contradicted himself and said that the deceased signed in the witnesses' presence. Bafatia said he did not see Haji Moot and never heard of a will having been made and thought it was merely a list of property, and that there was no signature on the will when he signed it. I feel satisfied in my own mind that the contradictions of the witnesses who were in the room at the time and who are called to explain the circumstances in which the will was made lead one to the conclusion that a will was being hurriedly prepared and the signature of the deceased obtained to it without such preparation as might be necessary to be able to acquaint him with the true facts.

Moreover, when we come to consider the circumstances in which probate was granted, it is clear that it was the intention of the learned Judge who tried the case that probate should be in solemn form. Eusoof Ahmed Sema was not in fact cited; and it is said by Dr. Ba Han that he did nothing when he came to know of the will different from what he would have done if he had received a special citation; and it is urged that he has waived his rights, and alternatively, that he has taken benefits under the will so as to raise an estoppel against him in the nature of the case. But, in my opinion, the fact that the learned Judge intended, as he obviously did, the probate to be in solemn form, together with the consideration of the suspicious circumstances in which the will was made, should have made the Court very careful in examining the nature of the evidence upon which probate was granted, and, in my view, it has been clearly shown that there is just cause for revocation of probate in this case. In my opinion, the appeal should be allowed with costs in both Courts, advocate's fee ten gold mohurs: and the probate of the will must be revoked.

**Dunkley J.** — The three respondents in this appeal are the three executors who propounded the will. Respondent 1 has now made common cause with the appellant, who is attacking the grant of probate. It is clear that the intention of the learned Assistant District Judge, who granted the probate, was that the proceedings should be in solemn form, although owing to a mistake in his office the grant was actually made in common form. For the respondents it is suggested that that now makes no difference because the appellant showed by his subsequent conduct that he accepted the will and the grant of probate to the respondents, and that therefore even had he been cited during the pendency of the probate proceedings he would have taken no objection to the grant. But the conduct of the appellant after the grant of probate seems to me to be of no importance in relation to the present matter, because there were other heirs besides the appellant who were not cited, and we have no indication as to what their attitude would have been if they had been given notice of the application for probate while the proceedings were pending. Consequently I am of opinion that Expln. (a) to S. 263, Succession Act, is applicable, and that the burden in the present proceedings is upon the propounders of the will to show that the testator was of sound disposing mind and that his signing of the will was his independent voluntary act.

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[2] Woomesh Chunder Biswas v. Rashmohini Dassi, (1894) 21 Cal 279.

[3] Swinfen v. Swinfen, (1858) 1 F & F 584=175 E R 862.

On both sides the evidence was, to a great extent, unworthy of credit, and with the exception of the evidence of Dr. W. D. Jones, who attended the deceased, I find it impossible to place any reliance upon the statements of the witnesses called on either side. The story which the respondents set up in their evidence, and by which they are bound in regard to showing that the will is a good will, is that the testator was, at the time of the execution of this will, in a perfectly normal condition of mind and body, except for an affliction to the legs which prevented him moving about, and that he gave long and detailed instructions regarding the preparation of the will, and in fact, according to the respondent Ma U, dictated it word for word, and made corrections in the first draft, and then ultimately signed it, while sitting up in bed, easily and without any assistance from any other person. That story is entirely incredible when viewed in conjunction with the evidence of Dr. Jones. It is clear from Dr. Jones' evidence that the condition of the deceased concerning which he speaks relates to a visit which he made to the deceased either on the day on which the will was executed or on the next day; and Dr. Jones has stated that at the time of this visit the deceased was able to understand the questions put to him, but was only able to answer very feebly, that it would be quite outside his power to give anything except the simplest instructions, and that if the very simple will, which was actually drawn up, was read over to him he might be able to understand the terms of the will to a certain extent and give his assent, but then only by nodding his head, and that the deceased could not have signed his name except with assistance. The evidence of the doctor is in my opinion fatal to the respondents' case. They have not succeeded in showing either that the testator was of sound disposing mind or that the signature on the will is the voluntary signature of the testator. Consequently, I agree with my Lord that this appeal must be allowed with costs in both Courts, and that the probate of the will must be revoked.

V.B.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 324

BRAUND J.

*In the matter of Motilal Premsukhdas and others.*

Insolvency Case No. 124 of 1937, Decided on 22nd December 1937.

**(a) Presidency Towns Insolvency Act (1909), (Rangoon), S. 22 — Several persons trading at Calcutta under certain firm name — Some of them also partners in another firm at Rangoon trading under different name — Such persons whether constitute 'same debtors'** *(Quære)*.

Where certain persons carry on business at Calcutta under certain firm name and some of the partners of that firm are also partners of another firm at Rangoon trading under a different name, it is doubtful whether they constitute 'same debtors' within the meaning of S. 22. [P 326 C 1]

**(b) Presidency Towns Insolvency Act (1909), (Rangoon), S. 17 Insolvent's property in Burma will not vest in Official Assignee in India.**

An order of adjudication made in Calcutta after separation of Burma is not sufficient to vest under S. 17 in the Official Assignee of Calcutta immovable property of the insolvent in Burma : *A I R 1932 Cal 310 and 62 Cal 659, Expl.* [P 326 C 2]

**(c) Presidency Towns Insolvency Act (1909), (Rangoon), S. 22 — Adjudication first in Calcutta and then in Rangoon—Substantial assets in Rangoon—Bulk of business whether in Calcutta not established — Proceedings under Rangoon adjudication order held ought not to be stayed at that stage.**

The jurisdiction of the Court to annul or stay proceedings on an adjudication order under S. 22 is a discretionary jurisdiction. It is a jurisdiction which cannot be invoked as of right, though no doubt there are settled principles upon which the discretion is either exercised or not. The dominating factor which decides the Court whether to exercise its discretion or not is whether the assets can be more conveniently and efficiently administered in the one Court than in the other. [P 325 C 2; P 326 C 1]

Certain persons in a firm were adjudicated insolvent first in Calcutta and then in Rangoon. There were substantial assets of the firm in Rangoon and it was not established to the satisfaction of the Court that the bulk of the business lay in Calcutta or that there were not considerable liabilities in Burma :

*Held* that the proceedings under Rangoon adjudication order ought not to be stayed and the case was not proper for the Court to exercise its discretion under S. 22 : *21 Bom 297*, *Expl.* [P 328 C 1]

Chatterjee — *for the Official Assignee, Calcutta.*

Choudhury — *for Insolvents.*

Hormasji and Nair — *for Creditors.*

**Order.** — This application raises a question of considerable interest. The facts are not very long and I can state them quite briefly. On 9th July 1937 an order was made in the High Court of Judicature at Fort William in Bengal, adjudicating nine persons insolvents. I need not set out the actual names of those nine persons, as it is sufficient to say that they constituted all the partners in a firm called "Ramnibas Ramnarain." That firm is described in the petition as carrying on business among other places at No. 192, Cross Street, in the town of Calcutta. I am told that since the making of that order of adjudication, it has been annulled as against two of the individual partners against whom it was made. In the result therefore seven partners in the firm have been adjudicated in Calcutta. The petition upon which that adjudication order was made was filed on 5th July 1937 and the petitioning creditors were a firm of Messrs. Bangshidar Gazanand of Calcutta. On 29th June 1937, that is to say six days before the filing of the Calcutta petition, a petition had been filed in this Court, i. e. in the Rangoon High Court, asking for the adjudication of six of the nine persons who had been originally adjudicated in Calcutta. The respondents to the Rangoon petition were the whole nine of the persons originally adjudicated in Calcutta except three, namely Ghasilal, Jugalikishore and Ramnibas, the two former of whom were the two persons against whom the adjudication order was subsequently annulled by the Calcutta High Court. The Rangoon petition is by a firm of Javerilal Anandjee and is addressed not only to the six insolvents by name but to the firm of 'Motilall Premsukhdass', the partners of which, it was alleged, the six insolvents were. On 5th August 1937 an adjudication order was made in the Rangoon High Court adjudging the "firm of Motilall Premsukhdass" insolvents.

The position therefore was that there first occurred the adjudication in Calcutta of seven persons trading under the name of 'Ramnibas Ramnarain' and a month later there was the adjudication in Rangoon of the firm of 'Motilall Premsukhdass' of which six of those seven persons were partners. I do not think that I am at present concerned with the acts of insolvency upon which those orders were made. The application which I have before me now is an application dated 26th October 1937 by the Official Assignee in Calcutta asking under S. 22, Rangoon Insolvency Act to have the Rangoon adjudication order annulled or alternatively to have all proceedings thereon stayed. Since that was filed there has been added to it a petition dated 3rd December 1937 asking for the same relief by the insolvent firm 'Motilall Premsukhdass' itself. It is with those two petitions that I now have to deal. I desire to point out that neither of the petitioners has challenged the jurisdiction of the Rangoon High Court to make an order of adjudication in the face of the adjudication order already made in Calcutta. Indeed, upon the authorities the jurisdiction could not I think be challenged. What the petitioners do however state is that, in the particular circumstances of this case, 'the same debtor' has been adjudicated in two places and moreover that the properties of the debtor can be more conveniently distributed by the Calcutta High Court in its insolvency jurisdiction than by the Rangoon High Court. A number of facts are alleged upon which that contention is founded. Before going any further, it will be convenient, and I think desirable, for me to refer specifically to S. 22, Rangoon Insolvency Act. It runs thus :

> Where it is proved to the satisfaction of the Court that insolvency proceedings are pending in any other British Court whether within or without British Burma against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon.

As I conceive, the jurisdiction of the Court to annul or stay proceedings on an adjudication order under this Section is a discretionary jurisdiction. It is a jurisdiction which cannot be invoked as of right though no doubt there are settled principles upon which the discretion is either exercised or not. And I take it as settled that, assuming the matter to fall within S. 22 at all, then the dominating factor which decides the Court whether to exercise its discretion or not is whether the assets can be more conveniently and efficiently administered in the one Court than in the other. I entertain some doubt as to whether it can be said with truth in this case that there were insolvency proceedings pending both in Calcutta and in Rangoon against 'the same debtor'. The position, as I have pointed out, is that there were nine or seven people carrying on business in Calcutta under the name of 'Ramnibas Ramnarain'. In Rangoon six out of these seven or nine persons were carrying on business under another name altogether, namely that of 'Motilall Premsukhdass.' And I have been exercised in my mind whether, for the purpose of S. 22, Rangoon Insolvency Act, they really constitute 'the same debtor'. Looking at it from the angle of a debt, there was a joint and several liability of nine persons in Calcutta trading under one name, while there was a joint and several liability of six persons in Rangoon trading under a different name altogether. I am not altogether sure, as I have said, that, for the purpose of S. 22, Rangoon Insolvency Act, they constitute 'the same debtor'. I am bound to concede, and I do concede, that the adjudication of seven partners in Calcutta carries with it and brings about the insolvency also of the firm in Rangoon of which six of the individual Calcutta insolvents formed partners. If *A*, *B* and *C* are adjudicated insolvents under a firm name, then *A*, *B* and *C* individually become insolvents. And if *A* and *B* are carrying on business elsewhere under another firm name, they and the firm are automatically involved in insolvency by their previous adjudication. While therefore it may well be that the Calcutta order of adjudication involved the adjudication of the Rangoon firm, that is not, to my mind, quite the same thing as saying that they constitute the 'same debtor', which is the necessary qualification for the exercise of jurisdiction under S. 22.

I do not however propose to decide this matter upon that ground. There is another matter with which I must deal. Prior to the separation of Burma from India, the whole of the insolvency jurisdiction in the presidency towns of both countries was governed by the Presidency Towns Insolvency Act. That Act was an Act of the Indian Legislature. The effect of separation has been this. The Presidency Towns Insolvency Act has remained in force in India. But in Rangoon, the insolvency jurisdiction has come to be governed by what must be treated as a new Act altogether, namely the Rangoon Insolvency Act, which has been made applicable to Rangoon by the Adaptation Order of British Burma. And if follows that, in the insolvency relations between India and Burma, Burma has now become a foreign country so far as India is concerned or, at all events, another part of the British Empire. And the question which arises—and it may one day form a more serious matter for debate—is whether an adjudication order in India has the effect of vesting in an Official Assignee in India immovable property in Burma. The principle underlying that question, of course, would operate both ways and would be applicable equally as to whether an adjudication order made in Rangoon would vest in the Official Assignee of Rangoon immovable property in India. The view which seems to be taken by Sir Dinshaw Mulla in his work on the Presidency-Towns Insolvency Act appears to be that in the altered relations between Burma and India, an adjudication order in India will not vest in an Official Assignee in India immovable property of the insolvent in Burma. This, of course, was written before separation, but nevertheless is exactly applicable, in my view, to the position of Burma since the separation. He says in discussing this question:

> The Presidency Towns Insolvency Act, however, is an Act of the Indian Legislature, and consequently it can operate only in British India.

I pause to observe that, since separation, Burma is no longer part of British India.

> Therefore though the Act provides that on the making of an order of adjudication the property of the insolvent wherever situate vests in the Official Assignee, the order, it is conceived, cannot operate as a transfer of immovable property within the British Empire outside British India, and as to immovable property in a foreign country it would certainly not be effective unless specially recognized by the law of that country. It is not to be supposed that the framers of the Act were not aware of this limitation to its scope. The whole question was fully considered, and the words 'wherever situate' were added in the Section to give to an order of adjudication made by Courts under the Presidency Towns Insolvency Act the widest possible effect.

If that expression of opinion be the true one—and with the greatest respect to the learned author of this book I am inclined to agree that it is — then the effect would be that an order of adjudication made today in Calcutta, is not sufficient to vest, under S. 17, Presidency Towns Insolvency Act, in the Official Assignee of Calcutta immovable property of the insolvent in Burma. I have been referred to two cases in the Calcutta High Court. The first of it is 35 C W N 997.[1] That however is not, in my opinion, an authority in a sense contrary to the view expressed by Sir Dinshaw Mulla. What the learned Chief Justice of Calcutta, if I understand him rightly, says there is that while an insolvent's interest in immovable property in another part of British India does not automatically vest in the Official Assignee, nevertheless, it is available for creditors in the sense that if the insolvent is amenable to the jurisdiction of the Calcutta Court, he can be made to make the property available for his creditors. That is expressed by Sir Dinshaw Mulla at p. 59 of his work on the Presidency Towns Insolvency Act. The other case in the Calcuta High Court is that of 62 Cal 659.[2] That is a very recent case of a single Judge in Calcutta and it is quite true that in that case he suggests that, where the law of insolvency is identical in the two places, the immovable property in one place vests in the Official Assignee by virtue of the adjudication order made in the other. Applying that to the present case before me it is, in my view, to put it at its lowest, doubtful whether the immovable properties of the insolvents in Burma have ever vested in the Official Assignee in Calcutta.

I now pass on to deal with the application upon its facts. Affidavits have been filed on behalf of the applicant in which they concede that there was in Burma not less than a lakh and a quarter rupees worth of immovable property. It may well be that that is an understatement, because I have before me an affidavit made by one of the partners of the insolvent firm, in Civil Regular No. 8 of 1937 of this Court in which he said on the 8th May this year, that his firm owned immovable property in Akyab and Chittagong worth today about three lakhs of rupees. Putting it however at its lowest, it can be said with truth that there is a very substantial quantity of immovable property in Burma. Moreover it is quite clear, both from the affidavits of the petitioners and from the affidavits of the respondents, that a substantial business, if not the bulk of the business, of the trading concern in Calcutta and Rangoon was carried on at Rangoon. They were purchasers of paddy, gold and other commodities in Burma which were—some at any rate of which were—shipped to India for sale. The petitioners say that practically the whole was shipped to India for sale but the petitioning creditors in Rangoon deny that and they say that, in truth, as much as 95 per cent. of the produce purchased in Burma was disposed of in Rangoon itself. I am satisfied on the evidence that it is certainly not possible at this stage to predict that there are not in Burma assets of a very substantial nature or that the liabilities in Burma are less than the liabilities in India. None of the insolvents has, as yet, filed his schedule and, accordingly, their statements of what the assets are that will have to be administered are not yet available to the Court.

Before closing this judgment, I want to refer very briefly to a case in the Bombay High Court to which I have been referred by Mr. Chatterjee as correctly setting out the principles upon which the Court has to exercise its jurisdiction in matters of this kind. The case is the case in 21 Bom 297.[3] There was there an adjudication first in Madras and then in Bombay and, in due course, an application was made in Bombay to annul the adjudication upon the ground of previous adjudication in Madras. That the Court refused to do. It pointed out that, on the authority, among other cases, of the well-known case in (1890) 24 Q B D 640,[4] an adjudication order ought to be made whether the necessary qualifications exist notwithstanding that there is at the time another adjudication in another place and not the less so, because there are or may be no assets for it to act upon. It is pointed out that the question of the Court in which the assets ought ultimately to be administered is one for future determination. As a result of that case, the Bombay High Court refused also to stay its own adjudication, holding that it was not sufficient to show that the assets had already vested in the Madras Court. But it was carefully recognized that the Madras Court by virtue of its prior order, had the right to control proceedings and that care had to be taken that nothing was done which would interfere with the exercise of that order. On the facts of the present case, it would seem to me, acting in my discretion under S. 22, that I ought not to stay the proceedings under the Rangoon adjudication order, at any rate as yet. In the first place, as I have pointed out, there are admittedly very substantial assets in Burma and it is not established to my satisfaction either that the bulk of the business lay in India or that there are not considerable liabilities in Burma. Again, there remains the question upon which I have expressed a view, but not decided, whether the immovable property in Burma ever has vested in the Calcutta Official Assignee. The view I take is that, before this Court is asked to commit itself to stay its own adjudication, this insolvency should have advanced considerably further than it has at present. If, when the assets and liabilities have been ascertained in the usual way and when the assets have been collected or are in process of collection, it is then ascertained that the interests of creditors would be better served by continuing the administration in Calcutta, then it can be done; but, on the materials before me now, I should not feel justified in saying that the administration of the Burma assets should be taken away from the Burma Official Assignee and handed over to the Calcutta Official Assignee. Accordingly, in my view, this is not a proper case for me to exercise my discretion under S. 22 and I propose to dismiss both the petitions. The petitions are therefore dismissed with costs against the petitioners, advocate's fee five gold mohurs on each petition.

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[1] **Sumermull Surena v. Bansilal Abirchand, (1932) 19 A I R Cal 310=137 I C 299=35 C W N 997.**

[2] **In re Binjraj Sagarmal, (1935) 62 Cal 659=39 C W N 1135.**

[3] **In re Aranvayal Sabhapathy Moodliar, (1897) 21 Bom 297.**

[4] **In re Artola, (1890) 24 Q B D 640=59 L J Q B 254=62 L T 781=7 Morrell 80.**

D.S./R.K. *Petitions dismissed.*

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## A. I. R. 1938 Rangoon 328

MYA BU AND SHARPE JJ.

*A. T. N. A. T. Chokalingam Chettyar* — Appellant.

v.

*A. K. R. M. M. N. M. N. Narayana Chettyar* — Respondent.

First Appeal No. 13 of 1938, Decided on 3rd May 1938, against order of Dist. Court, Toungoo, in Civil Exn. Case No. 18 of 1937.

**(a) Civil P. C. (1908), O. 21, R. 2 (3)—Adjustment and payment—Difference between—Art. 174, Limitation Act applies to adjustment.** (Per *Mya Bu J.*)

That there is a substantial distinction between an adjustment and a payment cannot be doubted; for such distinction is recognized by Art. 174, Limitation Act. A payment is not a contract of an executory nature whereas an adjustment is a contract of such nature. Art. 174 fixes the time of commencement of the period of limitation at the date of the making of the adjustment: *A I R 1935 Mad 581 and A I R 1933 Mad 28, Disting.* [P 329 C 2]

**(b) Limitation—Period cannot be waived by agreement.** (Per *Sharpe J.*)

It is impossible for parties by consent or agreement to extend or alter the period of limitation. Parties cannot waive the statute. [P 330 C 2]

N. Bose for K. C. Bose — *for Appellant.*

Venkatram — *for Respondent.*

**Mya Bu J.**—This appeal arises from an order passed in the Civil Execution Case No. 18 of 1937 of the District Court of Toungoo. In that case the respondent firm sought to have a money decree that they had obtained in the Original Side of the High Court against the appellant firm and which they had had transmitted by the High Court to the District Court of Toungoo executed. The decree is dated 17th January 1933. Certain payments having been made towards the decretal amount, the amount for which execution was sought was the decretal amount less the amount of the payments, plus further interest and subsequent costs. One of the objections raised by the appellant in the District Court was that there had been an adjustment of the decree after it had been passed by the High Court. The decree of the High Court was upon a compromise between the parties, the terms of the compromise being that the decretal amount should be payable in instalments and that for the due performance of the decree the appellant firm was to furnish security in the form of immovable property by a registered deed. The registered deed was never executed but the appellant firm in their objection alleged that an adjustment took place after the decree in pursuance of which the appellant firm handed over certain documents of titles to certain immovable properties as security for the due performance of the decree in terms provided in the alleged adjustment. The adjustment was alleged to have taken place in 1933 and was confirmed in 1934. The objection taken in the District Court to the execution was lodged on 4th December 1937 in the form of a petition accompanied by affidavits setting out the terms of the alleged adjustment, the petition setting out, among other prayers, a prayer that the adjustment alleged by the appellant firm might be recorded. The learned District Judge held that an application for recording of the adjustment is time barred and consequently, in view of the provisions of O. 21, R. 2 (3), the alleged adjustment could not be recognized by the Court.

In the course of the argument the appeal has been urged on this sole point. It has been contended on behalf of the appellant firm that the period of limitation for an application for recording of the adjustment in question did not commence until the respondent firm applied for execution of the decree. This contention is based on the allegation that it was one of the terms of the adjustment that so long as the appellant firm made regular payments of the instalments provided in the adjustment towards the satisfaction of the decretal amount the respondent firm was to have no right to take out execution of the decree and that if the respondent firm took out execution of the decree contrary to the adjustment the appellant firm was to have the right to apply to have the adjustment recorded. The argument proceeds upon the footing that by agreement of the parties the right to have the adjustment recorded at the instance of the appellant firm did not arise until execution was taken out in contravention of the adjustment. The period of limitation prescribed explicitly by Art. 174, Limitation Act, for an application for issue of a notice under the Civil Procedure Code upon a decree-holder to show cause why any adjustment of the decree should not be recorded as certified is 90 days from the date of the adjustment. The Article deals with not only an application for issue of notice to show cause why an adjustment of the decree should not be recorded but also an application to show cause why a payment made out of Court of any money payable under a decree should not be recorded as certified. An application such as falls under Art. 174, Limitation Act is that provided for in O. 21, R. 2 (2), which enables a judgment-debtor, in the event of the decree-holder failing to have a payment or adjustment recorded by the Court, to apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. In the terms of Art. 174, Limitation Act, the application of the appellant firm to have the adjustment recorded is clearly time barred. The ruling, 69 M L J 77,[1] has however been cited by the learned advocate for the appellant firm as authority for the proposition that an application for recording of an adjustment can be made when execution of the decree is taken out quite irrespective of the fact that the period of limitation prescribed by Art. 174 had elapsed since the making of the adjustment. The authority relied on by the learned advocate approved of the decision in 56 Mad 198[2] but failed to draw any distinction between an adjustment and a payment. That there is a substantial distinction between an adjustment and a payment cannot be doubted; for such distinction is recognized by Art. 174, Limitation Act. In 56 Mad 198[2] it was held:

> The promise to do something in future is legal consideration, and there is no legal impediment in the way of a decree-holder accepting a mere promise that the judgment-debtor will do something at some future time as a legal and immediate adjustment in satisfaction of his decree, and that where the decree-holder accepts such a promise there is a new contract amounting to legal adjustment of the decree on the basis of which the judgment-debtor is entitled to apply to the Court to enter up satisfaction of the decree. In other words the fact that the contract is of an executory nature does not prevent the defendant from applying for the recording of adjustment as soon as the contract is entered into.

This observation deals with an adjustment as distinct from payment. A payment is not a contract of an executory nature whereas an adjustment is a contract of such nature. Art. 174, Limitation Act fixes the time of commencement of the period of limitation at the date of the making of the adjustment. Under that Article the application to have the alleged adjustment recorded was time-barred and the decision of the District Court upon that point is correct. Although the ground of objection to the execution based upon the allegation that there had been an equitable mortgage of immovable properties by deposit of title deeds as security for the payment of the decretal amount is not pressed in the course of this appeal, I observe that the equitable mortgage alleged being part of the alleged adjustment, since the application for the adjustment itself does not lie as being time-barred, the question as to the truth or otherwise of the alleged equitable mortgage does not arise. Consequently the appeal fails and it is dismissed with costs, advocate's fee ten gold mohurs.

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[1] **Raghupathirayadu v. Pichayya, (1935) 22 A I R Mad 581=158 I C 961=69 M L J 77.**

[2] **Ramanarasu v. Venkata Reddi, (1933) 20 A I R Mad 28=141 I C 429=56 Mad 198=63 M L J 598.**

**Sharpe J.** — On 17th January 1933 a money decree was passed by consent on the Original Side of this Court in favour of the respondents. Various payments on account were made by the appellants between 1933 and 1937 and on 20th September 1937, the decree was transmitted to the District Court of Toungoo for execution. On 9th October 1937 the respondents applied in that District Court for warrant of attachment for the sale of certain specified properties in execution of the balance then outstanding on the consent decree which they had in their favour. The appellants sought to resist that application by suggesting that there had been an adjustment as set out in para. 4 of their counter-affidavit sworn on 4th December 1937. Now O. 21, R. 2, sub-rule 3, clearly lays down that an adjustment which has not been recorded shall not be recognized by any Court executing the decree. I am not at all sure that in order to resist such an application as that made by the respondent in the present case it was not essential that an adjustment should have been recorded prior to the application of the other party to execute the decree; but this point has not been argued before us and I express no considered opinion upon the matter. I will assume in favour of the appellant that an adjustment recorded subsequently to the application to execute the decree would have sufficed. I cannot for myself see that the appellant has even yet taken proper steps to have the alleged adjustment recorded. It is suggested that the appellant's petition and counter-affidavit both dated 4th December 1937, when taken together amounted to an application to have the adjustment recorded. In my judgment, the appellant did not, by filing that petition and counter-affidavit, take the steps required to be taken by O. 21, R. 2, sub-rule 3. But I will make yet another assumption in favour of the appellant, namely that that petition and counter-affidavit did amount to the taking of proper steps to have the adjustment recorded. That application, assuming it to have been in proper form, was made on 4th December 1937. It is clearly time-barred, for Art. 174, Limitation Act requires that such an application shall be made within 90 days from the date of the adjustment.

Turning back to para. 4 of the appellant's counter-affidavit of 4th December 1937 it appears that the appellant's own case is that the adjustment took place in or about 1933 and was again confirmed in 1934; therefore the latest date on which the appellants themselves say that the adjustment was made is 13th December 1934. Their application of 4th December 1937 is therefore hopelessly out of time. It is suggested that it was a term of the adjustment that to use the words of cl. (c) of para. 4 of the appellant's counter-affidavit of 4th December 1937, if the respondent ever filed an execution case in breach of the agreement, then the appellants would have the right to apply to the Court to have the adjustment recorded only when the breach had taken place on the part of the respondents. In my judgment, that was not, and could not be, a term of the adjustment. The only terms of the adjustment are those set out in cls. (a) and (b), para. 4 of the appellant's said counter-affidavit. This cl. (c) was merely an attempt on the part of both the parties to contract out of the statutory provision relating to adjustment of decrees. It is well settled law that it is impossible for parties by consent or agreement to extend or alter the period of limitation; parties cannot waive the statute. Art. 174 must therefore be applied, any agreement of the parties to the contrary notwithstanding.

The appellant's application to record the adjustment even assuming, as I have said, that it was in proper form, which I personally do not think it was, was not made within the statutory period and could not therefore be entertained. Accordingly there is no recorded adjustment; therefore, having regard to O. 21, R. 2, sub-rule 3, the adjustment alleged by the appellants could not be recognized by the District Court in this case. The learned District Judge was therefore right in holding that the respondents were entitled to proceed with their execution. The appeal must be dismissed with costs. I agree with my learned brother as to the amount of the advocate's fee.

B.D./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Rangoon 331

ROBERTS C. J. AND SPARGO J.

*Tun Khine U and others* — Appellants.

v.

*The King.*

Criminal Appeal No. 455 and Cri. Revn. Nos. 496-A, 497-A and 498-A of 1938, Decided on 23rd May 1938, from order of Addl. Sess. Judge, Arakan, D/- 21st March 1938.

**(a) Penal Code (1860), S. 300 — Injuries inflicted very serious and several in number — Offence held to be murder.**

Where the injuries inflicted by the accused on the deceased were of a very serious nature and several in number, one wound cutting the neck and severing the fourth cervical vertebra, another wound cutting the skull and exposing part of the surface of the brain etc. :

*Held* that the accused had intended to kill the deceased and that they were guilty of murder. [P 332 C 1]

**(b) Criminal Trial — Duty of prosecution — Motive.**

It is no part of the prosecution's duty to suggest a motive for a crime nor it is the duty of the Court to determine why the crime was committed. [P 332 C 2]

*** (c) Penal Code (1860), S. 302 — Murder committed by several accused — Who inflicted fatal blow not known — This by itself is no ground for giving lesser penalty—But discretion exercised by lower Court in awarding lesser penalty may not be interfered with if sentence passed is legal one.**

When once the guilt of murder is proved the proper penalty to be passed is a matter for the discretion of the Judge and it is by no means true to say that merely because there is a doubt as to which of the several of the attackers inflicted the fatal blow this is sufficient ground for withholding the death sentence in the case of any or all of them. But a person who has even wrongly got the benefit of a lenient sentence at his trial, may sometimes be allowed to benefit by his good fortune, provided the sentence passed is one which is legal: *A I R 1937 Rang 254, Rel. on.* [P 333 C 1]

E. W. Lambert, Govt. Advocate — *for the Crown.*

**Roberts C. J.**—This case has come before us by way of revision, in accordance with an order of Sharpe J. opening revision proceedings and calling upon the appellants to show cause why sentence of death should not be passed upon them. The three appellants were tried before the Additional Sessions Judge of Akyab, each with the murder of one Tha Mra Pru at Panlinbyin village, Akyab Township, on the night of 7th December 1937. It appears from the evidence that during the course of the evening the two younger appellants, Khine Hla Aung and Po Za, called at the house of the deceased, and were seen by his father Shwe Ban and Maung Net, and they said that their elder brother, appellant 1 Tun Khine U had sustained da injuries as a result of affray some short time previously and desired to see the deceased who was the ten-house-goung.

The two families had been somewhat at enmity although there had been no immediate quarrel. There was an occasion some years before on which Tun Khine U prosecuted the deceased for cutting him, and it is said there was a grudge against the deceased because he took a silver bangle belonging to the mother of all the appellants (who are brothers) in order to pay for the repair fees of a village drum which had been broken by yet another brother of the appellants. In these circumstances, Shwe Ban was doubtful about his son going and advised him to take a companion. He took a companion with him, Maung Net, and they went together towards the house of Tun Khine U where, according to his younger brothers, he was supposed to be lying. By the time the deceased and Maung Net had got a little way on the road, they met appellant 1 himself. He had not remained in his house with the injuries but had come out to meet deceased and his demeanour and behaviour were such that they were afraid they were walking into a trap and one of them said to his companion "let us go back", and they turned back to return to the ten-house-goung's house. However appellant 1 who was armed with a da chased them and, according to Maung Net, there were the other two appellants not very far away and they chased also. Maung Net managed to get away but the deceased had the misfortune to stumble and when he stumbled, he was cut by appellant 1 and then rose and crawled for about two fathoms and then, according to Maung Net, the two other men who came behind had overtaken him. The next thing that we know is that Maung Net called out loudly that Tun Khine U, Khine Hla Aung and Po Za, i. e. all three appellants, were cutting Tha Mra Pru and he continued running and finally came up face to face with some villagers who had come out with torches. There were several of them and they all give evidence to the same effect. Kyaw Hla Aung, Aung Tha Hla, Tha Mra Aung, Wai Tha Aung and Tha Tun Aung all say that they heard the shouts of Maung Net, that he denounced all the three appellants, that they saw the appellants and that each of the appellants was in possession of a da. The villagers flashed their torches at the appellants and thereupon the appellants ran away. There were found upon the scene of this slaughter of the deceased a small balm bottle and a pipe which had some distinctive marks on it because it had been bitten by rats. The balm bottle was identified by one of the witnesses for the prosecution as being the bottle which appellant 1 had taken very recently from the witness, Chee Lu Aung. It was picked up by the witness, Mogulali, in the presence of Yet Thai Aung. With regard to the pipe, this was also picked up by Kyaw Tun Pru and it was identified as belonging to appellant 2, and I am satisfied that that shows that appellant 2 was on the scene. Much effort was spent at trying to show that many persons might have a pipe of this kind but some of the villagers were positive that they recognized the pipe by the marks made by rats as being the pipe which they knew appellant 2 to possess.

The injuries which the deceased received were very serious and altogether there were nine in number. The doctor says that injuries Nos. 1, 2 and 4 might have been caused by one blow; Nos. 8 and 9 by another; and then he speaks independently of injuries Nos. 5, 3 and 7. With regard to the seventh injury, it was a gaping incised wound 6" by 2" cutting the neck and severing the fourth cervical vertebra and it would cause practically instantaneous death; injury No. 1 was also sufficient in the ordinary course of nature to cause death, and it was an incised wound 5" long by 2½" and cutting the skull exposing part of the surface of the brain. I agree with the learned Additional Sessions Judge — and it is difficult to escape the conclusion — that the assailants of this man intended to kill him. It is difficult to escape the conclusion that they must have intended to kill him the moment he emerged from his house and that all these persons were guilty in consequence of the offence of murder.

Pausing for a moment to examine their defence, they say that three persons had in fact attacked Tun Khine U earlier in the evening. Their names were San Khru, Ni La and Taw Aung, and that was the story which was told at first by Tun Khine U after he was arrested for the murder. On 8th December 1937 he filed his first information report against those persons and with considerable detail said that they had attacked him and inflicted these injuries. He said at the same time that he had sent his two brothers up to the ten-house-goung to report the matter to the ten-house-goung, i. e. to the deceased Tha Mra Pru. But at a later stage he altered the story and said that he was attacked by four persons and that Tha Mra Pru was one of them and that it was during the course of that attack which be it noted took place at 8 P. M. and not at 10 which was the time of the attack on Tha Mra Pru, he was defending himself against the onslaughts of Tha Mra Pru when he inflicted the fatal injuries upon the latter. Consequently on being tried for murder, his defence was one of the exercise of the right of private self-defence. This defence however will not hold water for a moment because it is quite clear from the first information report not only that Tha Mra Pru was never mentioned as one of his assailants but also that the fact that the earlier affray was to be actually reported to Tha Mra Pru. Accordingly I am driven to the conclusion that having been attacked in this way — and there is no doubt that he did receive some injuries on that night although they were not of a very serious nature — he sent a message to Tha Mra Pru and when the latter came down towards his house he and his brothers were lying in wait for him. It is no part of the prosecution's duty to suggest a motive although some motive has been suggested; nor is it any duty of ours to determine why this murderous attack was delivered. It may have been that Tun Khine U thought that the attack made upon him by Ni La, San Khru and Taw Aung had been in some way instigated by the deceased and that he was determined of revenge. With that however we have nothing to do and it is quite clear that the injuries which appellant 1 received were received long before the chase of the deceased which resulted in fatal injuries to him.

With regard to the position of the other two appellants, I am quite satisfied from the picking up of the pipe by one of the witnesses and the very clear recognition of it at the end of the chase by a number of villagers and the fact that they all three ran away when the villagers flashed their torches upon them that they were concerned, and I feel satisfied in my own mind that inasmuch as this attack was made shortly after the deceased emerged from his house that they went deliberately to his house to get him in order that they might waylay and kill him. They are all therefore clearly guilty of murder. Now the learned Additional Sessions Judge in the course of his judgment having found all the three appellants guilty of murder by reason of the common intention which existed between them and in conformity with the provisions of S. 34, Penal Code had to consider the question of sentence and he said there :

> Since evidence is lacking as to who had caused the fatal injuries on the deceased, the accused persons are entitled to the benefit of a reasonable doubt in the matter of sentence as in the matter of conviction. Where a person is convicted of murder for having killed a person along with others and it is not clear who inflicted the fatal blow, he may be given the lesser penalty of transportation. I therefore consider that it is a fit case in which the accused should be given the lesser penalty.

The conclusion at which the learned Judge has arrived is that because in some cases the lesser penalty may be given when it is not certain who struck the fatal blow, the lesser penalty should always be awarded in such cases; this is far from being correct. When once the guilt of murder is proved, the proper penalty to be is a matter for the discretion of the learned Judge and it is by no means true to say that merely because there is doubt as to which of several of the attackers inflicted the fatal blow this is a sufficient ground for withholding the death sentence in the case of any or all of them. On the other hand it is of course clear that there are cases in which once it has been established that one person out of several took a leading part and the others a comparatively subsidiary part, the greater penalty may be inflicted upon the ring-leader and the lesser penalty upon those who took a comparatively subsidiary part. That is a matter of discretion entirely. I think adopting the observations quoted with approval in (1937) R L R 169[1] at p. 171 : "It is recognized that a person who has, even wrongly, got the benefit of a lenient sentence at his trial, may sometimes be allowed to benefit by his good fortune, provided the sentence passed is one which is legal", may have some application here. These appellants have all believed for a period of two months that their lives would be spared. The sentence passed upon them was legal but the exercise of the discretion makes us doubt whether the learned Additional Sessions Judge allowed matters to weigh with him which ought not to have weighed with him. We are satisfied that this is a murder and that all the appellants are guilty but we hesitate to come to the conclusion that we ought to interfere in revision with the sentence passed upon them. Accordingly the convictions of each of the appellants and the sentences passed upon them of transportation for life will, each of them, be confirmed.

**Spargo J.** — There was clear and overwhelming evidence that the three appellants were there and that some at any rate cut the deceased, and it was clear that this cutting was done in furtherance of a common intention. It is also clear from the injuries that the deceased sustained that their object was to kill him. The only argument which has been suggested to us for not accepting this evidence was that appellant 1 was attacked on that night by Ni La, Taw Aung and San Khru and that the witnesses for the prosecution who gave evidence against the appellants are related to these persons. But it is quite clear that a number of these witnesses are quite unconnected with them and there appears to me to be no force in this argument at all. Two of the assessors found the appellants all guilty of murder. I agree with my Lord Chief Justice that this appeal must be dismissed and that this is not a case in which the sentence should be enhanced.

K.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 333

MYA BU AND SHARPE JJ.

*Maung Sin* — Applicant.

v.

*Maung Byaung and others* — Respondents.

Misc. Appln. No. 61 of 1937, Decided on 23rd December 1937, for leave to appeal to His Majesty in Council against Judgment of Mya Bu and Braund JJ., D/- 22nd March 1937.

**Civil P. C. (1908), S. 109 (a), O. 41, R. 23 —Appellate Court passing order of remand, finally disposing of rights of parties or of some of them leaving subsidiary questions consequent on final determination to be worked out later — Order of remand is final order within meaning of S. 109 (a).**

**Whether an order of remand passed by an Appellate Court is a final order or not within the meaning of S. 109 (a) depends upon the effect of the order as made ; if it finally disposes of the right of the parties or of some of them, the order**

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[1] Emperor v. Nga Bo Thin, (1937) 24 A I R Rang 254=171 I C 285=1937 R L R 169=38 Cr L J 1051.

is final. Where the Appellate Court has finally determined that the plaintiff to a suit has good and subsisting cause of action and all that remains is to work out subsidiary questions consequent upon the final determination of the defendant's liability, the order is in substance and effect a final order though the quantum of the rights and liability remains to be ascertained. [P 334 C 2]

Where an Appellate Court passes an order to the effect that an award is not binding on certain persons being void ab initio as against them and remands the case for investigation of their claims against the party applying for leave to appeal, the order is a final order within the meaning of S. 109 (a) inasmuch as it finally disposes the rights of those persons in respect of their claims against the opposite party : *A I R 1932 Rang 137 ; 15 Bom 155 (P C) and 17 All 112 (P C), Rel. on ; A I R 1920 P C 86 and A I R 1933 P C 58, Disting.* [P 335 C 2]

Hay — *for Applicant.*
Doctor — *for Respondents.*

**Mya Bu J.** — This is an application for a certificate granting leave to appeal to His Majesty in Council against an order of remand made in Civil First Appeal No. 25 of 1931 of this Court. The order of remand was made under O. 41, R. 23, Civil P. C. The application is opposed on the ground that the order is not a final order within the meaning of S. 109 (a), Civil P. C. The fact that the order in question is of the nature appealable under O. 43, R. 1 (u), Civil P. C. does not necessarily show that it is a final order within the meaning of S. 109. In 11 Rang 58[1] their Lordships of the Privy Council, adopting the test formulated by Lord Cave in 47 I A 124,[2] namely that an order is final if it finally disposes of the rights of the parties, held that an order passed by the Appellate Side of this Court under O. 41, R. 23, setting aside the dismissal of the suit by the Original Side and remanding it to the Original Side for trial on the merits, was not a final order within S. 109 (a), Civil P. C. Neither in 11 Rang 58,[1] nor in 47 I A 124,[2] did the order under appeal to the Judicial Committee finally dispose of the rights of the parties, but left them to be determined by the Courts of original jurisdiction in the ordinary way. In fact, in neither case did the order dispose of any question affecting the substantive rights or liabilities of the parties in any way.

In 18 I A 6[3] however the Judicial Committee granted special leave to appeal from the decree directing the defendant to account, holding that such decree was final within the meaning of S. 595, Civil P. C. In that case it was contended on behalf of the respondent that the decree would not be final till after the accounts directed had been taken. The suit was one in which the plaintiff alleged that the defendant was accountable to him upon several claims. The defendant put up certain legal defences and denied his accountability. The Court held that the legal defences put forward were valid as to some of the claims and as to others of the claims they were invalid and therefore that the defendant must account, and consequently the decree directing accounts to be taken, which the defendant had been contending, ought not to be taken at all was passed. This case was described by Lord Hobhouse in 22 I A 1[4] in the following words :

> The defendant denied his liability to account to the plaintiff. The High Court affirmed his liability and directed an account . . . . But their Lordships held that the order establishing liability was one which could never be questioned again in the suit, and that it was the cardinal point of the suit.

Upon a review of these authorities I am of the opinion that, as pointed out in 10 Rang 335,[5] whether an order is a final order or not within S. 109 (a), Civil P. C., depends upon the effect of the order as made ; if it finally disposes of the rights of the parties, the order is final ; and where the Appellate Court has finally determined that the plaintiff has a good and subsisting cause of action, and all that remains is to work out subsidiary questions consequent upon the final determination of the defendant's liability, the order is in substance and effect a final order though the quantum of the rights or liability remains to be ascertained. Applying these principles to the present case, in my opinion, the applicant should be granted the leave that he prays for.

The suit was instituted by the sole plaintiff, Ma Shwe Yu, respondent 4. The petitioner and his deceased sister, together with respondents 1, 2 and 3, children of Ma Shwe Yu by Ko Po Cho, deceased brother

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1. Abdul Rahman v. D. K. Cassim & Sons, (1933) 20 A I R P C 58=142 I C 328=11 Rang 58=60 I A 76 (P C).
2. Ramchand Manjimal v. Goverdhandas Vishindas Ratanchand, (1920) 7 A I R P C 86 = 56 I C 302=47 I A 124=47 Cal 918 = 14 S L R 191 (P C).
3. Rahimbhoy Hibibhoy v. C. A. Turner, (1891) 15 Bom 155=18 I A 6 (P C).
4. Syed Muzhar Husein v. Bodha Bibi, (1895) 17 All 112=22 I A 1 (P C).
5. U Nyo v. Ma Pwa Thin, (1932) 19 A I R Rang. 137=140 I C 420=10 Rang 335.

of the petitioner, were defendants. Ma Shwe Yu sued for possession of the share of her deceased husband, or of him and her, in certain properties and for mesne profits and accounts, etc. The petitioner and his deceased sister, Ma Nga Ma, pleaded inter alia that a certain arbitration award barred Ma Shwe Yu's claim except to the extent of the benefits which Ma Shwe Yu could have derived thereunder. At the time of the making of the award, respondents 1, 2 and 3 were minors, and certain persons acted as their guardians in the arbitration proceedings. After the petitioner and his deceased sister had filed their written statements, respondent 1 filed a suit for a declaration that the award was not binding on him, and for an order setting aside the award. Later on, all the other respondents, who were originally cited among the defendants, were transposed as plaintiffs. The result of that suit was a decree setting aside the award in favour of Maung Byaung and Maung Aung, respondents 1 and 3. The suit, at the instance of respondents 2 and 4, was held to have been barred by limitation. Respondents 1, 2 and 3 have however remained throughout the proceedings in the present suit as defendants. They arrayed themselves along with their mother only in the appeal, in which the order sought to be appealed against was passed. The trial Court did not allow them to prosecute their claims in respect of the properties in the suit except to the extent that their mother, respondent 4, was allowed to do so, for the reasons that the award was not set aside so far as respondents 2 and 4 were concerned, and that the first three respondents were not plaintiffs in the suit putting forward their claims, and that the suit, not being an administration suit, was one in which they had no right of making any claim to any share in the properties independently of respondent 4. By the order passed in appeal it was decided that none of the first three respondents was bound by the award, that the award was void ab initio as against all three of them, and that in the nature of the proceedings in the suit they had a right to have their claims investigated in the suit. In the result the final decree passed by the trial Court was set aside and the case was remanded to the trial Court for the purpose of enabling respondents 1, 2 and 3 to prosecute their claims and of having a proper final decree drawn up after necessary enquiries have been made.

In my opinion, the order of the Appellate Court finally disposes of the rights of respondents 1, 2 and 3 to prosecute their claims in the suit, and finally determines the question of the appellant's liability to them. The decisions upon these points can never be disputed again except by way of the proposed appeal. For these reasons, I hold that the order is a final order within the meaning of S. 109 (a), Civil P. C. Inasmuch as the conditions requisite under S. 110 are indisputably present in this case, the certificate prayed for will issue. The first three respondents must pay the applicant's cost of this application, advocate's fee three gold mohurs.

**Sharpe J.** — Seeing that this case has been going on for over a quarter of century and has, I am told, been before His Majesty in Council three times already, it is a matter of regret to me to have to hold that the order made in Civil First Appeal No. 25 of 1931 of this Court, acting in its appellate jurisdiction, was a "final order" within the meaning of Cl. (a) of S. 109, Civil P. C. But for the reasons appearing in the judgment which my learned brother has just delivered, I agree that this is a case in which there is a right of appeal to His Majesty in Council, and we must grant the appropriate certificate. This apparently unending litigation must, if the parties are so minded, continue its deplorable course. We were told at the Bar that certain offers of settlement had recently been put forward ; I hope most earnestly that there is yet time for the parties to see the wisdom of agreeing amongst themselves even at this late stage. I agree with the order proposed by my learned brother in regard to the costs of this application.

R.M./R.K. *Application allowed.*

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## * A. I. R. 1938 Rangoon 335

MOSELY AND DUNKLEY JJ.

*Daw Hnit* — Appellant.

v.

*C. T. A. R. A. Anamalai Chettyar* — Respondent.

First Appeal No. 43 of 1937, Decided on 18th January 1938, against decree of Dist. Court, Mandalay, D/- 31st December 1936.

*** (a) Banker and Customer — Native bank accepting deposits on current account on extensive scale—Money is payable on demand.**

**Where native bankers accept deposits on current account on a very extensive scale from their**

customers and conduct nearly every branch of ordinary banking business as it is understood in England, the relationship is not that of mere lender and borrower but there is an implied agreement that the money is payable on demand: *Case law referred.* [P 338 C 2]

✲ **(b) Limitation Act (1908), Art. 60—Deposit on current account with bank—Insolvency of Bank—Tender of proof of debt and claim in insolvency by creditor is not demand.**

Where a banker with whom deposit is made on current account is adjudicated insolvent, tender of proof of debt and claim made in insolvency by the creditor is not a demand within the meaning of Article 60. [P 338 C 2]

**(c) Limitation Act (1908), Art. 60—Demand must be for entire payment.**

The demand contemplated by Art. 60 is a demand for the repayment of the whole amount of the deposit due, and not a demand for partial payment. [P 339 C 1]

**(d) Limitation Act (1908), Art. 60—Deposit on current account — Insolvency of bank — Subsequent annulment of adjudication and order under S. 37 (1), Provincial Insolvency Act—Dividend paid by appointee—Limitation for suit for amount does not start from such date—Deposit does not lose its character when assets are paid back to debtor.**

A banker with whom money was deposited on current account was adjudicated an insolvent. The creditor filed claim by a tender of proof of his debt. The adjudication was annulled and an order was passed under S. 37 (1), Provincial Insolvency Act. The appointee made a payment of dividend to the creditor. Subsequently the creditor filed a suit for recovery of the balance:

*Held* that when the adjudication was annulled, the claim made by a tender of proof of debt to share equally and proportionately in the assets was annulled too, save in so far as any payments towards that claim had been made. The effect of annulment was to remit the party whose insolvency is set aside to his original situation. Time could not run against the creditor while the estate was in the hands of the appointee, who must be considered as in the position of a trustee for the debtor: [P 339 C 1]

*Held also* that where the property of the late insolvent was handed back to the debtor, what was handed back to him, so far as regards creditor's claims was his deposit and that deposit had not lost its character as such. [P 339 C 2]

Ba Han — *for Appellant.*

R. Clark — *for Respondent.*

**Mosely J.** — The appellant, Daw Hnit, sued the respondent, C. T. A. R. A. Anamalai Chettyar, a banker who carries on, or formerly carried on, banking business in Mandalay and Monywa, and perhaps also elsewhere, for Rs. 7000 (waiving Rs. 97), the balance on 1st January 1932, of a deposit made on current account with him. The suit was filed in August 1936, demand having been made on 17th August 1936. The defence made was that the relationship between the plaintiff and the defendant was that of lender and borrower, that demand for payment was not necessary, or that, if it was necessary, such demand must be deemed to have been made when the plaintiff presented her pass-book for proof of her debt against the defendant in proceedings in insolvency, and that the claim is barred by limitation. Issues were framed as to the relationship between the plaintiff and the defendant in respect of the suit money, and whether the suit was barred by limitation. No evidence was recorded, and this suit was decided by consent by a judgment in a similar case (Suit No. 23 of 1936). I note that that was a suit for a deposit made at Mandalay, while this suit is based on a deposit made at Monywa. The respondent C. T. A. R. A. Anamalai Chettyar was adjudicated insolvent in June 1927, and Daw Hnit filed a proof of debt for her claim, which was then Rs. 11,586, on 23rd September 1927. The first dividend was paid on 17th December 1927. The adjudication was annulled on 11th February 1930, for failure of the respondent Chettyar to apply for his discharge. After this the Official Receiver continued to act under an order of the Court passed under S. 37 (1), Provincial Insolvency Act, the property of the debtor having been vested in him, though the Court did not give any written directions to him. S. 37 (1) is as follows:

> 37. (1) Where an adjudication is annulled, all sales and disposition of property and payments duly made, and all acts theretofore done, by the Court or receiver shall be valid, but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint or in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

The appointee continued to act in the same way as if he had been receiver, and distributed a second dividend on 6th June 1930, and a third dividend on 1st January 1932, which left Rs. 7097 due to Daw Hnit. It had always been thought up to that time that the appointee had the power to distribute the estate to the creditors. It was however pointed out in a reference made in these very proceedings (Civil Ref. No. 5 of 1936[1] by a Full Bench of this Court) that the appointee had no such powers, and that the property of the debtor was merely vested in him for the purpose of making the property available to the creditors if they wished to file regular suits for the satisfaction of their claims, or the balance of their claims.

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[1] **Annamalay Chettyar v. R. K. Banerjee,** *reported in* **(1936) 23 A I R Rang 284=163 I C 217=14 Rang 254 (F B).**

This judgment was passed in March 1936, and the assets of the debtor were returned to him after that date. The present suit then was filed some little time after that. If the relationship between the parties was that of lender and borrower, the Article of limitation applicable is Art. 57, which gives a period (for money payable for money lent) of three years from the date when the loan is made. The plaintiff's contention on the other hand was that Art. 60 applied which reads :

> *60.* For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable ;

the limitation is three years from the date when the demand is made. The learned District Judge when dismissing the plaintiff's suit relied on the case in 10 L B R 161,[2] a judgment passed in January 1920. I have no doubt that that decision is no longer good law and must be dissented from. That was a case of money originally deposited with a Chettyar on thavanai account, remaining in the Chettyar's hand after the expiry of the period of deposit. It was money retained on current account, and it was held there that the Article of limitation to be applied between customer and a banker was Art. 57. In that case Sir Daniel Twomey C. J. said (p. 163) :

> In the absence of any special agreement, such as an agreement for a fixed deposit, the relation between a banker and customer who deposits money with him is the ordinary relation of debtor and creditor and the money is repayable 'on demand' in the legal sense, i. e. it is payable at once without demand. Art. 60 applies only in cases where an express demand is necessary to render the money repayable.

He also said :

> Money on current deposit with a Chettyar banker is payable at once. No demand is necessary to render it payable.

Robinson J. in a concurring judgment said :

> It is settled law in England that the relation between a banker and his customer who pays money into his bank is the ordinary relation of debtor and creditor, and does not import anything more than a mere loan

quoting (1844-48) 2 H L C 28,[3] a decision dating from a time when banking, even in England, was comparatively undeveloped. The learned District Judge held that he was bound by this ruling. He said that there was nothing to show that the money was deposited under an agreement that it was to be repaid on demand, though the judgment elsewhere inconsistently proceeds on the lines that money deposited on current account is never a deposit within the meaning of Art. 60. The District Judge also held that there was nothing in the Limitation Act to prevent time running from the expiry of the insolvency proceedings, and that demand had been made when proof of the debt was tendered. The learned advocate for the respondent has again repeated the case to us on the same lines. Dr. Ba Han, for the appellant, to whom I am indebted for a painstaking and lucid argument, has quoted the case in (1921) 3 K B 110.[4] The question there was whether the customer of a bank can sue the banker for the balance standing to the credit of his current account without making a previous demand on the banker for payment. That was a concurrent decision of three Judges of the Court of Appeal. Bankes L. J. pointed out (p. 119) that it could not be the ordinary relation of creditor and debtor, and that there must be quite a number of implied superadded obligations. Unless this were so, he said, the banker, like any ordinary debtor, must seek out his creditor and repay him his loan immediately it becomes due—that is to say directly after the customer has paid the money into his account—and the customer, like any ordinary creditor, can demand repayment of the loan by his debtor at any time and any place. Atkin L. J. said (p. 127) that the terms of the contract between the bank and its customer appear to include the following provisions :

> The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon a

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[2] M. M. K. K. Chetty v. Palaniappa Chetty, (1920) 7 A I R L B 74=57 I C 908=10 L B R 161.

[3] Foley v. Hill, (1844-48) 2 H L C 28 = 81 R R 14.

[4] N. Joachimson v. Swiss Bank Corporation, (1921) 3 K B 110=90 L J K B 973 = 25 L T 338=26 Com Cas 196=65 S J 434=37 T L R 534.

> reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine. The result I have mentioned seems to follow from the ordinary relations of banker and customer.

He went on to say (pp. 129-130):

> The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract ? If they did, effect will be given to their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention the nature of the contract may be material. In the case of such a contract as this, if I have correctly stated the manifold terms of it, it appears to me that the parties must have intended that the money handed to the banker is only payable after a demand. The nature of the contract negatives the duty of the debtor to find out his creditor and pay him his debt. If such a duty existed and were performed, the creditor might be ruined by reason of outstanding cheques being dishonoured. Moreover, payment can only be due, as it appears to me, at the branch where the account is kept, and where the precise liabilities are known. And if this is so, I apprehend that demand at the place where alone the money is payable must be necessary.

It would appear then, that the English authority on which Robinson J. based his judgment in 10 L B R 161[2] has not been good law in England for the last 16 years. I do not apprehend that Twomey C. J. intended to lay down a different rule for Indian or Chettyar bankers, and his remarks about them appear to have been merely obiter in the sense that no distinction was intended to be drawn in that case between English and native banking.

The present respondent carried on a considerable banking business in the ordinary way that such a business is carried on by Chettyars in this country, and the plaintiff had a pass-book and drew on her account, it would appear, in the usual way. It would, I apprehend, be impossible to hold that there was not an implied agreement in this, as in all such cases of deposits on current account with native bankers who do a large business, and may have branches at places other than their main place of business, that the money was to be payable on demand. Native banking business in India and Burma has long since developed on English lines. In 37 All 292,[4] Art. 60 was applied to the ordinary deposit on current account with a native banker, overruling a previous decision to the contrary in 29 All 773,[5] where it had been held that the ordinary dealings between a native banker and his customers are in the nature of loans made by the latter to the former. In 15 Lah 242,[6] it was said that an agreement to pay on demand may be implied and should be assumed in the ordinary course of dealings between a native banker and his customer. In 17 Lah 481,[7] a Bench decision, the same assumption was made, and I have no doubt, as I have said, that the same assumption must be made in Burma, where Chettyar bankers accept deposits on current account on a very extensive scale from their customers and conduct nearly every branch of ordinary banking business as it is understood in England. As Atkins L. J. said, the position would be impossible if a banker were to be liable to repay his customer without demand and thereby dishonouring any outstanding cheques of the customer ; and, of course, in the ordinary way no banker would ever want to repay without demand money lying in his hands at no interest or merely at nominal interest, unless he was winding up his business.

It is impossible, in my opinion, to hold that, when the creditor, Daw Hnit, tendered proof of her debt and made her claim in insolvency, she was making 'a demand,' as that term is used or understood in the Limitation Act. In insolvency, for the right of demand and remedy by suit, which the creditor formerly had, is substituted the right to share equally and proportionately in the assets after proof of the debt. It is true that in one sense, any claim not met in full is "a demand": *see* Wharton's Lexicon. However that may be, there is no doubt that when the adjudication was annulled, the claim made by a tender of proof of debt to share equally and proportionately in the assets was annulled too, save in so far as any payments towards that claim had been made. The effect of annulment is to remit the party whose insolvency is set aside to his original situation, (1872) 7 Ex 263,[8] and whatever happened in the insolvency proceedings prior to annulment is considered as if it had not happened, subject to the validation of all sales and disposition of property and payments duly made, and all acts done by the Court or Receiver as provided for in S. 37 (1), Provincial Insolvency Act. The Section, of course, does not provide that all acts done by the creditors shall stand as done (as is argued by the respondent), but the very contrary. Mr. Clark, for the respondent, quotes the case in (1891) 1 Q B 538,[9] but that case merely goes to show that where a trustee in bankruptcy had rejected a proof of debt that was a valid act unaffected by the annulment: it stands on the same footing as a partial payment made by way of dividend by the trustee—or here Receiver—which is likewise validated and does not affect the question of the claim itself. S. 78 (2) itself provides that the period from the date of order of adjudication to the date of the order of annulment shall be excluded in subsequent suits for recovery of a debt proved under the Act. The demand contemplated by Art. 60 is clearly a demand for the repayment of the whole amount of the deposit due, and not a demand for partial payment, or otherwise every demand for partial payment made by a cheque drawn for it would have to be considered as a demand for payment of the whole deposit which is absurd.

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[4] **Juggi Lal v. Kishan Lal, (1915) 2 A I R All 78=28 I C 949=37 All 292=13 A L J 402.**

[5] **Dharam Das v. Ganga Devi, (1907) 29 All 773 =1907 A W N 263=4 A L J 628.**

[6] **Gulab Rai-Gujar Mal v. Sandhi, (1934) 21 A I R Lah 42=151 I C 712=15 Lah 242= 37 P L R 56.**

[7] **Kanti Chandra Mukerji v. Badri Das, (1936) 23 A I R Lah 718=165 I C 699=17 Lah 481 =38 P L R 1025.**

[8] **Bailey v. Johnson, (1872) 7 Ex 263=41 L J Ex 211=20 W R 1013.**

Alternatively it is argued that the money of the debtor came into the hands of the appointee when the adjudication was annulled in February 1930, and that demand must be considered as having been made, at all events, on 6th June 1930, when the second dividend was paid (by the appointee). I do not see how time could run against the creditor while the estate was in the hands of the appointee, who must be considered as in the position of a trustee for the debtor. It appears to me that all parties were acting under a mutual mistake as to their position, but in any case it cannot be said here also that a claim by the creditor for a partial repayment out of a proportionate share in the assets of the late insolvent was a demand for repayment of a deposit in the sense contemplated by Art. 60. It would be truer, perhaps, to say that the creditor made no further claim at all, but the appointee continued to distribute dividends.

In any case, when the position was realized after the judgment in Civil Ref. No. 5 of 1936[1] and the property of the late insolvent was handed back to the debtor, it appears to me that what was handed back to him, so far as regards Daw Hnit's claim, was Daw Hnit's deposit. I do not see how that deposit can be said to have lost its character as such, or how it can be considered as a mere loan from the customer to the late insolvent when it was lying in the hands of the appointee. I am of opinion that the plaint was in proper form, and that demand proper was never made for return of the deposit from the respondent until 6th June 1936, shortly after the money had reached his hands. I hold therefore that Art. 60 applies, and that the suit was in time. The plaintiff's claim must be decreed. There will be a decree accordingly for the amount (Rupees 7000) claimed, with costs on that amount in both Courts.

**Dunkley J.**—I agree.

K.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 339

MYA BU AND SHARPE JJ.

*M. E. Mitchla and another* — *Defendants* — Appellants.

v.

*A. M. Mitchla and others* — *Plaintiffs* — Respondents.

First Appeal No. 168 of 1936, Decided on 23rd December 1937, from Judgment of High Court in C. R. Suit No. 310 of 1933.

**(a) Civil P. C. (1908), S. 92—Suit for appointment of new trustees on ground that there do not exist any lawful trustees falls within S. 92.**

In order to make a suit under S. 92 maintainable, it is not necessary that the plaint must contain an allegation of breach of trust. A suit under S. 92 lies not only in the case of any alleged breach of trust but also where the direction of the Court is deemed necessary for the administration of a trust, if it be a trust for public purposes of a charitable or religious nature. A suit for appointment of new trustees on the ground that there do not exist any lawful trustees is a suit which falls within the purview of the words "where the direction of the Court is deemed necessary for the administration of such trust" in S. 92 : *26 Mad 450, Rel. on.* [P 341 C 2 ; P 342 C 1]

**(b) Civil P. C. (1908), S. 92 — Mutwallis of wakf property are not trustees within meaning of S. 92.**

**Mutwallis of property which is the subject-matter of a wakf are not trustees in the technical sense within the meaning of S. 92 but are merely superintendents or managers : *A I R 1922 P C 123, Rel. on.* [P 342 C 1]**

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[9] **Brandon v. McHenry, (1891) 1 Q B 538=60 L J Q B 448=39 W R 372.**

**(c) Civil P. C. (1908), S. 92 — Word "interest" denotes interest which is substantial and not sentimental or remote or illusory.**

The word 'interest' in S. 92 denotes an interest which is substantial and not sentimental or remote; it must be a present and substantial and not a remote and fictitious or purely illusory interest. [P 342 C 1]

Where the only interest which the plaintiffs have in the trust property, which is the subject-matter of a wakf, is that they are members of the Sunni Borah community of the town in which only a small part of the property of the testator (who was also a Sunni Mahomedan) is situate, and the property is specifically excluded from the wakf by the testator, the interest of the plaintiff, if any at all, is merely sentimental and therefore too remote and is not a substantial one within the meaning of S. 92 : *A I R 1919 Mad 384, Foll.; A I R 1932 Rang 132, Expl.* [P 345 C 1]

Clark and N. N. Burjorjee—*for Appellants.*

N. M. Cowasjee — *for Respondents.*

**Mya Bu J.** — The suit out of which this appeal has arisen was filed in the Original Side by the four plaintiffs (who are respondents 4a, 4b, 4c and 4d) in June 1933 under S. 92, Civil P. C., (1) for the framing of a scheme for the management of the wakf created under the directions in the will of one Ebrahim Hussein Mitchla, deceased; (2) for the removal of defendants 2a and 2b (who are the appellants in this appeal) from the office of mutwallis, and (3) for accounts. The circumstances which led to the filing of the suit were as follows: Ebrahim Hussein Mitchla, a Sunni Mahomedan, died at Rander in the Surat District, India, on 18th January 1893 leaving considerable properties at Rander, Rangoon, Moulmein and Mauritius, and also leaving a will dated 13th February 1890 which was duly registered in the office of the Sub-Registrar of Surat on the 15th of that month. By that will, Ebrahim Hussein Mitchla appointed (1) Mohamed Salay Mitchla, a nephew residing at Moulmein, and (2) Esoof Ebrahim Mitchla, a son residing at Rangoon, "trustees (or executors) for the management" of all his properties after his demise. In the fifth clause of the will it was declared :

> And I have set apart as a waqf, that is to say towards charitable purposes, one-eighth, that is to say two annas to a rupee, out of the annual income of the above-mentioned residue of my estate properties except (or not including) that of the estate properties situated at Rander in the manner (i. e.) first of all a certain landed property shall be set apart which may derive an income equivalent to the amount of the waqf mentioned above, and after which the residue of the whole of the estate properties shall be divided amongst my above-mentioned heirs, according to the Mahomedan law of inheritance by my said trustees (or executors). A sum of Rupees twenty-five only shall be always sent to Mecca Sheriff and also a sum of Rupees twenty-five only to Medina Sheriff annually by my said heirs out of the income of the landed property, set apart for the waqf; and the balance, if there be any, shall be utilized towards schools and in sinking wells, etc., etc. I have given the management of the said waqf business to my said trustees (or executors), and they shall manage the same every year and God forbid, if any one of them dies, the (remaining) trustee (or executor) shall have the power of appointing another in his stead.

In compliance with the directions given in that clause, Mohamed Salay Mitchla and Esoof Ebrahim Mitchla created a wakf of a house situated in China Street, Rangoon (the only immovable property of the testator in Rangoon), by a registered deed of declaration dated 27th November 1893. The two executors themselves administered the wakf as trustees till 1903 when Esoof Mohamed Mitchla died. Thenceforward the surviving trustee Mohamed Salay Mitchla alone managed the trust till his death in 1915, when his three sons, Adjim Mohamed Salay Mitchla (defendant 1a), Ebrahim Mohamed Salay Mitchla and Gulam Mohamed Salay Mitchla (original defendants 1b and 1c, who died during the pendency of the suit in the Original Side) took upon themselves the management of the trust.

It is common ground that neither during the management of the wakf by the original trustees, nor during the management thereof by the sons of Mohamed Salay Mitchla, any part of the income derived from the wakf property was utilized "towards schools and in sinking of wells," although such income was considerably in excess of the sums of money annually despatched to Mecca and Medina. Therefore in 1926, Mohamed Esoof Mitchla (defendant 2a) and Mohamed Musaji Mitchla (defendant 3), who are the descendants of Ebrahim Hussein Mitchla, filed a suit in the District Court of Surat, against Adjim Mohamed Salay Mitchla, Ibrahim Mohamed Salay Mitchla, Gulam Mohamed Salay Mitchla, and two others, for the removal of the three above-named defendants from the management of the wakf property, for accounts and for the framing of a scheme under S. 92, Civil P. C. Subsequently the parties to that suit composed their differences and submitted a joint scheme for the approval of the Court. Being dissatisfied with the way in which the parties to that suit brought about the compromise among themselves, Ahmed Gulam Mohamed Sadiq and Hashim Mohamed Mitchla (plaintiffs 1 and 2), together with three others, applied to the Court to have themselves brought on the record as co-plaintiffs. The Court however decided to add Ahmed Gulam Mohamed Sadiq only as a co-plaintiff. Mohamed Esoof Mitchla (defendant 2) applied to the High Court of Bombay for revision of the order of the District Court adding Ahmed Gulam Mohamed Sadiq as a co-plaintiff. Before the disposal of that application, and while an application by Ahmed Gulam Mohamed Sadiq for appointment of a Receiver of the wakf property was pending in the District Court of Surat, Mohamed Esoof Mitchla came to Rangoon and applied to this Court for an order appointing him a mutwalli, making all the parties in the Surat case, except Ahmed Gulam Mohamed Sadiq, respondents. The three sons of Mohamed Salay Mitchla supported the application, while none of the other respondents put in any objection. The result of the application was that Mohamed Esoof Mitchla was appointed mutwalli of the wakf with power to appoint a co-mutwalli. Thereupon Mohamed Esoof Mitchla appointed his daughter, Fatima Bibi (defendant 2b, appellant 2) as a co-mutwalli; and then in compliance with the condition imposed by the sons of Mohamed Salay Mitchla in giving their support to Mohamed Esoof Mitchla's application in this Court the latter together with the co-plaintiffs in the Surat case, except Ahmed Gulam Mohamed Sadiq, moved the District Court of Surat to strike off the suit pending therein, on the ground that they had discovered that the Court had no jurisdiction to entertain the suit, as the wakf property was not situated within its jurisdiction. In spite of the opposition by Ahmed Gulam Mohamed Sadiq, the Court ordered that the suit be struck off. Thereupon Ahmed Gulam Mohamed Sadiq came to Rangoon and applied to this Court for the setting aside of the order appointing appellant 1 a mutwalli, and for the removal of the appellants from their office of mutwallis, on the ground that the order had been obtained by suppression of material facts. That application failed, as the learned Judge who disposed of it considered that the proper step to take to redress the wrong complained of was to file a suit under S. 92, Civil P. C. Consequently, the four plaintiffs, who are respondents 4a, 4b, 4c and 4d filed the suit from which this appeal has arisen.

Of these four plaintiffs, the first two are the residents of Rander while the remaining two are the residents of Rangoon. Hashim Mohamed Mitchla (plaintiff 2) is the only plaintiff who is a member of the Mitchla family. In the plaint there is no allegation of any breach of trust against the appellants. Such allegation would not be possible because the management of the wakf had fallen into their hands only recently. The defendants filed their written statements in which they averred, inter alia, (1) that the suit did not lie in the absence of an allegation of breach of trust, and (2) that inasmuch as plaintiff 2 being the descendant of the founder of the wakf through the female line, and the other three plaintiffs being those who have no "beneficial interest" in the trust, they are not competent to file the suit. In spite of these pleas raised in the written statements, no specific issue was framed in the trial Court concerning them. In the evidence that was led however, statements relevant to these pleas were admitted. The learned Judge on the Original Side answered the issues which had been specifically framed in favour of the plaintiffs, and ordered the removal of the appellants from their office of co-mutwallis and the framing of a scheme for the management of the wakf in question.

Numerous grounds have been raised in the memorandum of appeal, but those that have been pressed concern the question as to the maintainability of the suit as framed in the light of the pleas stated above and appearing in the written statements. As the question turns upon facts appearing in the record and beyond dispute, it is no doubt open to us sitting in appeal to consider and determine that question in spite of the fact that issues were not specifically framed with reference to the pleas concerning it. Indeed the learned advocate for the respondents 4a, 4b, 4c and 4d who are the only respondents contesting the appeal, makes no protest whatever against the hearing of the arguments in support of the contention that the suit as framed was not maintainable, but he endeavoured to refute them. A reference to the terms of S. 92, Civil P. C., is sufficient to show that the plea, that in the absence of an allegation of breach of trust in the plaint the suit is not maintainable, is untenable. A suit under that Section lies not only in the case of any alleged breach of trust but also where the direction of the Court is deemed necessary for the administration of a trust, if it be a trust for public purposes of a charitable or religious nature. The suit is one for the appointment of new trustees on the ground that there do not now exist any lawful trustees, and is therefore a suit which, as pointed out in 26 Mad 450,[1] falls within the purview of the words "where the direction of the Court is deemed necessary for the administration of any such trust" in S. 92, Civil P. C. The appellants who are mere mutwallis are not trustees in the technical sense but are merely superintendents or managers : *see* 44 Mad 831.[2]

The other objection to the maintainability of the suit, namely that there are not two plaintiffs having "beneficial interest" in the trust however is as pointed out in the judgment of my learned brother, fatal to the suit. The facts and law relevant to this point have been, if I may respectfully say so, so clearly set out in that judgment that I do not propose to cover the same grounds again. But I desire to add a word of explanation with reference to 10 Rang 342.[3] In that case the findings of fact arrived at by the District Court and accepted by this Court were that the property of the trust was a grant issued by Government to a member of the Karen Baptist Christian community upon trust for a Christian chapel to be erected thereon, and the chapel referred to as a Karen Baptist Christian chapel was erected with money collected by one Po Paik San from various sources, on behalf of a mission headed by that gentleman known as Po Paik San Karan Baptist Self-Supporting Mission. These facts show that the land came from the public and funds with which the chapel was erected were moneys collected from the public by a religious society, and are, in my opinion, sufficient to distinguish 10 Rang 342[3] from the cases cited by my learned brother to show that the word "interest" in S. 92, Civil P. C., means "a present and substantial, and not a remote and fictitious or purely illusory interest."

Therefore the observation of the late Chief Justice referred to by my learned brother is in no way contrary to or inconsistent with the interpretation put upon the word "interest" in S. 92, Civil P. C., by the authorities referred to by my learned brother, with whose deductions drawn from those authorities I entirely agree. I do not think that merely because certain members of the Mitchla family nominated plaintiff 1 as their representative in the case at Surat, he can be held to have "an interest in the trust." I agree that the appeal must be allowed and the decree of the trial Court set aside and the suit dismissed, and I also agree in the order of my learned brother as to costs.

**Sharpe J.** — The present suit is brought under S. 92, Civil P. C., to secure the appointment of new trustees and the settlement of a scheme in connexion with a certain trust created for public purposes of a charitable nature. Such a suit may only be instituted by "the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General." This suit was instituted by four persons who obtained the consent in writing of the Advocate-General, but a preliminary point arises in this appeal as to whether any two or more of those four persons had an interest in the trust. It appears from the will by which this trust was created (Ex. A) that the testator was one "Ebrahim Hoosain Mitchla of Bawahir caste, an inhabitant of Kusbaa Rander", who, at the time of executing such will, was possessed of moveable and immovable properties said to be then worth upwards of Rs. 90,000. They comprised three houses at Kusbaa Rander, together valued at Rs. 7500, one house in Rangoon valued at Rs. 10,000, a one-third share in a house at Mauritius, such share being valued at Rs. 20,000, one house at Moulmein valued at Rs. 900, shares valued at Rs. 51,825 in various companies carrying on business in Burma, and another small share-holding valued at Rs. 500. The testator "set apart as a wakf, that is to say towards charitable purposes, one-eighth, that is to say two annas to a rupee, out of the annual income" of the residue of his estate properties, after paying his funeral expenses "except (or not including) that of the estate properties situated at Rander." Those last words are of some little importance in connexion with the preliminary point. He directed that first of all a certain landed property should be set apart to produce the necessary income, after which the residue of the whole of his estate was to be divided amongst his heirs according to the Mahomedan law of inheritance ;

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[1] Neti Rama Jogiah v. Venkatacharulu, (1903) 26 Mad 450.

[2] Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar, (1922) 9 A I R P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).

[3] Johnson D Po Min v. U Ogh, (1932) 19 A I R Rang 132=140 I C 317=10 Rang 342.

Rs. 25 were to be sent annually to Mecca and a like sum to Medina, and the balance was to be "utilized towards schools and in sinking wells, etc., etc." The landed property subsequently selected by the trustees to be set apart to produce the necessary income was the house in Rangoon.

Such was the nature of the trust created. I will now examine the position of the plaintiffs with a view to seeing whether they "have an interest" in the above-described trust. Originally, by paras. 23 and 24 of their respective written statements, both the appellants denied that plaintiff 2, Hashim Mohamed Mitchla, had "any interest in the wakf property. Plaintiff 2 being the son of a daughter is no heir of the founder when the founder had left three sons and one daughter, all of whom have male and female heirs." But Mr. Clark, on behalf of the appellants, conceded before us that, in view of the Privy Council decision in 47 Mad 884[4] (*see* especially the last three lines on page 891) plaintiff 2 in the present suit, being a descendant of the settlor, although only in female lines, had an interest in the proper administration of the trust sufficient to enable him to maintain the suit. The question therefore remains: Has any one of the other three plaintiffs a sufficient interest in the trust?

The position of each of the other three plaintiffs is identical, and the ground upon which they each allege that they have an interest is that they are all "members of the Sunni Borah community of Rander and Rangoon": *see* para. 23 of the plaint. In paras. 23 and 24 of their respective written statements the two appellants admit that plaintiffs 1, 3 and 4 are no doubt members of the "Sunni Borah community of Rander" (the admission is limited to their being of Rander as distinct from Rander and Rangoon) "but the provisions of Will confer no specific interest to the said Community." Accordingly, upon the pleadings these three plaintiffs cannot put it higher than that they are members of the Sunni Borah community of Rander. Turning now from the pleadings to the evidence, the only evidence on this point which I can find is (a) that passage in the cross-examination of the plaintiff Sadek where he says at the bottom of page 106 and the top of page 107:

> From the time when there was a case in the District Court of Surat I came to have an interest in this waqf. I began taking an interest after the day I was made a party in those proceedings. I am taking an interest in this waqf because I am a member of the community to which the deceased belonged. I am taking an interest also because of public interest,

and (b) the concluding sentences in the evidence of the plaintiffs' witness Desai, at the very bottom of page 127:

> I know the other plaintiffs in this suit. I cannot say why they are not giving evidence. Olia and Bham got their names in as plaintiffs themselves. They willingly came on the record for the interest of their community and for the sake of charity.

So that there is no evidence in support of these plaintiffs' allegations that they are members of the Sunni Borah community of Rangoon as well as Rander. Hence the most that can be said for them is, as was admitted in their written statements by the defendants who are the present appellants, that these three plaintiffs are all members of the Sunni Borah community of Rander. The short point is therefore whether mere membership of that community confers the necessary interest. Our attention has not been called to any Rangoon decision on this point. 10 Rang 342[3] was cited to us on another point and I see in that case that at page 346 the former Chief Justice said in passing:

> He (that is, the District Judge) also held, and in my opinion correctly held, that all Karen Christians who are Baptists are beneficiaries under the trust, and therefore that the plaintiffs are entitled as being persons interested in the trust, to file a suit under S. 92, Civil P. C.

My learned brother in the judgment which he has just delivered has already distinguished 10 Rang 342[3] from the present one and I myself desire to point out that apparently no point was raised in that case, at any rate on appeal, as to the sufficiency of the plaintiffs' interest. The learned Chief Justice dealt exhaustively with the substantial points raised before him and did not and indeed had no need to, direct his mind to the question of the extent of the plaintiffs' interest in the trust. My learned brother Mya Bu was a party to that decision, and he tells me that it is the fact that in that case no question arose on the appeal as to the adequacy of the plaintiffs' interest in the trust. I therefore disregard any passing dictum of the former Chief Justice in 10 Rang 342[3] which case must not be treated as being any authority on the point which we now have to consider, and I do not know of any Rangoon case which helps us to decide the present point. There is however a Madras case in 42 Mad 360[5] which is in point, and upon the majority judgments in that case I propose to base my decision in the present appeal. To my mind the general proposition for which the plaintiffs there contended was stated in such wide terms that the plaintiffs were bound to fail. It was suggested :

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[4] **Vaidyanatha Ayyar v. Swaminatha Ayyar, (1924) 11 A I R P C 221=82 I C 804=51 I A 282=47 Mad 884 (P C).**

> That every Hindu temple must be presumed. . . to be dedicated for the use of all Hindus of whom there were 270½ millions in British India at the last census, to say nothing of the additional millions in Native States, and that each of these individuals has therefore an interest in the trust of every Hindu temple in India within the meaning of S. 92 (per Wallis C. J. at page 362).

But nevertheless, apart from the special facts of that particular case, there are certain guiding principles which appear in the judgments in 42 Mad 360[5] which do help me in deciding the narrower proposition which was placed before us by Mr. Cowasjee on behalf of the respondents. In that Madras case "interest" in S. 92, Civil P. C., was held to denote an interest which is substantial and not sentimental or remote : it must be a present and substantial and not a remote and fictitious or purely illusory interest. The whole topic was very fully canvassed in the various judgments in the case, the history of the legislation on the subject was carefully reviewed, and the removal by S. 44 of Act 7 of 1888 of the word "direct" from its position before the word "interest" was duly commented upon; while the extent to which the English decisions under Lord Romilly's Act should afford guidance in interpreting S. 92, Civil P. C., was fully discussed. I do not therefore propose myself to discuss the matter at length in this judgment. As I have already said, I intend to follow the general principles laid down by the majority decision in that Madras case; and I will content myself with quoting a few passages from some of the judgments in that case. The Chief Justice Sir John Wallis said at page 363 :

> We were not referred to any case in which a plaintiff has sued without having some interest of his own as distinct from the rest of the community,

and at page 366 he expressed himself as being

> clearly of opinion that 'the interest in the trust' must still, in Lord Eldon's words (the learned Chief Justice was there referring to Lord Eldon's speech in the House of Lords in (1827) 1 Bligh (N S) 17[6]) 'be a clear interest', that is to say a present and substantial, and not a remote and fictitious or purely illusory interest . . . . . It is, I think, quite clear both under Lord Romilly's Act and the Section that the Court must be satisfied not only that the requisite authority has been given, but also that those to whom it has been given have a clear interest in the trust. That interest, it seems to me, if the provision is not to be altogether illusory, must arise from some special relation in which the plaintiff stands to the endowment in question as compared with the whole body of religious community throughout India; in other words, he must be in a position to derive some benefit from the trust in respect of which the suit is filed.

And on p. 368 the learned Chief Justice held that the object of the insertion of these words in Section 92 was

> to prevent people interfering by virtue of the Section in the administration of charitable trust merely in the interest of others and without any real interest of their own,

an interpretation which was expressly approved by Sir John Edge in delivering the judgment of the Privy Council in 47 Mad 884[4] *supra*.

Oldfield J. said at page 391 :

> No good reason has been shown against the interpretation of the word 'interest' in the Section in the manner in which it is ordinarily interpreted in other legal connexions and in which I shall interpret it, as an interest which is substantial and not sentimental or remote.

At pages 395 and 396 Coutts-Trotter J. said :

> Romilly's Act authorized any two or more persons to take proceedings under the Act in regard to the trust to which the Act referred, on obtaining the sanction of the Attorney-General, and the Act contains not a word to prescribe that they should have an interest, direct or otherwise. Nevertheless Lord Eldon in those two cases [the learned Judge is there referring to (1819) 2 Swans 470[7] and (1827) 1 Bligh (N S) 17,[6] both supra] expressed an emphatic opinion that the Court would not listen to a relator who had not an interest which he describes in one place as 'clear,' and in another as 'direct'. As the Section of the Civil Procedure Code is known, as a matter of history, to be based on Romilly's Act, I do not think this argument from analogy is one that can be overlooked.

Finally, at the bottom of page 398, the learned Judge said that :

> The most that can be done, or attempted to be done, is to say that the interest required by the Statute to reside in the relator must be, in the words of Lord Eldon, 'clear' or, in the words of the learned Chief Justice in this case, 'a present and substantial and not a remote and fictitious, or purely illusory' interest.

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[5] T. R. Ramachandra Aiyar v. Parameswaran, (1919) 6 A I R Mad 384=50 I C 693=42 Mad 360=36 M L J 396.

[6] Corporation of Ludlow v. Greenhouse, (1827) 1 Bligh (N S) 17=30 R R 7.

[7] In re Bedford Charity, (1819) 2 Swans 470=19 R R 107.

In the present case, for reasons hereinbefore appearing, the only ground upon which it can be suggested that the plaintiffs 1, 3 and 4 have the necessary interest in the trust is the bare fact that they "are members of the Sunni Borah Community of Rander," coupled with the fact that the testator was a Sunni Mahomedan who died at Rander, leaving, inter alia, three houses at Rander. I would however point out that the total value of those three houses is approximately no more than 8 per cent. of the value of all his property, and as I have already pointed out when reading the material parts of the will, all the Rander properties were specifically excluded from the wakf by the testator. That is the most that can be said on behalf of plaintiffs 1, 3 and 4. They are neither managers of schools nor persons in need of wells. In my judgment their interest, if any at all, is sentimental and therefore too remote; it is certainly not, to my mind, a substantial one. None of them has sought to show any real interest; or, indeed, any interest at all, of his own as distinct from the rest of that community to which they all belong. I will not repeat the passages in the evidence which I have already read. The interest of these plaintiffs is far from being either "clear" or "direct," to use Lord Eldon's adjectives. Nor have they sought to show that they are in a position to derive any benefit from the trust in respect of which this suit is filed. In all these circumstances I am unable to hold that they, or any of them, have the necessary interest in this trust.

This point, though raised, as I have pointed out, in the pleadings, was not, apparently, relied upon by the appellants in the Court below, for the only reference to the plaintiffs' interest in the trust which is to be found in Ba U J.'s judgment is in the following terms (p. 3 of the judgment):

> He (that is, plaintiff 1) and plaintiffs 3 and 4 are not related to the founder of the waqf, but they claim that they are interested in the affairs of the waqf as they belong to the same community as its founder. Plaintiff 2 is a grandson of the founder.

That is all the learned Judge says about this matter. The present point was apparently never argued; if it had been, the learned Judge would certainly have dealt with it. This preliminary point was taken by Mr. Clark on behalf of the appellants when he first opened the appeal, and the respondents have not suggested to this Court either that it is not one with which we can now deal or that it takes them by surprise. We therefore entertain this preliminary point which, in my judgment, for the reasons already given above, succeeds. This appeal must be allowed, the decree passed in the Court below must be set aside, and the suit dismissed. Respondents 4 (a), 4 (b), 4 (c) and 4 (d) must pay fifteen gold mohurs for the appellants' advocates' fee in this Court; and each party must pay its own costs in the Court below and of the proceedings consequent upon the decree there, as the point upon which we allow this appeal was not argued before Ba U J.

R.M./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 345

### SPECIAL BENCH

ROBERTS C. J., MYA BU AND DUNKLEY JJ.

*Dyer Meakin (Burma) Ltd.* — Applicant.

v.

*Chief Executive Officer, Mandalay Municipality* — Respondent.

Civil Ref. No. 11 of 1937, Decided on 14th January 1938.

**Burma Municipal Act (3 of 1898), S. 46—Contractor's test and revenue principle — Applicability — Occupation or business (for example brewery and distillery) carried on on premises being only occupation of its kind in the district or province—No standard of comparison with other hereditaments of similar nature —Contractor's test within certain limits held would afford useful guide.**

The assessment to be made under S. 46 is upon the premises in the occupation of the person assessed and not upon the profits of the business which he carries on. It is necessary to look at all the circumstances of the particular occupation including therein the business that has been done on the premises. Neither the contractor's test nor the revenue principle is a principle of assessment. Each or either, according as circumstances demand, may in particular cases of assessment of lands or buildings, be used as a method of finding out what the hypothetical rent may be when no direct evidence on this point is available. [P 346 C 2; P 347 C 1]

**A test based upon actual figures of profits can only be applied where a hereditament itself has an exclusive profit making characteristic so as to single it out from other classes of hereditaments and to make it safe to arrive at the rent which the tenant might reasonably be expected to pay from this consideration alone. [P 347 C 2]**

**Where an occupation or business carried on on premises (say a brewery and distillery) is the only occupation of its kind carried on in the district or province and there is thus no standard of comparison with other hereditaments of a similar**

character, to arrive at the rent which a hypothetical tenant would pay, the contractor's test may be taken as a rough test. Careful regard must be had both to the outlay which would have to be made and the return which the contractor would expect for such outlay. Hence it is legitimate to enquire whether the business of the occupant is good, bad or indifferent, or whether it is business which is specially fortunate by reason of the comparative absence of competition. The better the business is, the higher the rent which a hypothetical tenant might reasonably be expected to pay for the premises. But this does not mean that the hypothetical rent should be calculated by an investigation into the present profits. The examination of the profits made by the occupant and a direct calculation from them is, in such circumstances, a dangerous and unsafe method of discovering the rent which a hypothetical tenant would pay: *(1901) A C 175*; *(1932) 2 K B D 679; A I R 1927 Rang 161 and (1886) 17 Q B D 738, Ref.*; *(1900) A C 150, Disting.* [P 348 C 1, 2]

Clark — *for Applicant.*

Ba Han — *for Respondent.*

**Roberts C. J.**—This is a reference made by the Deputy Commissioner of Mandalay under R. 4, sub-r. (4) of the Rules published with the Ministry of Education, Local Government (Financial) Department Notification No. 35, dated 2nd day of July 1935, and relating to assessments to be made in the Municipality of Mandalay. The question which the Deputy Commissioner has referred to the Court is :

> Whether the assessment of Messrs. Dyer Meakin (Burma) Limited by the Mandalay Municipality could be based on what is known as the contractor's test or according to the revenue principle on the profits of the business.

Messrs. Dyer Meakin (Burma) Limited are brewers carrying on a brewery and distillery in Mandalay, which is in fact the only brewery or distillery in Upper Burma. The tax which is the subject-matter of this case is imposed under S. 46 (1) (a), Burma Municipal Act, 1898, which allows for the imposition of a tax on buildings and lands not exceeding 10 per cent. of the annual value of such buildings and lands. S. 46, sub-s. (4), says :

> In this Section 'annual value' means the gross annual rent for which buildings and lands liable to taxation may reasonably be expected to let and in the case of houses, may be expected to let unfurnished.

By R. 4, sub-r. (4) of the Rules already referred to:

> If on the hearing of an appeal under this rule, any question as to the liability to or the principle of assessment arises on which he entertains doubt, the Deputy Commissioner may of his own motion, and shall on the application of the appellant or the Chief Executive Officer made at the hearing, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer the statement with his own opinion on the point and the record of the case for the decision of the High Court, who shall send a ruling thereon to the Deputy Commissioner in order that he may dispose of the case in conformity therewith.

As stated by the Earl of Halsbury L. C. in (1901) A C 175[1] at p. 180, the thing to be done is to answer a plain question of fact, namely, what is the rent which a tenant might reasonably be expected to give for the premises? Lord Halsbury points out that it is not a tenant's trade which is to be rated, but the premises in which he carries on his trade or business : and that it is necessary to look at all the circumstances of the particular occupation, including therein the business that has been done on the premises. Where it is impossible, as here, by direct evidence to find out what rent a hypothetical tenant would give, recourse must be had to some other method of solving the difficulty. In this particular case it is impossible to arrive at the annual value of the property by comparison with properties of a similar nature in the neighbourhood, since this is the only brewery or distillery in Mandalay. As a means of arriving at the answer to the question of what is the gross annual rent for which these buildings may reasonably be expected to let, the Chief Executive Officer came to the conclusion that what is known as 'the contractor's test' was not a satisfactory method to adopt. Accordingly, he took as a basis for the assessment figures representing the profits of the company and arrived from that at a figure of Rupees 1,30,106-5-3. If this figure were taken, allowance would also have to be made for tenant's taxes, though this does not seem to have been done. In answering the question whether the contractor's test or the revenue principle is the right basis upon which to assess this particular hereditament, we must begin by saying that the only proper basis of assessment is that which enables the gross annual rent, for which the buildings and lands liable to taxation may reasonably be expected to let, to be discovered : in other words, neither the contractor's test, nor the revenue principle, is a principle of assessment. Each, or either, according as circumstances demand, may in particular cases of assessment of lands or buildings, be used as a method of finding out what the hypothetical rent may be when no direct evidence on this point is available. In order to see what rent a hypothetical tenant would pay, the whole of the circumstances in each particular case must be examined. As Lord Halsbury pointed out in (1901) A C 175[1]:

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[1] Mersey Docks & Harbour Board v. Assessment Committee of the Birkenhead Union, (1901) A C 175=70 L J K B 584=84 L T 542=49 W R 610=65 J P 579=17 T L R 444.

> Where you have premises of a similar character with equal facilities for carrying on trade, you have a very facile mode of coming to the conclusion what sum would reasonably be given by any tenant from year to year for such premises. But if, instead of doing that, you choose to go into elaborate calculations of how much the building cost to erect and when erected what would be the value of it, you are only elaborating and making more complex and difficult the simple proposition which the Legislature has put before the overseers to answer.

In another case, (1932) 2 K B 679,[2] Scrutton L. J. pointed out that where there was direct evidence of the rent which a hypothetical tenant actually would pay, the method of comparison was open to criticizm upon the ground that it is assumed that the properties with which comparison had been made had been themselves correctly assessed. The real question in all these cases is : Which is the most practical and direct means of arriving at the figure at which the premises might reasonably be expected to let? It is contended on behalf of the Chief Executive Officer that the brewery, which is the hereditament in question, is a place from which a trade which is a quasi monopoly is carried on since there are no other breweries in Upper Burma, and can be none until application is made for a license under Ch. 3 of the Burma Excise Rules. Dr. Ba Han has urged upon us that by R. 128 of the Excise Rules an application for sanction to construct another brewery might be rejected by the Commissioner of the Division with or without assigning any reason to the applicant, and Dr. Ba Han seeks to say that the present case is comparable with that of (1900) A C 150.[3] That was a case of a licensed public house in which the tenant was bound to purchase all liquors sold by him from the landlords or their nominees, and Lord Morris pointed out that almost the very first question that a hypothetical tenant would ask was whether the house was doing a good business or a bad business before he decided what rent to pay, and that the best way of ascertaining what trade was going on would be the production of the books of the existing tenant.

Lord Brampton pointed out that any prudent intending tenant would try to ascertain the trade actually done on the premises and that the landlord would also look at the matter from a similar angle and would demand a somewhat higher rent for a house capable of yielding a large profit than that which he would for a house yielding a small one. But the case of (1900) A C 150,[3] being that of a licensed public house, has this distinction from the present case, namely that the hereditament derived its letting value from the special character of the premises and the restrictions placed upon them; whereas here, although the letting value might well be affected by the character of the premises, the circumstances are by no means parallel. Where the number of enterprises is limited, the profit which is earned in the enterprise must affect the rent which a hypothetical tenant would pay. On the other hand, in my opinion, it will be fallacious to endeavour to arrive at an answer to the main question by taking the figures of the trade done by the present occupants and endeavouring to arrive from them at the rent which a hypothetical tenant might pay. We have had cases cited to us in relation to railways, which do not seem to have any useful application here: and it must not be forgotten that the assessment to be made is upon the premises in the occupation of the person assessed and not upon the profits of the business which he carries on. A test based upon the actual figures of profits can only be applied where a hereditament itself has an exclusive profit-making characteristic so as to single it out from other classes of hereditaments and to make it safe to arrive at the rent which the tenant might reasonably be expected to pay from this consideration alone. The nature of the contractor's test was explained shortly by the Court in 5 Rang 161.[4] The Court quoted with approval the method of assessment set out, which was in the following terms:

> The general theory of this principle is, briefly, that a certain amount of capital would require to be invested to provide a property of similar utility to the one to be assessed and the interest on this sum may be taken as the rent which the occupant would actually be paying.

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[2] **Ladies Hosiery and Underwear Ltd. v. West Middlesex Assessment Committee, (1932) 2 K B 679=101 L J K B 682=147 L T 390 = 96 J P 336=30 L G R 369.**

[3] **Cartwright v. Sculcoates Union, (1900) A C 150=69 L J Q B 403=82 L T 157 = 48 W R 894=64 J P 229=16 T L R 238.**

[4] **Ko Po Yee & Bros. v. Corporation of Rangoon, (1927) 14 A I R Rang 161 = 103 I C 40 = 5 Rang 161.**

It was pointed out that the application of this principle required careful handling and each case had to be considered on its merits.

Cave J., in (1886) 17 Q B D 738,[5] dealing with the application of the contractor's test where the place was occupied, and occupied by the owner himself, explains that if such occupier owner could get a place cheaper at a less rent than the interest on the cost, it is to be assumed that he would not get to the expense of building, but would prefer to take the cheaper course and pay the rent. It may therefore be said that in order to arrive at the rent which a hypothetical tenant would pay, the contractor's test may be taken as a rough test in a case of this kind. But the answer which is arrived at must obviously depend upon the rate of interest which the contractor would expect to obtain for his money. To take the contractor's test therefore is not, by itself, a solution to the question and propounds two new questions. In order to discover what would the hypothetical tenant pay, one must ask (a) what it would cost a contractor to acquire land and build premises of similar utility and convenience, and (b) at what rate he would expect to get a return for his outlay. Careful regard must be had both to the outlay which would have to be made and to the return which the contractor would expect for such outlay. In deciding what return the contractor would expect, I am of opinion that the considerations mentioned by their Lordships in (1900) A C 150[3] must not be lost sight of. Before laying out his money the contractor would wish to be satisfied as to the kind of opportunities for lucrative business which the premises were likely to afford, and the better the chance a tenant might have of doing lucrative business upon such premises, the greater the return on the outlay which it may reasonably be expected the contractor would get. Hence it is legitimate to inquire whether the business of the appellants in this particular case is good, bad or indifferent; or indeed, as has been suggested, whether it is a business which is specially fortunate by reason of the comparative absence of competition. The better the business is, the higher the rent which a hypothetical tenant might reasonably be expected to pay for the premises. But this does not mean that the hypothetical rent should be calculated by an investigation into the present profits and a conclusion drawn from them that the hypothetical tenant would pay so much per cent of the profit which the present appellants are making. I observe that in 5 Rang 161[4] it is noted that the rate of interest on the contractor's principle

> has been fixed by the Court in the Burma Railways case at 8 per cent. on the capital value of buildings and plant and 4 per cent. on land.

This does not mean that the figure of 8 per cent. is to be taken as a hard and fast rule providing what is a reasonable return to the contractor for his outlay in all cases. A reasonable return may, and will in most cases, vary with the state of the money market and with the special circumstances of each particular case. If the contractor's test is employed as a basis for ascertaining the amount which a hypothetical tenant might reasonably be expected to pay, care must be taken to examine the actual return which the contractor would reasonably expect to receive on his outlay. If money were dear and profits from the particular business likely to be high, it is plain that the percentage on the outlay would be higher than if money were cheap and no particular business opportunities were afforded by the premises erected. In such a case the contractor might be glad to let the premises to a tenant for a comparatively low return for his money. I would accordingly reply that in the absence of direct evidence or of any standard of comparison with other hereditaments of a similar character, the method of finding the annual value by means of the contractor's test will, within the limits laid down, afford a useful guide. The examination of the profits made by the appellants and a direct calculation from them is, in the present circumstances, a dangerous and unsafe method of discovering the rent which a hypothetical tenant would pay. We assess the advocate's fee in this Court at 20 gold mohurs.

**Mya Bu J.**—I agree.

**Dunkley J.**—I concur.

D.S./R.K. *Answer accordingly.*

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[5] Reg. v. School Board of London, (1886) 17 Q B D 738=55 L J M C 169=55 L T 384=34 W R 583=50 J P 419.

## A. I. R. 1938 Rangoon 349

ROBERTS C. J. AND SPARGO J.

*Bombay Burma Trading Corporation Ltd. and another* — Appellants.

v.

*Daw Chi* — Respondent.

Misc. Appeal No. 18 of 1938, Decided on 18th May 1938, against order of Commissioner for Workmen's Compensation, D/- 22nd December 1937.

**Workmen's Compensation Act (1923), S. 3 (1)—Accident arising out of employment — Facts proved giving rise to conflicting inferences of equal degrees of probability as to cause of death—Onus of applicant is not discharged.**

If the facts proved give rise to conflicting inferences of equal degrees of probability, so that the choice between them is a mere matter of conjecture, then of course the applicant fails to prove his case, because it is plain that the onus in these matters is upon him. [P 350 C 1]

Compensation was claimed on the ground that the deceased met with his death at the hands of an elephant in the course of employment but there was no real evidence which might be considered as affecting the balance of probability one way or the other. The whole subject was a matter of guesswork, and death from violence at the hands of the elephant, or death from epilepsy or death from some unexplained cause, might afford a right answer :

*Held* that the applicant had failed to discharge the onus of proving his case : *(1919) 89 L J K B 609, Applied.* [P 350 C 1]

Clark — *for Appellants.*

**Roberts C. J.** — We have come to the conclusion that this appeal must be allowed. It is brought by the Bombay Burma Trading Corporation, Limited, and Maung Po Htai, who was added as an appellant, because he is a contractor working for the Corporation and supplying elephants. And one of the elephant riders was a man named Maung Ba who unfortunately lost his life in the jungle in April 1937. On the morning of 25th April, at about 5-30, Maung Ba went out to collect an elephant, which he had been in the habit of riding and was known as Sadaw Koon. It appears that the elephant in question was not dangerous, but of mild disposition though fettered, as is commonly the case in order to prevent it exercising a tendency to roam. After Maung Ba had been absent for about a day or two, a search took place on his account, and he was found dead in the jungle on 30th April and Daw Chi brought this application : and the contention of the dependant was that the deceased had lost his life through an accident whilst being a workman and arising out of and in the course of his employment. It is conceded that he was a workman, and it is conceded that the accident arose in the course of his employment, that is to say it was during the period of his employment when he met with his death. But we have to consider whether the accident arose out of his employment, and in so doing we must consider ourselves as bound by the rules which have been carefully laid down in this behalf. The Commissioner for Workmen's Compensation had to consider how Maung Ba met his death, and he decided that the deceased was killed by an elephant in the jungle. The persons who found the dead body do not speak to any marks of violence on the body when it was found or to any sign of a struggle or a disturbance on the ground round the dead body, although it is true that some bamboo shoots had been broken from trees at a distance quite close to the deceased. The body was lying face upwards, and it is said that this is not a normal position for a person who has been killed by an elephant, to lie. There were no new elephant tracks, but there were tracks three or four days old, and of course the dead body was found on the fifth day after Maung Ba had left to search for this particular elephant.

The only circumstance which led persons to think, so far as it can be gathered, that Maung Ba had met with his death from elephants was that he was found in the elephants' feeding ground and that elephants had been near. But, as I have said, there were no signs of violence upon him. The particular elephant which he was searching for was found fettered later, and it has always been good-tempered and it would be a matter of complete conjecture as to how he came by his death, were it not for the fact that there is other evidence, and evidence from the deceased's own nephew, that he was subject to convulsions, or fits, which used to last for about five minutes, and that only during the previous years he had had an attack of epilepsy, at some kyaung and had had to crawl back to camp. The other witnesses agree with regard to his seizures and it must always be a matter of complete doubt as to whether he had a seizure and died as a result of it, or whether he met his death in any other way. When the body was found its condition was such that it was found necessary to cremate it at once, and it was subsequently buried. But the Commissioner, being in grave doubt as to how the deceased met with his end, secured the exhumation of the body and has relied for his finding upon a medical report, or letter, giving the opinion of a medical officer. In my opinion, that does not remove the case from one of conjecture only. The medical officer could not be questioned about the matter, but the Commissioner had to rely on his rather laconic observations. He said that he was of opinion that certain fractured bones were due to violence. This was six months after the death, and as we know that the body was cremated it is strange that the Sub-Assistant Surgeon should say that there were no signs that the bones were charred. Moreover, the skull bones, the bones of the arm and the bones of the leg were not discovered at all : and to say that other bones which were discovered were fractured because the death was caused by violence is to draw a conclusion of doubtful warrant.

In my opinion therefore the Commissioner should not have attached any reliance upon the report of the Sub-Assistant Surgeon : and this remark, of course, is not intended to be in the least a criticism upon that officer, who had somewhat imperfect material upon which to work. But as the exhumation really resulted in no further enlightenment, in my opinion the Commissioner had no satisfactory evidence upon which he could arrive at the conclusion which he did. As is said by Lord Birkenhead in (1919) 89 L J K B 609[1] at p. 611 :

> If the facts proved give rise to conflicting inferences of equal degrees of probability, so that the choice between them is a mere matter of conjecture, then of course the applicant fails to prove his case, because it is plain that the onus in these matters is upon him.

I think this is just one of those cases in which it may be said that there is no real evidence which might be considered as affecting the balance of probability one way or the other. The whole subject must ever remain a matter of guesswork, and death from violence, or death from epilepsy, or death from some unexplained cause might afford a right answer. In these circumstances, I am of opinion that this appeal must be allowed.

**Spargo J.**—I agree.

K.S./R.K. *Appeal allowed.*

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[1] Lancaster v. Blackwell Colliery Co. Ltd., (1919) 89 L J K B 609=122 L T 162=64 S J 115=12 B W C C 400.

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## A. I. R. 1938 Rangoon 350

ROBERTS C. J. AND SPARGO J.

*Bux Soo Meah Chowdry* — Applicant.

v.

*The King.*

Criminal Revn. No. 173-B of 1938, Decided on 18th May 1938, from review of order of Headquarters Magistrate, Mergui, D/- 14th October 1937.

**(a) Penal Code (1860), S. 40 — Local law declaring breach of rule framed thereunder as punishable — Breach might amount to offence under S. 40.**

Where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence within the meaning of S. 40 : *A I R 1929 Rang 75, Rel. on.* [P 351 C 1]

**(b) Penal Code (1860), S. 79 — Good faith — Working area outside limits of license — Accused held working without due and proper care and not dishonestly.**

An accused who lets his coolies work outside the area covered by his license at a distance of about a mile or so, cannot be said to be acting in good faith, i. e. with due and proper care as distinguished from dishonestly or fraudulently. [P 352 C 1]

Foucar — *for Applicant.*

E. W. Lambert, Govt. Advocate — *for the Crown.*

**Roberts C. J.** — In this case the applicant, one Bux Soo Meah Chowdry, was convicted of an offence under R. 107-I of the Land Revenue Rules published under the authority of the Burma Land and Revenue Act 1876, read with S. 109 of the Penal Code; that is to say he was charged with abetting persons who were committing an offence under R. 107-I. That rule lays down that whoever mines, quarries, digs for, excavates or collects any mineral other than those referred to in the previous chapter, or in contravention of the terms or limitations of any such license or lease, or removes any such mineral, shall be punished. The preceding chapter relates to stone, laterite, limestone, sandstone, marble, gypsum, clay, or other minerals : and it is agreed that this particular Rule 107-I, punishes anyone who mines for tin in contravention of the limitations of a license issued to him. Now S. 60 (2), Land Revenue Act says : "All rules made under this Act shall be published in the Gazette and shall thereupon have effect as if enacted in this Act." And it is clear from S. 38-A (3) that the Local Government may make rules for regulating or prohibiting the mining, quarrying or digging for or the excavating or collecting of minerals, and for the disposal of the right to work the minerals by way of lease, license or otherwise; and by S. 59 they may, in making any such rule, attach to the breach of it, in addition to other consequences, a punishment. Accordingly, this case, in my opinion, falls within the class of cases which were referred to in passing by my learned brother Mya Bu in 6 Rang 791.[1] The learned Judge said (at page 793):

> It is conceivable that where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence within the meaning of S. 40, I. P. C.

It clearly does so here, because it is not merely a matter of the local law declaring a breach of the rules made under its authority punishable (which it does by virtue of S. 59), but of the Act itself expressly saying in S. 60 (2) that the rules made under the Act shall have effect as if enacted therein. Accordingly, it is no part of our duty in this case to review any other aspect of the decision in 6 Rang 791,[1] to which I have referred, although in the terms of reference it is suggested that such a task might have been ours. In considering whether we would interfere in revision upon this matter, we have had the benefit of careful argument by Mr. Foucar, who says, first of all, that the prosecution had not proved that the work was done outside the area, and, if they have, still there was no proof that the applicant knew that it was outside, and that the provisions of S. 79 of the Penal Code should be applied as a defence on his behalf. That Section runs, so far as the material words are concerned, as follows :

> Nothing is an offence which is done by any person who, by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law in doing it.

And when one looks for the meaning of "good faith," one finds in S. 52 it is said:

> Nothing is said to be done or believed in good faith which is done or believed without due care and attention.

Accordingly, the question really is whether the applicant permitted his coolies to work in an area which was outside the licensed area, and, secondly, whether in so permitting them and abetting them in the work they were doing, he was acting without due care and attention, having regard to the limits of the licensed area. It is not strongly contended for the defence that the work done was not outside the area. There is ample evidence upon which the Magistrate could find, and did find, that it was a long way outside the area : in particular, E Chwein, who built barracks on the east side of a range of hills, says that they were two miles away from the storeshed of Gul Mohamed's licensed Pyicha-Chaungpya area. I should explain that Gul Mohamed was the holder of the license and he had a manager named Francis, who controlled the transport of ore, whilst the appellant was a person who had entered into a business arrangement with Gul Mohamed and was employing coolies to work in supposed conformity with the terms of the license issued to the latter. The area which was subject to the license must have been well known to Gul Mohamed. He first applied for a license as far back as 1933 submitting plans, and a point was fixed on the land and various measurements are said to have been made. With whatever degree of accuracy that application purports to express what was actually done, at all events this is certain, that the application was for between five and six hundred acres, and that the land upon which the applicant's coolies were working was two miles away from the store-shed, and well over a mile away from any part of the licensed area. When we come to enquire what precautions the applicant took to see that he was acting in conformity with the law in permitting his coolies to work in that area and how he puts forward his defence, the 35th question in his examination and his reply thereto are of importance :

> *Question.* — It is in the evidence of Maung Thwin that the area your employees worked (was) outside the licensed area of Gul Mohamed. What have you got to say ?
>
> *Answer.* — I do not know the place where my employees worked falls inside or outside Gul Mohamed's area. As far as I know, the place was pointed out to me as being inside Gul Mohamed's licensed area.

He also said in the course of his examination :

> Gul Mohamed's manager, Mr. K. K. Menon, and Mr. Francis told me that this area fell within the licensed area of Gul Mohamed. Both these managers told me that I should work in that area and they also had worked in the same place before. Hence I worked in this area.

Neither of these two persons was called by him as a witness. Then it is clear that the applicant was told by one Mr. Idris, who was a clerk or manager of his, that the area which was being worked was outside the licensed area, although it transpired that the views of Idris were either altered or silenced by assurances from Mr. Francis and Mr. Menon. Having regard to the nature of the accused's own frank statements in the course of setting up the defence that he used due care and attention, I cannot see any ground to interfere in revision, and indeed, speaking for myself, I am not surprised that the Magistrate came to the conclusion to which he did. But it is desirable, although this application must be dismissed, to refer to one matter, namely the absence of good faith. Absence of good faith in this connexion, and within the meaning of the Penal Code (Ss. 52 and 79), means simply carelessness or negligence. Absence of good faith, under the General Clauses Act, means "want of honesty." And, so far as the applicant's position may be, or might have been, prejudiced by reason of a conviction, it is perhaps desirable to point out that what he has been convicted of in the present instance is a want of care rather than a dishonesty or fraudulent act. It was pointed out to us that this application was of great importance to the applicant, not by reason of the fine inflicted, which, of course, must stand, but because his certificate of approval in relation to mine working has been denied to him. We have nothing to do with that; but it is fair to say, in dismissing this application, that it must be dismissed not because of any fraudulent action on his part (which is no part of the charge against him) but because of his want of due care and attention in neglecting to see that the area which his coolies worked over was that over which Gul Mohamed was licensed to do work.

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[1] **Ma Khwet Kyi v. Emperor, (1929) 16 A I R Rang 75=115 I C 664=30 Cr L J 509=6 Rang 791.**

**Spargo J.**—I agree that the application must be dismissed, and that the applicant is guilty not of dishonesty but of not taking due and proper care.

B.D./R.K. *Application dismissed.*

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## A. I. R. 1938 Rangoon 352

ROBERTS C. J. AND BRAUND J.

*M. M. K. Kuttayan Chettyar and another* — Appellants.

v.

*V. E. R. M. K. Krishnan Chettyar* — Respondents.

First Appeal No. 18 of 1938, Decided on 3rd June 1938, against order of Dist. Court, Bassein, D/- 16th February 1938.

**Civil P. C. (1908), S. 44 (Burma) — Decree passed in Pudukottai Court can be executed in Burma.**

A decree passed by a Court in Pudukottai State can be validly executed in Burma. [P 352 C 2]

E. Hay — *for Appellants.*

Horrocks — *for Respondents.*

**Roberts C. J.** — This appeal must be dismissed. The learned District Judge of Bassein rightly held that a decree of the Chief Court of Pudukottai could be executed in his Court. The respondent obtained a decree in Pudukottai on 22nd May 1937, that is after the separation of Burma from India, which took place on 1st April 1937. By S. 44, Civil P. C., as it existed before that date:

> The Governor-General in Council may, by notification in the Gazette of India, declare that the decrees of any Civil or Revenue Courts situate in the territories of Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees, may be executed in British India as if they had been passed by the Courts of British India.

By Para. 9 of the Burma Laws Adaptation Order 1937, any notification duly made or issued before the commencement of this Order was saved from being rendered invalid under its provisions; and provisions were made for the revocation, varying or undoing of any such notification

> in the like manner, to the like extent and in the like circumstances as if it had been made, issued or done after the commencement of the Order by the competent authority and under and in accordance with the provisions then applicable to such a case.

By virtue of notification No. 4395-1/A, dated 8th December 1904, and reproduced at p. 625 of Vol. I, General Statutory Rules and Orders (1907) a right was given to execute decrees (inter alia) of the Chief Court of Pudukottai in Burma, and this notification is saved. Moreover Sec. 148, Government of Burma Act, runs as follows:

> Notwithstanding the repeal of the Government of India Act, but subject to the provisions of this Act, all the law in force in Burma immediately before the commencement of this Act shall continue in force in Burma, until altered or repealed or amended by the Legislature or other competent authority.

And S. 149 runs:

> His Majesty may by order in Council to be made at any time after the passing of this Act provide that as from such date as may be specified in the order any law in force in Burma shall, until repealed or amended by the Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be consequential on the separation of India and Burma.

In this Section the expression "law" does not include an Act of Parliament, but includes any ordinance, order, bye-law, rule or regulation having in Burma the force of law.

It is true that reading S. 44, Civil P. C., as amended, it has become quite different and provides that the Governor may, by notification in the Gazette of Burma, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty or any such class of decrees may be executed in British Burma as if they had been passed by the Courts in British Burma. Pudukottai may well not be a Native Prince or State within the meaning of the Section as amended and since separation. But the contention that no notification made prior to separation can have any effect unless it is one which His Excellency the Governor would now have power to make if it did not already exist, is clearly unsound; and would, if given effect to, defeat the provisions of Para. 9 of the Adaptation of Laws Order, 1937, and of the Sections of the Government of Burma Act which I have quoted. The law in force in Burma immediately before the commencement of the Act, so far as the power of the Courts to execute a decree of a Native Prince or State in India is concerned, arises from the notification already quoted under S. 44, Civil P. C., and continues in force because it has not been altered, repealed or amended by the Legislature or other competent authority. Advocates' fee ten gold mohurs.

**Braund J.** — I agree and have nothing to add.

B.D./R.K. *Appeal dismissed.*

## * A. I. R. 1938 Rangoon 353

BAGULEY AND MOSELY JJ.

*V. N. A. Firm and others*—Appellants.

v.

*Bank of Chettinad Ltd.*—Respondent.

First Appeal No. 168 of 1937, Decided on 28th March 1938, against decree of Dist. Court, Hanthawaddy, in Civil Regular Suit No. 14 of 1935.

**(a) Civil P. C. (1908), O. 21, R. 2—Executory contract may form subject of adjustment — Compromise not extinguishing plaintiff's rights under preliminary decree but providing for their revival in case of default is not adjustment.**

**An executory contract may form the subject of an adjustment : *A I R 1933 Mad 28 and 172 I C 999 (P C), Rel. on.*** [P 354 C 2]

But where a compromise does not completely extinguish the rights of the plaintiff under the preliminary decree, but provides for their revival in cases of default, such a compromise is not adjustment. [P 354 C 2]

**(b) Contract Act (1872), S. 39—Preliminary decree in mortgage suit—Subsequently plaintiff agreeing to take mortgaged property at valuation less than sum fixed in preliminary decree —In addition judgment-debtor agreeing to pay certain sum and providing security for due payment of it—Default in payment of additional sum—Plaintiff asking for personal decree against judgment-debtor for amount due on preliminary decree and simultaneously praying execution against surety — Plaintiff held not estopped by acquiescence from proceeding with preliminary decree against judgment-debtor.**

In a mortgage suit a preliminary decree fixing the amount due to the plaintiff was passed. Subsequently by a compromise it was agreed that the plaintiff should accept the mortgaged property at valuation less than the amount fixed in the preliminary decree and in addition to this, the judgment-debtor was to pay certain sum on or before a fixed date. A security was furnished for the due payment of this additional sum. It was agreed that on conveyance of the property and the payment of the additional sum, the plaintiff should not be entitled to a personal decree but in default of the payment he was free to enforce the decree in the usual manner. On default in the payment the plaintiff asked for a personal decree against the judgment-debtor for the amount due on the preliminary decree and at the same time he prayed for execution against the surety. He was unsuccessful in serving notice upon the surety:

*Held* that from mere fact that the plaintiff mistakenly pursued both remedies at the same time, he was not estopped by acquiescence from proceeding with the preliminary decree against the judgment-debtor. [P 355 C 1]

*** (c) Civil P. C. (1908), O. 34, R. 3 (4)—Mortgaged property agreed to be taken over at valuation in lieu of Court sale—Personal decree can be passed without sale.**

Where the parties agree that the mortgaged property should be taken over by the plaintiff at a valuation in lieu of a Court sale, a personal decree can be passed without sale of the mortgaged property : *A I R 1928 All 71, Rel. on.* [P 356 C 1]

Clark — *for Appellants.*

P. K. Basu — *for Respondent.*

**Mosely J.** — The plaintiff-respondent firm filed a mortgage suit against the four defendant-appellants and two other defendants who have not appealed, and obtained a preliminary mortgage decree by which it was declared that the amount due to the plaintiffs by the first four defendants was Rs. 58,625 together with Rs. 1951-8.0 costs, and that the amount payable to the plaintiffs by defendants 5 and 6 was Rupees 4255. There was also the usual order entitling the plaintiffs to obtain a final decree for sale of the property in suit. After this a petition was filed by defendants 1, 2, 3 and 4 with the consent of the plaintiffs for a compromise in the following terms :

1. (a) The plaintiffs were to accept the mortgaged properties at a valuation of Rs. 40,000, and upon conveyance they were to release the minor defendant 4 from liability in respect of the balance due under the decree. (b) To receive from the receiver the rents of mortgaged properties towards part satisfaction of the decree. (c) In addition to the sum realizable from defendants 5 and 6, and the payment of Rs. 3000 made by defendants 1, 2, 3 and 4, some four months after the preliminary decree, the plaintiffs were to accept a further payment of Rs. 7400 on or before 15th March 1937, in full satisfaction of the claim against defendants 1, 2 and 3, provided that payment of the said instalment was guaranteed by one Ar. Al. Al. Arunachalam.

2. On conveyance of the property mentioned and the receipt of rents and payment of Rs. 7400 on or before the due date, 15th March 1937, it was provided that the plaintiffs would not be entitled to any personal decree against defendants 1, 2 and 3, provided only that the said sum of Rs. 7400 was paid on or before the due date and security for the payment thereof was furnished as aforesaid.

3. If defendants 1, 2 and 3 failed to perform any of the obligations hereinabove mentioned, the plaintiffs, it was said, would be entitled to proceed to enforce their decree in the usual manner subject only to entering part satisfaction for any payment made or any sum realized by them in pursuance of the decree.

On this application permission to transfer the property was granted and it was ordered that the compromise be recorded in a formal order, (diary of 1st July 1936), which was accordingly done. On 7th June 1937, the plaintiffs filed an application in which they referred to the compromise and the giving of a security bond by Ar. Al. Al. Arunachalam in the event of the first three defendants failing to pay the sum of Rs. 7400 on or before 15th March 1937. In para. 4 of the application it is said : "Defendant 1 has paid Rs. 2000 on 6th April 1937. No further payment has been made in spite of demands." The plaintiffs prayed therefore that a personal decree might be passed against the first three defendants for Rs. 12,624-5-0 and further interest, (on the sum due on the preliminary mortgage decree deducting the payments already made), and they also prayed that execution be ordered against Ar. Al. Al. Arunachalam to the extent to which he may be found liable under his bond.

In reply to this application, defendants 2 and 3 filed an objection where they stated that the surety was ill and that the plaintiffs agents, at Rangoon, demanded landed security in the place of his personal bond for the payment of the balance due Rs. 7400. The defendants agreed to give this security for the balance of Rs. 5400 tendering Rs. 2000 before the due date, 16th March 1937. The Rangoon agents of the plaintiff refused to accept this and as the entire dealings, they said, between the plaintiffs and the defendants were carried on between their respective principals (in India) and the agents in Rangoon only carried out the directions of their respective masters, the said sum of Rs. 2000 was paid to the plaintiffs' agents at Rangoon as part satisfaction on 16th April (should be 6th April 1937). It was said that this sum of Rs. 2000 was received in part satisfaction "in consideration of" (which I suppose means "in view of"), the aforesaid negotiations between the principals on both sides. The decree-holder filed a reply to this objection where he said that the Rs. 2000 was received in part satisfaction of the decretal amount, that is the amount due on the preliminary decree. No evidence was taken. The learned District Judge, after hearing argument, decided that the defendants were liable to have a personal decree passed against them for the amount claimed by the plaintiffs, that is to say the amount due on the preliminary decree for Rs. 12,624-5-0 with costs, and not merely for the Rs. 5400 balance due left unpaid under the compromise.

The first four defendants have now appealed. As is stated by the learned advocate for the appellants it is immaterial whether the compromise is to be regarded as an adjustment recorded under the provisions of O. 21, R. 2, or is a compromise decree recorded under O. 23, R. 3. I would agree with what is said in 56 Mad 198[1] at page 205 that an executory contract may form the subject of an adjustment. It would seem that in a case not quoted to us, their Lordships of the Privy Council came to the same conclusion: *vide* 42 C W N 509.[2] I do not myself see how the compromise obtained in this case before us can be regarded as an adjustment, as it did not completely extinguish the rights of the plaintiffs under the preliminary decree, but provided for their revival in cases of default. However, the question is, as I have said, not material. No doubt a formal compromise decree should have been drawn up but the formal order answers every requirement of a decree and that is merely a question of form. It is contended first for the appellants that time was not of the essence of the agreement or contract embodied in the compromise recorded in the formal order. I cannot assent to this. It is clear I think from the terms of the compromise that the defendants were only to have the concession of paying a smaller sum of money if they did so within the time limited. The due date is reiterated three times in the application. One of the cases cited to us, 2 Pat L J 520,[3] is one where a promisee admittedly accepted the part performance after the due date (Sec. 55, Contract Act). In another case, 24 A L J 210,[4] there were provisions on compromise similar to those in the present case. The defendants paid the bulk of the sum due two days after the due date and the remainder within some two months later. It would appear there that the burden was put on the defendants of proving that the payments made were accepted towards the compromise and were not taken in satisfaction of the original amount claimed.

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[1] **Ramana Rasu v. Venkata Reddi, (1933) 20 A I R Mad 28=141 I C 429=56 Mad 198=63 M L J 598.**

[2] **Rai Bahadur Het Ram-Budh Rai v. Seth Aya Ram Tola Ram, (1936) 42 C W N 509=172 I C 999 (P C).**

It is claimed that the taking of a surety for the performance of the terms of the compromise shows in itself that time was not of the essence of the contract. I cannot agree to this argument. It may well have been that the surety was taken in order to force the debtor to pay before the due date or again the decree-holder may have wished to have an option of proceedings against the surety if the Rs. 7400 was not duly paid or of rescinding the contract and proceeding against the principal debtors on the original preliminary decree. It is true that the decree-holder or his agent mistakenly applied for both these remedies at the same time, namely for the personal decree for the whole amount due and for execution against the surety, (who could not be liable under the preliminary decree), for the amount due on the compromise. But if the decree-holder mistakenly pursued both remedies at the same time, I cannot see that in this case, where he has been unsuccessful in even serving notice on the surety, he is estopped by acquiescence from proceeding with the preliminary decree against his judgment-debtor (S. 39, Contract Act).

I do not think it can be said as is argued for the appellants that para. 4 of plaintiff's application of 7th June 1937, contains an admission that defendant 1 had paid Rs. 2000 on 6th April 1937 towards the amount due on the compromise. This application merely recites, (para. 3), that a bond for Rs. 7400 had been executed in the event of failure of payment before 15th March 1937 and that defendant 1 had paid Rs. 2000 on 6th April 1937. The plaintiffs' agent at Rangoon was not in charge of the negotiations and could not accept the payment as one made towards the compromise. The payment must have been credited towards a suspense account. It is also argued for the appellants that if the plaintiffs elect not to abide by the compromise they must restore any benefit received by them under it (S. 64, Contract Act); that is to say, return the land taken over at a valuation and the payments made under the compromise. Admittedly for the purpose of this case either the relevant provisions of the Contract Act are applicable or that their principles should be applied as a matter of equity. But it appears to me to be clear that para. 3 of the application for compromise is against this contention. It is provided there that if defendants 1, 2 and 3 fail to perform any of their obligations the plaintiffs can enforce their decree, subject only to entering part satisfaction for any payment made or any sum realized by them in pursuance of the decree. The words "their decree" and "the decree" can only refer to the preliminary mortgage decree. It would have been idle to say that if the defendants failed to perform the compromise decree in full, the plaintiffs could enforce the balance of it.

Paragraph 2 of the same application says that if the terms of the compromise are satisfied in full, the plaintiffs will not be entitled to a personal decree and para. 3 must refer to the converse case and stipulate that if the defendants fail to perform their obligations the plaintiffs will be entitled to a personal decree; for the only way in which the plaintiffs can further enforce the preliminary mortgage decree is by obtaining a personal decree for the balance due. I have no doubt that the words "any sum realized by the plaintiffs in pursuance of the decree" are wide enough to include the taking over of the mortgaged property at a valuation of Rs. 40,000 which valuation was approved of in the affidavit of defendant 2 at p. 31 of the proceedings. It is objected that a personal decree cannot be passed under O. 34, R. 3 (4) except after the sale of the property by the Court. The sub-section reads :

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[3] **Parbhu Ram Pandey v. Mt. Raghubir Sah, (1917) 4 A I R Pat 82=42 I C 408=2 Pat L J 520.**

[4] **Kishen Prasad v. Kunj Behari Lal, (1926) 13 A I R All 278=91 I C 790=24 A L J 210.**

> Where the proceeds of the sale are not sufficient . . . . the Court shall . . . . pass a decree . . . . against the mortgagor personally . . . . .

But the application for compromise itself clearly shows, in my opinion, that the parties agreed that the mortgaged property should be taken over by the plaintiffs at a valuation in lieu of a court sale (where, as was said, in the affidavit, a fair price was not likely to be realized). The cases quoted by the lower Court are authority for showing that in certain cases where property has ceased to be available for sale owing to no fault of the mortgagee, such as by the discovery that the mortgagor has no title to the property or of the mortgagor losing it, or by destruction of the property a personal decree can be passed: 50 All 321.[5] Much more then it seems to me can a personal decree be passed without sale of the mortgage property where the parties have agreed to such a course as here. This appeal fails therefore and must be dismissed with costs, advocate's fee ten gold mohurs.

**Baguley J.**—I agree.

D.S./R.K. *Appeal dismissed.*

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[5] Bisheshar Nath v. Chandu Lal, (1928) 15 A I R All 71=108 I C 459=50 All 321=25 A L J 1042.

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## * A. I. R. 1938 Rangoon 356

ROBERTS C. J. AND DUNKLEY J.

*Maung Ohn and another* — Appellants.

v.

*Maung Po Kwe and others* —

Respondents.

Letters Patent Appeal No. 5 of 1937, Decided on 8th March 1938, from decree of High Court *reported in A I R 1938 Rang 49.*

*** Transfer of Property Act (1882), S. 53-A — Contract itself should be in writing — Reference in writing to oral contract is not valid under S. 53-A.**

Section 53-A clearly contemplates that the contract itself shall be in writing, and not that there shall be a writing referring to some part or parts of a contract which may previously have been oral. [P 356 C 1]

A distinction must be drawn between a writing which is a reduction into writing of a previous oral agreement, which would fall within the provisions of S. 53-A and a writing in which there is a mere reference to a previous oral agreement : *A I R 1934 Rang 304, Expl.* [P 357 C 1]

A. N. Basu — *for Appellants.*

K. C. Sanyal — *for Respondents 1 and 2.*

**Roberts C. J.** — In my opinion this appeal must be dismissed. The respondents in this case bought the property in suit on 4th February 1936, by registered deed from the N. A. S. R. M. Firm. Prior to the date of this sale, the N. A. S. R. M. Firm had agreed to sell the property to the appellants, it is said, on 3rd June 1935, and the sum of Rs. 300 out of the price of Rs. 350 had been paid. They permitted the appellants to remain in occupation throughout the period, and the appellants continued in possession of the premises until respondents 1 and 2 brought a suit for possession relying upon their registered deed. In defence to this suit the appellants produced a document which they described as an agreement, and valid under S. 53-A, T. P. Act, to afford protection to them against the suit brought by the respondents for possession. And the learned Judge of the High Court who tried this case on second appeal, looking at it, has found that it is not an agreement within the meaning of S. 53-A, T. P. Act. That Section says that where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and has satisfied certain other requirements, then though the contract be unregistered he shall have the protection to which I have referred.

It has been urged upon us that the mere production of a writing from which can be ascertained matters referring to a pre-existing oral contract is sufficient to come within the protection of the Section : but in my opinion the Section clearly contemplates that the contract itself shall be in writing, and not that there shall be a writing referring to some part or parts of a contract which may previously have been oral. I am not prepared, therefore, to dissent in any way from the finding of the learned Judge on second appeal in this respect. But there was a further question, which was whether the appellants had continued in possession of these properties in part performance of the contract and whether they have done some act in furtherance of the contract. It is contended that they have. But their continuance in possession and the acts which they did must, in order to bring their case within the benefit of the statute, be exclusively referable to a pre-existing contract of sale. In my opinion no kind of ground has been shown for supporting such a contention. In fact, before the receipt ever came into existence the N. A. S. R. M. Firm permitted the appellants to remain in possession of the property and although there is no doubt that at some time or another they might have objected, I cannot find the continuance in possession of the appellants is referable to the contract of sale between them and the N. A. S. R. M Firm. One can think of many other reasons for continuance in possession : one which would readily occur to mind would be, under a contract of tenancy, but it is not necessary to go into these considerations. In my opinion, this appeal ought to be dismissed; advocate's fee three gold mohurs.

**Dunkley J.** — I agree. A distinction must be drawn between a writing which is a reduction into writing of a previous oral agreement, which would fall within the provisions of S. 53-A, and a writing in which there is a mere reference to a previous oral agreement. In reference to my own decision in 13 Rang 17,[1] if the second clause of the headnote were read alone, it would appear to be too broadly stated, but if the whole headnote is read, it is clear that the reference to a receipt in the second clause means a receipt which must be construed as an agreement, or, what is the same thing, the reduction in writing of a previous oral agreement.

B.D./R.K. *Appeal dismissed.*

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[1] Ma Thet v Ma Se Mai, (1934) 21 A I R Rang 304 = 154 I C 13 = 13 Rang 17.

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## A. I. R. 1938 Rangoon 357

ROBERTS C. J. AND DUNKLEY J.

*Daw Oo and another* — Appellants.

v.

*U Ba Thaung and another* — Respondents.

**Civil Misc. Appeal No. 46 of 1937, Decided on 17th March 1938, against order of High Court, D/- 21st June 1937.**

**(a) Receiver—Appointment in proper course of law — Right to be reimbursed by way of commission and allowance — Lien on estate is available even though receiver is discharged.**

Where a receiver or manager is appointed by the Court in a suit properly constituted, such manager is to be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance, and also to a lien on the estate as against all persons interested in it for the balance, whatever it may be, that shall be found to be due to him on taking his account. A receiver, though discharged by the dismissal of the suit in which he was appointed, is entitled to a lien on the estate for all his just claims and allowances : *(1862) 31 Beav 429 ; 22 Cal 960 and (1911) 1 Ch 155, Rel. on.* [P 357 C 2]

**(b) Civil P. C. (1908), O. 40, R. 2 — Rules framed by Rangoon High Court, Rr. 204 and 205 — Receiver should consider his fees as per rules—Court can increase only up to maximum provided by rules.**

Official Receiver, in making his lists, should consider under what head the fees are to be charged and charged at the rate specified in the sub-section. The Court may then, in the circumstances of any particular case, review such remuneration, and, whilst not exceeding the maximum laid down, may direct such remuneration at any less rate as may be thought fit. [P 358 C 1]

U E Maung — *for Appellants.*

R. Clark and U Tun Byu, Govt. Advocate — *for Respondents.*

**Roberts C. J.**—This is an appeal from an order of Ba U J., dated 21st June of last year, relating to the accounts filed by the Official Receiver, who had been made receiver in charge of the estate of Daw Su by an order of 10th June 1936. The objection which was raised to the accounts filed by the receiver was that he was not entitled to claim payment of the remuneration and the expenses due to him out of the estate. We are satisfied that the general proposition of law, which has been laid down as far back as the case in (1862) 31 Beav 429[1] at p. 435 is, as was then stated by Sir John Romilly, the Master of the Rolls, as follows :

> Where a receiver or manager is appointed by the Court in a suit properly constituted, such manager is to be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance, and also to a lien on the estate as against all persons interested in it for the balance, whatever it may be, that shall be found to be due to him on taking his accounts.

The proposition of law thus enunciated was followed in 22 Cal 960[2] at p. 973. Sale L. J. quoted the case to which I have just referred and said :

> A receiver, though discharged by the dismissal of the suit in which he was appointed, is entitled to a lien on the estate for all his just claims and allowances.

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[1] Bertrand v. Davies, (1862) 31 Beav 429=32 L J Ch 41=9 Jur (N S) 34=7 L T 372=11 W R 48=135 R R 504=54 E R 1204.

[2] Premlall Mullick v. Sumbhoonath Roy, (1895) 22 Cal 960.

The case in (1911) 1 Ch 155[3] supports the same view. Accordingly, I am of opinion that the receiver's primary right here is to be paid out of the estate. It is not necessary for us to indicate whether there are any rights subsisting against other parties by reason of any application for the appointment of a receiver. The next question we have to determine is whether in the circumstances the sums charged by the receiver were reasonable and, if not, what ought to be done. The rules which govern this matter are Rr. 204 and 205 of the Rules of this Court; and Rule 204 runs :

> A receiver shall be allowed such remuneration as the Court or Judge shall, subject to the rate prescribed by the next following rule, direct, and in special cases may also be allowed the necessary expenses of management.

Rule 205 says :

> The rate of remuneration of a receiver shall in no case exceed the amount specified in the scale of fees given below :

and then

> The fees chargeable by the Official Receiver or receiver other than the Official Receiver shall be those laid down in the following scale :

A scale is then added, which, in my opinion, gives the maximum rate of remuneration: and in deciding what is reasonable the Court must in no case exceed the amount specified in that scale. The rule says: "The fees chargeable shall be those laid down in the following scales:" This means that the Official Receiver, in making his lists, should consider under what head the fees are to be charged and charged at the rate specified in the sub-section. The Court may then, in the circumstances of any particular case, review such remuneration, and whilst not exceeding the maximum laid down, may direct such remuneration at any less rate as may be thought fit. With regard to the claim made here, the total remuneration claimed was Rs. 9708 and costs: and the receiver was in charge of the property only until 3rd December 1936. The total amount therefore would be very large if these individual payments were to be held justified.

I am of opinion that the first item which is 5 per cent. commission on Rs. 1,63,049 odd, being the daily receipts of the "New Light of Burma" as per statement 'A' attached, is not justified. The circumstances were these : the daily receipts of the "New Light of Burma" were paid over to the receiver and it is true that he was obliged to appoint some one to be the manager of the business, and the manager, Maung Tin, had his expenses paid, and his remuneration paid, out of the estate. In these circumstances, he did the lion's share of the work, and it does not appear that the Official Receiver, in respect of these matters, did anything more than taking charge of the money, which would come under the second sub-head and entitled him prima facie to a commission of one per cent. only. Where five per cent. is chargeable, it is chargeable because certain work has been entailed in recovering moneys due, or the proceeds of a sale of the property. And the Court will take into account the circumstances of each particular case in deciding whether a sum so claimed falls more properly under sub-head (1) or sub-head (2) of R. 205 (b). In this case I am of opinion that the 5 per cent. commission charged on Rs. 1,63,049 odd ought to be 1 per cent.

With regard to the 5 per cent. commission on Rs. 705, rent for No. 58, Churchill Road, I am of opinion that that should stand. 5 per cent. commission has also been charged on Rs. 218-5-0 being the amount paid for the use of a motor car: and it appears that Maung Tin's salary was subject to deductions for the use of one of the motor cars belonging to the estate in and about the business. But I cannot think that commission should be paid on this, or that the amount falls into the category of rent, or that there is any proof that what was done in relation to the motor car was of value to the estate: it may only have been sufficient to cover depreciation. This item must therefore be excluded. With regard to the other items, they are allowed, with the exception of the 1 per cent. commission on the Rs. 15,000 being the value of the goodwill of the "New Light of Burma," an item which was expressly excluded by my learned brother Ba U in the trial Court. The effect of this appellate order will be that the amount to which the Official Receiver is entitled is Rs. 3175-9-0, and he must pay back the difference between this sum and what he has already received by way of commission to the appellants. The order of the learned trial Judge will be varied accordingly. No order as to costs.

**Dunkley J.**—I agree.

B.D./R.K. ***Order varied.***

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[3] Boehm v. Goodall, (1911) 1 Ch 155=80 L J Ch 86=103 L T 717=55 S J 108=27 T L R 106.

## A. I. R. 1938 Rangoon 359

ROBERTS C. J. AND DUNKLEY J.

*Daw Nyun and another* — Appellants.

v.

*Maung Nyi Pu* — Respondent.

Special First Appeal No. 166 of 1937, Decided on 31st March 1938, against decree of Small Cause Court, Rangoon, D/- 12th October 1937.

**(a) Contract—Contract of mother and minor daughter with company—Mother agreeing that minor should do certain service for company failing which mother and daughter to compensate company for loss — Minor failing to fulfil contract—Mother held liable and not minor.**

A mother and her minor daughter entered into a contract with a company whereby the mother agreed that the minor daughter should do certain service for the company and if the daughter failed to follow the terms of the contract, the mother and the daughter would compensate the company for the loss sustained by it. The mother was herself receiving money under the earlier contracts and she was promising to stand in the role of one who should use her influence with her daughter to enable the company's expectations in respect of the daughter to be realized. The company advanced money to be adjusted against her future earnings. The daughter failed to carry out the contract:

*Held (1)* that the minor daughter was not liable under the contract but her mother was liable on her covenant to pay the company any loss which it suffered : *(1819) 3 B & Ad 59 and A I R 1916 P C 2, Rel. on.* [P 359 C 2]

*(2)* That the contract was not one of indemnity. [P 359 C 2]

*(3)* That her failure to earn sums paid caused a loss to the company of the moneys advanced and this was the measure of damages. [P 359 C 2]

**(b) Pledging of Children's Labour Act (1933), S. 2—Agreement to pledge labour of child.**

Where the labour pledged is not to be expended till after the time by which the child has become 15 years of age, the agreement is not one to pledge the labour of a child under 15. [P 360 C 1]

**(c) Contract Act (1872), S. 68—Essentials to be proved stated — Money advanced for purchase of necessary articles comes under S. 68.**

**Under S. 68 it must be shown not only that the moneys were to be expended on goods suitable to the condition in life of the infant but also that they were suitable to her actual requirements at the time of sale and delivery. As any one who supplied necessaries to an infant is in the position of a legal creditor, so anyone who advances money to an infant for the purpose of procuring necessaries is entitled to stand in the position of a legal creditor : *(1908) 2 K B 1 and (1888) 4 T L R 560, Rel. on.* [P 360 C 1]**

Dr. Rauf — *for Appellants.*

Paget — *for Respondent.*

**Roberts C. J.— This is an appeal from a judgment and decree of the learned Officiating Chief Judge of the Court of Small** Causes of Rangoon in favour of the plaintiff in a suit for recovery of Rs. 1077, moneys advanced by the plaintiff to one or other of the defendants. Defendant 1, Daw Nyun is the mother of defendant 2, Ma Than Tin, who was born in September 1921 and is therefore still a minor. Defendant 1 entered into a series of agreements with the plaintiff, and defendant 2 purported to be a party to them, but, so far as she is concerned, being a minor, she lacked any contractual capacity by reason of S. 11, Contract Act, and any agreement entered into by her was void : 30 Cal 539.[1] It was agreed between the plaintiff and defendant 1 that Ma Than Tin should act for the plaintiff in connexion with certain films, and in one of the contracts, Ex. G, entered into on 22nd June 1936, para. 6 reads as follows:

> If Ma Than Tin leaves the service without obtaining permission from A. 1. Film Co., or if she fails to follow or breaks the terms contained in paras. 1, 2, 3, 4 and 5 (above) Daw Nyun and Ma Than Tin must pay whatever compensation A. 1. Film Co. may demand in proportion to the extent to which the company has suffered loss.

If Ma Than Tin did not choose to do that which was expected of her and that which her mother had contracted she should do, the mother was liable on her covenant to pay to the company any loss which they suffered in consequence: (1819) 3 B & Ad 59[2] and 43 I A 99.[3] In my opinion, this was not a contract of indemnity by defendant 1. Defendant 1 was herself receiving the moneys under the earlier contracts, and she was promising to stand in the role of one who should use her influence with her daughter to enable the plaintiff's expectations in respect of her to be realized. The sums amounting to Rs. 1077 paid by the plaintiff were paid as advances or loans to be adjusted against her future earnings. In other words, salary was paid in respect of which no work was done. Her failure to earn the sums paid caused a loss to the company of the moneys advanced and this was thus the measure of their damage and the amount of compensation payable by defendant 1. As regards defendant 2, the case went to trial on the footing that the plaintiff did not admit her minority: but there was evidence of it and no evidence in contradiction thereof was tendered and the learned Judge has impliedly found as a fact that she is a minor. She is therefore not liable under any alleged contract. The learned Judge dealt with two submissions of law. The first was that Act 2 of 1933 applied because at the time of entering into the last contract, defendant 2 was under 15 years of age; but this was not an agreement to pledge the labour of a child under 15 because the labour pledged was not to be expended till after September 1936 by which time the child had become 15 years of age, and the learned Judge is accordingly right upon this point. The second submission was that the suit was brought on a contract entered into at a time when defendant 2 had no contractual capacity. In dealing with this point the learned Judge referred to S. 68, Contract Act, and said he was satisfied that the moneys advanced to the defendants were advanced for necessaries and could therefore be recovered. First of all, with regard to the form of the decree, that was inaccurate since money in any event would only be payable out of the property of the minor and there could be no decree that she personally should pay it. But in my opinion there was no evidence upon which he could find that the moneys advanced were advanced for necessaries. It was never even pleaded by the plaintiff that this was so. He would have had to show not only that the moneys were to be expended on goods suitable to the condition in life of the infant but also that they were suitable to her actual requirements at the time of sale and delivery: *see* (1908) 2 K B 1.[4]

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[1] Mohori Bibi v. Dharmodas Ghose, (1903) 30 Cal 539=30 I A 114=7 C W N 441 = 8 Sar 374 (P C).

[2] Cuming v. Hill, (1819) 3 B & Ad 59 = 22 R R 305.

[3] Jamnabai v. Vasant Rao, (1916) 3 A I R P C 2 =34 I C 213=43 I A 99=39 Mad 409 (P C).

Mr. Paget for the respondent has rightly contended that as anyone who supplied necessaries to an infant is in the position of a legal creditor, so anyone who advances money to an infant for the purpose of procuring necessaries is entitled to stand in the position of a legal creditor: (1888) 4 T L R 560;[5] but I find no evidence that these moneys were ever advanced for such a purpose. Defendant 1 said her daughter had been earning a living out of the film work she did in Rangoon and her husband agreed. This is far from proving that it was for the purpose of obtaining necessaries that defendant 2 received advances of pay. Then it is said that some of the amounts paid were small, and the inference to be drawn is that advances were made to obtain necessaries urgently needed. In my opinion no such inference can be drawn. Living in Rangoon may have been to the infant's best advantage, but there is no evidence whatever that she was not in a position to obtain necessaries unless the plaintiff made her advances of salary. In my opinion therefore the appeal of defendant 2 should be allowed. All the advances made before 22nd June 1936 are more than covered by work done before that date so that Daw Nyun, defendant 1, will have to refund advances which are all made under Ex. G, and the appeal of defendant 1 will therefore be dismissed with costs five gold mohurs in each case.

**Dunkley J.** — I agree. I should have no difficulty in holding that, within the provisions of S. 68, Contract Act, money which was used for the purpose of purchasing necessary articles was itself a necessary. But it is clear that, when a creditor desires to make use of the provisions of this Section, the burden is upon him of proving that the articles supplied, or the advance made, to the minor were necessaries, and in this case this was not pleaded nor was any attempt made to prove it at the trial.

D.S./R.K. *Order accordingly.*

## A. I. R. 1938 Rangoon 360

ROBERTS C. J. AND DUNKLEY J.

*Maung Ahmin* — *Plaintiff* — Appellant.

v.

*Maung Saung and another* —
*Defendant* — Respondents.

Civil Misc. Appeal No. 16 and Civil Revision No. 143 of 1938, Decided on 6th April 1938, against order of Dist. Court, Prome, D/- 18th December 1937.

**(a) Civil P. C. (1908), O. 16, R. 1 — Dismissal for default—Process fee ordered to be paid by certain date—Party failing to appear before Court on that date—Case cannot be dismissed —Result of non-payment of process fee in time explained.**

Process-fees can be paid to the officer of the Court who is designated under the orders of the Court to receive them, and can be paid at any time, subject to the time-limit fixed by the Court, and it is plainly unnecessary for the party paying such fees to appear in Court to pay them, and in fact, it would be highly inconvenient if parties did so. The only result of the failure of a party to pay the fees by the date fixed by the Court would at the most be that summonses would not be issued to his witnesses, and he would run the risk of not having his evidence recorded if he could not persuade the witnesses to attend Court without the issue of summons. But a case cannot be dismissed for failure of a party to appear in Court on a date before which process-fee was to be paid. [P 362 C 1]

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[4] Nash v. Inman, (1908) 2 K B 1=77 L J K B 626=98 L T 658=24 T L R 401=52 S J 335.

[5] Lewis v. Alleyne, (1888) 4 T L R 560.

**(b) Civil P. C. (1908), O. 9, Rr. 3, 8 — Dismissal for default — Date fixed for filing list of witnesses — Failure to appear on the date cannot entail dismissal—Effect of such failure—Meaning of word 'hearing' explained.**

The utmost result of the failure of a party to give a list of witnesses within the time fixed would be that the Court might decline to hear the evidence of any witnesses whom he might subsequently call; failure to file a list of witnesses by the date fixed could under no circumstances result in the dismissal of a suit. O. 9, Rr. 3 and 8 refer to the dismissal of a suit on the failure of parties to appear when the suit is called on for hearing, and clearly a date fixed solely as the last day on which a list of witnesses may be filed is not a date fixed for hearing. The word 'hearing' in these rules although does not mean solely the recording of evidence, it means what it says, that is, "when the suit is called for hearing before the Court" and does not include the disposal of a routine matter which is within the powers of an officer of the Court and need not come before the Court at all. [P 362 C 1, 2]

**(c) Revision—Other remedy open to party—High Court will not interfere only if other remedy is certain and allowed by law.**

High Court will not interfere in revision where there is another remedy open to the party. But the other remedy which is open to the applicant in revision must be a certain and conclusive remedy allowed by law. [P 362 C 2]

U Myint Too for U Kyaw Myint — *for Appellant.*

Clark — *for Respondent 1.*

**Dunkley J.** — The plaintiff-appellant brought a suit against the defendants-respondents for the administration of the estate of one U Pu Lay, deceased. He alleged that he was a son of the deceased and admitted that respondent 1, Maung Saung, was another son. It was stated in the amended plaint that respondent 2, Ma Ngwe Mya, claimed that she was a daughter but this was not admitted. On 15th October 1937, the learned District Judge recorded the following order in the diary of the proceedings:

> Mr. Ahmed for the plaintiff appears and files a list of 86 witnesses. Defendant 1 appears in person and says he is not filing a list of witnesses as effort at compromise is being made. I have pointed out to him that that is no bar to filing a list of witnesses as ordered. This defendant is again ordered to do so on the day the Court re-opens after the Thadingyut holidays, i. e. 27th October. Defendant 2 is represented by her advocate, U Ba Swe and files her list of 14 witnesses. I fix the hearing of the plaintiff's witnesses on 22nd and 23rd November, defendant 1's witnesses on 24th and 25th November, and defendant 2's witnesses on 26th November. Process may issue after the holidays.

On 27th October the case was called in open Court. Why it should be so called, it is difficult to understand, for, that date was fixed merely as the last day on which defendant-respondent 1 would be permitted to file a list of witnesses. No one appeared except the advocate for defendant-respondent 2. Thereupon the learned District Judge dismissed the suit, as against defendant-respondent 1 under R. 3, O. 9, Civil P. C., and as against defendant-respondent 2 under R. 8, O. 9. Application was subsequently made by the plaintiff-appellant to have the case restored; but by an order of 18th December 1937 the learned District Judge declined to restore the suit to the pending file, although so far as defendant-respondent 2 was concerned he had no objection to the suit being re-opened. In his order of 18th December 1937 the learned District Judge said that it was necessary that all parties should appear or be represented in Court on 27th October, and that as they did not so appear, and he had been informed that there was a likelihood of a settlement out of Court, he assumed that the case had been settled out of Court and therefore had no option but to dismiss the suit. He further held that the contention on behalf of the plaintiff-appellant that his failure to appear on 27th October was due to a misunderstanding, as he did not think that his appearance was necessary on that date was fallacious, because from the affidavits filed in connexion with the application for restoration, it appeared that the case between him and defendant-respondent 1 had actually been settled; and that was the real reason why neither he nor respondent 1 entered an appearance on 27th October. Finally, the learned District Judge said that on the list of witnesses presented by the plaintiff-appellant on 15th October, he had endorsed that payment of process-fees for the issue of summonses must be made before 27th October, and therefore it was plainly necessary for the plaintiff to appear on that date in order to pay these fees or to inform the Court that they had been paid.

It is now conceded on behalf of the appellant that no appeal lies against this order of the learned District Judge so far as respondent 1 is concerned, although there is a right of appeal against respondent 2. As regards respondent 2, she has at no time objected to the restoration of the suit and has not entered an appearance at the hearing of this appeal. As regards respondent 1, application is now made that, so far as he is concerned, the appeal may be treated as an application in revision under S. 115, Civil P. C., and learned counsel for respondent 1 has no objection to this course being taken, and therefore as against this respondent, the appeal is converted into an application in revision. Turning to the grounds upon which the learned District Judge declined to restore the suit, the last ground is clearly untenable, for process-fees can be paid to the officer of the Court who is designated under the orders of the Court to receive them, and can be paid at any time, subject to the time-limit fixed by the Court, and it is plainly unnecessary for the party paying such fees to appear in Court to pay them, and, in fact, it would be highly inconvenient if parties did so. The only result of the failure of a party to pay the fees by the date fixed by the Court would, at the most, be that summonses would not be issued to his witnesses, and he would run the risk of not having his evidence recorded if he could not persuade the witnesses to attend Court without the issue of summons.

As regards the other grounds, it is quite clear from the diary order of 15th October that the date, 27th October, was mentioned merely as the last date on which defendant 1 would be permitted to file a list of witnesses. He could present his list to the officer of the Court, appointed under O. 16, R. 1, Civil P. C., on any day prior to that date, and what would be the result of his failure to file a list within the time fixed? The utmost result would be that the Court might decline to hear the evidence of any witnesses whom he might subsequently call; failure to file a list of witnesses by the date fixed could under no circumstances result in the dismissal of the suit. O. 9, Rr. 3 and 8, Civil P. C., refer to the dismissal of a suit on the failure of parties to appear when the suit is called on for hearing, and clearly a date fixed solely as the last day on which a list of witnesses may be filed is not a date fixed for hearing. Mr. Clark for the respondent has urged that the word 'hearing' in these rules does not mean solely the recording of evidence, and with this contention we are in entire agreement; but it means what it says, that is, 'when the suit is called for hearing before the Court,' and does not include the disposal of a routine matter which is within the powers of an officer of the Court, and need not come before the Court at all.

The sole question, which was before the learned District Judge, in considering the application to restore the suit, was whether on 27th October the suit was "called on for hearing," within the provisions of Rr. 3 and 8 of O. 9, and if he had applied his mind to this single point he must, we think, have concluded that in dismissing the suit he had acted without jurisdiction. The question as to whether the suit, as between the plaintiff-appellant and defendant-respondent 1, had been compromised was entirely irrelevant and should not have been considered at all. However, he has declined to restore the suit, and for respondent 1 Mr. Clark has strenuously urged that, as there is no right of appeal and as the revisional powers of the High Court, under S. 115 of the Code, are discretionary, this is not a case in which that discretion ought to be exercised in the plaintiff-appellant's favour. He has urged that, in deciding whether to exercise our discretion in favour of the appellant or not, we should consider the terms of this agreement of compromise, which, it is alleged, has been concluded between the appellant and respondent 1, and the circumstances under which it was concluded, and that if we do so, it will be apparent that the attempt of the plaintiff to get the suit restored is an attempt to evade a binding agreement. Mr. Clark has further urged that under R. 4 of O. 9 the plaintiff has his remedy by bringing a fresh suit, and that it is settled law that the High Court will not interfere in revision where there is another remedy open to the party. With this last contention we agree, save that it must be added that the other remedy which is open to the applicant in revision must be a certain and conclusive remedy allowed by law. In the case of the present appellant the remedy by means of another suit would be by no means certain or conclusive. It would entail that the appellant should pay fresh court-fees on a suit valued at Rs. 1,45,000; but, if it had appeared that he had entered into a binding agreement with both respondents to compromise the suit, we should have had no hesitation in holding that his further remedy by means of a second suit (if he could bring such a suit against both respondents) would be sufficient.

The answer to Mr. Clark's contention however is that the appellant has no right to bring a second suit against respondent 2 and that therefore if we decline to restore the suit, although she is willing that it should be restored, then we shall leave the appellant without any remedy as against her. Moreover, the appellant has a right of appeal against respondent 2 and, for the reasons which have already been stated, it is clear that the learned District Judge's order of 27th October, dismissing the suit, was made without jurisdiction, and that therefore his subsequent order of 18th December, declining to restore the suit, was wrong in law, and must be set aside as against respondent 2. It would be manifestly wrong to restore the suit against respondent 2, and then to leave the appellant to bring a fresh suit against respondent 1, thereby compelling the appellant to bring two separate suits against two defendants on the same cause of action, and for this reason, the application in revision must also be allowed. We decline to express any opinion as to whether an agreement of compromise has been concluded between the appellant and respondent 1, or whether, even if it has been concluded, it is valid as an adjustment of the suit by reason of respondent 2 not being a party thereto. That is a matter which the learned District Judge will have to decide if and when defendant-respondent 1 makes an application to record the agreement under R. 3, O. 23. This application in revision against defendant-respondent 1 and the appeal against defendant-respondent 2 are allowed, and Suit No. 2-P of 1937 of the District Court of Prome is restored to the pending file of that Court to be dealt with in accordance with law. The appellant is entitled to his costs of the application in revision against respondent 1, advocate's fee three gold mohurs.

**Roberts C. J.** — I agree.

B.D./R.K. *Appeal and Application allowed.*

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**A. I. R. 1938 Rangoon 363**

MOSELY AND DUNKLEY JJ.

*U Po Sein and others* — **Appellants.**

**v.**

*U Pu and others* — **Respondents.**

**First Appeal No. 56 of 1937, Decided on 8th December 1937, against order of Dist. Court, Myingyan, D/- 10th February 1937.**

**Civil P. C. (1908), Ss. 92 and 47 — Orders merely for carrying out scheme are appealable.**

Where orders are passed merely for carrying out a scheme, they are orders in execution, and appeals lie from such orders under S. 47: *A I R 1926 Bom 167, Foll.; A I R 1925 P C 155, Disting.* [P 364 C 1]

Twa Aung — *for Appellants.*

Kale — *for Respondents.*

**Mosely J.** — This is an appeal by three trustees of the Ananda Pagoda, commonly known as Ananda Pagoda at Pagan against certain objectors who objected to the election of two inhabitants from Taungbi as trustees of the said Pagoda. A preliminary objection has been taken to this appeal by the advocate for the respondents on the ground that it does not lie. In this connexion a judgment of their Lordships of the Privy Council is referred to: 27 Bom L R 872.[1] That was a case where the District Judge was persona designata under the scheme, and the scheme, which was obviously an incomplete one, provided for rules to be made for the management of the temple in question by the managers appointed, subject to the sanction of the District Judge. The scheme also provided for application to the High Court itself for alteration, modification of or addition to, the rules so framed. The District Judge passed certain orders amending the rules, and appeals were filed from those orders to the High Court, which purported to be appeals from orders passed in execution, the appeals lying under S. 47, Civil P. C. It was held by the Privy Council that such appeals in execution did not lie. The ground on which this was held is not very explicitly stated, but it is clear, I think, that the orders passed by the District Judge were held to be not orders merely carrying out the scheme, that is to say, orders in execution, but to be orders as contemplated by the scheme itself really based on the original decree. That appears to have been the foundation of the judgment, but I think it might have proceeded on two other grounds as well: (1) that the District Judge was persona designata, and (2) that application lay under the scheme itself to the High Court, and that that was the proper remedy in any case and not by way of an appeal from orders in execution.

In my opinion the present appeal clearly lies, as it has been held to lie in numberless previous cases in this Province, and that is also supported by the decision in 28 Bom L R 64,[2] where it was evidently admitted that where orders are passed merely for carrying out the scheme they are orders in execution, and appeals lie from such orders under S. 47, Civil P. C. By the judgment of the trial Court, the re-election of two trustees, U Kan Htu and U Po Yin, was confirmed, but the re-elections of U Po Htwa and U San Po were not confirmed as they come from Taungbi and not from Pagan. It was held that the scheme contemplated that the trustees should be residents of Pagan, by which I understand not Pagan village, for there are, at all events, two Pagan villages, the old Pagan and the new Pagan, but Pagan village tract, which is the ordinary connotation of the expression. The scheme is contained in Civil Suit No. 4 of 1903. I note from that suit that it was filed by the Officiating Government Advocate, and that the respondents were seven inhabitants of Pagan and two inhabitants, U Po Kyu and U Lu Gyi, of Taungbi, and a tenth respondent whose residence cannot be ascertained as the proceeding is defective. The plaint merely recites that the Pagoda is in the Myingyan District. The judgment starts by saying that the suit is for the appointment of trustees of the Ananda Pagoda at old Pagan. It goes on to say that the Pagoda is at Pagan. The scheme drawn up is headed: "Scheme for the regulation of trusts, offerings, and matters connected with the Ananda Pagoda at Taungbi."

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[1] Sevak Jeranchod Bhogilal v. Dakore Temple Committee, (1925) 12 A I R P C 155=87 I C 313=27 Bom L R 872 (P C).

It is conceded now, as it was in the Court below, that the Pagoda is situated in Taungbi village, and that Taungbi is now at all events a separate village tract from Pagan and has a headman of its own. (One of the persons whose election was not confirmed by the District Judge is styled "the headman of Taungbi-lai-yar village." I do not know if that is the same village or tract as Taungbi.) Para. 1 of the scheme reiterates the heading and says that there should be ten trustees appointed for the proper management of affairs connected with the Ananda Pagoda at Taungbi. Para. 2 is to the effect that if any of the trustees died, disclaimed the trust, or for a continuous period of one year were absent from Pagan, a new trustee shall be elected in his stead and notice of the vacancy shall be given at Pagan and a meeting shall be held at an appointed place nearest to the Pagoda. Para. 3 (g) says that the accounts to be kept shall be at all times open to the inspection of any Burman Buddhist in Pagan desiring to inspect the same. The learned District Judge allowed the objections, as I have said, to the appointment of two trustees from Taungbi because of Para. 2 (a). He said that that stipulated for a new election to be held in case of absence from Pagan, and it could be safely presumed that no villager of Taungbi would go and reside at Pagan for the purpose of being elected a trustee. He said the aim and object of that bye-law was to elect trustees from the residents of Pagan, by which I understand Pagan village tract only. It is difficult to understand the scheme framed under the judgment unless the position at that time was that the terms "Taungbi" and "Pagan" were thought to be interchangeable or equivalent. It may possibly be that at that time Taungbi was in Pagan village tract, but there is no evidence on the point.

Before passing final orders in this case, it will be necessary to ascertain whether at the time the scheme was framed in 1903, Taungbi village, or any part of what is now Taungbi village tract, or, that part of Taungbi village where the Ananda Pagoda stands, was part of Pagan village tract or not. This appeal will be remanded to the District Judge who will, if necessary, take evidence on that issue and return his finding on it to this Court within one month from receipt of this order.

**Dunkley J.**—I agree.

K.S./R.K. *Case remanded.*

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## A. I. R. 1938 Rangoon 364

ROBERTS C. J. AND DUNKLEY J.

*Ratilal J. Kothari* — Appellant.

v.

*Lakmichand Srinivas* — Respondent.

Special First Appeal No. 26 of 1938, Decided on 6th June 1938, against decree of Small Cause Court, Rangoon, D/- 9th February 1938.

**Sale of Goods Act (1930), S. 38 (2) — Contract of sale by instalments — Each instalment giving rise to separate cause of action—Intention, circumstances and terms of contract are necessary to ascertain effect of default on entire contract.**

**Parties to a contract agreed to deliver and take 1500 bags of corn in three instalments of 500 bags**

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[2] Lambodar Dhonddeo Deo v. Dharanidhar Ganesh Deo, (1926) 13 A I R Bom 167=93 IC 195=28 Bom L R 64.

each. When the first instalment was defaulted, a suit was filed in respect of that instalment; when the second instalment was defaulted, similar action was taken. In respect of the third instalment when a suit was filed, it was contended that the cause of action for the second and third suits was the same and hence the third suit was barred by O. 2, R. 2, Civil P. C. :

*Held* that looking to the terms of the contract, the intention of the parties and the circumstance in that objection on similar grounds was not taken in the second suit, the causes of action for default of each instalment were separate and that the suit was not barred : *A I R 1924 Rang 145; A I R 1915 Cal 126 and 41 I A 142 (P C), Disting.; (1874) L R 9 C P 208, Rel. on.* [P 365 C 2; P 366 C 1, 2]

Paget — *for Appellant.*

Doctor for Dr. Rauf — *for Respondent.*

**Roberts C. J.**—This is an appeal from a decision of the learned Chief Judge of the Small Cause Court dismissing the suit of the plaintiff for damages arising from failure of the defendant to give delivery of 500 bags Pezingone in the month of July 1937, pursuant to a contract between the parties dated 17th December 1936. The contract was admitted and reads as follows:

> *Sale Note.* — Rangoon, 17th December 1936. 1. I/we have this day sold through Bhuralal, Broker to Messrs. R. J. Kothari, the undernoted Pezingone Burma Myingyan or Pyawbwe quality crop 1937 the descriptions and on the terms and conditions as follows : 2. 1500 bags each weighing nett 216 lb. at Rs. 270 per 100 baskets of 72 lb. each. 3. Delivery to be taken ex-scale in all May, June and July 1937 monthly 500 bags only date at seller's option 1500 bags only. 4. The Pezingone to be fair average quality procurable at the time of delivery. 5. Gunnies and twine to be supplied by buyer; if seller's gunnies and twine are used, price Rs. . . . . .per 100 gunnies. 6. Bagging, sewing and shipping at Rs. . . . per 100 bags. 7. Brokerage at 8 as. per hundred rupees due to Bhuralal, Broker. Signing of this contract by the buyer.

Two suits respecting the May and June deliveries respectively were decreed before the present suit, and the suit in respect of the June delivery was instituted after the end of July 1937, and therefore at a date when the failure to deliver the July instalment was complete. It was contended for the defendant that O. 2, R. 2, Civil P. C., applied to the present suit in that the plaintiff had omitted to sue for damages for default in respect of the July instalment in the same suit as that in which he sued for damages for default in respect of the June instalments. There is an 'explanation' given to O. 2, R. 2 in which it is declared that "successive claims arising under the same obligation shall be deemed to constitute but one cause of action." These words are not in the Ceylon Civil Procedure Code, 1889, and consequently were not considered in 41 I A 142.[1] Contracts for the purchase of goods by instalments are expressly referred to in S. 38, Sale of Goods Act, 1930. Sub-s. (2) states :

> Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

Thus, in conformity with the English law, a default in payment for one or more instalments does not by itself necessarily amount to a repudiation of the whole contract by the buyer, the question in every case being one of the intention of the parties : *see* (1874) L R 9 C P 208.[2] Some agreements give rise to successive obligations the breach of one of which does not amount to repudiation of the whole agreement, though it may give rise to a separate cause of action as here. When the vendor defaulted in his obligation to deliver goods in May the purchaser sued him; and when the vendor defaulted in respect of the June deliveries he was sued again; these were plainly two separate causes of action arising out of one agreement; and another cause of action arose out of the same agreement when default was made in the July deliveries, for each separate default was in respect of a separate obligation and gave rise to a fresh cause of action. That is the way the parties themselves treated their agreement. But now what is contended in effect is this, that if a plaintiff has two separate causes of action against the same defendant arising out of the same agreement, he must join them in one suit. O. 2, R. 3 certainly says he may do so, subject, that is, to the provisions in Rr. 4 and 5; but it does not say he must. All that O. 2, R. 1 says is that a suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them; and R. 2 says it shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action not, be it noted, in respect of one or more causes of action.

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[1] Saminathan Chetty v. Palaniappa Chetty, (1913) 41 I A 142=26 I C 228 (P C).

[2] Freeth v. Burr (1874) L R 9 C P 208=43 L J C P 91=29 L T 778=22 W R 370.

The Illustration given to O. 2, R. 2, has been discussed in argument in this appeal but liability to pay rent arises from one obligation only, namely the obligation to pay it when it falls due, and gives rise to one cause of action for all rent due at the date of filing a suit. S. 38, Sale of Goods Act, has no application to that at all. Doubtless, there may be an agreement to sell goods and deliver them by instalments in which the parties have contracted expressly or impliedly to make a failure to deliver the first instalment a renunciation of the whole agreement : this does not depend, since the Sale of Goods Act, 1930, upon whether such a term is expressed in the contract, for whatever the law may have been at the time the case in 1 Rang 694[3] was decided, it is now clear that the intention of the parties is a question of fact to be implied from the circumstances of the case. Again, in 41 Cal 825[4] there was an express term that each item and instalment should be the subject of a separate contract; but in the present state of the law when nothing is expressed in the agreement on this point it is necessary to see what is implied.

I make no doubt from the action of the appellant in suing for the default in May that he chose to regard the position as one in which the respondent had made default in one of several obligations only but had not repudiated the whole agreement; when he brought his action in respect of the default in June, the defendant did not plead that there was only one cause of action arising out of the agreement and that that was res judicata, but he impliedly assented to the construction placed upon the contract by the plaintiff. Now the appellant has sued for the default in July and I think it is idle to contend that this default arose out of the same obligation as was disclosed in the preceding suit. Accordingly, in my opinion, the provisions of O. 2, R. 2, have no application and this appeal should be allowed with costs. The suit is restored to the file of the Small Cause Court and remanded to that Court for a decision on the merits. The plaintiff-appellant is entitled to a refund of the court-fee paid on the memorandum of this appeal.

**Dunkley J.** — The point for decision in this appeal is whether the contract for sale of beans gives rise to a single obligation to deliver 1500 bags or three severable obligations to deliver 500 bags. The contract says that 1500 bags are to be delivered at 500 bags per month, namely 500 in May, 500 in June and 500 in July. The question has to be decided with reference to the provisions of S. 38 (2), Sale of Goods Act, and that Section lays down that, where there has been a breach of a contract for the sale of goods to be delivered by stated instalments, it is a question in each case depending upon the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated. Hence, with regard to this particular contract, if a failure to deliver in May involved a repudiation of the whole contract, obviously there is only one obligation arising under the contract; but if a failure to deliver in May only involved a severable breach of the contract in respect of the 500 bags to be delivered in that month, but left the contract subsisting in regard to the deliveries for June and July, clearly the contract gives rise to three separate obligations: and this question has to be determined from the terms of the contract and the circumstances, the circumstances obviously including the intention of the parties to the contract.

It has been established that the intention of the parties was that a failure to deliver in one month should not involve the breach of the whole contract, but only a severable breach in respect of the delivery for that month, because when the respondent failed to deliver in May, a suit in respect of that month's delivery was instituted by the appellant and damages were obtained, and when the respondent failed to deliver in June, a suit in respect of the delivery for that month was filed by the appellant and damages were obtained; and in this second suit the respondent never set up the defence that his failure to deliver in May had resulted in the extinction of the whole contract. It is clear that at the time when the suit in respect of the June delivery was instituted the respondent himself considered that he had undertaken three severable obligations by this contract. I agree with my Lord the Chief Justice that this appeal must be allowed with costs and the suit remanded to the Small Cause Court for decision on the merits.

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[3] Ahmed Sahib & Co. v. Pakir Mahomed Rowther, (1924) 11 A I R Rang 145 = 79 I C 755=1 Rang 694.

[4] Mandal & Co. v. Fazul Ellahie, (1915) 2 A I R Cal 126=26 I C 209=41 Cal 825.

B.D./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 367

ROBERTS C. J. AND DUNKLEY J.

*U Tha Nyo and another*—Appellants.

v.

*M. M. R. M. Chettyar Firm and another* — Respondents.

First Appeal No. 156 of 1937, Decided on 8th March 1938, from decree of Dist. Court, Thaton, D/- 27th September 1937.

**(a) Sale—Price to be paid in one month — Acceptance by vendor of instalments — Right of recovering entire price within one month is waived—Time as essence of contract cannot be pleaded.**

Where in a contract for sale, the entire purchase price was to be paid within one month after the receipt of earnest money, and the vendor during that month accepted various instalments towards the purchase money, the vendor should be regarded to have waived his right for entire payment within one month and cannot plead time as essence of contract. [P 367 C 2]

**(b) Transfer of Property Act (1882), Section 56 (b)—Rights of vendee—Vendee prepared to pay price — Contract falling through — No default of vendee—Vendee entitled to recover price paid plus earnest money and also to have charge over property till recovery of his money.**

Where a vendee was in the process of paying the balance of purchase money and was ready to pay it all, and was asking for performance by the vendors of the contract which they had entered into with him, then the vendee is entitled to recover not only that part of the purchase price which he has already paid, but also those moneys which have been paid by him by way of earnest and which are repayable to him because the transaction has not fallen through because of any default of his, and he is entitled to have a charge on the property : *21 Bom 827* and *28 Bom 466, Rel. on.* [P 368 C 1]

Hay and S. T. Aung—*for Appellants.*

S. M. Ghosh and B. C. Guha — *for Respondents.*

**Roberts C. J.**—This is a case in which the facts and the application of the law to them are quite simple, provided they are not overloaded with a great deal of extraneous matter. I am satisfied, from looking at the pleadings and the extremely voluminous judgment of twenty-seven pages, that neither the facts nor the principles of law were ever properly presented to the mind of the learned District Judge, who had to decide a very simple issue and allowed the matter to be complicated by elaborate references to what he described as a 'novation'. There was a contract between U Tha Nyo and the S. R. M. S. L. Firm in 1924 by which U Tha Nyo purchased from the S. R. M. S. L. Firm four pieces of paddy land, described in greater detail in Exs. 2 and 2 (a) : and in respect of those four pieces of land, three of which were bought for Rs. 23,100 and the fourth for a sum to be calculated at the rate of Rs. 115 per acre when the exact acreage had been ascertained, two sets of earnest money were given, one on 16th March, and the other on 3rd April 1924, of Rs. 1100 and Rs. 100 respectively. Each of the receipts for the earnest moneys sets out that "the whole amount of the purchase price shall be paid within thirty days from this date and a sale taken at your expense." The purchase money was, it is conceded, not paid within the thirty days ; but I am satisfied from a perusal of Ex. 3 that a number of payments were made towards the purchase price throughout the months of April and May 1924, and that a total of Rs. 14,900 was so paid, making the total sum paid by way of part purchase price plus earnest Rs. 16,100: and by their acceptance of those instalments the vendors in my opinion, waived the performance of that part of the contract which relates to full payment being made within thirty days, and put it out of their power thereafter to contend that time was of the essence of the contract and that it could be repudiated.

It is also clear that early in 1925 U Tha Nyo was pressing the vendors to obtain a conveyance and wanted to pay the rest of the purchase money, but a dispute arose with regard to the payment of interest. Ex. L-1, written by Adimulam, who was for some time the agent of the S. R. M. S. L. Firm, and dated 14th May 1925, says: "U Tha Nyo too frequently comes and tells us to sell and convey the land and take money." The fact of there being a dispute with regard to interest is evidenced by Exs. Q and R, which show that at that time Chidambaram was trying to insist upon Re. 1-4-0 per cent. per mensem and U Tha Nyo was willing to pay Re. 1 per cent. per mensem only, and it is clear from the pleadings in this case that later on, all relevant parties to the suit agreed that Re. 1 per month might be regarded as a reasonable rate of interest to be paid. While these negotiations were going on, the S. R. M. S. L. Firm sold the lands to the plaintiff firm, the N. M. R. M. Chettyar

Firm, and at this time we are of opinion that U Tha Nyo had never been in default. So far therefore as he was concerned, his payment of the whole purchase price within a month had been waived. He was in the process of paying the balance, and ready to pay it all, and was asking for performance by the vendors of the contract which they had entered into with him. There is therefore ample authority for saying that he is entitled to recover not only that part of the purchase price which he has already paid, but also those moneys which have been paid by him by way of earnest and which are repayable to him because the transaction has not fallen through because of any default of his. The converse of this proposition was decided in 21 Bom 827[1] at p. 853 where a purchaser who was justified in refusing to accept the title was, in the opinion of the Bench, entitled to a refund of the deposit. Just as there the person entitled to a refund was someone who was not at fault when the transaction fell through, so in this case U Tha Nyo was not at fault but ready and willing to conclude the contract and it was only the prolonged insistence upon the payment of interest and the raising of difficulties by S. R. M. S. L. and their subsequent selling of the land to the plaintiff which rendered the position impossible.

Then, with regard to the rest of the matter, I am clearly of opinion that Sec. 55 (6) (b) T. P. Act, applies. The Section deals with the rights and liabilities of the buyer and seller in the case of a contract for the sale of immovable property; and it states that the buyer is entitled, unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest, for the amount of any purchase money properly paid. In this case therefore the purchaser is entitled to a charge for Rs. 16,100 paid by him by way of purchase price, including the part of it which was deposited by way of earnest. It is suggested that the charge, to which he is clearly entitled, cannot be incorporated in our judgment on the hearing of the present appeal, and Mr. Ghosh has admitted that a separate suit would be time-barred. The question of limitation does not apply, so far as we are concerned, because this suit is a suit brought to oust a person who is lawfully in possession of the property in pursuance of the charge which he possesses. Possession therefore can only be decreed upon payment of the moneys which are due under the charge.

The form of the decree is one which has received sanction of judicial authority in 28 Bom 466[2] and I am of opinion that the decision in that case was right, and therefore that the appeal ought to be allowed. The decree of the District Court must be varied by declaring that respondent 1 is entitled to possession, and that an account will be taken, on the one hand, of the amount due to the appellants in respect of the part of the purchase money paid, i. e. Rs. 16,100, plus interest thereon at one per cent. per mensem, and on the other hand, of the amount due by the appellants to the respondents on account of mesne profits of the lands in suit plus interest at one per cent. per mensem on such mesne profits. If it be found on taking such account that there is a balance still due to the appellants, the decree will be a decree granting possession of the lands to respondent 1 on paying that balance amount to the appellants or into Court. The costs of the appeal must be the appellants', but there will be no order as to the costs in the suit. The lower Court will have to fix a time for the amount to be paid after the account has been taken.

**Dunkley J.** — I agree and have very little to add. Adimulam said in his evidence that prior to his writing the letter Ex. L, which is dated 14th May 1925, there was a dispute going on between the appellants and the S. R. M. S. L. Firm regarding the rate of interest to be paid on the outstanding part of the purchase money, and for this reason he declined to receive the balance, although it was tendered to him, and declined to execute a conveyance; and it is admitted by Chidambaram, a partner of this firm, that at that time the appellants were in a position to pay the whole of the purchase money. Consequently, it is quite clear that the appellants were never in default and that they were unable to obtain a conveyance because of this dispute over the rate of interest to be paid on the outstanding part of the purchase money, and it is curious that from the pleadings it is now admitted by both the M. M. R. M. Firm and the S. R. M. S. L. Firm that the rateof interest which the appellants were prepared to pay at the time that this dispute was going on, is a rate which they are now prepared to accept. Mr. Ghosh has said that he must have notice of this charge because it is not binding upon him without notice, as he is a transferee of the property from the original owner and a transferee for consideration. But it is common ground that the appellants have been in possession of the property since 1924, and what better notice the M. M. R. M. Firm could have of the fact that the appellants had an interest in this property than the possession of the appellants, I cannot conceive.

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[1] Ibrahimbhai v. Fletcher, (1897) 21 Bom 827 (F B).

[2] Lalchand Motiram v. Lakshman Sahadu, (1904) 28 Bom 466=6 Bom L R 510.

B.D./R.K. *Decree varied.*

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## A. I. R. 1938 Rangoon 369

ROBERTS C. J. AND BRAUND J.

*Ma Pu Tu* — Appellants.

v.

*Maung Ba Sin and others* — Respondents.

First Appeal No. 165 of 1937, Decided on 6th June 1938, against decree of Dist. Court, Mandalay, D/- 11th October 1937.

**(a) Buddhist Law (Burmese) — Adoption — Keittima and apatitha forms — Intention to inherit is dividing line —Sufficient public notoriety must be proved — Evidence could be oral or documentary** *(Per Roberts C. J.)*

The dividing line between keittima adoption and apatitha adoption must be the question of intention to inherit : and it is clear that that intention must be given effect to in such a way as to secure a measure of public notoriety or attention : *A I R 1936 Rang 344 and 5 L B R 118, Rel. on.* [P 370 C 1]

It cannot be said that no proof of keittima adoption should be considered satisfactory if established upon oral evidence alone. All that the Judge has to do is to see whether from oral, documentary or circumstantial evidence from all the different elements at his disposal he can infer that intention and that notoriety which the law demands as being consistent with keittima adoption and keittima adoption alone. [P 370 C 2]

**(b) Buddhist Law (Burmese) — Adoption — Keittima form — Onus of proof shifts from time to time as evidence is proceeding.**

**Though the initial burden of proving facts sufficient to establish keittima adoption undoubtedly lies on the keittima claimant, nevertheless, as in every other question of fact to be proved before the Court, that burden shifts from time to time during the trial as each point is reached at which if no more evidence were given, the one party or the other, as the case may be, would succeed and, in the long run when evidence is given on both sides, the Court is left with the evidence as a whole and the surrounding circumstances to judge from.** [P 371 C 1]

S. C. Mukerjee — *for Appellant.*

U Kyaw Zan and U Kya Gaing — *for Respondents 1 and 2 (a) (b), 3, 4 respectively.*

**Roberts C. J.** — This was an action which was originally brought by one Ma Pu Tu who is the present appellant for possession of properties, which had belonged to one Ma Thein Tin, and for a declaration that the plaintiff was the sole heir thereto. Ma Pu Tu, the plaintiff, was the daughter of Daw Nyun, and Daw Nyun's sister Daw Kun was the grandmother of Ma Thein Tin who died about January 1937. At the time of Ma Thein Tin's death her mother Daw Hmi was dead, she having died about 1927 or 1928 and the grandmother was also dead; and the appellant claims by reason of being a first cousin of Ma Thein Tin's mother. In answer to the suit thus framed a number of relatives appeared. First of all, there were some relatives of Ma Thein Tin who were the children of her grandfather's sister; her grandfather was U Tok who was the husband of Daw Kun, and U Tok's sister was Ma Myint The, and it was her children who were defendants 2, 3 and 4, Ko Sein, Daw Myint and Daw Sint; Ko Sein is now dead and his legal representatives, in the person of Ma Ya and Maung Than Gyaung have been placed upon the record as respondents.

In addition to the representatives of this family, there was a defendant named Maung Ba Sin, and his brother Maung Ba Thwin was joined with him as a defendant. These two brothers were the sons of Maung Ant, who was a brother of Ma Pu Tu, the appellant. Consequently, Maung Ba Sin whose position falls principally to be considered, was the second cousin of Ma Thein Tin and a first cousin once removed of the deceased Daw Hmi. And his position was this : that he claimed to be the keittima adopted son of Daw Hmi, and a story was told which went in great elaboration into all relevant facts, and a decision in respect of which comes before us by way of appeal.

**In dealing with cases of this kind, as was observed by Page C. J. in 14 Rang 11[1] it is extremely desirable to bear in mind that we do not see or rehear the witnesses**

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**[1] Chinnaya v. U Khay, (1936) 23 A I R Rang 5=161 I C 387=14 Rang 11.**

and we ought not to interfere with the decision of the District Court unless we have come to the conclusion that it was plainly erroneous. We have to bear in mind in varying circumstances depending upon the nature of the Court of original jurisdiction, the observations of Lord Sankey in (1935) A C 243[2] : I say in varying circumstances because it is plain that the decision, for example, of a learned Judge of this Court upon the Original Side on a question of fact, would naturally have more weight than that of a Subdivisional or a Township Judge of comparatively little experience. And we have before reviewing the facts upon which the learned District Judge came to the conclusion, to make sure that he was expressing himself correctly with regard to the law involved in the case. The leading case on the subject of keittima adoption in recent years is that in 14 Rang 557,[3] it is pointed out there that the dividing line between keittima adoption and apatitha adoption must be the question of intention to inherit; and it is clear from the authorities that that intention must be given effect to in such a way as to secure a measure of public notoriety or attention. The words of Lord Dunedin in 5 L B R 118[4] may in this connexion usefully be quoted. He said :

> It has been laid down by this Board that according to the law of Burma, no formal ceremony is necessary to constitute adoption. One may go further and say that, although adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to.

Having read the careful judgment of the learned District Judge, I am satisfied that he directed himself correctly as to distinction between apatitha and keittima adoption and bore in mind throughout, and carefully weighed at the close of the case, those considerations which alone would lead him to a right conclusion on the facts. It has been urged in argument that no proof of keittima adoption should be considered satisfactory if established upon oral evidence alone. But there is no kind of requirement as to the nature of the evidence forthcoming. All that the Judge has to do is to see whether from oral, documentary or circumstantial evidence from all the different elements at his disposal he can infer that intention and that notoriety which the law demands as being consistent with keittima adoption and keittima adoption alone. It will be necessary in this case to review the evidence which was brought at the trial and to see how far the learned Judge had before him material for coming to the conclusion at which he arrived and whether this Court ought, having considered that material, to come to the conclusion that he was wrong and obviously so wrong that we ought to apply the rule laid down in 14 Rang 11[1] which I have just cited and allow the appeal. (His Lordship then examined the evidence and proceeded.) It is urged by counsel before us that the learned Judge in trying this case only stated his conclusions at the end of his judgment after saying that he accepted certain facts against adoption as proved. I would suggest that the real answer to that criticism is that the learned Judge summed up the case, as it were, to himself before arriving at the conclusion. He saw, as is true in many cases, that there is something to be said for both sides: there were pieces of evidence given for the plaintiff which should not be considered as accurate, and other pieces of evidence given for the defendants which, no doubt, were exaggerated. But, having summed up those sets of evidence and having sifted the grain from the chaff, he came to a definite conclusion and found that defendant 1 had established his claim. Another way would have been to express his view with some vehemence. But I think in that event it would have been said that he was one-sided and did not view the evidence in a judicial manner. The learned Judge has pointed out the difficulties in the case and I feel that there were great difficulties in this case: the learned Judge appreciated them: he saw the witnesses, applied his mind both to the law and to the facts and came to the conclusion, at the end of his judgment — a conclusion which is expressed in a well-reasoned judgment. And it is a matter in which, on a question of fact, we cannot possibly interfere and therefore for all these reasons, I am of opinion that this appeal must be dismissed.

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[2] Powell v. Streatham Manor Nursing Home, (1935) A C 243=104 L J K B 304=152 L T 563=79 S J 179=51 T L R 289.

[3] Ma Than Nyun v. Daw Shwe Thit, (1936) 23 A I R Rang 344=164 I C 272=14 Rang 557.

[4] Ma Ywet v. Ma Me, (1910) 5 L B R 118=36 Cal 978=3 I C 797=10 C L J 253=14 C W N 111 (P C).

We must make an order as to costs, although of course the appellant is suing in forma pauperis. We make a formal order as to costs, advocate's fee twenty gold mohurs. We dismiss the cross-objection with costs ten gold mohurs: the costs of the cross-objection to be paid by the objecting respondent. The appellant will have to pay the court fees which she would have had to pay if she had not been allowed to sue as a pauper.

**Braund J.**—I agree and have but little to add. I do not propose to set out the facts, which have already been fully dealt with by my Lord the Chief Justice. The real issue in the suit was raised by defendant 1, Maung Ba Sin. He is a young man of about 23, and he claimed to have been the adopted keittima son of Daw Hmi. He says that the adoption took place when he was about three years of age. And the learned District Judge framed an issue, which was appropriate to that contention. The issue he framed was :

> Was defendant 1 adopted by Daw Hmi to inherit ? If so, is he entitled to the whole estate of the deceased as her brother ?

And that was in reality the only issue he dealt with in the case. The principles which govern keittima adoption in Burma have now been well settled and indeed, have scarcely been in doubt since the well-known judgment of Lord Dunedin in 5 L B R 118.[4] Every question of this kind, in which no formal ceremony of adoption can be proved, appears to me to resolve itself into a pure question of fact whether the Court is, in the circumstances of each particular case, satisfied upon the evidence afforded by that case, that the claimant was adopted not in adoption generally, but in keittima adoption and with sufficient notoriety at the time to establish that adption. Though the initial burden of proving facts sufficient to establish that undoubtedly lies on the keittima claimant, nevertheless, as in every other question of fact to be proved before the Court, that burden shifts from time to time during the trial as each point is reached at which, if no more evidence were given, the one party or the other as the case may be, would succeed and, in the long run when evidence is given on both sides, the Court is left with the evidence as a whole and the surrounding circumstances to judge from. In my judgment, the learned District Judge has properly appreciated both the real issues in this case and that the burden of proving them lay upon defendant 1. That he has appreciated the nature of keittima adoption is to my mind quite clear from the fact that at pp. 2 and 3 of his judgment he correctly sets out the three kinds of adoption known to Burmese Buddhist law. He sets them out as keittima adoption, apatitha adoption and then that third form of adoption which is 'out of compassion'; and he draws the correct distinction between keittima adoption and apatitha adoption. That is made very plain when one sees from the learned Judge's judgment that he first of all deals with the question of whether there was an adoption at all and then goes on to deal with what he describes—and I think rightly describes—as 'the very much more difficult question' of whether Ba Sin was adopted as a keittima son. It is quite clear, I think, from the frame of the learned Judge's judgment that he has perfectly appreciated the difference between a mere apatitha adoption and keittima adoption.

It is perhaps a little unfortunate that the learned District Judge thought fit to take the evidence of the plaintiff first because, as I have already said, it is quite clear that the onus of proving the keittima adoption lay in this particular case on defendant 1. But nevertheless I am quite unable to think that on that account alone the learned Judge has laboured under any delusion as to where the onus really lay. He has quite clearly, on pp. 5 and 6 of his judgment, set out the various facts or types of fact which have to be proved to establish keittima adoption and I do not think that he was under the least misapprehension that it was for Ba Sin, defendant 1, to establish them. Moreover, as has been pointed out so many times, this question of onus is not really a material one in a case where there is evidence on both sides and it becomes merely a question of deciding what the effect of that evidence really is. Onus is only really material either when there is only evidence on one side or the evidence on each side is so nicely balanced that some extraneous assistance is needed to bring down the scale on one side or the other. In my judgment therefore the learned Judge has perfectly appreciated both, what the real issues were and where the onus of establishing them lay.

I do not desire to deal with the facts at any length, because they have been dealt with already exhaustively by my Lord the Chief Justice, and I desire to associate myself with what he has said upon the facts.

I should, speaking for myself, be quite unable to take a different view to the view taken by the learned District Judge of the facts, particularly having regard to the circumstance that he was in a very much better position than we are to judge of the credit of the witnesses who came before him. There can, I think, be no doubt that there was ample material before him upon which he could have decided in the way he did. So far as I am concerned, I have been particularly impressed by that part of the evidence which showed that the mother of defendant 1, on more than one occasion, stated what her motive in adopting him was. He said, and there is the evidence of Ma Ohn, Daw Chit, Daw San and U Kaw Tha La to prove it, that the purpose of her adoption was to get for herself a son because she had not got one of her own. That, to my mind points and strongly points to an intention on her part to put the adoptive child in all respects in the same position as her own real son would be; and I see no reason whatever for excepting inheritance, which is one of the ordinary incidents of the position of a son, from her intention when she made this adoption, which she said was to acquire for herself a son.

Then (possibly I may attach rather more importance to it than my Lord the Chief Justice has thought it right to do) I myself have been impressed by the evidence of Daw San when she says that from the moment of adoption there was a complete severance of all relations between the real mother and defendant 1. The only direct evidence we have of what happened on the occasion of the adoption is that of Daw San, the mother; and while it is true that she must be considered to be an interested party, nevertheless, I am, speaking for myself, not altogether ready to discard her evidence where that evidence fits the facts and in this case her evidence, namely that the child was adopted as a keittima child, seems to me to be consistent with almost everything that followed afterwards and for that reason, speaking entirely for myself, I am inclined to attach a little weight to the evidence of the mother, which is the only direct evidence of the fact, when she says that this was expressly a keittima adoption.

As regards notoriety, which is a very important ingredient of keittima adoption, there was, to my mind, ample evidence of notoriety. One has to bear in mind in this respect that the notoriety spoken of is notoriety at the time of adoption. Now, twenty years have elapsed since the adoption took place, and it is not surprising that you do not get a multitude of persons ready to come forward after a lapse of twenty years, to say that it was broadcast throughout Mandalay that the boy was adopted as a keittima child. It is quite obvious that there will not only be comparatively few people who will remember the facts, but also, that during the twenty years that have elapsed, a son who has been adopted in keittima adoption and who has been taken into the family will have become indistinguishable from a real son, will be regarded as a real son, and persons in the neighbourhood will have come to regard him and look upon him as a real son. Therefore the origins of the adoption would become forgotten and he would be indistinguishable from the natural son. Therefore, I think, it must always be difficult to get direct evidence of that notoriety which is necessary when a considerable number of years have elapsed as in this case. But here we do have a number of witnesses and witnesses whom I see no reason to disbelieve, saying that they were told by Daw Hmi, the adoptive mother, that she had adopted this child as a keittima son. I think therefore that there was ample evidence of notoriety which justified the learned Judge in finding that the principles of keittima adoption were satisfied in that respect. In all the circumstances, I agree with my Lord the Chief Justice that this appeal should be dismissed.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 372

BAGULEY AND MOSELY JJ.

*A. T. N. A. T. Chockalingam Chettiar*— Appellant.

v.

*Ko Maung Gyi and others* — Respondents.

First Appeal No. 125 of 1937, Decided on 13th January 1938, against order of Dist. Court, Toungoo, in Civil Execution No. 1 of 1937.

**(a) Administration — Preliminary decree drawn up — No supplementary decree can be passed—Only directions can be given by Court to administrator or receiver in charge of estate.**

**Where a preliminary decree for administration has been drawn up, nothing more is required from**

the Court beyond giving directions to the administrator or the receiver or whoever it is who is in charge of the estate, as to the lines the administration ought to take; and the only other decree which can be passed in the administration is the final decree, which will declare that the estate had been administered and which will allot out of the assets remaining in the hands of the Court or the administrator the various shares to the parties entitled to receive them. Hence after the preliminary decree, a supplementary decree cannot be passed by the Court on the application of a creditor. [P 374 C 2]

**(b) Execution—Decree binding — Executing Court can see whether decree has been passed at all — If it is found to be nullity, it can disregard it.**

No doubt the executing Court has got to take a decree and execute it as it stands, but the executing Court is not precluded from finding out whether any decree had ever been passed at all; and merely because something has been written in a decree form, it does not necessarily make it a decree : *A I R 1931 Rang 252 (F B), Expl.* [P 375 C 1]

Hence where there is no judgment to support the decree sought to be executed and the decree is something merely written in a decree form, the decree is a complete nullity and the executing Court can disregard it. [P 375 C 1]

Hay and K. C. Bose — *for Appellant.*
Clark — *for Respondent 3.*

**Baguley J.** — This is an appeal against an order passed in execution, the executing Court having held that it had no power to order the attachment of the personal properties of one Pyu Maung Maung. It is a case of a dispute between rival decree-holders and so far as the decree in favour of the A. T. N. A. T. Firm is concerned, it will be necessary to sketch out the history of how it came into existence. In the first place, there was a lady named Daw Phaw Oo. She died in 1926. In the same year Pyu Maung Maung filed an application for letters of administration to her estate, estimating its value at just under two lakhs of rupees. Letters of administration were granted to him; but on 2nd November 1926 a suit was filed in the Hanthawaddy Court for administration of the estate. One of the heirs was the plaintiff in the Hanthawaddy suit, Ma Yin Yin, a minor by her guardian ad litem, and in the end it was decided that the people entitled to share the estate were Ma Yin Yin, Pyu Maung Maung and another party referred to as Japan Maung Maung. Pyu Maung Maung had bought the interest of the remaining heir, one Ba Nyu. The suit was referred to arbitration and an award was made by the late Sir Po Tha. His award was accepted and was embodied in a decree which is dated 30th March 1931. The decree recites that it is a suit for the administration of the estate of Daw Phaw Oo and U An, both deceased, and it declares a large number of things, unfortunately using the word "decreed" in every case. It was decreed that Ma Yin Yin, Japan Maung Maung and Ba Nyun are entitled to a third share in the estate; it was decreed that Pyu Maung Maung had Ba Nyun's share assigned to him; it was decreed that the property was equally divisible as shown in a schedule; it was decreed that the parties had liberty to apply for partition; it was decreed that Pyu Maung Maung had Rs. 71,890-2-0 in his hands belonging to the estate and that a sum of Rs. 60,000 was due on the mortgage of paddy lands to A. T. N. A. T. Firm and that Pyu Maung Maung was to discharge the mortgage; it was decreed that Pyu Maung Maung should pay certain sums in cash to Ma Yin Yin and Japan Maung Maung; it was decreed that the mesne profits for the years 1929-30 and 1930-31 had not been taken into account and that Pyu Maung Maung was authorized to collect them and divide them between the heirs in equal proportion; it was decreed that Pyu Maung Maung was authorised to collect debts and outstandings, the same to be divided equally; it was decreed that a certain civil suit on the Original Side of this Court should be withdrawn; it was decreed that Ma Yin Yin and Japan Maung Maung should convey by registered deed to Pyu Maung Maung a certain mill; it was decreed that Ma Yin Yin and Japan Maung Maung were at liberty to repair pagodas and religious buildings and it was decreed that the arbitrator should be paid his fees.

It is perfectly manifest from the wording of this decree that it was nothing more nor less than a preliminary decree in an administration suit. It was not a final decree in any sense of the word. After this there was an amendment, which was allowed and afterwards struck off by this Court in revision. The next step apparently was to fix some figure of the mesne profits, which entailed an alteration of the amounts payable by Pyu Maung Maung; and after that, the present trouble began to gather. A petition was filed on behalf of the A. T. N. A. T. Firm and Bunsillal Abirchand, who had got a sub-mortgage of the mortgage in favour of the Chettyar Firm, in which they said that there is Rs. 1,00,050 due on the mortgage. The prayer which winds up the petition is that the claim should be enquired into and accounts taken of the claims on the mortgage and that a "supplementary decree" be passed charging the estate with the amount due, that the mortgaged property be first sold in case payment was not made in a fixed time, that a Receiver be appointed to realize the mortgage claim and he be asked to satisfy the mortgage out of the income and that in the event of the sale proceeds being found insufficient, a money decree for the balance might be passed; in other words, in this administration suit the Chettyar Firm asked for a mortgage decree, paying no stamp fee nor anything else. An order was passed on this petition on 26th June 1933, in which the then District Judge (he was the fourteenth Judge to deal with the case) says :

> The question has now arisen as to what is the amount which Pyu Maung Maung has to pay to discharge the mortgage;

and he held that Ma Yin Yin and Japan Maung Maung were entitled to insist on the amount being properly proved as they were interested in the estate. He objected to the argument that the mortgagee should be required to file a mortgage suit and said that the Court had power to decide the question as it was an administration suit. He of course dealt with the question whether court-fees had to be paid and decided that in favour of the Chettyar Firm, and he then said the Court would then proceed to decide the actual amount due. The next order, which was passed after the enquiry, was passed by yet another Judge, and he decided that the amount due on the mortgage was Rs. 1,00,050 and he stated that it must be realized in the first place from Pyu Maung Maung's one-third share and the balance to be realized from the proceeds of Ma Yin Yin and Japan Maung Maung's shares, if Pyu Maung Maung's share was insufficient. So far, the case is understandable. The arbitration suit was on the file, the Court had decided, with the aid of the arbitrator, the people who were entitled to a share; it had directed that certain assets be collected and accounted for; and it had decided that there was this mortgage over part of the estate property. The Court had seisin of the whole estate and when a creditor applied for payment out of the estate which was under the control of the Court, the Court—rightly, if I may say so—decided the amount of the debt due to the creditor and directed from whose shares in the estate the money was to be realized. It was all a matter of the Court controlling the administration of the estate. It was at this point that the Court went wrong. On this judgment, which as I have said, appears to me perfectly correct, a decree was drawn up. Why a decree, I am unable to understand. A preliminary decree for administration had been drawn up, and after that nothing more was required from the Court beyond giving directions to the administrator or the receiver, or whoever it was who was in charge of the estate, as to the lines the administration ought to take; and the only other decree which could have been passed in the administration was the final decree, which would declare that the estate had been administered and which would allot, out of the assets remaining in the hands of the Court or the administrator, the various shares to the parties entitled to receive them. In the present case the preliminary administration decree had been passed. The A. T. N. A. T. Firm filed an application, which was very much in the nature of a plaint, and they definitely asked for a mortgage decree, although they called it "a supplementary decree in their favour charging the estate for the amount due." What "a supplementary decree" is, I am unable to say. If a decree is altered for any reason, the new decree is an amended decree, and the District Judge, before whom the application first came in his preliminary order, held first of all :

> It is only the question of calculating the amount of interest to be paid and in my opinion it would be wrong to refer the mortgagee to a separate suit to decide this matter when this Court has power to do it.

After that he held that it was not necessary for the A. T. N. A. T. Firm to pay court-fees, and the order winds up : "This Court will now proceed to decide what is the amount due on the mortgage." With this order no fault can be found, in my opinion. Unfortunately, after this the matter came before another Judge and it was he who found Rs. 1,00,050 due on the mortgage and then directed that "a supplementary decree" should be drawn up; and he laid down the way in which this money is to be realized — in the first place, from Pyu Maung Maung's one third share in the estate, the balance from the proceeds of Ma Yin Yin and Japan Maung Maung's shares in the mortgaged lands, and if still insufficient, from the proceeds of the other estate property, "when the estate properties are sold by the Receiver in due course." From what is explained it seems clear that the order never contemplated a decree in the ordinary sense of the word; it was a series of directions which had got to be followed by the Receiver, the administrator, or whoever it was who was acting as the hand of the Court in administering the estate. Unfortunately, as so often happens, finding an order on the record, a decree form was filled up in one way or another and signed by the Judge, and these directions to the Receiver came out as a full fledged decree, and the application for the transfer of that decree to another Court for execution came before yet another Judge. This was in Civil Execution No. 27 of 1936 of the District Court of Hanthawaddy. This Judge foresaw difficulties, but came to the conclusion that these difficulties must be dealt with by the executing Court after the transfer and not by himself, and that is why all these contentions were raised and settled by the executing Court.

I am well aware that the executing Court has got to take a decree and execute it as it stands : *vide* 9 Rang 480;[1] but I do not read this ruling as deciding that the executing Court is precluded from finding out whether any decree had ever been passed at all; and merely because something has been written on a decree form, it does not necessarily make it a decree. What was produced before the executing Court in this case was a copy of something which was written on a decree form, it was true, but that there was something peculiar about it was obvious from the fact that the parties to the suit are set out as Ma Yin Yin, plaintiff, Japan Maung Maung and Pyu Maung Maung as defendants, and the decree is in favour of A. T. N. A. T. Firm; and it should have been something still more peculiar (on the face of the copy it does not appear) because the original is marked definitely as a "supplementary decree", but the true copy (so called) omits the word "supplementary." However, it appears from the record that the original file was sent for by the executing Court and it may be assumed that the executing Court had the original "supplementary decree" before it. No decree can exist unless supported by a judgment, because a decree has got to be in accordance with the terms of the judgment, and in the present case there is no judgment which supports the decree. The decree therefore is a complete nullity and cannot be termed a subsisting decree passed by a duly constituted Court. I do not read 9 Rang 480[1] as precluding the executing Court in proceedings between the judgment-debtor and the decree-holder from determining for itself whether as a fact a decree exists, because the basis of that ruling is that there must be a subsisting decree and that ruling mentions certain decrees which are nullities and may be disregarded by the executing Court; and in my opinion this is another case of a decree being a complete nullity, because although a decree form had been filled up and signed there is no judgment to support it ; and if these considerations apply to the case of a contest between the judgment-debtor and a decree-holder, still more would they apply to a case like the present one in which the contest is not between the decree-holder and the judgment-debtor, but between a person holding a decree which is impugned and another person who is executing his decree against the same judgment-debtor.

The present proceedings are really under S. 73, and the claim is for a rateable distribution between persons who have applied to the Court for execution of decrees. Surely, in a case of this kind, where rival decree-holders are contesting for rateable distribution, the Court which holds the assets is entitled to call upon each of the contesting parties to prove that it has a valid decree for execution in order that it may make sure that the assets are properly distributed among persons who are really entitled to a share in them. For these reasons, I would hold that the order now appealed against, which is to the effect that the A. T. N. A. T. Firm is not entitled to rateable distribution in Civil Execution No. 56 of 1936 of the Subdivisional Court of Pyu should be dismissed, is correct, and I would dismiss this appeal with costs; advocate's fee five gold mohurs.

**Mosely J.** — I agree that the decree sought to be executed was a nullity and inexecutable and therefore there is no need to consider whether the decree can be executed against the legal representatives of the deceased Pyu Maung Maung under S. 50, Civil P. C.

K.S./R.K. *Appeal dismissed.*

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[1] **S. A. Nathan v. S. R. Samson, (1931) 18 A I R Rang 252=135 I C 65=9 Rang 480 (F B).**

## A. I. R. 1938 Rangoon 376

MACKNEY J.

*and afterwards*

MYA BU AND SPARGO JJ.

*Maung Po Zaw and others*—Appellants.

v.

*Maung An and others*—Respondents.

Second Appeal No. 354 of 1937, Decided on 1st June 1938, against decree of Dist. Court, Bassein, in C. A. No. 16 of 1937.

**(a) Civil P. C. (1908), S. 100 — Question of law raised for first time upon admitted facts may be entertained** (Per *Mackney J.*).

When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea : *(1892) A C 473 and A I R 1932 P C 118, Foll.* [P 377 C 1]

**(b) Estoppel—Admission of counsel on point of law** (Per *Mackney J.*)

Admission of a counsel on a point of law does not preclude the client from raising it subsequently : *27 Cal 156* (*P C*), *Rel. on*; *25 Mad 367 (P C), Disting.* [P 377 C 1, 2]

**(c) Buddhist Law (Burmese) — Succession — Widower having children by previous marriage marrying widow having children from previous marriage — On widow's remarriage share of one of her two sons in her atetpa property taken away by his widow—Other son's representatives are entitled to entire half share in lettetpwa or hnapazon property acquired after remarriage of widower and widow** (Per *Division Bench*).

Under the Burmese Buddhist law a child who takes his share in the estate of his parents after the death of one parent and upon the remarriage of the surviving parent ceases to have any further claim in the remainder of such estate and in the property acquired subsequent to the remarriage of the surviving parent except probably in the event of the surviving parent dying without leaving a widow or widower or descendants. [P 379 C 2]

One $U$, a widower, married $D$, a widow. They had children of their respective previous marriages and also some payin property. $D$'s children were her two sons, $S$ and $M$. Shortly after the marriage of $D$ and $U$, $S$ died leaving a widow who demanded and received the share to which her husband was entitled in $D$'s atetpa property (i. e. property which $D$ brought from her previous marriage) on account of her marriage with $U$. $S$'s share was one half of the half share to which two sons, $S$ and $M$ were entitled in the estate of their parents on account of $D$'s remarriage after the death of their father. After $D$'s death the representatives of $M$ brought a suit for half of the lettetpwa or hnapazon property of $U$ and $D$ :

*Held* that it was not logical that, because $S$ or his representatives had taken away his share in the property of $D$'s previous marriage and $S$ thus dropped out of the new family, the share to which $M$ or his representative were entitled in the property acquired subsequent to $D$'s marriage with $U$ should be reduced by the share which $S$ would have had in it if he or his representatives had not taken away the share in the atetpa property upon the remarriage of $D$. Hence $M$'s representatives were entitled to the entire half share in the lettetpwa or hnapazon property of $U$ and $D$ : *A I R 1928 Rang 225 (F B), Disting.* [P 380 C 2]

E Maung — *for Appellants.*

K. C. Sanyal — *for Respondents 1 to 6.*

**Mackney J.** — The suit out of which this appeal arises is a contest between the children of U Tun Hla and the children of Daw Mo, begotten in each case by previous spouses, on whose death U Tun Hla and Daw Mo married. The plaintiffs are the children of Po Myit, one of the two sons of Daw Mo by her former marriage. They ask for administration of the estate of U Tun Hla and Daw Mo. U Tun Hla died in 1929 and Daw Mo in 1934. There was another child of Daw Mo, named Po Sint, but it has been held that his share of the estate had been given to his widow shortly after Tun Hla's marriage with Daw Mo, which occurred some forty years ago. The defendants, who represent the children of Tun Hla by his former marriage, claim that Po Myit also had his share given to him, but both the lower Courts have found against them on this point. The Sub-Divisional Court granted a decree for administration in which it declared that the plaintiffs were entitled to one-half of the jointly acquired property of Tun Hla and Daw Mo and the whole of Daw Mo's payin property, whilst the defendants, the children of U Tun Hla, were entitled to the other half of the "joint" property of U Tun Hla and Daw Mo. On appeal to the District Court, the only point taken was that the trial Court should have held that Po Myit had received his share in the estate. The District Court dismissed the appeal. The defendants now appeal to this Court. It should be noted that respondent 7, Ma Thet Pu, is the widow of Maung Po Sint. She was originally joined as a defendant and apparently takes no interest in the suit whatsoever.

Of the grounds of appeal set out in the memorandum of appeal, grounds 3 and 4 have been abandoned. It is admitted that the children of Po Myit are entitled to the whole of the payin property of Daw Mo. What is now urged is that the children of Po Myit are entitled not to half of the jointly acquired property but only to a quarter thereof, inasmuch as Po Sint's heirs have already taken his share, and reliance is placed on the decision of a Full

Bench of this Court in 6 Rang 427.[1] A further ground of appeal has been added as it has been discovered that the decree is not in accordance with law in that accounts were not directed to be taken for funeral expenses as provided in Form 17, Appendix D, Civil P. C. The learned counsel for the respondents has raised the preliminary objection that as the ground of appeal now put forward has never been put forward either in the trial Court or in the lower Appellate Court, the appellants are not entitled to rely on it now. Reference is made to the remark of the learned District Judge in his appellate judgment, where he says:

> The defendants appeal. They do not deny that the trial Judge's findings are in accordance with the Buddhist law of succession, but they contend that Daw Mo's son' Po Myit, by a family arrangement, had received his share in his mother's estate and that this family arrangement debarred the plaintiffs from any share in the lettetpwa property of Tun Hla and Daw Mo.

I am of opinion that this preliminary objection must fail. The point now raised is a point of law and it has been observed by their Lordships of the Privy Council in (1892) A C 473[2] at p. 480, which is quoted by their Lordships again in 10 Rang 242[3] at pp. 254, 255:

> When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea.

Here it has clearly been admitted by the legal representative of Po Sint that Po Sint has received his share and both the lower Courts have accepted this as true: nor does it appear to have been disputed by any of the parties. It is not clear from the learned District Judge's remark whether the counsel for the defendants-appellant in his Court had expressly admitted that the trial Judge's findings were in accordance with the Buddhist law of succession. It may well be that the learned Judge was simply commenting on the fact that these findings had not been disputed. However even if the counsel had made such an admission, it does not appear to me that that would preclude them from raising this point of law in the present appeal: *see* 27 Cal 156[4] at pp. 162, 163. In that case it is observed:

> The High Court seems to have understood counsel to have admitted that receipt of rent by the Maharajah operated as a confirmation of the pottah, and the only question therefore which remained was the construction of the pottah. In the opinion of their Lordships this admission, if correctly understood, was erroneous in point of law, and does not preclude the counsel for the appellant on this appeal from claiming his client's legal right.

In 25 Mad 367[5] at pp. 372, 373, it was pointed out that the admission of a vakil made with due authority would bind his client. It is evident that the kind of admission contemplated was an admission which in effect is but dispensing with proof of the facts admitted — which, in effect, would amount to abandoning an issue—and the remarks do not apply to an admission in regard to a point of law. It is clear that in the lower Appellate Court the appellants relied entirely on their contention that the children of Po Myit were not entitled to anything, and hence did not trouble to argue the point that if they were entitled at all, they could only be entitled to one-quarter of the jointly acquired property. Consequently, this point has not been dealt with in the District Court. I have not proceeded further with the hearing of the appeal because in my opinion that is an appeal which would properly be heard by a Bench of this Court. The Full Bench decision on which the appellants rely, 6 Rang 427,[1] was a decision on a reference of the following question:

> A Burman Buddhist died leaving surviving him children by his first wife and also the second wife and children by her. The second wife has died and since her death one of the children of the first marriage has put forward a claim for partition of the inheritance. To what proportion of the property acquired during the continuance of the second marriage are the children of the first marriage entitled in such a suit?

It will be seen that the case is one not quite similar to the present, the difference being that there were no children by the second wife, although the second wife had brought children with her to the marriage. It was decided that in such a case the children of the first marriage are entitled to one-third of the property acquired during the second marriage. Applying the principles enunciated, it is clear that in this case the children of the two parents by earlier spouses must stand on an equal footing as regards the division of the property acquired during the second marriage and they would be entitled to one-half share each. However in the *case of Po Aung*[1] it appears that Maung Kha's sister had already taken her share (just as in our case Po Sint's legal representative has taken Po Sint's share) and the Court proceeded to add obiter that since his sister had already taken her share, Maung Kha's share would be one-half of one-third, i. e. one-sixth. The appellants argue that on the analogy of this decision, the children of Po Myit are entitled only to one-half of one-half, i. e. one-quarter of the jointly acquired property. The point as to whether Maung Kha's share was to be the whole of one-third or one-half of one-third was not referred to the Full Bench for decision. It is true that the learned Judges have stated it as their view that he was entitled to only one-half of one-third, but the point was not fully considered save by Brown J. and he observes:

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[1] Maung Po Aung v. Maung Kha, (1928) 15 A I R Rang 225=112 I C 418 = 6 Rang 427 (F B).

[2] Connecticut Fire Insurance Co. v. Kavanagh, (1892) A C 473=61 L J P C 50=67 L T 508 =57 J P 21.

[3] M. E. Moola Sons, Ltd. v. Burjorjee, (1932) 19 A I R P C 118=136 I C 737=10 Rang 242 =59 I A 161 (P C).

[4] Beni Pershad Koeri v. Dudhnath Roy, (1900) 27 Cal 156=26 I A 216=4 C W N 274=7 Sar 580 (P C).

[5] Venkata Narasimha Naidu v. Bhashyakarlu Naidu, (1902) 25 Mad 367=29 I A 76=8 Sar 258=6 C W N 641 (P C).

> The Dhammathats lay down no express rule as to the share to be claimed by one only of the co-heirs when another co-heir has already claimed her share, and general principles of equity must be applied. On these general principles I find it difficult to hold that Maung Kha is not entitled to the whole share of the family of his own parents less only the small share already taken by Ma On. The one-eighth share claimable by Ma On and Maung Kha jointly on the death of their father must be held to be equivalent to a one-third share claimable at a later stage on the death of the step-mother, and it does not seem to me equitable to the step-mother's own family to deprive them of the whole one-third share now less only a one-sixteenth in spite of the fact that the estate has already lost what is now equivalent to a one-sixth part of it. It is impossible to be entirely logical in such a case, but it seems to me more equitable to hold that Ma On has already received what is now equivalent to a one-sixth share of the estate, and that her brother Maung Kha is therefore entitled only to the one-sixth share remaining of the one-third which his branch of the family is entitled to claim.

The observations of the learned Judges composing of the Full Bench were accepted by the Divisional Bench which had referred the question. It was observed:

> This last question was not actually referred but we agree with the opinion thus expressed, for the reasons stated by our brother Brown in his judgment on the reference.

It appears to me, with the greatest respect, that the dicta of the members of the Full Bench in *Maung Po Aung's case*[1] do not necessarily afford support to the appellants' contention in the present appeal. The property which we are now considering is jointly acquired property, that is to say it is property which has come into existence after the marriage of Maung Tun Hla with Daw Mo, and after Po Sint's widow took Po Sint's share. It does not appear to me to be possible to say that Po Sint's widow has already received the equivalent of one-quarter of the jointly acquired property: not only has she not received it but she could not possibly have received it because it was not then in existence. It does not seem to me to be reasonable that the children of the one parent should alone benefit because one of the two children of the other parent took the share to which he was then entitled immediately after the re-marriage, and that the remaining child of the other parent should get less than he would have done if he had had no brother at all.

The great difference between our present case and the *case of Po Aung*[1] is this: The sister of Maung Kha, when she left the family on the death of the step-parent, took the share of the jointly acquired property to which she was entitled then and, of course, after the death of the step-parent, there could be no further property jointly acquired. The arguments employed by the learned Judges who decided the *case of Po Aung*[1] obviously have considerable force in regard to the case before them. The present case is very different in this respect because Po Sint's widow received her husband's share very shortly after the marriage of Tun Hla and Daw Mo and consequently there was no jointly acquired property in which she could share. The case however to my mind is of considerable importance and if I were to hear this appeal, I think I should feel myself compelled to make a reference with the consequence that the appeal would have to be heard all over again and much time would be wasted. The proceedings will therefore be laid before my Lord the Chief Justice for his orders.

### Judgment of Division Bench

**Mya Bu J.**—This case raises a question of Burmese Buddhist law which, in certain aspects, is not covered by direct textual or judicial authority. It arises in the following way: One U Tun Hla, a widower, married Daw Mo, a widow, about 40 years ago. They had children of their respective previous marriages and also some payin property. Daw Mo's children were her two sons, Maung Po Sint and Maung

Po Myit. Shortly after the marriage of Daw Mo and U Tun Hla, Maung Po Sint died leaving a widow who demanded and received the share to which her husband was entitled in Daw Mo's atetpa property (i. e. property which Daw Mo brought from her previous marriage) on account of her marriage with U Tun Hla. Maung Po Sint's share was one half of the half share to which the two sons, Maung Po Sint and Maung Po Myit, were entitled in the estate of their parents on account of Daw Mo's remarriage after the death of their father. U Tun Hla's children by his previous marriage were six in number and they are represented by the eleven defendant-appellants. U Tun Hla died in 1929 and Daw Mo in 1934. There was no issue of the marriage of U Tun Hla and Daw Mo. During their coverture they acquired properties which are referred to as the lettetpwa or hnapazon property of U Tun Hla and Daw Mo. (The distinction between lettetpwa property and hnapazon property is of no importance in this case.)

The suit is by the first six respondents who are the children of Po Myit who predeceased Daw Mo. By a preliminary decree passed by the trial Court, which has been confirmed by the lower Appellate Court, the plaintiff-respondents have been declared to be entitled to the whole of the payin property of Daw Mo (i. e. property which Daw Mo brought to her marriage with U Tun Hla) less the share of Maung Po Sint which the latter's widow had already received, and that they are also entitled to half of the lettetpwa or hnapazon property of U Tun Hla and Daw Mo.

In the present appeal, the correctness of the decision that the first six respondents as representatives of Maung Po Myit are entitled to receive the whole of the remaining payin property of Daw Mo is not disputed. The dispute centres around the division of the lettetpwa or hnapazon property of U Tun Hla and Daw Mo. Even there, it is not disputed that if Maung Po Sint's share in the atetpa property of Daw Mo had not been separated and taken away by Maung Po Sint's widow after Daw Mo's marriage with U Tun Hla, then Maung Po Sint (or his heirs) and Maung Po Myit (or his heirs), as the atet children of Daw Mo or their representatives, would be entitled to a half-share in the estate of Daw Mo and U Tun Hla as against the atet children of U Tun Hla who would be entitled to the other half, under the authority in 3 Rang 438,[6] the correctness of which has never been disputed or doubted.

The question that falls for determination however is whether, in view of the fact that Maung Po Sint's widow had taken away Maung Po Sint's share in Daw Mo's atetpa property by reason of her remarriage, and Maung Po Sint's interest in the remainder of such property and in the property acquired after the marriage of U Tun Hla and Daw Mo was consequently eliminated, Po Myit's representatives were entitled to the entire half-share in the lettetpwa or hnapazon property of U Tun Hla and Daw Mo.

Under the Burmese Buddhist law, a child who takes his share in the estate of his parents after the death of one parent and upon the remarriage of the surviving parent, ceases to have any further claim in the remainder of such estate and in the property acquired subsequent to the remarriage of the surviving parent except probably in the event of the surviving parent dying without leaving a widow or widower or descendants. Therefore it is clear that so far as Maung Po Sint's representatives were concerned they could make no claim whatever in the remainder of the property of Daw Mo's previous marriage or in that of her subsequent marriage as Daw Mo died leaving her surviving other descendants.

A very near approach to the question before us is to be found in 6 Rang 427,[1] in which the parties to the dispute were one of the two children of the previous marriage of the husband who had children by his subsequent marriage and predeceased his second wife. Upon his death one of his atet children, i. e. the children of his previous marriage—a daughter—sued for her share while the other atet child—her brother—did not join her in the claim with the result that she received a one-eighth share in the hnapazon properties of her father and her step-mother. Thereafter the step-mother died. Upon the death of the step-mother her brother sued the half-brothers and half-sisters (children of the father and the step-mother) for his share in the hnapazon property of the father and the step-mother. In that case it was ruled by the Full Bench that as one of the two atet children had already taken her share on the death of their parent the other atet child would be entitled to only half of one-third of the hnapazon property of the couple, upon the footing that the atet children of the husband would be entitled to only one-third of the property acquired by their father with their step-mother upon the death of both as against the children of the marriage of their father and their step-mother. It was observed by Heald J. in the course of his judgment :

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[6] **Maung Po San v. Maung Po Thet, (1926) 13 A I R Rang 28=91 I C 653=3 Rang 438.**

> As the sister has already claimed and received her share and has presumably left the family on receipt of that share, it is arguable that she should not be considered at all, and that the plaintiff, as being the sole child of the first family who continued to be a member of the second family, ought to get the whole one-third share of such of the jointly-acquired property of the second marriage as was left at the death of the step-parent. It is also arguable that he should receive the one-third share diminished by the share which his sister has already taken, and that is the share which the plaintiff actually claims in this case. On the other hand it is arguable that because they were in fact two children of the first family and one has already received her share, the other should receive only half of the one-third share to which the two together would have been entitled. It is difficult to guess what share the Burmese Buddhist law givers would have given in such a case, but on grounds of justice, equity and good conscience I am inclined to think that the plaintiff should be given only half of the one-third share, that is one-sixth of such of the jointly-acquired property of the second marriage as was left at the death of his step-mother.

The ratio decidendi in that case therefore proceeds upon the footing that, as there were two persons who would be entitled to a one-third share, and as one of them had previously taken away what he or she was entitled to, in the circumstances obtaining at that time, in the property which is now to be divided, the other person should not be given a share in that property to which the other would, if he or she had previously not taken in satisfaction of his or her claim, have been entitled.

On behalf of the appellants, it has been urged that the ratio decidendi in 6 Rang 427[1] should be followed and that the first six respondents were not entitled to the full half share in the lettetpwa or hnapazon property of the second marriage. But the present case is fundamentally different from 6 Rang 427[1] in that, in the latter, the property which was to be divided was the property in respect of which one of the atet children had taken away what he or she was entitled to receive in the circumstances obtaining at the time of her claim, and the question arose between an atet child of the deceased couple and his brothers and sisters of the half-blood, while in the present case there is no dispute as regards the rights of the first six respondents in the payin property of Daw Mo which was the only property out of which Maung Po Sint's widow took Maung Po Sint's share, and the question of division of the lettetpwa or hnapazon property of the marriage of U Tun Hla and Daw Mo arises between the atet children of Daw Mo and the atet children of U Tun Hla. It does not appear to be logical that, because Maung Po Sint or his representatives had taken away his share in the property of Daw Mo's previous marriage and Maung Po Sint thus dropped out of the new family, the share to which Maung Po Myit or his representatives are entitled in the property acquired subsequent to Daw Mo's marriage with U Tun Hla should be reduced by the share which Maung Po Sint would have had in it, if he or his representatives had not taken away the share in the atetpa property upon the remarriage of Daw Mo. For these reasons, in my judgment, the rule laid down in *Maung Po Aung's case*[1] is inapplicable to the case under consideration.

It is a settled rule of Burmese Buddhist law that the division of the property of the subsequent marriage between the atet children of the husband and of the wife is per stirpes and not per capita : therefore in the division of such property the numerical strength of the group or family makes no difference to the share which it is entitled to get. If there was only one atet child of Daw Mo he would be entitled to half of the property of Daw Mo and U Tun Hla quite irrespective of the number of the atet children of U Tun Hla. If it was out of the lettetpwa or hnapazon property of U Tun Hla and Daw Mo that Maung Po Sint's widow had taken Maung Po Sint's share (this could not possibly be either in fact or in law), then there might be some reason for withholding from what is due to the atet children of Daw Mo in the present division of the estate, what might have been due to Maung Po Sint's representatives in such estate if he or his widow had not previously taken his share. For these reasons, I am of the opinion that it is just and equitable and consistent with the general principles of division of inheritance under the Burmese Buddhist law to grant Maung Po Myit or his representatives an entire half share in the lettetpwa or hnapazon property of U Tun Hla and Daw Mo. The appeal fails in substance, but we find that the preliminary decree, which has been drawn up by the trial Court, does not contain directions for inquiry into the funeral and testamentary expenses of Daw Mo. This omission should be rectified. Therefore while affirming the preliminary decree passed by the trial Court and confirmed by the District Court in substance, we order a direction to be inserted in the preliminary decree requiring the Commissioner for the taking of accounts, if necessary, to inquire into the funeral expenses of Daw Mo. The appellant to pay the costs of the first six respondents in this appeal.

**Spargo J.**—6 Rang 427[1] is clearly distinguishable from the present case. In that case one of two step-children had secured a share in the jointly acquired property of her father and her step-mother after the death of her father but before the death of the step-mother. After the death of the step-mother the remaining step-child, Maung Kha, sought a share of the same property as that out of which Ma On had previously taken her share and it was held that the fact that Ma On had taken a share of that property previously reduced the share which Maung Kha could secure. But in the present case what Maung Po Sint or his widow had secured was his share in the atetpa property of Daw Mo. He secured no share in the jointly acquired property of Daw Mo and U Tun Hla. He could not, because at the time it had not yet come into existence. What is in question now is the division of this jointly acquired property. *Maung Po Aung's case*[1] can surely furnish no reason for supposing Maung Po Myit's share of the jointly acquired property is affected by the previous partition in which Maung Po Sint obtained his share of the lettetpwa property.

I agree with my learned brother that the two cases can also be distinguished because in *Maung Po Aung's case*[1] the parties were children of the half-blood and in the present case they are not blood relations at all. Neither can I see any reason why the fact that Maung Po Sint had obtained a share of the atetpa property immediately after the marriage of his mother with U Tun Hla should affect Maung Po Myit's share of the jointly acquired property which he claimed after Daw Mo's death. I agree therefore with my learned brother that this appeal must be dismissed in substance subject to the amendments which he has ordered. The procedure adopted by the Court does not appear to have been correct. For the proper procedure reference might be made to 57 Cal 1358[7] at p. 1364.

D.S./R.K. *Appeal dismissed.*

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[7] Balakbala Dasee v. Jadunath Das, (1931) 18 A I R Cal 45=129 I C 566=57 Cal 1358=34 C W N 634.

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## A. I. R. 1938 Rangoon 381

ROBERTS C. J. AND DUNKLEY J.

*U Ba Thaung* — Appellant.

v.

*Daw Oo and others* — Respondents.

First Appeal No. 196 of 1936 and Civil Misc. Appeal No. 120 of 1936, Decided on 16th March 1938, against decree of High Court, *reported in A I R 1937 Rang 170.*

**(a) Buddhist Law (Burmese) — Adoption—Adopted child should generally be brought up by adoptive parents—When this is not done there should be sufficient proof to show fact of adoption.**

Although it is by no means essential that, in these days at least, children should live with their adoptive parents or that if they do not do so the proof of adoption should be deemed incomplete, yet in the case of young children it is a normal characteristic of adoption that the up-bringing of the children adopted should be undertaken by the adoptive parents and where this is not done, one must look carefully at the surrounding circumstances to see whether, when the normal characteristics have been departed from, there is still sufficient proof of the factum of adoption remaining. [P 382 C 1, 2]

**(b) Buddhist Law (Burmese)—Keittima adoption—Proof of actual ceremony or course of conduct essential—Acid test is change of family—In keittima adoption adoptive parent should take charge of adopted child.**

Keittima adoption may be proved either by evidence of a ceremony on a particular date of giving and taking in adoption, or by evidence of a course of conduct which cannot be explained on any other basis than that the children had been adopted with a view to inherit. The acid test of adoption is that the children should leave the family of their natural parents and join the family of their adoptive parents, and, consequently, in a case of a keittima adoption it is essential that the adoptive parents should, from the date of the adoption, make themselves responsible for the upbringing of the children. [P 383 C 1 ; P 384 C 1]

Clark — *for Appellant.*

Foucar and U E Maung—
*for Respondents 1 and 2.*

J. B. Sanyal — *for Respondent 3.*

**Roberts C. J.**—We are both of opinion that each of these appeals must fail. The second appeal is consequential and against the grant of succession certificate to Daw Oo and Daw Noo, the two sisters of the deceased. The first appeal is one arising out of an application for letters of administration by the present appellant on behalf of his natural children, Ma Khin Htwe and Maung Mya Han, who, he alleged, had been adopted by U Maung Maung Gyi and his wife Daw Su, U Maung Maung Gyi being the brother of Ma Ma Gyi, the plaintiff's wife and mother of these two children. U Maung Maung Gyi died in September 1933, and Daw Su died in January 1936, leaving an estate of considerable value. And it has been strongly urged before us that the two children were the keittima children of Maung Maung Gyi and of Daw Su. Asking the question which Lord Dunedin put to himself in 36 I A 192[1] at p. 195 as to whether a distinct occasion could be appealed to as that on which the factum of adoption took place, we notice that in this case a definite date is alleged, namely 3rd January 1932, and the occasion one at which U Maung Maung Gyi asked in terms for the children to be left with him with a view to adoption; he stated to other persons then visiting the house that he desired to adopt the children, and in reply to persons who asked him whether a deed was not necessary, he stated that he was a man of his word and that registered deeds of adoption would only be contemplated by persons who lived in the jungle. I think that this observation attributed to U Maung Maung Gyi, who was a businessman of considerable affluence, is somewhat unlikely on the face of it, especially as it is contended that, though he urged that the children should be adopted and must have known on making inquiry that some public notoriety of the event was desirable, he was about to permit them to return to the house of their natural parents, and yet did not take the precaution of protecting the fact of adoption by means of a deed.

It has been argued before us that it is by no means essential that, in these days at least, children should live with their adoptive parents; nor is it essential that if they do not do so the proof of adoption should be deemed incomplete. Speaking for myself, I am in agreement with that view: but I think that in the case of young children it is a normal characteristic of adoption that the up-bringing of the children adopted should be undertaken by the adoptive parents and that where this is not done, one must look carefully at the surrounding circumstances to see whether, when the normal characteristics have been departed from, there is still sufficient proof of the factum of adoption remaining. In this case we have to look at the evidence of witnesses who state what U Maung Maung Gyi said to them and to bear in mind that though they may be perfectly honest witnesses, it is very easy to exaggerate slightly observations which may have occurred to them to have been of little importance to them when made some years ago. It is, of course, plainly to the interests of every party to this litigation that he or she should succeed. U Ba Thaung naturally would have an interest in seeing his two children adjudged to be the keittima adopted children of this wealthy couple: in the same way, the two sisters, Daw Oo and Daw Noo, are not disinterested parties. The main story in relation to U Maung Maung Gyi's expressed intention to adopt comes, of course, from U Ba Thaung, and he is supported by witness Ranga Raju, who is a creditor of U Ba Thaung for Rs. 2000 for which, it is true, he holds security; and by a colleague who is a lower grade pleader of Myanaung, the same town as that in which U Ba Thaung himself practises—Maung Po Tha—who, in the course of his cross-examination, was confronted with an affidavit which threw not a very satisfactory light upon the remainder of his evidence. In addition to considering what the witnesses say, the learned Judge had to give weight to a number of extraneous facts, which he has commented on with great propriety in his judgment, and, if I may say so, with respect, I agree with all that he has said. It is only necessary to add one or two words.

The plaintiff admits that he paid the school fees of these children and that after the adoption, the name upon the school register of himself as their father remained unchanged. At a much later date, when it came to the shinbyu ceremony and Daw Su, the widowed aunt was asked for expenses in connexion with it, she inquired what it would cost and was told Rs. 300 or Rs. 400, if it were done cheaply: she thereupon made a present of Rs. 300, but she was unable to attend the ceremony. It was not held in Rangoon and Exs. 2, 3 and 4 invitations in connexion with the shinbyu ceremony, do not show her name or describe her in any way as the adoptive parent of the youth. Another matter which has been considered is the letter Ex. B, which was written by Daw Su to the plaintiff at the time of the death of the latter's wife. She says that she is unwell and is sorry she could not attend the funeral and asks, as I read the letter, for the children to come and stay with her. Though she asks for this in pressing terms, I see nothing in that letter which drives one to suppose that the writer had intended to convey the fact that there had already been an adoption of these children, that she had the right to have them with her and that Maung Ba Thaung had ceased to be their parent, except that he was in fact their natural parent although they had been adopted by others. To see therefore whether the evidence given on behalf of the plaintiff carried conviction to mind, the learned Judge had a number of matters which he might well take into consideration, and I think he did take them into consideration very fully and carefully, and having regard to them all, I should by no means be inclined to disagree with him that the plaintiff had not proved the factum of adoption either in January 1932 or indeed at any other time.

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[1] Ma Ywet v. Ma Me, (1909) 36 Cal 978=36 I A 192=3 I C 797=10 C L J 253=14 C W N 111=5 L B R 118 (P C).

Some small additional pieces of evidence by which we were sought to be influenced have been adduced. One such fact is that small presents were given by the uncle and aunt to the two children on their earlier visit to the house. And on that occasion the aunt decided to have a photograph taken and asked her sister and some neighbours to sit by her and the two little children were seated in front of her. It is said that this photograph was in commemoration of the adoption ceremony. If that were so, it seems to me a very strange thing that those who took part in it did not know the fact of the adoption at all. In all the circumstances therefore there are no grounds for interference in this case. Each of these appeals will accordingly be dismissed. The two appeals must be considered as one for the purpose of costs. We think that ten gold mohurs will be sufficient costs.

**Dunkley J.** — Keittima adoption may be proved either by evidence of a ceremony on a particular date of giving and taking in adoption, or by evidence of a course of conduct which cannot be explained on any other basis than that the children had been adopted with a view to inherit. In this case the appellant has chosen to rely on an alleged ceremony which is said to have taken place on 3rd January 1932. He says that these children were adopted by U Maung Maung Gyi and Daw Su during a visit which he made with the children to their house at Rangoon at that particular time. He admits that when he came to Rangoon no suggestion had yet been made by U Maung Maung Gyi or Daw Su that they wished to adopt these children and the idea of giving the children in adoption was not present in his mind. His evidence that an adoption did take place on this visit is supported by that of only a single witness, namely Ma Hla Myaing. Although a number of persons were present in the house on this occasion and photographs of the house party were taken, apparently no member of this house party, except this one particular lady, Ma Hla Myaing, was ever informed of the adoption which is said to have taken place. Accepting this evidence at its highest value, there obviously was not given to this alleged ceremony that publicity which is necessary to constitute a valid adoption. The other evidence, which is said to support the fact that an adoption did take place on this occasion, refers to what took place at Myanaung at the house of the appellant when his wife Ma Ma Gyi died at the end of July 1932. A number of witnesses have given evidence mainly as to what Ma Ma Gyi said on her death-bed evidence which, so far as the adoption of the children is concerned, is entirely irrelevant. The only relevant evidence with regard to this matter is in respect of a conversation which is alleged to have taken place between the appellant and U Maung Maung Gyi, and this evidence is conflicting as to whether this conversation referred to an adoption which had already taken place or to a proposed adoption which was to take place at a future time. That evidence is fatal to the appellant's case that there was a concluded adoption in January.

The evidence as to conduct is entirely in favour of the respondents. Although this adoption is said to have taken place at the beginning of 1932, and Daw Su did not die until January 1936, in the course of these four years not a single incident can be referred to which would suggest that U Maung Maung Gyi and Daw Su ever regarded these children as their own children, or ever contributed anything towards their up-bringing. It has been strenuously argued before us that there is no reason why adopted children should live in the house of their adoptive parents, but of course in the case of adoption of young children that would be the natural consequence of adoption. But in any case the acid test of an adoption is that the children should leave the family of their natural parents and join the family of their adoptive parents and consequently, it seems to me that in a case of a keittima adoption it is essential that the adoptive parents should, from the date of the adoption, make themselves responsible for the up-bringing of the children. In this case it is not even suggested that U Maung Maung Gyi or Daw Su contributed anything towards the maintenance of these two children. Consequently I agree with my Lord that these appeals fail and must be dismissed.

B.D./R.K. *Appeals dismissed.*

## A. I. R. 1938 Rangoon 384

BAGULEY AND MOSELY JJ.

*Shwe Phone and others* — Applicants.

v.

*Chairman, District Council, Mergui* — Opposite Party.

Criminal Revn. Nos. 606-B, 607-B, 608-B and 609-B of 1937, Decided on 8th February 1938, Review of order of First Addl. Special Power Magistrate, Mergui, D/- 1st September 1937.

**(a) Burma Ferries Act (2 of 1898), S. 15—Ply for hire — Person waiting for public regularly making a business of it plies for hire.**

A person is said to ply for hire a ferry when he waits or attends on the bank or in the stream regularly, (that is to say not uninterruptedly, for it might be done periodically, but regularly in the sense of repeatedly, making a business of it), for hire by the public or by anybody who chooses to employ him to cross the river or convey goods across the river : *A I R 1937 Rang 275, Rel. on.* [P 385 C 1]

**(b) Burma Ferries Act (2 of 1898), S. 12 — Rules under, R. 4-A — Scope.**

Rule 4-A of the rules framed under the Act is ultra vires. [P 385 C 2]

Eunoose — *for Applicants.*

**Mosely J.** — These cases came up for hearing before Baguley J., and were referred by him to this Bench. We are dealing here with four applications, Criminal Revn. Nos. 606-B, 607-B, 608-B and 609-B of 1937, in which the applicants were convicted under S. 15/27, Burma Ferries Act, and fined Rs. 5 each. The applicants are employees at two different ferries of the contractor for the mail from Ye to Mergui. In Criminal Revn. No. 606-B of 1937, the accused boatman in charge of the contractor's boat used to carry the mail parcels across the river at the Tamok-Lut Lut ferry. He admitted conveying passengers in "a hired boat", by which I take it was meant in the contractor's boat for hire. In Criminal Revn. No. 607-B of 1937, the two accused boatmen of the contractor's boat at the Kywegu-Kyaukpya ferry admitted conveying or carrying passengers, but said that they were servants of Government officials whom they carried free. In Criminal Revn. No. 608-B of 1937, the accused boatman at the Tamok-Lut Lut ferry admitted carrying passengers on two occasions one day, and on another occasion the next day in the mail parcel boat, but said that he did it free, and in Criminal Revn. No. 609-B of 1937 the same accused made the same plea on a similar charge. In these last three cases the Magistrate convicted the accused without deciding whether they carried for hire or not. He quoted and misunderstood an executive instruction by the Commissioner of the Moulmein Division which said that passengers could not be carried in the contractor's boat across the ferry on payment of the usual tolls without the consent of the lessee or the Chairman of the District Council, *vide* S. 15, Burma Ferries Act. But the question to be decided in these last three cases was whether any tolls had been paid, for I understand the Commissioner's letter as meaning tolls paid by the passengers to the contractor. Section 15 of the Act says as follows :

> No person shall ply a ferry boat for hire or establish, maintain or work a ferry, or convey for hire any passenger, animal, vehicle or goods, between points within, or within two miles from, the limits of a public ferry except with the sanction of the Superintendent or of the lessee of such public ferry : Provided that the Local Government may, by notification, exempt any persons or classes of persons from the operation of this Section.

It seems to me perfectly clear that in the first case, Criminal Revn. No. 606-B of 1937, the applicant-accused, Shwe Phone, admitted conveying passengers for hire within the limits of a public ferry without the aforesaid sanction, and his application must be dismissed. As regards the other three applications, there was no proof that the accused conveyed any passenger for hire, which was the offence with which they were charged. The question might however arise as to whether they plied a ferry boat for hire. The expression "to ply for hire" was considered in Criminal Revn. No. 31-B of 1937[1] by Spargo J. That was a case where the contractor himself who conveyed the parcels between Ye and Tavoy was prosecuted by the lessee of the Ye ferry for conveying the parcels for hire across that ferry. It was held that he could not be prosecuted by reason of the provisions of Rule 4 framed under the Burma Ferries Act, because he did not "ply for hire". I would agree in the present connexion with what was there said about "plying for hire". A person is said to ply for hire a ferry when he waits or attends on the bank or in the stream regularly, (that is to say not uninterruptedly, for it might be done periodically, but regularly in the sense of repeatedly, making a business of it), for hire by the public or lay anybody who chooses to employ him to cross the river or convey goods across the river. I would not necessarily agree with what was said there, that because the accused in that case only crossed once in each direction daily, he was not plying for hire, but I would agree that it is an essential part of the term that the person plying for hire offers his services to the public. We are not concerned in the present case with Rule 4 or as it is now, R. 4-A. Rule 4 was omitted from the rules framed by Local Government Notification No. 188 of 26th October 1936 and was not re-enacted until Notification No. 176 of 21st September 1937, when it was re-enacted as R. 4-A.

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[1] Lim Twa Kee v. M. Ismail, *reported in* (1937) 24 A I R Rang 275=170 I C 236=38 Cr L J 872.

Rule 4-A reads as follows :

> 4-A. The lessee of a ferry shall not interfere with any person swimming cattle across the stream or with any boat employed by its owner in conveying himself, his property or any other person or property across the stream, provided such boat does not ply for hire.

The offences now being considered were committed in the interval, after R. 4 was omitted and before it was re-enacted as R. 4-A. As it was not proved in one of these cases, No. 607-B, that any hire was taken, or that the two accused made a practice of soliciting custom for hire, it cannot be said that the accused plied a ferry boat for hire any more than that they conveyed for hire any passengers. The application of the applicants in Criminal Revn. No. 607-B will be allowed, and they will be acquitted and the fine, if paid, will be refunded to them. The applicant in Criminal Revn. No. 606-B admitted the offence. The applicant in Nos. 608-B and 609-B Mg. Pyo Nyein was shown to have taken passengers three times in one day and once the next day. He must be presumed not to have done it gratuitously, and was therefore both conveying for hire and plying for hire. The applications of the applicants in Criminal Revn. Nos. 606-B, 608-B and 609-B will be dismissed. It is desirable however, I think, to say something in this connexion about R. 4-A. This rule purports in the notification to have been made under S. 12, Burma Ferries Act. S. 12 provides that the Local Government may frame rules consistent with the Act : (a) for the superintendence and management of . . . ferries, (b) to (i) for other matters *ejusdem generis*, and (j) generally for carrying out the purposes and objects of this Act.

It certainly cannot be said that R. 4-A is a rule consistent with the Act framed for carrying out its purposes and objects; that could only be said after issue of a notification under the Proviso to S. 15 exempting persons from the operation of the Section. But it would be unnecessary to frame such a rule as R. 4-A if a notification were properly issued under the Proviso to S. 15. It may be said that R. 4-A, as framed, would amount to exemption, for if a lessee cannot interfere with any boat employed by its owner in conveying property, no doubt the lessee could not prosecute the owner. But as framed under S. 12, the rule is clearly ultra vires. It would be simpler, and in accordance with law, if a notification were issued under the Proviso to S. 15 exempting such classes of persons.

**Baguley J.** — I agree.

B.D./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 385

BAGULEY AND MOSELY JJ.

*K. K. K. M. Muthukaruppan Chettyar* — Appellant.

v.

*P. S. T. Sellami Achi* — Respondent.

First Appeal No. 163 of 1937, Decided on 17th February 1938, against order of Dist. Court, Henzada, D/- 2nd September 1937.

**(a) Civil P. C. (1908), O. 21, R. 10, S. 2 (5) — Decree transferred for execution to another Court—Application for execution initiates proceedings in execution — Receipt of decree on transfer is mere ministerial act—Decree transferred to Burma Court becoming foreign decree at the date of application for execution, by reason of separation of Burma—Burma Court cannot execute it — S. 10, Govt. of Burma Adaptation of Laws Order of 1937 does not apply.**

Where a decree is transferred for execution to another Court, it is the application for execution which initiates the proceedings in execution. The receipt of the decree on transfer is a mere ministerial act. [P 386 C 2]

A decree passed by the Sub-Judge, Devakotta, Madras, was transferred for execution to the Additional District Judge, Henzada, Burma. The date of order of transfer was 17th October 1936 and the date of receipt was 29th October 1936. The application for execution was made on 19th May 1937, i. e. after separation of Burma, which took effect from 1st April 1937 :

*Held* that the application for execution having been made after separation of Burma, the decree of the Devakotta Court became a foreign decree and as such the Burma Court had no jurisdiction to execute it. S. 10, Govt. of Burma Adaptation of Laws Order of 1937 did not apply as it referred to substantive rights acquired and not to mere matters of procedure. The substantive right of the decree-holder to get his money from the judgment-debtor was not touched. [P 386 C 2; P 387 C 1, 2]

**(b) Civil P. C. (1908), S. 50 (2) — Question as to whether application to add legal representative of a deceased judgment-debtor should be made to the Court passing decree or to Court which is executing decree is one of procedure and not one of jurisdiction—In case of non-compliance with procedure defect might be waived.**

The question as to whether an application to add the legal representatives of a deceased judgment-debtor should be made to the Court which passed the decree or could be made to the Court executing the decree is one of procedure and not of jurisdiction. The jurisdiction of the executing Court over the subject-matter continues as before but a certain procedure is prescribed for the exercise of such jurisdiction. If there was non-compliance with such a procedure, the defect might be waived. No litigant can have a vested right in a matter of procedure : *A I R 1928 P C 162 ; A I R 1938 Rang 130 ; (1861) 30 L J Ex 40 and (1876) 3 Ch D 62, Rel. on.* [P 387 C 1, 2]

P. K. Basu — *for Appellant.*

E. Hay — *for Respondent.*

**Mosely J.** — This is an appeal from an order of the Additional District Judge of Henzada dismissing an application for execution of a decree passed by the Court of the Subordinate Judge, Devakotta, Madras, which had transferred the decree to the Henzada Court for execution. The ground on which the learned Additional District Judge dismissed the application was this, that the judgment-debtor had died in the interim between the date of receipt of the application for execution on transfer and the date of the application for execution, and no application had been made to the Devakotta Court for the addition of legal representatives. In the order of the District Court it was also mentioned that (a more vital) objection was made, namely that the decree was one of a foreign Court and incapable of execution in Burma, in any event the application for execution having been made after separation. This aspect of the case was merely mentioned at the opening of the judgment of the learned Additional District Judge : it was not afterwards alluded to. It is however relied on in great part by the learned advocate for the respondent judgment-debtors in this appeal. The date of the order of transfer was 17th October 1936 and the date of receipt 29th October 1936. Under O. 21, R. 10, where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree, or if the decree has been sent under the provisions of S. 39 to the Court to which it has been sent. It is clear from this Section that it is the application for execution which initiates the proceedings in execution. The receipt of the decree on transfer is a mere ministerial act. O. 21, R. 10 (a) provides that if no application is made by the decree-holder within six months of the date of receipt of the papers the Court shall return them to the Court which passed the decree with a certificate of the circumstances. This period of six months had expired on 29th April 1937, and as the District Court itself remarked, the copy of the decree should have been returned before the application was actually made.

The application for execution was only made on 19th May 1937. Separation took effect from 1st April 1937. The decree of the Devakotta Court had by then become the decree of a foreign Court and the judgment a foreign judgment within the definition of S. 2 (5) and (6), Civil P. C. Under S. 44-A which came into force on 1st November 1937, *vide* Judicial Department Notification No. 203, dated 6th November 1937, it is only where the foreign Court which passed the decree belongs to a territory which has reciprocated in this respect with Burma that a copy of its decree may be filed in the District Court in Burma so as to become executable here as if it had been passed by the District Court. The application for execution in question was filed before the date of that Notification; but that is immaterial as at the date that it had been filed, the District Court had no jurisdiction to execute decrees of a foreign Court, while even if the application had been made after 1st November, no reciprocation has yet been made with Burma by India or any part of it. Mr. Bose for the appellant has quoted Ss. 10 and 11 of the Government of Burma Adaptation of Laws Order of 1937. I do not think that S. 11 is relevant. S. 10 says that nothing in this order shall affect any right, privilege, obligation or liability already acquired under any Burman law;

but this refers clearly to substantive rights acquired and not to mere matters of procedure in which rights cannot be acquired.

As regards the point dealt with by the learned Additional District Judge, there was a conflict of authorities on the point as to whether application to add legal representatives of a deceased judgment-debtor must be made, *vide* S. 50, sub-s. (2), Civil P. C., to the Court which passed the decree or could be made to the Court executing the decree also. This controversy was set at rest in 55 I A 227,[1] where their Lordships of the Privy Council held that the matter was one of procedure and not of jurisdiction. The jurisdiction, it was said, of the executing Court over the subject-matter continued as before, but a certain procedure was prescribed for the exercise of such jurisdiction. If there was non-compliance with such procedure the defect might be waived. I might note here that the learned Judge should not have fallen into the common and slipshod error of quoting an author's Commentary on the Civil Procedure Code instead of quoting the judgments of the Courts of India to be found on the subject after very little search there or in any annotated Code. The Commentary cited, it may be added, is not usually considered one of any particular weight. For these reasons this appeal fails and will be dismissed with costs; advocate's fee three gold mohurs.

**Baguley J.**—I agree but would put the matter shortly in this way. In my opinion execution proceedings can only start with an application for execution: *vide* O. 21, Rr. 10 and 11. In this case the application was not filed until after the Court had ceased to have jurisdiction to deal with it. Before 1st April 1937, the execution proceedings could have been initiated in Henzada and had they been initiated, it is possible, though I have not considered the matter, that the result would have been different. In this case they were not initiated until the Court ceased to have jurisdiction to deal with them: as I cannot agree that the receipt of a copy of the decree gives the receiving Court a jurisdiction to do anything before an application was made for it. Whether the plaintiff executes his decree in one Court or another is a matter of procedure. In a recent Full Bench case of this Court, not yet published, Civil Revn. No. 136 of 1937,[2] a case of a similar nature to the one before us, it was pointed out, relying upon the cases in (1876) 3 Ch D 62[3] and (1861) 30 L J Ex 40[4] that no litigant can have a vested right in a matter of procedure. For this reason S. 10 of the Adaptation of Laws Order cannot apply. The substantive right of the appellant to get his money from the respondent is not touched; he can execute his decree in any Indian Court or he can file a suit in the Henzada Court or any other Court in Burma, using the judgment which he has obtained as a foreign judgment on which to sue for a decree; no substantive right is taken away by refusing to allow him the right of procedure of executing his decree in the Henzada Court. For these reasons I agree that the appeal must be dismissed.

R.M./R.K. *Appeal dismissed.*

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[1] Jang Bahadur v. Bank of Upper India, (1928) 15 A I R P C 162=109 I C 417=55 I A 227=8 Luck 814 (P C).

[2] Arunachallam Chettyar v. Valliappa Chettyar, *Since reported in* (1938) 25 A I R Rang 130 =175 I C 275=1938 R L R 176 (F B).

[3] Republic of Costa Rica v. Erlanger, (1876) 3 Ch D 62=45 L J Ch 145.

[4] Wright v. Hale, (1861) 6 H & N 227=30 L J Ex 40=6 Jur (N S) 1212=3 L T 444=9 W R 157.

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## ✲ A. I. R. 1938 Rangoon 387

BAGULEY AND MOSELY JJ.

*Abdul Kader and others* — Appellants.

v.

*R. M. P. Chettyar Firm* — Respondent.

Civil Misc. Appeal No. 42 of 1937, Decided on 16th February 1938, against order of District Court, Thaton, D/- 22nd May 1937.

✲ **(a) Civil P. C. (1908), O. 43, Rule 1 (s), O. 40, R. 1—Order dismissing application to remove receiver is appealable.**

An order dismissing an application to remove a receiver falls under O. 40, R. 1 and as such is appealable under O. 43, R. 1 (s): *A I R 1926 Cal 593, Rel. on; A I R 1916 Cal 824, Not foll.*

[P 388 C 2, P 389 C 1]

**(b) Civil P. C. (1908), O. 40, R. 1 (2)—Two sets of defendants joined in suit on mortgage — Receiver appointed over land covered by mortgage—One set of defendants subsequently struck off as being not necessary parties — Defendants so discharged applying for removal of receiver and for land being released to them —They are entitled to order prayed for, if they were in possession when receiver was appointed and if the other parties to suit had no right to remove them.**

**Where two sets of defendants are joined in a suit on a mortgage and the mortgagee gets a receiver appointed to take charge of certain land covered by the mortgage, but subsequently one set**

of defendants are struck off the record as being not necessary parties to the suit, and the defendants so discharged apply that the receiver should be discharged and that the land under his possession should be released to them, they are entitled to the order prayed for, if it is found that they were in possession of the land at the time the receiver was appointed and if none of the other parties had the right to remove them from possession: *A I R 1924 Rang 181, Expl.* [P 389 C 1]

E. Hay — *for Appellant.*

Surridge — *for Respondent.*

**Baguley J.** — This is an appeal against an order passed by the District Judge of Thaton refusing to discharge a receiver and restore certain lands to the appellants. The proceedings arose out of a mortgage. The R. M. P. Chettyar Firm filed a suit on a mortgage against thirty-two defendants who might be referred to as group *A* and group *B*. At the same time they applied for the appointment of a receiver to take charge of certain land covered by the mortgage. A receiver was appointed. After this, group *B* defendants were ordered to be struck off the record by the District Court and the order striking the group *B* defendants off the record was confirmed by this Court in Civil Revision No. 254 of 1936.* The defendants group *B* thereafter ceased to be parties to the mortgage suit. It was after they had ceased to be parties to the suit that they filed an application asking that the appointment of the receiver be cancelled, that the receiver be discharged from his possession and that the land and property be released to them. Affidavits were filed and then without further investigation the order which is the subject-matter of the present appeal, was passed dismissing the application. The defendants whom I have referred to as group *B*, now come to this Court in appeal.

The first point that was raised was whether an appeal lies. It is urged that this is an order and that it is not an order which is made appealable under the Code as it is not an order which is referred to in O. 43, R. 1. Under this Rule, sub-cl. (s), an order under R. 1 or R. 4 of O. 40 is appealable, but it is claimed that the present order is not one passed under O. 40, R. 1, or R. 4; and no other orders under O. 40 are appealable. It is quite clear that this order cannot come under R. 4. R. 1 empowers the Court to appoint a receiver, to remove any person from possession or custody of the property, to commit the same to the possession, custody or management of the receiver and to confer certain powers upon the receiver. It is argued that what was asked for here was an order to remove the receiver and the application was dismissed; so the order cannot be said to have been passed under O. 40, R. 1. This reasoning, in my opinion, is fallacious. S. 16, Burma General Clauses Act says:

> Where, by any Act, a power to make any appointment is conferred, then, unless a different intention appears, the authority having power to make the appointment shall also have power to suspend or dismiss any person appointed by it in exercise of that power.

In my opinion O. 40, R. 1 must therefore be regarded as giving authority to the Court to remove the receiver, and if an application is made to remove the receiver then the dismissal of that application must be regarded as an order passed under O. 40, R. 1, as the right of appeal is given generally to all orders passed under O. 40, R. 1. If O. 43, R. 1 is examined carefully it will be seen that in some cases the right of appeal is given generally to all orders under a certain rule, but in others the right of appeal is only given to certain orders passed under that rule. For instance, O. 43, R. 1 (v) makes appealable an order refusing the grant of a certificate under R. 6, O. 45 but apparently does not make appealable an order under that Rule granting the same kind of certificate. O. 43, R. 1 (t) makes appealable an order of refusal to re-admit or to re-hear an appeal, but does not make appealable an order allowing re-admission or re-hearing. We were referred to 20 C W N 789.[1] In the judgment occurs the following passage:

> This is not a case of an application for appointment of a Receiver or of a refusal to appoint a Receiver. In substance it is one for the removal of a Receiver who has already been appointed. Therefore I think that no appeal lies.

No reasons whatsoever are given for this opinion. A different view however was taken by the Calcutta High Court in 53 Cal 319[2] in which it is laid down that an appeal lies against an order removing a Receiver, and this case has been accepted and officially reported, whereas the other case has not; in addition to this the judgment in this case gives full reasons for coming to the conclusion to which it came, and the General Clauses Act has been referred to as giving the right. I think it unnecessary to give further authority— I hold that an appeal lies. To turn now to the merits of the case, the present appellants whom I have referred to above as group *B*, are no longer defendants in the mortgage case. They are no longer parties to the case. If they were in possession of the land at the time when the Receiver took charge of the land, they were wrongly ousted by the Receiver unless they were liable to be ousted either by the plaintiff or by the other defendants in the case. This I think is manifest from O. 40, R. 1 (2) which says:

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* *See* A I R 1937 Rang 351.

1. Eastern Mortgage and Agency Co. Ltd. v. Premananda Saha, (1916) 3 A I R Cal 824=34 I C 789=23 C L J 217=20 C W N 789.
2. Sripati Datta v. Bibhuti Bhusan Datta, (1926) 13 A I R Cal 593=92 I C 940=53 Cal 319.

> Nothing in this Rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

The learned Judge in his order refers to 1 Rang 770.[3] In that case a Receiver was appointed to properties belonging to *A* and also to properties belonging to *B* and *B* was subsequently held to be wrongly joined and dismissed from the suit. The Court ordered the properties to be returned to *B* and held that the Receiver's possession was wrongful ab initio. The learned Judge referring to this case says:

> It is not known whether or not the property mentioned as *B's* in the case under reference was under a mortgage, or whether the regular suit was of the same nature as the present one.

He goes on to say:

> In the present suit, the property over which the Receiver was appointed is under very heavy mortgage to the petitioners who are contesting the title set up by the present respondents adverse to them as well as to the mortgagors.

The learned Judge appears to have overlooked the fact that the property in itself was not under mortgage. What was claimed to be mortgaged was the right, title and interest of the defendants who are still defendants in the case. The defendants who have been dismissed from the case are now in the position of complete outsiders. This being so, if the property was in the actual possession of the group *B* defendants and if neither the plaintiff nor the group *A* defendants had any present rights to remove the group *B* defendants from possession of the property, the Court, by appointing a Receiver, had no right to oust them. The learned Judge seems to have gathered from the judgment of this Court in Civil Miscellaneous Appeal No. 27 of 1935, that the defence in the regular suit had not disclosed any prima facie title in the group *B* defendants. But that was not conclusive nor considered final judgment. If the present appellants were in possession and if none of the other parties to the suit had the right to remove them from their possession, then the Receiver could not remove them from their possession and should now be ordered to give the land back to them. No full enquiry has as yet been held with regard to the fact or the nature of the possession at the time that the Receiver was appointed and this will have to be held before orders can finally be passed on the present application. For these reasons I would allow the appeal, set aside the order dismissing the application for the removal of the Receiver and would direct that the District Court do hold an enquiry: (1) as to whether the present appellants were in possession of the land at the time the Receiver was appointed and (2) if they were in possession, whether, at that time, the plaintiff or the other defendants had the right to remove them. After holding this enquiry the Judge will pass orders keeping in mind the provisions of O. 40, R. 1 (2). Costs of this appeal, advocate's fee five gold mohurs, will be decided by the ultimate result of the application for removal of the Receiver. If appellants are successful, they will get their costs from the respondents; if the appellants are unsuccessful, then they will bear respondents' costs of this appeal.

**Mosely J.** — I agree.

R.M./R.K. *Order set aside.*

## A. I. R. 1938 Rangoon 389

MACKNEY J.

*Daw Dwe and another* — Applicants.

v.

*U San Hla* — Respondent.

Civil Revn. No. 158 of 1937, Decided on 2nd December 1937, against order of Township Court, Insein, D/- 8th March 1937.

**Civil P. C. (1908), O. 23, R. 1 (2) (a) and (b) — Cl. (b) is not limited to cases in which Court thinks that suit must necessarily fail — There may be other sufficient grounds on which it is proper to allow plaintiff to withdraw suit.**

**The two sub-cls. (a) and (b) of O. 23, R. 1 (2) are worded in an entirely different manner and are intended to cover different circumstances. Cl. (b), which omits any reference to a failure of suit, is not limited to cases in which the Court thinks that the suit must necessarily fail. There may be other sufficient grounds on which it is proper to allow the plaintiff to withdraw his suit.**

**[P 390 C 2]**

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[3] **M. S. Naikwara v. Ma Aye Byu, (1924) 11 A I R Rang 181=79 I C 724=1 Rang 770.**

Where a plaintiff suing for recovery of money due by way of interest on a mortgage, together with the amount of municipal taxes paid by him to prevent the land being sold for default, subsequently applies for leave to withdraw his plaint with liberty to bring a fresh suit so as to include in his claim the principal amount due on the mortgage as well, the Court granting such leave exercises its discretion properly. It is quite possible that the original plaint might appear defective in its method of seeking to attain the plaintiff's desire and that the plaintiff seeking to recover the interest due without losing his rights as mortgagee feared that to persevere in the suit might result in its becoming impossible for him to recover the principal amount. That is a circumstance which justifies the Court in allowing him to withdraw the suit with leave to bring a fresh suit including the prayer for recovery of interest as well as one for recovery of the principal : *A I R 1935 Bom 28 ; A I R 1924 Rang 249 and 10 Mad 160, Rel. on.* [P 391 C 2]

N. K. Bhattacharyya — *for Applicants.*
Anklesaria — *for Respondent.*

**Order.**—The plaintiff-respondent, U San Hla, sued the defendants-applicants, Daw Dwe and Peer Ahmed, in the Township Court of Insein for recovery of a sum of money being interest due on a mortgage by the defendants in his favour together with the amount of the municipal taxes paid by the mortgagee in order to prevent the land from being sold for default. The plaintiff announced in his plaint that at present he asked only for this relief reserving his claim to repayment of the principal of Rs. 500 to a later date. In the course of the proceedings the plaintiff, who had originally not been represented by an advocate, engaged a lawyer and on his advice filed an application for leave to amend his plaint so as to include the recovery of the amount due on the mortgage; that is to say he wished to convert the suit into a mortgage suit. The learned Township Judge declined to allow an amendment because he thought that to do so would be to alter the title of the suit entirely. He was of the opinion that the plaintiff's proper course was to obtain leave of the Court to withdraw his plaint with liberty to institute a fresh suit in respect of the mortgage suit in question. Accordingly the plaintiff prayed for such leave and the Court, after hearing the parties, granted leave to withdraw with liberty to file a fresh suit. In his order the learned Township Judge added the words "with costs". This was interpreted by the drawer of the decree to mean that it was the defendants that had to pay the costs of the plaintiff. This is obviously a mistake as is admitted by the learned counsel for the respondent. I am quite sure that the learned Township Judge intended that the plaintiff should pay the costs of the defendants. His order must be altered to make this clear. The applicants object to the order of the Township Court on the ground that in granting leave to withdraw, it exceeded its powers under O. 23, Rule 1, sub-rule (2), Civil P. C., which reads as follows :

> (2) Where the Court is satisfied : (a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

Learned counsel for the applicants argues that the weight of authority is in favour of the interpretation of the phrase "other sufficient grounds" in the sense of grounds ejusdem generis with a formal defect. He argues that it cannot by any means be maintained that there was anything like a formal defect in the plaint as originally filed. I am myself inclined to doubt that the effect of this clause should be too rigorously restricted. The two sub-cls. (a) and (b) are worded in an entirely different manner and it seems to me that they are intended to cover different circumstances. With great respect I agree with the observations of the learned Chief Justice of the High Court of Bombay in 59 Bom 114.[1] He points out that Cl. (a) says that the Court must be satisfied that the suit must fail by reason of some formal defect and Cl. (b) omits any reference to a failure of the suit. He observes :

> I have no doubt whatever that Cl. (b) is not limited to cases in which the Court thinks that the suit must necessarily fail. There may be other sufficient grounds on which it is proper to allow the plaintiff to withdraw his suit. No doubt the two clauses must be read together, and one has in Cl. (a) an illustration of the sort of reason which the Legislature thought would be sufficient, and in that way Cl. (a) may, to some extent, limit the generality of the words in Cl. (b), but I am not prepared to go further than that in limiting the very wide discretion which is conferred by Cl. (b).

The only case of this High Court which has been brought to my notice is the case in 2 Rang 66.[2] In this case the plaintiff had instituted two suits on the same date of such a nature that it was possible that if he were successful in the first he might be debarred under the provisions of O. 2, R. 2, Civil P. C., from succeeding in the second suit. He applied to the Court for liberty to withdraw both suits and institute a fresh suit in respect of the subject-matter of the two suits. His applications were rejected and the plaintiff applied to this High Court to revise the order rejecting the applications. Lentaigne J. observed:

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[1] **Bai Mahakor v. Bhikhabhai Sankal Chand, (1935) 22 A I R Bom 28 = 154 I C 553 = 59 Bom 114=36 Bom L R 1110.**

[2] **Sahib & Co. v. K. M. Adamsa, (1924) 11 A I R Rang 249=81 I C 465=2 Rang 66.**

> In my opinion the provisions of O. 23, R. 1 (2), are intended to authorize the granting of relief inter alia in cases in which the formal defects rendering the relief desirable are defects of legal formalities prescribed by the Code or other such legal defects, and that in suitable cases relief should be granted whether the defects arise from a mistake of law or from a mistake of fact. I may also add that even if the plaintiff did in fact realize that there was a doubt as to his legal right to institute two suits instead of one, I do not think that it would be any ground for refusing to allow him to correct a bona fide mistake.

Lentaigne J. further observed :

> The expression 'formal defect' must be given a very wide and liberal meaning and presumably as connoting defects of various kinds which are not defects affecting the merits of the case on substantial questions (including equities and estoppels) reasonably arising between the parties. The expression, as used in this Rule, appears to be capable of such a wide meaning, and it is difficult to fix on any more restricted meaning which could have been reasonably intended by the Legislature.

Lentaigne J. then at page 78 dealt with the argument

> that though the second suit might fail by reason of a formal defect under O. 2, Rule 2, the same formal defect does not apply to the first suit which could be decreed in full notwithstanding any defect alleged in the case. So far as Cl. (a), O. 23, Rule 1 (2), is concerned, that might appear to be correct as regards the claim as originally framed in such suit ; but I think that the case would come within Cl. (b), when it is admitted or contended by the defendant that the cause of action of the first suit includes the claim of the second suit and that such portion of the claim on such cause of action must fail if the plaintiff is not given relief under O. 23, R. 1 (2). An amendment of the plaint might save a portion of that wider claim but it would not save it all.

These remarks seem to be not inapplicable to the present case. Lentaigne J. accordingly set aside the order of the lower Court refusing to grant leave to withdraw and institute a fresh suit. In the course of his judgment, Lentaigne J. referred to 10 Mad 160.[3] I notice that this was a suit brought to recover the principal and interest due on a mortgage, which had been instituted after a suit brought to recover the interest only had been withdrawn with permission to file a fresh suit. It was argued that in spite of leave to withdraw having been given the second suit was barred. With this aspect of the case we are of course not concerned. But it is clear from the observations of the learned Judges who decided the case that they approved of the order of the original Court in allowing the first suit to be withdrawn. They say :

> The obvious intention of the Court which made the order was to allow the respondent to sue for principal and interest instead of compelling him to proceed with his claim for interest alone, in which case any second suit for the principal would have been met by the plea that the suit is barred by S. 43 of the Code (now O. 2, R. 2) ; and if the contention now raised were to prevail, the anomaly would be presented of an order made by a competent Court as to a matter within its discretion to which order no legal effect would be given. S. 373 (now O. 23, R. 1) was presumably intended to allow of mistakes or omissions being corrected within the discretion of the Courts concerned, and we do not think it necessary to hold that Sec. 43 is a bar to the entertainment of the present suit.

In the present case it is quite possible that the respondent's plaint might appear defective in its method of seeking to attain the plaintiff's desires. The plaintiff who wishes to recover the interest due without losing his rights as mortgagee feared that to persevere in the suit might result in its becoming impossible for him to recover the principal amount. That is surely a circumstance which would justify the Court in allowing him to withdraw his suit with leave to bring a fresh suit including the prayer for recovery of interest as well as one for recovery of the principal. Having regard to the consequences which might ensue, there is no doubt that his plaint might be held defective in form, and adopting the interpretation approved by the learned Chief Justice of Bombay in the case cited above, I am of the opinion that the Township Court exercised its discretion properly in granting the leave. This application therefore is disallowed. The order of the Township Court is confirmed save that it shall be altered so as to make it clear that it is the plaintiff who should pay the costs in the Township Court in any case and as a condition of availing himself of the leave. The applicants shall pay the costs in this Court: advocate's fee two gold mohurs.

R.M./R.K. *Application dismissed.*

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[3] Venkata Shetti v. Ranga Nayak, (1887) 10 Mad 160.

## A. I. R. 1938 Rangoon 392

### FULL BENCH

ROBERTS C. J., DUNKLEY AND BRAUND JJ.

*H. C. Dey* — Applicant.

v.

*Bangalee Young Men's Co-operative Credit Society Ltd.* — Respondents.

Civil Revn. No. 117 of 1938, Decided on 22nd July 1938, against decree of Small Cause Court, Rangoon, D/- 7th March 1938.

**(a) Burma Co-operative Societies Act (6 of 1927), S. 50 (2) (f) — Rules made under — Burma Co-operative Societies Rules (1931), R. 15—Jurisdiction of Civil Courts is barred.**

The rules made under the Burma Co-operative Societies Act take away by implication the jurisdiction of the Courts in respect of disputes contemplated under R. 15 : *(1832) 8 Bing 394, Rel. on; A I R 1937 Rang 363, Expl.* [P 393 C 1]

**(b) Civil P. C. (1908), S. 9 — Jurisdiction — Special tribunal appointed by statute — Civil Court's jurisdiction is barred.**

Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive : *31 Bom 604, Rel. on; Case law referred.* [P 393 C 2]

Dr. Rauf — *for Applicant.*

Dangali — *for Respondents.*

**Roberts C. J.** — This case has come before the High Court in revision from a judgment of the Third Judge of the Small Cause Court, Rangoon, and has been referred to a Full Bench for determination of the point of law involved. The defendant in the suit was one of two guarantors on a bond and was sued as such by the respondent society, it having been the practice to entertain suits of this character by a Co-operative Society against one of its members in the law Courts in Burma. By the Burma Co-operative Societies Act (6 of 1927), S. 50 (2) (f), the Local Government may, for the whole or any part of Burma and for any Co-operative Society or class of Co-operative Societies, make rules to carry out the purposes of this Act, and in particular and without prejudice to the generality of this power may provide that any dispute touching the business of a Co-operative Society between members or past members of the Society or persons claiming through a member or past member or persons so claiming and the Committee or any officer shall be referred to the Registrar for decision or if he so directs, to arbitration, and shall prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed, etc. By Rule 15 (1) (b) of the Burma Co-operative Societies Rules 1931, every dispute touching the business of a Co-operative Society, between a member or past member or persons so claiming and the Committee or any officer of the Society shall be referred to the Registrar. S. 9, Civil P. C. says:

> The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

In my opinion the point raised is amply covered by authority. But before passing to consider it, I desire to observe that it appears to me that the Rule would be unnecessary altogether if by its application the jurisdiction of the Courts was not taken away; parties to a dispute could always agree to refer it to the Registrar and in these circumstances the Rule would be unnecessary; whereas if the Rule is not to take away the jurisdiction of the Courts when the parties in dispute have not agreed to submit the matter to the Registrar, it would become a dead letter. The leading authority on this point appears to be the case in (1832) 8 Bing 394,[1] an authority which has remained unquestioned for over a hundred years. The action was brought against the defendants for money had and received by them to the use of the plaintiff. The defendants were trustees of the Mildenhall Bank, which was a savings bank to which the provisions of 9 Geo. IV, Chap. 92 applied. By S. 45 of that statute it was provided:

> That in case any dispute shall arise between any such institution or any person or persons acting under them, or any individual depositor therein the matter so in dispute shall be referred to the arbitration of two different persons to be chosen and appointed in the manner therein pointed out, etc.

Tindal C. J. said:

> It is undoubtedly true that the jurisdiction of the superior Courts of Westminster is not to be ousted, except by express words or by necessary implication : . . . yet, where the object and intent of the statute manifestly requires it, words that appear to be permissive only shall be construed as obligatory, and shall have the effect of ousting the Courts of their jurisdiction . . . Now in this case the Legislature has enacted that disputes of the description of the present 'shall be referred' — words which, in their natural force, denote an obligation, not a permission only : and unless these words are construed to be compulsory on the plaintiff, they mean nothing. If they are not com-

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[1] **Crisp v. Bunbury, (1832) 8 Bing 394=1 Moore & Scott 646=1 L J (NS) C P 112=34 RR 747.**

> pulsory on the plaintiff, neither can they be so, upon any principle of fair construction, upon the defendant. And if recourse to arbitration is not intended except when both parties choose to adopt it, then indeed the Act is made a dead letter; for it would be competent for both parties to refer the dispute to arbitration if they both agree upon it, without the intervention of the statute.

Adopting the phraseology which the learned Chief Justice later employed, it is clear that in the present case the remedy by action is taken away and that of reference to the Registrar is substituted in its place. The case which I have cited is followed in principle by the cases in (1855) 2 Kay & J 211,[2] (1849) 5 Dowl & L 679=79 R R 892[3] and (1883) 23 Ch D 103.[4] In (1884) 9 A C 260[5] it was held that when the rules of a Benefit Building Society established by statute provided for the settlement by arbitration of disputes between the society and any of its members, the High Court could not entertain an action by the society against a member for money due to it under covenant in mortgage deeds executed by the member as such to the society. The point upon which Lord Selborne delivered a dissenting judgment was that the disputes which had arisen were not in so many words defined as matters in dispute between the society or any person acting under them, and any individual member thereof, or person claiming on account of any member. In this judgment Lord Blackburn expressly referred to the decision in (1832) 8 Bing 394[1] to which I have referred. I entertain no doubt that the rules made under the Burma Co-operative Societies Act take away the jurisdiction of the Courts in respect of disputes contemplated under R. 15.

It is clear that in India the same principle has been accepted that where there has been a special tribunal set up, the jurisdiction of the Civil Courts has often been held to be barred : *see* 42 C W N 391,[6] 12 Mad 105[7] (a case under the Madras Forest Act) and 43 Bom 221.[8] In this latter case it was held that the decision of a Collector of Customs under S. 182, Sea Customs Act 1879, was final and that the Courts would not intervene when certain silver imported into British India without payment of duty was confiscated by him. In 47 All 374[9] the election of directors of a co-operative society being part of the business thereof the Court held that the intention of the Co-operative Societies Act, 1912, in India was that this and any dispute of similar character should be referred for the decision of the Registrar or the arbitrators appointed by him in accordance with the rules made under S. 43 and not to the Civil Court. They accordingly held that a suit brought by two preference shareholders in the Muthra District Co-operative Bank for a declaration that the four defendants had not been legally elected directors of the Bank and for an injunction to restrain them from acting as such was not maintainable. In 31 Bom 604[10] Jenkins C. J. said at p. 609 :

> But where a special tribunal, out of the ordinary course, is appointed by an act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive.
>
> It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any ; there is no change of the old order of things ; a new order is brought into being.

Our attention has been called to a dictum of Mosely J. in 1937 R L R 399[11] in which he says that there is nothing in R. 15 expressly barring the jurisdiction of the Courts. This dictum in its terms does not deal with cases of implication, and we are satisfied that the learned Judge was merely emphasizing the fact that in the particular case he was governed by express words. The argument for the respondents, if carried to its logical conclusion, would lead to an express disregard of the term of S. 9, Civil P. C., which clearly contemplates that the jurisdiction of the Courts may by necessary implication be avoided. In my opinion therefore this application in revision must be allowed, and the decree passed by the Third Judge of the Rangoon Small Cause Court must be set aside and the suit of the plaintiff-respondent society dismissed with costs in both Courts, advocate's fee in this Court five gold mohurs.

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[2] Armitage v. Walker, (1855) 2 Kay & J 211=2 Jur (N S) 13=110 R R 188.

[3] Ex parte Dayne, (1849) 5 Dowl & L 679=18 L J Q B 197=79 R R 892.

[4] Hack v. London Provident Building Society, (1883) 23 Ch D 103=52 L J Ch 541=48 L T 247=31 W R 392.

[5] Municipal Permanent Investment Building Society v. Kent, (1884) 9 A C 260=53 L J Q B 290=51 L T 6=32 W R 681=48 J P 352.

[6] Dacca Co-operative Industrial Union, Ltd. v. Dacca Co-operative Sankha Silpa Samities Ltd. (1938) 25 A I R Cal 327=42 C W N 391 =I L R (1938) 2 Cal 103.

[7] Ramachandra v. Secretary of State, (1889) 12 Mad 105.

[8] Ganesh Mahdev v. Secretary of State, (1919) 6 A I R Bom 30=49 I C 427=43 Bom 221=21 Bom L R 27.

[9] Gopi Nath v. Ram Nath, (1925) 12 A I R All 356=86 I C 585=47 All 374=23 A L J 129.

[10] Bhaishankar Nanabhai v. Municipal Corporation of Bombay, (1907) 31 Bom 604=9 Bom L R 417.

[11] Maung Kyaw Tha v. Co-operative Town Bank, Henzada, (1937) 24 A I R Rang 363=173 I C 377=1937 R L R 399.

**Braund J.**—I agree and have nothing to add.

**Dunkley J.**—I am of the same opinion. The applicant was sued as guarantor on a bond for the repayment of money borrowed from the respondent Co-operative Credit Society by one of its members. The applicant is also a member of the society. By R. 15 of the Burma Co-operative Societies Rules, 1931, framed by the Government of Burma under S. 50 (2), Burma Co-operative Societies Act, 1927, every dispute touching the business of a co-operative society between a member and the committee of the society shall be referred to the Registrar. It is conceded on behalf of the respondent society that the recovery of this loan is a "dispute touching the business of a co-operative society," but it is urged, that R. 15, so far as it purported to restrict the jurisdiction of the Civil Courts must be construed strictly, and that in strictness the dispute is between the applicant and the society, and therefore does not fall within the scope of R. 15. This is an ingenious attempt to draw a distinction for this particular purpose between the society and the committee of the society. Now, under S. 31 of the Act the society is a body corporate and under S. 2 (b) the committee means "the governing body to whom the direction of the affairs of the society is entrusted". The suit for the recovery of the loan must, under S. 31, be brought in the name of the society but there can be no dispute with the society as such. The suit was brought by resolution or order of the committee as the governing body of the society, and therefore the dispute was in the strictest sense between the applicant and the committee. S. 9, Civil P. C., enacts that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. In 1937 R L R 399[11] my brother Mosely J. pointed out that the jurisdiction of the Civil Courts is not expressly barred by R. 15 of the Burma Co-operative Societies Rules, 1931, but he did not go on to consider whether the jurisdiction of the Courts is barred by implication. That it is so barred is plain from the simple fact that as stated by my Lord the Chief Justice, if a dispute of the nature contemplated by the Rule could be brought by either party before the Courts for decision, the Rule would be of no force or effect.

B.D./R.K. *Petition dismissed.*

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## A. I. R. 1938 Rangoon 394

ROBERTS C. J. AND DUNKLEY J.

*In the matter of U Kun, Barrister-at-law.*

Civil Misc. Appln. No. 60 of 1937, Decided on 10th November 1937.

**(a) Legal Practitioner—Conviction—Case sent to Bar Council for enquiry—Bar Council should merely record conviction and issue notice to show cause why disciplinary action should not be taken.**

Where a legal practitioner has been convicted of a criminal offence and his case is sent to the Bar Council for enquiry to determine if any disciplinary action was called for, the Bar Council should merely record the conviction and should call on the legal practitioner to show cause why action should not be taken against him. It is not open to it to justify the action of the legal practitioner. [P 395 C 1]

**(b) Defamation — Justification only under exceptions to S. 499, I. P. C., or other privilege.**

No man can ever be justified in disseminating defamatory matter unless he can bring himself within one of the exceptions to S. 499, I. P. C., or unless his action is privileged in other respects. Having held that a person did not act in good faith it must be wrong to say that he was justified in acting as he did. [P 395 C 1, 2]

**(c) Legal Practitioner—Disciplinary action—Criminal proceedings finally concluded against legal practitioner — Presumption is that they were correct—Enquiry for disciplinary action —Whether facts show moral turpitude is to be seen.**

When criminal proceedings are taken against a pleader or an advocate and finally concluded, they must be taken to have been rightly decided, and the question to be determined in a subsequent enquiry as to whether the advocate or pleader ought to have disciplinary action taken against him is whether upon a perusal of the facts and circumstances disclosed in the evidence in the criminal proceedings his offence has been one implying a defect of character which unfits him to be a pleader or advocate. Such a defect of character normally involves moral turpitude. [P 395 C 2]

U Tun Byu, Government-Advocate — *for the Crown.*

Campagnac — *for Respondent.*

**Roberts C. J.**—This case comes before us for such action as it may appear ought to be taken under the Bar Councils Act 1926, one U Kun, an advocate of this High Court, having been convicted of the offence of defamation, contrary to S. 499, I. P. C., and having been required by the Magistrate to enter into a bond and to come up for judgment when called upon within a period of two years, under the provisions of S. 562, Criminal P. C. The advocate thus convicted did not appeal against his conviction, and we must take it for all purposes therefore that that conviction was right. An enquiry has been held by a Tribunal of the Bar Council into his conduct with a view to seeing whether he has done anything which seems to indicate the necessity of taking disciplinary action against him, and the Tribunal, we think, should have merely recorded the fact that he had been convicted of an offence and have asked him to show cause why no disciplinary action should be taken against him. But the Tribunal framed charges which involved a consideration of the law of conspiracy and which also included an allegation that he had published the defamatory matter knowing it to be false; and they exonerated him of guilt on the charges thus framed. They have even gone further and said that he was justified in the action which he took.

The charge brought against him in the Magistrate's Court and the matters out of which these incidents arose form the writing of a letter by the advocate to the Registrar of the High Court inviting him to call for papers and institute enquiries upon certain allegations made in affidavits of which the advocate enclosed copies. The affidavits contained charges which were clearly defamatory and if untrue of a scurrilous nature; and by writing in the way he did, we are clearly of opinion that as a responsible citizen he was disseminating defamatory matter and making himself responsible for its republication. We think that if he had desired to take any action and had been taking action in good faith, he would have adopted a course different from that which he did, and the Magistrate who tried the case —and beyond whose judgment we cannot go—took the same view and arrived at a finding of fact which we cannot disturb that U Kun had not in all the circumstances of the case acted in good faith in forwarding the affidavits in the way he did. It is therefore necessary to say that the Committee of the Bar Council must be held wrong in declaring that he was justified in the action which he took. No man can ever be justified in disseminating defamatory matter unless he can bring himself within one of the exceptions to S. 499, I. P. C., or unless his action is privileged in other respects. Having been held that he did not act in good faith it must be wrong to say that he was justified in acting as he did.

When we come however to consider the measure of guilt which we ought to impute to him the matter is rather different. It has been held, following a number of decided cases in this High Court and elsewhere, that when criminal proceedings are taken against a pleader or an advocate and finally concluded, they must be taken to have been rightly decided, and the question to be determined in a subsequent enquiry as to whether the advocate or pleader ought to have disciplinary action taken against him is whether upon a perusal of the facts and circumstances disclosed in the evidence in the criminal proceedings, his offence has been one implying a defect of character which unfits him to be a pleader or advocate. Such a defect of character normally involves moral turpitude.

We are of opinion that in this case the action of U Kun was exceedingly ill-advised. He took some part in the preparation of some of the affidavits, and the nature of the allegations made in them made it desirable for him to have corroborative material if any action were to be taken by him, and also to have pointed out that he was merely passing on information in good faith for what it was worth with the object of an enquiry being held and with bona fide intentions. But we do not think, while it is not open to us to question the propriety of the criminal conviction, that what he has done is of such a nature as to render him to be unfit to be an advocate, or even to call for any disciplinary action on our part beyond saying that we trust that responsible citizens, when afforded the opportunity of making charges against persons (whether known to them or not) of which they have not ascertained the truth, should be careful not to aggravate the defamatory nature of the matter by lending their support to an implied acceptance of it without careful investigation into its nature. As I say, we have come to the conclusion that in all the circumstances no further action need be taken in this matter, but U Kun will have to pay the costs of the Bar Council enquiry and the hearing before this Court: 10 gold mohurs before the Bar Council and 10 gold mohurs here.

**Dunkley J.**—I agree.

B.D./R.K. *Order accordingly.*

## A. I. R. 1938 Rangoon 396

ROBERTS C. J. AND DUNKLEY J.

*U Eindawbatha* — Appellant.

v.

*U Zaneinda* — Respondent.

First Appeal No. 113 of 1937, Decided on 27th January 1938, against decree of High Court, D/- 13th July 1937.

**Buddhist Law (Burmese)—Sayadaw or presiding monk of a Kyaungtaik which is sanghika and not poggalika property is not entitled to evict a monk merely on ground that he challenges his position as poggalika owner in absence of proof of any misconduct.**

A Sayadaw or presiding monk of a kyaungtaik which is sanghika and not poggalika property is not entitled to evict a monk merely on the ground that the latter challenges the position of the plaintiff to be the poggalika owner of the property, in absence of proof of any misconduct on his part or of such behaviour as would render his eviction from the kyaungtaik desirable. The sanghika property does not belong to any particular person or group or sect. It partakes of the nature of public religious property. When a kyaung becomes vacant, there is nothing wrong in a monk who comes peaceably in to dwell in the kyaung: *A I R 1931 Rang 125*, *Rel. on.* [P 396 C 2 ; P 397 C 1]

Desirability of the formation of a trust scheme for pagodas and kyaungtaiks pointed out. [P 397 C 1]

Saw Tun Teik — *for Appellant.*

Ba Soe — *for Respondent.*

**Roberts C. J.** — In this case the plaintiff-appellant claimed to be the presiding Sayadaw of Nyaunggon kyaungtaik in Pazundaung and said that he was elected to that position on 14th October 1933 by eleven persons who were present and voted for him, each representing a kyaung in the kyaungtaik. Two other persons were said to have been absent from the election, there being thirteen kyaungs in the kyaungtaik in all. What took place at the election is evidenced by a document, which has become Ex. A, beyond which we need not, and indeed must not, look to see the true position. That document explains itself, and it is clear that the monks decided to put some one in spiritual control of the kyaungtaik and they also, by the use of the word "control" and by dint of saying that it was dangerous not to have a leader, appear to have borne in mind the necessity of giving temporal headship in addition to the person whom they should select. The position, when that election had taken place, was that the person elected was the spiritual and temporal head of the kyaungtaik, but it has to be clearly understood that the kyaungtaik was not poggalika property. The plaintiff throughout seems to have been strongly infused with the idea that the property was poggalika and, consequently, as head, or presiding monk, he has adopted a view of his own powers and rights which are consistent with poggalika ownership, but are not quite accurate when it is remembered that he is the Sayadaw of a kyaungtaik which is sanghika property. In relation to that Mr. Saw Tun Teik, who appears for the appellant, has been obliged to concede that the kyaungtaik is admittedly sanghika—and, indeed, he could hardly have done otherwise in view of the clear finding of Maung Gyi J. in Civil Regular No. 189 of 1925.

That being so, we have to consider what are the rights of a presiding monk of a sanghika property. Such property does not belong to any particular person or group or sect; it partakes of the nature of public religious property. We are of opinion that when a kyaung becomes vacant, there is nothing wrong in a monk who comes peaceably in to dwell in the kyaung. The presiding monk of a sanghika property may, it is true, in certain circumstances, evict a monk who is guilty of misconduct. Whether it is necessary for him to consult the whole of the Sangha before so doing, as was the view held by a Full Bench in 9 Rang 77,[1] or whether he could himself act upon proof of a serious misconduct, it is not necessary to consider here. But we think it only right to point out that the authority of the case which I have cited shows that the refusal to furnish a list of lay residents in the kyaung when called upon to do so by the presiding monk of the sanghika kyaung was not such misconduct, under the circumstances of that particular case, as would render the monk liable to ejectment. In this appeal we notice that the plaintiff has never expressly alleged misconduct in the monk whom he seeks to evict, and doubtless, as I have already explained, this was due to a feeling on his part that he was the poggalika owner and could evict the monk in question at pleasure. All that he says in his plaint is that the defendant claimed to be the presiding monk of a kyaung and that his defiance of the authority of the plaintiff made it impossible for the plaintiff to administer the affairs of the kyaungtaik and impossible for reasonable rahans to live in. That is not a misconduct which can justify the presiding monk of a sanghika kyaungtaik in having recourse to eviction and it seems clear to us that the real complaint of the presiding monk was not that the defendant was guilty of any absolute misconduct, but that the defendant challenged the position of the plaintiff to be the poggalika owner and in that respect we think that the defendant was undoubtedly right. It has been suggested that the defendant was a trespasser, but we are clearly of opinion that there has been no proof of any misconduct on his part, or of behaviour such as would render his eviction from the kyaungtaik desirable.

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[1] **U Nanda v. U Ganda, (1931) 18 A I R Rang 125=132 I C 715=9 Rang 77 (F B).**

Accordingly, in our view the decision of the learned Judge in the Court below is right, and this appeal must be dismissed with costs: advocate's fee ten gold mohurs.

**Dunkley J.**—I agree.

### Note.

*Roberts C. J.*—Having given judgment upon this appeal we are constrained to add a word in relation to the possible formation of a trust scheme. The late May Oung J., a Burmese Buddhist lawyer of great erudition, pointed out in his book on Buddhist law, as far back as 1914, that religious rights, as against outsiders, may be safeguarded and internal disputes readily settled by formulating schemes for pagodas and kyaungtaiks. No restraint is thereby placed upon any religious or spiritual independence, but a safeguard is obtained against disputes and unhappy dissensions. In respect of this very kyaungtaik similar advice was given by Maung Gyi J., but it was neglected, and we cannot help feeling that this neglect has led to the present state of dissension and bad feeling which is much to be deplored. It is proposed therefore to bring the judgment in this case to the notice of the Advocate-General in order that he may consider whether or not steps should be taken for the formulation of a trust scheme in such a way as to prevent continuance of the disputes which have unhappily arisen.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 397

BAGULEY J.

*The King*

v.

*Ma Ban Gyi.*

**Criminal Revn. No. 731-A of 1937, Decided on 23rd December 1937, from order of Sub-Divisional Magistrate (1), Kanbalu, D/- 16th August 1937.**

**Penal Code (1860), S. 211—Scope explained — 'Criminal proceedings' mean proceedings before Magistrate—Woman making complaint to police that certain person committed rape on her—Case investigated by police and found to be false—Woman prosecuted under S. 211, first part, by First Class Magistrate—Trial held legal.**

'Criminal proceedings' referred to in S. 211 must be regarded as proceedings before a Magistrate. A man who makes a false charge, which fails to result in any proceedings before a Magistrate, owing to his clumsiness or for some similar reason, is saved from himself to a certain extent by the action of the police in throwing out the case, and he has merely 'falsely charged'. He has neither initiated criminal proceedings nor caused them to be initiated. If, owing to his greater skill, he has succeeded in getting the police to arrest his enemy and place him before a Court, then his greater skill has succeeded in involving himself perhaps in an offence for which he can be more heavily punished, because he would then have "caused criminal proceedings to be instituted". If he had gone directly to the Magistrate with the idea that the Magistrate will harass his enemy by summoning him to Court, then he has instituted criminal proceedings himself and the annoyance or dishonour which he has placed on his enemy has again made him liable to heavier punishment. [P 399 C 2; P 400 C 1]

Where therefore one *M* reported to the police that *T* had committed the offence of rape on her and the police investigated the case, and finding it to be false, the prosecution of *M* under S. 211 was ordered, and the case was tried by a First Class Magistrate :

*Held* that the case fell within the first part of S. 211 and the trial was legal: *5 All 215; 5 All 598; 16 All 124 and 14 Cal 633, Rel. on ; 17 Cal 574; 20 Mad 79 ; A I R 1925 Pat 678 and A I R 1931 All 269, Dissent. ; 22 Bom 596, Ref.* [P 400 C 1]

E. W. Lambert, Govt. Advocate — *for the Crown.*

**Order.**—Ma Ban Gyi has been convicted under S. 211, I. P. C., and ordered to pay a fine Rs. 30, or, in default, one month's rigorous imprisonment, by the Sub-divisional Magistrate, Kanbalu, who has first class powers. The case has been sent for by the office with a view to examining the legality of the sentence, and it has in consequence come before me. The facts of the case are that Ma Ban Gyi reported to the police that Tun Gyaw had committed the offence of rape on her. The police investigated the case, and finding it to be false, the prosecution of Ma Ban Gyi under S. 211 was ordered, and the case was tried, as has been mentioned, by a First Class Magistrate. Offences under S. 211 fall under three categories. Anyone who with intent to injure any person institutes or causes to be instituted any criminal proceedings or falsely charges any person with having committed an offence is punishable with two years imprisonment, or fine, or both, and the case is triable by a First Class Magistrate. If such criminal proceeding be instituted on a false charge of an offence punishable with imprisonment for seven years or upwards (an offence coming under the second part of S. 211), the offender is liable to imprisonment up to seven years, and a fine in addition, and the case can only be tried by a Court of Session or a Magistrate of the First Class, and if the criminal proceeding is instituted on a false charge of an offence punishable with death or transportation for life, the case can only be tried by a Court of Session. In connexion with the present case the charge was under S. 376, I. P. C. This being punishable with transportation for life, if the case came under the second part of S. 211, the Magistrate could not deal with it himself, but if it came under the first part of S. 211, for which the maximum punishment is rigorous imprisonment for two years, then the Magistrate had power to deal with the case, and the punishment he has inflicted is legal.

In my view, if the offender has merely falsely charged a person of any offence whatsoever, the case is triable by a Magistrate, and the maximum sentence is two years, so that if Ma Ban Gyi instituted, or caused to be instituted, criminal proceeding charging Tun Gyaw with the offence of rape, then her offence comes under the second part of S. 211, and is triable only by a Court of Session: if, on the other hand, she merely falsely charged him with having committed the offence of rape, then the Magistrate had power to deal with the case, and the sentence which he passed was legal. For authority on this point there seems to be none in Burma, and two views have been taken by High Courts in India. Allahabad begins with two single Judge rulings, 5 All 215[1] and 5 All 598,[2] in which it was held that if a complaint is made to the police that some one had committed an offence, and the case is struck off by the police and never gets to Court, then the person who had made that false charge has merely 'falsely charged' the person against whom he reported within the meaning of the first part of S. 211. In 14 Cal 633[3] a Bench of the High Court of Calcutta consisting of Comer-Petheram C. J. and Ghose J. the same view was taken, and the cases in 5 All 215[1] and 5 All 598[2] were followed.

Three years later however appeared the case in 17 Cal 574.[4] This case, despite its name, appears to be quite independent of the previous Calcutta case, and was started by a report of a Sessions Judge, in which he stated that 14 Cal 633[3] was opposed to the practice current in the mofussil Courts for many years: so a Full Bench of five Judges, including the Chief Justice, considered the matter. The judgment of the Bench was delivered by Wilson J. and it was decided that a man who sets the criminal law in motion by making a false charg to the police of a cognizable offence institutes criminal proceedings within the meaning of S. 211, I. P. C., and that if the offence fell within the description in the latter part of the Section, he is liable to the punishment there provided. In the judgment itself no previous case of any kind was referred to. The learned Judge pointed out that there are two ways by which a person aggrieved can put the criminal law in motion: he may make a charge to the police, or make a complaint, and it is stated that whichever of these methods is adopted, the thing done by the accused is the same, although they are given different names, and in each case the steps that follow are governed by the Criminal Procedure Code. It was pointed out that the argument arises that the Legislature must have meant different things when it spoke of 'instituting proceedings' and 'making a charge', and that only what fell within the former phrase was within the latter part of the Section. The learned Judge said that he agreed in this reasoning in one sense and not in another. After that his reasoning is not very clear to me, and he says he did not suppose that the Legislature meant the phrases to be mutually exclusive in meaning, so that the instituting of criminal proceedings must be by something which is not a charge, and a charge must be something which is not the institution of criminal proceedings. With respect, it seems to me that this argument breaks down, because the learned Judge has only envisaged two things, namely "making a charge" and "instituting criminal proceedings," whereas S. 211 deals with the third possibility, because it makes punishable under the first part of the Section three things, namely, "instituting criminal proceedings," "causing to be instituted criminal proceedings" and "falsely charging." An argument which might be satisfactory when applied to two things is not necessarily satisfactory when three things are envisaged.

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[1] Empress of India v. Pitam Rai, (1883) 5 All 215=1882 A W N 225.

[2] Empress v. Parahu, (1883) 5 All 598=1883 A W N 149.

[3] Queen-Empress v. Karim Buksh, (1887) 14 Cal 633.

[4] Karim Buksh v. Queen-Empress, (1890) 17 Cal 574.

Unfortunately however in my view this ruling has been followed in 20 Mad 79,[5] where again only "institution of criminal proceedings" seems to be referred to, and not "causing of criminal proceedings to be instituted." In 4 Pat 472,[6] in which no reasoning is given, it is merely stated that 17 Cal 574[4] contained the correct statement of the law, notwithstanding the authority in 16 All 124.[7] Allahabad however in its official reports still keeps to its original view. In 1893 this point was again raised, and in the reference the cases in 5 All 215,[1] 5 All 598[2] and 14 Cal 633[3] were mentioned on the one side, and the case in 17 Cal 574[4] was mentioned on the other side. The reference was led before a Bench, and without further discussion the Bench adhered to the earlier rulings of its own Court. It is true that in an unofficially reported case, a Bench of this Court has taken the opposite view, 33 Cr L J 256.[8] The Bench of two Judges preferred to follow 17 Cal 574[4] in preference to the other Bench ruling of its own Court. As this case has not been reported in the official reports at all, I take it that the official view of the Allahabad High Court is still that which was given in 16 All 124.[7] The Bombay High Court has, it would seem, not yet published any ruling on this point. The question was adverted to in 22 Bom 596[9] and on p. 600 the rival views expressed in 17 Cal 574[4] and 16 All 124[7] were mentioned, and it was stated that there has been no ruling on the point of the Bombay High Court, and that it was not necessary to decide it in that case.

In my opinion, the proper view is that of the Allahabad High Court. S. 211, as I have said, refers to three matters: falsely charging a person, instituting criminal proceedings against that person, and causing to be instituted criminal proceedings against that person. "Criminal proceedings" are not defined in the Penal Code, nor in the Code of Criminal Procedure. S. 4 (m), Criminal P. C., defines "judicial proceedings" as including any proceeding in the course of which evidence is or may be legally taken on oath: so, no investigation by the police can be a judicial proceeding, although it is a criminal matter. However, progressing further through the Criminal Procedure Code, we come at length to Part 6 which refers to "Proceedings in Prosecutions," and a little further on, above Sec. 190 we get the cross-heading "Conditions Requisite for Initiation of Proceedings." These proceedings, of course, are enquiry proceedings or trials, but they are certainly criminal proceedings as well, and in my opinion the criminal proceedings referred to in S. 211 must be regarded as proceedings before a Magistrate. Taking this view the Section can very easily be applied. If a man wishes another man to be dealt with by the Courts there are two courses open to him: he can file a complaint to a Magistrate, or he can report to the police. If he files a complaint under S. 190, he is initiating criminal proceedings; as to that there can be no possible doubt. If he makes a report to the police, and the police send the man up for trial, also under S. 190, then criminal proceedings have been instituted against a person, and the man who has set the police in motion has caused those criminal proceedings to be instituted. If however the police refuse to initiate proceedings, then what has been done is merely that a false charge has been made.

The scope of the Section can then easily be grasped. A man who makes a false charge, which fails to result in any proceedings before a Magistrate, owing to his clumsiness or for some similar reason, is saved from himself to a certain extent by the action of the police in throwing out the case, and he has merely "falsely charged," he has neither initiated criminal proceedings nor caused them to be initiated. If, owing to his greater skill, he has succeeded in getting the police to arrest his enemy and place him before a Court, then his greater skill has succeeded in involving himself perhaps in an offence for which he can be more heavily punished, because he would then have caused criminal proceedings to be instituted. If he had gone directly to the Magistrate with the idea that the Magistrate will harass his enemy by summoning him to Court, then he has "instituted criminal proceedings" himself and the annoyance or dishonour which he has placed on his enemy has again made him liable to heavier punishment. This view of the matter gives a separate and definite meaning to each one of those three things envisaged by S. 211; and, with respect, if the view taken in 17 Cal 574[4] is taken, one is left with a kind of uncertainty as in the judgment only two of the three possibilities are dealt with; whereas the view which I take seems to me to be clear and defines the three possibilities referred to in the Section, each covering a totally different state of affairs. Taking the view that I take, Ma Ban Gyi only "falsely charged" Tun Gyaw : her offence therefore came under the first part of S. 211, and she could be legally tried by a Magistrate of the First Class, and the sentence of fine was a legal sentence. There is therefore no need to interfere in theses proceedings. With these remarks the record will be returned.

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[5] **Queen-Empress v. Nunjunda Rau, (1897) 20 Mad 79=1 Weir 188=7 M L J 16.**

[6] **Parmeshwar v. Emperor, (1925) 12 A I R Pat 678=92 I C 885=27 Cr L J 373=4 Pat 472 =7 P L T 657.**

[7] **Queen-Empress v. Bisheshwar, (1894) 16 All 124=1894 A W N 10.**

[8] **Emperor v. Johri, (1931) 18 A I R All 269= 1931 Cr C 429=136 I C 277=33 Cr L J 256= 1931 A L J 177.**

[9] **Imperatrix v. Jijibhai, (1898) 22 Bom 596.**

N.S.D./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 400

BAGULEY J.

*The King*

v.

*Ba Ba Sein.*

Criminal Revision No. 783-A of 1937, Decided on 10th December 1937, from order of First Addl. Special Power Magistrate, Henzada, D/- 13th August 1937.

**Penal Code (1860), Ss. 82 and 40 — Owner of motor bus, a boy of five years, found guilty of offence under R. 7 of Burma Hired Motor Vehicles Rules—Conviction held bad.**

Section 82, I. P. C., is governed by S. 40 and hence the word 'offence' in S. 82 denotes a thing which is punishable under the Penal Code or under any special or local law. [P 400 C 2]

A motor bus was found not fit to ply and hence a "fit pass" was not issued to the owner of the bus. Nevertheless the motor bus was found to be plying for hire without being registered. The owner of the bus who was a boy five years old was found guilty of offence falling under R. 7 of Burma Hired Motor Vehicles Rules :

*Held* that the conviction was bad. [P 400 C 2]

**Order.**—The accused in this case is, it would appear, 4 or 5 years old. The medical officer after examination says that his age is between 4 and 5, and his father who brought him to Court says that he is 5 years old, which is according to the ordinary Burmese way of reckoning age. This would mean that he is 4 or 5 years old according to English reckoning. He has been found guilty of an offence described as being under S. 7, Burma Hired Motor Vechicles Rules and bound over. R. 7 merely states that the registering authority may at any time require a motor vehicle plying for hire to be produced for inspection and may prohibit the use of any hired motor vehicle which is unfit. According to the Motor Vehicle Sub-Inspector of Police, bus No. R. B. 3670 was found not fit to ply and so a "fit pass" was not issued to the owner. I presume that means that registration was refused. Nevertheless, the bus was found plying for hire without being registered; so the owner has been found guilty of plying it for hire without a license. It is of interest to note that although no person under the age of 18 years is allowed to drive, there seems to be no provision against children, however young, being registered owners of motor vehicles, even of hired motor vehicles, which seems a defect in the Act and rules which might be brought to the notice of the authorities. Be that as it may, it is obvious that the conviction is a bad one. The learned Magistrate before whom the case was brought had doubts as to whether S. 82, I. P. C., was not a complete bar to the charge. The Court Prosecuting Officer however drew his attention to the last paragraph of the note on S. 82, I. P. C., in Ratanlal's Law of Crimes, which says:

> The exception in favour of infants under seven years is only confined to the Penal Code, and does not extend to local or special Acts,

and gives as an illustration S. 130, Railways Act. This comment must, I fear, be regarded as a blot on a publication which can as a rule be relied upon. S. 130, Railways Act, contains special words suspending with regard to certain Sections of the Act the provisions of Ss. 82 and 83, I. P. C. In general however S. 40, I. P. C., governs S. 82. Sec. 82 is in Chap. 4 of the Act, and S. 40 says that in Chap. 4, I. P. C., the word "offence" denotes a thing punishable under this Code, or under any special or local law. This being the case the conviction is clearly bad. I set aside the conviction and sentence, and acquit the accused. The custody order and bond which has been executed will be cancelled.

N.S.D./R.K. ***Conviction set aside.***

## * A. I. R. 1938 Rangoon 401

ROBERTS C. J. AND BRAUND J.

*U Tun Maung* — Appellant.

v.

*L. Ah Choy* — Respondent.

Special Second Appeal No. 333 of 1937, Decided on 3rd June 1938, against decree of the Dist. Court, Amherst at Moulmein, D/- 4th October 1937.

*** (a) Limitation Act (1908), S. 20 (as amended in 1927)—It is not necessary to show that express words were used to show that payment made was payment of interest as such—It is sufficient to show that in fact payment was payment of interest** *(Per Mackney J. in order of Reference).*

No doubt when any payment has to be proved it must be established whether the payment was a payment of interest as such or a payment of part principal, but it is not necessary that it should be shown that when the payment was made there was an express declaration on the part of the person making the payment that it was a payment of interest before the Court can regard it as such. It is sufficient to show that in fact the payment was a payment of interest. Hence where circumstances (such as the amount paid being very much less than the amount of interest due) indicated that the payment was a payment of interest, it must be taken to be such : *Minority view in A I R 1935 All 946 (F B), Approved.* [P 402 C 2]

*** (b) Limitation Act (1908), S. 19—Acknowledgment—Endorsement on back of promissory note 'paid on a/c Rs. 10' held acknowledgment of liability** *(Per Bench).*

By a promissory note Rs. 2141 were promised to be paid. The debtor made an endorsement on the back of the note 'paid on a/c Rs. 10' followed by his signature :

*Held* that the endorsement must mean that the debtor had not paid in full and hence was an acknowledgment of liability and from the date of it a fresh period of limitation must be computed : *6 Beng L R 619, Disting. ; A I R 1917 Mad 805; A I R 1923 Bom 239; A I R 1921 Cal 331 and A I R 1938 Rang 84, Rel. on.* [P 404 C 1]

A. A. Darwood — *for Appellant.*

Mootham — *for Respondent.*

### ORDER OF REFERENCE

*Mackney J.*—One U Ohn Khin and the present appellant, U Tun Maung, executed a promissory note in favour of the respondent, L. Ah Choy, on 2nd June 1931. The present suit was instituted by L. Ah Choy on 26th May 1937 for recovery of the amount due thereon. The plaintiff sought to escape the bar of limitation by proving that, on 27th May 1934, Maung Ohn Khin and Maung Tun Maung had paid to account the sum of Rs. 10 towards the amount due on the promissory note. This amount had been appropriated towards interest. The position taken by the two defendants, was somewhat different. Ohn Khin appeared to admit that the amount was due although he denied that he had made any payment of Rs. 10 as alleged. Maung Tun Maung professed to be ignorant about the matter as he had relinquished his claim to the estate in respect of which the money had been borrowed. He also denied that he had made any payment of Rs. 10. Both defendants admitted having endorsed their signatures on the back of the promissory note. The Sub-Divisional Court was not satisfied that Maung Tun Maung had paid any interest as alleged and granted a decree against Ohn Khin only as he did not contest the suit. Against this order the plaintiff appealed making Tun Maung a respondent. The learned District Judge was satisfied that the Rs. 10 had been paid by the two defendants and limitation was thus saved. He accordingly allowed the appeal and granted the plaintiff a decree against Tun Maung also. U Tun Maung now appeals against the decree of the District Court.

It is not now seriously contested that the finding of the District Court that the sum of Rs. 10 was paid as alleged must not be accepted. As the learned District Judge has pointed out, it is quite impossible to accept the very unsatisfactory evidence of witnesses who are deposing out of inaccurate memories to events which happened three years ago. The story of the defendants that they blindly wrote their signatures on the back of the promissory note shortly before it was to become time barred simply at the request of the plaintiff's agent is unbelievable. When they endorsed the promissory note they must have been satisfied as to the correctness of the entry 'paid to account Rs. 10.' It is further urged that as this Rs. 10 was not interest paid as such although it has been appropriated towards interest, and it cannot be deemed to have been payment of part of the principal, the plaintiff-respondent is not entitled to rely on S. 20, Limitation Act. This contention is supported by the Full Bench decision of the Allahabad High Court in 58 All 261.[1]

The argument in the case cited proceeded on the basis that payment of interest as such, or payment of part of the principal, were in effect acknowledgments of a still existing liability. Prior to the amendment introduced by Act 1 of 1927, it was not necessary that the payment of interest as such should be evidenced by the handwriting of the person making the payment or by writing signed by that person. It was necessary that the payment should be strictly proved to be a payment as interest, otherwise the payment could not be taken as an acknowledgment of a continuing liability. After the amendment was introduced, which required that the payments of interest also should be acknowledged by writing, the same considerations hold. Any payment made could not be held to be necessarily either a payment of interest as such or a payment of part of the principal. Consequently if it was claimed that the payment was of interest, then it must be proved that the payment was a payment of interest expressed as such. There were two dissentient judgments in that case which took the view that the words 'as such' were redundant and that it was contrary to common sense to decline to recognize the payment made because it was not said expressly whether the payment was of interest or of part principal. In the case which was before the Full Bench the debtors had endorsed a payment on the back of the bond and allowed the bond to remain in the possession of the creditor, thus showing that the liability was not completely wiped off.

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[1] Udaypal Singh v. Lakhmi Chand, (1935) 22 A I R All 946=159 I C 387=58 All 261=1935 A L J 1029 (F B).

It appears to me that, if I may say so with the greatest respect, the majority of the learned Judges on the Full Bench have overlooked the fact that, after the payment, the bond remained in the hands of the creditor, from which the natural presumption is that the liability under the bond still continued. That being so that payment made must have been either a payment of interest or a payment of part of the principal. Where circumstances (such as the amount paid being very much less than the amount of interest due) indicated that the payment was a payment of interest, it must be taken to be such. In 44 Mad 570[2] their Lordships of the Privy Council laid it down that, where both principal and interest are due, sums paid on account must be applied first to interest. In the absence of any evidence to the contrary, the payment of Rs. 10 in the present case would naturally be assumed to have been payment of interest, for no interest had been paid since the execution of the note. There has been no decision in this Court on the point which arises, since the amendment of S. 20, Limitation Act.

In 7 Rang 522,[3] a decision of a single Judge in a case under S. 20, Limitation Act, prior to the amendment, it was held, following a case of the Allahabad High Court and of the Bombay High Court, that the mere appropriation by the creditor of a payment by his debtor as interest would not save limitation. The payment of interest must be made as such by the debtor. I am of the opinion that this case is of sufficient importance to be heard by a Bench of the Court. It is by no means clear to me that the minority of the learned Judges in the Allahabad case have not come to the correct conclusion. No doubt when any payment has to be proved it must be established whether the payment was a payment of interest as such or a payment of part principal, but it does not appear to me to be necessary that it should be shown that when the payment was made, there was an express declaration on the part of the person making the payment that it was a payment of interest before the Court can regard it as such.

I suspect that under the old Act only part payment of principal had to be acknowledged in writing because such a payment in a sense effected a change in the original contract; the words 'as such' were then used in connexion with a payment of interest merely to emphasize the fact that no payment of part of the principal could be proved orally. I do not see that the importation of these two words necessarily means that the payment must be expressly stated to be a payment of interest; it is sufficient to show that in fact the payment was a payment of interest. And this applies now, although a payment of interest has to be acknowledged in writing if it is to save limitation. The argument employed by the learned Chief Justice, who wrote the leading judgment in the Allahabad case, to justify the contention that a payment of interest must be expressly said to be such at the time of payment, could equally well be used to show that a payment of part principal must also be expressly stated to be such at the time of payment before limitation could be saved.

If the payment of part of the principal is valuable only as an acknowledgment of the continuing liability, then it seems to me it is just as necessary to say that it is such a payment as it is to say that the payment of interest is a payment of interest and, if at the time of the payment of the one, express words must be used, then equally they must be used at the time of payment of the other. It may be that this interpretation tends to diminish the importance to be attached to the words "as such," but it is to be remembered that S. 20 as amended does not apply to the case of payment of interest made before the first day of January 1928, and this would be a sufficient explanation for the retention of the old wording. Under the Section as it stood prior to the amendment, if there were no writing it could not be proved that the payment was a payment of part of the principal, so unless it could be shown that the payment was a payment of interest as such it might be possible that the payment had been one made in settlement of the debt. Now after the amendment, provided that there has been a writing, it seems to me that it is open to the plaintiff relying on S. 20 to prove either that the payment was, in fact, a payment of interest or, in fact, a payment of part principal, although no words were used at the time of payment to express which it was. The proceedings will therefore be submitted to my Lord the Chief Justice for orders as to whether the appeal should be heard by a Bench.

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[2] **Venkatadri Appa Rao v. Parthasarathi Appa Rao, (1922) 9 A I R P C 233=61 I C 31=44 Mad 570=48 I A 150 (P C).**

[3] **U Ba Gyi v. U Than Kyauk, (1929) 16 A I R Rang 339=120 I C 897=7 Rang 522.**

### Judgment of Division Bench.

**Roberts C. J.**—This case arises out of a suit brought by the respondent in the Sub-Divisional Court of Moulmein for recovery of the sum of Rs. 4443 alleged to be due on a promissory note executed on 2nd June 1931, in his favour by two defendants, one of whom is the appellant. By his plaint the plaintiff claimed "exemption from the law of limitation by reason of the fact that both the defendants made a payment of Rs. 10 towards the interest due on the promissory note in suit on 27th May 1934 which payment was duly endorsed and signed by the defendants on the reverse of the promissory note." In his written statement the appellant denied that he ever paid interest but pleaded that he signed on the reverse of the document in blank "as the plaintiff's agent Mr. Henry brought the promissory note and asked me to sign on the back of it." He further pleaded that the endorsement as to the payment of alleged interest of Rs. 10 was made subsequently by the plaintiff without his knowledge or consent. It has been suggested that there are some slight discrepancies in the evidence given on behalf of the plaintiff, but it was given over three years after the acknowledgment of liability was said to have been made by the appellant. His signature appears on the back of the note below the words "paid to a/c Rs. 10," and below his signature is a date, "27th May 1934." Plaintiff's story is that both defendants were asked to come to his shop shortly before the note was to become time-barred: they came and asked for more time: they both signed their names on a table near plaintiff's counter. Mr. Williams Henry was present and he gave corroborative evidence. Rs. 10 was paid to the plaintiff. He did not actually see, or does not now remember, who wrote "paid to a/c Rs. 10," but Mr. Henry says it was the appellant, and he thinks it was at his dictation. At all events it was written at that time. The appellant had studied up to the tenth standard in English and is a trader at Mudon. The other defendant was his brother. The appellant's story was that Mr. Henry (whom he called Mr. Williams) came to his house and asked for and obtained his signature in blank and that the other words were not there when he signed. He said:

> I signed it as Mr. Williams ask me to sign it. I did not ask him why I had to sign it.

I am in agreement with the learned District Judge that this version cannot be accepted. The appellant called witnesses who say they were present and remember that there was no writing above the signature: there is no reason why they should remember such a thing for a period of three years as they could be in no way interested and traders do not endorse promissory notes without reason or without some explanation given to them why they should do so. I disagree with the view taken by the Sub-Divisional Judge that because Mr. Henry is the agent of the plaintiff his evidence adds no weight to that of his principal. It was natural that the plaintiff should desire to have a part payment or an acknowledgment of liability whereby to save the period of limitation and equally natural that the defendants should desire to avoid being sued at once, as they would have to be if they did not give it. Once it is established that the appellant signed his name on the back of the note on 27th May 1934, and under the words "paid on a/c Rs. 10," what is the position? In my view, upon the authorities this was a clear acknowledgment of liability under S. 19, Lim. Act, and from the date of it a fresh period of limitation must be computed. The words "paid on a/c Rupees 10" must mean that the debtor has not paid in full, and are markedly distinguishable from the words "remittance of £40 to old account" which were relied on as an acknowledgment of liability, but held not to be such in 5 Beng L R 619.[4] In that case the words were to be found in a postscript to a letter written by the obligee, and might well have related to a final instalment which extinguished the liability; but in the present case the words "paid on a/c Rupees 10" were on the back of the promissory note and on the front there was a promise to pay Rs. 2141 with interest.

There is ample authority for showing that such an endorsement is an acknowledgment of liability. Thus, in 40 Mad 698,[5] the endorsement on the back of a mortgage bond of the words "Rs. 378 paid towards this document" followed by the debtor's signature when nearly Rs. 1500 was due at the date of payment was held to be an acknowledgment of liability under S. 19. The attempt in that case to treat Ss. 19 and 20 as mutually exclusive, so that where there is part payment an acknowledgment has no effect unless the case falls under S. 20, was, in my opinion, rightly rejected by the Court. Then there is the case in 47 Bom 632,[6] where the endorsement was a signature appended to a note of three payments on different dates. Macleod C. J. said:

> It may be admitted that defendant 2 had not written in so many words that he admitted his liability for the balance due. But we must read the whole endorsement made by him, taken in conjunction with the words on the face of the note. It is difficult to say that that endorsement can mean anything else than this: 'I have paid so much on account of liability on the note, and in consequence I am only liable for the balance remaining due'.

Next, in 48 Cal 1046[7] the principal sum advanced on a mortgage bond was Rupees 5700 and on payment of Rupees 1751 an endorsement was made on the back of it in the following terms, "paid on account of the principal as per separate accounts Rs. 1751 only" and the same conclusion was arrived at. There is a similar authority in this High Court, 1937 R L R 421.[8] In my opinion, the effect of S. 20 of the Act need not be considered, since the debt was saved from limitation by the operation of S. 19. Not only does this matter arise from the pleadings, but the Subdivisional Judge framed as an express issue "is the suit barred by limitation?" and quoted (from an unauthorized report) a case in which it was apparently held that a bare signature by a debtor on the back of a promissory note executed by him was not an acknowledgment of liability in the absence of evidence as to intention. His words show that the question of S. 19 was present to his mind, but here the words "paid on a/c Rs. 10" clearly show an intention to make an acknowledgment of liability as appears from the authorities I have cited. Accordingly, for the reasons given, this appeal must be dismissed with costs; advocate's fee ten gold mohurs.

**Braund J.** — I agree and have nothing to add.

D.S./R.K. *Appeal dismissed.*

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[4] Shoarman v. Fleming, (1870) 5 Beng L R 619.

[5] Venkatakrishniah v. Subbarayudu, (1917) 4 A I R Mad 805=36 I C 240=40 Mad 698.

[6] Ganesh Narhar v. Dattatraya Pandurang, (1923) 10 A I R Bom 239=72 I C 249=47 Bom 632=25 Bom L R 144.

[7] Prasanna Kumar Roy v. Niranjan Roy, (1921) 8 A I R Cal 331=64 I C 988=48 Cal 1046=33 C L J 433=26 C W N 213.

[8] Kasiviswanathan Chettyar v. Lakshmanan Chettyar, (1938) 25 A I R Rang 84=175 I C 550=1937 R L R 421.

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## A. I. R. 1938 Rangoon 404

ROBERTS C. J. AND SHARPE J.

*Municipal Committee, Myaungmya* — Appellant.

v.

*Paw Haing and another*—Respondents.

Letters Patent Appeal No. 2 of 1938, Decided on 12th May 1938, against decree of High Court, in S. A. No. 273 of 1937, D/- 8th December 1937.

**(a) Burma Municipal Rules (1934), Ch. 6, R. 24 — Rule is made for guidance of committee and is only directory and not mandatory — Breach of rule does not make contract void.**

*(Per Roberts C. J.)* — Rule 24 of Ch. 6 of the Burma Municipal Rules framed under S. 229 (g), Burma Municipal Act, was made generally for guidance of committees and public officers in all matters connected with the carrying out of the Act: and so it has a directory and not a mandatory significance. Hence a breach of this rule does not make the contract void: *(1853) 9 Ex 457 Appl.* [P 406 C 2]

(Per *Sharpe J.)* — The rule was either under S. 71 and beyond the powers of the Local Government to make or at least it was only directory if made under S. 229 (g) and as such a contract in contravention of the rule is valid and the parties cannot escape liability under it. [P 407 C 2; P 408 C 1]

**(b) Specific Relief Act (1877), S. 54—Granting relief is discretionary — Ordinarily no interference with decision of lower Courts.**

The grant of an injunction is a discretionary matter and where both the lower Courts have held that the case is a fit one for an injunction, the decision will not be interfered with. [P 406 C 2]

K. C. Bose — *for Appellant.*

M. M. Rafi — *for Respondents.*

**Roberts C. J.** — The appellant in this case, Paw Haing, brought an action seeking an injunction, under S. 54, Specific Relief Act, against the Municipal Committee of Myaungmya restraining them from selling to any other person the license to conduct the business of a certain pawn shop at Myaungmya for the years 1937-1938 and 1938-1939. In the Township Court he secured the relief prayed for, but on appeal the District Court set aside the decree: the High Court has restored it again, and the defendants in the original action have appealed. The course of conduct between the parties shows that there was first of all an advertisement issued on 27th January 1936, by the appellants, which stated that licenses for carrying on the business of pawn-brokers in two shops for one or three years, at the option of the Committee, from 1st April 1936, would be disposed of by public auction. We are told that the effect of that advertisement was that when the bidders attended the auction, they did not know whether they were bidding for the license for one or for three years. The respondent, however, attended the auction and his was the highest bid, namely of Rs. 7310. A report of the auction was accordingly sent to the Committee and at the head of the report are the words, "for the year 1936-1937".

The auction had taken place on 10th February 1936, and on 12th February 1936, the respondent wrote a letter asking the President and members of the Myaungmya Municipal Committee to allow him to retain the license, which he had purchased for Rs. 7310 at the auction for a period of three years. It seems clear to me, upon a consideration of what happened at the auction, that there was no concluded contract between the parties arising from that: the Committee had not made up their mind what they were going to sell, or, even if they had, the respondent had no idea of what he was going to buy. However on 22nd February there was a further meeting and a document, which has come to be known as Ex. A, was drawn up. It states:

> Under bye-laws made under S. 142 (e), Burma Municipal Act, 1898, Mr. Pow Haing of Rangoon is hereby licensed by the Municipal Committee of Myaungmya to carry on business as a pawnbroker at Myaungmya, subject to the conditions stated on the reverse hereof and prescribed by the above-mentioned bye-laws. The license may be cancelled by the committee for breach of any one or more of the said conditions. The license will be in force until 31st March 1937 unless previously cancelled.

This was signed by the President of the Municipal Committee. The terms of payments to be made by the licensee were endorsed upon the document. It is also signed and witnessed by him, and, in my opinion, it constituted a valid contract between the Municipal Committee and the respondent by which the latter purchased for one year the right to carry on the business. It appears that after that nothing more happened until 11th June 1936, when the Committee purported to extend the license already given, for a further period of two years. It is important to note that there was new consideration for the new promise. It was in effect a contract for two more years on terms similar to the preceding contract. And thereupon a second document, known as Ex. B, in the same terms was entered into between the parties, stating that the license would be in force until 31st March 1939, and stating the new consideration. It is now contended that the second contract was void and ultra vires the Myaungmya Municipal Committee. And our attention has been drawn to Ch. 6 of the Burma Municipal Rules, para. 24. The effect of R. 24, so far as it concerns the present case, is that when pawn shop licenses are sold, they shall be sold by public auction, unless the Committee, with the sanction of the Commissioner, direct their disposal by sealed tender: if there is no public auction and no disposal by sealed tender, any other proposals made by the Committee shall be submitted to the Commissioner for his prior sanction, and his order shall determine the period and method of notice of the disposal and any other matter incidental thereto. Now, the question which arises is whether neglect to do that has rendered the Municipal Committee's contract void. It is necessary to examine how these rules came to be made. And it appears that they are expressed to be made in exercise of the powers conferred by various Sections of the Burma Municipal Act and sundry other statutes. The notification is "Local Government (Administrative Department) Notification No. 127, dated 9th July 1934". Mr. Bose has taken us through the various Sections under which the Local Government has power to make rules. S. 71 of the Act reads:

> The Local Government may make rules consistent with this Act for the assessment, collection and remission or refund of taxes leviable under this Act and for preventing evasion of the same. Such rules may also authorize the committee to dispose in accordance with rules, by way of lease or otherwise of the right to collect any tolls leviable under S. 62, sub-s. (1), Division (A) Cl. (h).

In passing, it may be noted that those tolls relate to tolls, not exceeding eight annas, on every vehicle, or beast, used in a certain manner, entering the Municipality and not liable to taxation under the preceding clause. I cannot hold that any rules which are made in relation to the sale by the Municipal Committee of pawn shop licenses are rules for the assessment, collection, remission or refund of taxes leviable under the Act. Accordingly, turning back to the notification, the next Section of any Act under which this particular rule might be made is clearly S. 229 (g), Municipal Act. That Section says that the Local Government may make rules consistent with the Act "generally for the guidance of committees and public officers in all matters connected with the carrying out of this Act." In my opinion, this is what they have done in R. 24 of Ch. 6: what they have done is to issue a rule as a matter of guidance. There is nothing in that rule to make it so mandatory that a breach of the rule means that any contract entered into in contravention of it is void. In this connexion, we have been referred by Mr. Rafi to the case in (1853) 9 Ex 457.[1] In that case the plaintiff and the defendants entered into a contract without the estimate and report of the surveyor of the defendant corporation having been obtained; and to that extent, S. 85, Public Health Act, 11 and 12 Vic., C. 63, was not observed. It was nevertheless held that when a contract under seal was entered into between the Board and a third party for the execution of certain works, such contract was valid. Pollock C. B. said:

> Now, Local Boards of Health are appointed by the statute, and they have power given them by it to enter into contracts, which the defendants, as constituting such a Board, have done; and the question is, whether they are liable upon the contract so made. The first objection is, that they ought to have obtained an estimate of expense from their surveyor; but what have the plaintiffs to do with that? It may be incumbent upon the defendants themselves to take that course but it is no part of the plaintiff's duty to ascertain that they have done so; for the plaintiffs have no means of ascertaining the fact. The question then upon this part of the case is, whether these directions are to be treated as conditions precedent, so as to render a contract invalid, if they are not complied with; or whether, according to the modern phrase, they are only directory, that is, whether they are such that parties are bound to comply with them, and in many cases would be liable to an indictment if they do not, but yet do not constitute conditions precedent to the validity of the contract. I am of opinion that these matters are merely directory, and that the plaintiffs were not bound to ascertain whether they had been observed; consequently, the first objection falls to the ground.

Parke B. said:

> The plea therefore raises the question, whether the directions in S. 85 are formal conditions to the validity of obligations by Boards of Health under the Act, or whether they are only directions to them, with which they are bound to comply, under the penalty, in case of non-compliance, of being deprived of all remedy of reimbursement against their constituents. I am clearly of opinion that these matters are not conditions precedent, but that they are what are called in ordinary language 'directory.'

In my opinion, these observations apply equally to the present appeal, because of the express words of S. 229 (g), Municipal Act, under which this rule was made which shows that it was made generally, for the guidance of committees and public officers in all matters connected with the carrying out of the Act: and that means that it has a directory and not a mandatory significance. In my opinion therefore the second contract which was entered into between the Municipal Committee of Myaungmya and the respondent was a valid contract, although the Municipal Committee had not complied with the directions in the rules, and if there has been a breach of that contract the respondent is entitled to relief. The grant of an injunction is a discretionary matter, and both the Township Judge and the learned Judge of the High Court who dealt with the matter on second appeal considered that the case was one for an injunction. And speaking for myself, I am not prepared to interfere with that decision. Accordingly, in my opinion, this appeal should be dismissed with costs, advocate's fee twenty gold mohurs.

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[1] Nowell v. Mayor of Worcester, (1853) 9 Ex 457=2 C L R 981=23 L J Ex 139=18 Jur 64.

**Sharpe J.**—We have been told by the Bar that this is an important case; doubtless that is so. I will therefore give my reasons for agreeing with the conclusions at which my Lord the Chief Justice has arrived. In the month of February 1936, there was what was called an auction of the Myaungmya pawn shop. My Lord has referred to what took place at that auction, and the surrounding circumstances of that auction, and I need not repeat them. S. 54, Burma Municipal Act says:

> When a contract made by or on behalf of the committee exceeds in value or amount one hundred rupees, it shall be in writing and signed by the president or vice-president and at least one other member of the committee.

The respondent before us, who was the plaintiff in the original Court, rests his case, (as indeed he must, in view of the Section to which I have just referred) upon two writings which have become known as Exs. A and B in this case. One is dated 22nd February 1936, and the other 26th June 1936. To my mind, it is unnecessary to consider the legal effect of what took place before those documents came into being and were signed, as they were signed, by both the parties; and I do not propose to go into those details preliminary to the signing of these two documents. There is really no dispute about the first of them, which granted the respondent the right to carry on business as a pawn-broker at Myaungmya for one year from 1st April 1936. It is the second document which causes all the trouble in this case. On the face of it, by this document the appellants sold to the respondent the right to carry on the business of a pawn-broker in Myaungmya for two years from 1st April 1937: that is what the plaintiff alleges in his plaint, and he pleaded that the defendants threatened to re-sell the right to the Myaungmya pawn shop for those two years: and, in those circumstances, he claimed an injunction restraining the appellants from so re-selling that right. The appellants' whole defence can be found in para. 5 of their written statement, wherein they submitted that this second contract "was ultra vires and without jurisdiction" and that they "had no power to extend or grant lease" for those two years. That was reiterated in para. 10 of their written statement, wherein, after repeating that the license was invalid and ultra vires as far as those two years were concerned, they also alleged that neither the plaintiff nor any one else acquired any interest by the license and that they were perfectly within their legal rights in re-selling it.

The whole of their case rests upon a certain rule made by the Local Government. Before examining that rule, I will say this: it appears to me that the only point in this case is, was it within their power to make this contract of 26th June 1936? Now, R. 24 of Chap. 6 of the Burma Municipal Rules is the rule relied upon by the appellants. That is one of many rules made by the Local Government in pursuance, it is said, of certain powers vested in them by statute: and the heading of those rules recites that they are made in exercise of the powers conferred by a number of Sections of three different Acts, the most important of which is the Burma Municipal Act, 1898. Turning to the Sections referred to in that recital, it appears that the Local Government has undoubtedly power to make certain rules which will have the force of law: other Sections, notably S. 229 (g), gave them the power to make rules generally for the guidance of committees and public officers in all matters connected with the carrying out of that Act. So that, it is clear, I think, that the rules which could be made by the Local Government under the powers given to them fall into two distinct categories, each with a different effect from the other. Unfortunately, as it turns out, the Local Government did not say which of the rules they were making under one Section and which under the other, and it has now fallen upon us to say whether Rule 24 of Chap. 6 was made under S. 71, or whether it was made under S. 229.

It is a little difficult to know precisely under which Section it was made. If it was made under S. 71, it seems that the Local Government had no power to make the rule, because S. 71 empowered them to make rules "for the assessment, collection and remission or refund of taxes." This particular rule being incorporated amongst the rules headed "Chap. 6 Taxation" somewhat leads one to suppose that this rule was made under S. 71 : and I am inclined to think that it was, and that it was therefore beyond the power of the Local Government to make this rule, because the rule has nothing to do with the assessment, collection, remission or refund of any tax. But, assuming that I am wrong and that it was made under S. 229 (those are the only two Sections under which, apparently, it could have been made), then it was merely a rule for the guidance of the committee. I need not repeat the passages which my Lord has read from the case in (1853) 9 Ex 457,[1] a case which seems to me to be directly in point. The words of S. 85 of the then Public Health Act in England were that "the Local Board shall obtain from the surveyor an estimate," and so on; the word used is 'shall' as in R. 24. Yet in that case the conclusion reached by, if I may say so, a very strong Court, was that that Section was merely directory and I think that that is all that can be said about the present R. 24, on which the appellants rely in this case. In my view, the rule was either under S. 71 and beyond the powers of the Local Government to make, or, if I am wrong in that, at least it was only directory, and it could not in any way interfere with the right acquired by third persons under any contract entered into by them with the appellants, even though the appellants had entered into it otherwise than in accordance with the directions given in the rules. The contract between the parties must, in my judgment, stand. The appellants cannot escape from the liability into which they entered when they executed the contract, Ex. B, of 26th June 1936. As far as the relief prayed for is concerned, it appears to me that the learned Township Judge, who originally granted this injunction, appreciated all those factors which ought to be taken into account in such a case as this: he considered them, and it is impossible to say either that the injunction so granted by him, and restored by Mackney J. on appeal, was not the proper relief or that the respondent was not entitled to it. I therefore agree with my Lord the Chief Justice in dismissing this appeal.

K.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 408

MYA BU AND MACKNEY JJ.

*Reverend Brother Patrick* — Appellant.

v.

*Maung E* — Respondent.

First Appeals Nos. 47 and 48 of 1938, Decided on 29th June 1938, against order of Dist. Court, Insein, in C. R. Suit No. 4 of 1937.

**Specific Relief Act (1877), S. 38 — Scope — Court cannot limit rights of party rescinding contract — Other party's right to recover amount paid under contract how exercised stated — Decree declaring contract to be void specifying time within which party avoiding contract to refund benefit acquired under contract — Failure to pay within that time does not result in dismissal of suit—But other party can execute decree on failure of refund.**

Where a contract is voidable on account of its being induced to be entered by fraud or misrepresentation and the person at whose option it is voidable has received benefit under the contract, it cannot be avoided by return of the benefit so received but by the exercise of the option of the aggrieved party to rescind the contract. He has to make the payment because the contract is void, the contract does not become void on his making the repayment. The Court in passing a decree in a suit by the aggrieved party for rescission of the contract cannot limit the right of the aggrieved party to reseind the contract. But it can enable the other party to recover his money (paid to the aggrieved person under the contract) by execution of the very decree rather than by being compelled to bring a suit for its recovery, and in making such a direction for the payment of the benefit obtained under the contract, the Court can specify a time before the expiration of which the other party cannot proceed to execute the decree.
[P 410 C 2; P 411 C 1]

Where in such a suit by the aggrieved party the Court passes a decree declaring the contract to be void and ordering it to be set aside subject to the aggrieved party paying to the other party the amount (benefit) received under the contract within a certain time, this does not indicate that it is the intention of the Court that the suit should stand dismissed if he fails to make the required payment within the specified time. But it can only mean that by virtue of the aggrieved person's success in his suit he is bound to pay to the other party the sum of money within the period of grace allowed, with the consequence that on his failure to make this payment, not that his suit shall fail altogether but that the other party can proceed to execute the decree against him for recovering the amount: *A I R 1918 All 98 and A I R 1924 Rang 375 and 31 Mad 28, Ref.*
[P 411 C 2; P 412 C 1]

Paget — *for Appellant.*

Hay and U Sein Tun Aung — *for Respondent.*

**Mackney J.**—The plaintiff-respondent, Maung E, is the heir to one-third of the estate of one Maung Po Ka, deceased. There was litigation in respect of this estate and Maung E mortgaged to the defendant-appellant, the Rev. Brother Patrick, his one-third interest; subsequent to the mortgage, being in need of further money, Maung E obtained Rs. 1000 from the Rev. Brother Patrick on an agreement, so he alleged, to assign the preliminary decree which Maung E had obtained for partition of the estate, with the condition that the Rev. Brother Patrick should recover the said decree within three months of the passing of the final decree on repayment of the original loan and the fresh loan with interest. Maung E alleges that the true facts of the position were not correctly represented to him. He further alleged that although the defendant had promised to give him a letter containing an undertaking to reconvey the said decree and the mortgaged properties on payment of the mortgage debt, no such letter was ever given to him. Accordingly, in Civil Suit No. 4 of 1937 of the District Court of Insein, Maung E, as a pauper, sued the Rev. Brother Patrick for redemption of his one-third share in the estate of Maung Po Ka. In this suit Maung E was successful. The learned District Judge found that the conduct of the defendant's agent, whereby he obtained the plaintiff's assent to the assignment, was either fraudulent or amounted to misrepresentation, and he held that the assignment was voidable under S. 19, Contract Act. He therefore concluded that the assignment must be set aside but only on certain terms, having regard to S. 65, Contract Act or Section 38, Specific Relief Act. Accordingly he passed a decree in the following terms:

> The assignment dated 10th July 1936 is declared void and set side subject to the plaintiff paying the defendant Rs. 1000 together with interest from 10th July 1936 to the date of payment, at the rate of Re. 1-8-0 per cent. per mensem (the rate contracted for under the mortgage) within three months of the date of this decree. It is further ordered that, subject to the above mentioned payment being made, the decree or order in Civil Regular Suit No. 5 of 1935 of this Court dated 2nd November 1936 be set aside and that the suit be recommenced from that stage.

It was also ordered that the plaintiff would, subject to the above payment being made, also get a preliminary decree for redemption of the mortgage dated 24th October 1935 in the terms following and in the decree there followed thereupon a preliminary redemption decree in the ordinary form directing that the sum of Rs. 1619-4-0, being costs of the suit, should be paid by the defendant, Rs. 724-4-0 to the plaintiff and Rs. 895 to the Collector and it was declared that the amount due to the defendant by the plaintiff was the sum of Rupees 7273-12-0, etc. This amount represented the amount due on the mortgage less the Rs. 724-4-0 costs payable by the defendant to the plaintiff. Time was allowed until 2nd March 1938 for payment into Court of the amount found due, on failure of which the defendant was declared to be entitled to foreclose and obtain a decree for foreclosure. It appears to me that not S. 65 but S. 64, Contract Act was applicable. The relevant portion of S. 64 reads as follows:

> The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Section 38 of the Specific Relief Act is as follows:

> On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Section 35 of the Act provides that any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in certain cases, one of which is where the contract is voidable as terminable by the plaintiff. This decree was passed on 30th August 1937. It will be observed that the period of three months would lapse on 30th November 1937. On 27th October 1937, the Rev. Brother Patrick filed an appeal in this Court, Civil First Appeal No. 139 of 1937, against the decree of the District Court. This appeal was filed on 7th February 1938. The plaintiff had made no payment into Court as directed. On 25th November 1937 he did apply to the District Court for an extension of time. This application was however withdrawn and instead it was prayed that he may be allowed to set off costs payable to him against the amount which he had to deposit in Court. This application also was withdrawn on 22nd December 1937. Maung E had also made an application in this Court in Civil First Appeal No. 139 of 1937 on 6th December 1937, for an extension of time. This application was dismissed on 10th January 1938; the Court observed that it was a groundless application and seemed to be a misuse of the process of the Court, in addition, the advocate for the party making it had not chosen to appear.

On 10th March 1938 Maung E deposited in the District Court Rs. 1300 payable by him in the terms of the decree subject to objections which might be raised by the opposite party. Objections were raised but on 21st March 1938 the learned District Judge passed orders respecting these objections and allowing the application to extend time and to permit Maung E to treat the deposit made by him on the 10th March as payment made in fulfilment of the conditions laid down by the Court in its decree dated 30th August 1937. The learned

District Judge held that under S. 151, Civil P. C., he was entitled to make such an order in the interest of justice. As a subsidiary justification for his order the learned District Judge observed that he was disposed to the view that the decree of the District Court participated of the nature of a decree for specific performance and there was sufficient authority for holding that, where a decree for specific performance was passed, the decree was in the nature of a preliminary decree and the original Court kept control over the action and had full power to make any just and necessary orders therein including, in appropriate cases, the extension of the time limited by the decree. The Rev. Brother Patrick had also applied to the Court for an order absolute declaring that Maung E's suit was dismissed on his failure to make the deposit within time. This application was, of course, dismissed by the District Court and Rev. Brother Patrick has now preferred appeals against the order dismissing his application for an order absolute and against the order extending time for payment by the plaintiff-respondent of the moneys due under the decree. These appeals will be conveniently dealt with in the same order.

At the outset there was some discussion as to whether, in fact, an appeal lay from such an order as the District Court's. The question is however not of much moment. If it is regarded as a matter arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree which to some respects it certainly does seem to be—then an appeal would lie; if however the action of the District Court be regarded as an amendment of its decree, then an application in revision would certainly lie under Sec. 115, Civil P. C.: *compare* in this connexion 27 C W N 720.[1] In the course of the argument before this Court, considerable attention was given to the question as to what was the effect of the order of this Court in Civil First Appeal No. 139 of 1937 dismissing the appeal as withdrawn. On behalf of the appellant, it was contended that such a dismissal was in effect a dismissal for default and therefore was not a decree (S. 2 (2) Civil P. C.), and that, there being no decree of this Court in which that of the District Court could merge, the decree of the District Court remained the effective decree. Consequently the period of three months granted by the decree would run from the date of the decree of the District Court and not from the date of the order of the High Court dismissing the appeal. Of course, if the decree is executable at all, the period of limitation for an application in execution will run from the date of the withdrawal of the appeal (Article 182(2), Limitation Act). Assuming however that the decree in the case remains the decree of the District Court, it might seem that unless an extension of time for the repayment of the amount in the decree can be given, the decree cannot be executed by Maung E. It will be advantageous therefore first to consider what is the effect of the decree and what is the true interpretation thereof.

On behalf of the appellant it is argued that the payment of the Rs. 1000 with interest within three months of the date of the decree was a condition precedent to the success of the plaintiff in his suit, and on his failing to comply with that condition the suit must in effect stand dismissed. If this indeed is the correct interpretation of the decree, then there can be no doubt that it is not only contrary to law but most unjust. If it is possible to interpret the decree as being in accordance with law, such an interpretation must be accepted in preference to an interpretation which would convert the decree into an act of gross injustice. On the finding of the District Court the plaintiff-respondent was induced to enter into an agreement, by which he assigned his interest to the defendant-appellant, by fraud or by misrepresentation. That being so, the contract was voidable at the option of Maung E (S. 19, Contract Act). Maung E obviously exercised that option for that was the object with which he brought his suit. The Court was therefore bound to give him a decree rescinding the contract. Since under S. 64, Contract Act, Maung E was bound to restore to the other party any benefit which he had received under the contract, and since Sec. 38, Specific Relief Act, enables the Court, on adjudging the rescission of the contract to require Maung E to make compensation to the other which justice might require, the Court was clearly entitled to require Maung E to refund the Rs. 1000, with interest, which he had received on making the assignment. What the Court could not do was to say that 'unless Maung E made this payment within a certain time, the contract which had been found voidable at his option, and in respect of which he had exercised that option became a valid one. Such a conclusion would be nothing but nonsense. A voidable contract is not voided by repayment of a benefit obtained under the contract, but by the exercise of the option of the aggrieved party to rescind the contract. He has to make repayment because the contract is voided; the contract is not voided on condition of his making such repayment.

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[1] Habibullah v. Gola Asmoter Khatun, (1923) 10 A I R Cal 612=74 I C 575=37 C L J 395 =27 C W N 720.

The Court could not limit Maung E's right to rescind the contract, but it could enable the Rev. Brother Patrick to recover his money by execution of this very decree rather than by being compelled to bring a suit for its recovery; and in making such a direction for the repayment of the benefit obtained by Maung E under the contract, the Court could specify a time before the expiration of which the Reverand Brother Patrick could not proceed to execution of the decree. In my opinion, an examination of the decree in the light of these considerations will show that this is the true interpretation to be put upon the decree. How otherwise can we explain the failure to provide in the decree for the payment of court-fees by the plaintiff to the Collector in the event of his suit failing because he did not make the required deposit? How explain the fact that the costs due to the plaintiff have been allowed for the calculation of the amount declared due on the mortgage? Surely this seems to indicate that the Court found that the plaintiff had been successful in his suit and was entitled to costs in any case? To my mind there is nothing in the wording of the decree to indicate that it was the intention of the Court that the plaintiff's suit should stand dismissed if he failed to pay the amount required under the decree within the specified time. This is not a decree in the nature of a pre-emption decree which directs that the pre-emptor is to have possession conditional upon his paying the pre-emption money into Court within a specified time, and that upon his failure to do so the suit shall stand dismissed, wherein the Court has no jurisdiction to extend the time and the rights of the pre-emptor come into operation only when he makes this payment. In the present case the rights of the plaintiff-respondent have been established and their effective operation is not dependent on the plaintiff's making restitution to the defendant. I would accept the dictum in 40 All 579[2]:

> There is no distinction between a pre-emption decree and any other decree which embodies certain conditions and provides for the suit being dismissed if those conditions are not complied with

as applicable only in cases in which it is lawful for the Court to make such a provision in its decree, and to my mind it is beyond all doubt that the present suit is not such a case.

In 3 Bur L J 163[3] the plaintiff-appellants had by a decree of the District Court been directed to pay into Court within one month from the date of the decree a certain sum and on such payment being made defendant 3 was ordered to convey to them a certain plot of paddy land. The appellants did not pay the said sum into Court within the time specified; no application had been made either to the original or the Appellate Court for an extension of time. Relying on 31 Mad 28[4] the learned Judge who decided the appeal held that the plaintiffs-appellants were not entitled to execute the decree as they had not applied for an extension of time. The judgment in this case as reported does not indicate what was the nature of the suit in the District Court but in the Madras case referred to, the decree in question was a decree directing, on the plaintiffs paying into Court the balance of consideration Rs. 10 within a month from the date of the decree, the defendants would execute a sale deed of the suit land and so it was a decree in the nature of a decree for specific performance. In the Madras case the point for decision was whether the order of the Appellate Court, which simply confirmed the decree of the lower Court and dismissed the appeal, enlarged the time fixed in the original decree; and it was held that it did not.

In the decree which is before us it appears to me that the words "subject to the plaintiff paying the defendant Rupees 1000 . . . . . . . within three months of the date of this decree" must be read as meaning "subject to the defendant's right to have such payment made to him after the expiration of three months from the date of the decree." That is to say, that it was declared not that the plaintiff's suit should fail unless he made this payment within three months, but that, in virtue of his having succeeded in his suit, he was bound to pay to the defendant this sum of money within the period of grace; with the consequence that, on his failure so to make this payment, not that his suit should fail altogether, but that the defendant could proceed to execution against him. In putting this interpretation upon these words, it does not appear to me that I am in any way straining their natural meaning: and it is the only interpretation which can be put upon them which will make the decree consonant with law. Following on such a payment the plaintiff was also to get a preliminary decree for redemption of the mortgage of 24th October 1935. Thus the decree in effect gave the defendant an extra lien on the property in respect of the amount which the plaintiff was required to pay him under the decree.

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[2] Sajjadi Begam v. Dilawar Husain, (1918) 5 A I R All 98=47 I C 4=40 All 579=16 A L J 625.

[3] Ma Pu Mai v. Ko Sit Tin, (1924) 11 A I R Rang 375=85 I C 852=3 Bur L J 163.

[4] Ramaswami Kone v. Sundara Kone, (1908) 31 Mad 28=17 M L J 495=3 M L T 26.

Under Art. 97, Limitation Act, the Rev. Brother Patrick had three years in which to sue for money upon an existing consideration which afterwards failed. The decree puts him in a better position by requiring the plaintiff-respondent to make this payment within three months of the date of the decree. On this view, it was, in my opinion, not even necessary to declare formally that the time granted to the plaintiff for making the payment in question was extended. On this view it is also not necessary to consider whether the Court had power to make such an extension of time or whether the order of this Court dismissing Civil First Appeal No. 139 of 1937 as withdrawn, automatically extended the time specified in the decree. It has been argued that, inasmuch as the defendant-appellant withdrew his appeal in this Court against the decree of the District Court because he understood that there was no need to proceed with it as the decree had become ineffective owing to the plaintiff's failure to comply with the condition specified therein, the defendant is not entitled to an extension of time for that would inflict injustice on the plaintiff who is now no longer able to prosecute an appeal. It appears to me that the argument is of no weight. The defendant-appellant cannot hold the plaintiff-respondent responsible for the consequences of his taking an erroneous view of his legal position. In any case, as I have shown, there has in fact been no extension of time because none was required.

For these reasons I would dismiss both the appeals with costs; advocate's fees twenty gold mohurs for the two appeals, in view of the length of time occupied by the hearing.

**Mya Bu J.**—I concur.

B.D./R.K. *Appeals dismissed.*

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## A. I. R. 1938 Rangoon 412

ROBERTS C. J. AND BRAUND J.

*Ma Phaw and another* — Appellants.

v.

*S. B. Dutt and another* — Respondents.

Letters Patent Appeal No. 1 of 1938, Decided on 16th June 1938, from decree of High Court in S. A. No. 399 of 1936, D/- 5th November 1936.

**(a) Letters Patent (Rangoon), Cl. 13—Certificate under Cl. 13 obtained upon representation that there is point of law of importance involved — Appellate Court ought not allow counsel to abandon point of law and recanvass matter on facts alone.**

Where a certificate under Cl. 13 of the Letters Patent is obtained from a Judge in a case upon a representation that there is a point of law of some importance involved and the case then comes before an Appellate Court, the Court ought not to assent to a procedure whereby the appellant's counsel abandons the point of law and desires the whole matter to be recanvassed upon the facts, it being apparent that there would be no appeal on facts alone and that no certificate would have been granted by the Judge unless the applicability of the supposed point of law had been urged before him. [P 413 C 1]

**(b) Evidence Act (1872), S. 111 — Sole dispute on pleadings, not one of bona fides of particular transaction but one about real nature of transaction—S. 111 does not apply.**

Section 111 has no application except as between parties to the transaction itself. It does not apply where the sole dispute on the pleadings is not one of the bona fides of any particular transaction, but is one as to the real nature of the transaction itself. When a question which is entirely outside one of good faith and the transaction is impugned from another angle altogether, merely because a sale takes place between solicitor and client or between persons who have not that special relationship but some other analogous relationship, it does not mean that the method of impugning it should be different or the things to prove should in any way be varied. [P 413 C 2]

U E Maung and Yan Aung — *for Appellants.*

K. C. Sanyal — *for Respondents.*

**Roberts C. J.**—We are obliged in this case to the learned counsel on both sides and in particular to Mr. Yan Aung to-day for the ability with which he has contended that this appeal should be allowed. The case comes before us having been certified as a fit case for appeal by Mackney J., who made an order pursuant to Cl. 13 of the Letters Patent and said therein that the question of the applicability of S. 111, Evidence Act, to the case is of some importance. I desire to say that in my opinion when a certificate is obtained from a Judge in a case of this description upon the representation that there is a point of law of some importance involved and the case then comes before an Appellate Court, the Court ought not to assent to a procedure whereby the appellant's counsel abandons the point of law and desires the whole matter to be re-canvassed upon the facts, it being apparent that there would be no appeal upon the facts alone and that no certificate would have been granted by the learned Judge unless the applicability of the supposed point of law had been urged before him.

However we are not now asked to do that in this case: and it is conceded—I think very rightly—by the appellant's counsel that as the learned District Judge and Mackney J. have come to the same conclusion upon the facts it would be idle to ask the Appellate Court to review all the facts again and ask them to come to a contrary conclusion, except in very exceptional circumstances. The only matter which we have before us in effect to determine is whether S. 111, Evidence Act, applies here. The two appellants, who were plaintiffs in the original action, were the legal representatives of a deceased gentleman named U Ba Thaw, who died in the month of April 1930. And prior to his death he executed a sale of his properties in favour of Mr. S. B. Dutt, respondent 1 in this case; and it was held by the Subdivisional Court first of all that it was a fraudulent conveyance, but the learned District Judge and the learned Judge on second appeal came to a different conclusion. The legal representatives sought for a declaration that they were still the true owners of the property; and it was their contention that the property had only been mortgaged to Mr. Dutt whereas his view of the transaction was that there had been an out and out sale. The question was very fully considered both in the District Court and in the Court of second appeal, and Mackney J. in his judgment, dated 18th November last year, dealt with the point as follows:

> As the learned District Judge has pointed out, there is nothing alleged in the pleadings which suggest that as between Mr. Dutt and U Ba Thaw there was anything but the utmost good faith over the transfer. It is alleged not only that after the transfer U Ba Thaw retained the conveyance and possession of the land but also that to safeguard U Ba Thaw's interests Mr. Dutt deposited with U Ba Thaw at the same time the document Ex. 1 (i. e. the deed of sale in question). There is in fact no question at all of the good faith of the transaction as between Mr. Dutt and U Ba Thaw. What is alleged is that Mr. S. B. Dutt has recently taken advantage of the existence of the deed to set up a claim to be the real owner of the land.

He points out that the learned District Judge has carefully reviewed the facts and apparently it has been throughout agreed that S. 111, Evidence Act, has no application. And despite the argument presented to us, I cannot see either that it has any application except as between parties to the transaction itself. Where there is a transaction between two persons and one of the parties is in a position of advantage over the other, who puts trust in him, he must, if the other contracting party challenges the good faith of the transaction, prove that he has not abused that trust. But that does not mean that, when a question arises which is entirely outside one of good faith as between the contracting parties, and the transaction is impugned from another angle altogether, merely because a sale takes place between solicitor and client or between persons who have not that special relationship but some other analogous relationship, the method of impugning it should be different or the things to prove should in any way be varied.

Accordingly, although I think that in granting the certificate the learned Judge had it presented to his mind that there must have been some point concerning the applicability of the Evidence Act which he had overlooked, he had in fact rightly decided and determined the only point at issue. And, accordingly, I am of opinion that this appeal ought to be dismissed with costs: advocate's fee ten gold mohurs.

**Braund J.**—I agree and have but little to add. This is a second appeal which has been certified under Cl. 13 of the Letters Patent, and the learned Judge in the Court below has, in his diary order of 11th January 1938, said that his reasons for certifying this case as a fit one for appeal was the question of the applicability of

S. 111, Evidence Act. In my judgment the difficulty in this case has proceeded upon a misunderstanding of the real effect of Sec. 111, Evidence Act. In this case the plaintiffs from the start set up a story that a particular transaction between their father, since deceased, and the defendant, Mr. Dutt, a lawyer, was a transaction by way of mortgage by conditional sale. The answer given to that by Mr. Dutt has always been that on the contrary it was an out and out and genuine sale for a cash consideration. The dispute therefore which emerged on the pleadings in this case was one of pure fact, namely whether the transaction was such a transaction as the plaintiffs alleged it to be, or whether it was such a transaction as the defendant Mr. Dutt alleged it to be. Reverting to S. 111, Evidence Act, which is in these terms :

> Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

It is to be observed that what that Section applies to is a question as to the good faith of a transaction between the parties. The Section of the Evidence Act is a reproduction of the well-known rules of equity which required good faith in the dealing of one person with another who has some hold over him and that equity is applied in all cases that I have ever heard of where a particular transaction such as a sale or mortgage is alleged to have been procured by the opposite party by the exercise of the influence he has by reason of his fiduciary position. But this is not that sort of a case at all. This is a case not alleging a particular, definite and certain transaction which was procured by the influence of Mr. Dutt. It is a dispute as to what the transaction really was. That, in my judgment, is an entirely different question. It may well be that if Mr. Dutt had succeeded in establishing that this was a sale, it would have been open to the plaintiffs to say: "Very well, if it was a sale, it was procured improperly by the exercise of your influence over our father." But the sole dispute on the pleadings is not one of the bona fides of any particular transaction, but one of what the real nature of the transaction itself. In those circumstances, in my view, it is a misapprehension of the real purpose and effect of S. 111 to suppose that it enters into this case at all, as this case is framed on the pleadings. I agree that this appeal must be dismissed.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 414

BAGULEY AND MOSELY JJ.

*Daw Gun* — Appellant.

v.

*Ma Ohn Kin* — Respondent.

Civil Misc. Appeal No. 50 of 1937, Decided on 8th February 1938, against order of the Commissioner for Workmen's Compensation, Mandalay, D/- 2nd June 1937.

**Workmen's Compensation Act (1923), S. 3—Accident arising out of and in course of employment — Workman employed in Electric Supply Company to put up and change posts and to connect and disconnect wires—On considering facts, accident held took place out of and in course of his employment.**

The deceased was employed in an Electric Supply Company to put up and change the posts and to connect and disconnect wires. On the day of accident he was sent out to disconnect wires from certain house. While returning, he saw on his way two other workmen employed in similar kind of work replacing a post. He stopped to help them as it was customary to do so and to which the employer did not object. The two workmen after digging a hole for the new post went away. While they were away, the deceased climbed the post to disconnect the wires and while coming down the pole fell and he came down striking the new pole that was going to be erected. As a result of the injuries he died :

*Held* that the accident arose out of and in the course of his employment. [P 415C 2]

B. C. Paul — *for Appellant.*

**Baguley J.**—This is an appeal against an order passed by the Commissioner for Workmen's Compensation, Mandalay, directing the appellant to pay Rs. 525 further as compensation to the widow of one Ba Kyaw who was killed when working in the employ of the appellant. The appellant is the owner of an Electric Supply Company at Amarapura. The deceased was one of her workmen who was employed, as she says, "to put up and change the posts and to connect and disconnect wires." On the day in question, he was sent out to disconnect wires from a certain house. The other two employees of the appellant were told to go and replace a post at a pongyi kyaung. Ba Kyaw finished his work and on the way back, carrying the wire which he had disconnected, he saw the other two men at their work and stopped to help them. He had done this sort of thing before without any objection raised by his employer. Her witness Saya Maung says: "It is our custom that when there is a delay in any piece of work the other came and help." Maung E, her next witness, says "Ba Kyaw joined in and helped us sometimes under orders and sometimes of his own accord." The work which they were doing was the kind of work for which he was employed. It would appear that these two men, Saya Maung and Maung E, had dug a hole for a new post close to the one which they were going to replace. They say they both went away and left Ba Kyaw alone. Ba Kyaw climbed up the old pole to disconnect wires from the top of it. As he was coming down, the pole fell and he came down striking the new pole that was going to be erected and which was lying on the ground near the place. In consequence of the injuries he received he died.

There can be no possible doubt that although Ba Kyaw is not proved to have been ordered to do this particular job, it was the kind of job that he was employed to do, and the three workmen used to help each other, and I have no doubt, whatsoever, Daw Gun never objected to their doing so. She says that she ordered Ba Kyaw to come back as soon as he had finished the job she had sent him to do. She does not say why she wanted him there, and, in view of the fact that she has produced two witnesses whom the learned Commissioner regarded as false witnesses (an opinion with which I entirely agree), I disregard Daw Gun's statement. It is also worthy of note that the case which Daw Gun tries to make out in evidence has nothing whatsoever to do with the case which she puts forward in her written statement, namely that Ba Kyaw found the bottom of the post rotten and instead of trying to dig it up he tried to break it off by jerking it. I take therefore the facts as I have set out above. Prima facie Ba Kyaw's widow is entitled to compensation under S. 3 as none of the provisos to that Section apply. It is argued that Ba Kyaw took upon himself such an added peril, that the accident cannot be said to have arisen out of, and in the course of, his employment. The added peril suggested is that he ought not to have climbed the post while his two fellow workmen were away, as otherwise they would have stood and held the post up. Several English cases on the subject have been quoted to us but in none of them do the facts in the least resemble the facts in the present case; so I do not propose to deal with them in detail. It seems quite clear that the wires had got to be disconnected before the post was removed, or the post could not be removed, and clearly Ba Kyaw must have been at the top long enough to disconnect the wires, or else the post could not have fallen down. In the ordinary way the man, no doubt, would have been able to jump therefrom without serious damage, and it was only because he happened to hit the post which was lying on the ground that he was killed. There is really nothing to show that there was any serious addition to the danger that he would normally run, by reason of his going up in the absence of his fellow workmen. As a matter of fact, I have much doubt that two men would be able to hold up an electric post with a man on the top of it, if it showed signs of falling. I would hold that the accident arose out of, and in the course of, his employment. There is no appeal with regard to the amount of compensation awarded. The appeal is therefore dismissed. No order as to costs as the respondent has not put in an appearance.

**Mosely J.**—I agree.

D.S./R.K. *Appeal dismissed.*

## A. I. R. 1938 Rangoon 415

ROBERTS C. J. AND DUNKLEY J.

*Dawsons Bank Ltd.* — Applicants.

v.

*Maung Mya Thwin and others* — Respondents.

Civil Misc. Appln. No. 23 of 1938, Decided on 6th April 1938, for leave to appeal to His Majesty in Council, against decree of High Court, D/- 12th January 1938.

**Civil P. C. (1908), Secs. 110 and 109 (c) — Value of subject-matter not upwards of Rs. 10,000 but shown to be about Rs. 9750- Questions of law involved — Leave under Sec. 109 (c) should be granted.**

It must always be kept in view that no real mischief can arise from not allowing a very wide construction of Section 110 because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-s. (c) of Sec. 109. [P 416 C 1]

Where the value of the subject-matter in dispute on appeal to His Majesty in Council was not upwards of Rs. 10,000, but the value was shown to be about Rs. 9750 and there were questions of law involved :

*Held* leave ought to be granted under Sec. 109, sub-s. (c) : *A I R 1925 Cal 159, Rel. on.* [P 416 C 1]

Clark — *for Applicants.*

U Tun Aung —*for Respondents.*

**Roberts C. J.** — We think in this case that leave ought to be granted to appeal to His Majesty in Council. With regard to the valuation of the subject-matter in dispute on appeal to His Majesty in Council, this was assessed by the applicants at Rs. 9750 in their appeal to this Court. The appeal by the Bank was in respect of a half share of certain landed property which had belonged to minors who had now attained majority, and the whole of this land, together with an electric light plant, had been accepted by the Bank as the equivalent of an indebtedness of Rs. 50,000. The method by which the valuation of this appeal was computed was to subtract the value of the electric light plant when new, from the sum of Rs. 50,000 and to halve the remainder, and to say that that was the value of the half share of the land. As Mr. Clark has pointed out however there is also the question of severance value, and the method of computation might have been made the other way round, namely by seeing what was the actual value of the share of the land which was the subject of appeal. In 52 Cal 650[1] Lord Dunedin said, referring to S. 110, Civil P. C.:

> It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the Section, because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-s. (c) of S. 109.

We have come to the conclusion that, although there is some doubt about the matter, it cannot be said to have been established to the satisfaction of this Court that the value of the subject-matter in dispute on appeal to His Majesty in Council is upwards of Rs. 10,000 : but we nevertheless think that this is a case in which, having regard to the value that has been shown, and having regard to the questions of law involved, leave ought to be granted under S. 109, sub-s. (c) of the Code. In one of the judgments of the Appellate Court it is clearly stated that the manager of the appellant bank was guilty of fraudulent misrepresentation and that the consent of the minors to an agreement entered into by them was caused by the fraudulent misrepresentation of the appellant bank's manager; the other learned Judge of the Appellate Court did not so hold. Neither of the Judges of the Appellate Court upheld the judgment of the District Court in the sense that they arrived at the same conclusion for the same reasons, although in fact they did dismiss the appeal. It is argued that the applicants should not be granted leave to appeal to His Majesty in Council by reason of these facts since the result would be to inflict hardship on the respondents which they are ill-equipped to bear. But in the written statement of respondents 1, 3 and 4 (para. 8) it clearly appears that :

> These defendants submit that they were induced by the plaintiff to execute, and executed, the alleged sale-deed without any consideration whatever, on the misrepresentation of the plaintiff to the effect that they (these defendants) were legally liable to execute the same.

With regard to Zaw Pe, I do not find the same allegation in the written statement; but if a certificate is given with regard to the first three respondents it ought, I think, to be given with regard to Zaw Pe as well. Leave to appeal to His Majesty in Council will therefore be granted.

**Dunkley J.** — I agree.

D.S./R.K. *Leave to appeal granted.*

## A. I. R. 1938 Rangoon 416

ROBERTS C. J. AND SHARPE J.

*U Aung Myint* — Appellant.

v.

*Daw Mya and others* — Respondents.

First Appeal No. 136 of 1937, Decided on 12th May 1938, against decree of Dist. Court, Sagaing, D/- 23rd August 1937.

**(a) Limitation Act (1908), Arts. 109 and 120 — Action for profits of immovable property against co-heir in occupation — Not Art. 109 but Art. 120 applies.**

Article 109 does not apply to an action for claim of profits of immovable property against a person who is in possession of the property as co-heir. As there is no special time prescribed for such a claim by any Article, Art. 120 applies : *A I R 1924 Rang 155; 23 Cal 799 and A I R 1917 Mad 901, Foll.* [P 417 C 1]

**(b) Limitation Act (1908), Art. 123—Claim of profits in moveable property of deceased — Art. 123 does not apply.**

Article 123 does not apply to the claims of profits in the estate of a deceased in respect of moveable property : *A I R 1932 P C 81, Foll.* [P 417 C 1, 2]

U. Sein — *for Appellant.*

A. N. Basu — *for Respondent 1.*

K. C. Sanyal — *for Respondents 2 to 5.*

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[1] Udoychand Pannalal v. P. E. Guzdar & Co., (1925) 12 A I R P C 159=88 I C 445=52 Cal 650=52 I A 207 (P C).

**Roberts C. J.**—This is an appeal brought by one U Aung Myint against Daw Mya, who was the plaintiff in an action against him and a number of other defendants who are his nephews and nieces, arising out of the distribution of the estate of U Tha Wun. The only question which remains for decision at this stage is in relation to a question of limitation which lies within a very small compass. All the parties were descendants of U Tha Wun, who died on 9th July 1926, and in particular the appellant was a co-heir. He says that the plaintiff ought to have brought her action within a period of three years since it was an action to which Art. 109 of Sch. 1, Limitation Act, was applicable by reason of the fact that it was a claim for the profits of immovable property belonging to the plaintiff which she said had been wrongfully received by the defendant. In my opinion, it was not such an action. It was an action by the plaintiff against a person who was in occupation as a co-heir and, accordingly, the decision which was referred to in the judgment of the learned Judge, that in 1 Rang 405,[1] is in point. At p. 418 of the report Lentaigne J. said:

> As the occupation of a co-heir would not be wrongful, I do not think that Art. 109 would apply, and I am of opinion that Art. 120 would be the Article applicable.

He quoted there the case in 23 Cal 799[2] and a decision of the Madras High Court in 39 Mad 54;[3] and the learned trial Judge has followed these decisions, and, we think, came to a right conclusion. There are outstanding questions in relation to this estate which will still fall to be decided by the Commissioner whose task it will be to find out what is the right share and how much respectively each person claiming a share has now got into his possession. But the only matter which affects the appeal before us is to decide whether Art. 109 is applicable to the case of a co-heir. There is authority to the contrary, and we are in agreement with it, and we therefore think that the learned Judge came to the right conclusion when he said that as no special time was prescribed by any other Article, Art. 120 applies: the period of limitation thereupon became one of six years: the suit was in time, and, in consequence, this appeal must be dismissed. Mr. Basu, for respondent 1, has filed a cross-objection in which it is suggested that Art. 123, and not Art. 120, applies to the claims of profits in U Tha Wun's estate in respect of moveable properties. This contention was, after a long series of Rangoon decisions, decided in a contrary sense in 54 All 93[4] by their Lordships of the Privy Council, a decision which is binding upon this Court. Accordingly, the cross-objection must be dismissed.

**Sharpe J.** — I agree.

N.S.D./R.K. *Appeal dismissed.*

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[1] Maung Po Kin v. Maung Shwe Bya, (1924) 11 A I R Rang 155=76 I C 855=1 Rang 405.

[2] Robert Watson & Co. Ltd. v. Ram Chand Dutt, (1896) 23 Cal 799.

[3] Mader Sahib v. Kader Moideen Sahib, (1917) 4 A I R Mad 901=38 I C 705=39 Mad 54.

[4] Ghulam Muhammad v. Ghulam Husain, (1932) 19 A I R P C 81=136 I C 454=54 All 93=59 I A 74 (P C).

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## A. I. R. 1938 Rangoon 417

### SPECIAL BENCH

MYA BU OFFG. C. J., BA U AND DUNKLEY JJ.

*Maung Po Hnyin in the matter of the "Sun Press" Ltd.*

Civil Misc. Application No. 164 of 1938, Decided on 26th August 1938.

**Press (Emergency) Powers Act (1931), Sec. 4 (1) (h) — Articles held did not tend to promote feelings of enmity or hatred between different classes of His Majesty's subjects.**

A riot between Indians and Burmans was followed by two articles in a newspaper. The articles pointed out that the facts recited in the articles were already of common knowledge. One of the articles stated that there was no intention to apportion the blame for this affray as between Burmans and the Indians. It also pointed out that that paper had previously published extracts from the pamphlet which had so grievously affronted the Buddhists and had called on the Government to proscribe it, but no action had been taken. It went on to state that the first clash was between monks and Indian and European police, and that in a meeting of Indian and Burmese leaders, the Indian leaders gave an assurance that the Indians would not attack the Burmans ; but, in spite of this assurance Indians had attacked two monks and grievously injured one of them, another monk had been cut with a dah by Indians, a school boy had also been cut by Indians, Indians had done damage on the Sule Pagoda and had sacked Burmese silk shops ; that Burmans in outlying parts of the city, on receiving information of these events, had risen in anger, armed themselves, killed Indians, set fire to mosques and sacked Indian shops. The article pointed out that it was only natural that Burmans in the suburbs of the city and in the districts should resent these acts of Indians in Rangoon, and concluded by expressing the hope that the natives of Burma would live amicably and unitedly with all foreigners who had come to the country for the purpose of trade. The second article pointed out that certain locality was notorious during the riots, and that the Government knew that this locality was inhabited by Indian bad characters who lived by act of violence. It called upon the Government to expel these bad characters from Burma, asserting that only then would Indians and Burmans be able to live in peace with one another :

*Held* as regards first article, that as news, the facts were stated with restraint, and not in violent or provocative language, and no attempt was made to gloss over the misdeeds of one side in favour of the other. The article did not "tend to promote feeling of enmity or hatred between different classes of His Majesty's subjects" and therefore did not come within the scope of Cl. (h) of S. 4 (1). Regarding second article, Indian bad characters were not a "class of His Majesty's subjects," as contemplated by Cl. (h) of S. 4 (1) and the article was directed against them only. Even if the article fell within the scope of Cl. (h), it came within Explanation 4, and therefore could not form the basis of an order under Sec. 7 (3).
[P 419 C 2; P 420 C 1]

U. E. Maung — *for Applicant.*

E. W. Lambert — *for the Crown.*

**Mya Bu Offg. C. J.**—This is an application by Maung Po Hnyin, Printer and Publisher of a daily newspaper (printed in Burmese) called "The Sun," under the provisions of S. 23, Press (Emergency Powers) Act, seeking to have set aside an order of the Government of Burma, dated 2nd August 1938, made under the provisions of Sec. 7 (3) read with Sec. 4 (1) of that Act, requiring Maung Po Hnyin to deposit with the District Magistrate of Rangoon security to the amount of Rs. 3000. The provisions of the Press (Emergency Powers) Act were considerably enlarged by the Criminal Law Amendment Act of 1932, by S. 16 of which several clauses and several Explanations were added to the provisions of S. 4, sub-sec. (1). Cl. (h), which was one of the clauses so added, reads as follows :

(h) or which tend, directly or indirectly, to promote feelings of enmity or hatred between different classes of His Majesty's subjects.

The order of the Government of Burma set out that two articles had been published in "The Sun" newspaper, one in its issue of 1st August 1938, and one in its issue of 2nd August 1938, which contained words "of the nature described in Cl. (h) sub-s. (1) of S. 4, Press (Emergency Powers) Act ;" that is, that these two issues of "The Sun" newspaper contained words which tended, directly or indirectly, to promote feelings of enmity or hatred between different classes of His Majesty's subjects. What purported to be translations into the English language of the two articles to which exception was taken were also set out in the order of Government. It is not contended on behalf of the Government that the words contained in either of these articles can be brought within the scope of any clause of Sec. 4 (1) other than Cl. (h), and therefore we have to consider them solely in relation to the provisions of this clause. Now, the translation of the articles which appear in the order of Government of 2nd August 1938, are extremely inaccurate ; that is admitted by both sides. We have been provided with more accurate translations prepared in the translation Department of this Court, and these translations are accepted as accurate on behalf of the Government. Although not completely accurate, they are sufficiently so for all practical purposes, but we think it desirable to mention one inaccuracy. In the translation of the article of 1st August, at the end, the real effect of the Burmese expression which has been translated as "in search of wealth" is more correctly expressed by the words "for the purpose of trade." However, the translations contained in the order of Government were definitely misleading.

No evidence, either in the form of affidavits or in any other form, has been adduced before us at the hearing of this application, and regarding the facts and circumstances which led up to the issue of the order of Government we are compelled to rely on the statements which have been made from the Bar, which appear not to be controversial, and the allegations of fact contained in the two articles in question, which allegations of fact learned Government advocate has said that he is not in a position either to admit or to deny. We are therefore left with no alternative but to accept these allegations as being accurate. It appears that on 26th July 1938, a meeting of monks and laymen was held on the platform of the Shwedagon Pagoda, for the purpose of protesting against a pamphlet which had been published by a Burma Moslem and which is said to contain grave aspersions on the Buddhist religion. These persons formed themselves into a procession and marched towards the Soorti Bara Bazaar. On the way they came into conflict with the police as a result of which several persons, including a number of police officers, were injured and one policeman was killed. On 28th July general rioting between Mahomedans on the one side, and Burmans on the other side, broke out; a large number of persons both Indians and Burmans, were killed or injured, and very many Indian and Burmese shops were looted. The disturbance continued during the 29th, but order was gradually restored although the tension between the contending parties remained extremely acute. On 1st and 2nd August the offending articles appeared in "The Sun."

On behalf of the applicant it is contended that the first article does not fall within the scope of Cl. (h) of S. 4 (1), Press (Emergency Powers) Act, and we think that this contention is well founded. The article first mentioned the original clash between the procession of monks and laymen and the police on 21st July and said that this had developed into a communal affray. It then went on to state that there was no intention to apportion the blame for this affray as between the Burmans and the Indians. It also pointed out that "The Sun" had previously published extracts from the pamphlet which had so grievously affronted the Buddhists and had called on the Government to proscribe it, but no action had been taken. It went on to state that the first clash was between monks and Indian and European police, and that at a meeting of Indian and Burmese leaders, held on the 26th, the Indian leaders gave an assurance that the Indians would not attack the Burmans; but, in spite of this assurance, on the 28th, Indians had attacked two monks and grievously injured one of them, another monk had been cut with a dah by Indians, a school boy had also been cut by Indians; Indians had done damage on the Sule Pagoda and had sacked Burmese silk shops; that Burmans in outlying parts of the city, on receiving information of these events, had risen in anger, armed themselves, killed Indians, set fire to Mosques and sacked Indian shops. The article pointed out that it was only natural that Burmans in the suburbs of the city and in the districts should resent these acts of Indians in Rangoon, and concluded by expressing the hope that the natives of Burma would live amicably and unitedly with all foreigners who had come to the country for the purpose of trade.

Now "to promote" means either to bring into existence something which did not exist before, or to further and encourage the growth and development of something which is already in existence. How can it be said that this article tended, directly or indirectly, to bring into existence feelings of enmity or hatred between Mahomedans and Burmans in Burma, or to encourage and increase such feelings of enmity or hatred which already existed ? It certainly did not bring such feelings into existence, for they already existed. If action had been taken against this newspaper for publishing extracts from the offensive pamphlet which originated the trouble, we could have better appreciated the reasons for the order of the Government. The recital of facts contained in the article cannot have had the effect of encouraging or increasing such enmity, for the article points out that these facts were already common knowledge, they were merely news which had already been reported generally in the Press. As news, the facts are stated with restraint, and not in violent or provocative language, and no attempt is made to gloss over the misdeeds of one side in favour of the other. The article does not, in our opinion, display such undue partisanship as to be objectionable on that ground. It concludes with a fervent expression of a desire for peace between persons of all nationalities residing in Burma. We are of opinion that this article, published at the time and under the circumstances in which it was published (so far as we have been made aware of those circumstances) did not "tend to promote feelings of enmity or hatred between different classes of His Majesty's subjects" and therefore did not come within the scope of Cl. (h) of S. 4 (1), Press (Emergency Powers) Act. In regard to the second article of 2nd August, for the applicant reliance is placed upon Expln. 4 to S. 4 (1) of the Act, which Explanation reads as follows :

> Words pointing out, without malicious intention and with an honest view to their removal matters which are producing or have a tendency to produce feelings of enmity or hatred between different classes of His Majesty's subjects shall not be deemed to be words of the nature described in Cl. (h) of this sub-section.

The second article pointed out that the locality round about Tseekai Maung Taulay street was notorious during the riots, that the Government knew that this locality was inhabited by Indian bad characters who lived by act of violence, and that although the state of the city had improved these Indians were conspiring to engage persons to commit acts of incendiarism in the Burmese quarters of the city. It called upon the Government to expel these bad characters from Burma, asserting that only then would Indians and Burmans be able to live in peace with one another. It stated that if the Government failed to take any action against these persons and there was a recrudescence of the rioting the Government would be responsible. That is the gist of the article. Now Indian bad characters are not a "class of His Majesty's subjects," as contemplated by Clause (h) of Sec. 4 (1), and the article was directed against them only. That consideration alone is fatal to the order of Government, so far as this article is concerned. Moreover, the order of Government does not suggest that the article was written dishonestly and with a malicious intention, and we have no means of testing the motive or intention of the writer of the article except from the contents of the article itself. As we said, there is no evidence on the record, and we must therefore conclude that the statements in the article, that this particular locality was notorious during the riots and was to the knowledge of Government the residence of undesirable Indians, are true. We can therefore only construe the article as an honest and sincere attempt to persuade Government to take action which the writer believed to be essential for the peace of the city. In our opinion, even if the article falls within the scope of Cl. (h), which we doubt, it comes within Expln. 4, and therefore cannot form the basis of an order under Sec. 7 (3).

This application is therefore allowed and the order of Government of Burma, dated 2nd August 1938, requiring the applicant to furnish security to the amount of Rupees 3000 is set aside. The applicant is entitled, as against the Government of Burma, to his cost of this application, advocate's fee ten gold mohurs.

D.S./R.K. *Application allowed.*

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## A. I. R. 1938 Rangoon 420

BRAUND J.

*Daw Hla Gyi* — Plaintiff.

v.

*Maung Po Thaung* — Defendant.

Civil Regular Suit No. 89 of 1936, Decided on 14th June 1938.

**Civil P. C. (1908), O. 1, R. 3 and O. 2, R. 6 —Misjoinder— Person claiming as landlord — Possession with tenants and trespassers—Claims against 20 persons—Different causes of action against each one — Suit held was bad — O. 2, R. 6 held not applicable.**

Where a person, being the ground landlord of the whole parcel upon which in various circumstances and at various times, persons—some of them as tenants and others as mere trespassers — have erected buildings, claims individually as against those who either are his tenants or who claim through persons who were his tenants, to recover possession on the ground of breaches of their respective tenancy agreements and, as against some of the others, he claims as mere trespassers who have from time to time possessed themselves of the land :

*Held* that the suit, in reality, was an attempt to combine in one suit 20 suits against 20 different persons in respect of 20 different pieces of property and upon 20 different causes of action; and as such was bad for misjoinder of parties and causes of action. [P 421 C 1; P 422 C 1]

*Held further* that O. 2, Rule 6 did not apply to this case as it was a case of misjoinder of causes of action, not as between a plaintiff and a defendant but as between a plaintiff and different defendants. Further, O. 2, R. 6 does not apply to cases of misjoinder of causes of action but to cases where several causes of action have been properly joined in one suit and the causes of action so joined cannot conveniently be tried together. [P 422 C 2]

Sein Tun Aung — *for Plaintiff.*

**Braund J.**—This suit is one by a plaintiff against some twenty defendants or sets of defendants. It is one in which the plaintiff, alleging himself to be the owner of a certain piece or parcel of land at Kemmendine, seeks to obtain possession of the various tenements into which the land is divided from the several persons who, at the date of the plaint, were in possession of them. The plaintiff claims to be the ground landlord of the whole of this parcel, upon which, in various circumstances and at various times since the year 1905, persons—some of them as tenants and others as mere trespassers — have erected buildings. He claims individually as against those who either are his tenants or who claim through persons who were his tenants, to recover possession on the ground of breaches of their respective tenancy agreements and, as against some of the others, he claims as mere trespassers who have from time to time possessed themselves of the land. Each of the several parcels of land now in the possession of the several defendants came into his or her possession at different times and in different circumstances. As it seems to me, wholly different questions of fact and of law may apply to each, although it is possible that there may be some common question of law which may apply to all of them. With the assistance of the plaintiff's advocate, I have gone carefully through each of the defendant's titles and I find that the title of each of the defendants to each separate piece of land is separately traced, either from some original tenant of the plaintiff's predecessor-in-title or from a demise to that defendant by the plaintiff herself or from mere occupation of the land by the defendant himself or by the defendant's predecessor in occupation at some time in the past.

It is, I think, impossible to take any other view than that this suit, in reality, is an attempt to combine in one suit 20 suits against 20 different defendants in respect of 20 different pieces of property and upon 20 different causes of action. The cause of action as against each defendant consists of all those facts which go to make up the circumstances of that particular defendant's present occupation of the land and of all those circumstances which constitute in each particular case the right of each particular defendant to remain in possession. In the case of no two of these defendants, or of no two sets of defendants, are those facts in any sense identical. Those few of the defendants who are themselves original tenants obtained their tenancies at different times and under different conditions and a considerable number of the defendants who claim to trace their title to their present occupation through predecessors who were themselves tenants of the plaintiff's predecessors-in-title have to rely upon earlier tenancies, which themselves arose in circumstances entirely dissimilar to each other. Finally those persons who are in possession, or whose predecessors have been in possession, as mere squatters or trespassers have to rely upon facts constituting the origins of their possession. When one comes to consider merely the question of limitation it becomes apparent at once not only how inconvenient, but how impracticable, it would become to try this matter in one suit. The defendants rely upon limitation in this case and it might involve the Court in having to try in one suit 20 or more different issues of limitation, raising an equal number of different sets of facts and considerations of law. Neither, in my view, is it necessarily a fact that there is, or may be, some question running through the case that is common to all.

It is said by the plaintiff's advocate that there is a common issue here, namely the issue that all the defendants, among other things, deny the plaintiff's title to the land. It is said that the defendants with one voice set up, against the plaintiff, a title in some third party or third parties. That is, it is said, the common factor which makes it proper that these particular cases should all be tried as one. Even that however is by no means proved. It may well be that to some of these defendants it is open to deny the plaintiff's title, whereas to others it is not. One only has to read S. 116, Evidence Act, which says that no tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such a tenant had at the beginning of the tenancy a title to such immovable property. In the case of those persons who claim to derive their title through an original tenant, that involves trying separately issues of whether the particular defendant traces his title through an original tenant. It involves enquiring whether each particular defendant is himself a tenant or claims through a tenant. It involves enquiring whether the tenancy is now continuing. As it seems to me, upon that ground it involves different considerations in each case. On the other hand, it may be that in the case of trespassers—I am not, of course, deciding this —no question as to S. 116 will arise. It is not, in my view, true by any means to say that there is one common question of law as to the plaintiff's own title which is applicable to each of these cases.

There is another point made by the plaintiff. He says that in 1925 there was an agreement by the defendants to certain suits which had been started then to the effect that, in the matter in dispute as to the title of the plaintiff's predecessors, they would abide by the result of certain other proceedings. For myself, I see great difficulties in that contention. But apart from that, even though that did constitute a feature common to all defendants, it would not, in my view, justify 20 cases such as these being tried as one. O. 1, R. 3, Civil P. C., is the rule which regulates matters of this kind. It is the only rule which deals with the joining together of causes of action against different defendants. O. 2 deals with the combining of different causes of action as between the same parties. But O. 1, R. 3 says :

> All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise.

That makes provision for what, upon any footing, must be the exceptional case of combining in one suit separate causes of action against separate defendants. But it provides that, before that ought to be done, the right to relief must arise in respect of or out of the same "act or transaction or series of acts or transactions." It is, I think, impossible in this case to say that the right to relief against these defendants, which depends upon terms of occupation varying in each case, arises out of "the same act or transaction or series of acts or transactions." It seems to me to be quite clearly contemplated that in order to qualify under this Rule, the case must be one in which the issue— be it an issue of fact or an issue of law or both — against each of the defendants is substantially the same. That appears to me to become plainer when one sees that it is still permitted to make use of this rule even where the relief against some of the defendants is merely ancillary to the relief claimed against the others. It is to be no obstacle to a plaintiff availing himself of O. 1, R. 3, if while the case against the defendants is substantially the same, certain "ancillary" relief is necessary against some and not against others. What is objectionable is that the cases against each of them should be different and should arise out of separate transactions. It seems to me to be impossible in this case to say that the causes of action against the defendants in any sense arise out of the same acts or out of the same transactions. Separate lettings to each tenant and separate "squatting" by each squatter do not constitute, in my view, the same acts or the same series of acts or transactions. Notwithstanding the possibility that they may have some common feature running through them, there is so much that is not common that, in my view, it would be improper to treat this as a case under O. 1, Rule 3 and the matter is one for the discretion of the Court.

The learned advocate who has appeared for the plaintiff agrees with me in thinking that, generally speaking, there are three classes of defendants here. There is, first of all, that class of occupant who is himself the tenant. There is, secondly, that class of occupant who claims to trace his title through some previous tenant, whether by inheritance or otherwise. Thirdly, there is that class of person who is a mere trespasser. I am reluctant that these proceedings, should be wholly wasted. I have been prepared therefore to treat this suit as a suit against any one of the defendants whom the plaintiff's advocate may select and to proceed with it on that footing with suitable amendments to the pleadings. He has selected defendant 1. I shall, accordingly in the first place, direct that this suit, be continued henceforth as between the plaintiff and defendant 1. As ancillary to that, I shall direct the plaintiff to deliver within 14 days an amended plaint as against defendant 1. Defendant 1 will then have liberty within a further period of 14 days to deliver an amended written statement. I have pointed out already that, in my view, the plaintiff's case is a quite simple one as against each individual defendant and that it need not be pleaded with anything like the prolixity of the present pleadings.

The plaintiff's advocate has invited my attention to O. 2, R. 6, and has asked me to maintain this suit as it is, and to order separate trials of the three issues that I have mentioned. In my view, for the reasons that I have expressed, this is a case of misjoinder of causes of action, not as between a plaintiff and a defendant, but as between a plaintiff and different defendants. It is not, in my view, a matter which is within the scope of O. 2 at all, and in particular it is not one, I think, that is covered by O. 2, R. 6. I agree with the note of the learned author of Mulla's "Code of Civil Procedure" at p. 504 where he says that this rule does not apply to cases of misjoinder of causes of action but to cases where several causes of action have been properly joined in one suit and the causes of action so joined cannot conveniently be tried together. It remains therefore for me to consider what I must do as regards the remaining defendants. I have offered to permit the suit to be withdrawn as against them, with liberty to bring a new one, but that offer has been declined. I do not think I have any jurisdiction under O. 23, R. 1, to make an order to that effect unless I am asked to make it by the plaintiff. In this case the plaintiff's advocate does not accept my offer to permit him to withdraw the suit under O. 23, R. 1, and, accordingly, though with some regret, I am compelled to dismiss the suit as against all the defendants other than the first. No extra costs have been incurred by reason of the present misjoinder of defendants and accordingly, I shall dismiss the suit as against these defendants with no order as to costs.

B.D./R.K. ***Order accordingly.***

## A. I. R. 1938 Rangoon 423

### SPECIAL BENCH

MYA BU OFFG. C. J., BA U AND DUNKLEY JJ.

*In the matter of O, a Barrister-at-law.*

Civil Misc. Appln. No. 59 of 1938, Decided on 26th August 1938.

**Bar Councils Act (1926), Sec. 10 — Professional misconduct—Advocate engaged to file suit employing unregistered clerk and leaving plaint with him for presentation — Plaint not presented by clerk – Advocate not taking care to see whether suit had been filed and failing to account for money advanced to him by his client for stamps and other incidental expenses —Misconduct held of grave nature.**

An advocate was engaged to file a suit. The advocate employed an unregistered clerk and left the plaint with him for presentation. The clerk failed to file the plaint and thus the suit was not filed. The advocate however did not take care to see whether the suit had been filed by looking into the cause list and thus allowed his clerk to cheat his client. Besides this the advocate did not return or account for the money he had taken from his client for stamps and other incidental purposes :

*Held* that the conduct of the advocate amounted to gross misconduct : *35 Mad 543 (P C), Rel. on ; A I R 1934 Rang 33, Ref.* [P 425 C 1, 2]

E. W. Lambert — *for Applicant.*

Gregory — *for Respondent.*

**May Bu Offg. C. J.**—These proceedings are the offshoot of Criminal Regular Trial No. 128 of 1936 of the Court of the Western Subdivisional Magistrate, Rangoon. The undisputed facts relating to the institution of that case are these: One Miss Iris Gordon engaged Mr. *O*, an advocate of this Court, in the first week of August 1935, to file a suit for recovery of over Rs. 2000 alleged to be due as principal and interest on two promissory notes against Taylor and Gardner. She paid him Rs. 175 as fee and Rs. 243.8.0 for stamps and other incidental expenses. Stamps to the value of Rs. 200 were purchased and a plaint was prepared and signed by Miss Gordon. A few days later Miss Gordon met Mr. and Mrs. Taylor in the office of *O* and she was asked to come to terms. She agreed. The terms as agreed to by her are set out in the letter Ex. A, which *O* wrote to her on 25th September 1935. It is in the following terms :

**Dear Madam,**

**In re the matter of Miss. I. Gordon v. F. Taylor and 1 in the High Court, Rangoon. Suit on promissory notes dated 12th October 1933 Rs. 1200 and 24th November 1933 Rs. 800 with interest and costs.**

With reference to the above case, after the discussion between Mr. Taylor and yourself in my office yesterday, I understand that you have agreed to compromise the case on the following basis. You agree to accept from Mr. Taylor Rs. 2500 in full settlement and discharge of your claim. In consideration of the fact that you are foregoing nearly Rs. 1000 as interest Mr. Taylor undertakes to make you an immediate cash payment of Rs. 1000 and the balance of Rs. 1500 Mr. Taylor undertakes to pay you by monthly instalments of Rs. 100 per month the first of such instalments to be payable on 15th October 1935 and thereafter on the 15th of each succeeding month until final discharge.

I have therefore your authority now to withdraw the case filed by you in the High Court.

Yours faithfully,
(Sd.) *O*.

The above represents the agreement arrived at between us the undersigned.

(Sd.) Taylor.
(Sd.) Eileen Taylor.

In spite of the agreement she did not get any money from Taylor, whereupon she made inquiries through one Hla Aung whether a suit was really instituted in this Court. She learnt that it was not. As a result thereof she prosecuted both *O* and G. S. Paul for criminal breach of trust in respect of Rs. 418 which she had paid, partly as *O's* fees and partly as costs of stamps and incidental expenses. The Magistrate found *O* not guilty but found Paul guilty of having misappropriated the money paid for stamps and other incidental expenses and sentenced him to four months' rigorous imprisonment and fine. Although he acquitted *O* yet the learned Magistrate made some adverse comment on the conduct of *O*. Paul appealed to this Court and Spargo J. set aside the conviction and sentence. In doing so, the learned Judge also made some adverse comment on the conduct of *O*. In consequence thereof, a Tribunal constituted under S. 11, Bar Councils Act, held an inquiry into the conduct of *O*. The Tribunal framed the following two charges:

**1. That you being an advocate of the High Court of Judicature at Rangoon did accept an engagement in or about August 1935 from Miss Iris Gordon to file a suit against Messrs. Taylor and Gardner and were paid Rs. 418-8-0 inclusive of your fees Rs. 175; that by your letter dated 25th September 1935 you intimated to Miss Iris Gordon that the case had been filed and that it was to be withdrawn on certain terms, when in fact the suit was never filed; that you were negligent in not even ascertaining whether the said suit had been filed as asserted by you and that you are thereby guilty of professional misconduct. You are called upon to show cause why you should not be struck off the Roll of Advocates, or suspended from practice, or otherwise punished.**

2. That you in or about August 1935 did obtain from Miss Iris Gordon the sum of Rs. 243-8-0 being court-fee and incidental expenses and the said sum has not been returned to her or otherwise accounted for to her and you are thereby guilty of negligence in your professional conduct. You are called upon to show cause why you should not be struck off the Roll of Advocates, or suspended from practice, or otherwise punished.

The tribunal found both the charges proved and submitted a report to this effect. We have no doubt in our minds that the finding of the Tribunal is perfectly correct. Even taking the facts admitted by *O* himself, there can hardly be any doubt that he was grossly negligent in the conduct of Miss Gordon's case. He kept Paul in his office and allowed him to help him in his work, but he did not get him registered in this Court as his clerk and he paid him no salary. One of the rules of this Court provides that no plaint, application or appeal shall be accepted unless filed by a registered clerk of an advocate. Seeing that he has been an advocate of this Court for over thirteen years, he must have been aware of the existence of this rule. And yet he made over the plaint in Miss Gordon's case to Paul with instructions to file it on the Original Side of this Court. Mr. Gregory on his behalf submits that though Paul could not file the plaint himself, he could still have asked a registered clerk of another advocate, or an advocate himself, to file it on behalf of Mr. *O*. According to Mr. Gregory, this is done almost every day in this Court. Assuming that Paul could have done it, the question is whether *O* made enquiries whether Paul had really done it after he had made over the plaint to him. There is no answer to it. The only answer he gives is that he was all along under the impression that the plaint had been filed. Why he thought so may best be described in his own words:

> **The fact that Miss Gordon was a personal friend of Mr. Paul who was looking after her interest as it were, the fact that Miss Gordon had implicit faith in Mr. Paul, the fact that the stamp fees for the suit had been purchased, the fact that Miss Gordon had signed the plaint in my presence, the fact that Mr. Paul was the only person to whom Miss Gordon spoke about the case, the fact that Miss Gordon never once questioned me about the case and the fact that the parties compromised the suit in my presence, all convinced me that the suit had in fact been filed.**

Even assuming that all these things were true, still he could have, and in fact should have, known whether the plaint had been filed or not if he had only looked at the Cause Lists of this Court. It is common knowledge that when a plaint is filed, it is numbered and registered and the case then appears in the Cause List about a fortnight after it has been filed. Then it keeps on appearing in the appropriate Cause List first for filing of written statement, secondly for directions and then for hearing. The plaint in the present case was signed by Miss Gordon on 10th August 1935, and so, if it was filed on that date or a day or two later, it would have appeared in the Cause List on or about 24th August. Thereafter it must appear in the appropriate Cause List from time to time. Therefore if *O* had only looked at the Cause List, he would have found out by about the third week in August whether the plaint had been filed or not. His learned advocate, Mr. Gregory, submits that *O* was not a subscriber to the Cause List. In that case what did he do with regard to his other cases in the High Court? From where did he get information as to when his cases were coming on for hearing in the High Court? To the same source he must go for information to find out when Miss Gordon's case was likely to come on for return of summons. If he had done it, he would have known that the plaint was never filed by Paul. If he did not do it, then it was gross negligence on his part not to have done it. What did he in fact do? On 25th September 1935, that is over a month after he had made over the plaint to Paul, he had both Miss Gordon and Taylor in his office and effected a compromise. He says that in order that there should be no misunderstanding regarding the terms of the compromise, he wrote the letter Ex. A. It is, as set out above, headed:

> **In re the matter of Miss I. Gordon v. F. Taylor and 1 in the High Court, Rangoon. Suit on promissory notes dated 12th October 1933 Rs. 1200, and 24th November 1933 Rs. 800 with interest and costs.**

It is a curious way of heading the letter. What one would have expected him to do was to mention the case number in the letter Ex. A. From the fact that he did not do so one must infer that he was all along aware that Paul never filed the plaint. This inference becomes stronger when a reference is made to the return of the two promissory notes to Miss Gordon. Miss Gordon was served with a summons to produce these promissory notes in a case in the Court of the Western Subdivisional Magistrate, Rangoon, on 1st November 1935. On receipt of the summons she went to *O* and asked him for return of the promissory notes. He asked Paul to get them from the High Court and return them to Miss Gordon. As an advocate of this Court, he must have known that even a registered clerk of an advocate—leave alone an unregistered clerk like Paul—could not get back any document from the High Court. Documents are returned only to a party concerned or to its advocate. Paul however did manage to get these promissory notes and returned them to Miss Gordon. Therefore when *O* asked Paul to get these promissory notes back and return them to Miss Gordon, he knew perfectly well that the promissory notes were in Paul's possession and that the plaint had never been filed.

Even assuming that he did not know that Paul had not filed the plaint till he received a notice of demand from U Kyaw in February 1936, he is, in our opinion, still guilty of professional misconduct. Miss Gordon states that at the request of *O* she paid Rs. 95 to Paul for the purpose of having the summons served on Taylor at his house and not through the Head of his Department. She is supported by Jane and Ma Than Tin. The tribunal believe their evidence and we see no reason to differ from them. Therefore what is clear is that *O* left the case entirely in the hands of Paul and made no enquiries about the progress of it and allowed Paul to cheat Miss Gordon.

In 35 Mad 543[1] the Madras High Court held that the negligent management of his office and permitting his clerks to cheat his clients and mislead them as to the progress of the case is misconduct on the part of the pleader for which he might be suspended from practice. For all these reasons we are satisfied that the first charge is proved.

In dealing with the second charge, we also propose to take the admitted facts first. On 12th October 1935, *O* applied for refund of unused stamps of the value of Rs. 160. A refund of Rs. 150 was allowed. A cheque was given in his name. He endorsed it and subsequently Paul had it cashed at Messrs. Whiteaway Laidlaw and Company. The stamps for which refund was claimed were the stamps purchased for Miss Gordon's case. Now, his explanation in connexion therewith is as follows:

> Besides him there was another man by the name of Mr. Shircore who was acting as the agent of one of my clients who engaged me in an administration suit which I filed in this Hon'ble Court . . . . Some time in October 1935, Mr. Shircore brought me an application which he asked me to sign. The application was the usual form used for applying for refund of unused stamps and the value of the unused stamp shown in this application was Rs. 160. Mr. Shircore explained to me that his principal intended to file another suit through him in the High Court and he purchased this stamp in my name as he intended to engage me in this suit as well. He told me that as the claim had been settled out of Court, he was obliged to apply for a refund of these unused stamps as it was not now needed for the purpose for which it was bought . . . . After an interval, a cheque for Rs. 150 representing the actual refund was brought to me by Mr. Shircore who asked me to endorse the cheque as it was issued in my name. I endorsed the cheque and handed it over to Mr. Shircore and thought no more about it.

It is extremely incredible that an advocate of *O's* standing would not have looked at the stamps before he signed the application for refund. It is very remarkable that the application for refund should be made at a time when the stamps purchased for Miss Gordon's case had not been used. If it was a coincidence, it was a very strange coincidence indeed. Therefore having regard to these facts, we cannot help holding that when he filed the application for refund, he knew that the application was for refund of the stamps purchased for Miss Gordon's case. It was therefore his duty to see that the money was returned to Miss Gordon after the cheque had been cashed. In failing to do so, he must be held to be guilty of misconduct. Now, the question is what kind of punishment must be meted out to him. S. 10, Bar Councils Act, provides that

> the High Court may, in the manner hereinafter provided, reprimand, suspend or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct.

The charges of which the respondent *O* is found guilty are grave charges. In Civil Misc. Appln. No. 85 of 1933[2] of this Court, Page C. J. said:

> **Now, what is the position of an advocate, and what are the ideals that he ought to set before him? Settled in the days of imperial Rome they have remained immutable throughout the ages. An advocate, as the name denotes, is one summoned to aid members of the public who call upon him for assistance; and a true advocate ever bears in mind the ancient and noble conception of his office, namely that he is the *patronus* standing in *loco parentis* towards litigants, the latter being called his *cliens* or *cluens* (a term in later use often strangely misapplied in connexion with**

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**[1] In the matter of Krishnasami Aiyar, (1912) 35 Mad 543=16 I C 328=39 I A 191=13 Cr L J 680=(1912) M W N 963=23 M L J 114 (PC).**

**[2] In the matter of P an advocate, *reported in* (1934) 21 A I R Rang 33 = 149 I C 856 = 12 Rang 110.**

other avocations), because he listens to, and follows the advice of his advocate. Indeed, so closely is the advocate associated with his client that in times gone by occasions have been recorded upon which an advocate has been called upon to defend his client not only with his forensic skill but with his body. From this conception of the office of an advocate it follows that the public are entitled to receive disinterested, sincere and honest treatment and advice from the advocates to whom they repair for counsel and succour in their time of need ; and it is for this reason that Lord Mansfield laid down, and the Court has always insisted, that members of the legal profession 'should stand free from all suspicion.'

If we Judge *O's* conduct in the light of these observations, we feel that he must receive such punishment as will fit the gravity of his misconduct. We are however not unmindful of the fact that he is now an old man of about 64 years of age, that he has been a member of the Bar for 33 years, that he has made some reparation to Miss Gordon and that the Bar Tribunal has recommended for leniency to him. Because of these facts, we suspend him from practice for three years. The respondent to pay the cost of the proceeding before this Bench ; advocate's fee 10 gold mohurs.

D.S./R.K. *Order accordingly.*

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## A. I. R. 1938 Rangoon 426

ROBERTS C. J. AND DUNKLEY J.

*Balthazar & Son, Ltd.* — Appellant.

v.

*Official Assignee* — Respondent.

Civil Misc. Appeal No. 43 of 1937, Decided on 14th March 1938, against order of the High Court, *reported in A I R 1938 Rang 1.*

**(a) Charge — Creation of — Hypothecation of future debts as security for default in payment — Valid charge on future book debt is created — But nothing passes till property comes into existence.**

Where a person hypothecates all his book debts, present and future, as security for default in payment on demand of the balance of his account, such an hypothecation creates a valid charge on or to use the term familiar in English law, assignment of the future book debts of the debtor. But nothing passes under such an assignment until the property comes into present existence : *(1888) 13 A C 523; (1912) 3 K B 474 and A I R 1924 P C 162, Rel. on.* [P 427 C 2; P 428 C 1]

**(b) Transfer of Property Act (1882), Ss. 130 and 131 — Notice is not necessary to perfect title of assignee — But until receipt of such notice, dealings with original debtor are protected.**

Notice is not necessary to perfect the title of the assignees of a debt, but until the debtor receives notice of the assignment in accordance with S. 131, his dealings with the original creditor will be protected and he may get a valid discharge of his debt from the original creditor. [P. 428 C 1]

**(c) Presidency-Towns Insolvency Act (1909), S. 52 (2) (c)—Book debts — Necessary step to remove them from order or disposition of insolvent is to give notice to debtors — Absence of notice implies consent, unless it is not due to any fault of real owner — Goods may be taken from possession, order or disposition of the real owner by mere demand on day before bankruptcy.**

In the case of trade debts the ordinary and appropriate method by which the true owner may terminate his consent to the debt remaining in the possession, order or disposition of the insolvent is by giving notice to the debtor and the fact of no notice having been given to the debtor is conclusive evidence of the consent of the true owner to the debt remaining in the reputed ownership of the bankrupt, unless failure to obtain possession of debts is not attributed to any fault of the real owner. This must, of course, be the case where nothing occurs to alter the circumstances in which the insolvent has the reputation of ownership. The party who is to pay must know at whose order and disposition the debt subsists; the reputation of ownership continues in another person apart from the true owner. The rule however comes into operation and the true owner's goods are seized only where he has allowed, not merely the debtors of the insolvent to remain without notice, but possible fresh creditors of the insolvent to grant him false credit by reason of the reputation of ownership continuing right up to the moment of insolvency. [P 431 C 1, 2; P 432 C 1, 2]

Goods may be taken from the possession, order or disposition of the reputed owner by a mere demand on the day before the bankruptcy, and consent to debts remaining in the order or disposition of the insolvent may be withdrawn by taking some step towards the giving of notice, even though such notice does not reach the debtor before the bankruptcy commences. Circumstances giving rise to a reputation of ownership may cease to exist on the day before the insolvency by some act of the true owner which negatives the continuance of any such reputation. [P 431 C 1]

A proprietor of a restaurant hypothecated to the appellant his future trade debts as security for the repayment of his balance on current account. The proprietor agreed to furnish list of debts at such time as he desired. In case of his default in payment he agreed that the appellant should be free to seize the property in the security without notice. The appellant never required the proprietor to furnish accounts. But on the 5th, he took possession of premises and book debts on failure to pay balance and posted "mortgagee in possession" on the entrances, but only from the 8th onwards sent notice to the debtors owing money to the restaurant that money outstanding should be paid to him and not to the proprietor. On the 6th the proprietor applied for being adjudicated as insolvent and was so adjudicated on the 7th. The general body of creditors claimed all the book debts due to the insolvent on the 6th as property divisible among them by virtue of Sec. 52 2) (c). The appellant resisted the claim on the ground that the debts were not in the order or disposition of the insolvent, as they were hypothecated to him :

*Held* that though the debts were in the order or disposition of the insolvent till the 5th with the appellant's consent, as the appellant had not given any notice to any debtor till that date though he had opportunity, still the reputation of ownership was determined, when the appellant entered the premises on the 5th and accordingly was not still subsisting at the commencement of the insolvency. Hence the claim of the general body of creditors could not succeed : *A I R 1938 Rang 1 point (e)*, **Reversed**; *English case law discussed.* [P 431 C 2]

**(d) Presidency-Towns Insolvency Act (1909), S. 52 — Phrase "possession, order or disposition" is used disjunctively.**

The phrase "possession, order or disposition" is used disjunctively, and debts due or growing due to the insolvent in the course of his trade or business are "goods" by reason of Proviso 1 to Section 52. [P 428 C 2]

R. Clark — *for Appellant.*

C. N. Paget — *for Respondent.*

**Roberts C. J.**—A. Stephens, the proprietor of a restaurant in Rangoon known as the "Silver Grill", filed his petition to be adjudicated insolvent, under the Rangoon Insolvency Act on the morning of 6th January 1937. On the afternoon of 5th January, Messrs. Balthazar & Son, Ltd., entered into possession of the premises of the "Silver Grill", took possession of the stock-in-trade and all the moveable property of the restaurant, and also of all the books of account. At each of the entrances to the restaurant they posted notices to the following effect: "Balthazar & Son, Ltd., mortgagees in possession". From 8th January onwards, notices were sent by Balthazar & Son, Ltd. to the persons who owed money to the restaurant, informing them that their debts should be paid to them (Balthazar & Son, Ltd.) and not to the "Silver Grill". Prior to this, from 6th January the employees of Balthazar & Son had sent out some bills in the name of the "Silver Grill." Stephens was adjudicated insolvent on 7th January and the present appeal arises out of a petition, dated 20th March 1937, by the Official Assignee to the Insolvency Court, in which petition the Official Assignee, on behalf of the general body of creditors, claimed the right to all the book debts due to the "Silver Grill" on 6th January 1937, as property of the insolvent Stephens divisible amongst his creditors by virtue of the provisions of S. 52 (2) (c), Rangoon Insolvency Act. The respondent-appellant Company, Messrs. Balthazar & Son, Ltd., have resisted this claim on the grounds that the book debts of the insolvent had been hypothecated to them by a letter of hypothecation dated 21st March 1931, and that the book debts were not in the possession, order or disposition of the insolvent, within the meaning of Clause (c), Sec. 52 (2), Rangoon Insolvency Act, at the commencement of the insolvency. Cl. (c) of S. 52 (2), Rangoon Insolvency Act, is in the same terms as Cl. (c) of Sec. 38, English Bankruptcy Act, 1914. It runs as follows, so far as it is material to the present case :

> Section 52 (2). Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely :
>
> (c) All goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business, by the consent and the permission of the true owner under such circumstances that he is the reputed owner thereof : provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of Cl. (c).

Under the letter of hypothecation of 31st March 1931, on which the appellant Company bases its right to the book debts, the insolvent Stephens hypothecated to the Company inter alia "all book debts present and future for the time being due and owing to me in connexion with my said business during the continuance of this security," as security for the repayment to the Company on demand of such sum as might at any time thereafter be owing to the Company (which, I should have said, carries on a banking business) on the balance of his current account with the Company. The insolvent further agreed (1) to furnish to the Company lists of his debts at such times as the Company might prescribe ; (2) that if he should make default in payment on demand of the balance of his account with interest it should be lawful for the Company without previous notice to him to seize and take possession of the property included in the security and to get in and collect the book debts. It was under this latter clause of the agreement that the Company entered into possession of the premises and seized the books of account on the afternoon of 5th January. That such an agreement creates a valid charge on, or, to use the term familiar in English law, assignment of, the future book debts of the insolvent is not disputed. As Lord Watson said in (1888) 13 A C 523[1] at page 533 :

> Choses in action . . . . though not yet existing, may nevertheless be the subject of present assignment. As soon as they come into existence assignees who have given valuable consideration

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[1] Tailby v. Official Receiver, (1888) 13 A C 523 =58 L J Q B 75=60 L T 162=37 W R 513.

> will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him or had been within his disposition and control at the time when the assignment was made.

In (1912) 3 K B 474[2] at p. 490, Parker J. referring to such charges on future property, said:

> With regard to the assignments of future property, they stand, I think, on a totally different footing. Nothing passes, even in equity, until the property comes into present existence Only when this happens can the assignment attach and an interest pass.

This passage was quoted with approval by their Lordships of the Privy Council in 52 I A 1[3] at page 19. A great deal of the argument before us has turned on the question whether a charge on future debts, of the description which we are now considering, falls within the provisions of S. 130, T. P. Act, which deals with the transfer of an actionable claim, the term "actionable claim," as used in this Section, being defined in S. 3 of the Act. The learned Insolvency Judge, after giving this point the most careful consideration, has come to the conclusion that a future debt (i. e. a debt which does not exist at the date of the assignment) is not capable of being the subject of a transfer under S. 130, T. P. Act. Now, it is agreed that, as Parker J. said in (1912) 3 K B 474,[2] nothing passes under such an assignment until the property comes into present existence, and only when this happens can the assignment attach and an interest pass. From the Proviso to S. 130 it is clear that if a charge upon future debts is to be regarded as a transfer of an actionable claim, then every dealing with them by the debtors shall be valid as against such transfer in the absence of express notice received by the debtors. Notice is not necessary to perfect the title of the assignees of a debt, but until the debtor receives notice of the assignment in accordance with S. 131, his dealings with the original creditor will be protected and he may get a valid discharge of his debt from the original creditor. In my opinion, it is not necessary therefore to decide whether S. 130 applies or not. The result is the same. The debt remains in the "order or disposition" of the assignor till notice has been given to the debtor, within the meaning of S. 52 (2) (c), Rangoon Insolvency Act.

Now, in order to decide whether the book debts of the business are goods which comprise the property of the insolvent or whether they are goods to which the appellants are entitled, three points have to be considered. This was clearly laid down by Lord Loreburn in (1913) A C 564[4] at p. 570. First it must be decided whether at the commencement of the insolvency the goods were in the possession, order or disposition of the insolvent in his trade or business; secondly, whether they were so by the consent and permission of the true owner; and thirdly, whether they were so under such circumstances that the insolvent was the reputed owner thereof. In 58 Mad 181[5] it was held that where the owner of goods handed to a Bank endorsed railway receipts relating thereto as security for an advance there was constituted, in the absence of evidence to the contrary, an equitable charge upon the goods even though no notice had been given to those having custody of them. There was a letter of hypothecation which was in terms an acknowledgment by the former owners that they had deposited the property documents and securities thereunder mentioned as collateral security for the advance. The railway receipts were documents of title, within the meaning of the Contract Act; accordingly the Bank's possession of those documents became equivalent to possession of the goods since they were entitled to obtain delivery from the railway company, and the goods were not in the possession, order or disposition of the insolvents. The Official Assignee merely stood in their shoes and had no better right than the insolvents had at the date of the insolvency. The Bank was therefore a preferential creditor. But in the present case though Mr. Stephens had constituted an equitable charge in favour of the appellants he had transferred no documents of title and by reason of the Proviso to S. 130 the debts remained in his order or disposition. The phrase "possession, order or disposition" is used disjunctively, and debts due or growing due to the insolvent in the course of his trade or business are 'goods' by reason of the first

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[2] Glegg v. Bromley, (1912) 3 K B 474 = 81 L J K B 1081=106 L T 825.

[3] Vatasavaya Venkata Subhadrayyamma v. Poosapati Venkatapati, (1924) 11 A I R P C 162=80 I C 807=48 Mad 230=52 I A 1 (P C).

[4] Hollinshead v. P. and H. Egan Ltd., (1913) A C 564 = 83 L J P C 74 = 109 L T 681=20 Manson 323=57 S J 661=29 T L R 640.

[5] Official Assignee of Madras v. Mercantile Bank of India, (1934) 21 A I R P C 246 = 152 I C 730=58 Mad 181=61 I A 416 (P C).

Proviso to S. 52, Rangoon Insolvency Act. Now, secondly, were these debts in the order or disposition of the insolvent on 6th January 1937, by the consent and permission of the true owner? As each book debt came into existence the assignment of it attached, even without notice to the debtors, and the title of the appellants became established and they were the true owners. They left the book debts, at any rate, till 5th January 1937, in the order and disposition of the insolvent: it is therefore necessary to see what would be an effectual withdrawal of consent on their part. In the case of possession of goods, the decision in (1833) 5 B & Ad 674[6] shows that where the true owner permits the goods to remain in the order and disposition of another but demands possession of them the day before the bankruptcy of the reputed owner, they do not pass to the assignee in bankruptcy. In 23 Cal 592[7] the insolvent had given the Bank a letter of lien over his stock-in-trade, outstandings and fittings; the fact showed that his business or stock-in-trade was not, at the date of the insolvency, in the order or disposition of the insolvent with the consent of the Bank: they had tried but failed to take actual possession of the insolvent's business on the day before that on which he filed his petition: it was held that as regards the amount of the debt secured by the letter of hypothecation the Bank was entitled to rank as a preferential creditor. It appears however from (1855) 5 El & Bl 227[8] that a mere intention to demand the goods and to get possession of them is not enough; it is not enough for the true owner to say he has done all he can if in fact he has not done anything.

The present case however is somewhat different from those in which possession of goods is to be obtained or demanded from the insolvent before the commencement of the insolvency: it is a case of book debts and the necessary step to remove them from the insolvent's order or disposition appears to me to be the step of attempting to give notice to the debtors. Such a step was taken in (1848) 2 Ex 303[9] and the effect of this was that consent was thereby withdrawn to the debts remaining in the order or disposition of the insolvent. The only step that was taken in (1914) 2 K B 910[10] was the mere appointment of a receiver and it was neither effectual by way of withdrawal of consent nor as a determination of the reputation of ownership. In this latter case, the assignees had a period of 19 days in which they could have given notice to the debtors. It is said in the present appeal that there was no such period but only a period of about 24 hours. I think that it is clear from the judgment of Stirling J. in (1895) 2 Ch 872,[11] adopting the language of Mellish L. J. in (1878) 8 Ch 144,[12] that in the absence of notice consent on the part of the true owner to the debt remaining in the order and disposition of the bankrupt is to be inferred, unless the failure to obtain possession of the debt is not attributable to any fault of the real owner.

Now, applying that principle to the present case, it is in my opinion clear that the appellant company did not, prior to the presentation of the insolvent's petition take the steps which were open to them within the time available to terminate the consent by virtue of which the goods remained at the possession, order or disposition of the insolvent. When the insolvent filed his petition he attributed his insolvency to the fact that the appellants had entered into possession of the premises of the "Silver Grill" and seeing that this business was known to the appellants to be the insolvent's only means of livelihood and that the assets of the business were to the knowledge of the appellants his only assets, they must have realized that their demand for repayment of the overdraft followed by their taking possession of the premises and books of account would inevitably result in the insolvent filing his petition. Under cl. 5 of the hypothecation agreement, the appellants were empowered to call upon the insolvent to furnish lists of his book debts at any time; admittedly that power has never been exercised, and yet one would have thought that, as a matter of ordinary precaution, the appellants would have desired to have lists of the book debts furnished at regular intervals so as to satisfy themselves that the security was sufficient to cover the overdraft. If the appellants had taken the very ordinary precaution of requiring a list of the book debts to be furnished periodically, they could, before making their demand for payment and entering into possession, have had prepared notices to the persons appearing as debtors in the latest list, and could have posted those notices immediately on taking possession. Moreover, it is admitted that when they entered into possession all bills up to 31st December 1936, had already been prepared and were taken possession of by them, and it would not have required a great effort to have posted notices to at least the greater portion of these debtors before the insolvency petition was filed on the next day. If they had posted such notices, their title to the debts would have been protected; they did not do so, and the fact that, although there was opportunity to do so, notice was not attempted to be given to any debtor is conclusive evidence of their consent to the debts remaining in the possession, order or disposition of the insolvent. The final matter which falls to be considered is whether the debts were in the order or disposition of the insolvent in such circumstances that he was the reputed owner thereof. In (1873) 8 Ch 520[13] at p. 528, Lord Selborne said:

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[6] **Smith v. Topping, (1833) 5 B & Ad 674 = 2 N & M 421=3 L J K B (N S) 47=39 R R 616.**

[7] **In re Ambrose Summers, (1896) 23 Cal 592.**

[8] **Brewin v. Short, (1855) 5 El & Bl 227 = 24 L J Q B 297=1 Jur (N S) 798=103 R R 450.**

[9] **Belcher v. Bellamy, (1848) 2 Ex 303=17 L J Ex 219=76 R R 606.**

[10] **In re Neal; Ex parte Trustee, (1914) 2 K B 910 =83 L J K B 1118=110 L T 988=21 Manson 164=58 S J 536.**

[11] **Rutter v. Everett, (1895) 2 Ch 872 = 64 L J Ch 845=13 R 719 = 73 L T 82=44 W R 104 =2 Manson 371.**

[12] **Ex parte Ward; In re Couston, (1878) 8 Ch 144 = 42 L J Bk 17=27 L T 502 = 21 W R 115.**

> The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief either of all creditors, of particular creditors, and still less of the outside world, who are not creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject. So on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods, one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession.

This passage was quoted with approval by Lord Blackburn in (1886) 11 A C 426[14] at p. 436. It was also adopted by Lord Wright in 58 Mad 181[5] at p. 203. Applying these principles it must be conceded that these book debts were in the order or disposition of the insolvent for varying periods of time in such circumstances that he was the reputed owner thereof. It is not altogether easy to determine whether this reputation of ownership came to an end when the appellants entered the premises. They caused a notice to be erected bearing the words: "Balthazar and Son, Limited mortgagees in possession." They also took possession of the books of account and of bills up to the 31st December which had already been prepared. What they did was ineffectual as a withdrawal of consent because they took no step towards giving notice to the debtors, but the question still remains whether something ineffectual as a withdrawal of consent can be a determination of reputed ownership. The whole basis of the order and disposition clause is that

> if goods are in a man's possession, order or disposition under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given him the credit: *see* the Judgment of James L. J. in (1879) 10 Ch D 591.[15]

Thus regard must be had not only to the persons to whom the true owner should give notice so as to put an end to the debts remaining in the order or disposition of the reputed owner with his consent, but also to the persons from whom the insolvent might get what has been described as false credit by reason of the continuance of the reputed ownership of these debts right up to the commencement of the insolvency itself. Can it be said by the appellants that although they left the debts in the order and disposition of the insolvent with their consent right up to the insolvency, yet on the very day before the insolvent filed his petition they destroyed the reputation of ownership by some act ineffectual as a withdrawal of consent ? In 39 Mad 250[16] it appears to have been assumed that the affixing of a board by a mortgagee of goods at the place of business of the mortgagor stating that he is the mortgagee in possession takes the goods out of the reputed ownership of the mortgagor. It was held in that case that giving notice to a creditor that a debtor is about to suspend payment is an act of insolvency; where therefore after the receipt of such a notice the creditor took possession of goods, the benefit of S. 57, Presidency Towns Insolvency Act, could not be claimed. But the effect of putting up such a notice before an act of insolvency had been committed did not directly fall to be decided.

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[13] Ex parte Watkins; In re Couston, (1873) 8 Ch 520=42 L J B K 50=28 L T 793 = 21 W R 530.

[14] Colonial Bank v. Whinney, (1886) 11 A C 426=56 L J Ch 43=55 L T 362=34 W R 705=3 Morrell 207.

[15] Ex parte Wingfield, (1879) 10 Ch D 591=40 L T 15=27 W R 346.

Now there can be no doubt in this case that the reputation of ownership had been permitted by the Bank to subsist up to the 5th of January, and the insolvency might have obtained false credit up to that date. Yet the Act says that the reputation of ownership must still be subsisting at the date of the commencement of the insolvency. Now goods may be taken from the possession, order or disposition of the reputed owner by a mere demand on the day before the bankruptcy as in (1833) 5 B & Ad 674[6] and consent to debts remaining in the order or disposition of the insolvent may be withdrawn by taking some step towards the giving of notice even though such notice does not reach the debtor before the bankruptcy commences, as in (1848) 2 Ex 303.[9] And in my opinion the circumstances which Lord Selborne has discussed in (1873) 8 Ch 520[13] as giving rise to a reputation of ownership may cease to exist on the day before the insolvency by some act of the true owner which negatives the continuance of any such reputation. Applying the tests which he has laid down I cannot hold that at the commencement of the insolvency the situation of the goods was any longer such as to convey the reputation of ownership to the minds of those who chose to make inquiry on the subject. The point is not free from difficulty for it is stated in Williams on Bankruptcy, Edn. 15, p. 303, that with respect to trade debts the fact of no notice having been given to the debtor seems conclusive evidence of the consent of the true owner to the debt remaining in the reputed ownership of the bankrupt. This must of course be the case where nothing occurs to alter the circumstances in which the insolvent has the reputation of ownership. The party who is to pay must know at whose order and disposition the debt subsists; the reputation of ownership continues in another person apart from the true owner. The clause however comes into operation and the true owner's goods are seized only where he has allowed not merely the debtors of the insolvent to remain without notice but possible fresh creditors of the insolvent to grant him false credit by reason of the reputation of ownership continuing right up to the moment of insolvency. In the present appeal the appellants did not allow this false credit to be obtained right up to that moment; I think that they determined the reputation of ownership when they entered the premises on the 5th of January and accordingly it was not still subsisting at the commencement of the insolvency.

Persons visiting the "Silver Grill" to obtain their information would find on the eve of the insolvency the servants of the appellants in possession of the premises and carrying on the business previously carried on by the insolvent, and they would see at the entrance the notice informing them that the appellants had entered into possession as mortgagees; they would find the insolvent's books of account in the possession of the appellants. If they made the slightest inquiry, they would discover that all the bills and the vouchers in support thereof, up to the end of the previous month, were in the possession of the appellants. These are the facts which were capable of being the subject of general knowledge. They are such as to exclude all legitimate ground from which those who had taken any means to inform themselves as to those facts could infer the ownership of these debts to be in the insolvent. To my mind therefore it is clear that at the commencement of the insolvency the book debts were not in the possession, order or disposition of the insolvent under such circumstances that he was the reputed owner thereof In my opinion this appeal must be allowed and the petition of the Official Assignee dated 30th March 1937, must be dismissed with costs in both Courts : advocate's fee in this appeal thirty gold mohurs.

**Dunkley J.**—I have had the advantage of reading the judgment of my Lord the

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[16] Mercantile Bank of India v. Official Assignee of Madras, (1917) 4 A I R Mad 525=35 I C 942=39 Mad 250.

Chief Justice, with which I am in entire agreement. As my Lord has said, in order to bring these book debts within what is known as the "reputed ownership" clause, the Official Assignee has to establish three separate things, and I propose to make a few observations concerning each of those points. In regard to "the possession, order or disposition" of the insolvent, I agree that it is immaterial whether or not a charge on future debts such as we have in this case, is a transfer of an actionable claim, within the provisions of S. 130, T. P. Act. It is conceded that if S. 130 has no application to such a charge, then the debts do remain in "the possession, order or disposition" of the assignor until notice has been given to the debtors; and, in my opinion, the position is exactly the same even if S. 130 is applicable, for under the Proviso to S. 130, sub-s. (1), the transferor can receive payment of the debt and give a valid receipt for such payment in spite of the transfer unless notice in writing is given to the debtor in the manner provided by Sec. 131, and consequently the debts remain at the order and disposition of the transferor until such notice has been given.

As regards the consent of the true owner (who is, of course, in this case the appellant company) to the debts remaining in the possession, order or disposition of the insolvent, it cannot be denied that they were in the order and disposition of the insolvent by the consent and permission of the appellant company up to the time when the company entered into possession of the premises, and the question for determination is whether subsequently, and prior to the presentation of the insolvency petition, the appellants effectually withdrew their consent. This question involves the consideration of two cases which the learned Insolvency Judge has described as involving "a painful conflict of opinion between two eminent lawyers," but which, to my mind, are reconcilable, at any rate in relation to the facts of the present case. These are the cases in (1895) 2 Ch 872[11] and (1914) 2 K B 910.[10] On a full consideration of the judgments in these cases, and the line of earlier cases which were cited and considered by Stirling J. in (1895) 2 Ch 872,[11] but which it is scarcely necessary for me to mention specifically, it appears to me that a principle is deducible therefrom which ought to be applied in the present case. That principle is that in the case of trade debts the ordinary and appropriate method by which the true owner may terminate his consent to the debt remaining in the possession, order or disposition of the insolvent is by giving notice to the debtor, and the fact of no notice having been given or attempted to be given is, where there is an opportunity of giving such notice, conclusive evidence of the consent of the true owner; but the inference of consent arising from the omission to give notice can be rebutted if the true owner, within the time available to him, takes every possible steps to terminate the possession, order or disposition of the insolvent, or if the failure to terminate such possession, order or disposition is not attributable to any fault on the part of the true owner. I agree with my Lord, and for the reasons stated by him, that the appellant company did not, prior to the presentation of the insolvency petition, take the steps which were open to them within the time available to terminate the possession, order or disposition of the insolvent.

In regard to the third point, that is, whether the debts were in the order and disposition of the insolvent under such circumstances that the insolvent was the reputed owner thereof, the question which I have found most difficult to answer is whether, in the case of debts, the reputation of ownership is not static, in the sense that when the insolvent has once acquired that reputation it cannot be determined except by the withdrawal by the true owner of his consent to the debts remaining in the order and disposition of the insolvent. But it must be remembered that, for the purpose of S. 52 (2) (c), Insolvency Act, trade-debts are "goods", and exactly the same principles are applicable in the case of debts as are applicable in the case of chattels, although, in order to raise an inference of a certain kind, different facts may have to be established if the goods were chattels. Furthermore, the question of reputed ownership has to be examined, not from the position of the debtors of the insolvent, but from the position of his creditors or possible creditors, by whom I mean persons who might be persuaded to give credit to the insolvent by reason of the reputation of ownership remaining with him. When these considerations are borne in mind, it becomes clear that, although the consent of the true owner may not have been effectually withdrawn, yet the reputed ownership of the insolvent may be determined by a change of circumstances. This principle has been clearly enunciated by Lord Selborne in a passage from his judgment in (1872) 8 Ch 520[13] at p. 528 which my Lord has quoted. In (1904) 2 K B 753[17] at p. 757 Vaughan Williams L. J. said :

> In our opinion it is essential before a Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise,

and further : "the inference of ownership by the bankrupt must (observe, not might or might not) arise." *See also* (1923) 2 Ch 89[18] at p. 94. The material date on which this reputation of ownership must exist is at the commencement of the insolvency, and I agree that, by reason of the action taken by the appellants after the afternoon of 5th January 1937, the circumstances were so changed that at the commencement of the insolvency the facts were such as to exclude all legitimate ground from which those who had taken any means to inform themselves as to those facts could infer the ownership of these debts to be in the insolvent.

V.B.B./R.K. *Appeal allowed.*

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17. In re William Watson & Co. ; Ex-parte Atkin Brothers, (1904) 2 K B 753=73 L J K B 854 =11 Manson 256=20 T L R 727.
18. In re Kaufman Segal and Domb ; Ex-parte Trustee, (1923) 2 Ch 89=92 L J Ch 218=128 L T 650=67 S J 333=(1923) B & Cr 1.

## A. I. R. 1938 Rangoon 433

MYA BU AND MACKNEY JJ.

*V. E. A. Arumugam Chettyar* — Appellant.

v.

*M. R. M. L. Ramanathan Chettyar and others* — Respondents.

First Appeal No. 12 of 1938, Decided on 18th May 1938, against order of Asst. Dist. Court, Pegu, D/- 4th February 1938.

**(a) Civil P. C. (1908), O. 21, Rr. 13 (7) and 90—Property attached specified as owned by judgment-debtors—Share of each of judgment-debtors in property not mentioned — There is no material irregularity.**

A decree-holder asked the Court to bring to sale certain properties described as a half share belonging to the judgment-debtors in certain specified holdings. What was the exact interest of each of the judgment-debtors individually in the property was not specified. It was stated that the whole of this half share belonged to the judgment-debtors. The sale was challenged on the ground that it had not been specified exactly what share each of the different judgment-debtors possessed :

*Held* that it was not necessary that this should be done. The decree-holder held a decree against each of the judgment-debtors. He had brought this property to sale because it was the property of one or other or all the judgment-debtors and that was sufficient for his purpose. What the Court sells is the right, title and interest of the judgment-debtors in this property. It is no part of the Court's duty to enter into an enquiry as to the exact proportion of each of the judgment-debtor's interest in this property. [P 434 C 2]

**(b) Civil P. C. (1908), S. 151, O. 21, Rr. 89, 90, 91 — Specific provisions for setting aside sale not availed of—Inherent power cannot be invoked.**

When there are specific provisions in the Code of the remedy which a party seeks, it is not open to him, after his failure to adopt those remedies, within the period allowed by law, to appeal to the inherent powers of the Court to obtain that remedy. Hence where a party has not applied under O. 21, Rr. 89, 90 or R. 91 it is not open to him to seek the inherent power of the Court to set aside the sale : *A I R 1931 P C 33, Foll.* [P 435 C 2]

E. Hay — *for Appellant.*

S. B. Chakravarty — *for Respondents.*

**Mackney J.** — On 8th August 1935 the appellant obtained a money decree against three individuals, respondents 1, 2 and 3 in this appeal, and against the M. R. R. M. S. L. M. Chettyar Firm, respondent 4 in this appeal. The decree was obtained on the original side of this Court. The appellant decree-holder had his decree transferred to the Assistant District Court of Pegu for execution. It is out of the execution proceedings in that Court that this appeal arises. Respondent 1 is a party as the legal representative of M. R. M. L. Letchmanan Chettyar, his father. The appellant decree-holder asked the Court to bring to sale certain properties described as a half share belonging to the judgment-debtors in certain specified holdings. What was the exact interest of each of the judgment-debtors individually in the property was not specified. It was stated that the whole of this half share belonged to the judgment-debtors. The proceedings were much delayed but finally 30th October 1937 was fixed for the sale of the properties. The delay has been caused by a claim on the part of respondent 1 in his personal capacity to be the sole owner of the properties attached. This claim was allowed by the executing Court but on appeal to this Court it was disallowed, and this Court declared that respondent 1 personally had no interest in that property. In the course of the judgment of this Court there occurs a paragraph which might suggest that this Court found that the property belonged to the M. R. R. M. S. M. L. Chettyar Firm. Respondent 1 sought a review of the judgment on the ground that these observations were obiter. His application was dismissed summarily on the ground that there was no definite finding that the property was the property of the M. R. R. M. S. M. L. Chettyar Firm. Whilst this application was pending respondent 1 asked the executing Court to postpone the sale. The executing Court in an order passed on 29th October 1937 refused to postpone the sale, giving as its reason that this Court had clearly found that respondent 1 had no interest in the land in question and that the property belonged to the M. R. R. M. S. M. L. Chettyar Firm. The Court held that the decree-holder had every right to execute his decree against this firm. The sale was held on 30th October 1937. Respondent 1, still persistent, made an application on 8th January 1938 pointing out that the reasons given by the executing Court for refusing to postpone the sale were no longer valid in view of the order of this Court which had been passed on his application in review. This in my opinion was a most misleading application to make. It did not matter in the least whether the reasons which the learned Judge had given for refusing to postpone the sale were valid reasons or not. At that stage all that mattered was whether the sale was a valid sale: whether the sale was correctly held or not. Under O. 21, R. 92, where no application to set aside a sale is made under Rr. 89, 90 and 91 or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute. No application has been made to the Court in time under Rr. 89, 90 or R. 91, and it is difficult to see in these circumstances by what possible method the Court could decline to confirm the sale which had been held.

In 58 I A 50[1] at page 56 their Lordships of the Privy Council observed :

> The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in Rule 89—namely, by depositing in Court the amount for the recovery of which the property was sold, together with 5 per cent. on the purchase money, which goes to the purchaser as statutory compensation, and this remedy can only be pursued within 30 days of the sale : *see* Art. 166, Sch. 1, Limitation Act, 1908. That this is so is, in their Lordships' opinion, clear under the wording of R. 92, which provides that in such a case (i. e. where the sale has been duly carried out), if no application is made under R. 89 the Court shall make an order confirming the sale and thereupon the sale shall become absolute.

Possibly respondent 1 would like to be considered as making an application to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it : R. 90. The ground he would take is that under O. 21, R. 13, Cl. (7), it is incumbent on the decree-holder in setting out the sale particulars to specify the judgment-debtor's share or interest in the property. In the present case the judgment-debtors' share or interest in the property has been specified. It is asserted that they owned the whole of this property that has been attached. What respondent 1 complains of is that it has not been specified exactly what share each of the different judgment-debtors possesses. In my opinion it is not necessary that this should be done. The decree-holder holds a decree against each of the judgment-debtors. He has brought this property to sale because it is the property of one or other or all the judgment-debtors and that is sufficient for his purpose. What the Court sells is the right, title and interest of the judgment-debtors in this property. It is no part of the Court's duty to enter into an enquiry as to the exact proportion of each of the judgment-debtor's interest in this property. In any case however it was not for respondent 1 to raise such an objection at this stage for he has no possible concern whatsoever in the matter. Presumably he knows the extent of his own interest in the property as the legal representative of his father : that interest has been sold. If he had no interest then nothing of his has been sold and that is an end of the matter.

However, on the application of 8th January 1938, the learned Assistant District Judge on 4th February 1938 passed an order setting aside the sale. His reasons were that had he known what was the correct interpretation of the judgment of this Court in Civil First Appeal No. 27 of 1937 he would not have passed the order which he did pass refusing to postpone the sale, because the Court proceeded with the sale on the basis that the property belonged to respondent 4, the M. R. R. M. S. M. L. Chettyar Firm. The learned Judge held that it was not possible to bring the properties to sale until it had been specified what exactly were the interests of each of the judgment-debtors therein. On these grounds, and acting under S. 151, Civil P. C., he set aside the sale and appointed a fresh date for hearing the advocates of the parties as to what the next proceeding should be. It would seem that the learned Judge must have become completely confused in regard to the matter. It is sufficiently clear from what has already been said that the sale which has been held was quite in order and therefore it should not have been set aside. The decree-holder has appealed to this Court against the order of the learned Assistant District Judge. I think that an appeal does lie because this is a question arising between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree under Section 47, Civil P. C. The learned advocate for respondent 1 has sought to argue that this Court has indicated that the property belongs to the M. R. M. L. Chettyer Firm and in view of that indication the decree-holder is not entitled to attach the property without explaining how it has become the property of his judgment-debtors. This Court has not found that the property belongs to the M. R. M. L. Chettyar Firm. What had to be decided was whether a certain transaction whereby these properties were sold was a transaction in which respondent 1 himself was a party or not, and it was decided that he was not a party but the M. R. M. L. Firm was. I am of the opinion that this appeal must be allowed. The order of the Assistant District Court must be set aside, and the sale confirmed provided there are no other questions which have to be settled before such confirmation takes place. The conduct of respondent 1 in this matter appears to be wantonly obstructive and I consider that he should pay the costs of this appeal in this Court, advocate's fee ten gold mohurs, and also the costs of his application in the lower Court, in which the advocate's fee shall be assessed at five gold mohurs.

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[1] Nanhelal v. Umrao Singh, (1931) 18 A I R P C 33=130 I C 686=27 N L R 95=58 I A 50 (P C).

**Mya Bu, J.**—I agree in the orders proposed by my learned brother. All that I wish to add is that the prayer in the petition from which this appeal has arisen is one for review of the order of the trial Court dated 29th October 1937 which was an order rejecting an application for stay of sale which had been ordered to take place on 30th October 1937 and which did take place on 30th October 1937 and considering that the application was made on 8th January 1938 or more than two months after the date of the sale, what the learned Assistant District Judge has done by the order which is under appeal is to set aside the sale for the setting aside of which no petition could be entertained at the instance of respondent 1 at the time. The learned Assistant District Judge, by showing that he had gone on with the execution proceedings upon some misapprehension of facts gathered from the judgment of this Court in Civil First Appeal No. 27 of 1937, not only found that there were grounds for review but passed an order not for stay of sale because such an order would be impossible of being given effect to, the sale having taken place long before the application, but for setting aside the sale for which respondent 1 had been long debarred by lapse of time from making an application. When there are specific provisions in the Code for the remedy which respondent 1 sought, it is not open to him, after his failure to adopt those remedies, namely O. 21, R. 89 or R. 90, within the period allowed by law, to appeal to the inherent powers of the Court to obtain that remedy.

K.S./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 435

ROBERTS C. J. AND DUNKLEY J.

*Abba Dada and Co.* — Applicant.

v.

*Commissioner of Income-tax, Burma* — Respondent.

Civil Misc. Appln. No. 22 of 1938, Decided on 6th April 1938, for mandamus under S. 66 (3), Income-tax Act.

**(a) Income-tax Act (1922), S. 26-A—Assessee, a Mahomedan carrying on business, capital of which consisted mainly of immovable property—Gifts by assessee to his sons out of capital of business—Sums so gifted reinvested by sons in business — Gifts not made in accordance with S. 123, T. P. Act — Application by assessee under S. 26-A for registration of business as business of firm — Application accompanied by unregistered deed of partnership specifying individual shares — Business held could not be registered as firm.**

An assessee, a Mahomedan in Burma, had certain business the capital of which mainly consisted of immovable property. The assessee alleged that he had made gifts to each of his two sons and had given a bonus to each of his two employees out of the capital of his business and that these sums had been reinvested by these four persons in the business, which had thereby become a partnership of five persons. The gifts were however not registered in accordance with S. 123, T. P. Act. The assessee made an application under S. 26-A for the registration of this business as the business of a firm.

The application was accompanied by a deed of partnership which was not registered under the Registration Act but which purported to specify the individual shares of the partners :

*Held* that as the gifts were not made in accordance with the provisions of S. 123, T. P. Act, there were no valid gifts by assessee to his sons and employees, and hence there were no contributions by them to the capital of the alleged partnership. Moreover, the capital of the business consisted mainly of immovable property and as it had not been registered under the Registration Act, it was clearly ineffectual. Hence four of the alleged partners had not acquired any share in the capital of the business and therefore the firm could not be registered under S. 26-A : *A I R 1936 Rang 430 (FB), Rel. on.* [P 437 C 1]

**(b) Income-tax Act (1922), S. 66 (3) — High Court cannot order Commissioner to refer question which assessee has not required Commissioner to refer under S. 66 (2).**

The High Court has no jurisdiction under S. 66 (3) to order the Commissioner of Income-tax to state a case and to refer a question of law to the High Court which the assessee has not duly required the Commissioner to refer under S. 66 (2): *A I R 1934 Rang 132, Foll.* [P 437 C 2]

Paget — *for Applicant.*

U Thein Maung — *for Respondent.*

**Dunkley J.** — When Haji Abba Dada was about to be assessed to income-tax for the year 1936-37 he made an application to the Income-tax Officer, under the Provisions of S. 26-A, Income-tax Act, and the rules framed thereunder for the registration of this business as the business of a firm for the purposes of this Act. Haji Abba Dada alleged that he had made gifts of Rs. 75,000 to each of two sons and had given a bonus of Rs. 5000 to each of two employees, out of the capital of his business and that these sums had been reinvested by these four persons in the business which had thereby become a partnership of five persons. He produced a deed of partnership, dated 29th April 1936, which was not registered under the provisions of the Registration Act, and a certificate of registration of this partnership under S. 59, Partnership Act, and pointed to entries in the books of account which purported to show that the capital of the new partnership was divided into five shares, one and half lacs for himself, Rs. 75,000 for each of his two sons, and Rs. 5000 for each of the two employees. The Income-tax Officer held some sort of an inquiry and came to the conclusion that no real firm existed, and therefore refused to register the firm under S. 26-A. An appeal against this order was made to the Assistant Commissioner of Income-tax, but was dismissed. Then application was made to the Commissioner of Income-tax to refer certain questions of law, which, the assessee alleged, arose out of the appellate order of the Assistant Commissioner, to this Court, but the Commissioner of Income-tax declined to state a case. Hence this present application to this Court, under S. 66 (3), Income-tax Act, asking us to require the Commissioner to state a case.

The order of the Commissioner of Income-tax, dated 16th November 1937, is based mainly on surmise and speculation, and we do not propose to make any further reference to it, save that we must take strong exception to one statement occurring in the order, where, referring to an application of the assessee that his assessment should be made at Rangoon instead of at Myanaung, the Commissioner says that this application was "made, I should guess, in the interests of his professional representative." This statement is entirely without foundation, in fact, was quite unnecessary and highly improper. It is admitted that the application by the assessee under Sec. 26-A was made in proper form and in accordance with the rules. It was accompanied by a deed of partnership which was not registered under the Registration Act, but which purported to specify the individual shares of the partners. There were also produced the book entries in the books of account purporting to set out the shares in the capital of each of the partners, and the registration certificate of the firm under the Partnership Act. No other facts were alleged to prove, as Sir George Rankin C. J., put it in 4 I T C 365[1] at p. 370, "the reality of the instrument produced," but Mr. Paget for the assessee now says that other evidence was available and would have been produced if opportunity had been given.

The assessee asked the Commissioner of Income-tax to refer six questions to this Court. It is unnecessary to set out these questions in full, and it is sufficient to say that in essence they amount to the single question whether there were contributions validily made to the capital of the alleged partnership by the two sons and the two employees. It is common ground that these four persons had no means of their own wherewith to make contributions to the capital, and that all that has occurred is that certain entries, which may well have been made by a clerk, have been made in the account books of the business formerly belonging to Haji Abba Dada alone, giving them credit to their respective shares in the capital of the business. Admittedly, no cash or property ever passed, but it is set up that these entries in the books of account and the execution of the partnership deed amount to gifts by Haji Abba Dada to each of these persons of these respective amounts, which were at the same time contributed by these persons to the capital of the firm.

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[1] **Bisseswarlal Brijlal v. Commissioner of Income-tax, Bengal, (1930) 17 A I R Cal 449=128 I C 327=57 Cal 1336=4 I T C 365 = 34 C W N 363 (S B).**

Any question of law which might arise out of these circumstances has already been answered by a Full Bench of this Court in 14 Rang 439,[2] where it was held that in Burma a gift of property by one Mahomedan to another must be made in accordance with the provisions of Sec. 123, T. P. Act. There were no valid gifts by Haji Abba Dada to his sons and employees, and hence there have been no contributions by them to the capital of the alleged partnership. Moreover, the capital of this business consists mainly of immovable property, and the partnership deed purported to transfer this capital from one person, Haji Abba Dada, to five persons, Haji Abba Dada, his two sons and his two employees. As it has not been registered under the Registration Act, it was clearly ineffectual to do anything of the kind. Therefore four of the alleged partners have not acquired any share in the capital of this business. Mr. Paget has urged that it is unnecessary to the constitution of a partnership that all the partners should hold a share in the capital of the firm; that is undoubtedly so, but in order that a firm may be registered under S. 26-A, Income-tax Act, the instrument of partnership must specify the individual shares of the partners, and the instrument in this case specifies that each partner holds a share which in actual fact he does not hold, and therefore the firm cannot be registered under the Section. In our opinion, a question of law does arise from the appellate order of the Assistant Commissioner, and that is this: "Whether, when an application under S. 26-A, Income-tax Act, is made in proper form and a deed of partnership is produced with the application, the Income-tax officer has jurisdiction to refuse to register the partnership under S. 26-A and the rules thereunder, either peremptorily or after having given the assessee an opportunity of being heard?"

There is no decision of this Court on this important point, and the provisions of the Section and rules are by no means clear, and therefore we should have been prepared to require the Commissioner of Income tax to refer this question if we had jurisdiction to do so. But clearly we cannot require him to refer it; this has been decided in 12 Rang 322.[3] In his application under Sec. 66(2) the assessee did not ask the Commissioner of Income-tax to refer this question of law, no doubt advisedly, as the question is covered by authority of Indian High Courts. Consequently it is not open to us to require the Commissioner to state a case on this point. This application fails and is dismissed with costs; advocate's fees ten gold mohurs.

**Roberts C. J.** — I agree.

D.S./R.K. *Application dismissed.*

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[2] Ma Asha v. B. K. Halder, (1936) 23 A I R Rang 420=164 I C 984=14 Rang 439 (F B).

[3] Commr. of Income-tax, Burma v. C. P. L. R. Chettyar Concern, Paundge, (1934) 21 A I R Rang 132=150 I C 408=12 Rang 322 (S B).

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## A. I. R. 1938 Rangoon 437

ROBERTS C. J. AND DUNKLEY J.

*U Ba Tin and another* — Appellants.

v.

*U Tun On and another* — Respondents.

First Appeal No. 45 of 1938, Decided on 5th July 1938, against decree of Original Side of High Court, D/- 25th February 1938.

**Carriers Act (1865), S. 10—Suit against persons alleged to be common carriers for loss and injury to goods entrusted to them for carriage—It is not necessary for plaintiff to expressly state in plaint that notice under S. 10 has been issued—Such averment is implied under O. 6, R. 6, Civil P. C.—Defendants must raise plea of absence of notice—Defendants failing to do so—Onus is on them to show that they were not negligent.**

In a suit against persons alleged to be common carriers within the meaning of the Carriers Act, for the loss or injury to goods entrusted to them for carriage, it is not necessary for the plaintiff, as in the case of S. 80, Civil P. C., to expressly state in the plaint that he has issued a notice under S. 10, Carriers Act. Such an averment is implied under O. 6, Rule 6, Civil P. C., and it is for the defendants to deny in their written statement according to O. 8, Rule 2, that they are common carriers or to raise the plea of the absence of notice. Where they fail to do so, the onus is on them to prove and to show that they took good care in the carriage of the plaintiff's goods. [P 438 C 2; P 439 C 1]

Per *Dunkley J.*—An averment in plaint that demands were made for the amount of damage claimed but to no avail, which is not denied by the defendants, is a sufficient compliance with the provisions of S. 10. Moreover failure to raise in the written statement the plea of the absence of notice amounts to waiver on the part of the defendants of the proof of notice. The notice under Sec. 10 is not a part of cause of action of the suit but is merely a condition which has to be performed before the suit could be brought and differs in that respect from a notice under S. 80, Civil P. C. [P 439 C 1]

F. S. Doctor — *for Appellants.*

U Chan Htoon for U Ba So — *for Respondents.*

**Roberts C. J.**—In this case the plaintiff U Tun On was a rice miller of Moulmeingyun and plaintiff 2 U Ba Tun was his agent; and plaintiff 2 arranged for the carriage of 1000 bags of rice from Moulmeingyun to Rangoon in March 1937 on a steam launch of the defendants known as 'Hamedia'. The learned trial Judge framed a preliminary issue as to whether the contract of carriage which was entered into was an agreement between the plaintiffs and the defendants when the latter were acting as common carriers, and he found that the defendants were common carriers. It seems difficult to see how he could ever have found otherwise, for the defendants described themselves almost in direct terms as such, Maung Nyun, defendant 2, giving his occupation as that of a launch hiring business and saying that he owned the 'Hamedia' and that he hired out other launches as well and carried merchandise about for his clients. It is also stated by one of the witnesses for the defendants that Maung Nyun on learning that the 'Hamedia' was required to take this rice to Rangoon said "Please send it by all means. We will take upon ourselves the responsibilities just as the Irrawaddy Flotilla Company does". All the evidence which was adduced pointed in the same direction, and we have to deal with this case upon the footing that it was an established fact not seriously contested that the defendants at all material times were common carriers within the meaning of the Carriers Act.

Now, in my judgment, the plaintiffs were not bound to plead this fact in their plaint. The provisions of O. 6, R. 6, show clearly that any condition precedent, the performance of which is intended to be contested, must be distinctly specified in the pleading, but an averment of other conditions precedent, which are necessary for the plaintiff's case, shall be implied, and O. 8, R. 2, lays down that the defendant must raise by his pleading all matters which show the suit not to be maintainable. We have been strongly pressed to regard this case as one in which the plaintiff should have expressly said in his plaint that he had issued the notice which is required by S. 10, Carriers Act. That Section runs as follows:

> No suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.

It is said that this Section can be compared with Sec. 80, Civil P. C., and with suits which are instituted after notice given against the Secretary of State for India in Council or a public officer in respect of acts done in certain capacities. But S. 80 says in terms that the plaint shall contain a statement that the notice which is required has been served upon the requisite person, whereas S. 10, Carriers Act, contains no such condition. The defendants, when they came into Court, came with the knowledge that they had been held to be common carriers, and they neither amended the written statement to say that they were not common carriers, nor did they amend it in the sense of complaining of absence of notice under S. 10, Carriers Act, in order to comply with provisions of O. 8, R. 2.

The effect of that, in my view, was that when they came into Court the onus was upon them to show that they executed due care in the carriage of the plaintiffs' goods. But on whichever side the original onus should have been placed, when all the evidence was taken, it was easy to see that the whole of it tended one way and one way only, namely that the defendants were negligent. It is not, I think, necessary to go into the evidence in detail. It is enough to say that the defendants themselves put into the box a gentleman named Hole, a Waterways Inspector, from whose evidence the learned trial Judge was satisfied that the serang of the 'Hamedia', the servant of the defendants, navigated the launch in a way which in all the circumstances was risky and negligent; and I am of opinion that he was fully entitled to come to that conclusion, and indeed, upon the evidence placed before him, that was the only conclusion at which he could have arrived. Accordingly, in my opinion, this appeal fails and must be dismissed with costs.

**Dunkley J.**—Two points have been urged before us on behalf of the appellants.

The first is that if the appellants are common carriers, then the suit is barred by the provisions of S. 10, Carriers Act. I agree with my Lord the Chief Justice that, in view of the provisions of O. 6, R. 6, Civil P. C., it must be implied in the pleading of the plaintiffs-respondents that the condition precedent to their right to bring the suit, namely the service of a notice upon the appellants, had been duly performed. But, however that may be, I consider that the averment in para. 6 of the plaint, which stated that demands were made for the amount of damages claimed but to no avail, and which was not denied by the appellants, was a sufficient compliance in any case with the provisions of S. 10, Carriers Act. Taking the other view that there was no specific pleading to the effect that notice had been given, then the fact that the appellants did not raise this matter in their written statement, as they were required to do under O. 8, R. 2, as a matter which showed that the suit of the respondents was not maintainable, was a waiver on their part of the proof of this notice. For the appellants reference has been made to the provisions of O. 6, R. 11; it is said that this notice was part of the cause of action and therefore must be specifically pleaded. In my view it was not material to allege this notice because the notice was not of itself part of the cause of action; it was merely in this case a condition which had to be performed before the suit could be brought, and in that respect differed from a notice under S. 80, Civil P. C.

The second point raised is that the plaint did not set up that the appellants are common carriers, and that in fact the appellants are not common carriers. However the learned trial Judge came to the conclusion that this point was raised by the pleadings, and he framed a preliminary issue thereon, and heard evidence on this issue some 15 days before the trial of the main issue in regard to negligence, and upon that evidence it was impossible for him to come to any other conclusion than that the appellants are common carriers. In fact, as my Lord has said, the appellant Maung Nyun himself admitted this. When the conclusion that the appellants are common carriers had been arrived at clearly the suit against them must succeed, because they failed to discharge the onus which then lay upon them of showing that the loss of the respondents was not due to their negligence. I therefore agree that this appeal fails and must be dismissed with costs.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 439

ROBERTS C. J. AND DUNKLEY J.

*K. C. Nath* — Applicant.

v.

*Salima Khatoon* — Respondent.

Civil Misc. Appeal No. 7 of 1938, Decided on 22nd March 1938, against order of Commissioner for Workmen's Compensation, Bassein, D/- 1st December 1937.

**Workmen's Compensation Act (1923), S. 3 — Engine driver employed on steam launch during whole round voyage—During temporary halt in course of voyage accident taking place to engine driver while doing certain repairs to engine and boiler—Accident held arose out of and in course of employment.**

An engine driver was employed on a steam launch during the whole round voyage. In the course of the voyage a temporary halt was made. During that halt an accident took place to the engine driver while doing certain repairs to the engine and the boiler as a result of which he died:

*Held* that because during the voyage a temporary halt was made, it could not be said that the engine driver's employment did not continue during that halt. The accident therefore arose out of and in the course of his employment. [P 440 C 2]

A. A. Darwood — *for Applicant.*

M. I. Khan — *for Respondent.*

**Dunkley J.** — This appeal arises out of an order of the Commissioner for Workmen's Compensation of the Bassein District, dated 1st December 1937. The proceedings before him arose out of an accident which occurred on the steam launch "Ayin" on the 16th April 1937, as a result of which accident the engine driver of the launch, Lal Meah, was killed. The sole issue which was raised in the pleadings was whether the accident arose out of and in the course of Lal Meah's employment. This was affirmed by the applicant for compensation, who is the present respondent, and denied by the opposite party, who is the appellant before us. The learned Commissioner came to the conclusion that the accident did so arise. His finding on this point is as follows:

> It is clear that Lal Meah's death was caused by an accident arising out of and in the course of his employment and I find accordingly.

However, it is regrettable that he has given no reasons for this finding: and the contention which is raised before us is that this finding is not supported by any evidence, and that the appellant has been prejudiced by reason of the fact that he was not given an opportunity of calling witnesses in support of his averment that the accident did not arise out of and in the course of the deceased's employment. It appears that on 6th November the appellant presented a list of thirteen witnesses to the Commissioner for examination on his behalf: but none of these witnesses has been examined. Under R. 30 of the Workmen's Compensation Rules, if an application is presented by any party to the proceedings for the citation of witnesses, the Commissioner shall issue summonses for the appearance of such witnesses, unless he considers that their appearance is not necessary for the just decision of the case. The Commissioner has not recorded in the proceedings his reasons for considering that the appearance of these witnesses was not necessary; but when the proceedings in the case are examined the reason why the witnesses were not called becomes clear, for in the application to call these witnesses the present appellant made the following statement:

> Wherefore the opposite party prays that the issue fixed for hearing to-day may be heard to-day and decided, if the facts stated by him be accepted by the applicant as correct; otherwise, summons may be issued to the witnesses and they be examined and issue be heard and decided according to law.

The conclusion therefore is, as stated by the respondent, that the statement of facts contained in the written statement of the appellant was accepted and the issue was decided upon those facts. The facts, as alleged by the appellant, are set out in para. 4 of his written statement. He says that the launch left Bassein for Khenandaunggyi on 13th or 14th April, 1937, towing a boat which was sent there for loading bags of rice. The launch was to tow the boat back to Bassein when it had been loaded. During the intervening period, while the boat was being loaded and before it was ready, the launch remained idle at Khenandaunggyi. The boat was not ready until 20th April. Therefore the appellant submitted that the accident, which took place on 16th April 1937, did not arise out of and in the course of the employment of the deceased, for the launch having arrived at Khenandaunggyi on 14th April, and the boat which the launch was towing being in process of being loaded from that date until 20th April, anything that happened during the intervening period could not be said to arise out of and in the course of the deceased's employment as engine driver of the launch. This is a contention which cannot be supported. The engine driver was employed on the launch during the whole round voyage, and because in the course of the voyage a temporary halt was made, it cannot be said that his employment did not continue during that halt, or that anything which he did during the halt in connexion with the engine of the launch was not something done in the course of his employment as engine driver.

This particular accident arose because on this date, 16th April, the deceased did some repairs to the boiler, and in the course of executing those repairs steam escaped from the boiler and scalded him so severely that he died. Plainly, it was part of his duty as engine-driver of this launch to keep the engine and boiler of the launch, as far as he could, in such a condition that the launch was able to do the work for which it was being employed at that time. It was his duty to do such minor repairs to the engine and boiler as were, in his judgment, necessary in order to permit the launch completing the journey for which it had been sent out by its owners: and while he was executing repairs which he considered to be necessary, he met his death. Therefore it must be held that the accident arose out of and in the course of his employment, and, consequently, that the decision of the learned Commissioner for Workmen's Compensation was correct. The appeal therefore fails and is dismissed with costs, advocate's fee five gold mohurs.

**Roberts C. J.**—I agree. It is accepted, and indeed pleaded, by the opposite party that at the time of the accident the launch on which the accident occurred was taking part in a business trip, though it had temporarily halted at one of the ports of call. I agree with my brother that in the normal course of events one would expect the engine driver to attend to the engine and the boiler; but even if, in this particular instance, it may be said that he did exceed his express instructions, I cannot see how it can be possibly said that, so long as he remained on board the launch as engine driver and was doing something in relation to the engine, he was not doing it in the course of his employment. We had, at first, some difficulty in ascertaining the facts of the case, since the Commissioner came to his conclusion without referring in terms to the written statement and also to the prayer of the opposite party, in which he had asked that summonses might be issued to certain witnesses unless the facts stated by him were accepted by the applicant as correct. They were so accepted, and they constitute, in my opinion, a conclusive case against him, and, therefore, the summoning of the witnesses was not, in the discretion of the learned Commissioner, necessary ; and he was right in coming to the conclusion which he did. I agree with the proposed order as to costs.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 441

ROBERTS C. J. AND DUNKLEY J.

*The King*

v.

*Nga Pu Gyi.*

Criminal Appeal No. 216 of 1938, Decided on 7th March 1938, from order of Addl. Sess. Judge, Insein, D/- 24th November 1937.

**Criminal Trial — Murder — Self defence— Accused causing quarrel by his conduct and not leaving place when asked to do so—Fight ensuing—Accused killing deceased—Right of self defence held could not be pleaded.**

Where an accused began quarrel by acting in an improper manner towards the deceased's wife, and when he was asked by the deceased and the deceased's wife to leave the scene peacefully he declined to do so, whereupon a fight ensued in which the accused killed the deceased :

*Held* he could never plead the right of private defence. [P 441 C 2 ; P 442 C 1]

**Roberts C. J.** — The respondent was charged with the murder of one Ba Shun at Hlawga village on 25th August 1937, and was acquitted by the Additional Sessions Judge of Insein : the Government now appeal against this order of acquittal. The facts are that on the day in question Ma Aye Mya, the wife of the deceased, came out of her house at about 3 o'clock in the afternoon and she saw the respondent coming down from a pony cart, which was being driven by one Karapaya : and the respondent asked her where she was going to, employing a phrase which, all the Burmese witnesses agree, was extremely familiar in character and of such a kind that no one would address it to a married woman unless indeed he were her husband. She resented his method of address and asked him to go away; but he declined and seemed determined to stop and pick a quarrel with her. Thereupon her husband Maung Ba Shun, the deceased, who was in the house, called out to him to go away, but again he declined to do so and stood his ground. One of the eye-witnesses, Ma Ngwe Kyi, who has known the deceased and his family for many years and who is a next door neighbour, said that instead of going away the respondent took three or four steps towards the house of Ba Shun. Ba Shun thereupon picked up a stick, which was an exhibit in the case and is no doubt a formidable weapon, and came out, having first said to the respondent, "Do not come to me." The respondent, instead of going away as he had been asked to do, stood his ground and when Ba Shun approached him the latter struck him a blow with the stick in order to induce him to go away. Thereupon the respondent drew a knife, which was in his possession and which has a blade nearly three inches in length, and he stabbed the deceased just below the left nipple in a place which, according to general knowledge, is one of the most vulnerable parts of the body, and the wound thus caused by the knife transfixed the heart and, although Ba Shun was able to make a statement about an hour later, by 4.30 he was dead. There can be no doubt, in our opinion, that the wound which was inflicted was sufficient in the ordinary course of nature to cause death, and the intention in inflicting such a wound must be clear from the place at and the force with which it was inflicted.

We have heard in this case suggestions that the respondent was exercising the right of private self-defence, although perhaps exercising it in a manner too vigorous to be defensible, and that he has committed some lesser offence than murder. There is no force in these contentions. The respondent, although he may first have been on the road for a legitimate purpose, remained there being guilty of conduct which was likely to produce a breach of the peace. He was indulging in insolent behaviour and provocative language both to the woman Ma Aye Mya and also to her husband. When invited to go away on two separate occasions he declined to do so, and this incident would never have occurred if he had left the neighbourhood instead of waiting for the onslaught of Ba Shun, with the knowledge that he had in his possession a clasp-knife with which a fatal wound could readily be inflicted. Accordingly, there is no doubt that the respondent was guilty of murder. We have considered carefully the question of sentence in this case, and in our opinion, although it is quite true that the respondent had no right of self-defence, we think that Ba Shun may have been so exasperated by the respondent's conduct as to have done what the witness, Maung Hla Maung, says and have provoked the respondent with a very insulting gesture at a time when the respondent was inflamed with drink. Taking therefore a merciful view of his conduct when so provoked, we have come to the conclusion, though with some hesitation, that this is a case in which we might properly say that the death penalty need not be passed. Accordingly, the order of acquittal passed by the Additional Sessions Judge of Insein will be set aside: the accused will be convicted of the offence of murder under Sec. 302, Penal Code, and the sentence passed upon him is one of transportation for life.

**Dunkley J.**—The evidence in this case was quite clear, and in fact there are no discrepancies between any of the witnesses, even including the defence witness; and from this evidence it is plain that the respondent never had any right of private defence of his body, because it was entirely his own fault that he was ever in danger. He began the quarrel by acting in an improper manner towards the deceased's wife, and when he was asked by the deceased and the deceased's wife to leave the scene peacefully he declined to do so. Consequently, he was responsible for the subsequent occurrences, and he could never plead the right of private defence. I agree that in the circumstances, the offence committed was murder, but, in view of the facts stated by my Lord the Chief Justice, the sentence should be a sentence of transportation for life.

B.D./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 442

ROBERTS C. J. AND DUNKLEY J.

*Brahmaya and another*— Applicants.

v.

*The King.*

Criminal Misc. Appln. No. 35 of 1938, Decided on 18th July 1938, for transfer from Sess. Judge, Insein.

**(a) Criminal P. C. (1898), S. 526—Application under — Practice.**

As a matter of practice the better course to adopt is that when an application for transfer is made, the Judge from whose Court the transfer is sought to be obtained should be given an opportunity of instructing the Government Advocate on the matters raised in the affidavits, but any formal explanation which is subsequently incorporated in the proceedings is not desirable. [P 443 C 2]

**(b) Criminal Trial — Transfer—Evidence of police investigating officer interpolated during cross-examination of prosecution witness — This course held could not be said to have prejudiced accused.**

During the course of the trial the evidence of the police investigating officer was interpolated during the cross-examination of prosecution witness. Complaint was made of this in the affidavits supporting the petition for transfer:

*Held* that although Judge might better have waited till the investigating officer came to be called, he was entirely within his rights in putting this witness in the box. This course could not be said to have prejudiced accused: *A I R 1935 Rang 98, Ref.* [P 443 C 2; P 444 C 1]

**(c) Evidence—Cross-examination — Till evidence-in-chief of witness is given, pleader or advocate is not bound to declare names of witnesses whose statements he intends to use in cross-examination.**

It is not till the evidence-in-chief of a witness is given that a pleader or advocate can decide what material he will use for cross-examination, and it follows that he is by no means bound to declare his witnesses beforehand, but that on the other hand he exercises an undoubted right when he makes his application in respect of each separate witness as the need arises. [P 444 C 1]

**(d) Evidence — Cross-examination — When there are continued irrelevancies and repetitions, Judge has right to curtail cross-examination.**

A Judge is and always must be in control of the proceedings in his Court. On the one hand the right of cross-examination must be carefully guarded and it must be remembered that it may be necessary for an advocate to approach delicately and with caution the point upon which he is seeking to obtain admissions. Hence considerable latitude is desirable since the admissions sought to be elicited may only be forthcoming when the witness, if he is concealing something, is thrown off his guard; on the other hand the length of cross-examination is by no means the criterion of its excellence. When irrelevant topics are pursued at great length, and persistence is shown in going over the same ground again and again in the hope of making the witness appear discrepant, some limit must be placed upon the latitude given. Continued irrelevancies and repetitions are not to be endured indefinitely. [P 444 C 1]

**(e) Criminal Trial — Practice—Witness examined in committal Court — It is not duty of Public Prosecutor to call him or to tender him for cross-examination.**

Where a witness had been examined as a witness in the committal Court, it is not the duty of the Public Prosecutor to call him unless it is thought that he can give material information in connexion with the offence charged: nor is it his duty to tender him for cross-examination. If a Judge advises the Public Prosecutor as to how the latter would exercise his discretion, no exception can be taken to it; but if the Judge goes further and instructs the Public Prosecutor not to call the witness, this is going too far: *14 Rang 45, Rel. on.* [P 444 C 2; P 445 C 1]

**(f) Criminal Trial—Practice — Judge should not decline to allow pleaders for accused to see record of statements made by prosecution witnesses under S. 164, Criminal P. C., or to cross-examine witnesses thereon.**

A Judge should not decline to allow the pleaders for the defence to see the records of statements made by the prosecution witnesses to a Magistrate under the provisions of S. 164, Criminal P. C., or to cross-examine the witnesses thereon, because it is an elementary principle of natural justice that an accused person shall have free access at any time during the trial to all the records which are before the Court. The same considerations apply to the refusal to permit reference in cross-examination to the contents of the charge sheet, for this also forms part of the committal record. [P 445 C 2]

**(g) Evidence—Question disallowed by Court by formal ruling — Note of ruling should be recorded by Judge if so desired by advocate.**

It is most desirable that when a question is disallowed by a formal ruling and an advocate desires that a note of the ruling should be recorded in the proceedings, this should be done; as the question whether evidence material to one side was improperly excluded may often engage the attention of an Appellate Court. Unless the Appellate Court knows the exact question which was disallowed, or the application which was refused, it is difficult to judge afterwards as to the propriety with which evidence may have been excluded from the consideration of a Court of first instance. [P 446 C 1]

**(h) Criminal Trial — Transfer — Reasonable apprehension in mind of accused.**

In a trial the Judge declined to allow the pleaders for the accused to see the record of the statements made by prosecution witnesses under Sec. 164, Criminal P. C., or to cross-examine the witnesses thereon. Further in the cross-examination of a witness the Judge disallowed a question which was most material to the accused. Moreover reference in the cross-examination to the contents of the charge sheet was refused :

*Held* that these things created an apprehension in the mind of the accused that he would not have a fair and impartial trial and hence the case should be transferred. [P 446 C 1]

**Roberts, C. J.** — This is an application for transfer of Sessions Trial No. 8 of 1938 of the Court of the learned Sessions Judge of Insein to any other district for disposal. The application is made under Sec. 526, Criminal P. C., and relies upon the provisions of sub-s. (1) (e), which lays down that an order of transfer may be made whenever it is made to appear to the High Court that "such an order is expedient for the ends of justice or required by any provision of the Code." We desire to state at the outset that it was not contended that a fair or impartial trial could not be had before the learned Sessions Judge, but merely that in the course of the trial a reasonable apprehension was raised in the mind of the accused that they might not receive a fair and impartial trial. In support of this contention the learned advocates for the two applicants have filed affidavits and the Sessions Judge has submitted to the Court a statement which forms part of the proceedings. As a matter of practice we are both of opinion that the better course to adopt is that when an application of this kind is made, the learned Judge from whose Court the transfer is sought to be obtained should be given an opportunity of instructing the Government Advocate on the matters raised in the affidavits, but we do not think that any formal explanation which is subsequently incorporated in the proceedings is desirable. This is in no spirit of criticism to the course adopted by the learned Judge in this case but merely lays down a principle for future guidance in other similar cases.

The affidavits filed by the two advocates are lengthy. The trial began on 13th June and was continued on 14th, 15th, 16th and 17th June, by which time the case for the prosecution had been concluded, and the application for transfer was then made. It is said by the petitioners that the learned Sessions Judge appeared to resent submissions made by their respective lawyers from time to time and sometimes would not listen to their arguments. It is clear from what is said on both sides that the learned Sessions Judge took the view that Mr. Vertannes had not prepared his case properly and was wasting time: while Mr. Vertannes appears to have thought that the learned Judge was being unduly impatient. On the second day of the trial, it appears that the evidence of the police investigating officer, U Maung Gale, was interpolated during the cross-examination of Achayya, P. W. 1. Complaint is made of this in both the affidavits supporting the petition. We think that, although the learned Sessions Judge might better have waited till the investigating officer came to be called, he was entirely within his rights in putting this witness in the box; and we are not surprised at his refusal to allow Mr. Vertannes to dictate to him the precise course which he should pursue. There is no ruling opposed to the course taken here although in 13 Rang 1,[1] there is a dictum which shows that a different course may often be expeditiously taken. We cannot understand how it could possibly be said that this course prejudiced either of the applicants, and indeed, it is not now seriously contended that it could possibly have done so.

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[1] **Nga U Khine v. Emperor, (1935) 22 A I R Rang 98=1935 Cr C 307=155 I C 66=36 Cr L J 665=13 Rang 1.**

But when this witness was giving evidence the learned Judge required the pleader for the defence to mention there and then the names of all the witnesses whose statements to the police he intended to use in cross-examination. This was a mistaken course to adopt. It is not till the evidence-in-chief of a witness is given that a pleader or advocate can decide what material he will use for cross-examination, and it follows that he is by no means bound to declare his witnesses beforehand, but that on the other hand he exercises an undoubted right when he makes his application in respect of each separate witness as the need arises. Allegations are made regarding the curtailment by the learned Judge of the cross-examination of certain witnesses. The allegations are in the main without substance. A Judge is and always must be in control of the proceedings in his Court. On the one hand the right of cross-examination must be carefully guarded, and it must be remembered that it may be necessary for an advocate to approach delicately and with caution the point upon which he is seeking to obtain admissions. It may be important that a witness whom he does not consider truthful should not be put on his guard by immediate presentation of the case set up by the opposing side. If questions are couched in too blunt a form he may readily deny them. Hence considerable latitude is desirable since the admissions sought to be elicited may only be forthcoming when the witness, if he is concealing something, is thrown off his guard : and there are cases in which it is necessary to drop a particular issue in the course of cross-examination and to return to it again discreetly at a later stage.

On the other hand the length of cross-examination is by no means the criterion of its excellence, and it is lamentably true that lack of skill in advocacy often leads to a failure to appreciate this fact. When irrelevant topics are pursued at great length, and persistence is shown in going over the same ground again and again in the hope of making the witness appear discrepant, some limit must be placed upon the latitude given. Continued irrelevancies and repetitions are not to be endured indefinitely. If after several warnings an advocate persists in abusing his position in this way, he may be directed to resume his seat, but only when the Judge has enquired what are the material matters on which he still desires to cross-examine and is satisfied that no satisfactory reply has been forthcoming from the advocate and that no legitimate questions by him have been shut out. In any case the Judge should make a note of the submission of any advocate as to further questions which he desires to put or as to any specific question which has been disallowed.

In the present case we are satisfied that the learned Judge's patience must have been severely tried. The complaint on behalf of the applicants is directed to the evidence of two witnesses, namely Yeo Han and U Maung Gale. As regards the witness, Yeo Han, the pleader for the second applicant was due to continue his cross-examination of this witness when the trial opened on the morning of 16th June. He turned up ten minutes late and was guilty of a grave affront to the Court. In the circumstances, he could have no ground for complaint if he had been denied the right of further cross-examination; but in actual fact he was allowed to cross-examine the witness further and at considerable length. The allegation in respect of this witness ought never to have been made and amounts to be merest prejudice. The pleader for the second applicant also complains in his affidavit that he was not allowed to complete his examination of the investigating officer U Maung Gale. He does not set out what further questions he desired to ask, and in argument before us learned counsel for the applicants has been able to suggest only two topics on which U Maung Gale might have been further questioned. As regards these two topics, one would at the utmost have involved only two or three questions, and there had already been considerable disjointed cross-examination on the other. The record shows that cross-examination of this witness was lengthy, and we are satisfied that within the time the witness was under cross-examination all material questions could have been asked.

The next complaint which is made is that the learned Judge remarked that he could not allow one Perayya to be called by the Public Prosecutor and tendered for cross-examination by the defence. This witness had been examined as a witness in the committal Court and, as laid down in 14 Rang 45[2] it was not the duty of the

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[2] **Nga Aung Gyi v. Emperor, (1935) 14 Rang 45.**

Public Prosecutor to call him unless it was thought that he could give material information in connexion with the offence charged : nor was it his duty to tender him for cross-examination. However he chose to do so, and we think the learned Judge was quite right to point out the principle enunciated in 14 Rang 45[2] which he appears to have done. We are left somewhat in the dark as to the precise phrase used. If what the Judge said to the Public Prosecutor was in the nature of advice as to how the latter should exercise his discretion, no exception could be taken to it; but if the learned Judge went further and instructed the Public Prosecutor not to call him, we think that this was going too far. At all events however it is open in these cases to the defence to call such a witness themselves and we think that a Public Prosecutor exercising a sound discretion would desist from calling such a witness when the Judge properly drew his attention to the ruling in 14 Rang 45.[2]

The next matter complained of was that during the evidence of Maung Ba Goon the learned Judge showed his disinclination to have the witness examined at length. Mr. Vertannes thereupon rose and quoted the case in 3 L B R 133.[3] This case is reported in the form of a long charge to a jury occupying 18 pages of the report, and in it the learned Judge pointed out that the prosecution tendered no material evidence in support of the story told by a girl whom the accused were charged with having abducted. He reviewed the facts at great length and told the jury at which points the girl's evidence ought reasonably to have been confirmed. We are of opinion that a prolonged investigation into this case in the Sessions trial at Insein was entirely uncalled for. It proceeds upon its own special facts and is an examination of the ingredients which are required in order to prove the offence of abduction and the evidence by which it is to be expected they will be supplied. It is quite clear from 14 Rang 45[2] that the prosecution were not obliged to call this witness, and it is also clear that the learned Judge was fully aware of the principles of law to be applied. By the end of the third day of the trial, we are of opinion that the learned Judge reached the conclusion, which it is difficult for anyone to avoid, that an attempt was being made to take the conduct of the case out of his hands and to put it into those of the applicants' advocates. We are not surprised that he very properly resisted it.

But in our view there is a very grave allegation made in regard to the records of three statements made by three of the prosecution witnesses to a Magistrate under the provisions of S. 164, Criminal P. C. The learned Sessions Judge declined to allow the pleaders for the defence to see these records, or to cross-examine the witnesses thereon. He required the accused, if they desired to make use of these records for the purpose of cross-examination, to apply for and pay for copies of the records. Cross-examination based on these statements was however clearly admissible under S. 145, Evidence Act, and it is plain from the provisions of S. 164 (2) that a record of a statement made under that Section forms part of the proceedings before the Court at the subsequent trial. It is an elementary principle of natural justice which needs no authority that an accused person shall have free access at any time during the trial to all the records which are before the Court. The same considerations apply to the refusal to permit reference in cross-examination to the contents of the charge sheet, for, this also forms part of the committal record.

Now in such an application as this we should not be disposed to pay attention to errors of law which could, if necessary, be corrected on appeal provided they were apparent on the record, and therefore could not give rise to an apprehension based on reasonable grounds in the minds of the accused. But what does weigh with us is the fact that there is no mention anywhere on the record of the application to see these records or of the ruling of the learned Sessions Judge on the application. It has been alleged that on more than one occasion during the course of the trial the learned Judge declined to record the applications or objections of the defence and his rulings thereon, and this allegation has not been denied by him. It has further been alleged that in the course of the cross-examination of one witness a question was asked which was, it is urged, most material to the defence. This question appears to us to have been material, but it was disallowed; and when the learned Judge was asked to record the question and his ruling disallowing it, he declined to do so. This allegation is also not denied by the learned Judge. In our judgment it is most desirable that when a question is disallowed by a formal ruling and an advocate desires that a note of the ruling should be recorded in the proceedings, this should be done; as the question whether evidence material to one side was improperly excluded may often engage the attention of an Appellate Court. Unless the Appellate Court knows the exact question which was disallowed, or the application which was refused, it is difficult to judge afterwards as to the propriety with which evidence may have been excluded from the consideration of a Court of first instance.

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[3] King-Emperor v. E Maung, (1905) 3 L B R 133.

The course of conduct adopted by the learned Judge in respect of the three confessional statements, the charge sheet, and the disallowed question cannot have been otherwise than prejudicial to the accused, although we have not the smallest doubt unintentionally so. If the accused had been convicted at this trial and had appealed, learned counsel appearing for them would have been denied the opportunity of bringing these mistakes of law to the notice of the Appellate Court, because there would have been no reference to these matters on the record, and the Appellate Court would remain in ignorance of the existence of these previous statements of the three witnesses or the fact that this question was asked. We have therefore reluctantly come to the conclusion that there was in the minds of the accused or their legal advisers a reasonable apprehension that they might not have a fair and impartial trial, although we are satisfied that the learned Judge endeavoured to try the case in an atmosphere of strict impartiality and that his task was rendered more difficult by the incidents to which we have alluded. We have decided with the utmost reluctance to allow this application and direct that Sessions Trial No. 8 of 1938 in the Court of Session, Insein, be transferred to the Court of Session, Hanthawaddy, for a trial de novo by the Judge of that Court.

D.S./R.K. *Application allowed.*

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## A. I. R. 1938 Rangoon 446

ROBERTS C. J. AND BRAUND J.

*S. Visuvasam* — Appellant.

v.

*Nadar Mahajana Co-operative Credit Society Ltd.* — Respondent.

First Appeal No. 52 of 1938, Decided on 27th June 1938, against order of High Court on the Original Side, D/- 28th March 1938.

**Civil P. C. (1908), S. 144 — Application on Original Side of High Court for restitution in execution proceedings – Application made long after suit has been determined and right of parties fully settled by final judgment—It is not application made in suit — Order passed on it is not judgment and is not appealable.**

An application on the Original Side of the High Court under S. 144 for restitution in execution proceedings made long after the suit has been determined and the rights of the parties fully settled by a final judgment is not an application in a suit at all nor is the order made on it a judgment It is not a final judgment, such a judgment having been already delivered; it cannot be said to be either preliminary or interlocutory judgment. It is merely an order and not a judgment under the Letters Patent and is not appealable. Even if the order be regarded as a decree, there would be no right of appeal, the matter being governed by the Letters Patent and not by Civil P. C.: *A I R 1935 Rang 267, Foll.* [P 446 C 2; P 447 C 1]

K. N. Dangali — *for Appellant.*

Joseph — *for Respondent.*

**Roberts C. J.** — In this case there was an application made to Shaw J. on the Original Side under S. 144, Civil P. C. It was an application for restitution in execution proceedings, and it is important to notice that it was an application made long after the suit had been determined and the rights of the parties fully settled by a final judgment. S. 144, sub-s. (2), plainly points out that no suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by an application under sub-s. (1) and accordingly, we are dealing now with new proceedings in execution when the suit and the rights of the parties connected therewith have been finally determined. That being so, this was not an application in a suit at all; nor was the order made on it a judgment. It is not a final judgment, because a final judgment had already been delivered : certainly it cannot be said to have been either preliminary or interlocutory, and therefore we are bound by the decision of the Full Bench of this Court in the case in 13 Rang 457.[1] At p. 475 of the report the learned Chief Justice pointed out that all decisions other than final or preliminary or interlocutory judgments, the nature of which he defined, were 'orders' and not 'judgments' under the Letters Patent, or appealable as such. In passing, it may be observed that the argument that this order may have been a decree within the meaning of the Civil Procedure Code is of no avail to the appellant;

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[1] **Dayabhai Jiwandas v. Murugappa Chettiar, (1935) 22 A I R Rang 267=157 I C 1107=13 Rang 457 (F B).**

even if that were so, there could be no right of appeal under S. 96, Civil P. C., unless it was a right of second appeal and not a right of appeal from the Original Side. The jurisdiction of the Appellate Court in respect of matters which have been decided upon the Original Side is regulated not by the Civil Procedure Code but by the Letters Patent, and within the meaning of Cl. 13 we are satisfied that the appellant in this case has no right of appeal. On the preliminary objection therefore Mr. Joseph must be successful and the appeal must be dismissed with costs, advocate's fee seven gold mohurs.

R.M./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 447

MOSELY AND DUNKLEY JJ.

*U Ba Din* — Appellant.

v.

*Janki Devi and others* — Respondents.

First Appeals Nos. 53 and 54 of 1937, Decided on 2nd December 1937.

**Company—Liquidation—Assets of Company can be disposed of only by resolution of shareholders passed at special meeting called for purpose of winding up of Company — Resolution by Board of Directors authorizing one of them to sell assets of Company is ultra vires—Transfer effected in pursuance of resolution does not pass any title to transferee so as to entitle him to bring suit under O. 21, R. 63, Civil P. C.**

The assets of a Company cannot be disposed of by a resolution of the Directors only. They can only be disposed of after the resolution of the share-holders passed at a special meeting called for the purpose of winding up the Company and disposing of its assets and a resolution passed by the Board of Directors of a Company, authorizing one of their members to sell the assets of the Company for satisfaction of its debts, is ultra vires and a transfer of property effected in pursuance of such resolution is ineffectual to pass any title to the transferee so as to entitle him to bring a suit under O. 21, R. 63, Civil P. C., more so when the formalities in respect of the deed of transfer provided by the Articles of Association of the Company have not been observed and the transfer has been effected not by the Director so authorized but by his agent whose authority to act for the Company is not proved. [P 447 C 2; P 448 C 1]

S. T. Leong — *for Appellant.*

Shukla — *for Respondents 1 and 2.*

**Dunkley J.**—The two suits out of which these two appeals arise were suits brought under the provisions of O. 21, R 63, Civil P. C. Respondents 1 and 2 were the attaching judgment-creditors and respondent 3 company was the judgment-debtor. Respondents 1 and 2 had attached a number of oil well sites and an oil well as belonging to the judgment-debtor company, and the appellant, having been unsuccessful in claim proceedings under R. 58, brought the suits under O. 21, R. 63, to establish his title to these attached properties. He bases his title on a deed of 23rd September 1932 which is Ex. A on the record of Suit No. 3 of 1936. By this deed a certain person named Maung Ba Ye, who describes himself in the deed as the agent of the Maung Khin Oil Co. Ltd. purported to sell to the appellant Maung Ba Din 13 oil well sites and an oil well for a consideration of Rs. 15,000. The learned Assistant District Judge came to the conclusion that this sale, which was ostensibly a sale by the company to Maung Ba Din, was fraudulent and without consideration, and therefore he dismissed the suits.

It is, in our opinion, unnecessary to enter into a discussion of the actual merits of this transaction, because it is clear that the deed (Ex. A) of 23rd September 1932, was ineffectual to pass any title in this property. It appears that by a resolution passed at a meeting of the directors of the Company, held on 20th June 1932, (Ex. C), Maung Po Khin, who was the Managing Director of the Company, was authorized to mortgage, sell or surrender in satisfaction of the debts due by the Company, the Company's properties. The minutes of this meeting are contained in the minute book of the meetings of the Directors and are headed as a meeting of the Directors. It may be that the Directors are the only share-holders in the Company, but there is no evidence to this effect and we cannot presume that such is the case. The assets of a company cannot be disposed of by a resolution of the Directors only: they can only be disposed of after a resolution of the share-holders passed at a special meeting called for the purpose of winding up the company and disposing of its assets. Moreover, in the case of this Company, under Art. 106 of the Articles of Association, the common seal of the Company must be affixed to a deed of transfer of property belonging to the Company in the presence of at least one Director and the Secretary of the Company, and the deed must be signed by that Director and by the Secretary. Hence the position in the present case is that the Board of Directors passed a resolution authorizing one of their numbers to sell the assets of the Company, and this resolution of the Directors was ultra vires. Even allowing that the Directors had authority to pass such a resolution it gave authority to Maung Po Khin, this particular Director, and not to Maung Ba Ye, the person who actually executed the deed in favour of the appellant, to dispose of the assets of the Company. Maung Ba Ye holds a power of attorney granted to him by Maung Po Khin personally in 1924, but he did not execute this deed as the attorney of Maung Po Khin; he purported to execute it as the agent of the Company, and his authority to act for the Company has not been proved. In any case the Directors could not by resolution override the Aricles of Association, and therefore, even if it be conceded that the resolution of the Directors empowered Maung Ba Ye, as agent of Maung Po Khin, to enter into a contract for the sale of this property, under Art. 106, the actual deed of transfer must be signed by at least one Director and the Secretary. The deed in question is signed by Maung Ba Ye alone, purporting to be the agent of the Company. It is not signed either by a Director or by the Secretary. Consequently, it is ineffectual to pass any title in these properties to the appellant. On this ground therefore his suits under R. 63 of O. 21, were bound to fail.

The Appeals Nos. 53 and 54 of 1937 are dismissed with one set of costs for both appeals; advocate's fee five gold mohurs.

**Mosely J.**—I agree.

R.M./R.K. *Appeals dismissed.*

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## A. I. R. 1938 Rangoon 448

BAGULEY AND MOSELY JJ.

*Nga Po Than* — Appellant.

v.

*The King.*

Criminal Appeal No. 1482 of 1937, Decided on 3rd January 1938.

**Criminal Trial — Murder—Sentence—Crime committed in state of drunkenness as result of provocation — Although provocation is very slight, sentence of death should not be passed — Sentence reduced to one of transportation for life.**

Where the accused is clearly guilty of murder, the mere fact that he was drunk at the time of murder is not ordinarily sufficient to reduce the crime to anything below that of murder. But a drunken man may be provoked by a taunt which could not in any way ruffle the temper of a man who is in his sober senses. Where therefore the accused has committed the offence in a state of drunkenness as a result of provocation, however slight, it is a case in which the extreme penalty of law should not be inflicted. [P 448 C 2]

Ba Win — *for Appellant.*

E. W. Lambert, Govt. Advocate — *for the Crown.*

**Baguley J.**—The appellant, Po Than, appeals against the conviction for murder and the sentence of death passed upon him by the Sessions Judge of Henzada. The facts are not in dispute, and we are only asked to reduce the sentence. The facts of the case are that Po Than was drunk. One Maung So had borrowed four annas from him a long while ago, and he had found it impossible to obtain repayment. On the day in question he went into the house where Maung So was together with several other people, and he asked Maung So to give him his four annas. Maung So asked him to come for it at some other time, and Po Than said that he was tired of coming for it. Maung So offered him some liquor, but he refused it, and said that he had no use for the liquor and wanted the money. Finally, Maung Po said that his wife was soon coming back and asked if Po Than would wait until she arrived. He waited for what seems to have been a short time, and remarking that it was a long time he seized Maung So by the hair and gave him one cut on the body with a dah. The cut was not on any part which is usually regarded as a vital spot. It may be described as across his flank, but nevertheless it penetrated so deep that it actually communicated with the chest cavity, and it is described by the medical officer as being necessarily fatal. That the offence was murder is undoubted. As has been pointed out in 12 Rang 445,[1] drunkenness is not sufficient to reduce the crime to anything below that of murder. The provocation—if provocation it can be called—was very slight, but as is pointed out in that case, a drunken man may be provoked by a taunt which could not in any way ruffle the temper of a man who is in his sober senses. A year is a long time to wait for repayment of a debt of four annas, and although Po Than seems to have been acting rationally in the course of the day, still he was only acting with a drunken man's rationalness and not with the rationalness of a man who was sober. It is quite possible that his mind might have been in a condition to flare up at very trivial annoyance, and we think therefore that this is one of the cases in which this Court may interfere with the sentence. The conviction is confirmed, but the sentence of death is reduced to transportation for life.

**Mosely J.** — I agree.

R.M./V.B.B. ***Sentence reduced.***

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[1] Nga Sein Gale v. Emperor, (1934) 21 A I R Rang 361=1934 Cr C 1326=152 I C 1054=36 Cr L J 228=12 Rang 445.

## A. I. R. 1938 Rangoon 449

### SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND
BRAUND JJ.

*Maung Thein and another*—Appellants.

v.

*Maung Nyo Sein and another* —
Respondents.

Letters Patent Appeal No. 4 of 1938, Decided on 20th June 1938, against decree of Mya Bu J., in Special Second Appeal No. 191 of 1937, D/- 12th January 1938.

**(a) Buddhist Law (Burmese)—Dhammathats—Former marriage—Two simultaneously subsisting marriages—One that was contracted first is former marriage.**

Two contemporaneous or overlapping marriages may be described as former and latter, the former being that which was contracted earlier and the latter being that which was contracted later, where the two marriages subsist for some time side by side. [P 449 C 2]

**(b) Buddhist Law (Burmese)—Inheritance—Burmese male marrying twice—Both wives living simultaneously—Child from former marriage—Parents dying leaving child and second wife—Second wife dying leaving no heirs of her own—Child by former wife can inherit to her step-mother.**

When a Burmese Buddhist male had contracted two marriages and both wives had been alive at the same time, the children of the first marriage in point of time whose parents both predeceased their step-mother, are heirs of their step-mother in respect of her separate property, when there are no children or direct descendants of the second wife : *A I R 1931 Rang 32*, *Rel. on.* [P 449 C 2 ; P 450 C 1]

**(c) Buddhist Law (Burmese)—Duty of Courts in Burma explained.**

The task of the Courts of British Burma has been, and still is, to deduce from the *ad hoc* decisions compiled in the Dhammathats general principles of the common law of Burma which are in accordance with the habits and customs of the Burman of to-day : *A I R 1935 Rang 248*, *Ref.* [P 450 C 2]

P. K. Basu — *for Appellants.*

U E Maung — *for Respondents.*

**Roberts C. J.**—I am of opinion that this appeal must be dismissed, and should indeed have regarded the judgment of my learned brother Mya Bu to which we have been referred as conclusive in the matter, were it not for the ingenious and careful argument which has been addressed to us by Mr. Basu. As the learned Judge pointed out, the case in 8 Rang 590[1] is no authority for saying that a step-son cannot inherit merely because his step-mother and mother were both living at the same time, that is to say in a case where two valid marriages overlap each other and do not succeed each other in point of time. It is said that the words "former marriage" in the Dhammathats do not mean merely a former marriage but a marriage which came to an end by death or divorce. But in my opinion it is clear that two contemporaneous or overlapping marriages may be described as former and latter, the former being that which was contracted earlier and the latter being that which was contracted later, where the two marriages subsist for some time side by side.

Though such contemporaneous or overlapping marriages are recognized by the Dhammathats, if Mr. Basu is right, it would seem that there were no provisions for inheritance made in those cases, and, as has been pointed out to us by the learned counsel for the respondents, there is no provision in the Digest for wives of an inferior class taking part of the inheritance on the death of the husband and wives of the superior class; there is no provision for children of wives of the four superior classes *inter se* and the answer seems to me that it is because such children must be pubbaka within the meaning of S. 16 of the Digest. One would be reluctant to hold that a step-son were ousted merely because the two marriages overlapped. I respectfully agree with some observations which fell from Baguley J. in 8 Rang 524[2] at p. 537, where he said :

> If the father married one day after the death of his first wife, the children would get their right of partition. Why should they not have a right of partition if he hurried matters to the extent of marrying one day before the other wife died ?

Unless the inferior children in the case mentioned in S. 305 of the Digest had provision made for them, they would not succeed, and so this provision is inserted. When a second wife has children they of course oust her step-children from inheritance under the rule in 8 Rang 590,[1] but if she has no children it seems to me clear that her step-children—those begotten of her husband by a former wife—can have a share of the inheritance. Accordingly, in my opinion, this appeal must be dismissed and the judgment of Mya Bu J. will be affirmed with costs; advocate's fee here twelve gold mohurs.

**Dunkley J.**—The question for decision in this appeal is whether, when a Burmese

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[1] Ma Ni v. Ma Shwe Pu, (1931) 18 A I R Rang 67=131 I C 50=8 Rang 590.

[2] Maung Aung Pe v. U Tun Aung Gyaw, (1931) 18 A I R Rang 32=129 I C 503=8 Rang 524.

Buddhist male has contracted two marriages and both wives have been alive at the same time, the children of the first marriage in point of time, whose parents both predeceased their step-mother, are heirs of their step-mother in respect of her separate property, when there are no children or direct descendants of the second wife. It is conceded that were the two marriages successive, i e. were the second marriage contracted after the death of the first wife, they would be entitled to succeed, but the argument for the appellants is that when the two marriages are contemporaneous, or, more accurately, when the second marriage is contracted before the death of the first wife, the children of the earlier marriage cannot under any circumstances be the heirs of their step-mother. In my opinion, such a contention is opposed both to law and to reason. The common-sense point of view has been expressed by Baguley J. in 8 Rang 524[2] at p. 537.

As regards the law, step-children constitute the fifth class of the six classes of children entitled to inherit, which are set out in the last section of Book 10 of the Manugye Dhammathat. They are the pubbaka children. According to Richardson's translation of the Manugye, this class includes "children, male or female, of a wife by a former husband, or of a husband by a former wife," and on this translation is based the argument that in order that children of a former marriage should be pubbaka children the first marriage must be terminated before the remarriage of one parent. But, in my opinion, this translation is not an accurate translation of the original Burmese text, which does not suggest that the first marriage must have terminated before the second marriage was contracted. A more accurate translation of the Burmese is contained in Section 16 of U Gaung's Digest of Burmese Buddhist law, which reads as follows: "children of the husband or the wife by a former marriage". This is in accordance with the texts of all the other Dhammathats mentioned in the Digest. The expressions "former husband" and "former wife" do perhaps connote that the marriage in question has terminated; by the expression "former marriage" means merely a marriage which is earlier in point of time, and as polygamy is recognized under Burmese Buddhist law, the first marriage of a Burmese Buddhist male will be a "former marriage" even though the marriage still subsists when the second marriage is contracted, and the children of the first marriage will therefore be pubbaka children of the second marriage and entitled to inherit in the absence of descendants of the second wife. It has been urged on behalf of the appellants that this cannot be the correct rule because, if the second wife and the common husband had predeceased the first wife, leaving children of the second marriage, those children would not be pubbaka children of the first marriage and therefore could not be the heirs of the first wife, but this consideration is really beside the point, and does not fall for decision in the present case. However with the greatest respect, the remarks of Page C. J. in 13 Rang 412[3] at p. 420 appear to me to be extremely apposite to this matter. The learned Chief Justice said :

> The truth is that the Burmese Customary law of inheritance as set forth in the Dhammathats is not strictly speaking a system of law at all, but a congeries of decisions which are merely pronouncements *ad hoc* upon particular cases as they have arisen, and which for the most part do not purport to be determined pursuant to any general or guiding principle. Of course, the Dhammathats are not the sole repository of Burmese Customary law, and I agree with U May Oung that 'the present customs are a safer guide than the little known law of the Dhammathats'.

The task of the Courts of British Burma has been, and still is, to deduce from the *ad hoc* decisions compiled in the Dhammathats general principles of the Common law of Burma which are in accordance with the habits and customs of the Burman of to-day. Now a fundamental principle of the Burmese Buddhist law of inheritance, which has been laid down by the Courts, is that an inheritance shall not ascend where it can descend, (1897-1901) 2 U B R 66,[4] and I shall have no hesitation in applying this principle in the case of the children of the second wife, and in holding, on the analogy of the rights of the children of the first wife in the property of the second wife when she has no descendants, that they were entitled to inherit the first wife's property in the absence of natural descendants of the first wife. The decision of my learned brother Mya Bu on second appeal was in my opinion correct and I agree that this appeal must be dismissed.

**Braund J.**—I only desire to add a few words because at one point of the argument in this case I felt and, I think, permitted myself to express, some slight doubt. In my opinion, in order that a child, in circumstances such as this, may inherit, it is necessary that he or she should come under one of the six classes of persons capable of inheritance that are defined in the Dhammathats, and, in this particular case, that he or she should qualify as a pubbaka child. In Richardson's Laws of Manoo, we were referred by Mr. Basu to a definition of "pubbaka" child which described him as being the child of a former husband or wife as the case may be. With great respect, I venture to think that that is slightly misleading. When one looks at the Dhammathats themselves, which are summarized in the Digest, it is found that the qualification of a pubbaka child is that he or she should be a child of "a former marriage". There seems, in my opinion, to be a difference between a child of a former husband or wife and one of a former marriage. The words "former husband" or former wife must, I think, refer to a person who was once a husband or wife but is no longer. In that sense I felt some difficulty in ascribing to the child of what has been called here a "contemporaneous" marriage the qualities which are necessary to qualify as a "pubbaka" child. But, when once it is conceded that what is necessary is merely that there should have been a "former marriage" and not a former husband or wife in the sense I have explained, that difficulty entirely disappears.

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[3] Maung Thein Maung v. Ma Kywe, (1935) 22 A I R Rang 248=13 Rang 412 (F B).

[4] Ma Gun Bon v. Maung Po Kywe, (1897-1901) 2 U B R 66.

Moreover, the moment of time which is relevant is the time at which the right to inherit arises. Accordingly, at that moment the former wife or husband as the case may be can ex hypothesi no longer be in existence. Once those difficulties are overcome, I have no difficulty in agreeing with my Lord the Chief Justice and with my learned brother Dunkley J. that there is no reason for conceding a right of succession to the child of a "successive" marriage while excluding from succession the child of a marriage which is contemporaneous in the sense—in my opinion, in the rather misleading sense—in which that expression has been used in this case. I agree that this appeal should be dismissed.

**B.D./R.K.** *Appeal dismissed.*

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## A. I. R. 1938 Rangoon 451

MYA BU AND MACKNEY JJ.

*Ma Sint* — Appellant.

v.

*Ma Ma Gale* — Respondent.

First Appeal No. 6 of 1938, Decided on 14th July 1938.

**Buddhist Law (Burmese) — Succession — Apatitha child — No right to share when one parent is surviving.**

In the absence of keittima or natural children, the apatitha child is entitled to inherit in the estate of his adoptive parents when both parents are dead; but he has no right to share in the estate of the deceased parent when the other survivor parent is living : *A I R 1926 Rang 148 ; A I R 1929 Rang 218 and A I R 1917 L B 113, Ref.*

[P 451 C 2; P 453 C 1]

U E Maung — *for Appellant.*

U Tha Kin — *for Respondent.*

**Mackney J.** — The plaintiff-respondent Ma Ma Gale has been held by the original Court to be apatitha child of U Tun Kyaw and his wife Ma Lon Byu, both deceased. Ma Lon Byu was the natural aunt of Ma Ma Gale. She predeceased her husband U Tun Gyaw and after her death U Tun Gyaw married the defendant-appellant Ma Sint. Ma Ma Gale has brought a suit for the administration of the estate of U Tun Gyaw. The original Court having found that she is an apatitha child decided that she was entitled to one-half of the share of the natural child. Therefore as the share of a natural child in the present circumstances would have been three-quarters, he awarded Ma Ma Gale a three-eighth share. Against this decision Ma Sint has now preferred this appeal. One of the grounds set out in the written memorandum of appeal is that the original Court erred in holding that the plaintiff-respondent was an apatitha child of U Tun Gyaw and Ma Lon Byu. This contention however was not urged before us. The main contention raised is that in Burmese Buddhist law the apatitha child has no right of inheritance in the presence of a wife of the deceased.

It is quite clear that in the absence of keittima or natural children the apatitha child is entitled to inherit in the estate of his adoptive parents: 1937 R L R 426,[1] 14 Rang 557[2] and 2 Rang 661.[3] Where there are no natural or keittima children the apatitha child takes half of the estate of the adoptive parents, the other half going to the relatives. In Manugye, Vol. 10, Art. 25, is laid down the law for partition of the property between the adopted son and the relations of the adopting father and mother. Generally throughout the Article it is assumed that both the adoptive parents are dead. If the adopted child shall be living with the adopting parents at the time of their death, he is to share equally with the relations of the deceased. If he shall have already received a portion and be living separate, he shall have no further share; the property shall descend to the relatives of the deceased. To this proposition a proviso is attached, namely that if the deceased man and his wife had payin and lettetpwa property, the survivor was the heir and on the death of the survivor his or her relatives would inherit. Finally there is the case where the adopted child is one of the six relatives entitled to inherit. In his case, although he be living separately, if there be no natural children, he shall take an equal share with the relatives.

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[1] Ko Pe Kyal v. Ma Thein Kha, (1937) 24 A I R Rang 455=173 I C 238=1937 R L R 426.

[2] Ma Than Nyun v. Daw Shwe Thit, (1936) 23 A I R Rang 344=164 I C 272=14 Rang 557.

[3] Maung Gyi v. Maung Aung Pyo, (1925) 12 A I R Rang 178=85 I C 286=2 Rang 661.

It is possible to read this last clause as a special case of the adopted child who has received his portion and is living separate, and in that case it would indicate that after the death of the survivor he is entitled to an equal share with the relations. Be that as it may, it must be conceded that the Manugye does not clearly state whether the adopted son has or has not any right to share in the estate in such a case as the one that is now before us. I think there can be no doubt that if such a case as the present had been mentioned in the Dhammathats, it would have been stated that the apatitha child would have no right to inherit when the adoptive father on the death of the adoptive mother had married again and died. It has only been comparatively recently, i. e. in 1929, that it has been laid down that a keittima child on the remarriage of one parent after the death of the other can sue for partition of the estate in the same manner as can a natural born child: 7 Rang 193.[4] The learned Judges who decided this case quote the following observation from 4 Rang 184,[5] a Full Bench decision:

> We are satisfied that according to the dhammathats the position of the keittima child in respect of inheritance was inferior to that of own children, but in view of the judicial decisions which for many years have recognized the right of the keittima child to share equally with the own children, we are of opinion that that right should not now be questioned.

The learned Judges who decided 7 Rang 193[4] were unable to decide how the right of a natural child to claim inheritance after one parent had died and on the remarriage of the surviving parent, could be denied to a keittima child. In 1937 R L R 426[1] it was pointed out that the keittima child gets right of inheritance from the intention of the adoptive parents that he shall inherit. On the other hand an apatitha child does not get any right of inheritance from the intention of the person who adopts because the person who adopts has no intention to give him any such right. There is therefore a very good reason why the same rights which have been extended to a keittima child notwithstanding dhammathats should not be extended to the apatitha child. In Vol. 10, Art. 25 of the Manugye it is made quite clear that the apatitha child in certain circumstances can come in with the relatives in sharing the estate. As however the relatives do not inherit until the survivor of the husband or wife dies, it would seem to follow that the apatitha child also cannot inherit until the survivor dies unless special provision has been made for his so inheriting, as was formerly in existence for the natural children only, but now exists in favour of a keittima child also.

Again the kilitha child has greater privileges than the apatitha. On the death of his parents, the co-heirs have no claim to the property, he shall inherit the whole of the property: Kinwun Mingyi's Digest of Burmese Buddhist Law, S. 301. In 9 L B R 1[6]—a Full Bench decision of the Chief Court of Lower Burma—it was held that a kilitha child could not share with his father's widow in the father's estate. In this case the kilitha child was the child of a man by a woman who was not his wife. The man had subsequently married another woman. On his death the illegitimate daughter brought a suit for three-quarters of the share of his estate. As therefore, so far as inheritance in the estate of parents goes, the kilitha child who is more privileged than the apatitha child, may not share with the survivor, it would follow that all the more certainly is the apatitha child excluded.

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[4] Ma Thein v. Ma Mya, (1929) 16 A I R Rang 218=118 I C 124=7 Rang 193.

[5] Pa An v. Ma Dwe, (1926) 13 A I R Rang 148 =98 I C 621=4 Rang 184 (F B).

[6] Ma Hnya v. Ma On Bwin, (1917) 4 A I R L B 113=33 I C 171=9 L B R 1 (F B).

The apatitha child has been adopted with no intention to inherit; no thought for its future has been taken. In certain special circumstances it is allowed to inherit in the estate of its adoptive parents: but it is quite clear that it cannot do so when there is a direct claimant. It has been placed, on certain conditions, on an equality with the relatives of the deceased; but these themselves succeed only when there is no survivor of the deceased couple. Such a survivor is the recognized heir of the deceased and his or her rights can be affected in certain circumstances only by the natural children or the keittima child, that is to say the children in whose status the right of inheritance is inherent. I would therefore hold that Ma Ma Gale has no right to share in the estate of U Tun Gyaw in the lifetime of Ma Sint. I would therefore allow this appeal and set aside the judgment and decree of the trial Court with costs throughout, advocate's fees in this Court five gold mohurs.

**Mya Bu J.** — I agree.

B.D./R.K. *Appeal allowed.*

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## A. I. R. 1938 Rangoon 453

MYA BU AND MACKNEY JJ.

*Dr. A. Karim and another* — Applicants.

v.

*Kyauktaga Grant Ltd. and another* — Respondents.

Civil Revn. No. 83 of 1938, Decided on 23rd June 1938, against order of Asst. Dist. Court, Pegu, D/- 23rd December 1937.

**Civil P. C. (1908), Ss. 115, 47, O. 33, R. 1 — Application under O. 33 dismissed on ground that suit is not maintainable under S. 47, although Court is satisfied that applicants are paupers—Court, in coming to this conclusion, making use of information obtained from execution proceedings—Such use is irregular and it amounts to material irregularity.**

Where the Court to which an application under O. 33, R. 1 for leave to sue in forma pauperis is presented, dismisses the application, although satisfied that the applicants are paupers, holding that the suit is not maintainable in view of the provisions of S. 47, and in coming to this conclusion, it not only refers to certain proceedings mentioned in the proposed plaint but makes use of the information obtained therefrom, the use of such information is irregular and it amounts to a material irregularity in the conduct of the proceedings in the lower Court which vitiates the order passed therein: *A I R 1932 Rang 107, Foll.* [P 453 C 2; P 454 C 1]

(Per *Mackney J.*)—Where the execution proceedings have been referred in the plaint, the Court may be entitled to look at these proceedings, but on looking into them, the Court can only discover what defence is likely to be used; it cannot at that stage, consider the validity of that defence. [P 454 C 1]

P. B. Sen — *for Applicants.*

Irvine Jones — *for Respondents.*

**Mya Bu J.** — This is an application for revision of an order dismissing the applicant's application for leave to sue in forma pauperis. The procedure laid down by O. 33, Rr. 1 and 2 was duly complied with and the Court issued notice under R. 4. In the course of the hearing, after the notice, evidence upon the question of the applicants' pauperism was adduced and the Court was satisfied that the applicants were paupers, but coming to the conclusion that the proposed suit was not maintainable in view of the provisions of S. 47, Civil P. C., the learned Assistant District Judge dismissed the application. In coming to this conclusion the learned Assistant District Judge not only referred to certain execution proceedings mentioned in the proposed plaint but made use of the information obtained therefrom for the purpose of showing that the cause of action in the suit was a matter relating to execution between respondent 2 and the applicants against whom the execution proceeding had been taken by respondent 2. In the proposed plaint it is alleged that the defendants had taken three lots of paddy on the pretext of taking the same towards or in satisfaction of the decree under execution but none of the paddy or its value was utilized for that purpose or deposited in Court. On these allegations the applicants claimed that they were entitled to receive the value of the paddy from the two respondents.

According to the allegations in the plaint although the execution proceeding had facilitated the respondent's alleged fraudulent conduct in the taking away of the paddy, the right of the applicants for recovery thereof or its value is based on appropriation of the paddy to some purpose other than that of payment towards the discharge or satisfaction of the decree. Such appropriation cannot be said to have related to the execution or satisfaction or discharge of the decree under execution. The applicants' case is that the paddy was not utilized for the discharge or satisfaction of the decree and therefore they are entitled to recover the paddy or its value. The case in so far as the irregular use of information obtained upon reference to the execution case is concerned, is covered by the Full Bench case in 10 Rang 357.[1] There has thus been material irregularity in the conduct of the proceeding in the Court of the Assistant District Judge which has vitiated the order that he has made. Since the learned Assistant District Judge's findings are to the effect that the applicants are in all other respects entitled to sue as paupers, their application for leave to sue in forma pauperis is granted; the respondents to pay the applicants' costs in both Courts; advocate's fees in this Court three gold mohurs.

**Mackney J.** —I agree. As the execution proceedings were referred to in the plaint the Court may have been entitled to look at these proceedings, but on looking into the proceedings the Court could only discover what defence was likely to be used. The Judge could not at that stage consider the validity of that defence.

R.M./R.K. *Order accordingly.*

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[1] U Ba Dwe v. Maung Lu Pan, (1932) 19 A I R Rang 107=139 I C 265=10 Rang 357 (F B).

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## *A. I. R. 1938 Rangoon 454

BRAUND AND SHARPE JJ.

*Maung Ba Chein and others*—Applicants.

v.

*The King.*

Criminal Misc. Applns. Nos. 53 to 56 of 1938, Decided on 20th September 1938, for transfer under S. 526, Criminal P. C.

***(a) Criminal P. C. (1898), S. 526—Accused charged with offence of joining unlawful assembly — Mere fact that Magistrate trying case had exercised powers under S. 127 (1) in relation to disturbance out of which offence arose is no ground for transfer.**

As a general rule the mere fact that a Magistrate has, in his capacity as a Magistrate, exercised the powers given to him under S. 127 (1), in relation to a particular disturbance or series of disturbances affords no ground for the transfer from the cognizance of that Magistrate of a case arising out of that disturbance or series of disturbances. If on the other hand, a Magistrate, in the course of the performance of his duties in relation to any particular disturbance, were to acquire any particular knowledge by his own observation or otherwise which might, in the hearing of any case, tend to embarrass him, it is possible that a transfer, either at the instance of the Magistrate himself or at the instance of the accused person, might in some cases be desirable in the interests of justice. [P 455 C 1]

**(b) Criminal P. C. (1898), S. 526—Practice.**

In case of an application for transfer it is necessary for a person who claims a transfer to prove by affidavit, fully and strictly, all the facts on which he rests his claim. [P 456 C 1]

**Braund J.**—These are applications for transfer under S. 526, Criminal P. C., by some 131 persons who have been charged before the Western Sub-divisional Magistrate, the Senior Magistrate, the First Additional Magistrate and the Sixth Additional Magistrate of Mandalay respectively with offences under S. 144, I. P. C., or S. 19 (e), Arms Act, or both in relation to the recent civil disturbances in Mandalay. Sec. 144, I. P. C., relates to the offence of joining an unlawful assembly, armed with a deadly weapon. It reads in this way :

> Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 19 (e), Arms Act, relates to the offence of "going armed" in contravention of the provisions of S. 13 of the Act, that is to say without a licence. The principles and facts are common to each application and we propose therefore to deal with them together. The first ground upon which these transfers are sought is that the individual Magistrates by whom the particular cases respectively are to be tried were at one time or another during the disturbances at Mandalay engaged in relation to such disturbances as a whole but not necessarily in relation to any particular occasion out of which these respective charges have arisen. As regards the Senior Magistrate, even that is not a fact, because he was not present at any of the disturbances at all. But as regards each of the other Magistrates with whom we are concerned we shall assume that it is so. It is nowhere alleged in any of the applications before us —and it could not, indeed, be so alleged, because it is not a fact—that any of these Magistrates acquired, by personal observation or otherwise, any particular knowledge as regards these particular accused persons whereby their fair and impartial trial might be prejudiced or whereby the Magistrate himself might in any way be embarrassed. But it is urged, as a general proposition, that the mere fact of a Magistrate having been engaged generally in the performance of the duties of his office in relation to the disturbances in Mandalay is enough by itself to create a sufficient case for a transfer under S. 526, Criminal P. C., to another district.

We are quite unable to accept this view. None of the applicants has in any way made it appear to us that it is expedient "for the ends of justice" that these cases should be transferred or that a fair and impartial inquiry or trial cannot be had in the Courts of Mandalay. Neither, in our view, is a transfer expedient in such a case for the ends of justice upon the ground that in the minds of the accused persons themselves there can arise any reasonable apprehension that their cases will be dealt with by the respective Magistrates otherwise than with strict regard to the law applicable to the facts. It cannot reasonably be assumed either that a Magistrate who has had occasion to exercise his powers under S. 127 (1), Criminal P. C., is liable to be prejudiced generally against a number of persons charged with offences arising out of the disturbances in respect of which he was engaged as a Magistrate under that Section—and still less against any particular accused person or persons. Nor can we concede that an apprehension of any such prejudice can reasonably exist in the mind of any accused person himself.

We lay it down therefore as a general rule that the mere fact that a Magistrate has, in his capacity as a Magistrate, exercised the powers given to him under Section 127 (1), Criminal P. C., in relation to a particular disturbance or series of disturbances affords no ground for the transfer from the cognizance of that Magistrate of a case arising out of that disturbance or series of disturbances. If, on the other hand, a Magistrate, in the course of the performance of his duties in relation to any particular disturbance, were to acquire any particular knowledge by his own observation or otherwise which might, in the hearing of any case, tend to embarrass him, it is possible that a transfer, either at the instance of the Magistrate himself or at the instance of the accused person, might in some cases be desirable in the interests of justice. In the cases before us, no such thing is alleged and we therefore desire to lay down no general rule upon that aspect of the matter, for it is manifest that every such application must fall to be considered in relation to its own particular facts and circumstances.

The next ground upon which these transfers are sought is that the Magistrates concerned have demanded excessive bail. In each case the bail has been fixed as Rs. 500 or less with two sureties. In the case of some of the applicants it was originally fixed as Rs. 1000, but on reconsideration, reduced to Rs. 500 before the bond was executed. It is said that these amounts are, in all the circumstances, so excessive as to raise in the minds of the applicants a reasonable apprehension that the Magistrate is prejudiced against them and accordingly that it is expedient for the ends of justice that the cases should be transferred.

We concede that the ends of justice do require that the accused person himself should have no reasonable ground for distrusting the impartiality of his Judge. But, in this case, having regard to the circumstances in which the alleged offences have arisen — and having regard also to the nature of those offences, which, if committed, are indeed serious—we can find no indication in the sums at which bail has been fixed which could reasonably point to the slightest prejudice on the part of any of the Magistrates concerned. We have no doubt that each of the Magistrates has exercised judicially his discretion as to the amount of the bail to be fixed and, even though upon an appropriate application we might ourselves have reduced the bail—and we are bound to say that, as at present advised, there is nothing to lead us to think that we should have reduced the bail — on such an application as this we find it impossible to treat the amounts at which bail has been fixed as showing any form of partiality in the minds of the Magistrates.

Finally, a suggestion has been introduced —it cannot be called more than a suggestion—that the applicants might desire to call the Magistrates themselves as witnesses in their own behalf. No reason has been advanced why they should be so called. Nor has U Tun Aung, who has appeared for all the applicants, been in a position to inform us of any single matter upon which the evidence of any one of the Magistrates could, or might, assist the applicants or any of them. For these reasons all these transfer applications must be dismissed.

We desire to say that we have, for the purpose of this judgment, considered the applications upon the footing that all the necessary facts which have been advanced to us in argument by U Tun Aung have been properly proved by the affidavits which have been filed on behalf of some of the applicants. But this is very far, in fact, from being the case. Even had we been able to take the view that the facts, as U Tun Aung has alleged them before us, disclose any proper grounds for a transfer of the cases to another district, we should, upon the actual materials before us, have been nevertheless quite unable to accept many of those facts as proved. We point out that, in such a case as this, it is necessary for a person who claims a transfer to prove by affidavit, fully and strictly, all the facts on which he rests his claim.

**Sharpe J.**—I agree that all these applications must be dismissed. As the judgment which my learned brother has just delivered fully incorporates my own views in this matter, I have nothing further to add.

D.S./R.K. *Applications dismissed.*

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## A. I. R. 1938 Rangoon 456

BRAUND J.

*U Saw, Editor-in-Chief of the "Sun"*

v.

*The King.*

Criminal Misc. Appln. No. 52 of 1938, Decided on 5th September 1938.

**(a) Criminal P. C. (1898), S. 526—Allowance or disallowance of question by Judge in pursuance of judicial duty cannot by itself afford ground for application for transfer.**

A Judge or Magistrate who conscientiously tries a case in a judicial proceeding has a legal duty to apply, to the best of his ability, the rules of evidence, as those rules are laid down in the Evidence Act. And his plain judicial duty is to exclude irrelevant evidence, whether in examination-in-chief or in cross-examination. The allowance or disallowance of questions by a Judge in pursuance of a judicial duty cannot ever by itself afford a ground upon which to base an application for a transfer of a case, unless it is either shown affirmatively that there exists some improper motive or unless upon the face of the questions themselves, disallowed or allowed as the case may be, the only possible inference must be that they have been allowed or disallowed for some ulterior and improper reason. [P 457 C 2]

**(b) Criminal P. C. (1898), S. 526 — Previous unfavourable comment made by accused against Magistrate trying case held no ground for transfer.**

An Additional District Magistrate was trying a case against the accused. The accused made an application for transfer on the ground that as the accused had previously made some unfavourable comment on the Magistrate while he was Deputy Commissioner, he might harbour resentment against the applicant which would prevent him doing justice in the case :

*Held* that this could not be accepted as a ground for a transfer. [P 458 C 2]

**Order.**—This is an application by one U Saw under S. 526, Criminal P. C., for a transfer of the hearing of a complaint dated 3rd August 1938, laid against him by the District Magistrate of Rangoon, from the Court of the Additional District Magistrate of Rangoon to some other Court. It seems that on 26th July an article and some photographs were published in the "Sun" newspaper relating to certain disturbances in Rangoon. On the following day — 28th July 1938 — the District Magistrate of Rangoon, U Po Sa, in expressed pursuance of S. 144, Criminal P. C., promulgated an "order" in the following terms :

> Whereas it has been made to appear to me that the publication of certain photographs and articles in connexion with the present disturbances in Rangoon is likely to prolong and to aggravate these disturbances, I, U Po Sa, District Magistrate, Rangoon, do hereby order you to abstain from publishing any article or writing in connexion with the present disturbances in Rangoon likely in any way to cause feelings of enmity between different sections or classes of the community or any photograph in connexion with the disturbances permission in writing to publish which has not been given by the Home Department of Government—Sd. Po Sa, District Magistrate, Rangoon.—Rangoon, 28th July 1938.

It is to be noticed that that "order" is addressed to the "Editor, The Sun, Rangoon." On 31st July 1938, a further "order" —also addressed to "the Editor, The Sun, Rangoon"—was promulgated by the District Magistrate identical in terms to that of the 28th, except that it referred to "disturbances in Burma" instead of to "disturbances in Rangoon." The former of those two articles was admittedly served upon one Maung Ba Gale, the Managing Director of the Sun Press, and the latter upon one Maung Ba Than, who is said to be the assistant editor. The next thing that happened was that on 31st July, 1st and 2nd August three further articles appeared in the "Sun" newspaper. In relation to these three further articles a complaint was laid by the District Magistrate against the present applicant, Maung Saw, under S. 188, Penal Code, upon the ground that, by reason of their publication, he had "disobeyed" the order of 31st July. That complaint came on for hearing on 18th August 1938, before the Additional District Magistrate.

Witness 1 was U Po Sa, the District Magistrate himself—no doubt, for the purpose of proving the "orders" of 28th and 31st July. He was examined and, before the conclusion of his cross-examination, intimation was given to the respondent's advocate that this present application for transfer would be lodged. The further hearing of the case was accordingly adjourned by the Additional District Magistrate until 5th September, i. e. until today —in order to give ample time for this transfer application to be made and disposed of. It is a matter for unfavourable comment that it was not until a full fortnight had elapsed that the present applicant — on 1st September in fact — filed the transfer application, for the purpose of making which he had obtained the adjournment. The ground upon which this application is based is that, under sub.ss. 1 (a) and 1 (e) of S. 526, Criminal P. C., "a fair and impartial inquiry or trial cannot be obtained . . . ." in the Court of the Additional District Magistrate and that it is "expedient for the ends of justice" that the case should be transferred to some other Court. This is a serious charge to make. U E Maung, who appears for the applicant, has told me that he relies upon only two of the grounds which are alleged in his application. He says first, that the wholesale disallowance by the learned Additional District Magistrate of the questions put at the hearing to U Po Sa in cross-examination shows that he is biased against his client. And secondly, he says that, inasmuch as the "Sun" newspaper had once adversely commented upon the learned Additional Magistrate's conduct when acting as the Deputy Commissioner of Myingyan in connexion with an appointment to the Myingyan Municipal Committee he is now disqualified from hearing the case. Before dealing with these allegations in detail, it is necessary to see what exactly was the issue that the learned Magistrate was dealing with. It is to be found in S. 188, Penal Code—the Section under which the complaint was laid. It is this :

> 188. Whoever, knowing that by an order promulgated by a public servant, lawfully empowered to promulgate such order, he is directed to abstain from a certain act . . . . disobeys such direction shall . . . . be liable to. . . .

certain punishment. The issues before the Additional District Magistrate were therefore first, whether there was an "order"; secondly, whether it has been "promulgated"; thirdly, whether the "public servant" who promulgated it was "lawfully empowered" to do so; fourthly, whether it has been "disobeyed" by the person directed to abstain from the act; and, fifthly, whether he knew of the order. I am not in the least concerned upon this present application to determine — nor do I express any opinion—whether the applicant has, or has not, a good defence to the complaint under S. 188. I am concerned merely to determine whether the learned Magistrate who heard it has, by reason of the questions he has disallowed, shown a "bias" against the applicant. The learned Magistrate disallowed in all some 22 questions, all but one of which he recorded verbatim. The last—I suspect, through sheer weariness—he did not record. It is perfectly plain, from the record the learned Magistrate made, what the purport and tendency of the questions were. The questions are too long to set out verbatim in this judgment. But they may be fairly summarized as questions tending to show : (1) that U Po Sa, the District Magistrate, was unduly influenced by the Ministers in making the orders of 28th and 31st July ; (2) that he had made other orders against the editors of other newspapers under pressure from the Ministers ; and (3) that he had discriminated against the "Sun" in withdrawing orders against the editors of other newspapers. These questions one and all were disallowed. And it is said that, from the mere fact of their disallowance, the learned Magistrate must be deemed to be biased against the applicant.

I cannot for a moment agree. A Judge or Magistrate who conscientiously tries a case in a judicial proceeding has a legal duty to apply, to the best of his ability, the rules of evidence, as those rules are laid down in the Evidence Act. And his plain judicial duty is to exclude irrelevant evidence, whether in examination-in-chief or in cross-examination. Apart altogether from the question of the relevance of any particular question excluded in this case, I am not prepared to concede that the allowance or disallowance of questions by a Judge in pursuance of a judicial duty can ever by itself afford a ground upon which to base an application for a transfer of a case, unless it is either shown affirmatively that there exists some improper motive or unless upon the face of the questions themselves, disallowed or allowed as the case may be, the only possible inference must be that they have been allowed or disallowed for some ulterior and improper reason. I find it very difficult to imagine in what circumstances such a case would arise.

I am extremely reluctant even to consider in this case the question of the relevancy of the particular questions disallowed, for there is upon their face no reason whatever to suppose that the learned Additional Magistrate has done more than to exercise his judicial discretion—indeed his judicial duty—to the best of his ability. To admit the principle that a party may, under cover of a transfer application, have resort to what in effect would be an "interlocutory" appeal, would, I think, go far beyond anything contemplated by S. 526, Criminal P. C. There is nothing whatever before me which could, as I have said, lead me to the conclusion that, in disallowing these questions, the learned Additional Magistrate has—whether he is right or wrong is another matter—acted otherwise than judicially. If it should turn out ultimately that he was wrong in disallowing them, then the applicant will have his remedy in such appeal or revision as the law allows. I should be prepared upon that ground alone to refuse to accept the disallowance of these questions as any valid reason why this case should be transferred.

But I feel it right--in justice to the learned Additional Magistrate—to add that in my own view, the particular questions were rightly disallowed. The Magistrate's task was to determine the issues raised under S. 188, I. P. C. The inquiry was whether there was an "order" which satisfied the Section, whether it was promulgated by a public servant lawfully empowered to promulgate it and whether it had been disobeyed by a person who knew of it and whom it directed to abstain from the act in question. If there was such an "order" then it seems to me to be immaterial, for the purpose of S. 188, in what circumstances that order was originally made. In a revision proceeding against the "order" itself, the case might, of course, have been different and the bona fides of it might have been a relevant issue. But I myself find it difficult to perceive the relevancy of any of the questions disallowed to any issue which can properly come under S. 188, I. P. C.

In my judgment, therefore, even had I been able to perceive any ground upon which I could justifiably on this application, go behind the judicial discretion of the learned Additional Magistrate in the conduct of the trial and in the matter of the questions he allowed or disallowed, I should have been unable to differ from the view he formed as to the relevancy of these particular questions. And I can certainly find nothing in the mere fact of their having been disallowed which can possibly lead me to suspect in the learned Additional Magistrate a bias of any sort. U E Maung has pressed upon me to hold that the questions are relevant, because the District Magistrate had no jurisdiction to make the orders of 28th July and 31st July unless or until he had judicially found the facts in which his jurisdiction to make the orders arose. But the answer to that is obvious. The learned District Magistrate has, on the face of his orders of 28th and 31st July, found those facts. They have been the subject of no revision proceedings, as they might have been, and for the purposes of a complaint under S. 188, I. P. C., they must stand as found. Nor do I think that they are justified by reference to S. 250, Criminal P. C. That again is a matter in respect of which the applicant would have his remedy, if any, in appeal or revision.

As regards the other of the grounds upon which the applicant rests his case, it is that the learned Additional District Magistrate, having been the object of an unfavourable comment by the "Sun" newspaper while Deputy Commissioner of Myingyan, is not a fit person to try the case. U E Maung, very properly, in the face of the explanation given to the Court by the learned Magistrate, repudiates any suggestion that the adverse comment in question was deserved. It rests therefore upon this, that the learned Magistrate might harbour a resentment against the applicant which would prevent him doing justice in this case. I cannot accept this as a ground for a transfer. I have no reason whatever to impute any such frailty to the Magistrate. Nor indeed was this ground even put forward at the time the transfer was first mentioned in the Magistrate's Court. It is I suspect, an ingenious afterthought. In all the circumstances I must refuse this transfer application and direct the hearing of the complaint to take its course in the Court of the Additional District Magistrate. I desire to add that from nothing that I have said must it be assumed or inferred, that I hold any opinion as to the merits of the complaint in the Magistrate's Court. It remains there entirely at large.

D.S./R.K. ***Application refused.***

## A. I. R. 1938 Rangoon 459

MYA BU AND MACKNEY JJ.

*A. K. R. M. M. K. Chettyar Firm* — Appellant.

v.

*P. L. V. M. Valiappa Chettyar and others* — Respondents.

First Appeal No. 32 of 1938, Decided on 14th July 1938, against decree of Asst. Dist. Court, Insein, D/- 23rd December 1937.

**Transfer of Property Act (1882), S. 67—Mortgagee holding mortgage in respect of properties situated in Burma and in British India, executed prior to separation of Burma, bringing suit for sale of mortgaged property—Court in Burma has no jurisdiction by reason of Burma (Adaptation of Laws) Order 1937, to pass decree for sale of property situated in British India—Plaintiff is entitled to decree for sale of property situated in Burma only—Substantive rights of mortgagee are not injured.**

The plain meaning of S. 67, T. P. Act, is that the mortgagee is entitled to obtain the assistance of the Court concerned in bringing the mortgaged property to sale if the mortgage money has become due and remains unpaid. Whether the mortgagee will have to obtain one decree or more than one decree will depend upon the procedure laid down for such suits. The method of obtaining a decree is a matter of procedure. No suitor has any vested right in a course of procedure nor any right to complain even if during the litigation the procedure is changed. The Civil Procedure Code confers no substantive rights. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. [P 460 C 1, 2]

Where a person holds a mortgage in respect of properties situate in Burma and in Madras Presidency in British India, the Transfer of Property Act no doubt gives him a right in respect of both the properties but it makes no provision as to the Courts to which he must have recourse in exercising that right of action. He must have recourse to Courts having jurisdiction and the jurisdiction of the Court is determined by the Code of Civil Procedure. [P 460 C 1]

Where therefore a mortgagee holding a mortgage in respect of properties situated in Burma and in Madras Presidency in British India, executed prior to 1st April 1937, i. e. prior to separation of Burma from India, brings a suit in October 1937 in Burma for recovery of the amount due on the mortgage and for sale of the mortgaged property in default of the payment, the Court in Burma has no jurisdiction by reason of Burma (Adaptation of Laws) Order 1937 to deal with the property situate in British India and is not empowered to pass a decree for sale in respect of property situate in British India and the plaintiff is entitled to decree for sale only in respect of property situated in Burma within the jurisdiction of the Court. The substantive rights of the mortgagee are in no way injured because owing to the fact that the procedure provided does not enable him to sue in one Court in Burma for sale of all the mortgaged property, he is not to be deemed to have waived his claim against property situated in British India inasmuch as it cannot be included in the suit instituted in Burma: *A I R 1938 Rang 130; (1878) 3 A C 582; A I R 1919 P C 150 and A I R 1930 P C 188, Rel. on.* [P 461 C 1]

Surridge — *for Appellant.*

**Mackney J.**—On 8th June 1931, respondents 1 and 2 mortgaged to the plaintiff-appellant certain properties, some of which are situate in the District of Insein but others are situate in the Madras Presidency of British India. The amount of the loan became due six months after the date thereof. On 5th October 1937, the plaintiff-appellant filed a suit in the Assistant District Court of Insein for the recovery of the amount of the loan due with interest, and for sale of the mortgaged property in default of payment. The learned Assistant District Judge held that he had no jurisdiction to deal with the property in British India owing to the fact that on 1st April 1937 Burma ceased to be a part of British India. In consequence of the alterations in the Burman laws introduced by the Government of Burma (Adaptation of Laws) Order 1937, the Courts in Burma ceased to be able to entertain any suit relating to property in British India. Accordingly, whilst granting the plaintiff-appellant a mortgage decree for the full amount of the principal and interest due on the mortgage bond, he gave a preliminary decree for sale only of that property which was situated in Insein District and within the jurisdiction of his Court.

The plaintiff now appeals to this Court on the ground that the Assistant District Court did have jurisdiction in respect of the mortgaged property situated in British India and should have granted a mortgage decree in respect of all properties subject to mortgage. The appeal has been heard ex parte. Cl. 10 of the Adaptation of Laws Order reads as follows:

> Nothing in this Order shall affect the previous operation of, or anything duly done or suffered under, any Burman law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law.

By definition, 'Burman law' means a law as defined in S. 149, Government of Burma Act, 1935. This Section refers to laws in force in Burma at the time of the Act and states that:

> In this Section the expression 'law' does not include an Act of Parliament but includes any ordinance, order, bye-law, rule or regulation having in Burma the force of law.

Now, it is said that under S. 67, T. P. Act, which is a Burman law, as operative before 1st April 1937 and at the time the present mortgage was executed, the plaintiff-appellant had acquired a right to obtain from the Court a decree that the mortgaged property be sold. It is argued that this right was a right to obtain a single decree in one Court, because the mortgagee was entitled to enforce his claim against the whole of the mortgaged property at one time. The learned counsel for the appellant attaches great significance to the words 'a decree' which he wishes to interpret 'as a single decree.'

I am unable to agree that the words necessarily have this meaning. The method of obtaining a decree is a matter of procedure with which it would surely be out of place to deal in an Act setting out the rights of mortgagors and mortgagees. The plain meaning of S. 67 is that the mortgagee is entitled to obtain the assistance of the Court concerned in bringing the mortgaged property to sale if the mortgage money has become due and remains unpaid. Whether the mortgagee will have to obtain one decree, or more than one decree, will depend on the procedure which has been laid down for such suits. The Transfer of Property Act, no doubt, gave the plaintiff-appellant a right of action in respect of both the properties in Burma and in the Madras Presidency, but it makes no provisions as to the Courts to which the plaintiff-appellant must have recourse in exercising that right of action. It is obvious that he must have recourse to the Courts having jurisdiction; and the jurisdiction of the Courts is determined by the Code of Civil Procedure.

It has been pointed out in 1938 R L R 176[1] that no suitor has any vested interest in the course of procedure, nor any right to complain even if during the litigation the procedure is changed. The Civil Procedure Code confers no substantive rights; it is a Code of rules whereby rights may be enforced before the Courts. Lord Blackburn's observation in (1878) 3 A C 582[2] is quoted, where he says:

> I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that you should proceed in another and a different way; clearly these bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.

By the Adaptation of Laws Order, in S. 16, Civil P. C., the word 'India' has been altered to the word 'Burma,' so that the Section becomes applicable only to property which is situate in British Burma. S. 16 (c) directs that suits for sale in the case of mortgage shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. S. 17 of the Code is as follows:

> Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situated within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate.

In 42 Mad 813[3] their Lordships of the Privy Council observed that in this Section the word "Courts" must be held as meaning Courts to which the Code applies; that is to say, in the present case, it must be held to mean 'Courts in Burma.' The appeal with which their Lordships were dealing was from the decree passed in a suit brought to enforce a mortgage of property which was situate partly in a district to which the Code applied and partly in a scheduled district under Act 24 of 1839, that is to say the district subject to the special jurisdiction of the Agency Courts. A decree for the sale of the mortgaged property was made by the Subordinate Judge and affirmed by the High Court of Judicature at Madras. Their Lordships, in consequence of their view of S. 17 of the Code, varied the decree passed by the High Court deleting the order for sale so far as applicable to the land situated within the jurisdiction of the Agency Court. They added:

> This will be, of course, without prejudice to the respondent's right to apply in the Agency Court for an order for sale of those lands.

Again, in 54 Bom 495[4] their Lordships dealt with an appeal from the High Court at Bombay in a suit in the Satara Court of the Bombay Presidency to enforce certain mortgages of property situated not only in the Bombay Presidency but also in the Kolhapur State which is not within British India. It was observed:

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[1] Arunachallam Chettyar v. Valiappa Chettyar, (1938) 25 A I R Rang 130=175 I C 275=1938 R L R 176 (F B).

[2] Gardner v. Lucas, (1878) 3 A C 582.

[3] Setrucharlu Ramabhadra Raju v. Maharaja of Jeypore, (1919) 6 A I R P C 150=51 I C 185=42 Mad 813=46 I A 151 (P C).

[4] Nilkanth Balwant v. Vidya Narasinh Bharati, (1930) 17 A I R P C 188=126 I C 417=54 Bom 495=57 I A 194 (P C).

The provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India, and their Lordships are of opinion that the words in S. 17 'within the jurisdiction of different Courts' must mean within the jurisdiction of different Courts to which the Code applies, that is to say, Courts in British India . . . . . Inasmuch as the properties in Kolhapur are not within the jurisdiction of any Court in British India, the learned Subordinate Judge of Satara had no jurisdiction to try the suit, so far as it related to the mortgaged properties situate in Kolhapur.

In the result, the plaintiffs-appellants succeeded so far as the mortgaged properties in Satara and Belgaum were concerned but failed as regards the mortgaged property in Kolhapur. It appears to me, therefore, that the learned Assistant District Judge rightly refused to grant a decree for sale of the mortgaged property which is in British India. The substantive rights of the plaintiff-appellant are in no wise injured, because, owing to the fact that the procedure provided does not enable him to sue in one Court in Burma for sale of all the mortgaged properties, he is not to be deemed to have waived his claim against the property situated in British India, inasmuch as it cannot be included in the present suit. This appeal must therefore be dismissed. No order as to costs is necessary as it has been heard ex parte.

**Mya Bu J.**—I concur.

R.M./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Rangoon 461

BAGULEY AND MOSELY JJ.

*Mrs. Niemeyer* — Appellant.

v.

*E. M. Mamooji and others* — Respondents.

First Appeal No. 93 of 1937, Decided on 10th March 1938, from judgment of High Court, in C. R. S. No. 234 of 1936, *Reported in A. I. R. 1937 Rang 413.*

**(a) Practice— Duty of Court — Court should not allow its sympathy to get upper hand.**

Although a party has suffered much from his legal and financial advisers yet the Court must not allow its sympathy to get the upper hand because it is a commonplace that hard cases make bad law. [P 462 C 1]

**(b) Mortgage—Creation of—Endorsement of pronote with transfer of title deeds does not create mortgage.**

A mortgage of immovable property being an interest in immovable property cannot be transferred for consideration by endorsement of a promissory note together with the making over the title deeds. [P 462 C 1, 2]

**(c) Civil P. C. (1908), O. 6, R. 17— Amendment of pleading — Amendment allowable by law—Court must allow it.**

Latter part of R. 17 shows that it is not always purely a question of the discretion of the Judge, and, if the amendment is permissible under the law otherwise, then the Judge has no discretion in the matter but he has got to allow the amendment if it is necessary for determining the real questions in controversy between the parties, provided of course that they arise out of the same transaction. [P 463 C 1, 2]

**(d) Pleadings — Sloppiness and prolixity should be discouraged.**

Sloppiness in the pleadings is the last thing to encourage. Irrelevant and undue prolixity in pleadings is also to be discouraged. [P 467 C 1]

**(e) Promissory Note—Suit on — Presumption of consideration—Necessary allegations in plaint stated.**

If a suit is brought on a promissory note, all that is necessary to set out is that the defendants by their promissory note promised to pay and they have failed. In the case of a promissory note consideration is presumed and it is for the defendant, if execution is proved, to prove that there was no consideration. When there is no reason to suppose *a priori* that the question of consideration will ever come to be raised, there is no good reason why parties filing suits based on promissory notes should, in the plaint, set out the consideration for promissory notes. The mere existence of the promissory note in the case therefore prima facie implies that there was consideration for it, and until and unless the question of consideration becomes of interest, there seems to be no reason why the plaint should be burdened with long details of how the promissory note came to be executed. When the question of consideration becomes of interest, then, and then only, is there any reason for the plaintiff to set forth what the consideration was. [P 467 C 1]

*** (f) Pleadings—Amendment of— Mortgage suit — Claim based on pronote and transfer by deposit of title deeds — Pronote inadmissible because of some defect in it — Amendment to base claim on original transaction—Other party if not deprived of defence, amendment can be allowed.**

In a suit to obtain a mortgage decree the claim was based on a promissory note executed by the other party and deposit of title deeds. As the pronote was found to be defective it could not be admitted in evidence. The claimant applied to amend his plaint so as to base his claim on the original liability for which the pronote was given:

*Held* that the amendment could be allowed on the payment of costs provided the other party was not thereby deprived of any defence as regards his claim : *A I R 1918 P C 146 and A I R 1933 Bom 476, Foll.*; *A I R 1921 P C 50 ; 6 M I A 393 (P C) and 25 Cal 371, Ref.*; *A I R 1925 Rang 282 (F B) ; A I R 1914 All 494 ; A I R 1928 Bom 516 and 41 I A 142 (P C), Disting.*; *5 All 456, Doubted ; 21 Bom 570 held no longer good law.* [P 467 C 2]

N. M. Cowasjee and Hormasji — *for Appellant.*

B. K. Basu, Sulaiman and Ray — *for Respondents.*

**Baguley J.** — This is an appeal by a plaintiff who filed a suit on the original side of this Court endeavouring to recover from certain heirs and legal representatives of two deceased persons, Khatiza Bibi and Ismail Eusoof Jeewa Karwa, moneys which she said were due to her from them on a certain mortgage. Before any evidence had been called it was found that the promissory note which, according to the plaint, forms an important part of her cause of action, could not be received in evidence because one of the stamps had not been cancelled in such a way that it could not be used again. The plaintiff asked leave to file an amended plaint based on the original liability for which the promissory note had been given. The learned Judge was of opinion that the plaintiff should withdraw the suit under O. 23, Rule 1, in which case he was quite prepared to give her permission to do so with liberty to institute a fresh suit in respect of the subject-matter of the suit. The plaintiff's counsel refused to accept the suggestion and insisted that leave to amend the plaint should be granted. The learned Judge, being of opinion that the plaint could not be amended, dismissed the suit and against the decree dismissing the suit the present appeal has been brought.

The case is not an easy one to deal with, and there can be no doubt that the plaintiff has suffered much from her legal and financial advisers. Nevertheless one must not allow one's sympathy to get the upper hand because it is a commonplace that hard cases make bad law. The original plaint as filed, it is admitted, is far from an accurate description of the facts that the plaintiff really wishes the Court to accept. It sets out that the two deceased persons executed a promissory note in favour of Messrs. Balthazar and Son, Ltd. and with intent to create security for repayment deposited with that firm certain title deeds. It goes on to say that the promissory note was endorsed by Balthazars to the plaintiff for valuable consideration, and the title deeds had been made over to her by them. It is admitted that this is entirely untrue, and that they had never endorsed the promissory note for valuable consideration. These words were presumably put in as catchwords regardless of their meaning.

It was very quickly seen that on the allegations of this plaint the plaintiff was bound to fail, because a mortgage of immovable property being an interest in immovable property could not be transferred for consideration by endorsement of the promissory note together with the making over of the title deeds. The plaintiff therefore consulted other lawyers and an amended plaint was filed. In this plaint it is set out that Balthazars were to the knowledge of two deceased persons acting as agents for the plaintiff, and the title deeds were made over to Balthazars as plaintiff's agent, but as the plaintiff wished to file the suit, Balthazars endorsed the promissory note to the plaintiff without recourse, and afterwards for better security the firm executed a duly registered assignment of this debt and security. This amended plaint was allowed to be filed by a former Judge of this Court. Had the case in 1938 R L R 6[1] been reported before this amended plaint was filed it would no doubt not have been accepted, because the duly registered assignment of the debt was made subsequent to the date on which the suit had been filed, and this case lays down that:

> Nothing arising after action brought can either create a new, or complete a then incomplete, cause of action entitling the plaintiff to any relief in that same then existing suit.

The case reached the stage of hearing, but before issues were framed the learned Judge asked to see the promissory note, and he then discovered something which the defendants had not noticed, and that is that of the four stamps on the promissory note one was not effectively cancelled. The claim therefore, based as it was to a great extent upon this promissory note, was bound to fail. It was then that the plaintiff asked for leave to amend the plaint, and the plaintiff refusing to accept the offer to withdraw the suit with permission to file a fresh suit, the case was dismissed. The first ground of appeal is that the learned Judge was wrong in holding that the stamp on the promissory note was not properly cancelled. This ground of appeal, I think, must fail. It is a simple matter of fact which has to be judged by the eye. The law says that the stamp must be cancelled so that it cannot be used again. The stamp in question has a little touch of ink on the extreme right edge. It is perfectly well known that people in tearing stamps sometimes do not keep to the line of perforation exactly, and a dishonest person could easily have torn off this minute portion of paper from the stamp and put it on a letter which would undoubtedly have been passed through the post. It is not without interest to observe that the four stamps on the promissory note are apparently a block out of a booklet of stamps, because both the left hand stamps have had all the perforations cut off as sometimes occurs when stamps are bound up in booklets. This is mentioned merely as showing the way in which stamps with slight defects on their edges may honestly come to be used. On the other hand if this stamp had fallen innocently into the hands of an honest person with just this little purple blur on the right hand side, he might well have thought it was an unused stamp, and that somebody might have picked it up with an inky finger. This stamp, I think, is certainly not cancelled so that it cannot be used again, and the learned Judge was correct in finding to this effect. The promissory note therefore cannot be used in evidence.

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[1] **Smith v. Heptonstall, (1938) 25 A·I R Rang 134=1938 R L R 6.**

The step which the learned Judge proposed to take is provided for by O. 23, R. 1. The Court was satisfied that the suit must fail by reason of some formal defect, and had the course of action proposed by the learned Judge been followed there could have been no difficulty about the case. It is obviously a case in which this course of action could have been properly followed. The plaintiff however wished to save expense and trouble and wanted to amend this plaint. It may be remarked, incidentally, that so far from saving expenses and trouble she has had to incur much more both of expense and trouble. The plaintiff's counsel wished the Court to take action under O. 6, R. 17 :

> The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

The wording of this Rule begins with the words "The Court may" and had this type of wording been persevered in to the end of the Rule I should have had no hesitation in supporting the learned Judge's order, because it would show that the allowing or disallowing of an amendment was a matter within the discretion of the Court; but the rule goes on to say "all such amendments shall be made . . . . ." and this, I think, shows that it is not always purely a question of the discretion of the Judge, and if the amendment is permissible under the law otherwise, then I think the Judge has no discretion in the matter but he has got to allow the amendment if it is necessary for determining the real questions in controversy between the parties, provided of course that they arise out of the same transaction. I think therefore that the learned Judge has not approached the matter from quite the right angle when he said it is a matter of the Court's discretion, the discretion to be exercised on certain well defined principles.

Going on, the learned Judge says that the first principle on which the Court has to act is that the Court does not allow a party by amendment to raise against his opponent a new case. It allows him to implement or to perfect some case that he has already pleaded, but in which for some reason or other there is a defect. Looking at this one has to ask "what is the case which the plaintiff is trying to raise against the defendants?" Her claim is that she is the mortgagee; the two deceased persons owed her money and deposited with her agents title-deeds with intent to give her security over the property to which the title-deeds related. That was her case originally when she sought to utilize the promissory note as evidence of the liability, and that is the case which she now seeks to put up; but, being unable to prove the promissory note and so make it evidence of the debt, she seeks to prove some pre-existing liability which was really evidenced by the promissory note.

The second principle which the learned Judge lays down is that for the purpose of doing justice the Court will endeavour to allow amendments in all cases where the opposite party can be compensated in costs. The present case is one of that nature. The third principle which the learned Judge lays down is that the Court will not as a rule permit a party by amendment to take away from his opponent some legal right that his opponent has acquired. As authority for this he refers to 48 Cal 110,[2] a decision of the Privy Council. From this authority, of course, it is impossible to differ. The learned Judge goes on to say, after dealing with other cases :

> Taking therefore as my guide the Privy Council case in 48 Cal 110[2] I have I think to apply the ordinary rule, namely that I must not, except in very special circumstances, deprive a defendant of a legal defence that he may have acquired . . . . I

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[2] Charan Das v. Amir Khan, (1921) 8 A I R P C 50=57 I C 606=48 Cal 110=47 I A 255 (PC).

feel therefore that I shall have in my discretion to refuse to allow an amendment in this case. That leaves me no alternative but to dismiss the suit.

Now, so far as I can see, had the learned Judge allowed the amendment sought for instead of directing the plaintiff to file a fresh case, he would in no way whatsoever have deprived the defendants of any defence which they could put up. The promissory note is dated 6th September 1932. The suit was filed on 11th July 1936, rather more than four years later. At that time therefore, the plaintiff was well within time for getting a decree against the property represented by the title-deeds, but unless she could prove some fact which could save limitation she was too late for a personal decree for any possible balance. There is no direct allegation put forward for the purpose of saving limitation, but in the particulars of the amount due, there is a statement that interest had been paid up to 1st October 1935. Such interest presumably would not have been paid earlier than 1st October 1935. If the plaintiff could prove the payment of interest made in such a way as to save limitation on 1st October 1935, then on the date the suit was filed she was within time for getting a personal decree for any possible balance due after the sale of the property. Otherwise, she could not get a personal decree under any circumstances.

The suit was dismissed on 1st July 1937. At that time had the plaintiff filed a new suit she would, as before, have been in time to get a mortgage decree against the property. If she were unable in any way to prove facts which would save limitation, she was time-barred from getting a personal decree for any possible balance just as she was on 11th July 1936. Again, if she were in a position to prove the payment of interest on 1st October 1935 or any similar fact which would save limitation, on 1st July 1937, she was still in a position to get a personal decree for any possible balance. In fact, so far as limitation was concerned for both the mortgage decree and the personal decree for any possible balance, she was in exactly the same position on 1st July 1937 as she had been on 11th July 1936. This being the case I do not understand how the rule laid down in 48 Cal 110[2] can possibly make it necessary to refuse leave to amend in order to avoid going against the principle laid down in that case. It seems therefore to me that the learned Judge has not quite apprehended the actual facts in that he seems to think that he must follow 48 Cal 110[2] and refuse the plaintiff leave to amend the plaint, because by so doing he would prevent the defendants from setting up a plea of limitation against a personal decree which had come into existence between 11th July 1936 and 1st July 1937.

The learned Judge seems to have had difficulty in dealing with the case in 3 Rang 183,[3] because he says he finds himself a little relieved at being able to distinguish the present case from that decision. In that case the plaintiff filed a suit on a promissory note but failed to prove execution of it. The defendant while denying execution admitted receipt of the consideration. No alternative cause of action based on the original loan was pleaded in the plaint. It was held that the plaint could be amended at any stage by the addition of an alternative plea and the plaintiff be given a decree on the original consideration. This case is distinguishable from the present one because in the present case nothing has been said in any of the pleadings about any original liability. Both plaints start by referring to the two deceased persons promising by their promissory notes to pay, and there is not in the present case, as there was in 3 Rang 183,[3] any admission by the defendants of a pre-existing liability. His attention does not seem to have been drawn to 57 Bom 802.[4] The headnote of this case is as follows:

> In a suit brought on a promissory note, it is permissible to the Court at the trial or even in appeal to allow an amendment of the plaint in order to entitle the plaintiff to sue in the alternative on the original cause of action giving rise to the consideration for the note.

In this case on p. 805 the Court added :

> Strong reliance is placed on the decision of Mr. Justice Blackwell in 34 Bom L R 643.[5] The headnote in that case is :
>
> "Where a suit is brought on a promissory note, it is not permissible to the Court at the trial of the suit to allow an amendment in order to entitle the plaintiff to sue on the original cause of action on the loan, that being a cause of action wholly distinct from the cause of action based upon the promissory note."
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> Now, we are not concerned with the question whether in that case the learned Judge was right

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[3] Maung Shwe Myat v. Maung Po Sin, (1925) 12 A I R Rang 282=89 I C 425=3 Rang 183 (F B).

[4] Sarafalli Mahomadali v. Mahasukhbhai Jechandbhai, (1933) 20 A I R Bom 476=147 I C 426=57 Bom 802=35 Bom L R 965.

[5] Burjorji v. Hormusji, (1932) 19 A I R Bom 394=138 I C 783=34 Bom L R 643.

or wrong in refusing leave to amend, but if the learned Judge intended to lay down as a proposition of law that in a suit on a promissory note an amendment claiming in the alternative on the consideration for the note should never be allowed at the trial, I think, with great respect to the learned Judge, that his judgment cannot be supported.

It is further pointed out that the Privy Council case in 46 Cal 663[6] is authority for holding that in a case which was based on a hundi which has been dishonoured :

> It would, of course, have been open to the plaintiffs, had they thought fit, to have framed their case in an alternative form, and to have sued both on the hundis and alternatively upon the consideration.

Referring to this Beaumont C. J. says:

> If two alternative and inconsistent claims can be combined originally in the plaint, I see no reason on principle why they should not be combined at a later stage by amendment.

This Bench also referred to 48 Cal 832,[7] which was also referred to before us; but that case, in my opinion, has no application to the present case. The parties there had had business relations between 1903 and 1912. Maung Mo Hnaung sued Ma Shwe Mya for specific performance of a verbal agreement alleged to have been made in 1912, and after losing the case the Judicial Commissioner in appeal made an order directing that he should be given liberty to amend so that he could claim for payment of damages for breach of some other contract made in 1903, nine years earlier. That is obviously a case of which the facts bore no possible resemblance to the present case.

Liberty to amend has in certain cases been granted with the utmost freedom. For instance, in 25 Cal 371,[8] a Full Bench of the Calcutta High Court allowed amendment of a very far reaching nature. The plaintiff sued the defendant for an ordinary mortgage decree. The defendant pleaded that he was an infant at the time of the mortgage. The plaintiff was allowed to amend his plaint in such a way as to convert the suit from a simple mortgage suit to a suit for recovery of money based on the plea that he had been induced to part with his money upon a false representation. The Bench stated :

> The intention of the Legislature was that, as far as possible, all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit.

In 6 M I A 393[9] on page 411 occurs the passage:

> The substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute.

In 45 Cal 305[10] it is laid down:

> The Court being desirous of getting at the true facts will allow an amendment subject to the three chief conditions : that there is good faith on the part of the applicant : possibility of amendment without such prejudice to the other party as cannot be compensated by costs; and, lastly, that the amendment is not such as to turn a suit of one character into a suit of another character.

Now, in the present case, there is I think no suggestion that the plaintiff did not act in good faith. There can be no prejudice to the other party such as cannot be compensated by costs, and the suit as originally framed was for money recoverable on the mortgage created by the deposit of certain title deeds, and if the amendment sought is allowed it will still remain a suit to recover money on this mortgage created by the deposit of the same title deeds. A case in some respect similar to the present one in which permission to amend was not allowed is reported in 52 Bom 640.[11] This was a suit on three hundis. It was decreed against one of the defendants who appealed, and after the appeal had been heard the respondent's counsel asked for leave to amend by pleading in the plaint an alternative claim for moneys lent. Marten C. J. who delivered the first judgment said:

> To my mind it would be wrong at this stage of the case to allow the plaintiffs to introduce an entirely new and different cause of action, which would require extensive amendment of the pleadings, which would require a new trial, and which would involve quite different considerations and quite different evidence from that which were before the learned trial Judge.

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[6] **Sadasuk Janki Das v. Kishen Pershad, (1918) 5 A I R P C 146=50 I C 216=46 Cal 663=46 I A 33 (P C).**

[7] **Ma Shwe Mya v. Maung Mo Hnaung, (1922) 9 A I R P C 249=63 I C 914=48 Cal 832=48 I A 214 (P C).**

[8] **Saral Chand Mitter v. Mohun Bibi, (1898) 25 Cal 371=2 C W N 201.**

[9] **Hunoomanpersaud Panday v. Mt. Baboose Munraj Koonweree, (1854-57) 6 M I A 393=18 W R 81=2 Suther 29=1 Sar 552 (P C).**

[10] **Upendra Narain Roy v. Janaki Nath Roy, (1919) 6 A I R Cal 904=47 I C 129=45 Cal 305=22 C W N 611.**

[11] **Sitaram Krishna v. Chimandas Fatehchand, (1928) 15 A I R Bom 516=115 I C 400=52 Bom 640=30 Bom L R 1300.**

A case of this nature is obviously very different from the present case in which so far there has been no trial at all and no evidence led.

Another case, 5 All 456,[12] seems to me to be a doubtful authority in view of the subsequent rulings in 46 Cal 663[6] and 25 Cal 371.[8] 21 Bom 570[13] which states that the amendment of a plaint is in the discretion of the Judge and is not the right of the suitor, seems to me no longer applicable in view of the wording of Order 6, R. 17, which says that all such amendments shall be made as may be necessary. This case was decided under a former Code. Order 6, R. 17 is new. The imperative character of the last sentence of the Rule is dwelt on by Bachelor J. in 33 Bom 644[14] on page 649.

On behalf of the respondent great stress is laid upon 41 I A 142.[15] This was not a suit in which any question of amendment of plaint arose. It arose under the following circumstances:

*A* and *B* had some disputes which were referred to arbitration. The arbitrators made an award directing payment of a certain amount of cash and the giving of two promissory notes. The cash was paid and the two promissory notes were handed over. A suit was brought on the promissory notes. The defence was raised on material alteration and the suit was dismissed. It was held by the Privy Council in appeal in a subsequent suit:

> It is evident that a claim on the promissory notes and a claim for the amount found due under the award and for which payment was provided by the agreement are not the same cause of action but are in truth inconsistent and mutually exclusive causes of action. So long as the notes were outstanding there was no right of action otherwise than upon the notes.

It is obvious from this that if amendments were allowed in the present case the plaintiff would be going back from her suit based in part on the promissory note to a suit based to some extent on some pre-existing debt or liability, and this ruling of the Privy Council is quoted as showing that the causes of action being different an amendment cannot be allowed changing the cause of action. The point in issue in this case, which was a case from Ceylon, was whether Sec. 34, Ceylon Civil P. C., which corresponds in every way with our O. 2, R. 2, barred a second suit on the consideration for the promissory notes, and it appears from what is said in the arguments that the Ceylon Civil Procedure Code has a definition of "cause of action", and we have no definition of "cause of action"; so it is possible that this is not an authority which is absolutely binding in Burma. Be that as it may, it seems to me that, having regard to 46 Cal 663[6] if a plaintiff is entitled to sue in the alternative form in that case, both upon the hundis and in the alternative upon the pre-existing consideration, then for the purposes of Order 2, R. 2, as applied in 41 I A 142,[15] he is suing in one suit in the alternative on two different causes of action. If two causes of action can be combined in one plaint it is difficult to see, as mentioned in 57 Bom 802,[4] why the plaintiff should not amend his plaint so as to make it one based on two alternative causes of action; and it must be remembered that O. 6, R. 17 does not refer to any cause of action at all but refers to "the real questions in controversy between the parties", though I would hold that these questions in controversy must arise out of one and the same transaction.

The respondent also refers to 50 I A 115.[16] This is also a case under O. 2, R. 2, and it does not appear to me to be particularly apposite. The plaintiff had a mortgage and the interest being unpaid he sued for the interest alone. A clause of the mortgage deed said that if the interest fell into arrears beyond six months the mortgagee had a right to realize the whole principal and interest by a suit on the mortgaged property. It was held that as there was no independent obligation to pay the principal and the interest, a suit having been brought for part of the claim which could then be realized on the mortgaged property barred a subsequent suit for the remainder of the principal money. 36 All 560[17] is to the same effect as 41 I A 142[15] and follows it. In the judgment the learned Judge deals at some length with 61 Cal 433.[18] This is a case in which a

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12. Hamilton v. Land Mortgage Bank of India, (1883) 5 All 456=1883 A W N 99.
13. Tapiram v. Sadu, (1897) 21 Bom 570.
14. Kisandas Rupchand v. Rachappa Vithoba, (1909) 33 Bom 644=4 I C 726=11 Bom L R 1042.
15. Payana Reena Saminathan v. Pana Lana Palaniappa, (1913) 41 I A 142=26 I C 228=18 C W N 617 (P C).
16. Kishan Narain v. Pala Mal, (1922) 9 A I R P C 412=72 I C 187=50 I A 115=4 Lah 32 (P C).
17. Beni Ram v. Ram Chandra, (1914) 1 A I R All 494=26 IC 302=36 All 560=12 ALJ 959.
18. Ramendramohan Tagore v. Keshabchandra, (1934) 21 A I R Cal 554=150 I C 982=61 Cal 433=38 C W N 488.

promissory note which was sued upon proved to be improperly stamped and therefore inadmissible in evidence, and leave to amend was sought for and given, but the lower Appellate Court thought an amendment should not have been allowed and dismissed the suit. It was held on second appeal that the trial Judge was right in allowing the plaint to be amended.

The main point in which the case is differentiated from the present case by the learned trial Judge is that in that case all the facts leading up to the execution of the promissory note were pleaded in the original plaint, and in the present case they are not pleaded. I regret I am unable to attach the same importance to this point of pleading as was attached by the learned trial Judge. Sloppiness in the pleadings is the last thing I wish to encourage. Irrelevant and undue prolixity in pleadings is also to be discouraged. And, strictly speaking, if a suit is brought on a promissory note all that is necessary to set out is that the defendants by their promissory note promised to pay and they have failed. In the case of a promissory note, consideration is presumed and it is for the defendant, if execution is proved, to prove that there was no consideration. When there is no reason to suppose a priori that the question of consideration will ever come to be raised, I can see no good reason why parties filing suits based on promissory notes should, in the plaint, set out the consideration for promissory notes. As I have said, consideration is assumed. The mere existence of the promissory note in the case therefore prima facie implies that there was consideration for it and until and unless the question of consideration becomes of interest, I see no reason why the plaint should be burdened with long details of how the promissory note came to be executed. When the question of consideration becomes of interest then and then only, is there any reason for the plaintiff to set forth what the consideration was; so it seems to me that in 61 Cal 433[18] the plaintiff really was allowed to benefit by the fact that he had introduced a certain amount of irrelevant details into his pleadings.

In Mulla's Civil Procedure Code in the Commentary on O. 6, R. 17, at p. 501, the matter is summed up :

> The general rule is that any amendment allowed must be such as is either raised in the pleadings, or is consistent with the case as originally laid, and that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from.

A reference is made to 11 M I A 7.[19] In the present case the suit has been on a mortgage from the beginning, and the relation of the mortgagor and mortgagee existing between the plaintiff and the two deceased persons now represented by the defendants, is certainly set out by the plaintiff. The amount of the money due on the mortgage is the same and the property mortgaged is the same. The transaction in fact is the same in the original plaint as in the amendment which the plaintiff seeks to make. It is merely a question of whether the liability which forms part of the mortgage was evidenced by the promissory note or in some other way. The learned Commentator deduces from the general rule three other rules. The first is that :

> Where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he may not be allowed to amend the plaint so as to base it on a different legal relation.

This rule is certainly not offended against in the present case and it was certainly stretched a long way in 25 Cal 371.[8] The other two rules which are set out in this place do not apply to the present case. For these reasons, I think the suit should not have been dismissed but the plaintiff should have been allowed to amend the plaint on the following lines :

Paragraph 1 would have to be amended so as to omit reference to the promissory note, and to set out the existing liability, if any, which the two deceased persons owed to the plaintiff. Para. 3 would have to have omitted from it all references to the transfer alleged to have been made subsequent to the date on which the suit was filed and the amount due might require to be altered. The trouble having been arisen from errors on the plaintiff's side the amendment will only be allowed on payment of costs and I think the fairest order for costs would be that the defendants be paid the sum of Rs. 340 as costs as directed in the decree under appeal up to the time from which the case starts again on the amended plaint. Costs in this Court would include advocate's fee 15 gold mohurs. If the defendants are in the event successful they will get costs in this Court from the plaintiff. If the plaintiff is in the event successful they will be added to the money due on the mortgage.

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[19] Eshen Chunder Singh v. Shama Churn Bhutto, (1866) 11 M I A 7=6 W R 57=2 Sar 209=1 Suther 649 (P C).

**Mosely J.** — I agree.

B.D./R.K. *Order accordingly.*

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## * A. I. R. 1938 Rangoon 468

DUNKLEY AND BRAUND JJ.

*R. M. A. R. M. Chettyar Firm and another* — Appellants.

v.

*Maung Shwe Hmun and others* — Respondents.

Letters Patent Appeal No. 6 of 1938, Decided on 29th June 1938, from decree of Mackney J., in Special Second Appeal No. 205 of 1937, D/. 27th January 1938.

**(a) Second Appeal — Question of fact not decided by lower Courts—High Court in second appeal can decide it, if there is sufficient material before it** (Per *Mackney J.*).

The question whether the interest of a guardian was adverse to that of the minor is a question of fact and even if the question has not been considered by the lower Courts, the High Court, if there is sufficient material before it on which to form an opinion on the matter, is entitled to decide the matter in second appeal. [P 470 C 1]

**(b) Specific Relief Act (1877), S. 42—Decree for sale of property alleged to be jointly held by minors and guardian-ad-litem—Minors can sue for bare declaration that guardian-ad-litem's interest being adverse decree is nullity — They need not ask for possession of their shares** (Per *Mackney J.*).

Where a decree is passed for the sale of property alleged to be jointly held by minors and guardian-ad-litem, the minors, whether or not they have a right to the property, are entitled to a declaration that the decree which has been passed against them is a nullity because guardian-ad-litem's interest being adverse, they were not properly represented. For the purpose of such a suit, it is immaterial whether or not they have a right to possess the land and consequently it is entirely unnecessary for them to ask the Court to restore them to possession. [P 470 C 2]

**(c) Estoppel — Suit against majors in their absence on footing that they were minors — Majors having no knowledge of suit until after decree—They are not estopped from contesting validity of decree even if they became aware of execution proceeding and did not object then** (Per *Bench*).

Where persons to be sued are majors a suit brought without their knowledge against them on the footing that they are minors is wrong, and the guardian-ad-litem appointed to represent them has no legal standing to act for them in the suit and his admission of liability is not binding on them. Such persons if they were not aware of the suit until after the decree in the suit was passed are not estopped from contesting the validity of the decree even if they became aware of the execution proceeding and did not come forward to prosecute their claims then: *21 Mad 167, held no authority; A I R 1917 Mad 318 and A I R 1928 Mad 294, Disting.* [P 472 C 2; P 473 C 1]

**(d) Civil P. C. (1908), O. 32, R. 3 — Suit against persons on footing that they were minors by appointing guardian-ad-litem—Onus to prove that they were majors is on person alleging them to be so** (Per *Braund J.*).

Where a suit is instituted against certain persons on the footing that they were minors by appointing guardian-ad-litem, the Court under O. 32, R. 3 must be taken to have arrived at a finding of fact of their minority and the onus to prove that they were majors at the time of institution of the suit is on the person alleging it to be so. [P 473 C 1, 2]

**(e) Buddhist Law (Burmese) — Guardian — De facto guardian cannot mortgage minor's property** (Per *Bench*).

Under Burmese law a de facto guardian cannot dispose of immovable property of the minor. Hence a mortgage executed by a person purporting to act as guardian of minors cannot affect the interests of the minors in the mortgaged property: *A I R 1934 Rang 335, Foll.* [P 474 C 1]

*** (f) Civil P. C. (1908), O. 32, R. 4 — Mortgage by guardian on behalf of himself and minors in respect of property in which they were jointly interested—Mortgage suit against them — Guardian appointed guardian-ad-litem —His interest is adverse to that of minors and decree passed is nullity against minors** (Per *Braund J.*).

Where a mortgage is executed by a guardian on behalf of himself and minors in respect of property in which they were jointly interested and in a suit brought against them on the mortgage the guardian is appointed guardian-ad-litem, his interest is adverse to that of the minors as they are sued as joint-debtors, and every joint-debtor has an interest in seeing that his co-debtors do not escape from their joint liability. This being so, the decree obtained against minors is a nullity on the ground that they were not properly represented in the suit. [P 474 C 1, 2]

P. B. Sen — *for Appellants.*

U Hla Min — *for Respondents.*

*S. A. No. 205 of 1937.*

*Mackney J.*—This appeal arises out of a suit brought by the appellants, Maung Shwe Hmun, Ma Ohn Thint and Ma Ohn Myint against the defendants-respondents, R. M. A. R. M. Firm and Maung Po Thaw, together with two other defendants Maung Shwe Kun and Ko Myat Tha, who are not now parties to the appeal, for a declaration that the judgment and decree in Civil Regular No. 242 of 1933 of the Township Court of Paungde was null and void. This decree was given in a suit brought by the R. M. A. R. M. Firm for recovery of a loan due on a mortgage of certain property executed by Maung Shwe Kun on his own behalf and as guardian of the three appellants, his brother and sisters, who were alleged to be minors at the time of the mortgage. In that suit Maung Po Thaw and Ko Myat Thaw were made respondents because they also had executed the mortgage deed as sureties; the plaintiffs alleged that the three appellants were minors and they suggested Maung Shwe Kun as their guardian ad litem. Maung Shwe Kun accepted the proposal and notices were apparently issued to the minors, but they did not appear. The Court appointed Maung Shwe Kun as guardian ad litem. Maung Shwe Hmun admitted the plaintiff's claim and raised no defence. Consequently, the Court granted a decree for sale of the property failing payment of the amount due on the date fixed. The amount was not paid. The property was sold and passed into the possession of Maung Po Thaw who purchased it from the decree-holder who had obtained it in the court auction. The court auction took place on 22nd August 1934 and the present suit was instituted on 16th September 1936. The plaintiffs-appellants claimed that they were not minors at the time the mortgage suit was instituted and that Maung Shwe Kun was fraudulently appointed their guardian ad litem. Alternatively they claimed that even if they were minors at the time, the appointment of guardian was not a legal appointment, for other reasons, and also because Maung Shwe Kun's interest was adverse to their own. The Township Court found that the plaintiffs were unable to prove that they were not minors at the time the mortgage suit was brought, but that as they must have been minors at the time of the original mortgage, Maung Shwe Kun had no authority to dispose of their property and therefore as they were not parties to the mortgage, the decree passed against them must be deemed to have been passed without jurisdiction and was therefore null and void. Accordingly, the Court granted a decree declaring that the decree in Civil Regular No. 242 of 1933 was void as against the plaintiffs and that that decree was therefore set aside. Of course, the Court could not set aside the decree nor could it, on the ground that the decree ought not on the facts to have been passed, declare that the decree was null.

Against this decree an appeal was laid in the District Court. The learned District Judge very properly pointed out that the reason given by the learned Township Judge would not justify the decree passed. The learned District Judge appears to have agreed with the learned Township Judge that the parties were minors at the time the original suit was framed, but he was also of the opinion that the plaintiffs could not be allowed to succeed on the ground that they were minors at the time the suit was filed, because such a plea was inconsistent with their pleadings, which the learned District Judge thought were based entirely on the allegation that they were majors at the time the suit was filed. The learned District Judge further thought that the plaintiffs-appellants were estopped from impeaching the decree because they knew of the suit and of the proceedings in execution but had raised no objection. Accordingly, he allowed the appeal and dismissed the plaintiffs-appellants' suit. The plaintiffs have now appealed to this Court. The learned District Judge erred in thinking that the plaintiffs had not raised the alternative plea, that is that if they were minors the appointment of Maung Shwe Kun as their guardian ad litem was illegal. It is quite clearly set out in the plaint. They were clearly entitled to raise this alternative plea. There can be no question, to my mind, that the interest of Maung Shwe Kun in the mortgage suit was distinctly adverse to that of the appellants. The allegation was that the three appellants and Maung Shwe Kun were jointly interested in the property mortgaged. If the appellants had an interest in the property and if that interest was not affected by the mortgage because they were minors at the time, then obviously Maung Shwe Hmun's share must bear the whole burden of the mortgage loan. If, on the other hand, the appellants' shares in the property were duly mortgaged, then their shares must bear the burden equally with Maung Shwe Kun's. It is quite clear therefore that in this particular suit, the interest of Maung Shwe Kun was adverse to that of the minors. Supposing the minors were to have put forward that defence, which apparently they could have put forward, that they were minors at the time of the execution of the mortgage, then Maung Shwe Kun's position would be very much affected. O. 32, Rule 4, Cl. (i), Civil P. C., provides that

> any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :
>
> Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

If as a fact the interest of the person to be appointed as guardian is adverse to that of the minors, then the appointment is illegal and a decree obtained against a minor in this manner is a nullity against him because he was not properly represented in the suit: 31 All 572[1] and 47 Mad 79.[2] It is argued on behalf of the respondents that the question whether the interest of Maung Shwe Kun was adverse to that of the appellants is a question of fact which has not been considered by the lower Courts. This may be true but as there is sufficient material before this Court on which to form an opinion on the matter, this Court is entitled to decide the matter. In my opinion, for the reasons already given, there are sufficient materials to enable this Court to come to the conclusion that the interest of Maung Shwe Kun in the mortgage suit was adverse to that of the plaintiffs. It has been argued that his interest was not adverse because the respondents could have proved that the minors had consented to his acting as their guardian and because the money borrowed was for their benefit and was used for their marriage and maintenance. These conditions are obviously entirely irrelevant. Even if Maung Shwe Kun had acted throughout with the most scrupulous consideration of the interests of the minors, that would not show that his interest in the mortgage suit was not in fact adverse to theirs. The learned counsel for the respondents referred the Court to a case, 52 Mad 275.[3] In this case the question arose whether a mother who had executed a promissory note on behalf of her minor child could be properly appointed guardian ad litem of the child in a suit for the recovery of money due on the promissory note. In discussing whether the interest of the mother was adverse to that of the minor in such a suit, it was observed that the matter could not be treated as a pure question of law and that it was not possible to lay down a rule that such a person could not in any circumstances be appointed. All this is no doubt true, but as I have endeavoured to show in the present case there are facts before the Court which definitely show that the interest of Maung Shwe Kun was adverse to that of the appellants.

The case referred to dealt with the case of a mother who was the natural guardian of the child under the Hindu law. In this suit we are not concerned with the point as to whether the appellants have or have not a right to share in the property. The only point for consideration is whether the decree in the mortgage suit is valid against them or whether it is a nullity. It has been argued that they are not entitled to sue for a bare declaration that the decree is a nullity, and that, being out of possession of the land, they must also sue for the possession of their shares. For such a suit however, other points arise for decision, which do not necessarily arise in the present case. Whether or not the plaintiffs have a right to the property, they are entitled to a declaration that the decree which has been passed against them is a nullity because they were not properly represented. For the purpose of such a suit, it is immaterial whether or not they have a right to possess the land and consequently it is entirely unnecessary for them to ask the Court to restore them to possession. If the decree in question is a nullity against the appellants, then it is unnecessary to consider the legal effect of their conduct after the decree was passed. I hold that the plaintiffs-appellants were not properly represented in the mortgage suit brought by defendant R. M. A. R. M. Picha Pillay against them in Civil Regular No. 242 of 1933 in the Township Court of Paungde and that the decree therein as against them is a nullity. This appeal is allowed. The decree of the District Court is set aside and the decree of the Township Court is modified accordingly, with costs to the plaintiffs-appellants in all Courts: advocate's fees in this Court two gold mohurs.

## Letters Patent Appeal.

**Dunkley J.**—The three respondents are the children of Maung Po Mya and Ma Ngwe Thaw. One Maung Shwe Kun is their elder brother. After the death of their parents Maung Shwe Kun mortgaged to appellant 1 firm certain land which is alleged to have been the property of their parents. He executed the mortgage deed on behalf of himself and also on behalf of the three respondents, whom he asserted to be minors, purporting to act as their guardian. Appellant 2, Maung Po Thaw, and one Maung Myat Thaw signed this mortgage bond as sureties. This mortgage was executed in April 1929, and it seems clear from the evidence that even at that time respondent 1, Maung Shwe Hmun, was a major. Subsequently, in Suit No. 242 of 1933 of the Township Court of Paungde, appellant 1 firm brought a suit on this mortgage. The following were impleaded as defendants in this mortgage suit, namely the three respondents, Maung Shwe Kun and the two sureties. The three respondents were sued as being minors, and appellant 1 applied for the appointment of Maung Shwe Kun as their guardian ad litem for the suit. No appointment of Maung Shwe Kun as guardian ad litem was made by the Court, but he acted on behalf of the three respondents in the suit. Preliminary and final mortgage decrees were passed against Maung Shwe Kun and the respondents on the admission of Maung Shwe Kun, and the mortgaged property was brought to sale and was sold by court auction and was purchased by appellant 1, the purchase price being set off against the mortgage decree. Subsequently appellant 1 sold the land to appellant 2.

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[1] Rashid-un-nisa v. Muhammad Ismail Khan, (1909) 31 All 572=3 I C 864=36 I A 168=6 A L J 822 (P C).

[2] Sellappa Goundan v. Masa Naikan, (1924) 11 A I R Mad 297=76 I C 1018=47 Mad 79=45 M L J 675.

[3] Venkatasomeswara Rao v. Lakshmanaswami, (1929) 16 A I R Mad 213=115 I C 801=52 Mad 275=56 M L J 175 (F B).

In Suit No. 142 of 1936 of the Township Court of Paungde, out of which the present appeal arises, the respondents sought for a declaration that the decree in Suit No. 242 of 1933 is not binding upon them. Their case was that they were majors to the knowledge of appellant 1, when this suit was instituted, and that they were fraudulently sued as being minors, and their brother Maung Shwe Kun was fraudulently appointed their guardian ad litem in the suit at the instance of appellant 1, in order to conceal from them this mortgage, to which they were not parties and which was not binding on them; and, in the alternative, that if they were minors at the time when the mortgage suit was instituted, Maung Shwe Kun's appointment as guardian ad litem was not a lawful appointment because his interest in the suit was adverse to their interest and for other reasons. The respondents were successful in the original Court, but lost on first appeal to the District Court of Prome; but this decision was again reversed by a single Judge of this Court on second appeal. The learned Judge who heard the second appeal has given a certificate for further appeal, and hence this Letters Patent appeal before us.

The whole appeal is now open for consideration, and as there was a right of appeal on facts in the second appeal there is a right of appeal on facts before us. On the case set up by the respondents in their plaint, it is plain that the principal point of fact for decision in the suit was whether the respondents were majors or minors at the time when the mortgage Suit No. 242 of 1933 was filed in 1933; and yet, strange as it may seem, although this case has now been before three Courts there has been no clear decision on this point. I am therefore compelled, with the utmost reluctance, in this third appeal to consider the evidence led in the original Court on this point. (After considering evidence his Lordship proceeded further.) From this evidence it is quite clear that respondents 1 and 2 were majors when the mortgage suit was filed. There may be some slight doubt as to whether respondent 3, Ma Ohn Myint, had actually reached her eighteenth birthday when the suit was filed, but Maung Po Thaw says that the suit was only filed after her marriage, and there is ample evidence to show that she was approaching 18 years of age at the time of her marriage, and consequently I have no difficulty in holding that she also was a major when the mortgage suit was instituted. Hence the suit was wrongly brought against the respondents on the footing that they were minors, and their brother Maung Shwe Kun had no legal standing to act for them in the suit and his admission of liability was not binding on them.

The appellants, however, contend that the mortgage decree is nevertheless binding on the respondents because they are estopped from contesting its validity. The assertion is that they were aware during its pendency of the institution of this suit against them, and that as they did not come forward to make a defence to the suit, although they knew all about it, they cannot now be heard to say that the decree therein is void as against them. It is clear from the record of Suit No. 242 of 1933 and from the evidence called by the appellants that the proceedings in that suit were highly irregular and that the respondents were not served with summonses or notices in connexion with the suit. The record of the suit itself shows that only ordinary summonses were issued on all the defendants, and no notices of the proposal to appoint a guardian ad litem for the three respondents who were alleged to be minors, were issued, and no appointment of a guardian ad litem was made by the Court. The record further shows that the summonses for the respondents which were issued were served on Maung Shwe Kun and not on them personally. The evidence of the appellant Maung Po Thaw is to the effect that the respondents were all married and were living in other village from that in which Maung Shwe Kun was living at the time that the mortgage suit was filed. The process server, Maung Pu, who was called for the appellants has stated that when he had to serve summonses in this suit he went to Maung Shwe Kun's house and served them all on Maung Shwe Kun. In December 1936, he deposed that even then he did not know the respondents and that at the time of service he did not know whether they were in Maung Shwe Kun's house or not. He had summonses for service on the respondents, but he did not serve them on the respondents. The only evidence which would suggest that the respondents were ever aware of the proceedings in the mortgage suit is to be found in the evidence of the appellant, Maung Po Thaw, and Maung Tun Nyun, the first witness for defendant 3. Po Thaw and Tun Nyun both state that respondent 1 was present at the auction sale of the mortgaged property. Maung Tun Nyun also states that when the mortgaged property was under attachment he was asked by respondent 2 to defend her interest. Of course, as this was an execution arising out of a mortgage suit, there was no attachment, and Tun Nyun must obviously have been referring to the proclamation of sale. The learned Township Judge came to the conclusion that the respondents were aware of the mortgage proceedings while they were still pending, and the learned District Judge on first appeal concurred in this conclusion, but neither Judge has set out in his judgment his reasons for this finding of fact, and there is not on the record a tittle of evidence to show that the respondents were aware of the proceedings in the mortgage suit before the decree therein was passed. I have searched in vain through the record of the trial of the present suit for any evidence on which the conclusion of the learned Township Judge and the learned District Judge could be based, and the burden of proving that the respondents were aware of these proceedings was clearly upon the appellants, who failed to discharge it.

Mr. Sen, for the appellants, has cited in support of his contention that an estoppel arises the cases in 21 Mad 167,[4] 39 Mad 1031[5] and 51 May 763.[6] In 21 Mad 167,[4] the judgment consists of only eight lines and the facts are not given, and therefore it is no authority for the general proposition for which Mr. Sen contends. The other two cases are easily distinguishable from the present case because in both those cases the defendant was properly sued as a minor but became a major during the pendency of the proceedings, and that, of course, places an entirely different complexion on the matter. In the present suit the three respondents were majors at the time that the mortgage suit was instituted and were therefore never represented before the Court, and they were never served with summons. But if it had been established that before the decree was passed they had knowledge that proceedings were being taken against them on the footing that they were minors and did not come forward to defend, they would probably be estopped from denying that the decree which was passed in the suit was binding upon them. For the respondents it has been contended that knowledge of the suit alone could not be sufficient to create an estoppel but that for an estoppel to be raised the respondents must also be aware that the suit affected their interest, and therefore as the mortgage deed was not binding upon them, their interests were not involved, and there was no liability upon them to come forward and defend, even if they heard of the institution and pendency of the suit. It is, however, quite clear that the interests of the respondents were involved in this mortgage suit because the mortgage deed purported to be executed on their behalf by their de facto guardian, and one of the questions for decision in the suit was whether their de facto guardian could make a mortgage so as to affect their interests, and this point was by inference decided against them in the mortgage suit.

Nevertheless, if the respondents had no knowledge of the suit until after the decree had been passed, no estoppel would be raised against them under the circumstances of the present case because they were aware of the execution proceedings and did not come forward to prosecute their claims then.

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[4] **Ramachari v. Duraisami Pillai, (1898) 21 Mad 167.**

[5] **Seshagiri Rao v. Jagannadham, (1917) 4 A I R Mad 318=32 I C 391=39 Mad 1031.**

[6] **Lanka Sanyasi v. Lanka Lakshman Naidu, (1928) 15 A I R Mad 294 = 118 I C 294 = 51 Mad 763=55 M L J 374.**

I therefore hold that on the facts of the present case the respondents are not estopped from contesting the validity of this decree, because it has not been proved that they had any notice of the proceedings in the mortgage suit before the decree was passed, and on this ground this appeal fails and is dismissed with costs, advocate's fee ten gold mohurs. In view of these findings of fact, it is unnecessary for me to consider the alternative plea which was raised by the respondents in their plaint, namely that even if they were minors at the time when the mortgage suit was instituted the decree therein is not binding upon them because Maung Shwe Kun could not lawfully represent their interests in the suit.

**Braund J.**—I agree. This Letters Patent Appeal has been certified to this Court under Cl. 13 of the Letters Patent as a case which is a fit one for appeal. It started on 2nd March 1936 in the Township Court of Paungde. The points at issue are really very simple ones and I need not set them out again as they have been fully dealt with in the judgment of my learned brother. In the result there have emerged for decision in this Court two or three comparatively simple questions of fact and one question of law as to which there has been, and indeed could be, no controversy. Mr. P. B. Sen who appears for the appellants has contended before us first that the Township Judge of Paungde has wrongly decided—if indeed, contrary to Mr. Sen's contention, he decided it at all—that the three respondents were minors at the date in 1933 when Civil Regular Suit No. 242 of 1933 was commenced. In my view, it should be appreciated that the onus lay upon the respondents in the first instance to establish that they were at the date of the institution of the 1933 suit adults, as they contended for. This, I think, becomes plain when the terms of O. 32, R. 3 (1), Civil P. C., are taken into consideration. For, that Order requires that before a guardian ad litem can be constituted for a minor defendant, the Court appointing him shall have been satisfied of the fact of his minority. It is common ground that Maung Shwe Kun was, de facto, appointed guardian ad litem for the three respondents in the 1933 suit. It must, in my opinion, necessarily follow therefore that there must be taken to have been a finding of the Court of the fact of their minority. In those circumstances the burden lay, I think, upon the respondent-plaintiffs in the first instance of establishing the fact which they contended for, that they were adults and not minors in the year 1933.

In this respect though he has not expressed himself in the clearest possible language, the Township Judge has not, I think, in fact been misled. He appreciated that it was for the plaintiffs in the suit before him to establish that they were adults. He set out briefly the evidence which had been adduced on behalf of the appellants to the effect that the three respondents were of age in 1933. He proceeded to express his view that it was not reliable evidence, adding that "there is therefore no proof that these plaintiffs were of age." That, in my view, having regard to the fact that the burden lay upon the respondents, amounted to a finding of fact, that they had failed to discharge that onus and that, for the purpose of this suit, they were minors in 1933. That finding of fact has remained undisturbed in the Court of the District Judge of Prome and in this Court upon second appeal. Mr. P. B. Sen now contends that that finding of fact was not justified by the evidence. For myself, while I in no way differ from the conclusions at which my learned brother has arrived, I do not find it necessary to determine this question of fact.

In my view, even upon the footing that at the date of the commencement of the 1933 suit the three respondents were not adults but minors, they were clearly entitled in this suit to a declaration, which they in fact obtained from the Township Judge, to the effect that the decree in the 1933 suit was not binding upon them, though I venture to disagree with the grounds upon which the Township Judge reached that conclusion. There is no doubt to my mind that the original plaint in this suit contained an unmistakable alternative allegation that, if it should be found that the plaintiffs were minors in 1933, they were still entitled to the declaration they sought upon the ground that the appointment of their brother Maung Shwe Kun as their guardian ad litem was defective in that he was a person having an adverse interest to their interest and that accordingly they were not represented in the suit properly or at all and the decree obtained in the suit was on that account not binding upon them. I do not understand the conclusion at which the learned District Judge of Prome arrived that this contention, though pleaded in the alternative, could not be heard to be raised by the respondents.

I have myself no difficulty in reaching the conclusion, upon the materials already upon the record in this suit, that Maung Shwe Kun was a person whose interest in the matters in controversy in the 1933 suit was adverse to that of the minors. The short facts were that in 1929 Maung Shwe Kun purported to mortgage to the present appellant 1 property in which he and the three respondents, who were then minors, were jointly interested. The mortgage bond or mortgage deed was executed by Maung Shwe Kun on his own behalf and on behalf of his minor brother and sisters, the respondents. There can be no doubt that Maung Shwe Kun had no power to affect the interests of his minor brother and sisters by any mortgage, and if authority for that were needed, it is to be found in 12 Rang 656.[7] When therefore Maung Shwe Kun and the three respondents in 1933 found themselves as defendants to a mortgage suit in which the present appellant 1 was the plaintiff, the position was that they were sued as joint debtors and joint mortgagors. As to these facts there has been no dispute throughout. It is plain therefore not because of their joint interest in the property but because of their position as ostensible joint debtors, that it would have been fatal to Maung Shwe Kun, should the three minors have escaped from their obligations as mortgagors, whereas, upon the other hand, the interest of the minors themselves was that it should be pleaded and proved that they were not bound by the mortgage. To put the matter in its simplest possible form, every joint debtor has an interest in seeing that his co-debtors do not escape from their joint liability. Upon that ground alone I have, as I have said, no difficulty in finding upon the materials already before the Court that Maung Shwe Kun had an interest adverse to that of the minors.

It has been contended that we ought to remit this case to the Township Court for the purpose of taking further evidence upon the question of adverse interest. The matter has already been the subject of an exhaustive trial in the Township Court when further evidence could have been adduced had it been so desired, though it is difficult to think of any evidence that could have displaced what to my mind is the obvious adverse interest of Maung Shwe Kun. In my judgment, it would be nothing short of an abuse of the process of the Court to send this matter back again for trial in the Township Court upon this issue, inasmuch as there is, as I have already said, ample material upon the record already upon which a finding of fact in this respect can be and has been properly reached. In these circumstances it seems to me that Maung Shwe Kun was not a person who was qualified to be the guardian ad litem of the minors in the 1933 proceedings under O. 32, R. 3, Civil P. C. The learned Judge on second appeal has held that the fact that the interest of the person to be appointed as guardian is adverse to that of the minors renders any decree obtained against the minors abortive as far as they are concerned upon the ground that they were not properly represented in that suit. He refers to two authorities in the High Courts of Allahabad and Madras in which this has been expressly held. Indeed upon this, the only question of law which arises upon this appeal, Mr. Sen has felt obliged to concede that he cannot dispute that this finding of the learned Judge is correct.

In these circumstances therefore apart from the question of fact as to whether the respondents were or were not minors at the date of the institution of the suit, which question I have not felt it necessary to consider, I am of opinion that this appeal must be dismissed upon the ground that the appointment of Maung Shwe Kun as their guardian ad litem was defective in respects to which I have referred and that thereby it became impossible in that suit for a binding decree to be obtained against the respondents. There should, in my judgment, be a decree passed in this suit against the defendants in the form of a declaration that the decree passed in Civil Regular Suit No. 242 of 1933 in the Township Court of Paungde was not binding upon the respondents. This appeal will accordingly be dismissed with costs, including an advocate's fee of ten gold mohurs.

D.S./R.K. *Appeal dismissed.*

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[7] Dawsons Bank Ltd. v. Ma May, (1934) 21 A I R Rang 335=153 I C 627=12 Rang 656.

## A. I. R. 1938 Rangoon 475

MYA BU OFFG. C. J. AND DUNKLEY J.

*Chuan Seng & Co.* — Appellant.

v.

*Aster & Co.* — Respondent.

Civil Misc. Appeal No. 37 of 1938, Decided on 25th August 1938, against the order of High Court, Original Side, D/- 4th May 1938.

**(a) Presidency Towns Insolvency Act (1909), (Rangoon), Sec. 9 (g) — Test for notice of suspending payment — Debtor stating that in case of refusal of composition by creditors as proposed by debtor, creditor would get nothing— Such statement held amounted to notice.**

The test which is to be applied to a notice of suspending payment is whether the language of the notice, be the notice a written notice or a verbal notice, is such that it could only lead the creditors to infer that if the offer of composition made by the debtor is not accepted, suspension of payment is the only alternative. Where therefore a debtor said that if his offer of composition was not accepted he had no other assets whatever and there was nothing else that he could give to his creditors, even if there was no definite statement by the debtor that he would have to file his insolvency petition, it is clear that his statement was statement which could lead the creditors to infer only that he intended to suspend payment of his debts and therefore his statement amounted to an act of insolvency : *(1891) A C 316 and (1905) A C 442, Rel. on.* [P 476 C 1, 2]

**(b) Insolvency—Firm—Not firm but partners of firm can be adjudicated in name of firm.**

A firm is not a legal entity, and a firm cannot be adjudicated insolvent, but the partners of a firm can be adjudicated in the firm name ; and when the petitioning creditor commits himself to a statement that a certain firm to be adjudicated insolvent is a one man firm, then there appears to be no significance in an adjudication in the firm name. [P 477 C 1]

**(c) Insolvency—Adjudication—Petition both by debtor and creditor—There can be two adjudications — Court should however decide as to in which case assets are to be realized.**

There is no legal bar to two adjudications of the same person, once on application by a creditor and another on the application of the person himself. The only result of this double adjudication would be that the Court must, after the adjudication, make up its mind and make a definite order as to the particular proceedings in which the insolvency shall proceed and the assets of the insolvent shall be realized. [P 477 C 1]

**P. K. Basu and K. N. Dangli** — *for Appellant.*

**Hormasjee** — *for Respondent.*

**Dunkley J.**—This is an appeal against an order of the learned Insolvency Judge adjudicating the appellant upon a petition of the respondent creditor. Dealing first with the merits of the petition ; the petition itself was headed :

> In the matter of Chuan Seng & Co. being the firm name and style under which Lim Hock Ew carried on business as a Trader at No. 599, Dalhousie Street, Rangoon.

Consequently, the averment in the petition, by which the respondent is undoubtedly bound, is that the firm known by the name of Chuan Seng & Co. is a one man firm the proprietor of which is a person named Lim Hock Ew. The act of insolvency upon which the appellant has been adjudicated is set out in para. 4 of the petition. There it is stated that on 5th January 1938, a number of creditors of the appellant met in the office of Messrs. Balthazar & Son, Ltd., and at that meeting the appellant informed his creditors that his only available asset was a claim against an insurance company for payment of some Rupees 20,000 or Rupees 30,000 on account of a fire insurance policy. It appears that the appellant's business premises and the whole of his stock had been burnt in a fire. It is said that at this meeting the appellant produced a composition deed whereby he agreed to have the amount to be recovered from the insurance company divided amongst his creditors and his creditors were to agree to accept this amount in full satisfaction of their claims. It is further averred that the creditors refused to accept this composition and that thereupon the appellant said that unless this offer was accepted he would have no other course open to him but to file his petition for the benefit of the Insolvency Act. In para. 6 (b) of the petition it is set out that this amounted to an act of insolvency in that with intent to defeat and delay his creditors the appellant had given notice, in the terms of Cl. (g) of S. 9, Rangoon Insolvency Act, that "he has suspended or is about to suspend payment of his debts."

At the hearing of this petition, the respondent and two witnesses for him and the appellant and one witness on his behalf were examined, and the learned Insolvency Judge, upon this evidence, came to the conclusion that at the meeting in the office of Messrs. Balthazar & Son Ltd., which meeting was admitted by the appellant, (and further the appellant admitted that at that meeting he had made a proposal for composition) there was a further statement by the appellant to the effect that if his creditors did not accept the composition proposed, they were not likely to get anything at all and that, further if his creditors did not sign the composition deed he would be obliged to file his own petition in insolvency. It is said that the evidence does not support this finding of fact. But, at the very lowest, the evidence does amount to this, that the composition deed was produced and that it was a composition for an uncertain amount, but was to the effect that whatever was recovered from the insurance company should be distributed amongst the creditors, that this offer was refused by the creditors, and that the appellant then said that as the offer was refused he would have to take such steps as he considered necessary. That is the statement of the most reserved of the witnesses in support of the petition. The other two witnesses said definitely that the appellant said that as the composition was not accepted he would have to file his petition for adjudication. It is certainly clear that at the meeting the appellant did definitely state that the whole of his assets consisted of this claim against the insurance company and that all that his creditors could possibly get was the amount which was to be recovered from that company.

In my opinion, this state of facts is governed by the case in (1891) A C 316.[1] It seems to me that, except for the fact that in (1891) A C 316[1] the debtor sent a letter to his creditors, the facts were very similar indeed. As pointed out by the House of Lords again in (1905) A C 442,[2] the test which is to be applied is whether the language of the notice, be the notice a written notice or a verbal notice is such that it could only lead the creditors to infer that if the offer of composition made by the debtor is not accepted, suspension of payment is the only alternative. What occurred at the meeting in this case is clearly that the appellant said that if his offer of composition was not accepted he had no other assets whatever and there was nothing else that he could give to his creditors. Consequently, even if it be held that there was no definite statement by the appellant that he would have to file his petition, it still is, in my view, clear that his statement was a statement which could lead the creditors to infer only that he intended to suspend payment of his debts and that therefore his statement amounted to an act of insolvency.

Let me add further that, when one considers the fact that after the respondent had filed his petition to adjudicate the appellant on 14th February, the appellant himself, on 15th February, filed his own petition for adjudication, that lends great support to the evidence led on behalf of the respondent to the effect that at the meeting the appellant did say that if the composition deed was not signed he would be obliged to file his petition, and no doubt, such a statement as that is a notice of an intention to suspend payment of debts. Consequently, on the merits I agree with the learned Insolvency Judge that an act of insolvency had been committed, and that therefore the appellant ought to be adjudicated on the respondent's petition.

One other point has been raised before us, and that is that a debtor cannot be twice adjudicated, once on his own petition and once on a creditor's petition, in respect of the same debts. The facts in this case are that the respondent's petition of the 14th February was in the firm name of Lim Hock Ew, that is Chuan Seng & Co. On the 15th February Lim Hock Ew filed his own petition in his own name and on this later petition an ex parte order of adjudication was made on the 19th February. Subsequently, when it was suggested that further proceedings should take place in the case of the appellant's own petition, the respondent objected and insisted upon having an adjudication on his petition also. Upon this the learned Insolvency Judge directed, by his order of 1st April 1938, that the petition of the respondent should be heard and decided on the merits. In the course of his order the learned Judge said that there was no evidence before him that Lim Hock Ew was the sole proprietor of the debtor firm and that complications might ensue if it were subsequently found that he was not the sole proprietor. With the greatest respect, the learned Judge appears to have overlooked the petition itself of the respondent, which definitely states that this firm is a one man firm the proprietor of which is Lim Hock Ew, and consequently the result of an adjudication upon this petition must be the adjudication of Lim Hock Ew and of no other person, and even if subsequently it were to be found that there were other partners in this firm they would not be adjudicated upon this petition.

---

1. J. Crook v. Morley, (1891) A C 316=61 L J Q B 97=65 L T 389=8 Morrell 227.
2. Clough v. Samuel, (1905) A C 442=74 L J KB 918=93 L T 491 = 54 W R 114 = 21 T L R 702=12 Manson 347.

The real meaning of "firm" has not been always clearly borne in mind. A firm is not a legal entity, and a firm cannot be adjudicated insolvent, but the partners of a firm can be adjudicated in the firm name; and when the petitioning creditor commits himself to a statement of this kind, then there appears to be no significance in an adjudication in the firm name as the petitioning creditor himself avers that the firm name is merely the business name of a single person. Furthermore, there was evidence to the same effect before the learned Insolvency Judge, in that Lim Hock Ew had himself sworn an affidavit stating that he was the sole proprietor of the business which was carried on in this name.

However there is no legal bar to two separate adjudications of the same person. If these had been two petitions by creditors alleging two different acts of insolvency, both the creditors would have insisted upon the Court going into the merits of their petitions and making an adjudication thereon, and the same position, in my view, exists when there is a petition by a creditor and also a petition by the debtor himself. The only result of this double adjudication is that the Court must, after the adjudication, make up its mind and make a definite order as to the particular proceedings in which the insolvency shall proceed and the assets of the insolvent shall be realized. So far as this is concerned, the learned Insolvency Judge, in his order of 4th May 1938, has directed a stay of all further proceedings in Insolvency Case No. 22, which is the case on Lim Hock Ew's own petition. However we are of opinion that in view of the fact that both respondent and the appellant were agreed that there was no distinction whatever between the business carried on in the name of Chuan Seng & Co. and the business carried on by its sole proprietor Lim Hock Ew, the proper order to have passed on the application of 23rd February to proceed with the respondent's petition was an order that it was unnecessary to proceed on this petition as the appellant had already been adjudicated upon his own petition, and a direction that the records of the present insolvency should be amalgamated with those of the insolvency on the petition of the appellant. We therefore now direct that this should be done and that the two insolvency cases should be amalgamated into one proceeding. So far as this particular appeal is concerned, the appeal fails; but in the circumstances, as, in our view, it was unnecessary for the respondent to press for a decision on his petition, there will be no order as to the costs of the appeal.

**Mya Bu J.** — I agree.

B.D./R.K. *Appeal dismissed.*

---

## A. I. R. 1938 Rangoon 477

BAGULEY AND MOSELY JJ.

*Seelum Satyanarayana* — Appellant.

v.

*Thedala Seetha Ramaswamy* — Respondent.

Special Civil First Appeal No. 10 of 1938, Decided on 16th March 1938, against order of Small Cause Court, Rangoon, in C. R. No. 2671 of 1936.

**(a) Presidency Towns Insolvency Act (1909), S. 17—Arrest of judgment-debtor insolvent—Arrest disallowed only if judgment-debtor paid Rs. 40 per month to decree-holder — Order asking to pay is against spirit of S. 17—Provisions of S. 17 explained — Self earning of insolvent is included in his property.**

An order disallowing the judgment-debtor's arrest on condition that he paid Rs. 40 a month to the decree-holder is entirely contrary to the spirit of S. 17, Rangoon Insolvency Act, which in short directs that on the making of an order of adjudication the property of the insolvent shall vest in the assignee, and become divisible amongst his creditors, and that thereafter no creditor shall without the leave of the Insolvency Court have any remedy against the property of the insolvent. The personal earnings or income of the insolvent are also included in "the property of the insolvent." [P 478 C 1]

**(b) Civil P. C. (1908), O. 21, R. 40—Arrest of judgment-debtor—Exemption of—Limit of Rs. 40 minimum necessary for livelihood—No evidence showing judgment-debtor earning more than Rs. 40 and failure to pay excess—Arrest should not be ordered.**

As the normal limit under which a man cannot reasonably be expected to support himself and a family is held at Rs. 40, unless there is anything on the record from which it can be said to have been proved that a judgment-debtor earns more than Rs. 40 a month, and fails to pay the excess to the decree-holder the Court should not order arrest of a judgment-debtor. [P 478 C 2]

Rajagopaul — *for Appellant.*

Rafi — *for Respondent.*

**Mosely J.**— The respondent in this appeal obtained a decree against the appellant. The appellant thereafter was adjudicated insolvent: his discharge was refused and he was unable to obtain a protection order. The respondent then applied for his arrest in execution of the decree, and the learned Chief Justice of the Small Cause Court made an enquiry under O. 21, R. 40, Civil P. C., as regards the appellant judgment-debtor's ability to make any substantial payments towards the decree. The learned Judge found that the judgment-debtor was in a position "to make some substantial contribution towards the decree", and directed that the decree-holder was entitled to a warrant of arrest but ordered that it should not be executed so long as the judgment-debtor paid Rs. 40 towards the decree. No doubt the executing Court was competent to allow the arrest of the judgment-debtor if it thought that he was committing a contumacious default, that is to say that he was not making any payment to the decree-holder when able to do so. It is true that such matters are usually agitated in insolvency when an application is made towards an appropriation of the insolvent's earnings; but admittedly there is nothing to prevent a creditor from applying for the insolvent judgment-debtor's arrest in execution on such grounds, and nothing to prevent an enquiry being held in the executing Court as to the judgment-debtor's means of payment.

It appears to me however that the order disallowing the judgment-debtors's arrest on condition that he paid Rs. 40 a month to the decree-holder was entirely contrary to the spirit of S. 17, Rangoon Insolvency Act, which in short directs that on the making of an order of adjudication the property of the insolvent shall vest in the assignee, and become divisible amongst his creditors, and that thereafter no creditor shall without the leave of the Insolvency Court have any remedy against the property of the insolvent. The personal earnings or income of the insolvent are included in "the property of the insolvent": *see* on this Mulla's Law of Insolvency, Para. 537, p. 369. Another objection to the order passed by the learned Judge is this, that though evidence was produced before him on both sides as to the judgment-debtor's earnings there was clearly nothing on which it could be held with any certainty that the judgment-debtor was able to pay Rs. 40 a month. The only evidence was that of three coolie maistries, all of whom said that the judgment-debtor was employed as a petty contractor by Massink & Co. and that he had 20 to 30 coolies under him: witness 1 talked about himself earning about Rs. 5 a day; witness 2 for the decree-holder who was not in regular work considered that he might earn Rs. 40 to Rs. 100 a month; witness 3 knew very little about the judgment-debtor's earnings.

It used to be assumed under S. 60, Civil P.C., as it was before, the limit was recently raised that Rs. 40 which is the amount of salary not attachable in execution and exempt from execution was the normal limit under which a man could not reasonably be expected to support himself and a family. There is certainly nothing on the record from which it can be said to have been proved that the judgment-debtor here earns more than Rupees 40 a month. As I have said, the lower Court may not pass an order of arrest contingent on any payment, but make a straight order allowing or disallowing arrest if it thinks that the judgment-debtor is earning more than this limit, Rs. 40 a month, and is unwilling to pay his decree-holder. In my opinion the proper course now would be to direct that the order of the lower Court be set aside and that the decree-holder respondent be directed to continue his application and adduce fresh evidence, (as he says he is prepared to do) as to the judgment-debtor appellant's earnings. If he is successful in proving that the judgment-debtor earns more than this limit and refuses to pay, then the order for his arrest must be allowed, otherwise it must be disallowed in toto. There will be no costs in this appeal.

**Baguley J.** — I agree.

B.D./R.K. *Order accordingly.*

---

## A. I. R. 1938 Rangoon 478

ROBERTS C. J. AND BRAUND J.

*B. Miya Bhai and another*—Appellants.

v.

*Marian Bee Bee and others* —
Respondents.

Civil First Appeal No. 15 of 1938, Decided on 7th June 1938, against decree of High Court, in Civil Regular Suit No. 32 of 1937, D/- 12th January 1938.

**(a) Partnership—Dissolution—Fixing date of —Partner's conduct rendering it impossible to continue partnership—Date when such continuance became impossible should be fixed as date of dissolution.**

It is quite clear from a consideration of the history of partnership law that when one person conducts himself in matters relating to the partnership business so that it is not reasonably practicable for his partners to carry on business in partnership with him, the Court may dissolve the partnership and should, in doing so, fix the date on which that conduct has rendered it impossible for the relation of partnership to continue to subsist. [P 479 C 2]

**(b) Partnership—Suit for dissolution—Decree —Form of—Form given in Form 21, Appendix D to Civil P. C., should be followed.**

The proper form of an order in dissolution of partnership is given in Form 21, Appendix D to the Civil P. C. where there is a form given for a preliminary decree in a suit for dissolution of partnership and the taking of partnership accounts. The practice which has obtained some recognition of copying down the concluding sentences of a judgment and incorporating those as an order instead of making an order as contemplated by the first schedule is bad and ought to be discouraged. [P 480 C 1, 2]

K. N. Dangali — *for Appellants.*

G. N. Banerjee — *for Respondent 5.*

**Roberts C. J.**—This is an appeal from a judgment of Shaw J. sitting on the Original Side, brought by the defendants, who are the relations of one Kalender Sahib, who was a firewood contractor in business on his own account and had various contracts with the Bombay Burma Trading Corporation, Limited, for the sale of firewood. He died on 11th June 1936, and after his death two of his employees, the appellants in this case, carried on the business. There was at that time no partnership, but it appears to have been accepted that the business was carried on with the intention of benefiting the family of the deceased Kalender Sahib, and accordingly arrangements were made to enter into a partnership deed by which the three minor plaintiffs should be admitted to the benefits of the partnership.

Mariam Bee Bee and her husband A. M. Mohamed Esoof entered into a partnership with B Miya Bhai and Kuppay Pitchay Rowther, the first and second appellants; and it is stated that the parties altogether contributed a sum of Rs. 500; their shares are set out, and the deed is signed on 4th July 1936. And the plaintiffs in their action, which they brought for an account, set up this partnership deed, and the defendants said that it was entered into by fraud and misrepresentation and contained in it stipulations and conditions which were never brought to their notice. The learned Judge held that it was a valid partnership deed and that the appellants were bound by its terms: and after some hesitation Mr Dangali has felt obliged to say that he cannot now contend that there never was a valid partnership on 4th July 1936. Accordingly, the shares of the partners fell to be considered as defined by that deed, and the deed expresses the relationship between the parties in full.

But the partnership has now been dissolved, and the question is, what date the Court ought to fix for its dissolution. The learned Judge came to the conclusion that the proper date to fix was 3rd January this year, that being the date on which the advocate on behalf of the present appellants admitted that there was no justification for saying that any partnership was being continued. But, with great respect to the learned Judge, and whilst entirely agreeing with his findings in other respects, I feel obliged to adopt the view that the letter of 17th September, which was written by the first appellant's advocates to Mohamed Esoof and Mariam Bee Bee, and to Kuppay Pitchay Rowther, shows that the dissolution of the partnership must be regarded as having been effected on that date.

Partnership is defined in S. 4, Partnership Act, 1932, as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all of them, and it is quite clear from a consideration of the history of patnership law that when one person conducts himself in matters relating to the partnership business so that it is not reasonably practicable for his partners to carry on business in partnership with him, the Court may dissolve the partnership and should in doing so, fix the date on which that conduct has rendered it impossible for the relation of partnership to continue to subsist.

What the first appellant's advocate wrote on 17th September was, first of all, that the deed of partnership, which has been found by the learned Judge to be a valid deed, was procured by misrepresentation and fraud, and was void and not binding on their client. They go on to write:

> Under the circumstances our client is not willing to remain in the partnership any more which was really void from the beginning and the same is hereby cancelled.

I find it quite impossible to read into that sentence any other meaning than the expression of a clear intention on the part of appellant 1, first that he repudiated the partnership agreement and, secondly, if alternatively there was any validity in the partnership agreement, he was not willing, in his own words "to remain in the partnership any more." If that is an accurate interpretation of what was said, it follows that there could be no continuing relation of partnership, and I find it impracticable to consider what the date of dissolution should be from an examination of what the parties or their advocates did afterwards in relation to disputes as to when the date of dissolution should be fixed. Clearly, to my mind, whatever the position was up to 17th September 1936, the writing of that letter put an end to any relationship based on mutual trust and confidence and rendered the partnership impossible of continuance. Accordingly, by virtue of the partnership agreement, by which the parties agreed that in the event of any of the partners forming the partnership desiring not to be a partner any longer, he or she, as the case might be, might give a month's notice in writing, on the expiry of which such person should cease to be a partner, the month's notice would expire on 17th October, and, in my judgment, that is the proper date for the Court to fix as the date of the dissolution of the partnership. The effect of that decision will be that the appeal is dismissed, but the order of the learned Judge is varied so as to make the date of the dissolution of the partnership 17th October 1936.

I desire to add that the formal order which was drawn up in this case cannot stand and a fresh order must be substituted for it. The proper form is given in Appendix D to the Civil P. C., where there is a form given for a preliminary decree in a suit for dissolution of partnership and the taking of partnership accounts. It cannot be too clearly laid down that the practice which has obtained some recognition of copying down the concluding sentences of a judgment and incorporating those as an order instead of making an order as contemplated by the first schedule is bad and ought to be discouraged.

**Braund J.** — I agree, and I desire particularly to associate myself with the observations of my Lord the Chief Justice as to the form of the decree. Having some experience on the Original Side of this Court, I perhaps may be permitted to say that the practice of merely copying the relevant passages of the Judge's order in drawing up a decree is to be condemned. In this particular case, as my Lord the Chief Justice has pointed out, the proper form of decree is provided in Form 21, Appendix D, Civil P. C., and that is the form that should have been followed, with, of course, such adaptations as may be necessary to suit the particular case, and having regard to any particular directions that may have been given by the learned Judge in his judgment. In this particular case there were certain particular instructions given, namely as to who were to be the accounting parties and as to the date of dissolution. Nothing would have been easier than to add these directions to the form which is given in the Appendix to the Civil Procedure Code. I agree that a proper form of preliminary decree must be drawn up and substituted for the decree as it now stands. We think that we ought to give some costs, but having regard to the smallness of the amount involved, we limit the advocate's fee to five gold mohurs.

B.D./R.K. *Order accordingly.*

END

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## Sind J. C.'s Court

### * * A. I. R. 1938 Sind 1

**FULL BENCH**

RUPCHAND BILARAM AG. J. C.,
DADIBA C. MEHTA AND LOBO JJ.
*Bachoo Kandero* — Applicant.
v.
*Emperor.*

Criminal Revn. Appln. No. 158 of 1937, Decided on 18th October 1937.

*** * (a) Evidence Act (1872), S. 25—Abkari Officer investigating offence against Bombay Abkari Act is 'Police Officer'**: *18 S L R 75 =A I R 1925 Sind 70=82 I C 151 and 99 I C 594=A I R 1927 Sind 112, Overruled.*

The expression 'Police Officer' is not to be read in a technical sense but in its more comprehensive and popular meaning. Whatever reasons existed for inducing the Legislature to make a departure from the English law and exclude a confession made to a Police Officer apply with equal if not greater force to an officer who is clothed with powers of a Police Officer and is actually engaged in the investigation of a crime in respect of which the confession is made to him. Hence an Abkari Officer investigating an offence against the Bombay Abkari Act in exercise of the powers conferred upon him in Ch. 9 of the Act is a 'Police Officer' within the scope of S. 25: *18 S L R 75=A I R 1925 Sind 70=82 I C 151 and 99 I C 594=A I R 1927 Sind 112*, **Overruled**; *Case law discussed.* [P 4 C 1; P 5 C 1]

**(b) Interpretation of Statutes—Literal construction should not prevail if opposed to intention of Legislature.**

It is a well recognised canon of construction that the more literal construction ought not to prevail if it is opposed to the intentions of the Legislature as apparent from the statute, and if the words are sufficiently flexible to admit of some other construction by which the intention will be better appreciated: *(1881) 6 A C 114; (1881) 17 Ch D 746 and (1883) 22 Ch D 142, Ref.* [P 5 C 2]

**Kishinchand J. Bijlani** — *for Applicant.*

**Partabrai D. Punwani, Advocate-General** — *for the Crown.*

### OPINION

**Lobo J.**—By an order of a Divisional Bench of this Court the following point has been referred for decision by this Full Bench:

> Whether an Abkari Officer investigating an offence against the Bombay Abkari Act in exercise of the powers conferred upon him in Ch. 9 of the Act is a 'Police Officer' within the scope of S. 25, Evidence Act.

Chapter 9, Bombay Abkari Act 5 of 1878, relates to the powers of Abkari Officers. Under Ss. 36 to 40 Abkari Officers specially empowered in this regard have conferred upon them certain powers of issuing warrants, entry, search, seizure, and arrest without warrant. S. 41, Bombay Abkari Act, reads as follows:

> (1) Every Abkari Officer not below such rank as Government may prescribe shall within the area for which he is appointed have power to investigate all offences punishable under this Act. (2) Every such officer shall in the conduct of such investigation exercise the powers conferred by the Code of Criminal Procedure (1898), upon an officer in charge of a police station for the investigation of a cognizable offence; Provided that (i) if such officer is of opinion that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused to a Magistrate, or that the person arrested may be discharged with a warning, such officer shall release him on his executing a bond, with or without sureties, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence and shall make a full report of the case to his official superior and be guided by the order which he shall receive on such report; (ii) the powers of an officer empowered under this section shall be subject to such further modifications or restrictions as Government may prescribe.

**Section 41-A provides for the procedure to be adopted by Abkari Officers after effecting an arrest; S. 41-B empowers an Abkari Officer to grant bail in accordance**

with the provisions of the Criminal Procedure Code ; S. 41-C provides for disposal of articles seized by the Abkari Officer. It is clear therefore from a perusal of the sections referred to above that Abkari Officers especially empowered to investigate offences against the Abkari Act exercise all the powers conferred by the Code of Criminal Procedure upon an officer in charge of a police station for the investigation of cognizable offences. S. 25, Evidence Act, provides that no confession made to a Police Officer shall be proved as against a person accused of any offence. Does the phrase 'Police Officer' occurring in S. 25, Evidence Act, cover an Abkari Officer investigating an offence under the Bombay Abkari Act in exercise of the powers conferred upon him in that behalf ? The question has been answered in the negative in the cases in 18 S L R 75[1] and A I R 1927 Sind 112.[2] These are decisions of two Divisional Benches of this Court. It is clear however from a perusal of these cases that the point was never as a matter of fact debated before or really considered by the learned Judges composing these Divisional Benches. In 18 S L R 75[1] this is all that is said on the point :

> Further he (the Magistrate) relied upon the statement made to the investigating officers and Mashirs at the time when the search was made, in consequence of which search this property was found. Now, it appears certain that if the investigating persons had been Police Officers, that evidence would not have been admissible under S. 25, Evidence Act. But it appears that the investigating officers were as a matter of fact the Abkari Inspector and peons and the Mashirs and nothing has been pointed out which extends the operation of S. 25 to an Abkari Inspector and Abkari peons. On the contrary, there is a case in 46 Cal 411[3] which is authority for the proposition that Abkari peons and officers are not to be considered as 'Police Officers' for the purposes of S. 25, Evidence Act.

This is the judgment of Kennedy A. J. C., and the authority for the proposition of law enunciated is simply *Ah Foong's case.*[3] The case in A I R 1927 Sind 112[2] was the decision of another Bench of this Court consisting of Kincaid J. C. and Barlee A. J. C. The following passage in the judgment disposes of the point :

> As regards the confession made to the Abkari Inspector it is good evidence. It is now settled law that an Excise Officer is not a Police Officer within the meaning of the Evidence Act : 46 Cal 411[3] and 18 S L R 75.[1]

Thus here again the decision of the Bench is based upon *Ah Foong's case*[3] and the previous decision of our own Court. In 1926 however this specific point was considered by a Full Bench of the Bombay High Court in 51 Bom 78.[4] It was there held by the Full Bench that an Abkari officer who in the conduct of investigation of an offence, punishable under the Bombay Abkari Act, exercises the powers conferred by the Code of Criminal Procedure, 1898, upon an officer in charge of a police-station for the investigation of a cognizable offence is a police officer within the meaning of S. 25, Evidence Act, 1872, and any confession made to such an officer in the course of his investigation under the Abkari Act or the Criminal Procedure Code is inadmissible in evidence. The Full Bench overruled the case in 28 Bom L R 674[5] and differentiated the case of *Ah Foong Chinaman*[3] on the ground that *Ah Foong's case*[3] was under S. 20, Opium Act which was entirely different from the provisions of the Bombay Abkari Act. In the judgment of Marten C. J. referring to *Ah Foong's case*[3] it is stated *:

> In that case the statements of co-accused were ruled out because they were of a self exculpatory nature, and secondly, the decision was based on S. 20, Opium Act. In Bengal however there was no such amendment of S. 20, Opium Act, as in Bombay. Excise Officers in Calcutta have not the powers of a Police Officer as in Bombay where, by reason of the Amending Act of 1912, Excise Officers enjoy all the powers of a Police Officer under the Abkari Act. . . . . .

The learned Judges in this case relied very much on the case in 1 Cal 207[6] decided by Sir Richard Garth, Kt., C. J. and Pontifex J. and the dictum of the learned Chief Justice in that case with respect to S. 25, Evidence Act, wherein the learned Chief Justice says :

> Its humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them . . . . . . I consider that the term 'Police Officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning.

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1. Tillibai v. Emperor, (1925) 12 A I R Sind 70=82 I C 151=25 Cr L J 1223=18 S L R 75.
2. Emperor v. Budhu, (1927) 14 A I R Sind 112=99 I C 594=28 Cr L J 162.
3. Ah Foong v. Emperor, (1919) 6 A I R Cal 696=48 I C 504=20 Cr L J 24=46 Cal 411=22 C W N 834=28 C L J 105.
4. Nanoo Sheikh v. Emperor, (1927) 14 A I R Bom 4=99 I C 330=28 Cr L J 122=51 Bom 78=28 Bom L R 1196 (F B).
5. Raphael Pereira v. Emperor, (1926) 13 A I R Bom 517=97 I C 665=27 Cr L J 1145=28 Bom L R 674.
6. Queen v. Hurribole Chunder Ghose, (1876) 1 Cal 207=25 W R Cr 36.

* [in arguments, at p. 85 of 51 Bom.—*Ed.*].

Again the learned Chief Justice in another passage remarks :

> . . . .and I think it better in construing a section such as 25 which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification.

The principle of construction enunciated by the learned Chief Justice of the Calcutta High Court in 1 Cal 207[6] has been consistently followed by several of the High Courts in India. In 22 Bom 235,[7] a Police Officer in a Native State was held to be a Police Officer within the meaning of S. 25, Evidence Act. In 15 I C 800[8] the Madras High Court held that a foreign Police Officer was a 'Police Officer' within the meaning of S. 25, Evidence Act. These are merely two instances. The case in 46 Cal 411[3] itself which was the basis of the decision of our Court in 18 S L R 75[1] and A I R 1927 Sind 112[2] and which had been differentiated in the Full Bench case of the Bombay High Court, 51 Bom 78,[4] came up for consideration before a Full Bench of the Calcutta High Court in 61 Cal 607.[9] It was there held by the Full Bench that an Excise Officer who in the conduct of investigation of an offence against the excise, exercises the powers conferred by the Code of Criminal Procedure upon an officer in charge of a police-station for the investigation of a cognizable offence, is a Police Officer within the meaning of S. 25, Evidence Act, and a confession made by an accused person to such an officer is inadmissible in evidence. *Ah Foong's case*[3] can therefore no longer be considered good law. The judgment of Mukerji J., one of the Judges constituting the Full Bench in the Calcutta case just referred to, is so remarkable an exposition of the law covering this point that I can do no better than to refer to the more important passages in this truly classical judgment. At p. 619 the learned Judge states :

> The Evidence Act is now more than half a century old and though it may not rank with 'ancient statutes' in the sense in which that expression is used in forensic language, the principle will hold good that great regard ought to be paid, in construing a statute, to the construction which was put upon it by those who lived about the time or soon after it was made, because the meaning which a particular word or expression bore in those days may have got mixed up or blurred during the interval that has elapsed. From this point of view I regard the decision of this Court in 1 Cal 207[6] a decision of very great importance. It is true that the facts of that case were very different from those of the cases which have given rise to the present question . . . . But it seems to me that the most important aspect of the weighty pronouncement of Garth C. J. in that case has not—and I say this with great respect—been sufficiently appreciated in the case just cited: 12 Pat 46.[10] Dealing with one of the arguments addressed to the Court which was to the effect that the term 'Police Officer' in S. 25, Evidence Act, comprised only that class of persons who are called in the Calcutta Police Act (Bengal Act 4 of 1866) 'members of the police force', Garth C. J. said "on looking back to the Police Act of 1861, it will be found that the term 'Police Officer' as used in that Act has generally the same meaning as a member of the police force in the Act of 1866; but in construing the 25th section of the Evidence Act of 1872, I consider that the term 'Police Officer' should be read not in any strict technical sense, but according to the more comprehensive and popular meaning.
>
> Now, what is that more comprehensive and popular meaning which the term 'Police Officer' bore in those days ? . . . . . The question is not how it is understood at present, but how it was understood in or about 1872.

At pp. 628-629 the learned Judge after setting out the entire history of excise legislation between 1872 and 1934 continues as follows :

> It was in this state of the law that, in 1872, the Evidence Act was enacted and in that Act the Legislature did not consider it necessary to indicate what special meaning, if any, was to be attached to the words 'Police Officer', with regard to confession made to whom a most imperative rule of evidence was enacted. The only reason why they omitted to do so, in my view, was that at that time it was intended to express by that term all officers other than Magistrates who were entrusted with the duty of preventing and detecting crimes and specially the latter. It is the nature of the duties, performance of which was likely to give occasion for improper influences being exercised or felt, and not any particular aversion for a particular department of public service that must have moved the Legislature in enacting the provision. I am therefore of opinion that if matters which previously did not fall within the category of crimes subsequently came to be recognized as such and on that officers have been appointed to discharge or have been vested with powers of discharging duties which a Police Officer had to discharge in 1872, then whatever may be the name of the department to which such officers may have been attached, such officers must be regarded as coming within the term 'Police Officers' with regard to whom S. 25, Evidence Act, was intended to be applied. It should be noted that in that section the words used are 'as against a person accused of any offence.' I can find no reason why in 1872 in respect of an offence under the then Opium Act (13 of 1857) the Legislature

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[7] Queen-Empress v. Nagla Kala, (1898) 22 Bom 235.

[8] Public Prosecutor v. Veeraraghava Pillai, (1912) 15 I C 800=13 Cr L J 528.

[9] Ameen Sharif v. Emperor, (1934) 21 A I R Cal 580=1934 Cr C 841=150 I C 561=35 Cr L J 1071=61 Cal 607=59 C L J 555=38 C W N 980 (F B).

[10] Radha Kishun Marwari v. Emperor, (1932) 19 A I R Pat 293=1932 Cr C 765=140 I C 283=34 Cr L J 1=12 Pat 46=13 P L T 627 (S B).

could have thought of excluding a confession made to a member of the regular police force but not a confession made to an Abkari or excise officer, if such officer was in fact holding an investigation into an offence and was exercising such powers as a Police Officer is competent to exercise. The fact is that in those days he had no such powers and so could not exercise them. When in course of time he came to have powers and was able to exercise them in respect of offences which were not known to law in those days and only subsequently came to be regarded as such, such an officer, when so acting, is an officer for whom the term 'Police Officer' used in S. 25, Evidence Act, was meant.

Indeed after such a masterful exposition as is contained in the judgment of Mukerji J., I feel it would be pure pedantry on my part to attempt to adduce further arguments in support of the proposition that an Abkari Officer, investigating an offence against the Bombay Abkari Act in exercise of the powers conferred upon him in Ch. 9 of the Act, is a Police Officer within the scope of S. 25, Evidence Act. I would therefore answer the question referred to the Full Bench in the affirmative. As a consequence, the decisions of this Court reported in 18 S L R 75[1] and A I R 1927 Sind 112[2] must be considered as overruled.

**Dadiba C. Mehta J.**—I agree.

**Rupchand Bilaram Ag. J. C.**—Under the English law, a confession made to a person in authority is inadmissible in evidence except on proof that it was free and voluntary; and the expression "a person in authority" is said to include the prosecutor, officers of justice, and other persons directly connected with the prosecution. An excise officer investigating a case is as much a person in authority as a police officer investigating a case. Before the passing of the Indian Evidence Act, the law in India on this point was the same as in England: *see* (1868) 1 Beng L R (O S) Cr 15.[11] Ss. 24 to 28, Evidence Act, however lay down somewhat different rules relating to the admissibility of confessions.

Section 24 declares that a confession made by an accused person is irrelevant in a criminal proceeding if in the opinion of the Court it has been caused by an inducement, threat or promise proceeding from a person in authority if in the opinion of the Court such threat, inducement or promise is sufficient to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain an advantage or avoid an evil of a temporal nature in reference to the proceedings against him. S. 25 renders inadmissible a confession made to a Police Officer, and S. 26, which follows, renders inadmissible a confession made by any person while he is in the custody of a Police Officer unless it be made in the immediate presence of a Magistrate. Ss. 27 to 31 provide for certain exceptions to the rules laid down in Ss 24 to 26 of the Act and deal with the effect of a confession upon persons other than the maker thereof.

The expression "Police Officer" is not defined in the Evidence Act or in any other Act of the Government of India, and it has been held from the earliest times that the expression "Police Officer" is not to be read in a technical sense but in its more comprehensive and popular meaning: per Garth C. J. in 1 Cal 207.[6] In that case it was held that a confession recorded by an Inspector of Police, in whose custody the prisoner was, was not rendered admissible in evidence in consequence of such confession being subsequently signed and acknowledged by the prisoner in the presence of the Deputy Commissioner of Police at the Police Office and being received and attested by the Deputy Commissioner in his capacity as Magistrate and Justice of the Peace. It was pointed out that the fact that the Police Officer was also a Magistrate did not alter the effect of S. 25 as it did not make him the less a Police Officer and that as he could not separate his functions as Police Officer and Magistrate, he was not a Magistrate within the meaning of S 26 of the Act. A year later, a point again arose in the Calcutta High Court in 1 C L R 21,[12] whether the expression "Police Officer" in S. 25 of the Act should not be limited to a Police Officer investigating the case in which the confession was made. Ainslie J. refused to accept that contention. At page 22 the learned Judge has said:

> It appears to me that S. 26 shows that this is not the true construction of S. 25. That section deals with confessions made in the presence of a Police Officer who has the custody of an accused person, that is of a Police Officer who is concerned more or less in the investigation of the case; and those confessions are absolutely excluded, whether made to a Police Officer or to

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[11] Queen v. Nabadwip Chandra Goswami, (1868) 1 Beng L R (O S) Cr 15=15 W R Cr 71*n*=17 W R Cr 36*n*.

[12] In re Hiran Miya, (1878) 1 C L R 21.

any other person, unless made in the immediate presence of a Magistrate. This section would necessarily include S. 25 if it is to be read as suggested, and thus make it useless. But this could not be intended, and therefore it is clear that the proper construction is one that excludes confessions to a Police Officer under any circumstances or to anyone else, while the person making it is in a position to be influenced by a Police Officer, unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of a Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the police.

Both these rulings are good law up to the present day, and lay down that the expression "Police Officer" is not to be read in its technical sense. The case before us is to a certain extent the converse of the case in 1 C L R 21.[12] We are not asked to limit the meaning of the expression "Police Officer" to a Police Officer investigating a case but to extend its meaning to an officer who is not in its technical sense a Police Officer but who is exercising the duties of a Police Officer in investigating the very case in which the confession is made. Under S. 41, Bombay Abkari Act 5 of 1878, an Abkari Officer answering a certain description is empowered to investigate a crime against the Abkari Act and while doing so he is clothed with the powers and duties of a Police Officer. He may record statements, arrest an offender and send him to a Magistrate for trial.

Whatever reasons existed for inducing the Legislature to make a departure from the English law and exclude a confession made to a Police Officer apply with equal if not greater force to an officer who is clothed with powers of a Police Officer and is actually engaged in the investigation of a crime in respect of which the confession is made to him. In such a case it is often the word of the investigating officer that the confession was not improperly induced against the word of the accused that it was so induced. The interests of justice require that there should be no controversy between the prosecution and the accused on a point of such vital importance. If the expression "Police Officer" has during the last fifty or sixty years not been limited to its technical meaning, there is no reason why it should not be so interpreted as to include within its ambit an Abkari Officer who, though not a Police Officer strictly so called, is clothed by the Bombay Legislature with the powers and duties of a Police Officer in the investigation of a crime against the Abkari law. When investigating a crime against the Abkari law, the Abkari Officer is in effect a Police Officer. Unless this expression is so interpreted, it will lead to considerable difficulties not only in the interpretation of Ss. 25 to 26, Evidence Act, but also of S. 162, Criminal P. C. That section prevents a Police Officer from getting statements recorded by him during the course of an investigation signed by the persons making them, and prohibits the use of such statements at the trial except by the accused on certain conditions and for certain purposes mentioned in the Proviso to that section.

It would be wholly anomalous to hold that an Abkari Officer when investigating a case under the powers vested in him is not a Police Officer within the meaning of S. 162, Criminal P. C., that he may record statements which may be signed by the persons making them and that such statements may be used at the trial either by the Crown or by the accused without restriction. It is a well recognized canon of construction that the more literal construction ought not to prevail if it is opposed to the intentions of the Legislature as apparent from the statute, and if the words are sufficiently flexible to admit of some other construction by which the intention will be better appreciated: (1881) 6 A C 114[13] at page 121; (1881) 17 Ch D 746[14] at page 750 and (1883) 22 Ch D 142[15] at page 148. Both these circumstances exist in the present case. The main intention of the Legislature was to exclude a confession made inter alia to an investigating officer, whether called a Police Officer or not, without proof that such confession was improperly induced, and the expression "Police Officer" which is not defined is sufficiently flexible to include an officer performing the duties of a Police Officer although not technically a Police Officer. For these reasons, and for the reasons given by my learned brother, I agree that the answer to the question referred to us should be in the affirmative and that the decisions of this Court in 18

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[13] **Caledonian Railway Co. v. North British Railway Co., (1881) 6 A C 114=29 W R 685.**

[14] **Ex parte Walton: In re Levy, (1881) 17 Ch D 746=50 L J Ch 657=45 L T 1=30 W R 395.**

[15] **Spencer v. Metropolitan Board of Works, (1883) 22 Ch D 142=52 L J Ch 249=47 L T 459=31 W R 347.**

S L R 75[1] and A I R 1927 Sind 112[2] must be considered as overruled.

D.S./R.K. *Answer in affirmative.*

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## A. I. R. 1938 Sind 6

HAVELIWALA J.

*Rahimbux Haji Karimbux* — Plaintiff.

v.

*Secretary of State* — Defendant.

Suit No. 174 of 1935, Decided on 23rd April 1937.

**(a) Land Acquisition Act (1894), S. 9 (3) — Failure to serve notice not wilful or perverse —Subsequent proceedings are not void.**

Collector's failure, when it is not wilful or perverse to serve notice of intended acquisition on the occupier or the owner as required by S. 9, Cl. (3), and in the manner laid down in S. 45, does not make the subsequent proceedings void : *A I R 1920 Mad 417* ; *30 Cal 576 and A I R 1919 All 360, Rel. on* ; *11 C L J 612, Disting.* [P 8 C 1]

**(b) Principal and Agent — Crown — Duty of agent—Duty imposed by law — Secretary of State is not liable for tortious acts of Government servant, while they were performed in exercise of their duty.**

When the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. Hence the Secretary of State will not be liable for torts or acts of negligence committed by Government servants while performing acts done in the exercise of powers which are usually termed sovereign : *A I R 1932 Sind 181 and A I R 1936 Sind 130, Rel. on* ; *A I R 1936 Pesh 198, Ref.* [P 8 C 2]

Hakumatrai M. Eidnani—*for Plaintiff.*

Partabrai D. Punwani, Advocate-General — *for Defendant.*

**Judgment.** — This suit arises out of the following circumstances: The plaintiff Rahimbux Haji Karimbux was doing business in Karachi in 1919 in the name of Rahimbux Kaderbux. He had dealings with one Malookchand Premchand. In the course of his dealings, Malookchand Premchand was indebted to him in the sum of Rs. 8,000. Malookchand executed a mortgage deed of his undivided share in the agricultural land in dispute bearing Survey Nos. 357 and 361 Deh Thano, Tapo Thano, Taluka Karachi, in favour of the plaintiff. The mortgage deed Ex. 5/1 is dated 14th October 1920 and it was duly registered in the office of the Sub-Registrar at Karachi. It appears that one Choogalal Sagarmal had applied to the Court of the Judicial Commissioner at Karachi for execution of the decree against the heirs and legal representatives of Malookchand by attaching equity of redemption in the land in the suit. Plaintiff then filed an application in those execution proceedings praying that he was a mortgagee and that the property should be sold free of mortgage and subject to his mortgage right being shifted to the sale proceeds. This was agreed to by all the parties concerned in those proceedings and the property was sold on that condition at the Court auction. Plaintiff purchased the property on 24th January 1924 and got the sale certificate dated 3rd April 1924 which is Ex. 5/2. His case is that he was put in possession of the land by the Court officials. Malookchand was not the owner of the whole plot of land but had a small share in an undivided share in the plot. Then the plaintiff left Karachi in the beginning of 1925 and he was away trading in Bombay and Arabia. He returned to Karachi in about 1934 after a lapse of about nine years. He had not put anybody in possession of the land in question and there was no occupier of the land on his behalf. When he returned to Karachi in 1934, he made inquiry about the land from the Tapedar when he was told that the land was acquired under the Land Acquisition Act for the North Western Railway. He was also informed at the office of the Land Acquisition Officer that the compensation money amounting to Rs. 1,418 was paid to Manekbai, widow of Malookchand.

Now it appears there were three co-owners who jointly owned a share of 11 3/4 pies in the land in suit, so Malookchand had a small share in 11 3/4 pies. Names of these co-owners in the land had appeared on the Record of Rights Ex. 5/5 and the compensation money was paid to these three co-owners in their proportionate shares. Plaintiff's complaint is that he was a mortgagee by a registered deed which was duly registered and that he was the purchaser at the Court auction and that this Hon'ble Court did not communicate the fact of his purchase to the Collector as required by S. 135-H, Bombay Land Revenue Code, with the result that the plaintiff's share was not entered in the revenue record as the owner of the aforesaid land. His further complaint is that no notice of the acquisition was served on him and the Land Acquisition Officer wrongly acquired his land without notice to him and paid the compensation money to a wrong party, viz. the widow of Malookchand Premchand. On his return to Karachi he gave notice to the Collector of Karachi which is Ex. 5/12 and to the Agent, North Western Railway, which is Ex. 5/13, but there was no reply from any of them to his demand. The plaintiff therefore prays that the Land Acquisition Officer had failed to exercise due care in ascertaining the party to whom the property belonged and that the property was not validly acquired as no proper notice was issued to the plaintiff. He therefore prays that the Secretary of State be ordered to hand over the possession of the land in the suit and pay compensation for use and occupation at the rate of Rs. 90 per year or in the alternative Rs. 2,050 as compensation for the wrongful acquisition.

The defendant by their written statement state that Survey Nos. 357 and 361 were among other numbers notified for acquisition under the Commissioner's Notification No. 697 dated 27th July 1922 and an aggregate area of 7 acres and 2 ghuntas was acquired after an award under S. 11 of the Act was made by the Land Acquisition Officer on 25th February 1928. They further state that the Land Acquisition Officer did not know, nor had any reason to believe that the plaintiff was in any way interested in the land and that the mortgage and the sale in the plaintiff's favour were not shown in the Record of Rights and that as the names of the three co-owners appeared in the Record of Rights they were duly served with notices as required by the Act. They further contend that after due notices to the proper parties, the land was acquired, and the money paid bona fide and in ignorance of the plaintiff's interest in the land, and that no notice could be served upon the plaintiff in view of the fact that his name did not appear anywhere as an interested party. Other contention is that even if it be held that the Land Acquisition Officer was negligent in not properly making inquiry about the plaintiff's claim, the defendant would not be liable for any negligence or omission of duty of the subordinate officers engaged in the public service. They further plead that the suit is time-barred as it was filed on 9th November 1935.

The following issues were raised: (1) What was Malookchand's share in the Survey Nos. 357 and 361, Deh Thano Tapo Thano, Taluka Karachi? (2) Whether the statements in Paras. 2 and 3 of the plaint are proved? Did the plaintiff acquire the share of Malookchand in the aforesaid land and get a sale certificate from the Court as alleged? (3) Whether the land has been validly acquired by the defendant? (4) Whether the suit is time-barred? (5) What relief, if any, is plaintiff entitled to? (6) General.

So far as Issues 1 and 2 are concerned, facts are not in dispute. The only important issue is: whether the land has been validly acquired by the defendant. Ex. 5/4 dated 27th July 1922 is the notice published in the Sind Official Gazette that the land in question among other lands were acquired for a public purpose, viz. for the North Western Railway, Karachi. Exs. 5/6 and 5/7 are the notices issued by the Land Acquisition Officer to the owners whose names appear on the Record of Rights and extract Ex. 5/5, as pointed out above, shows the names of the co-owners Malookchand Premchand, Malookchand Rochimal and Ramji Pethabhoy. Further, notices of this acquisition were published in the local papers. Ex. 5/10 is the cutting of the "Daily Gazette" dated 28th March 1925 and Ex. 5/11 is a copy of 'Sind Sudhar' dated 28th March 1925. Therefore it is clear from these exhibits that the Land Acquisition Officer as provided by S. 6 of the Act had complied with the provisions of law in issuing the notices to the persons who were known or believed to be interested in the said properties as required by S. 9, Land Acquisition Act. Cl. 3 of S. 9 says:

> The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested as reside or have agents authorized to receive service on their behalf, within the revenue district in which the land is situate.

There is no serious dispute before me that the notices were served on these parties; the parties appeared before the Land Acquisition Officer and accepted the award made in their favour. But what is disputed is that the plaintiff was not served with a notice though he was a registered mortgagee, and had purchased the property at the Court's auction and in the absence of the notice to him it could not be said that the land was validly acquired. The evidence shows that there was no occupier of the land and that the plaintiff had not left anybody in charge of the land. The plaintiff did not own the whole land but owned an undivided share along with two others. That being so, the

Land Acquisition Officer could not have known as to who was the real owner except through public records, viz. the Record of Rights. Even assuming for the purpose of arguments that the Land Acquisition Officer failed to make inquiry and to give notice to the plaintiff as contended, it has been held in 43 Mad 280,[1] following 30 Cal 576,[2] that the Collector's failure to serve notice of the intended acquisition on the occupier or the owner as required by S. 9, Cl 3 and in the manner laid down in S. 45 does not make the subsequent proceedings void. These cases find support in another case reported in 51 I C 501[3] where it was held :

> Where in acquisition proceedings the Collector wilfully and perversely abstains from giving the necessary notice to the owner of the land under S. 9 (3), Land Acquisition Act, his proceedings cannot be considered bona fide and are inoperative in vesting the land in Government : but where, through mere inadvertence or mistake, a person interested has not had notice served upon him, the proceedings are not thereby invalidated.

It is neither suggested nor shown here in any way that the Land Acquisition Officer wilfully and perversely abstained from giving notice to the plaintiff. This is not a case in which the principle laid down in 11 C L J 612,[4] viz. :

> When statutory rights of an exceptional character have been created, the conditions prescribed by the Statute for the exercise of such rights must be strictly fulfilled, and if an attempt is made at merely nominal compliance with the provisions of the Statute in the exercise of such rights, the Courts are not powerless to afford relief to a person who is aggrieved by the adoption of such a course,

can be invoked. The Land Acquisition Officer did everything that a reasonable man could have done. He took the names of the co-owners from the revenue records. How could he have thought that an undivided small share of an undivided whole was mortgaged to some one. It was not the question of the whole plot. It was the negligence of the plaintiff himself that he did not take steps to have his name brought on record, and the Land Acquisition Officer gave notice of acquisition to those who were shown on the record. The declaration made by Government under S. 6 is conclusive evidence that the land was needed for the public purpose and the award having been made, the land vested absolutely in Government free from all incumbrances under S. 16. Therefore the contention that the land still remained as that of the plaintiff in the absence of the notice has no substance.

Then it was argued that under S. 3, T. P. Act, registration of the mortgage of the plaintiff was a constructive notice to the defendant and the Land Acquisition Officer should have made inquiry at the Registration Office as to whether there was any mortgage on the land or not. But it is clear that the fact of registration does not appear in the Record of Rights, and it is admitted by the plaintiff himself that he did not take any steps to have the mortgage registered in the revenue records and also he had not taken any steps for mutation to be effected to his name. It was the duty of the plaintiff to have his name brought on the Record of Rights as one of the co-owners of the land. Assuming for a moment that the Land Acquisition Officer did not make inquiry at the Registration Office and this Court failed to inform the Collector as required by the Land Revenue Code of the purchase of the plaintiff and the officers were negligent in their duties, still, as the law stands at present, the defendant could not be held responsible in damages for the negligence of their subordinate servants. When the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment and the Secretary of State will not be liable for torts or acts of negligence committed by Government servants while performing acts done in the exercise of powers which are usually termed sovereign: *vide* 27 S L R 142[5] and 30 S L R 314.[6] Therefore the claim of the plaintiff fails. The remedy, if any, the plaintiff may have against Malookchand's widow and heirs, who are alleged to have wrongly taken the compensation money and against the officer concerned as an individual, and not in his character of a servant of the Crown. It has been held in A I R 1936 Pesh 198[7] :

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[1] Kasturi Pillai v. Municipal Council, Erode, AIR 1920 Mad 417=53 I C 646=43 Mad 280 =37 M L J 618.

[2] Ganga Ram v. Secy. of State, (1903) 30 Cal 576.

[3] Secy. of State v. Qamar Ali, A I R 1919 All 360=51 I C 501=16 A L J 669.

[4] Raghunath Das v. Collector of Dacca, (1910) 11 C L J 612=6 I C 457.

[5] Radhakishen v. Secy. of State, A I R 1932 Sind 181=136 I C 517=27 S L R 142.

[6] Yousif Abid v. Secy. of State, A I R 1936 Sind 130=164 I C 571=30 S L R 314.

> Once compensation has been awarded under the Act and either no reference has been made to the Court or a reference has been finally decided, the Secretary of State and his agents have no further liability but the liability of any person who has received the whole or any part of the compensation to pay the same to the person lawfully entitled thereto is not affected.

On the issue of limitation, the suit is clearly barred under any of the Arts. 2, 17, 36 or 120, Lim. Act, as the award was made in 1928 and the suit was filed in 1935. As to the costs, I am satisfied that the plaintiff was absent from Karachi for a period of 9 years and was doing business in Bombay and Arabia. He came to know of the acquisition of his property and the compensation money paid to the widow of Malookchand on his return to Karachi in 1934. No doubt he loses the suit on the legal grounds urged on behalf of the defendant and also loses the compensation money of Rs. 1,418 owing to the negligence of the Court officials in not informing the Collector as required by the provisions of the Land Revenue Code. Therefore under the special circumstances of the case, I make no order as to costs.

B.D./R K. *Suit dismissed.*

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[7] Muradkhan v. Abdul Raziq, A I R 1936 Pesh 198=165 I C 924.

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## A. I. R. 1938 Sind 9

RUPCHAND BILARAM AG. J. C.
AND LOBO J.

*Minho wd. Mohano*
v.
*Emperor.*

Criminal Revn. Appln. No. 120 of 1937, Decided on 23rd July 1937.

**(a) Interpretation of Statutes — Statute to be construed literally unless section is repugnant to general intent or another section cuts down meaning.**

It is a cardinal rule of construction that a section of a statute must be construed literally unless (1) the section itself is repugnant to the general purpose of the Act, and (2) there is some other section which cuts down its meaning : *(1882) 8 Q B D 247, Rel. on.* [P 10 C 2]

**(b) Interpretation of Statutes — Marginal notes have no value.**

Marginal note is of no value in interpreting a section : *(1868) 37 L J C P 226, Rel. on.* [P 10 C 2]

**(c) Sind Frontier Regulation (3 of 1892), Ss. 8, 12 and 13 — S. 13 is not repugnant to general provisions of statute— No limitation as to when the powers under S. 8 should be exercised—Ss. 8, 12 and 13 can be reconciled with each other — Public Prosecutor may withdraw under S. 13 (2) from Sessions Court, even if Commissioner or District Magistrate exercised his discretion after trial in that Court commenced.**

There is nothing in the statute itself which shows that S. 13 is repugnant to its general purpose. There is also nothing in S. 12 or any other section which cuts down the meaning of the very wide words intentionally used by the Legislature in S. 13. Ss. 12 and 13 must be read along with and in the light of S. 8 which is the general section empowering the Commissioner in Sind and the District Magistrate to refer cases to a Council of Elders. This S. 8 puts no limitation of time within which such powers may be exercised. This power may be exercised before a case is challaned in Court or before the case is sent up to the Sessions Court, or it may be exercised after the trial of such a case has commenced in that Court. [P 10 C 2]

All the three sections are easily reconcilable. That being so, there is no reason why the very wide words of S. 13 should not receive their full and proper meaning. Thus S. 13 permits the Public Prosecutor to withdraw in the Sessions Court from the prosecution of an accused person at any time before an order of conviction or acquittal has been passed even though the Commissioner or District Magistrate has not exercised his discretion to refer the case to the Council of Elders, before the trial in that Court commenced. [P 11 C 1]

**(d) Sind Frontier Regulation (3 of 1892), Ss. 12, 13—Offence punishable with death or transportation for life—Trial only commences when case is proceeded with in Sessions Court.**

Where an accused person is charged with an offence punishable with death or transportation for life, his trial really commences when the case is proceeded with in the Sessions Court. The enquiry before the committing Magistrate is of a preliminary nature and therefore there can be no objection to the case being referred to a Council of Elders without moving the Court to stay its hands. [P 11 C 1]

D. N. O'Sullivan, as Amicus Curiæ — *for Accused.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Rupchand Bilaram Ag. J. C.** — The accused Minho *wd.* Mohano was being tried before the Additional Sessions Judge of Sukkur for an offence punishable under S. 302, I. P. C. After three witnesses were examined in the Sessions Court the learned Public Prosecutor applied for an adjournment of the case stating that he intended to move the District Magistrate to permit him to withdraw the case from the Sessions Court so that it may be referred to the Council of Elders for decision under the provisions of the Sind Frontier Regulation (3 of 1892). The case was adjourned and at the adjourned hearing, the learned Public Prosecutor applied for withdrawal of the proceedings under the provisions of S. 13 of that Act. The learned Judge accordingly passed an order under Cl. (2) of that section staying the proceedings so as to enable the District Magistrate to refer the case to the Council of Elders. In the Sessions Court, the accused was represented by a pauper pleader and he objected to the passing of the order under Cl. (2). His contention was that S. 13 was controlled by S. 12 and that the case could only be withdrawn from the Sessions Court if the Commissioner in Sind or the District Magistrate, as the case may be, exercised his discretion to refer the case to a Council of Elders before the trial in that Court had commenced, although the case might actually be withdrawn after the trial had commenced. On that ground, he prayed that the case of the accused be referred to this Court in its revisional jurisdiction for decision upon that point and this has been done. At our request Mr. O'Sullivan has argued the case on behalf of the accused as amicus curiæ. We have carefully considered the able arguments advanced by him. We are however of the opinion that the order passed by the learned Additional Sessions Judge was perfectly correct and should be maintained. S. 13 of the Regulation reads as follows :

> (1). In any trial before a Court of Session the P. P. may, when instructed in writing in that behalf by the Commissioner, Sind, or the District Magistrate at any time before the order of conviction or acquittal has been made with respect to any accused person, withdraw from the prosecution of that person, in order that the case may be referred to a Council of Elders. (2) The Sessions Judge shall thereupon stay proceedings with respect to that person, and the District Magistrate shall refer the case to a Council of Elders. (3) A person in respect of whom the Sessoins Judge has stayed proceedings under the section shall not be liable to be tried again before Court of any of the classes mentioned in S. 6, Criminal P. C., either for the same offence or on the same facts for any other offence.

There can be no doubt that this section is couched in the widest terms and permits the Public Prosecutor to withdraw from the prosecution of an accused person at any time before an order of conviction or acquittal has been passed in respect of such person. The learned advocate has urged that this section is controlled by the provisions of S. 12 of the Regulation. That section reads as follows :

> The powers conferred by S. 8 on the Commissioner in Sind and the District Magistrate may be exercised by them respectively in cases committed to the Court of Session at any time before the trial before that Court has commenced, and in cases pending before any Court inferior to the Court of Session at any time before an order of committal to the Court of Session has been made.

The learned advocate has laid considerable stress on the marginal note of that section which reads: "Time for exercising power of reference to Council of Elders". And he has contended that the words 'may be exercised' in S. 12 mean 'shall be exercised'. Now it is a cardinal rule of construction that a section of a statute must be construed literally unless (1) the section itself is repugnant to the general purpose of the Act, and (2) there is some other section which cuts down its meaning: see the observations of Jessel, M. R. in (1882) 8 Q B D 247[1] at p. 253. There can be no doubt that there is nothing in the statute itself which shows that S. 13 is repugnant to its general purview. The object of enacting this statute was to prevent blood-feuds, and bring about peace between the parties concerned. There is also nothing in S. 12 or any other section which cuts down the meaning of the very wide words intentionally used by the Legislature in S. 13. With regard to the marginal note relied upon by the learned advocate, it is sufficient to observe that a marginal note is of no value in interpreting a section. As pointed out by Bovill C. J. in (1868) 37 L J C P 226[2] at p. 230 :

> Indeed it is difficult to see how the marginal notes could ever be used in the construction of Acts of Parliament seeing they are not put there by the Legislature or assented to by them.

The argument that the words 'may be exercised' should be interpreted as 'shall be exercised' is also not well founded. Ss. 12 and 13 must be read along with and in the light of S. 8 which is the general section empowering the Commissioner in Sind and the District Magistrate to refer cases to a Council of Elders. It provides that if in their opinion it is inexpedient that the question of the guilt or innocence of any person or persons accused of any offence punishable under the Penal Code with death or transportation for life or of any of several persons so accused should be tried by a Court of Session, they may refer the question to the decision of a Council of Elders. This section puts no limitation of time within which such powers may be exercised.

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1. Nuth v. Ramplin, (1882) 8 Q B D 247=51 L J Q B 177=30 W R 346=46 J P 692.
2. Claydon v. Green, (1868) 37 L J C P 226=3 C P 511=18 L T 607=16 W R 1126.

Now this power may be exercised before a case is challaned in Court, or it may be exercised before the case is sent up to the Sessions Court, or it may be exercised after the trial of such a case has commenced in that Court. The Regulation is silent with regard to what is to happen if the District Magistrate exercises his discretion of referring a case to the Council of Elders before it is challaned, and the reason is obvious. It is hardly arguable that if orders are passed referring the case of an accused person to a Council of Elders the accused will be sent up to a Magistrate. But where a case was sent up before a Magistrate or was committed to the Court of Sessions but no trial had commenced in that Court, it was necessary for the Legislature to make provision empowering the Commissioner in Sind and the District Magistrate to refer the case to a Council of Elders. S. 12 was evidently intended to empower a reference to the Council of Elders without the Court seised of the case being moved to stay its hand, the order of reference operating as a bar to further proceedings in Court. In this connexion it is to be remembered that where an accused person is charged with an offence punishable with death or transportation for life, his trial really commences when the case is proceeded with in the Sessions Court. The inquiry before the committing Magistrate is of a preliminary nature and therefore there could be no objection to the case being referred to a Council of Elders without moving the Court to stay its hand.

Where however the trial of an accused person had commenced in the Court of Session, it was intended that before such a case was referred to a Council of Elders the Sessions Court should be moved to stay its hand. And it is for that purpose that S. 13 appears to have been enacted. All the three sections are easily re-concilable in the manner referred to above. That being so, there is no reason why the very wide words of S. 13 should not receive their full and proper meaning. As the order of the learned Judge can be upheld upon the above considerations, it is not necessary for us to go into the further question whether we have power to revise an order passed by the Sessions Court in pursuance of the Sind Frontier Regulation. We accordingly reject this application.

B.D./R.K. *Application rejected.*

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## A. I. R. 1938 Sind 11

HAVELIWALA J.

*Kanyalal Tikamdas* — Plaintiff.

v.

*Mahomed Idris Abdullah* — Defendant.

Suit No. 193 of 1935, Decided on 29th January 1937.

**(a) Malicious Prosecution — Essentials of—Burden of proof—Existence of malice is question of fact—Want of reasonable and probable cause is not in itself evidence of malice.**

In order to succeed in a case of malicious prosecution, the person suing has to prove that he was innocent and his innocence was pronounced by a tribunal, that there was a want of reasonable or probable cause for the prosecution and that the proceedings were initiated by a malicious spirit, that is from indirect or improper motives and not in furtherance of justice. But the burden lies on the person suing to prove want of reasonable and probable cause and the existence of malice. Malice, like intention or motive is a state of one's mind known to himself. The existence of malice is purely a question of fact to be gathered from the circumstances of the case and the conduct of the parties, and the absence of a reasonable and probable cause is not by itself sufficient evidence of malice: *A I R 1927 Lah 120*; *A I R 1932 Bom 259 and 24 All 363, Ref.* [P 14 C 1, 2]

**(b) Malicious Prosecution—Mere institution of criminal proceedings is sufficient to give rise to action for malicious prosecution.**

The prosecution commences as soon as the complaint is made; and it is not necessary in order to maintain an action for malicious prosecution that the charge should have been acted upon by a Magistrate or a conviction arrived at and it is not necessary that the criminal proceedings should have been heard out to the end; it is sufficient if it is shown that the criminal proceedings were initiated and that the accused was prosecuted: *A I R 1930 P C 260, Disting.*; *A I R 1926 Nag 175, Ref.* [P 15 C 1]

**(c) Malicious Prosecution—Damages—Measure not laid down by law and very vague—Best possible proof available should however be given.**

Law has not laid down what shall be the measure of damages in an action for malicious prosecution. The measure is vague and uncertain depending upon a variety of facts, conduct of the party and circumstances of the case. When a wrong has been committed, the person claiming damages must suffer from the impossibilities of actually ascertaining the amount of damages but that does not mean that he is exonerated from giving the best proof available for the extent of damages suffered by him. [P 16 C 1]

Sunderdas Jethanand—*for Plaintiff.*

Rewachand V. Thadani — *for Defendant.*

**Judgment.**—This suit is brought by Kanyalal Tikamdas, a graduate of the Bombay University and a surveyor and architect, carrying on his profession in

Karachi against the defendant Mahomed Idris, a landlord of Karachi, claiming Rs. 1,000 as and by way of damages for his malicious prosecutions. It is alleged in the plaint that in the month of October 1933 he was engaged by one Nathumal Gopaldas to act as his architect and surveyor in connexion with the construction of his building in Old Town Quarter. The defendant owned a plot adjoining Nathumal's building. Nathumal's building is plot No. 123 in the sketch (Ex. 6) and the defendant's plot is No. 127. Plaintiff prepared the plan which was sanctioned by the Municipality in the end of November 1933. Construction of the building was started immediately. It appears from the evidence that there was a dispute between Nathumal and the defendant in respect of a strip of land about 12' x 3' which the defendant claimed as his. This strip of land seemed to be very valuable to the defendant as it would open a frontage on his plot from Dhaloomal's lane. The frontage on the plot of Nathumal is from Dewan Dhaloomal's land and though there is a small passage leading to the plot of the defendant, the real entrance to the plot No. 127 of the defendant is from Visramdas Sukhramdas Street. The plaintiff states that the defendant wanted to purchase this strip of land from Nathumal so as to have a frontage from Dhaloomal's land and as he could not get it, he, out of enmity towards him, filed three criminal prosecutions against him: first on 1st June 1934 (Ex. 7) under Ss. 448 and 426, Penal Code; the second (Ex. 9/1) on 28th July 1934 under Ss. 434, 427 and 447, Penal Code, and the third (Ex. 9/2) on 16th August 1934 under Ss. 109 and 428, Penal Code. In the first prosecution, he was convicted by the First Class Magistrate of Karachi, but on appeal he was acquitted by the High Court and the proceedings in the other two prosecutions were quashed by the High Court by their order dated 7th March 1935. The plaintiff submits that these prosecutions were malicious and launched recklessly without any rhyme or reason, that he had to incur heavy expenses in defending himself in these prosecutions, had to file revision applications in the High Court and suffered in his profession and reputation and underwent considerable anxiety and pain of mind owing to these malicious prosecutions.

The defendant by his written statement admits the prosecutions but denies that they were malicious or without any reasonable and probable cause. He further denies the liability for damages. The only and the substantial issue in the case is whether the prosecutions were malicious and without any reasonable and probable cause. If so, what is the extent of the damages suffered by the plaintiff?

It appears from the evidence of Tikamdas (Ex. 16) that the defendant inquired from him whether Nathumal would sell his whole plot to him and it seems that he was anxious to purchase the plot belonging to Nathumal. Nathumal was willing to sell it and asked Tikamdas to bring the earnest money but the defendant did not pay earnest money. Then the defendant wanted to purchase only that strip of land which was useful to him, but Nathumal did not agree to it as it would materially affect his own building. The plaintiff's evidence is also to the effect that the defendant was anxious to purchase this strip of land and wanted him (the plaintiff) to use his influence with Nathumal and get him the land, but Nathumal would not sell. Doongermal (Ex. 17) also states that he was in charge of Nathumal's building when it was under construction and the defendant had asked him with regard to the purchase of that strip of land and that talk was going on till the foundation of Nathumal's building was put up. Now the strip of land was very important for Nathumal's building because according to the plan submitted, water-closet and the bath rooms were to be constructed on it. His evidence shows that as Nathumal would not sell it, the defendant at times gave him threats by saying that he would hamper him in the construction of the building, and on one day actually removed some of the rafters. When he complained to him about the removing of the rafters the defendant said: "Either I must sell that strip to him or he will see that 'Khoodai toofan' will happen every day". It also appears that the defendant made two applications (Ex 15/1 and 15/2) dated 24th March 1934 and 7th April 1934 respectively to the Municipality drawing their attention to the fact that the construction of Nathumal's building was such as would block the way and passage to his building in respect whereof he had acquired the right of easement and he strongly objected to the plan of Nathumal's building being passed and also objected to the construction of building on that narrow strip of land so as to affect his property.

The defendant's evidence is to the effect that the plaintiff's men working under him had trespassed on his land and in spite of the repeated warnings they continued to pass through the land and push on the construction of the building after trespassing on his land and he was obliged to file complaints against the plaintiff and his men under various sections of the Penal Code. From complaint (Ex. 7) filed by the defendant against the plaintiff on 1st June 1934 under Ss. 448 and 426, I. P. C., for committing the offence on 1st June 1934, it appears that the charge against the plaintiff was that he illegally and forcibly committed trespass and placed a ladder inside the complainant's (defendant's) house and climbed over the wall of the building adjoining the complainant's building which belonged to Nathumal and which has separate entrance through which he could pass and that he had thereby caused damage to the extent of Rs. 25. It is true that the plaintiff was convicted by the Magistrate but on appeal the High Court by order (Ex. 8) dated 4th December 1934 set aside the conviction of the plaintiff, observing:

> Now, no doubt there is a certain vague allegation in para. 5 of the complaint that the accused was warned and that he gave no heed; but there is no specific allegation when he was warned and what he did after such warning was given to him. It is not improbable that the so-called warning was given to the accused after he had crossed over to the house of his employer.
>
> It is possible that the accused did pass through the house of the complainant but he had no intention of causing injury to the property of the complainant, and if at all he thereby committed a technical offence, it was a case that should have been dealt with under S. 95, I. P. C. The Magistrate himself felt that this was a case which did not call for any severe punishment. He has dealt with the accused under S. 562 (1-A), Criminal P. C. But we think that this is not a case in which the accused should have been convicted, or so dealt with. The complaint might have been dismissed under S. 95, I. P. C.

The second complaint under Ss. 434, 427 and 447, I. P. C., and the third complaint under Ss. 109 and 428, I. P. C., did not reach the stage of final hearing, but on application being made to the High Court, the High Court quashed the proceedings by its order (Ex. 10) dated 7th March 1935. The High Court held as follows:

> In the whole of the present four charges we find no ground whatever for exposing any of the persons charged to the harassment of criminal proceedings. Although as a rule we are reluctant to interfere at a preliminary stage with criminal proceedings, nevertheless in such cases as these, we think it is our clear duty to prevent this harassment from going further and to quash the proceedings forthwith. There is however no ground whatever for imputing any criminal intention either to the landowner who has set back his wall to the line agreed upon by the surveyors for both parties and still less against any of those in his employment either as surveyors, architects, foremen or labourers.

No specific dates of the offences alleged in the 2nd and 3rd complaints (Exs. 9/1 and 9/2) are given. Ex. 9/1 relates to the complaint against the plaintiff for unlawfully entering the complainant's limits and removing land marks and committing trespass and mischief. Ex. 9/2 is directed against the plaintiff that he along with others, conspired among themselves, helped Nathumal with the intention of committing fraud by wrongful means, caused damage to the complainant in taking out a portion of the complainant's land and built construction on it. Now these are serious charges made against the plaintiff without making any mention as to how and when the conspiracy had taken place and how he had conspired with others to enter into the plot of the defendant for the aforesaid purpose. On these facts the question is, was there any justification for these charges? In other words, had defendant any proper and reasonable cause for launching the prosecutions and whether he was actuated by malice towards the plaintiff in doing so?

Now it is admitted that plaintiff was an architect engaged by Nathumal; in his capacity as such, he had to construct a building according to the plan approved by the Municipality. By the consent of the parties and in company of their advocates, the Court had the benefit of viewing the premises of the respective properties and the strip of land over which the water-closet and the bath rooms are put up on 22nd Janury 1937. Looking to the plan (Ex. 6) and the situation of the two plots and entrance to them and the benefit the Court had of seeing the plots personally, I do not think there could be any grounds for the defendant to say that the plaintiff and his gang of men had several times entered his plot and that they did so with the intention of causing mischief and committing theft. It is clear to me that there could be no occasion for the plaintiff and his men to enter through the plot of the defendant. There could be no necessity because the entry, for constructing work, would be clear from Dewan Dhaloomal's Lane. Why should they have entered through the plot of the defendant, passes my comprehension. As the evidence shows, the ground floor of Nathumal's building was complete by April 1934 and the construction work would be surrounded by walls. It was therefore unnecessary for any man of the plaintiff to pass through the land of the defendant. There is an open entrance to Nathumal's plot from Dewan Dhaloomal's lane where the construction work was going on. Why should anybody come through the defendant's plot from Visramdas side. Therefore there would be no necessity for trespass and mischief. It might be that while the ground floor was being constructed on the strip of the land and the wall was put up and some plaster work was going on, the plaintiff and his men put up a ladder or other materials in order to carry on the work on the wall which the plaintiff was supervising and which the defendant did not like. But it would be clearly beside the mark to say that the plaintiff and his men entered into the plot of the defendant with a view to commit mischief with criminal intention to cause damage to his land. These allegations such as I have mentioned above, seem to be reckless and made without any justification, particularly when the construction of the ground floor was completed in April 1934. If there was any truth in his allegations, he would have proceeded at once against the plaintiff and not waited till June, July and August.

It seems to me clear that the defendant did not like the idea of the construction of the building of Nathumal and therefore one after the other he filed three prosecutions against the plaintiff without any justification and probable cause. Now in order to succeed in a case of malicious prosecution, the plaintiff has to prove that he was innocent and his innocence was pronounced by a tribunal, that there was a want of reasonable or probable cause for the prosecution and that the proceedings were initiated by a malicious spirit, that is, from indirect or improper motives and not in furtherance of justice. No doubt, the burden lies on the plaintiff to prove want of reasonable and probable cause and the existence of malice. It is urged on behalf of the plaintiff that from the circumstances of the case, it is clear that the prosecutions were launched without any probable and reasonable cause and there was malice on the part of the defendant. But it is equally true as observed by Jai Lal J. in A I R 1927 Lah 120[1] that:

> Malice should be independently proved and cannot be inferred merely from the absence of probable and reasonable cause.

In the words of Alderson J. in (1854) 10 Ex 352[2] at p. 356 malice means:

> Any motive other than the motive of simply instituting a prosecution for the purpose of bringing a person to justice is a malicious motive on the part of the person who acts in that way.

Now malice, like intention or motive is a state of one's mind known to himself. The existence of malice is purely a question of fact to be gathered from the circumstances of the case and the conduct of the parties and the absence of a reasonable and probable cause is not by itself sufficient evidence of malice. This aspect of the case has been well considered in A I R 1932 Bom 259[3] where it is observed that:

> In order to succeed in an action for malicious prosecution, the plaintiff must prove that the defendant acted maliciously, that is, from some indirect or improper motive, and that there was no reasonable and probable cause for his action.

In (1891) 2 Q B 341,[4] it was held that:

> Malice is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed.

In 24 All 363,[5] at p. 366, it is observed by the learned Judges that the phrase "reasonable and probable cause" means as follows:

> There must be: (1) An honest belief of the accuser in the guilt of the accused; (2) such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) such secondly mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; (4) the circumstances so believed and relied on by the accuser must be such as would amount to reasonable ground for belief in the guilt of the accused.

It has been contended on behalf of the defendant that as the plaintiff was convicted by the Magistrate on Ex. 7 and though acquitted by the High Court by

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1. Nurkhan v. Jiwandas, A I R 1927 Lah 120=99 I C 638.
2. Stevens v. Midland Counties Ry. Co., (1854) 10 Ex. 352=2 C L R 1300=23 L J Ex 328=18 Jur 932.
3. Chaganlal Sakerlal v. Thana Municipality, A I R 1932 Bom 259=137 I C 545=56 Bom 135=34 Bom L R 143.
4. Stuart v. Bell, (1891) 2 Q B 341=60 L J Q B 577=64 L T 633=39 W R 612.
5. Bhim Sen v. Sita Ram, (1902) 24 All 363=1902 A W N 92.

Ex. 8, no case for malicious prosecution would lie and reliance is placed on a Privy Council ruling reported in A I R 1930 P C 260[6] where the head-note shows that:

> No action to claim damages for malicious prosecution can lie until there has been acquittal in the first Court.

A close reading of the case shows that the proceedings in that case had not gone to the stage of hearing and the case was not decided by the first Court. So the Privy Council held that as no case was decided by the First Court and as there was no acquittal, there could be no claim for damages for malicious prosecution because the prosecution had not ended in acquittal and the claim for the malacious prosecution was premature. Moreover, that was a case from the Supreme Court of Gold Coast Colony under the Native Ordinance Act, while we are here governed by the Criminal Procedure Code, and several authorities of the Indian High Courts show that the prosecution commences as soon as the complaint is made; and it is not necessary in order to maintain an action for malicious prosecution that the charge should have been acted upon by a Magistrate or a conviction arrived at and it is not necessary that the criminal proceedings should have been heard out to the end; it is sufficient if it is shown that the criminal proceedings were initiated and were instituted and that the plaintiff was prosecuted. Another ruling relied upon by the defendant is A I R 1926 Nag 175[7] where it is observed:

> If the plaintiff has been convicted in the first instance and ultimately acquitted on appeal, the presumption is against the absence of reasonable and probable cause unless the original conviction is proved to have proceeded on evidence known by the defendant to be false or on the wilful suppression by him of material facts.

Even assuming for a moment that the contention of the defendant is correct with regard to Ex. 7 and that the plaintiff was convicted by the Magistrate in the first instance, still there could be no justification for second and third complaints (Exs. 9/1 and 9/2). The charges are absolutely reckless and made without any reasonable cause. It was urged on behalf of the defendant that it would not be a want of reasonable and probable cause if the defendant honestly believed that the plaintiff and his men had trespassed on his land and then certainly it would not be malicious prosecution. But the Court has not to consider the belief of the defendant as to what the defendant thought of or believed his rights to be, the Court has not to consider the state of his mind in prosecuting a man. What the Court has to consider is whether he had a right to prosecute a man who had trespassed on his land on reasonable grounds as to what a cautious and careful man would do. Belief must be based upon reasonable grounds, as would lead any fairly cautious man in the defendant's position so to believe; and the circumstances so believed and relied on by the accuser must be such as amount to a reasonable ground for belief in the guilt of the accused. In order to justify a defendant, there must be a reasonable cause such as would operate on the mind of a discreet man; there must also be a probable cause, such as would operate on the mind of a reasonable man. I believe the evidence of the plaintiff when he says that he never trespassed on the land of the defendant. He is an educated man doing business as an architect. He was only professionally engaged by Nathumal. Why should he identify himself with and take interest in Nathumal so as to expose himself to a prosecution. A professional man in the position of the plaintiff would be all the more careful in not mixing himself with any dispute between his employee and the adjoining neighbours. I also believe the evidence of Doongermal that the defendant did give him threat that a "Khoodai toofan" will happen every day. He is an English talking witness and I do not see any reason why he should invent a story like this and tell falsehood. Therefore considering the evidence on the record and the circumstances of the case, I am of the opinion that the defendant was not actuated with bonafide intention to bring the plaintiff to justice for the supposed offence of trespass but that his sole desire was to cause annoyance to the plaintiff and Nathoomal, so that the construction work may be hampered. This is all the more clear from the complaints he filed one after the other against the plaintiff and his men, which were made without any reasonable and probable cause and actuated by indirect and improper motive, motive in the sense that in doing so he would cause annoyance to Nathumal in the construction of his building.

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[6] Osumanyawa Yaw Ewua v. Nana Sir Ofori Atta, A I R 1930 P C 260=128 I C 659 (P C).

[7] Bapuji v. Kisan, A I R 1926 Nag 175=89 I C 482.

The next question is what would be the damages? The plaintiff has claimed Rupees 1,000 in all. His evidence shows that he paid Rs. 200 to his advocates in defending the prosecutions and revision applications in the High Court. He claims Rs. 100 by way of expenses and Rs. 700 for mental suffering and loss of reputation and practice. He has not called any evidence in support of this claim of Rs. 700, that he had lost any clients owing to these prosecutions or owing to the worries he could not attend to his work or had suffered in reputation on account of these prosecutions. No doubt ordinarily he would have devoted some of his time to attend to these prosecutions at some inconvenience, but there is no evidence before me that he had lost any client or had suffered in business in any way. In the absence of any evidence it is always difficult to ascertain the measure of damages. Law has not laid down what shall be the measure of damages in an action for malicious prosecution. The measure is vague and uncertain, depending upon the variety of facts, conduct of the party, and circumstances of the case. When a wrong has been committed, the accuser must suffer from the impossibilities of actually ascertaining the amount of damages, but that does not mean that he is exonerated from giving the best proof available for the extent of damages suffered by him. Indeed it is a ticklish matter as to what would be the proper amount of damages in a matter like this in the absence of any evidence to give to a sufferer for worry and inconvenience caused to him by a prosecution. Considering everything in the case, I would assess Rs. 51 as solatium for worry and inconvenience and Rs. 200 for fees paid to lawyers and Rs. 25 for the miscellaneous expenses, viz. stamp, typing, etc., in all Rs. 276 which I decree with costs on Rs. 276.

B.D./R.K. *Suit decreed.*

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## A. I. R. 1938 Sind 16

DADIBA C. MEHTA AND LOBO JJ.

*Dayaram Pursumal* — Appellant.

v.

*Sirumal Manghanmal and another* — Respondents.

Second Appeal No. 24 of 1934, Decided on 26th May 1937, from judgment and decree of Dist. Judge, Hyderabad.

**(a) Landlord and Tenant—Burden of proof —Landlord contending creation of new tenancy — Burden of proving terms of new tenancy lies on him.**

Where in a suit for rent, the landlord contends that a new agreement of lease had been entered into from a certain date, the burden of proving the terms of the new tenancy is on the landlord. [P 17 C 1]

**(b) Evidence Act (1872), S. 109 — Tenant admitting tenancy—Presumption is that he continues as tenant till he proves cessation of such relationship.**

Where a tenant at will admits the tenancy, S. 109 comes into operation and there is a presumption against him that he continues as a tenant till he proves that the relationship has ceased to exist. [P 17 C 2]

Javhermal Vilaitrai — *for Appellant.*

**Lobo J.**—This is a second appeal the facts in connexion with which are as follows: The present respondents filed a suit in the Court of the Subordinate Judge at Mirpur-Khas being Suit No. 598 of 1932 against the present appellant and another for the recovery of Rs. 741 as rent and Rs. 119 as interest thereon. They alleged that the appellant rented from them a shop on 12th Chet 1986=23rd April 1929, for a period of 11 months agreeing to pay Rs. 30 as rent per Sindhi month. They further alleged that the appellant and the other defendant occupied the shop from 12 Chet 1986 = 23rd April 1929 to 3rd Vesakh 1988=22nd April 1931, a period of 24 months and 21 days according to the Sindhi calendar. The defence was that the appellant was a tenant of the respondents from 1985 and that from 12th Chet 1986 the respondents agreed to take Rs. 20 as rent per month instead of Rs. 30 per month. The appellant further contended that he vacated the shop after a period of 20 months calculated from 12th Chet 1986. Several issues were framed by the trial Court, the two principal issues being:

(1). Whether the rent agreed upon was Rs. 30 per month or Rs. 20 per month; (2) whether the rent and damages for use and occupation were payable for a period of 24 months and 21 days or for 20 months only.

Neither the respondents nor the appellant went into the witness box or led any evidence. The trial Court dismissed the suit against Jashanmal, defendant 2 in the suit. It held that rent was payable by appellant at the rate of Rs. 20 per month for the period alleged by the appellant, namely 20 months. Against this decision, the respondents preferred an appeal to the District Court of Hyderabad.

The learned District Judge who heard the appeal held that the appellant was liable for rent at the rate of Rs. 30 a month for the period of 24 months and 21 days. He accordingly varied the decree of the trial Court by ordering that the rent should be calculated at the rate of Rs. 30 per month for the period of 24 months and 21 days and not at the rate of Rs. 20 per month for 20 months. Against this judgment and decree of the lower Appellate Court, the present second appeal has been preferred by the appellant Dayaram, the original defendant 1 in the suit. The learned advocate who appears on behalf of the appellant has urged the same two points, namely that the appellant was not liable except at the rate of Rs. 20 per month for a period of 20 months only.

On the first of the two points which have been argued before us, namely the rate of rent per month, it appears to us that the learned Subordinate Judge was right in deciding that the rent should be calculated at the rate of Rs. 20 per month. It is true that the appellant made reference to a tenancy prior to 23rd April 1929=12th Chet 1986, but it was the case of the respondents in para. 3 of the plaint that a new tenancy started on 12th Chet 1986=23rd April 1929 for a period of 11 months on an agreement to pay Rs. 30 per Sindhi month. The burden of proving the terms of this new tenancy was therefore upon the respondents who were the original plaintiffs. They led no evidence and their claim was liable to be dismissed but for the admission by the appellant that he had agreed to pay Rs. 20 a month from 12th Chet 1986. The Subordinate Judge correctly sets out in his judgment the legal position on this point in the following words:

> The plaintiff's case is not that the defendant held over after the expiry of lease 22nd April 1929 but that a new agreement of lease was entered into on 23rd April 1929 . . . . It is the plaintiff who must prove that the defendant agreed to pay Rs. 30 p. m. Failing that the defendant's admission that rent was agreed at Rs. 20 prevails. I hold accordingly.

The view of the learned Judge of the first Appellate Court on this point with which we do not agree is set out in the following words:

> In the plaint it is alleged (para. 3) that defendant 1 got the shop from the plaintiff afresh from 23rd April 1929 for 11 months on Rs. 30 per month. Thus both parties agree that defendant 1 was already a tenant before 12th Chet 1986. As defendant 1 himself admits that before this date he was paying rent at Rs. 30 per month, I am of opinion that the burden of proving that the rent was reduced to Rs. 20 per month from this date lay on the defendants and that the learned Sub-Judge was wrong in holding that it was the plaintiff who had set up a new agreement which he was bound to prove . . . .

This disposes of the first point urged before us by the learned advocate for the appellant. With regard to the second point, namely the period for which Rs. 20 a month was payable by the appellant in respect of rent and damages for use and occupation, the Subordinate Judge held that the burden of proof was on the respondents, the original plaintiffs, to show that the defendant vacated after 24 months and 21 days. He states:

> There is no evidence. Therefore I hold on the admission of the defendant that tenancy was over after 20 months.

On this point the learned Judge of the first Appellate Court states as follows:

> Where a tenant-at-will alleges that his relationship as a tenant ceased to exist, the onus is on him to prove that the relationship ceased to exist . . . . In this case it is the defendant who alleged that the tenancy ceased to exist before the end of the period for which the suit has been filed. Under S. 109, Evidence Act, the burden of proving that a landlord and his tenant do not stand or have ceased to stand to each other in such relationship is on the person who affirms it. Such relationship is to be presumed to continue until it is proved to have ceased . . . . I hold that they (the defendants) must be presumed to have occupied shop on rent for 24 months and 21 days, the period for which the suit has been filed.

In our opinion on this second question the learned Subordinate Judge took an erroneous view of the law and the view of the learned Judge of the first Appellate Court is legally correct. Respondents, the original plaintiffs, gave no evidence in support of their allegation that the appellant, original defendant 1, was in occupation for 24 months and 21 days. The appellant however admitted the tenancy and once having admitted it, S. 109, Evidence Act, came into operation and there was a presumption against him that he continued as a tenant till he proved that the relationship had ceased to exist. As the appellant gave no evidence and the respondents had claimed for a period of 24 months and 21 days only, the learned Judge of the lower Appellate Court was right in holding that the rent and damages for use and occupation were payable for a period of 24 months and 21 days.

The result is that we hold that the respondents are entitled to recover from the appellant rent and damages for use and occupation at the rate of Rs. 20 a month for a period of 24 months and 21 days. The decree of the lower Appellate Court will be varied accordingly. As there is no appearance for the respondents and as the appellant has succeeded only in part, there will be no order as to costs in this Court as well as in the Court below. Each party to bear its own costs throughout.

A.L./R.K. *Decree varied.*

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## A. I. R. 1938 Sind 18

RUPCHAND BILARAM AG. J. C.
AND LOBO J.

*Firm Ugarchand Gajanand* — Applicants.

v.

*Firm Motiram Ghanshamdas* — Opponents.

Civil Revision Appln. No. 121 of 1934, Decided on 9th September 1937, from decision of Judge, Small Cause Court, Karachi, D/- 2nd July 1934.

**Sale of Goods Act (1930), Ss. 20, 22 and 25 (2)—Contract by *A* at K to sell scrap iron to *B* at C—Goods sent to C—Railway receipt and hundi sent by *A* to his banker at C—Hundi accepted by *B* but later on dishonoured and delivery refused — *A* suing *B* for value of goods—S. 22 applied and property in goods held not passed to *B* until payment was made under S. 25 (2)—Suit held not maintainable.**

*A* at Karachi had agreed to deliver scrap iron of a particular description to *B* at Cawnpore at a certain rate. *A* railed the goods to Cawnpore and sent a railway receipt and a hundi for the value thereof to his banker who presented the hundi to *B* who in his turn accepted it, but a few days later when the consignment arrived at Cawnpore dishonoured it and refused to take delivery of the goods. The goods were weighed at Karachi station. *A* had moreover asked his bankers not to part with the railway receipt until payment was made by *B*. *A*, contending that value in the goods had passed to *B*, brought a suit for the full value of the consignment :

*Held* that it was a matter of common knowledge that goods such as scrap iron decrease in weight during transit. Hence the buyer *B* was not responsible for the goods unless they were weighed at Cawnpore. In such cases S. 22 applied and not S. 20. [P 19 C 2]

*Held further* that S. 25 (2) also applied to the contract and the prima facie presumption that *A* intended to reserve the property in the goods until payment was made arose and hence *A's* suit was not maintainable. [P 19 C 2]

Srikishendas H. Lulla—*for Applicants.*

Santdas Idanmal — *for Opponents.*

**Rupchand Bilaram Ag. J. C.**—This is a revision application by the defendants-applicants against a decree passed against them by the learned Judge of Small Cause Court, Karachi. The facts of the case are hardly in dispute. The plaintiffs-opponents purchased at a certain rate per ton scrap iron auctioned by the North-Western Railway. At the time of the auction it was said that the scrap iron was in the vicinity of 20 tons but was to be paid for according to the actual weight. The plaintiffs negotiated for the sale of the scrap iron through a broker who made a contract with them on behalf of the defendants who are residents of Cawnpore. The contract was noonded in the noondh-book of the plaintiffs but that book is not now forthcoming, although it was produced in the Court of the City Magistrate, Karachi, in evidence in a complaint filed by the plaintiffs against the defendants for cheating in respect of the same transaction. A certified copy of the entry kept in that case has been produced. It reads :

> Bhai Ugarchand Gajanand of Cawnpore, date 25th March 1933, 20 tons black iron sheets old from Railway Stores about 1′ × 1′ at Rs. 79 per ton delivered at Cawnpore station.

In the record of the criminal case there is a note by the learned Magistrate that it appears that there is an alteration in the entry and that it is alleged that "the original measurements shown in the entry were 2′ × 2′, and 2′ has been altered into 1′." While the criminal case was pending, neither party would take delivery of the goods which were ultimately sold by the railway and the price realized was less than the demurrage which had been incurred meanwhile. The criminal case filed by the plaintiffs against the defendants failed and the book was returned to the plaintiffs. It has now disappeared. After that case was dismissed, the plaintiffs instituted the present suit for recovery of Rs. 710 alleging that in pursuance of the contract referred to above, they railed the goods to Cawnpore and sent the railway receipt to their bankers along with a hundi for the value thereof and that on 5th April 1933 the bankers presented the hundi to the defendants which was duly accepted for payment by the defendants, but ten days later, when the consignment arrived at Cawnpore, the defendants refused to honour the hundi or take delivery of the goods. The plaintiffs contended that as the property in the goods had passed to the defendants they were liable to pay the full value thereof. The learned Judge of the Small Cause Court accepted the contention of the plaintiffs and gave them a decree. The defendants have now come to us in revision. We are afraid we cannot accept the view taken by the learned Judge. He does not seem to have applied his mind to the provisions of Ss. 19, 22 and 25, Sale of Goods Act (3 of 1930). Cl. (1) of S. 19 provides that :

> Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Clause (2) provides that

> for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case;

and Clause (3) provides that

> unless a different intention appears, the rules contained in Ss. 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

The learned Judge has not attempted to ascertain for himself when, according to the facts disclosed above, the parties could have intended that the property in the goods should pass to the defendants. He has assumed that because the goods were bought by lot after inspection, the property in them passed the very moment the sale was effected and in support of his view he has relied upon S. 20, Sale of Goods Act, and the case in (1863) 133 R R 639.[1] He has said :

> Nothing had to be done by the plaintiffs to complete the sale. The goods had been identified and agreed upon at the time of the contract and all that the sellers had to do was to despatch the goods to the buyers at Cawnpore. It may be that the sellers retained possession till the price was paid, but still the property had passed to the buyers.

Now it is not disputed that in the first place the railway did weigh the goods after the auction and allowed a rebate of the price. Instead of the weight of the goods being twenty tons they were found to weigh 310 mds. 13 seers. In the next place the defendants were not concerned with the rate claimed by the Railway from the plaintiffs at Karachi. The plaintiffs had to deliver the goods at Cawnpore at a much higher rate than they had paid to the Railway and had to bear the expenses of railing the goods to Cawnpore. It is a matter of common knowledge that the weight of goods such as scrap iron decreases to a certain extent in transit. The scrap iron in issue had to be transferred from the yard where it was lying at the time of the auction to the Karachi Railway Station and from there to Cawnpore. The buyer was only responsible for the actual weight of iron delivered to him at Cawnpore. That being so, it is not S. 20 but S. 22, Sale of Goods Act, which would apply and the property in the goods could not pass to the defendants until the goods if so required by him were weighed at Cawnpore.

But that is not all. The plaintiffs made out the railway receipts in the name of their firm and instructed their bankers as their agents not to part with the railway receipt until payment. That being so, S. 25, Cl. (2), Sale of Goods Act, applies, and there is a prima facie presumption that the plaintiffs intended to reserve to themselves the right of disposal of the goods and that the property in the goods did not pass to the buyer until the condition imposed by the plaintiffs, namely that actual payment should be made, was fulfilled. It has been strenuously urged that because the defendants accepted the bill which was drawn on them, they must be deemed to have waived their right to weigh the goods on arrival, and that therefore in any case the property in the goods passed on the bill having been accepted. But we are afraid there is no substance in this argument. The defendants were prepared to pay the price of the goods provided they were satisfied that the goods were in accordance with the contract and the price charged was for the actual weight which they were getting. The goods had not arrived at Cawnpore when the hundi was presented to them for acceptance. Their acceptance was therefore conditional and had not the effect of transferring the property in the goods to them.

We think the only remedy, if any, of the plaintiffs was to sue for damages based upon the difference between the contract price and the price which the goods would in the ordinary course of events have fetched, if sold immediately after the alleged breach of the contract. If they allowed the goods to remain with the Railway pending the decision of the criminal case and the goods were sold in discharge of the demurrage which accrued due, they have to thank themselves for it. Under the circumstances it is not necessary for us to consider the further question as to the effect of the suppression of the noondh book containing the contract and the alleged alteration said to have been made therein. There is a good deal to be said in favour of the contention of the defendants that they agreed to pay Rs. 79 per ton as the price of the goods on the representation that the scrap iron was 2′ x 1′ and not 1′ x 1′ and that apart from the same having to be weighed it was not in accordance with the contract. We accordingly allow this revision application and dismiss the plaintiffs' suit with costs throughout.

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[1] Turbay v. Bates, (1863) 133 R R 639=2 H & C 200=33 L J Ex 42=10 Jur (N S) 366=10 L T (N S) 35=12 W R 438.

B.D./R.K. *Application allowed.*

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## ✲ A. I. R. 1938 Sind 20

Rupchand Bilaram Ag. J. C.
and Lobo J.

*Parmeshwaribai widow of Lalchand — Defendant 1* — Appellant.

v.

*Nihalchand Lalchand, Plaintiff and another, Defendant 2* — Respondents.

Second Appeal No. 1 of 1935, Decided on 23rd September 1937, against judgment and decree of Asst. Judge, Sukkur, D/- 17th November 1934.

**✲ (a) Married Women's Property Act (1874), S. 6—Making of money payable to Official Trustee is not condition precedent to create trust in favour of wife — Object of S. 6 is to create valid trust without any trust-deed or document being executed—Not naming of trustee by insured is no ground to hold that money made payable to wife is not for her benefit.**

Section 6 does not at all require as a condition precedent to the creation of a trust in favour of the wife that the money should be made payable to the Official Trustee. The object of this section is to create a valid trust in respect of the policy moneys without any trust deed or any other document being executed either in favour of the beneficiary or in favour of a trustee and without any trustee being nominated. The wording of the section makes abundantly clear that the fact that the insured has not named a trustee, whether such trustee be the Official Trustee or not, is no ground for holding that the money which is made payable to a wife is not for her benefit : *Observations of Haveliwala A. J. C. in A I R 1936 Sind 181, disapproved*; *Case law referred.* [P 23 C 2]

**✲ (b) Insurance — Life insurance — Construction of policy—Agreement in policy that money will be paid to person named—Money is payable to such person for his own benefit.**

The well established canon of construction is that the words used in a policy are to be construed in their plain, ordinary and popular meaning. The ordinary meaning of a promise to pay a sum of money to a named person is that it is payable to such person for his own benefit. Where therefore there is an agreement in the policy that the money is payable to the person named, and such person is the wife of the assured, the amount is to be paid to her in her personal capacity for herself and not as trustee for her heirs. [P 24 C 1]

Assudomal Rewachand — *for Appellant.*
Fatehchand Assudomal — *for Respondents.*

**Rupchand Bilaram Ag. J. C.**—This is a second appeal against the judgment of the learned Assistant Judge, Sukkur, decreeing the suit of the plaintiff-respondent 1, and arises out of the following facts :

The appellant-defendant 1 is the widow of one Lalchand deceased, and step-mother of respondent 1-plaintiff. Respondent 2, defendant 2, is her natural son. Both respondents are minors. Lalchand had during his lifetime insured his life with the Bharat Insurance Company, Lahore, in the sum of Rs. 3,000. This sum is under the terms of the policy payable by the Company to the appellant. The words of the policy on which the dispute between the parties centres are these :

> This policy of assurance . . . . witnesseth that in consideration of the payment already made . . . and of the subsequent premiums . . . . to be paid . . . . the Company doth hereby agree that upon proof . . . . of the event or events on which the sum assured is to become payable as described in the said schedule and of the title of the claimant or claimants it will pay . . . . the sum stated in schedule as the sum assured . . . . to the person or persons to whom by such schedule the same is made payable . . . .

| | |
|---|---|
| 9. Person or persons to whom the sum assured is payable ? | Shrimati Parmasri, aged 17 years, the wife of the Life assured. |

Shrimati Parmeshwaribai is the appellant, and was a minor when the policy was issued. She contends that under the provisions of S. 6, Married Women's Property Act (3 of 1874) she is entitled to the insurance money as her own property and to the exclusion of her sons. On the other hand, it is contended on behalf of the respondents that as all that the policy provides is that the sum assured is payable to the appellant, she occupies no better position than that of a nominee of the deceased for the purpose of receiving the money from the Insurance Company, and that on receipt of the money she is required to hold it in trust for and on behalf of the respondents who are the heirs of the deceased. Now Cl. (1) of S. 6, Married Women's Property Act, is as follows :

> A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.
>
> When the sum assured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Presidency in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing.
>
> And in reference to such sum he shall stand in the same position in all respects as if he had been duly appointed trustee thereof by a High Court, under Act 17 of 1864 (to constitute an office of Official Trustee), S. 10.
>
> Nothing herein contained shall operate to destroy or impede the right of any creditor to be paid out of the proceeds of any policy of assurance which may have been effected with intent to defraud creditors.

Clause (2) of the section declares that the provisions of Cl. (1) shall inter alia apply to the policies of Hindus, Mahomedans, Sikhs and Jains which have been effected after 1st April 1923. The present policy is dated 29th January 1931. It is common ground that this policy was effected by the husband of the appellant on his own life and the only question which therefore requires consideration is whether the policy is "expressed on the face of it to be for the benefit of the wife" within the meaning of the above section. On that question the trial Court has held in favour of the appellant, while the Court of first appeal has held against her. She has now come to us in second appeal. The only Indian decision which has a direct bearing upon the point in issue is that of Madhavan Nair J. in 55 Mad 171 =A I R 1932 Mad 220.[1] In that case at p. 174 the learned Judge has said:

> There is nothing in the language of the section (S. 6) to show that the words 'for the benefit of his wife' or other words corresponding to these should appear in the policy to enable us to infer a statutory trust in favour of the wife within the meaning of the section. If on reading the words used in the policy it appears that the assured has intended, in the event of his death, that the policy should enure to the benefit of his wife, then I think the policy may be deemed to be a trust for her benefit.

Although the above decision is that of a single Judge, it is amply supported by several English cases. S. 11, (Eng ) Married Women's Property Act, deals with the same provisions as are contained in Ss. 5 and 6 of the Indian Act, and the words "if expressed on the face of it to be for the benefit of the husband . . .," in S. 5, and "if expressed on the face of it to be for the benefit of the wife . . . . ." in S. 6 of our Act are reproduced from S. 11 of the English Act. There are no less than three English rulings on S. 11 which directly bear upon the point in issue. Two of these have been referred to by the learned Judge in the Madras case. These are (1909) 1 K B 805[2] and (1926) 1 Ch 48.[3] In (1909) 1 K B 805,[2] the policy in question was issued in favour of a husband and his wife and was payable to the survivor of the grantees. On the death of the wife the husband claimed to be solely entitled to the money. It was argued against the contention of the husband's counsel that to come within S. 11, Married Women's Property Act, 1882,

> the insurance must comply strictly with its terms, and must be expressly for the benefit of one or more of the objects therein named.

But this argument was not accepted by two out of the three learned Lords who dealt with the case. In the second case referred to above, a husband had taken out a policy of insurance by which the Insurance Company agreed to pay a certain sum to his wife if she were living at his death or in the event of her prior death to pay the same to the executors, administrators or assigns of the husband himself. Although the words "for the benefit of his wife" found no place in the policy, it was held:

> The policy is, in the terms of the section, a policy of assurance effected by a man on his life, and expressed to be for the benefit of his wife.

Both these decisions have been followed in (1937) 3 All E L R 173[4] which is the latest ruling on the point and was given long after the decision in the Madras case[1]. In that case by a policy of insurance described as a Lloyd's accident policy, certain sums calculated according to a schedule were expressed to be payable to the assured, his executors, administrators or assigns, in the event of bodily injury by accident, as therein specified, causing the death or disablement of the assured. There was a memorandum at the foot of the policy that all claims under the policy should be payable to the wife of the assured, if living at the happening of the event upon which the claim should become payable, or if she were dead, then to the executors, administrators or assigns of the assured. Upon the death of the assured the question arose whether the wife was solely and beneficially entitled to the policy moneys or whether such moneys formed part of the estate of the assured. Bennet J. propounded the following two questions for his decision: (1) whether the policy in question is a policy of insurance effected by the deceased on his own life, and (2) whether the policy being in the form referred to above, is expressed to be for the benefit of his wife. He answered both those questions in favour of the wife, and in dealing with the second question said :

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[1] **Abhiramavalli Ammal v. Official Trustee of Madras, (1932) 19 A I R Mad 220 = 141 I C 680=55 Mad 171=62 M L J 111.**

[2] **Griffiths v. Fleming, (1909) 1 K B 805 = 78 L J K B 567=100 L T 765=53 S J 340 = 25 T L R 377.**

[3] **In re Fleetwood's Policy, (1926) 1 Ch 48 = 95 L J Ch 195=1926 W C & Ins Rep 1=135 L T 374.**

[4] **Re Gladitz Guaranty Executor & Trustees Co. Ltd. v. Gladitz, (1937) 3 All E L R 173.**

> I should have been myself doubtful if that memorandum was a sufficient expression that the policy was to be for the benefit of Winifred Gladitz, were it not for two decisions. One of these is the decision of Tomline J. in (1926) 1 Ch 48,[3] and the other that of Farwell and Kennedy L. JJ. in (1909) 1 K B 805.[2] Both these cases seem to me to decide that words which in substance are not distinguishable from the words of the memorandum which has been put upon the policy in question are a sufficient expression of intention that it is for the benefit of the person to whom the policy moneys are to be paid. Both decisions bind me, and I propose to follow them.

There are other rulings also which, although not directly in point, support the same view and a reference will be presently made to these rulings. It is argued on behalf of the respondents that the words of the present policy are different from those used in the English policies, that all that the present policy provides is that the appellant is the person to whom the money is to be paid and says nothing more than that, that as these words are ambiguous, the Court should endeavour to ascertain the real intention of the deceased, and that it could never have been the intention of the deceased to deprive his children of the benefit of the insurance money. We are afraid we cannot accept these arguments as sound.

In (1906) 1 Ir Rep 155[5] a wife had effected a policy on her own life in favour of her husband, by which the Insurance Company promised to pay £1,000 to the husband or his executors, administrators or assigns on the death of the wife and it was held that by the policy a valid trust was created in favour of the husband and was not dependent on his surviving his wife. This is no doubt an Irish case, but it has been referred to with approval by Lord Hanworth, M. R. and by Romer L. J. in (1933) 1 Ch 126.[6] In this case there were no express words in the policy to the effect that the policy was for the benefit of the husband, and it was held that the fact that the policy did not merely provide for payment to the husband but contained the words or "to his executors, administrators or assigns", did not make any difference in the eye of the law. This is clear from the observations of Lord Hanworth, M. R. at p. 135, where it is said :

> The policy was expressed to be in favour of Mr. William Prescott, and the trust that remained was similar to the trust here, a trust to pay the policy moneys, as and when they became due, to the personal representatives of Mr. William Prescott. It is quite true that in the policy there was a covenant to pay to the named person and to his executors and administrators, but as the Master of the Rolls pointed out, the addition of those words in the covenant to pay do not make any alteration, because the plain meaning of the policy is that it was for the benefit of William Prescott and the other words add nothing and detract nothing.

After referring to the cases in (1930) 2 Ch 37,[7] (1903) 1 Ch 188[8] and (1910) 1 Ir Rep 243,[9] which are cited in support of the contrary view, Lord Hanworth has further said :

> In the present case, which arises under the Act of 1882 and where there is a persona designata, the wife indicated by name, an absolute interest is taken by her by virtue of the statute and a trust created in her favour. That trust still remains uncompleted and unperformed until the date shall arrive when she, as it is now, her personal representative, receive the money, and while that state of things continues the Act negatives any interest passing to the husband.

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[5] Prescott v. Prescott, (1906) 1 Ir Rep 155.

[6] Cousins v. Sun Life Assurance Society, (1933) 1 Ch 126=102 L J Ch 114=1933 W C & I Rep 164=148 L T 101=49 T L R 12.

[7] In re Collier, (1930) 2 Ch 37=99 L J Ch 241=143 L T 329=(1929-1930) B & C R 173.

[8] In re Browne's Policy, (1903) 1 Ch 188=72 L J Ch 85=87 L T 588=51 W R 364=19 T L R 98.

[9] Robb v. Watson, (1910) 1 Ir Rep 243.

At page 140 Romer L. J. has said :

> It follows that, in my opinion, (1906) 1 Ir Rep 155,[5] which was really indistinguishable from the present case, was rightly decided. I express that view in spite of the fact that Clauson J. had doubts as to its correctness . . . . For these reasons it seems to me that the case in (1910) 1 Ir Rep 243,[9] was not correctly decided . . . .

It has been faintly suggested that in this case and also in (1906) 1 Ir Rep 155[5] the policies of insurance expressly stated that they were made under the Married Women's Property Act of 1882, that a reference to that Act in itself indicated that the payee was absolutely entitled to receive the money, and that therefore there was no need for making any further express provision that the policy was made for the benefit of the husband or wife as the case may be. But if that was so, there was nothing easier for the learned Lords than to say that because the policies expressly contained a reference to the Married Women's Property Act, the policies were on the face of them for the benefit of the person named therein. But that is not the reason on which the decisions referred to above have proceeded. The learned advocate has invited our attention to the observations of Haveliwala A. J. C. in 31 S L R 98[10] at p. 117, where it is said:

> In order to attract the applicability of S. 6, Married Women's Property Act, the policy must be expressed to be for the benefit of the insured's wife or his children and money should be made payable to the Official Trustee. Until these two conditions are fulfilled, there can be no statutory trust in favour of the wife. Merely the words 'payable to the assured or his wife' would not, in my opinion, contemplate a trust in favour of the wife, because, as I have discussed above, these words would not confer an absolute estate or would not create a trust in favour of the wife. So, in order to create a valid statutory trust under the Married Women's Property Act, it must be clearly shown that the policy effected was for the benefit of the wife and the children and the moneys payable to the Official Trustee, and the reason for this is that as no express provision was made in the policy for the payment of the moneys to the Official Trustee, the insured at any time could revoke the policy with or without the consent of his wife, as the case may be, but in the case of a statutory trust he would have no right to revoke it because the moneys would be payable to the Official Trustee. 55 Mad 171=A I R 1932 Mad 220[1] is the case of single Judge and with due respect to the learned Judge my view is that the mere mention of the policy 'payable to *A* and her children' would not create a statutory trust within the meaning of S. 6.

With all respect, we are afraid we cannot accept the view expressed by Haveliwala A. J. C. in the above passage. S. 6 does not at all require as a condition precedent to the creation of a trust in favour of the wife that the money should be made payable to the Official Trustee. On the contrary, this section contemplates that where the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee. The object of this section is to create a valid trust in respect of the policy moneys without any trust deed or any other document being executed either in favour of the beneficiary or in favour of a trustee and without any trustee being nominated and all that it provides is that in the absence of any trustees being specifically appointed to receive the money, the Official Trustee shall receive the money as trustee and shall in reference to the money received by him stand "in the same position in all respects as if he had been duly appointed trustee thereof by a High Court." These words make it abundantly clear that the fact that the insured has not named a trustee, whether such.trustee be the Official Trustee or not, is no ground for holding that the money which is made payable to a wife is not for her benefit.

The learned advocate has also invited our attention to (1924) 2 Ch 348[11] at p. 353. In that case an endowment policy was taken out by a person in his own name for the benefit of his daughter, to mature on her attaining a specified age and it was held that it created no legal estate in the daughter and that she could not sue on the contract nor did the assured thereby constitute himself a trustee for his daughter of the policy and of the moneys payable thereunder, and therefore if the assured died before the policy matured, the policy moneys belonged not to the daughter but to the estate of the assured and must be paid to his executors. This was not a case which attracted the applicability of S. 11, English Married Women's Property Act, and has therefore no bearing on the present case. It might also be pointed out that the judgment in the above case was given by Romer L. J. who is one of the Judges who decided the case in (1933) 1 Ch 126,[6] referred to above. The only other case referred to by the learned advocate is that in (1892) 1 Q B

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[10] **Shamdas Gobindram v. Mt. Savitribai, (1936) 23 A I R Sind 181=170 I C 225=31 S L R 98.**

[11] **Tibbetts v. Engelbach, (1924) 2 Ch 348=93 L J Ch 616=130 L T 401=68 S J 208=1924 W C & I Rep 264.**

147.[12] But that case also has no application. In that case the wife was guilty of the murder of her husband and had lost her right to the money. S. 11, Married Women's Property Act, had therefore no application and the observations to which the learned advocate has invited our attention have no bearing whatsoever on the present case.

With regard to the argument that the words in issue in the present case are ambiguous and that we should therefore try to ascertain the intention of the insured, we have again to bear in mind the well established canon of construction that the words used in a policy are to be construed in their plain, ordinary and popular meaning: Halsbury Vol. 18, para. 616. What then is the plain meaning of the words "Company doth hereby agree . . . that . . . it will pay . . . . the sum stated . . . to the person or persons to whom by such schedule the sum is payable"? Do they mean that the said sum is payable to the person named therein for himself or as trustee or as nominee for others? The ordinary meaning of a promise to pay a sum of money to a named person is that it is payable to such person for his own benefit. Is there any reason why these words should not receive their ordinary meaning and be interpreted to mean that the amount is to be paid to the appellant not in her personal capacity and for herself but as trustee for the heirs? The present dispute is between the sons of the deceased and his widow. Had the dispute been between the creditors of the deceased and his widow or sons, could the creditors have possibly contended that as the widow was only a nominee to receive the money, they were entitled to the same in preference to the heirs? If not, there is no reason why a different interpretation should be put upon the words when the dispute is between the widow and the sons.

Even if there was any scope for speculation as to the intention of the testator, we have to bear in mind these facts, that the testator had one son from his first wife who was dead, that he had married a second wife who was only seventeen years old, and that at that time he had no other son. May it not be fairly presumed that when the deceased effected the policy and declared that the amount thereof should be paid to the appellant, it was his intention to provide for her and not for his son from the first wife who was his heir in law and entitled to inherit the rest of the property which the deceased died possessed of or for whom probably he had either made or intended to make provision in some other way. For these reasons, we allow this appeal and dismiss the suit with costs throughout.

S.C./R.K. *Appeal allowed.*

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## A. I. R. 1938 Sind 24

DADIBA C. MEHTA J.

*Firm Jhangaldas-Chimandas* — Plaintiff.

v.

*Firm Chetumal-Bulchand* — Defendant.

Suit No. 32 of 1936, Decided on 31st August 1937.

**(a) Negotiable Instrument—Negotiability—Essentials of—'Pabunch' is ordinary receipt—It is neither bill of exchange nor hundi and so is not negotiable.**

In order that an instrument may acquire negotiability, the following requisites are necessary: (1) the instrument must be in a form capable of being sued on by the holder of it pro tempore in his own name; and (2) it must be by the custom of trade transferable like cash by delivery. Failure to comply with either of these requirements prevents the instrument being a negotiable instrument at all. The 'pahunch' is a writing merely chronicling the fact that a certain amount is received by the person signing it from another person. It is an ordinary receipt. Neither expressly nor impliedly does it create any obligation on the part of anybody to pay the amount mentioned in the receipt. It is therefore neither a bill of exchange as defined by the Negotiable Instruments Act nor a hundi nor any other such document entitling or purporting to entitle any person to payment by any other person of any stated sum of money. It is therefore not negotiable: *A I R 1919 Cal 546*; *(1909) 2 K B 1029 and A I R 1936 P C 171, Rel. on.* [P 27 C 1; P 26 C 1, 2]

**(b) Transfer of Property Act (1882), Sections 130, 132—Pahunch acknowledging debt which has to be paid—Transfer can be effected by instrument in writing and is subject to equities under S. 132.**

Where the document of pahunch evidences acknowledgment of a debt, which has to be paid, it is a chose in action or actionable claim, transfer of which can be effected only by instrument in writing and such transfer is subject to the equities provided by S. 132. [P 26 C 2; P 27 C 1, 2]

**(c) Custom—Essentials of validity stated.**

In order that a Court may give effect to a custom it must be shown that it has the following attributes: (1) reasonableness; (2) certainty (enforceability and definiteness) ; (3) it should not offend against any provision of law ; (4) its immemorial usage can be proved by evidence by positive instances and (5) it should not be against public policy. If a custom is to have the force of law, if it is to upset the ordinary law, it must be established by instance, that the custom had come into conflict with a state of things inconsistent with the incidents of the custom, and had nevertheless prevailed. In short, the instances should be to show that one party asserted rights under a custom ; the other party resisted the right taking his stand on the provisions of law ; and the former succeeded invariably. To establish a custom it is not sufficient merely to prove that that is what is done constantly in the bazaar : *Case law referred.* [P 28 C 1]

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[12] Cleaver v. Mutual Reserve Fund Life Association, (1892) 1 Q B 147=61 L J Q B 128=66 L T 220=40 W R 230=56 J P 180.

**(d) Negotiable Instrument—Negotiability—Pahunch receipt — Custom of negotiability of pahunch by mere indorsement offends against public policy and provisions of law.**

In a suit on pahunch which is an ordinary receipt and not a bill of exchange payable on demand, it was alleged that there was a custom prevailing among the mercantile community in Karachi and other parts of Sind by which a pahunch receipt was negotiable like a bill of exchange by a mere indorsement :

*Held* that such a custom was neither reasonable nor certain and offended against public policy and also offended against the provisions of law with regard to stamp as the object of the merchants resorting to circulation of pahunch was to escape payment of the requisite stamp duty : *Case law referred.* [P 29 C 2]

Khanchand Gopaldas and Pahlajsingh B. Advani—*for Plaintiff.*

Srikishendas H. Lulla—*for Defendant.*

**Judgment.**—This is a suit on what is commonly known in the bazaar as a 'pahunch'. The plaintiff's case as put in the plaint is that the plaintiff is a firm carrying on business in Karachi; that on 21st November 1935 at Karachi the defendant firm received from and credited to one Udhaomal Raichand Rs. 2,500 and executed in favour of Udhaomal Raichand a pahunch receipt drawn up in Sindhi language which is attached to the plaint and marked "A"; that by a local usage prevailing among the Indian mercantile community in Karachi and other places in Sind, a pahunch receipt is negotiable like a bill of exchange by a mere indorsement, and is payable on demand; that on 1st December 1935 Udhaomal Raichand negotiated and sold to the plaintiff the pahunch given by the defendant-firm; that for valuable consideration the plaintiff has purchased the pahunch; that Udhomal Raichand thereupon indorsed the pahunch in favour of the plaintiff-firm; that on 21st January 1936 the plaintiff presented the pahunch to the defendant firm at their place of business and demanded payment; but the defendant declined to honour the same ; that on the following day, the plaintiff served the defendant with a notice asking for payment of the amount due on the pahunch, but the defendant failed to make the payment ; and hence the necessity for this suit, in which the plaintiff claims Rupees 2,500 with interest from date of suit till payment and costs.

The defendant firm by their written statement contend inter alia that there is no such custom or local usage as pleaded in para. 3 of the plaint, viz. that a pahunch is negotiable as a bill of exchange by mere indorsement and is payable on demand ; that this pahunch is not in a form which can acquire negotiability by local usage ; that the defendant had no notice of the transfer by Udhaomal Raichand in favour of the plaintiff ; that Udhaomal Raichand suspended payment on 17th December 1935 : that Udhaomal Raichand had executed three pahunch in favour of the defendant of the aggregate value of Rs. 9,000 prior to the transfer of the pahunch in suit to the plaintiff ; that on the date of that transfer, out of the amount of Rs. 9,000 the defendant had still to recover Rs. 4,000 from Udhaomal Raichand who have subsequently become insolvent ; that the plaintiff's rights, if any, were therefore subject to the equities in favour of the defendant ; and that therefore the plaintiff's suit should be dismissed with costs.

The following issues were raised by Rupchand A. J. C.: (1) Did the defendants execute a pahunch receipt as alleged in para. 2 of the plaint ? (2) Is there a usage as alleged in para. 3 of the plaint according to which the said receipt is negotiable as a bill of exchange by indorsement ? (3) Can the document sued upon acquire negotiability by local usage ? (4) Was the said receipt payable on demand ? (5) (a) Was it indorsed and negotiated in plaintiff's favour ? (5) (b) Had the defendant notice of the same? If not, what is the effect ? (6) Have the defendants receipts referred to in para. 3 of the plaint as alleged ? If so, what is the effect ? (Covers para. 10 of the W. S.) (7) What amount, if any, is due to plaintiff? (8) General.

Mr. Lulla for the defendant admits execution of the pahunch on which the suit has been brought. It was therefore brought on the record as Ex. 5. Issue 1 in the suit is therefore found in the affirmative. In order to simplify matters, parties consent that it may be assumed by the Court: (1) that what is known in the commercial circles of Karachi as a pahunch is ordinarily in the form of the suit pahunch Ex. 5; (2) that it is transferred by a mere indorsement like Ex. 8 which is the indorsement on Ex. 5; and (3) that such dealings have been taking place on a very extensive scale in Karachi. It may also be noted that in para. 3 of the plaint it is stated that by a local usage prevailing amongst the Indian mercantile community in Karachi and other places in Sind, a "pahunch" receipt is negotiable as a bill of exchange by mere indorsement and is payable on demand. Mr. Khanchand has however thought fit to modify the statement, after the deposition of Ex. 6, a servant of the plaintiff-firm, and now contends that a pahunch is negotiable like a bill of exchange by a mere indorsement. He has had to concede that a pahunch is not payable on demand. Before I consider whether the plaintiff has or has not succeeded in establishing the alleged custom about negotiability of a pahunch like a bill of exchange by mere indorsement, I should like to determine the prima facie nature of such a document irrespective of any custom or usage in the market. On this point I may have to make a reference to my order dated 4th May 1937, a copy of which should be annexed to this judgment as annexure 'A'. To show the form in which a pahunch is written, let us reproduce Ex. 5 :

> To
>
> Bhai Udhomal Bhai Raichand.
>
> Written from Karachi Bunder by Puj Chetumal Puj Bulchand. Read "Ram, Ram" from him.
>
> You paid Rs. 2,500 (in words rupees two thousand five hundred) cash. We received the same and credited to you and we passed on the receipt to you.
>
> Miti Kati dated 24, in words twenty-fourth, Sambat 1992.
>
> Sd. Jamnu.
>
> Sd. Murlidhar.

It is on the face of it an ordinary receipt. I may also reproduce from annexure 'A' the following pertinent observations :

> Now, a document has to be read at its face value where it is perfectly clear and unambiguous. The pahunch is a writing merely chronicling the fact that a certain amount is received by the person signing it from another person. It is an ordinary receipt. Neither expressly nor impliedly does it create any obligation on the part of anybody to pay the amount mentioned in the receipt. It is therefore neither a bill of exchange as defined by the Negotiable Instruments Act nor a hundi nor any other such document entitling or purporting to entitle any person to payment by any other person of any stated sum of money. It goes without saying that when a mere receipt is given and it is stated that the amount of the receipt is credited to the person to whom the receipt is given, there is nothing on the face of the document to show that the amount was deposited or that it had nothing to do with a mutual account, and had therefore to be paid back on demand or after any stated period. Indeed it is very difficult to comprehend how this receipt can be differentiated from a receipt given by a person who has got a standing account with the person making payment and who has received it towards the settlement of that account. It is also difficult to differentiate such a receipt from a receipt given by a person to whom some money was due and who on payment acknowledges receipt thereof. It would be extremely difficult for the revenue authorities to determine what the intention of the parties was if plain meaning of the terms of a document are to be supplemented by something not in it.

Assuming for the sake of argument that a promise to pay or an order to pay can be read in an instrument in the form of pahunch Ex. 5, the question is whether such a pahunch is transferable like a negotiable instrument by mere indorsement or writing like Ex. 8, or whether it is really a chose in action. No other mode of transferability is suggested by the parties. The burden of proving that by a custom or usage in the market a pahunch has acquired the characteristic of a negotiable instrument lies on the plaintiff. It is to be seen whether that onus has been discharged. The plaintiff firm themselves called the pahunch a receipt in the plaint. The dictionary meaning of the word pahunch is also the same. Even the stamp affixed to the pahunch is of one-anna, as if on a receipt. But Mr. Khanchand for the plaintiff contends that a pahunch is a bill of exchange within the meaning of the term as defined by S. 2 (2), Stamp Act. That clause reads thus :

> (2) "Bill of exchange" means a bill of exchange as defined by the Negotiable Instruments Act, 1881, and includes also a hundi, and any other document entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for any sum of money.

Before I consider whether S. 2 (2), Stamp Act, includes within its ambit an instrument like a pahunch, I may say that it is clear that if the document evidences acknowledgment of a debt which has to be paid, it is a chose in action or actionable claim, and according to S. 130, T. P. Act, the transfer of such a claim can be effected only by the execution of an instrument in writing. The transferee acquires the right which varies according as the instrument is governed by the Negotiable Instruments Act or the Transfer of Property Act. What kind of rights the transferee gets on the transfer of a pahunch under the alleged custom relied on by the plaintiff is not clear from the evidence. Mr. Khanchand relies on S. 137, T. P. Act, and contends that the transfer need not be by an instrument in writing because the pahunch that has been transferred to the plaintiff is by custom negotiable. According to S. 132 the transferee shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer. Illus. (i) is more or less on all fours with the facts of the present case :

> *A* transfers to *C* a debt due to him by *B*, *A* being then indebted to *B*. *C* sues *B* for the debt due by *B* to *A*. In such suit *B* is entitled to set off the debt due by *A* to him, although *C* was unaware of it at the date of such transfer.

So that the only issue of moment is whether a pahunch has by custom acquired negotiability by mere indorsement as alleged on behalf of the plaintiff. There is no evidence to show that a pahunch is a superior kind of document free from the trammels of S. 132, T. P. Act. Assuming however that the transferee of a pahunch has superior rights, still an instrument like Ex. 5 is not one which can acquire negotiability. In order that an instrument may acquire negotiability, the following requisites are necessary: (1) the instrument must be in a form capable of being sued on by the holder of it *pro tempore* in his own name; and (2) it must be by the custom of trade transferable like cash by delivery. Failure to comply with either of these requirements prevents the instrument being a negotiable instrument at all : *see* Halsbury's Laws of England, Vol. 2, Para. 1015, at p. 723. Ex. 5, as I have already held in my order (Ex. 11), is ordinarily a receipt and does not import any debt; therefore Ex. 5 is not in a form so as to acquire the attributes of negotiability. In 46 Cal 331[1] Chaudhuri J. says at page 337 :

> It has then been argued that, by mercantile usage, share certificates with blank transfer deeds endorsed by the last registered owner, are negotiable instruments. These are certificates of shares in a company whose Articles of Association require that the transfer shall be by a separate instrument executed both by the transferor and transferee, and that the name of the transferee shall be entered in the register of share-holders. On the face of these documents they are not transferable; but it is contended that inasmuch as in the Calcutta market, sales of shares are effected when they are accompanied by such blank transfer-deeds, and pass from hand to hand, they are therefore to be considered as negotiable instruments. But certain requirements have to be fulfilled before any instrument of this character can be considered negotiable. It must be in a form which renders it capable of being sued upon by the holder of it *pro tempore* in his own name; and it must be by the custom of trade transferable like cash by delivery. Failure of these requirements prevents its being treated as a negotiable instrument.

In (1909) 2 K B 1029[2] there are the arguments of McCardie, counsel for the defendant, which have been endorsed and adopted by Darling J. at page 1040. It was held that the document in the suit was on the face of it a mere receipt, and therefore could not be looked upon as a negotiable instrument. In A I R 1936 P C 171[3] it was held that if a document is primarily a receipt, even if coupled with the promise to pay, it would not become a pro-note. Lord Atkin who delivered the judgment remarked that a receipt would be a somewhat unusual visitor in the accustomed circles of negotiable paper. Further on, his Lordship says :

> Receipts and agreements generally are not intended to be negotiable; and serious embarrassment would be caused in commerce if the negotiable net were cast too wide.

Section 4, Negotiable Instruments Act, defines a pro-note. S. 5 gives a definition of a bill of exchange. S. 6 contains the definition of a cheque. A definition of a "negotiable instrument" is given in S. 13. The doctrine of negotiability of instruments is discussed exhaustively in *Miller v. Race* from pages 533 to 540 in Smith's Leading Cases, Vol. 1 (Edn. 12). So far as the form of Ex. 5 is concerned, it is not a negotiable instrument. Even if debt be implied from the mere acknowledgment of receipt of money, the claim to that debt is an actionable claim. As I have already stated above, such a claim according to S. 130, T. P. Act, is transferable by an instrument in writing; and such transfer is subject to the equities provided in S. 132. Prior to 1882, the year in which the Transfer of Property Act first came into force, an actionable claim was not assignable. In England also, prior to the Judicature Act of 1873, an actionable claim was not assignable. Although reliance is placed on S. 137, T. P. Act, it is not shown by evidence that the equitable right given by S. 132 of the Act is taken away by reason of a custom to that effect. In order that a Court may give effect to a custom it must be shown that it has the following attributes : (1) reasonableness ; (2) certainty (enforceability and definiteness) ; (3) it should not offend against any provision of law ; (4) its immemorial usage can be proved by evidence by positive instances ; and (5) it should not be against public policy.

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[1] Hazarimul Shohanlal v. Satish Chandra, A I R 1919 Cal 546=48 I C 966=46 Cal 331 =22 C W N 1036.

[2] Jones & Co. v. Coventry, (1909) 2 K B 1029= 79 L J K B 41=101 L T 281=53 S J 734=25 T L R 736.

[3] Muhammad Akbar Khan v. Attar Singh, A I R 1936 P C 171=162 I C 454=63 I A 279=17 Lah 557 (P C).

In (1919) 35 T L R 530[4] it was held that three documents (insurance policy being one of them) must be delivered in C. I. F. contracts; and that a custom pleaded, though sound, that instead of insurance policy a certificate of insurance will do, is not to be accepted. If a custom is to have the force of law, if it is to upset the ordinary law, it must be established by instance that the custom had come into conflict with a state of things inconsistent with the incidents of the custom, and had nevertheless prevailed. In short the instances should be to shew that one party asserted rights under a custom; the other party resisted the right taking his stand on the provisions of law; and the former succeeded invariably. To establish a custom, it is not sufficient merely to prove that that is what is done constantly in the bazaar: *see* 16 All 221.[5] The English & Empire Digest, Vol. 17, Note 414, at p. 36, contains remarks from the judgment of Pollock, C. B., in (1848) 11 L T (OS) 28.[6] On behalf of the plaintiff one solitary instance has been brought on the record. A suit had been filed in the Small Cause Court, Karachi, No. 2924 of 1933, Chainrai Utamchand v. Pribhomal, in which it appears (from Ex. 15/3) that the Judge admitted the custom of transferring a pahunch. He based his judgment however on an interpretation of the Stamp Act in a sense contrary to that decided by me in Ex. 11. Moreover the question whether the instrument was in a form which by custom can acquire negotiability was not litigated in that case.

As against one instance quoted by the plaintiff of the custom set up in the present case being upheld by the Small Cause Court, it is pointed out that in a suit filed in this Court, Suit No. 296 of 1930,[7] the plaintiff was the ultimate transferee of a pahunch, relief was sought against defendant 1 in whose favour the pahunch was written, and defendant 2 who was transferee from defendant 1; the learned A. J. C. ordered that the first point to be determined was whether, assuming such a custom existed, the pahunch could acquire negotiability under the law; this was fully argued; judgment was reserved; but before the judgment could be delivered, the plaintiff stated: "we have settled; we withdraw the suit." This would show that the only occasion in this Court when there was a clash between a party setting up the custom and the party opposing it, the party setting up the custom withdrew the suit. That a custom must be established by many instances is also held in 29 Mad 24.[8] A few instances, or instances of recent date, may not show that a particular course of conduct has ripened into custom recognizable according to law : 18 C W N 55.[9] Custom must be fair and proper, and such as reasonable, honest and fairminded men would adopt : *see* (1916) 85 L J K B 1695.[10] That a custom must not be opposed to public policy is laid down in 38 Mad 1052.[11] If a custom is unreasonable the Court is entitled to find against it : *see* 33 All 257.[12] There was a custom of trade existing in the Bombay market whereby a cheque with the word 'bearer' struck out without the word 'order' being inserted was regarded as an order cheque; but the negotiation was held to offend against the provisions of the Negotiable Instruments Act; and the Bombay High Court refused

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4. Wilson, Holgate & Co. Ltd. v. Belgian Grain and Produce Co. Ltd., (1919) 35 T L R 530=89 L J K B 300=(1920) 2 K B 1=122 L T 524=25 Com Cas 1.
5. Rama Nand v. Surgiani, (1894) 16 All 221=1894 A W N 47.
6. Sturge v. Haldimant, (1848) 11 L T (O S) 28.
7. Firm of Verhomal Chatumal v. Firm of Mulchand Topandas, Suit No. 296 of 1930.
8. Abbayya v. Pappayya Rao Bahadur, (1906) 29 Mad 24=16 M L J 8.
9. Durga Charan v. Raghunath, (1914) 1 A I R Cal 289=20 I C 810=18 C W N 55=18 C L J 559.
10. Olympia Oil and Cake Co. v. Produce Brokers Co., (1916) 2 K B 296=85 L J K B 1695.
11. Kunhambi v. Kalanathar, (1915) 2 A I R Mad 711=24 I C 528=38 Mad 1052=27 M L J 156.
12. Shadi Lal v. Muhammad Ishaq, (1911) 33 All Mad 257=9 I C 198=8 A L J 10.

to give legal recognition to it : *vide* 21 Bom L R 1.[13] It was, by the by, as a result of this ruling that sub-s. (1) of S. 13, Negotiable Instruments Act, was amended in 1919. In 34 Bom 72,[14] Batchelor J. observes at p. 83 :

> It may be observed moreover that here in India we are governed by our Codes, which are subjected to fairly frequent amendment whenever amendment is considered to be required; so that there should be the less temptation to Judges to encroach upon the province of the Legislature. And I am aware of no authority for supposing that, side by side with the recognized law, there exists in India to-day a separate set of valid but somewhat undefined legal principles describable as the law merchant. I should rather suppose that those portions of the law merchant which the Indian Legislature has seen fit to accept are to be found embodied in such provisions of that Legislature as the Contract Act and the Negotiable Instruments Act ; and that it is not competent to us to leave this firm ground and explore the uncertain regions which are imperfectly defined by the phrase, the law merchant.

There can be no recognizable custom against any positive provision of law : *see* Halsbury's Laws of England, Vol. 10, page 42, para. 57. The remarks of Cranworth, L. C., in (1856) 106 R R 987,[15] at the bottom of p. 990 and top of page 991 are very pertinent. If the object of the custom pleaded in the case is to defraud Government of its legitimate revenue, such a custom cannot be recognized by a Court of law. Pessumal (Ex. 6), plaintiff's representative, was asked what the object in circulating pahunchs in the bazaar could possibly be if not to defraud public revenue. The witness could not give any satisfactory answer. There is no doubt that if a pahunch is not a bill of exchange payable on demand, it would require a stamp. That is why there was this false statement in the plaint that a pahunch is a bill of exchange payable on demand. The plaintiff's witness Pessumal was however constrained to admit that a pahunch is not payable on demand. No doubt he qualified the statement by saying that it was payable on demand if the drawer became insolvent. Beyond his word there is no evidence to establish even this qualification. Not a single instance is cited. If the pahunch is not a bill of exchange payable on demand, then it is perfectly obvious, and I have not the smallest doubt in my mind, that the object of the merchants resorting to circulation of pahunchs is no other than that they may escape payment of the requisite stamp duty. It is noteworthy that no bank accepts a pahunch. This is admitted by plaintiff's witness Pessumal.

It is also noteworthy that the custom as pleaded in para. 3 of the plaint is given a go-by to, and a different custom is set up. Not a witness on behalf of the plaintiff has said that a pahunch is negotiable as a bill of exchange. Not a witness on behalf of the plaintiff has said that a pahunch is payable on demand. In a case of this sort, a custom pleaded in the plaint cannot be easily allowed to be varied in evidence. Applying the law quoted above to the facts of the present case, I am emphatically of the opinion that the custom set up in the plaint, or even the subsequent variation of it sought to be established by evidence, is neither reasonable nor certain ; it offends against public policy and offends against the provisions of law with regard to stamp as I will show presently.

The plaintiff's witness Pessumal admits that the period after which a pahunch is payable is agreed upon beforehand, and yet it is not to be mentioned in the pahunch. There can be no other object in omitting this important fact from the recitals of the pahunch except to defraud the Government revenue, by making it pass off as an 'on demand' instrument. It has been held in A I R 1925 Bom 527[16] that in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence the Court will look at the document itself as it stands,' and not at any collateral circumstances which may be shown in evidence.

Mr. Khanchand for the plaintiff contends, as noticed above, that the pahunch (Ex. 5) which is the basis of this suit comes within the definition of a bill of exchange as given in S. 2 (2), Stamp Act, and as such the transfer of it by indorsement is exempt from stamp duty under Art. 62. But it cannot be said that the pahunch is a document entitling or purporting to entitle any person to payment by another person of, or to draw upon another person, any sum of money. If anything may be construed by implication, it would be a promise on the part of the drawer to pay the amount. The pahunch is clearly a receipt as admitted in the plaint itself; and a receipt is defined in S. 2 (23), Stamp Act. If it evidences acknowledgment of a debt it is an actionable claim. It will not do to transfer an actionable claim by a mere indorsement. Mr. Khanchand says that the definition of a bill of exchange as given in S. 2 (3), Stamp Act, is not exhaustive, and that therefore we have to draw upon the definition of the term in the Negotiable Instruments Act, S. 19. This is legal jugglery; because a bill of exchange in S. 19 is a bill of exchange as defined by S. 5, Negotiable Instruments Act; and a pahunch is admittedly not a bill of exchange as defined by S. 5, Negotiable Instruments Act. According to Art. 13, Stamp Act a bill of exchange as defined by S. 2 (2) and (3) of the Act requires a stamp duty when it is payable otherwise than on demand. The pahunch being admittedly payable otherwise than on demand requires a stamp as shown in the Article: and the stamp with penalty taken by the Court on Ex. 5 on the record was therefore perfectly justifiable. A bill of exchange on demand has to bear no stamp since 1927. A pahunch bears a one anna stamp. It is a fair inference that the merchants treat a pahunch as a receipt and call it a receipt; they do not treat it as a bill of exchange or a bill of exchange on demand.

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[13] **Dossabhai Hirchand v. Virchand Dalchharam, (1919) 6 A I R Bom 73=49 I C 388=21 Bom L R 1.**

[14] **Raghunathji Tarachand v. Bank of Bombay, (1909) 34 Bom 72=2 I C 173=11 Bom L R 255.**

[15] **Dixon v. Bovill, (1856) 2 Jur (N S) 933=3 Macq H L 1=4 W R 815=106 R R 987.**

[16] **Ramprasad Shivlal v. Srinivasa Balmukund, (1925) 12 A I R Bom 527=90 I C 685=27 Bom L R 1122.**

For the reasons foregoing, then, if the endorsement of the pahunch in suit confers any right to the plaintiff to sue upon it, it is merely as an actionable claim: and as such subject to the equities of S. 132, T. P. Act. On the date of Ex. 5 the defendants had with them pahunchs of Udhaomal Raichand for a much larger amount than that of Ex. 5. The defendant has explained under what circumstances Udhaomal Raichand had to pay the amount of the pahunch Ex. 5. Mr. Khanchand contends that this is a set off which cannot be claimed in this suit without the defendant paying the requisite court-fee. But the argument is untenable, because the defendant does not claim any decree against the plaintiff. Udhaomal Raichand could not have filed a suit on Ex. 5. Ex. 5 would have been merely a piece of evidence, if at all, to prove the loan. Claim to the debt is not on Ex. 5. It is founded on the loan. Therefore it is not necessary that the defendant should ask for a set off and pay the necessary court-fee on it. I shall now give my findings in juxtaposition with the issues framed in the case:

| *Issues.* | *Findings.* |
|---|---|
| 1. Did the defendants execute a pahunch? | In the affirmative. |
| 2. Is there a usage as alleged in para. 3 of the plaint according to which the said receipt is negotiable as a bill of exchange by indorsement? | The usage as pleaded in para. 3 of the plaint is not proved. Nor is the usage subsequently pleaded in another form proved. |
| 3. Can the document sued acquire negotiability by local usage? | In the negative. |
| 4. Was the said receipt payable on demand? | In the negative. |
| 5 (a). Was it indorsed and negotiated in plaintiff's favour? | It was indorsed in plaintiff's favour but not negotiable according to law. |
| 5 (b). Had the defendant notice of the same? If not, what is the effect? | In the negative. Finding unnecessary. |
| 6. Have the defendants receipts referred to in para. 3 of the plaint as alleged? If so, what is the effect? (Covers para. 10 of written statement) | In the affirmative. The effect is that the defendant can plead the equities in his favour under S. 132, T. P. Act. |
| 7. What amount, if any, is due to plaintiff? | Nil. |
| 8. General. | Suit dismissed with costs. |

S.C./R.K. *Suit dismissed.*

## * A. I. R. 1938 Sind 31

RUPCHAND BILARAM AG. J. C.
AND LOBO J.

*Mt. Nonibai w/o Mulchand*—Appellant.
v.
*Jethanand Sheroomal and others* —
Respondents.

First Appeal No. 22 of 1935, Decided on 4th October 1937.

**✲ Civil P. C. (1908), O. 21, Rr. 18 and 19—Set-off — Rr. 18 and 19 are not exhaustive—Court has inherent jurisdiction to allow set-off of claims arising at different stages of same proceeding and even if such claims are barred by limitation.**

Rules 18 and 19 of O. 21 do not exhaust the cases in which set-off may be allowed in execution proceedings. It is now well established that apart from Rr. 18 and 19 of O. 21, the Court has inherent jurisdiction on equitable principles to allow a set-off of claims arising at different stages in the same suit or proceeding and this even if the right to recover the claim sought to be set-off is barred by limitation. [P 32 C 1]

A final decree in a partition suit entitled *A* to recover a certain sum from *B*. In the appeals arising out of the same suit and the same proceeding *B* was awarded costs against *A*, an amount larger than that recoverable by *A* against *B* in the final decree for partition. *B* had not executed his decree for costs. In an application to execute the decree obtained by *A*:

*Held* that *B* was entitled to set-off against his claim of costs against *A*, the latter's claim against *B*: *A I R 1917 Pat 259*; *9 W R 590*; *A I R 1935 Cal 225 and A I R 1936 Mad 626, Rel. on.* [P 32 C 2]

Srikishindas H. Lulla — *for Appellant.*
Assudomal Rewachand—*for Respdts.*

**Lobo J.**—This is an appeal arising out of execution proceedings in Suit No. 26 of 1917 of the First Class Civil Court, Shikarpur. The facts connected with this matter are these. Gulabrai and Jethanand were two brothers. Gulabrai instituted a suit against his brother for partition of joint family property. In this suit Jethanand pleaded that there had been a prior partition. The Court which tried the suit upheld this contention but allowed the suit to proceed on the basis of a suit for partition of the property of co-owners. Gulabrai failed to prosecute the proceedings on this basis and the suit was accordingly ordered to be dismissed. Gulabrai filed two appeals in this Court against the decision of the trial Court, being First Appeals Nos. 37 and 38 of 1919. In these appeals Gulabrai succeeded and the decree of the trial Court was vacated. The finding in favour of a prior partition between Gulabrai and Jethanand was negatived by the High Court and Jethanand was ordered to pay all the costs throughout. Meanwhile Gulabrai had mortgaged his undivided moiety of the property in dispute to the present appellant Nonibai. Nonibai filed a suit on the mortgage being Suit No. 185 of 1925. This suit was decreed and the mortgage upheld. In execution subject to equities in favour of Jethanand the property was ordered to be sold and it was purchased by the appellant.

Now, in the proceedings before the Commissioner in the partition suit after the High Court had vacated the preliminary decree and a fresh preliminary decree had been passed, Jethanand was given a money decree against Gulabrai for a sum of about Rs. 628-12-0 and this sum was made a charge upon the immovable property allotted to Gulabrai in the partition. After the final decree, for the recovery of the sum of Rs. 628-12-0, Jethanand filed an execution application praying for the sale of the half share of the property mortgaged with the appellant and subsequently purchased by her. Gulabrai in the meanwhile had been adjudicated insolvent. Jethanand's execution application was opposed by the appellant on the ground that no execution could issue at the instance of Jethanand for this money and no liability attached to the property awarded to Gulabrai in partition and purchased by the appellant, because the costs awarded to Gulabrai by the Court of the Judicial Commissioner of Sind in the appeals from the original preliminary decree passed by the trial Court in the partition suit were larger in amount than the amount which Jethanand was claiming against Gulabrai under the final decree and the Court was bound to record satisfaction of the smaller sum setting off Jethanand's claim against Gulabrai against the larger sum recoverable by Gulabrai from Jethanand. These objections were raised by the appellant as well as by Gulabrai. While disposing of these objections the learned Judge has stated:

> Coming to the objections of plaintiff, he has not supplied in the first place the details of the sums due by defendant 1 on various decrees from time to time. His objection is too vague and cannot be entertained. But assuming that it can be entertained, he admits that these moneys were due before preliminary decree passed in 1927 and no execution application has been filed after it. Hence as the execution application of these sums is admittedly time barred now, O. 21, R. 19 is inapplicable. The learned pleader for plaintiff

relies on the ruling in 40 Bom 60,[1] but it is inapplicable because both the sums due were in existence at the same time which is not the case here for plaintiff's sums were due before the preliminary decree and defendant 1's sums were due in the final decree only. To invite the application of O. 21, R. 19, Civil P. C., it is necessary that both the sums due should be executable at the same time by the same decree. . . . . Objections are therefore overruled. Notices under O. 21, R. 66, Civil P. C., to issue.

Against this order of the learned Judge the appellant has presented the present appeal. Jethanand and Gulabrai in the appeal are respondents 1 and 7. We are of the opinion that the learned Judge has fallen into an error in holding that the amount claimed by Jethanand in the execution application before him could not in law be set off against the larger amount due by Jethanand to Gulabrai as costs awarded in First Appeals Nos. 37 and 38 of 1919 of the Court of the Judicial Commissioner of Sind, before the second preliminary decree in the partition suit. The learned Judge has failed to consider that Rr. 18 and 19 of O. 21, Civil P. C., do not exhaust the cases in which set-off may be allowed in execution proceedings. It is now well established that apart from Rr. 18 and 19 of O. 21, Civil P. C., the Court has inherent jurisdiction on equitable principles to allow a set-off of claims arising at different stages in the same suit or proceeding and this even if the right to recover the claim sought to be set off is barred by limitation. In 39 I C 888[2] it was held by a Bench of the Patna High Court that where several orders awarding costs are made in the same suit and in the same proceeding, they must be deemed to be incorporated with and to form part of the final decree, even though the prior orders awarding costs are of an interlocutory character. Therefore a party is entitled to set off costs awarded to him by one order in the same suit as against the costs awarded to another party by a subsequent order in that suit. The learned Judges relied upon the case in 9 W R 590.[3] Atkinson J. has further stated in his judgment:

> I do not think that the question of limitation will materially arise in this case, because according to the view we take, whether the order be barred by limitation or not is immaterial.

In the present case the final decree in the partition suit entitled Jethanand to recover a certain sum of money from Gulabrai. In the appeals to the High Court arising out of the same suit and the same proceeding Gulabrai had been awarded costs against Jethanand, an amount larger than that recoverable by Jethanand from Gulabrai in the final decree for partition. It is true Gulabrai had not executed his decree for costs, but these were awarded in the same proceedings and the case referred to above is clear authority for the proposition that Gulabrai was entitled to set off against his claim of costs against Jethanand the latter's claim against him.

The principle enunciated in the case reported in 39 I C 888[2] has been followed in other cases. In A I R 1935 Cal 225,[4] it was held that an executing Court can entertain a claim to set off (O. 21, R. 19) and although a particular case does not come within the strict terms of O. 21, R. 19, on general principles and in the exercise of its inherent power such a Court can give effect to such a claim. The same principle was adopted in 71 M L J 506[5] where the learned Judges held that there was a strong body of authority in favour of the view that the Court had inherent power to allow set-off apart from the provisions of O. 21, R. 19, Civil P. C.

The appellant in our opinion is therefore entitled to succeed. We accordingly allow the appeal and remand the case to the trial Court to determine on its merits the extent to which set-off should be allowed and otherwise to dispose of the matter on the merits. Costs to be costs in the cause.

S.C./R.K. *Appeal allowed.*

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[1] Madappa Ganapa v. Jaki Ghosal, (1915) 2 A I R Bom 226=30 I C 893=40 Bom 60=17 Bom L R 689.

[2] Ramu Sahu v. Thakur Dayal Rai, (1917) 4 A I R Pat 259=39 I C 888.

[3] Nubo Lall Khan v. Maharanee of Burdwan, (1868) 9 W R 590.

[4] Krishna Chandra v. Pabna Dhanabhandar Co., (1935) 22 A I R Cal 225=155 I C 991 = 62 Cal 298=39 C W N 106=60 C L J 281.

[5] Chinnamal v. Chidambara Kothanar, (1936) 23 A I R Mad 626 = 165 I C 484 = I L R (1937) Mad 59=71 M L J 506.

## A. I. R. 1938 Sind 33

RUPCHAND BILARAM AG. J. C. AND
DADIBA C. MEHTA J.

*Tolaram Ramdas* — Applicant.

v.

*Commissioner of Income-tax, Bombay Presidency and Aden* — Opponent.

Civil Revn. Appln. No. 159 of 1934, Decided on 18th October 1937.

**Income-tax Act (1922), S. 26 (2)—Successor in business — *B* transferring sole agency to *A*, sole agent in different area—Amount paid for goodwill — *A* held not successor of *B* under S. 26 (2), as consent of company was necessary for transfer.**

Firms *A* and *B* carried on business at different areas in their own names, part of their business being to represent solely a company manufacturing machines. *B* transferred the stock-in-trade relating to agency, hire purchase agreements about the same and the right to represent the company in his area to *A* subject to company's confirmation, which was subsequently obtained. *A* paid some amount as goodwill to *B*. After the transfer, both *A* and *B* continued to carry on trade in their own name, the only difference being *A* represented the machine manufacturing company in *B*'s area in addition to his own :

*Held* that *B* could not transfer the agency without the consent of the manufacturing company. The agreement of transfer really amounted to a relinquishment by *B* of their right to represent the manufacturing company as their sole agents in the particular area and the grant of a similar right by the manufacturing company to *A*. The goodwill that was transferred was the goodwill of the manufacturing company and not that of *B*. Therefore *A* was not the successor in business of *B* under S. 26 (2). [P 34 C 2; P 36 C 1, 2]

Dipchand Chandumal — *for Applicant.*

Partabrai D. Punwani — *for Opponent.*

**Rupchand Bilaram Ag. J. C.**—On 9th February 1937 this reference came up for consideration before us. On that day we resettled the issues and passed an order permitting the Income-tax Commissioner to submit his opinion on the issues framed by us. He has submitted his opinion and we have considered the same. We have also heard the arguments of both parties, and are now in a position to deal with the issues.

*Issue 1.* This issue is not so simple as it might at first sight appear to be. Both sides have advanced lengthy arguments before us. In order to fully appreciate these arguments, it is necessary to refer to some of the salient facts of the case and on which there is no dispute. It is common ground (1) that the assessees carried on business in their own name before the alleged transfer of the business in question was made to them and a part of that business was to sell sewing machines manufactured by Messrs. Pfaff and Company at Karachi and at Hyderabad in their capacity as their sole agents or distributors; (2) that the firm of Messrs. Dhanumal Wadhumal & Co. (hereinafter referred to as Messrs. Dhanumal) likewise carried on business in their own name and a part of their business was likewise to sell sewing machines manufactured by Messrs. Pfaff & Co., as their sole agents or distributors but at Sukkur, Larkana and Jacobabad, and not at Hyderabad or Karachi; (3) that the alleged transfer by Messrs. Dhanumal to the assessees was not of the whole business carried on by them; (4) that at first this alleged transfer referred to (a) the sale of the stock-in-trade consisting of machines manufactured by Messrs. Pfaff & Co. and spare parts of such machines at cost, (b) the right of Messrs. Dhanumal in certain hire and purchase agreements (referred to as leases) which they had secured in respect of Pfaff machines, and (c) the right acquired by them from Messrs. Pfaff & Co. to represent them as sole agents or distributors for the sale of such machines; (5) that by a subsequent agreement, the transfer of the rights of Messrs. Dhanumal in the hire and purchase agreements was by mutual consent cancelled; (6) that the right to represent Messrs. Pfaff & Co. as their sole agents was not transferable without their permission and this permission was duly obtained, and (7) that after the said transfer the assessees continued to carry on business in their own name and that Messrs. Dhanumal likewise continued to carry on business in their own name as before, the only difference being that in addition to representing Messrs. Pfaff & Co. as their sole agents at Karachi and Hyderabad, the assessees represented them as such agents at Sukkur, Larkana and Jacobabad as well, and that Messrs. Dhanumal discontinued to represent Messrs. Pfaff & Co. as sole agents in those places.

The right of the parties to represent Messrs. Pfaff & Co. as their sole agents or distributors has been referred to in the course of arguments as a monopoly. The terms on which the so-called monopoly was originally granted either to Messrs. Dhanumal or the assessees or the terms on which the transfer of the monopoly by Messrs. Dhanumal to the assessees was sanctioned are not on the record. But it appears that a certain sum of money which is referred to as royalty was payable by the selling agents to Messrs. Pfaff & Co. on each machine which was sold, and that this royalty was payable in addition to the invoiced cost of each machine. It is also necessary to refer in greater detail to the two agreements between Messrs. Dhanumal and the assessees.

The first agreement recites that the assessees agree (a) to buy the entire stock-in-trade of Pfaff machines and spare parts of such machines at cost, and (b) to take over the leases (hire and purchase agreements) for a sum which was the cost of the machines on the dates when they were given on hire less such amount as was received by Messrs. Dhanumal as hire with interest thereon at 6 per cent. per annum. The said agreement further recites (1) that the assessees agree to pay to Messrs. Pfaff & Co. Rs. 1750 being the amount of overdue royalty and to pay to Messrs. Dhanumal a further sum of Rs. 1750 for "goodwill in full and final settlement"; (2) that the payment of the above sums will not affect the right of Messrs. Dhanumal to recover the amount deposited by them with Messrs. Pfaff & Co.; or the amount due to them by way of credit notes, etc., and (3) that in consideration of the promises made by the assessees, Messrs. Dhanumal agree, subject to confirmation by Messrs. Pfaff & Co., to transfer to the assessees "the entire Pfaff's sole agency for Sukkur, Larkana and Jacobabad Districts." At the end of the agreement a proviso has been added to the effect that the assessees will pay the rent of the shops in which Messrs. Dhanumal carried on their business.

The only material alteration in the second agreement is that Messrs. Dhanumal retained their rights under the hire and purchase agreements, and that in consequence thereof, they gave credit to the assessees for Rs. 1400 with the result that in addition to the costs of the stock-in-trade purchased by them and Rs. 1750 to be paid by the assessees as overdue royalty they paid Rs. 300 more to Messrs. Dhanumal for such rights as were transferred to them. It is clear from the agreements referred to above that what was transferred to the assessees was the "entire Pfaff sole agency for Sukkur, Larkana and Jacobabad Districts," or, in other words, the right to represent the manufacturers as their sole agents for sale of their machines in the areas referred to above.

Now the right to represent Messrs. Pfaff & Co. as their sole agents was a right which could only be conferred by them and not by Messrs. Dhanumal. Reading the main agreement as a whole, and giving due regard to the relative positions of the parties and the fact that this agreement had to take effect only after its confirmation by Messrs. Pfaff & Co., it would appear that the agreement really amounted to a relinquishment by Messrs Dhanumal of their right to represent Messrs. Pfaff & Co. as their sole agents in the areas referred to above and the grant of a similar right by Messrs. Pfaff & Co. to the assessees.

Section 26 of our Act is based upon R. 11, Sch. D, of the English Income-tax Act, 1918. That Rule was amended in 1928 placing the successor of a business on the same footing as that of a person who had set up or commenced a new business. Our attention has been invited to rulings both under R. 11 of the English Act prior to its amendment and under S. 26 of our Act. But none of those rulings refers to a case like the present where the subject matter of transfer is the right to represent the manufacturer of a particular article in a specified area and where such transfer is of no effect without the consent of the manufacturer. We therefore propose to deal with only two of the cases cited before us which have a certain bearing upon the point in issue. These cases are (1899-1904) 4 Tax Cas 441[1] on which considerable reliance has been placed on behalf of the assessees, and (1920-1924) 8 Tax Cas 541,[2] which has been made so much of by the Advocate General. In the first case the sale of a "tramp" ship without more was held not to render the transferees to pay income-tax as successors in business of the transferors. In that case the Lord President has said at p. 444:

> .... In short there is a sale of a corporal moveable which happened to be a ship. Well it appears that this ship had not traded between any definite ports or upon any definite route and indeed it does not appear that she was engaged in any definite trade but it is said that she took whatever freights were likely to be remunerative; in short, she seems to have been what I think in shipping language is called a sort of tramp stea-

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[1] Watson v. Lothian, (1899-1904) 4 Tax Cas 441=4 F 795.

[2] Thomson and Balfour v. Inland Revenue (1920-1924) 8 Tax Cas 541=1924 S C 27.

> mer. It is said that no debts were taken over by the purchasers, nor were any books belonging to the old owners transferred to the possession of the present owners. The only thing transferred was the ship. It is not said that there were any introductions to the past customers, or that there was any transfer of any of the machinery which would enable the purchasers of such a corporal moveable to endeavour to continue this trade. If the books had been transferred, if a list of customers had been transferred, if there had been any introductions or recommendations given, a very different state of facts would have occurred .... Well then the question comes to be whether para. 4 of the case under the Act applies, and the first part of that deals with the computation of duty in case of a change of partners; that is to say where some change has taken place within a firm, or within a partnership, and that is treated as a continuing thing, notwithstanding the change in one or more partners and provisions are made for the assessment of such a case. That of course is not the case we have to deal with, which comes second in the fourth head, and that is—if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods, the duty payable shall be estimated in a particular way; the way there again being determined by a regard to the previous history of that trade, manufacture, adventure, or concern, all upon the view that what was bought was a continuing thing, a continuing adventure, with all its prospects, with all its trade connexions, and with all those things which result in the making of a profit. In short it is treated as a case analogous to a change in a partnership. Well, has anything of that kind happened here? It appears to me very clear that nothing of the kind has happened.

Now, this ruling establishes three broad propositions: (1) that the transfer by way of sale of a corporal moveable, in this case the stock-in-trade of Pfaff machines and the spare parts of such machines, by itself does not make the transferee a successor of the business of the transferor; (2) that in determining whether or not the transferee is a successor or not, the Court will have regard to the previous history of the particular trade, manufacture, adventure or concern in issue, and find out whether "what was bought was a continuing thing, a continuing adventure with all its prospects, with all its trade connexions and with all those things which result in the making of a profit", and (3) that the case of a successor to a business is analogous to a change in partnership. Neither the previous history of the trade in this case which was that of selling Pfaff machines as sole agents of Pfaff & Co., nor the subsequent events show that what was bought was a continuing adventure, nor is this a case analogous to a change in partnership. The transferees carried on business both before and after the transfer in their own name. They depended upon the will of the manufacturers to supply them with machines, to permit them to act as their agents and to sell the machines as such agents. They depended on all things which resulted in the making of a profit upon the goodwill of Messrs. Pfaff & Co. and not upon the good will of Messrs. Dhanumal. The case in 8 Tax Cas 541,[2] if carefully analysed, lays down no different proposition of law. It has been rightly pointed out in that case that "the question whether there is in any particular case a 'succession' or not is a question of fact." In that case, unlike the case in 4 Tax Cas 441,[1] the transferees were held to be successors but on facts which were quite different. In this case there was a transfer of a business properly so called and the facts relied upon in support of the decision appear with sufficient clearness in the following passage which is at page 549:

> In the present case one is met at the threshold of the enquiry with the fact that Messrs. Mickel's business was bought along with their mills, for the goodwill was expressly included in the subjects sold. Again there is the fact that as soon as the sale was concluded, circulars by both the purchaser and the seller were issued to the public announcing, on the part of the purchasers, that it was their intention to add to their own business Messrs. Mickel and Co.'s joinery business, which they describe as a speciality of Messrs. Mickel carried on by them for many years, and on the part of the sellers, that they hoped the good relations which had existed between their old customers and themselves would be extended to their 'successors', an unfortunate description of the appellants from their present point of view. The sellers added that, from their knowledge of the appellants, they could be relied upon to give their utmost attention to orders entrusted to them. These two facts are perhaps not conclusive, but they are very weighty, for it is impossible for the appellants to say that, if Messrs. Mickel's connexion and reputation had any value, they did not acquire the benefit of it. What they do say, and what is found in fact in the very clearly stated case before us, is this, that at the moment of their acquisition of Messrs. Mickel & Co.'s business there were no current orders; that they have not been able to identify any orders they have got since Whitsunday, 1919, as orders from Messrs. Mickel & Co.'s customers. Those are the two important matters of fact found, for the circumstance that they did not look at the books of Messrs. Mickel & Co. is nobody's fault but their own. They chose to buy the goodwill without making any enquiry into the records of the business and without getting even a list of customers. But the circumstance that no customer of Messrs. Mickel & Co. has been successfully traced and identified amongst those giving orders after Whitsunday 1919, does not carry the matter very far, and it is not inconsistent with the acquisition of a business or goodwill to say that owing to the very disturbed conditions of trade at the time of purchase there were in fact no current orders.

The above case no doubt establishes the point urged by the learned Advocate General that the fact whether the outstandings of a business are transferred or not is immaterial in determining whether there has been a 'succession' or not, and so far as the present case is concerned, that is all that can be said in favour of the Crown. All the other facts are different. So far as the intending purchasers of Messrs. Pfaff & Co. were concerned, the connexion and reputation of Messrs. Dhanumal had no value whatsoever ; such intending purchasers looked to the reputation of Messrs. Pfaff & Co. and were prepared to buy machines from any person whether it was Mr. A or Mr. B who was permitted by Messrs. Pfaff & Co. to sell their machines. The learned Advocate-General has invited our attention to the expression "goodwill" used by the Lord President in the above case, and has argued that as in the present case the assessees have purchased the goodwill of the business of Messrs. Dhanumal, they are successors of that business. But the mere use of the expression "goodwill" in the agreement is not sufficient to warrant our holding that Messrs. Dhanumal had any goodwill in the right which they purported to transfer to the assessees. It is perhaps as difficult to define "goodwill" as it is to define "successor in business". In (1896) A C 7[3] at p. 17 Lord Herschell has said :

> The question, what is meant by "goodwill" is, no doubt, a critical one. Sir George Jessel, discussing in (1880) 14 Ch D 596[4] the language of Vice-Chancellor Wood which I have just quoted, said: "Attracting customers to the business is a matter connected with the carrying of it on. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of goodwill". The present Master of the Rolls took much the same view as to what constitutes the goodwill of a business. I cannot myself doubt that they were right. It is the connexion thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has acquired a goodwill. The former trader has to seek out his customers from among the community as best he can. The latter has a custom ready made.

Applying this definition to the present case, the goodwill is, as already observed, that of Messrs. Pfaff & Co. and not of the person whom they appoint as their sole agent for any particular area. As said above, we have not got the terms on which Messrs. Dhanumal were appointed as agents of Messrs. Pfaff & Co. It is possible that they were appointed as such agents for a fixed period and that they were therefore entitled to a certain amount of compensation before their agency could be terminated and what is shown as the amount paid as goodwill perhaps represents such compensation. It is also possible that this amount which consists only of Rs. 1750, overdue royalty and Rs. 300 more paid to Messrs. Dhanumal represents the estimated difference between the sale price and cost price of machines and parts of machines which were in stock and were transferred to the assessees. Lastly, it is equally possible that Messrs. Pfaff & Co. wished that the widow of Dhanumal should receive a certain gratuity before her agency was terminated.

It is hardly necessary for us to speculate on the causes which led to the payment of the above sums. Reading each of the agreements as a whole, we are afraid we are not prepared to hold that on the facts of this case the assessees are the successors in business of Messrs. Dhanumal. We accordingly hold on Issue 1 against the Crown. Under the circumstances, there is no occasion for us to go into the other two issues except to observe in respect of Issue 2 that the Income-tax Commissioner has pointed out that as the assessees never asked for a summons against Messrs. Dhanumal for production of their books, this issue does not at all arise. The assessees are entitled to their costs which should be taxed in the usual way.

B.D./R.K. *Answered accordingly.*

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## * A. I. R. 1938 Sind 36
## FULL BENCH

RUPCHAND BILARAM AG. J. C.,
DADIBA C. MEHTA AND LOBO JJ.

*Gangabai w/o Jethanand*—Appellant.

v.

*Jaikishindas Malayomal*—Respondent.

F. B. Reference in Misc. Appeal No. 46 of 1936, Decided on 27th September 1937.

*** Civil P. C. (1908), O. 41, R. 1—Appeal against order in contentious proceeding grant-**

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[3] Anna Trego and William Wilson Smith v. George Stratford Hunt, (1896) A C 7=73 L T 514=65 L J Ch 1=44 W R 225.

[4] Ginesi v. Cooper, (1880) 14 Ch D 596=49 L J Ch 601=42 L T 751.

**ing probate or letters of administration with will annexed is incompetent without production of copy of formal decree — Form of decree should be one adopted by Calcutta High Court.**

An appeal filed against an order passed in a contentious proceeding is an appeal filed under O. 41, R. 1, and not under S. 104 of the Code. Hence an appeal against an order in a contentious proceeding granting probate or letters of administration with the will annexed is incompetent without the production of a copy of a formal decree prepared in terms of such order. Such contentious proceeding should be registered as a suit and the form in which a decree should be prepared in such a proceeding should be that adopted by the Calcutta High Court. [P 37 C 2]

Fatehchand Assudomal—for *Appellant*.

Khanchand Gopaldas, *Amicus Curiae*.

## OPINION

**Rupchand Bilaram Ag. J. C.**—This appeal is against the order passed by the learned Judicial Commissioner granting probate of a will to the respondent. The Registrar has raised a preliminary objection as to the admissibility of the appeal without production of the copy of the decree. The question came up for consideration before a Bench consisting of myself and my brother Havelivala on 18th February 1937. As I was then proceeding on leave, and the information called for by the Registrar of this Court from the Registrars of different High Courts as to the procedure adopted by those Courts in contentious proceedings of a like nature had not been received, I passed an order postponing the consideration of the point in issue until information was received and suggested the following two questions be referred to a Full Bench for consideration:

(1) Is an appeal against an order in a contentious proceeding granting probate or letters of administration with the will annexed incompetent without the production of a copy of a formal decree prepared in terms of such order?

(2) If so, should such proceeding be registered as a suit and in what form should a decree be prepared?

These questions have now come up for consideration before a Full Bench. From the replies which have been received from the Registrars of different High Courts, it appears that a decree is always prepared in a contentious proceeding and is filed along with the memo of appeal in the High Courts of Allahabad, Bombay, Calcutta, Madras, Patna and Rangoon. But no decree is prepared in the High Courts of Lahore and Nagpur where the practice prevailing is the same as in this Court. In my order formulating the points for determination by the Full Bench, I have discussed the authorities for and against the point involved in Issue 1 which is now before us. And all that might be added is that this point is one which is not free from doubt. But there is no getting over the fact that six principal High Courts in India referred to above have insisted upon a decree being prepared in a contentious proceeding falling within the purview of S. 295, Succession Act, and have insisted upon its production along with the memo of appeal. It would appear that all these High Courts have treated an appeal filed against an order passed in a contentious proceeding as an appeal filed under O. 41, R. 1, Civil P. C., and not under S. 104, Civil P. C. We think that the same view should be adopted by us.

We accordingly hold on Issue 1 in the affirmative and on Issue 2 that a contentious proceeding should be registered as a suit and that the form in which a decree should be prepared in such a proceeding should be that adopted by the Calcutta High Court. It will be necessary to frame a rule to that effect for the guidance of this Court and the Subordinate Courts, and this should be done. So far as this appeal is concerned, the appellant should now be called upon to produce a certified copy of the decree and on production of such copy, the appeal should be admitted to a regular hearing and disposed of according to law.

D.S./R.K. *Answer in affirmative.*

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## A. I. R. 1938 Sind 37

RUPCHAND BILARAM Ag. J. C.
AND LOBO J.

*Hukomal Lakhmichand* — Appellant.

v.

*Tarachand Topandas and others* — Respondents.

Second Appeal No. 6 of 1935, Decided on 14th September 1937, against decree of Asst. Judge, Sukkur, D/- 31st October 1934.

**Easements—Injunction—Disturbance complained of should be such as materially affects enjoyment of tenement.**

Even though a right of easement of light and air is established, a person is not entitled to an injunction unless the disturbance of his easement appreciably and materially affects his enjoyment of the building in respect of which the easement is claimed. [P 38 C 1]

Dipchand Chandumal — *for Appellant.*
Fatehchand Dharamdas — *for Respondents.*

**Lobo J.** — The respondents in this second appeal filed a suit against the appellant in the Court of the Joint Subordinate Judge, Shikarpur, for an injunction to restrain the appellant from erecting his building in such a manner as to close a window 3′ x 3′ in the western wall of their building. The respondents in that suit established the existence of this window for over the statutory period and their right of easement of light and air through the same. The learned Subordinate Judge however dismissed the suit holding on the evidence that the respondents were not entitled to the injunction sought as the closing of the window would not materially affect the comfort and enjoyment of the room in which it existed. He did not allow any damages on the ground that no damages had been claimed, and awarded costs against the respondents. On appeal by the respondents, the first Appellate Court reversed the decision of the Subordinate Judge holding:

> Once the plaintiff establishes that his windows are ancient and the defendant by the proposed building threatens to disturb his easement, he is entitled to an injunction with regard to the windows which have been held to be ancient.

This second appeal has been presented from this decision of the learned Assistant Judge, Sukkur. It is obvious that the proposition of law thus enunciated by the learned Assistant Judge is incorrect. Even though a right of easement of light and air such as was claimed in these proceedings is established, a plaintiff is not entitled to an injunction unless the disturbance of his easement appreciably and materially affects his enjoyment of the building in respect of which the easement is claimed. In the present case the judgment of the trial Court makes it clear that there was no material disturbance of the plaintiff's comfort and enjoyment of the building and that at the most he was entitled to nominal damages for the disturbance of an easement the right to which he had established. We cannot therefore uphold the judgment of the learned Assistant Judge which must accordingly be reversed. With regard to the judgment of the original Court too, the learned Judge was certainly not right in holding that no damages could be allowed because none had been claimed, and in mulcting the respondents with costs. As the damages however would be merely nominal, it is not worth while remanding the case for re-trial on that ground. We accordingly order that the suit do stand dismissed but without costs. Each party must bear his own costs throughout.

B.D./R.K. . *Appeal allowed.*

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## A. I. R. 1938 Sind 38

DADIBA C. MEHTA J.

*Firm Hiranand Lalchand* — Plaintiffs.

v.

*Firm Sardar Meharsingh Sadhusingh and others* — Defendants.

Suit No. 104 of 1934, Decided on 31st August 1937.

**(a) Trade Mark—Acquisition—Fraudulent user cannot give right in trade mark—Person imitating trade mark of others and causing his goods to pass off as those of others cannot prevent another person equally guilty like himself from so doing even if he was first in market with imitation.**

Even if an owner of a trade mark has abandoned or practically abandoned his rights to the trade mark, it does not give a person any exclusive right thereto simply because he was perhaps the first to rush into the market with an imitation of that trade mark. Where a person by imitating the trade mark of others has caused his goods to pass as those of others, he cannot be heard to say that he alone has a monopoly to imitate and deceive people. Even if he succeeds in proving that he was the first in the market with an imitation, and maintains that having established a reputation on that imitation he had a right to prevent others from taking advantage of his exertions, he cannot be given any protection in a Court of law. Even if user be established extending over a considerable period, it does not follow that a title to the trade mark is made out; for, if the user was fraudulent in its inception and is still calculated to deceive, the user gives no right: (*1884*) *27 Ch D 570*, *Rel. on.* [P 41 C 2; P 42 C 2]

**(b) Trade Mark—Infringement—Intention to deceive—Inference.**

Fraud is to be presumed where the similarity is close and remains unexplained. An intention to deceive may be inferred from the circumstances of the case, though no case of actual deception is proved: (*1904*) *21 R P C 722*, *Rel. on.* [P 43 C 1]

**(c) Trade Mark — Infringement—Damage, in order to support action for infringement of trade mark, must be attributable to the passing off of other goods as plaintiff's goods.**

Mere damage is insufficient to support an action on the infringement of trade mark. The damage must be attributable to the passing off of other goods as plaintiff's goods. There may be damage and yet there may be no passing off. Thus a suit cannot be entertained if it is brought by a person not entitled to an action to restrain a defendant from passing off goods as the goods of a third party.

He can bring the action only when the representation is that the goods are his goods: *(1879) 10 Ch D 436, Rel. on.* [P 43 C 2]

**(d) Trade Mark—Infringement—Colourable imitation—Matters to be considered stated.**

It is a question of fact in every case whether the defendant's mark is or is not a colourable imitation of the plaintiff's mark. The surrounding circumstances of each case will have to be considered. It is not only necessary to look at the difference or at the resemblance between two given marks, but it is necessary to compare the two marks as a whole and then come to a decision: *(1905) 22 R P C 607, Rel. on.* [P 43 C 2]

**(e) Trade Mark — Infringement—Question whether colourable imitation has or has not deceived anybody is to be decided with reference to ultimate purchaser—Non-deception of experts is immaterial.**

The question for decision as to whether an alleged colourable imitation has or has not deceived anybody is to be decided with reference to the ultimate purchaser. In passing off cases, the probability of misleading, not experts or persons who know the real facts, but ordinary or unwary customers, is the mischief to be guarded against. Non-deception of middlemen and vendors is immaterial. [P 44 C 1, 2]

Pahlajsing B. Advani — *for Plaintiffs.*

Kundanmal Dayaram — *for Defendants.*

**Judgment.**—This is a trade mark suit. The undisputed facts are that for quite a number of years, drills manufactured in Japan used to be imported into Karachi by some of the Japanese firms, bearing a trade mark consisting of three dogs enclosed in a triangle; that these drills were very popular and commanded an extensive sale not only in Sind but in the neighbouring provinces; that these drills were commonly known in the bazaar as the Japanese 'kute chhap'; that in or about 1928-29 a very heavy duty was imposed on Japanese goods imported into India, and consequently the Japanese drill trade suffered a considerable set back; that it then occurred to the plaintiff firm of Hiranand Lalchand to purchase drills manufactured in Bombay Mills and to stamp them in Karachi with three dogs in a triangle giving to the three different qualities put by them on the market the distinguishing letters NNNNN, AAAAA, JJJJJ, the last of the three being registered in Karachi in November 1929, the first two being registered at Shikarpur in 1931; that within a short time, others came into the field with their drills marked with three dogs in a triangle; that in 1933 the plaintiffs launched a criminal prosecution in the Court of the First Class Magistrate at Kohat against defendants 1, 2 and 4; that the said complaint was dismissed; that on revision the Court of Session upheld the dismissal and referred the plaintiffs to the Civil Court; and that therefore the plaintiff firm has had to file the present suit. The plaintiffs' case in short is that they have acquired proprietary rights in the three trade marks registered in Shikarpur and Karachi; and that as drills bearing these marks have built up a reputation in the market, the defendants who are selling drills with a colourable imitation of the plaintiffs' trade marks should be stopped from doing so, and the plaintiffs should be awarded the usual reliefs on account of the alleged infringement.

Of the defendants, the principal contestant is defendant 4. He maintains that the plaintiff firm has not acquired any proprietary rights in the dog trade mark which is commonly known as 'kute chhap'; that the plaintiffs firm has imitated the Japanese trade mark and as such cannot claim any originality; that the defendant has since 1931, after registering his trade mark, sold drills with a trade mark consisting of a triangle in which there are to be found a lion, a dog and a bear with the words 'chuga', 'jaman' and 'India'; that the defendant's drills have also acquired a wide reputation; and that the plaintiff firm has therefore no cause of action whatsoever. In substance the defence is a demurrer to the charge of imitation; and without prejudice a challenge to the plaintiff firm that they themselves being deceivers cannot have remedy against others. Originally the following issues were framed by Havelivala A. J. C. on 29th March 1935:

1. Have the plaintiffs been affixing their alleged marks and using the alleged get up in suit on drills since 1928 as alleged? 2. Have they acquired proprietary rights in them as their trade mark and get-up? 3. Since when have defendant 4 and/or any of the defendant or defendants, if any, been using their alleged trade mark and get-up? Have they acquired any rights thereto? 4. Are the defendants' alleged trade mark and get-up similar to and/or a colourable imitation of the plaintiffs' alleged trade mark and get-up? 5. Are the defendants, and if so, who of them, are acting in collusion in infringing the plaintiffs' trade mark and/or get-up as alleged by them? 6. Is 'kute' mark in suit common to trade as alleged in para. 9 (c) of the W. S.; if so, what is the consequence? 7. What relief, if any, and against whom are the plaintiffs entitled to? 8. General.

After the evidence of Balram, one of the plaintiffs, was partly recorded, it appeared from the cross-examination of the witness that perhaps the main plank of the defence was that the plaintiff firm having imitated the Japanese trade mark of the three dogs in a triangle and having themselves thus practised a deception on the market, were not entitled to bring this suit on the pretence that they were the originators of the 'kute chaap' trade mark. Rupchand A. J. C. consequently framed the following additional issues and directed that out of these additional issues, Issue 1, second part of Issue 2 and Issues 3 and 5 should be heard as preliminary issues :

1. Are the plaintiffs disentitled to relief on grounds alleged in their new plea by the defendants ? 2 Have the plaintiffs been using their marks openly, to the knowledge of Japanese manufacturers, and/or their agents, and have the latter abandoned their alleged mark and/or acquiesced in the use by plaintiffs of their mark ? If so, what is the effect ? 3. Is there a distinction between Japanese and Indian made goods and marks in question thereon ? Has there been a deception and is deception likely ? 4. Have the plaintiffs built up a reputation for their marks as alleged ? If so, what is the effect ? 5. Have the defendants imitated the Japanese marks or plaintiffs' marks and in either case, what is the effect ?

It is on these additional issues that evidence has now been recorded by me and I have to give my findings thereon. Although Balram (Ex. 9), a member of the plaintiff firm, made a disingenuous effort to prove that the three dogs mark on the plaintiffs' drills was not an imitation of the Japanese but a creation from out of the imagination of his father, he had very soon to give up the attempt when asked to show if there was any difference whatsoever between the dogs in the two trade marks. He had evidently to admit that all the three different dogs on his drills were perfect reproductions of the three Japanese dogs. There is no doubt whatsoever in my mind that taking advantage of the fact that owing to the imposition of very heavy duties the Japanese drills could not compete with the Indian made drills, the plaintiff-firm immediately adopted the 'kute chhaap' and wanted to pass off some of their drills as if they were the well known Japanese drills. Balram has had to admit that prior to 1928 his firm used to sell drills with diverse trade marks. He has also had to admit that when there was less duty on the 'kute chhaap' drills of the Japanese, they were more popular than any of the drills put on the market by the plaintiffs. If the drills that the plaintiff-firm was selling prior to 1928 has acquired as great a reputation in the Indian market and if they were superior to the Japanese drills, the plaintiff-firm would never have thought of imitating the Japanese trade mark. That is perfectly obvious. In fact if the Japanese drill was not so well known or if it was inferior in quality, the plaintiff-firm would on the contrary have taken pains to see that their own drills were not mistaken for the Japanese drills. It is however conceded, as observed above, that the Japanese drills were more popular than any of the drills of the plaintiffs. The samples of the drills of the plaintiffs are Exs. 9/1, 9/2 and 9/3. If the cloth of these samples be compared with the texture of the Japanese drill, a sample of which is Ex. 9/87, it can easily be seen that the Japanese drill is of a superior kind. Thus then there can be no doubt that the plaintiffs purloined the 'kute chhaap' trade mark of the Japanese and rushed into the market as soon as the Japanese trade in drills was paralysed by the almost prohibitive duty, in order to push the sales of their own drills into an unsuspecting market.

According to witness Tikamdas (Ex. 15) who is head clerk of the Japan Cotton Trading Co., the duty on a piece of drill the price of which formerly used to be Rs. 7.2.0 is something like Rs. 4.13.0—70 per cent. more. There is considerable evidence on the record to suggest that it does not now pay the Japanese firms to compete with the drills manufactured in India. An almost negligible quantity of Japan drills is sold locally, the rest is imported in India to be railed direct to Afghanistan. For the plaintiffs it is contended that there has been no deception by the plaintiffs, because underneath the 'kuta' trade mark they have printed in bold types that their drills have been manufactured in India, and also because on their three different qualities they have additional prints NNNNN, AAAAA, JJJJJ. But this legend is in English, and it is perfectly obvious that the illiterate people out in the mofussil would not be able to read it or understand its import.

Three local brokers in piecegoods have been examined on behalf of the plaintiffs. They are Vishnomal, (Ex. 10), Dewanmal, (Ex. 11) and Tecomal (Ex. 12). They have glibly told us that the plaintiffs' drills are not likely to pass off as Japanese drills because the 'kute chaap' on the plaintiffs' drills is known as the 'nakal' (imitation), whereas the 'kute chhaap' on the Japanese drills is known as the 'asal' (original). It may be that so far as the brokers are concerned, who deal with wholesale dealers, they can differentiate between the Japanese drills and the plaintiffs' drills because they get orders for both. The question is whether the illiterate unwary customer is or is not likely to be deluded into the belief that when he buys any 'kute chaap' drill it is the one which has behind it a good reputation of years and years built up by the Japanese. On this point, apart from the defence evidence, there is material enough in the evidence of the two brokers examined by the plaintiffs on commission, which would go to show that to the individual illiterate purchaser the dog is the decisive factor. It also stands to common sense that no shop-keeper will warn the unwary purchaser that the plaintiffs' drills are the 'nakal' and not the 'asal'. Deception is therefore quite likely.

It is contended by Mr. Pahlajsing on behalf of the plaintiffs that even if the Court comes to the conclusion that the three trade marks on the plaintiffs' drills Exs. 9/1, 9/2 and 9/3 are imitation of the Japanese dogs, and even if the Court comes to the conclusion that mistakes by the illiterate unwary purchasers are not unlikely, still the plaintiffs having taken up a trade mark which has fallen into desuetude, and the Japanese firms having acquiesced in the use thereof by the plaintiffs, there can be a trade right in the marks, and no one should be permitted to infringe that right. From the evidence it appears however that soon after the plaintiffs came out with their drills with the three dogs in a triangle, the plaintiffs were served with a notice by three of the Japanese firms trading in Japanese drills; but the correspondence shows that no definite action was taken by the Japanese firms. It is contended on behalf of the defendant, and some evidence has been led in support of it, that the plaintiffs were constantly suing for peace; and that in April of this year the plaintiffs were once again served with a notice through Messrs. Dipchand and Co. to desist from imitating the Japanese trade mark. From the evidence of Mr. Dipchand (Ex. 16), it appears that after the notice, Mr. Hassomal, advocate for the plaintiffs, approached him for some kind of settlement through arbitration; but that somehow the negotiations fell through. It is clear that the Japanese firms did protest against the violation of their trade right; but perhaps they thought that it was not worth while bringing to book all the imitators, the number of which admittedly ran into dozens. It cannot therefore be said that the Japanese firms had acquiesced in the use by the plaintiff-firm of the three dogs chhaap on drills, Exs. 9/1, 9/2 and 9/3. Nor can it be said that the Japanese firms had abandoned the dogs chhaap trade mark, because it is in evidence — and I consider it very reliable—that the Japanese drills are still on the market. In fact the plaintiff Balram himself admits that the Japanese 'kute chaap' drills are still available in open market. He however maintains that they are not sold locally but transported to Afghanistan. Balram has struck me as a thoroughly unreliable witness. In fact he had to be warned several times to give direct replies; because every time that he was asked an inconvenient question he would first give an evasive reply. There is no evidence that the Japanese drills cannot be obtained anywhere in India for local consumption. Under the circumstances, particularly in view of the action such as has been taken by the Japanese firms, I am definitely of the opinion that till now the 'kute chaap' trade mark has not been abandoned by the Japanese as urged on behalf of the plaintiff.

Assuming for the sake of argument that the Japanese firms have abandoned or practically abandoned their rights to the 'kute chhaap' trade mark, it does not give the plaintiff any exclusive right thereto simply because he was perhaps the first to rush into the market with an imitation of that trade mark. As a matter of fact the plaintiffs registered two of their designs in 1931. The defendant has also registered his trade mark in 1931. Even if we assume that the plaintiffs sold in large quantities and defendant's sales were not so large, that makes no difference. Probably it depends on the facility for finance.

The next question which may be considered, although it is unnecessary to do so, is whether the defendants are also imitators of the Japanese 'kute chhaap' or whether they have a different kind of chaap. The defendant has registered his trade mark as a triangle enclosing a lion, a dog and a bear. The sample of defendants' drill is Ex. 9/8. There is no doubt that the first animal does very much look like a lion. But the other two animals are imitations of two out of the three dogs of the Japanese drills. The pictorial effect however is an imitation of the Japanese dogs although, less so, than the plaintiffs' design. I am of opinion that the unwary illiterate purchaser is likely to be deceived into believing that the defendants' drills are the original Japanese drills bearing three dogs trade mark. Thus then the plaintiff firm as well as the defendants are in pari delicto. The question is whether under these circumstances a Court of law would be prepared to give protection to one against the other. I shall presently review the law on the subject of trade mark rights. I am emphatically of the opinion that the plaintiff firm not having established an exclusive right to the use of the three dogs design cannot get the help of the Court to stop others from the same kind of imitation. The plaintiffs cannot claim that they have a monopoly for deceiving public.

I shall now discuss the law applicable to the facts of this case. The basic idea of a trade mark right is that a person having originated a design on any vendible article and having established a reputation in the market on it, has a right to prevent others from copying the idea and taking advantage of the good name made through the efforts of the originator. It is also for the protection of the unwary illiterate purchasers of which there are legions in a country like India that the Court will intervene. As James L. J. has said in (1880) 18 Ch D 395[1] at p. 412:

> No man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade mark or trade designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of copyright, or in the nature of a patent in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods; always subject to this, that he must not, as I said, make directly or through the medium of another person, a false representation that his goods are the goods of another person.

In England there is a statute law for registration of trade marks. There is no such law in India. The Calcutta High Court has observed in 19 C W N 1[2]:

> In India the law of trade marks is not governed by statute and there is no statutory system of registration. The rights and liabilities in connexion with trade marks are determined by reference to the common law of England.

The law therefore stands as it was in England prior to the Trade Marks Act of 1875. In *Imperial Tobacco Co. of India Ltd. v. Albert Bonnan and Bonnan & Co.*[3] the Privy Council rules that the ordinary principles of jurisprudence with regard to trade marks and those forbidding the passing off of goods apply to India. The Courts in India have as closely as possible followed the English law with regard to trade marks. The plaintiffs' goods having masqueraded in the market as if they were drills of the Japanese "kute chaap", the plaintiffs cannot be heard to say that they alone have a monopoly to imitate the chaap and deceive people. Even if a plaintiff were to succeed in proving that he was the first in the market with an imitation and maintain that having established a reputation on that imitation he had a right to prevent others from taking advantage of his exertions, he cannot be given any protection in a Court of law. (1884) 27 Ch D 570[4] is an authority for the proposition that even if user be established extending over a considerable period, it does not follow that a title to the trade mark is made out; for, if the user was fraudulent in its inception and is still calculated to deceive, the user gives no right.

The acquisition of title by wrongful user cannot be recognized inasmuch as trade mark right is an equitable right. The plaintiff who seeks the intervention of the Court must come with clean hands. A trade mark is a mode of warranting the origin of goods to which it is attached, or rather their trade association, and consequently it is of the essence of the trade mark that its representation should be true. In the present case, the circumstances under which the plaintiff chose to adopt the "kute chhaap" clearly go to show that his object was to pass off his drills as Japanese drills and thus deceive the public. His user of the imitation gives him no better right as against persons equally guilty like himself. As to how property in a trade mark can be acquired, Lord Westbury, L. C., has said in (1864) 4 De G J & S 380[5] at p. 384:

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[1] **Singer Manufacturing Co. v. Loog, (1880) 18 Ch D 395.**

[2] **Hannah v. Jagannath & Co., (1915) 2 A I R Cal 520=27 I C 483=42 Cal 262=19 C W N 1.**

[3] **(1924) 11 A I R P C 187=80 I C 1013=51 I A 269=51 Cal 892 (P C).**

[4] **In re Heaton's Trade Mark, (1884) 27 Ch D 570 = 53 L J Ch 959=51 L T 220=32 W R 951.**

> The essential ingredients for constituting an infringement of trade right, probably would be found to be no other than these: first, that the mark has been applied by the plaintiffs properly (that is to say) that they have not copied any other person's mark; and that the mark does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing off in the market other articles of a similar description.

In (1842) 49 E R 749[6] it was held that:

> The ground on which the Court protects trade mark is that it will not permit a party to sell his own goods as the goods of another; a party will not therefore be allowed to use names, marks, letters, or other indiciae by which he may pass off his own goods to purchasers as the manufacture of another person. If a plaintiff coming for an injunction in such a case appears to have been guilty of misrepresentations to the public, the Court will not interfere in the first instance.

Para. 1357 of Halsbury's Laws of England, Vol. 27 at p. 774, reads thus:

> Neither law nor equity assists a wholly fraudulent trade, since both adopt the maxim *ex turpi causa non oritur actio*; and if it is shown that the plaintiff's trade is of this nature he cannot succeed in any action for the use of his trade name or trade mark, or for passing off.

Fraud is to be presumed where the similarity is close and remains unexplained. An intention to deceive may be inferred from the circumstances of the case, though no case of actual deception is proved: (1904) 21 R P C 722.[7] As a matter of fact, in the present case, if there was any deception on the part of the defendant it was not to pass off his goods as those of the plaintiffs, but as those of the Japanese. Consequently the plaintiff has no grievance. Mere damage is insufficient to support an action of the type we are concerned with. The damage must be attributable to the passing off of other goods as plaintiff's goods. There may be damage and yet there may be no passing off. Thus a suit cannot be entertained if it is brought by a person not entitled to an action to restrain a defendant from passing off as the goods of a third party. He can bring the action only when the representation is that the goods are his goods. As James L. J. said in (1879) 10 Ch D 436[8]:

> The Court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion by somebody else. It does not interfere to prevent the world outside from being misled into anything.

The spurious mark complained of may be either an exact or substantial copy of the genuine trade mark, e. g. as in (1872) 7 Ch 611[9] and (1852) 6 Cox C C 380[10]; or an imitation done in a manner which is likely to cause the spurious mark to be mistaken for the genuine one. The plaintiff firm in the present case cannot be heard to urge that because the three dogs in their trade mark are not printed in the same order in which the Japanese dogs are printed that therefore there is no imitation of Japanese.

> What degree of resemblance is necessary, is, from the nature of things, a matter incapable of definition *a priori*. All that Courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival as that ordinary purchasers purchasing with ordinary caution are likely to be misled: per Cranworth L. C. in (1866) 1 Ch 192.[11]

It is a question of fact in every case whether the defendant's mark is or is not a colourable imitation of the plaintiff's mark. The surrounding circumstances of each case will have to be considered. In the determination of the question whether there is or is not colourable imitation, it is not only necessary to look at the difference or at the resemblance between two given marks, but it is necessary to compare the two marks as a whole and then come to a decision: (1905) 22 R P C 607. Where the name of the manufacturer is always used along with a trade name or mark on his goods, it may be difficult to show that the trade name or mark by itself distinguishes his goods. The cases in (1872) 5 H L 508[12], (1882) 7 A C 219[13],

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[5] McAndrew v. Basset, (1864) 4 De G J & S 380 =4 N R 12=33 L J Ch 561=12 W R 777 = 10 Jur (N S) 550=10 L T 442.

[6] Perry v. Truefitt, (1842) 6 Beav 66=63 E R 11 =49 E R 749.

[7] County Chemical Co. Ltd. v. Frankenburg, (1904) 21 R P C 722.

[8] Levy v. Walker, (1879) 10 Ch D 436=48 L J Ch 273=39 L T 654=27 W R 370.

[9] Ford v. Foster, (1872) 7 Ch 611=41 L J Ch 682=27 L T 219=20 W R 818.

[10] Reg. v. Dundas, (1852) 6 Cox C C 380.

[11] Seixo v. Provezende, (1866) 1 Ch 192=12 Jur (N S) 215=14 L T 314=14 W R 357.

[12] Glenfield Starch; Wotherspoon v. Currie, (1872) 5 H L 508=42 L J Ch 130=27 L T 393.

[13] Elephants Jhonston v. Orr Ewing, (1882) 7 A C 219=51 L J Ch 797=46 L T 216=30 W R 417.

(1897) A C 710,[14] (1907) 24 R P C 697[15] and (1892) 2 Q B 639[16] are well-known instances of this type, where notwithstanding the fact that the defendant's name appeared prominently along with the trade name or mark on the goods, an action for passing off was successful. The question for decision as to whether an alleged colourable imitation has or has not deceived anybody is to be decided with reference to the ultimate purchaser. It is now well settled that in passing off cases

> the probability of misleading, not experts or persons who know the real facts, but ordinary or unwary customers, is the mischief to be guarded against: Lindley L. J. in (1895) 2 Ch D 54[17] at page 68.

Whatever may be the view as regards the English public, the conditions in India are to be considered by Indian Courts. In view of the fact that a large majority of the people in India are illiterate, the Indian Courts have often emphasised that the probable purchaser should be regarded as the incautious, ignorant or unwary person. Quite a number of Indian cases may be cited in support of the proposition. It is also well settled that non-deception of middlemen and vendors is immaterial; and that it is the ultimate purchaser who has to be considered in deciding whether the defendant's mark or as in this case the plaintiff's mark is calculated to deceive. Evidence of so called experts, who say whether in their opinion a customer is or is not likely to be deceived, is not admissible. This is a settled rule since the decision of the House of Lords in (1899) A C 83.[18] It is for the Court to decide whether deception is likely or not. On the facts and law as found above my decision on the preliminary issues is as follows:

| *Issues.* | *Findings.* |
|---|---|
| 1. Are the plaintiffs disentitled to relief on grounds alleged in their new plea by the defendants? | In the affirmative. |
| 2. Have the plaintiffs been using their marks openly, to the knowledge of the Japanese manufacturers and/or their agents, and have the latter abandoned their alleged mark and/or acquiesced in the use by the plaintiffs of their marks? If so, what is the effect? | On the second part my finding is that the Japanese manufacturers and/or their agents have not abandoned their trade mark and have not acquiesced in the use by the plaintiffs of their marks. The effect is that the plaintiff firm cannot, having come to Court with unclean hands, claim protection. |
| 3. Is there a distinction between Japanese and Indian made goods and marks in question thereon? Has there been a deception and is deception likely? | The first part in the negative; and the second part in the affirmative. |
| 5. Have the defendants imitated the Japanese marks or plaintiffs' marks, and in either case, what is the effect? | The defendants have imitated the Japanese marks with a slight alteration and are in the same position as the plaintiffs. |

In the result, the suit of the plaintiffs must be dismissed. The only question that remains to be considered is, whether the defendants are entitled to their costs. It is urged on behalf of the defendants that at any rate defendants 1, 2 and 3 have been unnecessarily dragged to Court and harassed for a number of years. Not only have the plaintiffs come to Court with an untenable claim but they have obtained an injunction preventing the defendants from selling their drills with the dog chhaap. On behalf of the plaintiffs it is urged that no evidence has been led on the main issue and therefore the participation of defendants 1, 2 and 3 in the infringement alleged by the plaintiffs has not been proved. Mr. Pahlajsing relies on a decision in (1875) 10 Ch A 276.[19] The facts of that case are not entirely on all fours with the present. In the present case the plaintiffs knew very well that they were the imitators of an emblem which had already acquired reputation in the market without any exertions on their part; and yet simply because the idea struck them first to adopt the dog chhaap of the Japanese for Indian made drills, they have started a campaign of terrorisation, and got several timid imitators to give up or vary their dog chaaps. I fail to see why in the ordinary course costs should not follow the event. I therefore dismiss the suit with costs; the defendants will be entitled to one set of costs.

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[14] Yorkshire Relish, Birmingham Vinegar Brewery Co. Ltd. v. Powell, (1897) A C 710=66 L J Ch 763=76 L T 792.

[15] Cat and Boord & Son v. Thom and Cameron Ltd., (1907) S C 1326=24 R P C 697.

[16] Camel Hair Belting (Reddaway & Co.) v. Bentham Hemp Spinning Co., (1892) 2 Q B 639=67 L T 801.

[17] Powell v. Birmingham Vinegar Brewery Co. Ltd., (1895) 2 Ch D 54.

[18] North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co. L. R., (1899) A C 83=68 L J Ch 74=79 L T 645=15 T L R 110.

[19] Estcourt v. Estcourt Hop Essence Co., (1875) 10 Ch A 276=44 L J Ch 223=32 L T 80=23 W R 313.

D.S./R.K. *Suit dismissed.*

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## A. I. R. 1938 Sind 45

RUPCHAND BILARAM AG. J. C.
AND LOBO J.

*Harnamsing Jawhersing*—Applicant.

v.

*Parsram Lalchand* — Opponent.

Civil Revision Appln. No. 154 of 1934, Decided on 10th September 1937, from judgment of Judge, Small Cause Court, D/- 7th August 1935.

**Arbitration — Architect settling dispute between owner and contractor is arbitrator and is subject to Arbitration Act.**

When a member of the firm of architects is holding an inquiry as to the cost of certain work done in case of a dispute between the owner and contractor, he acts in his capacity as an arbitrator and is subject to the provisions of the Arbitration Act. [P 46 C 1]

Dipchand Chandumal — *for Applicant.*
Srikishendas H. Lulla — *for Opponent.*

**Rupchand Bilaram Ag. J. C.**—This revision application arises out of a suit filed by the plaintiff-applicant against the defendant-opponent for recovery of a sum of Rs. 2000 said to be due to him in respect of a building contract. The learned Judge of the Court of Small Causes has dismissed the plaintiff's suit. He has now come to us in revision. Cls. 3 and 6 of the agreement between the parties require consideration. The pertinent parts of these clauses are as follows:

> Clause 3 . . . . Should any of the materials used in the workmanship appear to the architects or owner to be inferior, the contractor shall be bound if asked by them to remove, alter, rectify or replace the same at contractor's risk and cost and in this respect the decision of the architect shall be final and binding against the contractor. Should he fail to do so, the owner or the architects shall be at full liberty to get the same done at the contractor's risk and cost.

And Clause 6 reads:

> In all disputes of whatever nature arising out of this contract, the decision of the architects should be final and binding against both the parties.

It appears that the architects employed by the defendant were not satisfied with the work carried on by the plaintiff. They asked him to re-do certain work, particularly to repaint all the doors and windows. The plaintiff refused to do so and the work was carried out by the defendant at the risk and cost of the plaintiff. The plaintiff had also not supplied certain articles. These articles were likewise supplied on account of the plaintiff. The architects prepared their final bill which shows that according to the contract rate a sum of Rs. 8888-13.0 was due to the plaintiff, and from this sum they deducted Rupees 667-11-0 for re doing bad work and supplying articles which had not been supplied by the plaintiff. The chief items are: (a) removing bad paint and re-doing the same for all the upper floors woodwork at the rate of Rs. 4 per 100 square feet: Rs. 573; (b) plain panes of glasses put by owner on behalf of contractor at the rate of Re. 1-8-0 per dozen: Rs. 54.

The other items are small items and Mr. Deepchand has said that he confines the plaintiff's claim to these two items only. Now it was contended on behalf of the defendant in the Court below that the certificate of the architects was final and that the plaintiff could not therefore dispute the correctness of these items. The learned Judge gave effect to that contention, and allowed full credit to the defendant for both these items. We are afraid the learned Judge was wrong in doing so. He does not appear to have applied his mind carefully to Cls. 3 and 6 of the agreement referred to above. There is a distinction between the power of the architects under Cl. 3 of the agreement to reject bad work and the right of the defendant to claim the amounts spent by him for replacing such bad work. Although the decision of the architects that certain work should be replaced may be final under Cl. 3, it does not follow that the decision that a certain amount is due to the defendant for replacing such work is likewise final under the same clause. Such a decision could only be given by a member of the firm of the architects in his capacity as an arbitrator under Cl. 6 of the agreement, and he could do that only after holding an enquiry as an arbitrator. And that has not been done. No date of hearing was fixed, and no opportunity afforded to the plaintiff of either examining the defendant or adducing evidence to disprove the amount debited to him. In para. 595 of Halsbury's Laws of England, Vol. 3, Hailsham Edition, it is said:

> In cases where the architect or engineer who has to give a certificate of approval of the work done is also the person designed to act as arbitrator in case of disputes, it is very important to distinguish between his duties and powers in his capacity as a certifier from those in his capacity as arbitrator. It must also be observed that he may be acting in regard to the same matter at one time in the one capacity and at another time in the other. When the architect or engineer is acting in his capacity as certifier, the provisions of the Arbitration Act, 1889, do not apply, while when he is acting in his capacity as arbitrator, they do.

It would therefore appear that when a member of the firm of the architects was holding an inquiry as to the cost of removal and replacement of the paint and the cost of supplying panes by the defendant, he was acting in his capacity as an arbitrator and was subject to the provisions of the Arbitration Act. Mr. Lulla has drawn our attention to the passage appearing at p. 506 of Hudson on Building Contracts, Edn. 6, where it is said:

> Arbitrators may, it is submitted, decide without formally examining witnesses or hearing evidence in cases where: (1) they are employed to decide owing to and by the exercise of their skill and knowledge of the subject; or (2) there is in the agreement to refer an apparent intention that they should not hear witnesses; or (3) there are no facts which should be inquired into beyond those which are within the skill and knowledge of the arbitrators in the particular subject; or (4) the parties do not ask for a hearing or tender any evidence.

He has contended that in this case there was no obligation upon the member of the firm of architects who gave the certificate to examine any witnesses. He had knowledge of the work which was re-done and panes of glass supplied and of the rates prevailing in the market for such work and the glass panes and there is no evidence that the parties asked for a hearing or tendered evidence. But that is begging the question. If the certified architects had purported to act as an arbitrator and had given notice in that behalf, and no hearing was asked for or evidence tendered, a good deal might have been said in favour of the defendant. With regard to the knowledge of the architect, again, it is sufficient to observe that market rates and kinds of work differ, and the work of replacing or at any rate some part of it was alleged to have been done departmentally by the defendants. Without proof as to the rates at which the defendant got the work removed or replaced or materials supplied, the certified architects could not allow the claim of the defendants in the manner they have done.

We think therefore the plaintiff is entitled to have a re-hearing of the case so far as those two items are concerned. The rest of the items in dispute are either matters of evidence on which the finding given by the learned Judge below cannot be disturbed or are matters which fall within Cl. 3 of the agreement referred to above. We accordingly uphold the decision of the learned Judge below on all those questions, but remand the case to him for taking evidence for decision on the above two items according to law. With regard to costs, it is to be noticed that the plaintiff's suit is for Rs. 2000. His claim for Rs. 1400 has already been disallowed. With regard to the two items of Rs. 567 and Rs. 54, the plaintiff is having the luxury of a remand and putting the defendant to the proof thereof. Very probably a good portion of that amount will be found due to the defendants. We think under these circumstances the plaintiff should be made to bear the costs of the trial Court and of this Court to the extent of the amount disallowed and should be allowed costs on the amount, if any, which is decreed in his favour. We direct the Court below to pass a decree for costs in accordance with the above directions after ascertaining what amount, if any, is found due to the plaintiff.

B.D./R.K. *Case remanded.*

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## A. I. R. 1938 Sind 46

RUPCHAND BILARAM AG. J. C.
AND LOBO J.

*Tahilram Khanchand* — Applicant.
v.
*Emperor.*

**Criminal Bail Appln. No. 230 of 1937, Decided on 23rd September 1937, against order of Addl. Dist. Magistrate, Karachi.**

**Criminal P. C. (1898), Ss. 491 and 83 — Nasirabad is outside British India—Warrant of arrest under S. 83 sent by Nasirabad Magistrate to Magistrate in British India**

**cannot be executed — Such proceedings if taken can be quashed under S. 491.**

Nasirabad is outside British India and therefore a Nasirabad Magistrate has no jurisdiction to issue a warrant under S. 83 for the arrest of a person residing in British India. Such a warrant therefore cannot be executed by a Magistrate in British India and proceedings taken in pursuance of such warrant can be quashed by the High Court under S. 491 : *A I R 1934 Sind 123* and *A I R 1935 Sind 244, Rel. on.* [P 47 C 2 ; P 48 C 1]

Dingomal Narainsing—*for Applicant.*

Partabari D. Punwani, Advocate General—*for the Crown.*

**Rupchand Bilaram Ag. J. C.**—This is an application by one Tahilram Khanchand who has been arrested under the orders of the Additional District Magistrate, Karachi. It appears that the learned Additional District Magistrate has purported to act under the provisions of S. 86, Criminal P. C., on the strength of a warrant issued by the First Class Magistrate, Nasirabad, and sent to him for being executed. The applicant has come to us for relief both under the provisions of Ss. 491 and 498, Criminal P. C. The proper section however which applies in the circumstances of the present case is S. 491, Criminal P. C.

It is contended on behalf of the applicant that Nasirabad is outside the limits of British India and that therefore the First Class Magistrate, Nasirabad, had no jurisdiction to issue a warrant under S. 83, Criminal P. C., for the arrest of the applicant who is residing in British India and that being so, the learned Additional District Magistrate had no jurisdiction to enforce that warrant. In support of this contention our attention has been invited to the agreement between His Highness the Khan of Kalat and the British Government printed at p. 225 of Vol. 11 of Aitchison's "Treaties, Engagements and Sanads" which shows that Nasirabad belongs to His Highness the Khan of Kalat and that it has been handed over for being managed by the officers of the British Government on certain terms and conditions mentioned therein. This is also clear from p. 1 of Vol. 1 (Edn. 4) of "British Enactments in Force in Indian States," and from p. 317 of the Imperial Gazetteer of India, Vol. 6. In 28 S L R 54[1] this Court had to consider whether Quetta which was leased to the British Government formed part of British India, and at p. 61 it is said :

> We are also of the opinion that Quetta does not form part of British India as defined in S. 3, General Clauses Act. This part of the territory has been permanently leased to the British Crown : see Imperial Gazetteer, Vol. 6, page 227, and Aitchison's Treaties, Vol. 9, page 399. That being so, this part of the territory is not within the dominion of His Majesty the King-Emperor, and although every function of administration is exercised by the Viceroy in virtue of the authority transferred to the British Crown under the lease, it does not comply with one of the two essentials of the definition and does not therefore form part of British India. It is what is known as an 'Administered Area': *see* Halsbury's Laws of England, Vol. 10, para. 1021.

The grounds on which this decision is based apply equally to Nasirabad. We have observed that although the warrant is issued by the First Class Magistrate, Nasirabad, it bears a seal which has the words "Magistrate, First Class Nasirabad, and Jhatpat." But that makes no difference because Jhatpat is a part of Nasirabad District. This is clear from the note in the Imperial Gazetteer of India at p. 317, where it is said :

> Of these the directly administered areas cover 37,216 square miles, comprising the Quetta tahsil, the Bolan Pass District, and the Nushki and Nasirabad tahsils, all of which have been leased from the Khan of Kalat; the lands occupied by the Railway from Jhatpat to Mithri, Nari to Spintangi and Spezand to Sorosham; the Chagai and Western Sinjrani country; and the whole of the Zhob and Loralai Agencies, except the Duki tahsil in the latter.

As Nasirabad and Jhatpat are outside British India, the presence of the applicant could be secured by the learned First Class Magistrate, Nasirabad, by resort to proceedings under the Extradition Act 15 of 1903 and not by the issue of a warrant under S. 83, Criminal P. C. That being so, S. 491, Criminal P. C., gives us jurisdiction to quash the proceedings taken by the Additional District Magistrate, Karachi, on the strength of the warrant issued under S. 83 by the Nasirabad Court. This is clear from the case in 29 S L R 60[2] at p. 62, where it is said :

> The case in 20 S L R 128[3] is to the same effect. It was held there that if the authority issuing the warrant is a legitimate authority binding on the officer complying with it, he is bound to obey the order of that authority and the Court cannot

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[1] Dev Samaj Council, Lahore v. Amritlal Motilal, (1934) 21 A I R Sind 123=155 I C 677=28 S L R 54.

[2] A. W. Goulter v. Emperor, (1935) 22 A I R Sind 244=1935 Cr C 1307=37 Cr L J 312=160 I C 115=29 S L R 60.

[3] Jamna v. Emperor, (1926) 13 A I R Sind 126=91 I C 69=20 S L R 128=27 Cr L J 87.

interfere. The Court can however see that there is no patent defect visible in the authority by which the person having custody detains any person.

We find that there is a patent defect visible in the warrant under which the applicant is being detained in custody, that is to say the warrant purports to have been issued under the provisions of the Criminal Procedure Code by a Court which is outside British India and therefore it could not be executed by the learned Additional District Magistrate, Karachi. We accordingly set aside the proceedings which have been taken in pursuance of this warrant and direct that the applicant be set at liberty and his bail bond stand cancelled.

S.C./R.K. *Application allowed.*

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## A. I. R. 1938 Sind 48

RUPCHAND BILARAM AG. J. C.
AND LOBO J.

*Larkana Municipality* — Applicant.
v.
*Kaloomal Pamoomal and others* — Opponents.

Civil Revn. Appln. No. 3 of 1935, Decided on 16th September 1937, from decision of Judge, Small Cause Court, Larkana, D/. 24th September 1934.

**Limitation Act (1908), Arts. 120, 115 — Terminal tax—Suit for—Art. 120 applies.**

A suit for recovery of terminal tax is governed by Art. 120 and not by Art. 115 : *20 Cal 51*; *21 Cal 157 and A I R 1936 Sind 184, Rel. on.*
[P 48 C 2]

Fatehchand Assudomal — *for Applicant.*

Jethanand L. Nain — *for Opponents.*

**Lobo J.**—The applicants in this revision application filed a suit against the opponents in the Court of Small Causes, Larkana, for recovery of terminal taxes amounting to Rs. 54-6-0 and Rs. 20 interest, in respect of certain articles imported by the opponents into the Municipal limits of Larkana. The opponents raised a preliminary point that the suit was barred by limitation, the suit having clearly been filed more than three years after the goods had been imported into Larkana. The opponents' contention was that the suit was governed by Art. 115, Lim. Act. The applicants contended that the Article of the Limitation Act applicable to such a suit was Art. 120. The learned Judge of the Court of Small Causes dismissed the suit as time barred. He states in his judgment :

> I am accordingly of opinion that a suit of the present nature will fall under Art. 115, Lim. Act, and as the same has been filed after the period of limitation, viz. three years, it must fail as time barred. I accordingly dismiss it with costs.

The only point that arises in this revision application therefore is whether to the suit filed by the applicants Art. 115, Lim. Act, is applicable or whether it is governed by Art. 120, Lim. Act. In 20 Cal 51[1] at page 57 there is a passage in the judgment of Petheram C. J. which reads thus :

> The Limitation Act does not prescribe any period of limitation for money due under a statutory liability to pay it, so the suit is I think within Art. 120 ; in other words, the period of limitation is six years, which begins to run from the time when a demand for the money is made by persons who could give the receipts required by the section.

Again, in 21 Cal 157,[2] there is a dictum of their Lordships of the Privy Council to the effect that Art. 120 should be applied unless it is clear that the suit is within some other Article. In 30 S L R 146,[3] the question involved was the period of limitation applicable to a suit for the recovery by the Shikarpur Municipality of a fee levied by the Municipality for permission for use of Municipal land. It was held in that suit that the Article of limitation applicable was Art. 120. We think therefore that there is ample authority in support of the view that the Article of limitation applicable in this case is Art. 120. We accordingly reverse the judgment of the learned Judge of the Small Cause Court of Larkana. As it appears that the question of limitation was dealt with and disposed of as a preliminary point, the result will be that the suit must be remanded to the lower Court to be disposed of on the merits according to law. Order accordingly. Costs to be costs in the cause.

B.D./R.K. ***Case remanded.***

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[1] Secy. of State v. Guru Proshad Dhur, (1893) 20 Cal 51 (F B).

[2] Mahomed Riasat Ali v. Hasin Banu, (1894) 21 Cal 157=20 I A 155=6 Sar 374 (P C).

[3] Masand Motiram v. Shikarpur Municipality, (1936) 23 A I R Sind 184=165 I C 369=30 S L R 146.

## * A. I. R. 1938 Sind 49

RUPCHAND BILARAM J.

*Secretary of State* — Appellant.

v.

*Official Assignee* — Respondent.

Misc. Appeal No. 5 of 1936, Decided on 15th January 1937.

*** Presidency Towns Insolvency Act (1909), S. 49 (1) (a)—Expression "debts due to Crown or local authority" explained.**

The expression "a debt due to the Crown or to any local authority" includes not only a debt which has become due to the Crown but also a debt which is provable within the meaning of S. 46 (3), whether such demand has become provable or not and whether it is in point of law strictly a debt or not : *(1874) 9 Ch A 383 and AIR 1936 Mad 789, Rel. on.* [P 49 C 2 ; P 50 C 1]

Partabrai D. Punwani, Advocate General — *for Appellant.*

Suganlal Hassanand — *for Respondent.*

**Order.** — The facts of this case are hardly in dispute. The insolvent Lilaram Jeomal worked as a weighman of the Steam Roller Flour Mills and made a profit in the year ending with 31st March 1935. Thereafter he did very little business, and on 21st June 1935, he was adjudicated as an insolvent. On the strength of the provisions of S. 25, Income-tax Act, he has been taxed to income-tax for the year 1935-36 on the basis of his income during the previous year. The pertinent parts of that section are as follows :

> (1) Where any business, profession or vocation (on which income-tax was not at any time charged under the provisions of the Income-tax Act 1918) is discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year.
>
> (3) Where any business, profession or vocation on which tax was at any time charged under the provisions of the Income-tax Act, 1918, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such continuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.
>
> (4) Where an assessment is to be made under sub-s. 1 or sub-s. 3, the Income-tax Officer may serve on the person whose income, profits and gains are to be assessed . . . a notice containing all or any of the requirements which may be included in a notice under sub-s. 2 of S. 22, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

It is common ground that the insolvent was not charged at any time with income-tax under the provisions of the Income-tax Act 1918. The insolvent was therefore liable to be taxed on the income which he had derived from his business during the year ending with 31st March 1935 and also in addition thereto on the income, if any, which he derived from 1st April 1935 up to 21st June 1936. Both the insolvent and the Official Assignee, in whom has vested the estate of the insolvent, were served with notices as required by the Income-tax Act, and the insolvent was taxed at Rs. 86-12-0 on the income which he had derived during the period ending 31st March 1935. A claim was then preferred before the Official Assignee under S. 49, Presidency Towns Insolvency Act 3 of 1909, and he was required to give priority to this debt which was due to the Crown under Cl. (1), sub-cl. (a) of that section. The Official Assignee refused to give preference to this debt as a Crown debt with the result that the present appeal has been filed on behalf of the Secretary of State for India. Mr. Suganlal has argued that the debt in question was not a debt due to the Crown on the date of the adjudication order. But I am afraid there is no substance in that argument. The expression "a debt due to the Crown or to any local authority" includes not only a debt which had become due to the Crown but also a debt which is provable within the meaning of S. 46 (3), Presidency Towns Insolvency Act, which includes within its ambit all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication.

The debt in question was indubitably a contingent liability to which the insolvent was subject on the date when he was adjudicated as an insolvent. It is no doubt true that under the Income-tax Act, there was no obligation upon the insolvent to pay income-tax until and unless the provisions of that Act were complied with, that is to say that he was served with a notice calling upon him to fill up his form and the amount of tax payable by him was ascertained in the manner provided by the Act. But this only shows that the liability of the insolvent to pay the tax was contingent on those conditions being fulfilled. Both those conditions have been fulfilled and the contingent liability has now been converted into a debt due to the Crown. Even if the contingent liability had not been converted into a debt certain in amount, it fell within the purview of "a debt due to the Crown" within the meaning of S. 49 read with S. 46 (3) of the Act.

In support of the view that the expression "debts due to the Crown" means a provable demand which the Crown has against the insolvent, whether such demand has become provable or not and whether it is in point of law strictly a debt or not; it is sufficient to refer to the observations of Mellish L. J. in (1874) 9 Ch A 383[1] at page 388, and to the recent decision of the Madras High Court in A I R 1936 Mad 789[2] at page 791, where the observations of Mellish L. J. have been referred to with approval. For these reasons, I hold that this debt should be given priority and should be paid in full out of the estate of the insolvent before a dividend is declared. As the point in issue is a point on which there was no distinct authority of this Court or of any other High Court in India one way or the other, I order that each party should bear his own costs.

D.S./R.K. *Order accordingly.*

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[1] Ex parte Kemp; In re Fastnedge, (1874) 9 Ch A 383=43 L J Bk 50 = 30 L T 109=22 W R 462.

[2] Official Assignee, Madras v. Trustees of Port Trust, Madras, (1936) 23 A I R Mad 789=166 I C 427=I L R (1937) Mad 178.

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## ✻ A. I. R. 1938 Sind 50

RUPCHAND BILARAM AG. J. C.
AND DADIBA C. MEHTA J.

*Aildas Madhowdas and others* — Appellants.

v.

*Sobhomal Pursoomal and others* — Respondents.

First Appeal No. 43 of 1935, Decided on 29th September 1937, against judgment and decree of First Class Sub-Judge, Larkana, D/- 30th April 1935.

**✻ Limitation Act (1908), S. 14 — S. 14 can be availed of even if the party was not described as plaintiff or applicant in previous proceedings — Award made under Arbitration Act filed in a Court by arbitrator on request of party in whose favour it was made — That Court holding that it had no jurisdiction to entertain award—Party filing it in proper Court — Time taken by former Court to consider whether it had jurisdiction held should be excluded.**

The mere fact that an award was presented in Court by the arbitrator on the request of the party is not sufficient to warrant the holding that the person who seeks to enforce the award by process of the Court is not the claimant but the arbitrator. Nor can the rules framed by the Court under the Arbitration Act requiring parties to arbitration proceedings being styled as respondent 1 and respondent 2 have the effect of changing their relative position of claimant or creditor or debtor respectively into any other position. S. 14, nowhere lays down that before a plaintiff or applicant may claim exemption under this section, he should have been described as plaintiff or applicant in the previous proceedings. All that is required of him to prove is that he prosecuted the previous civil proceedings in good faith, and if he proves that, he may avail himself of S. 14, even though he was not described as a plaintiff or as an applicant in the previous proceedings. [P 51 C 2; P 52 C 1]

Where an award was made under the Arbitration Act in favour of the plaintiff, and the arbitrator on being requested by the plaintiff filed the award in the Court and upon that Court holding that it had no jurisdiction to entertain the award the plaintiff presented the award in another Court:

*Held* that the time taken in the former Court for ascertaining whether it had jurisdiction to entertain the award or not, should be excluded, as so long as that Court was determining upon the question whether the award should be taken off the file on the plea of jurisdiction or not, the award was enforceable as a decree. No proceedings could be taken in any other Court for the purpose of enforcing the award. That being so, limitation remained "in suspense" so long as the award was capable of being enforced by execution proceedings and the plaintiff was bona fide litigating for his rights in a Court of justice: *A I R 1916 P C 96 and A I R 1929 P C 103, Rel. on; A I R 1933 Nag 130, Disting.* [P 52 C 1, 2; P 53 C 2]

Fatehchand Assudomal — *for Appellants.*

Kimatrai Bhojraj — *for Respondents.*

**Rupchand Bilaram Ag. J. C.** — The short question which we are called upon to decide in this appeal is whether or not the learned Judge below was right in excluding under S. 14, Limitation Act, the time occupied by this Court in the exercise of its District Court jurisdiction in coming to a decision that it had no jurisdiction to entertain the award under the Arbitration Act and in holding that the subsequent application made to that Court for filing the award under Sch. 2, Civil P. C., was therefore not barred under Art. 178, Limitation Act. This question arises under the following circumstances: The plaintiff-respondents and the defendants-appellants referred their disputes at

Karachi to an advocate of this Court who gave his award dated 11th May 1932 ordering the defendants to pay to the plaintiffs a sum of Rs. 11,970 with interest at nine per cent. per annum from the date of the reference up to payment and declaring that the immovable property of the defendants which was situated within the jurisdiction of the Larkana Sub. Civil Court do remain mortgaged to the plaintiffs until payment. He ordered that the above sum be paid by instalments, the first instalment of Rs 1000 on or before 1st August 1932, and the subsequent instalments of Rs. 2000 each on or before 1st January 1933 and on or before 1st January of each subsequent year. The reference expressly recites that it is made under the Arbitration Act and the arbitrator on being requested by the plaintiffs filed the award in this Court under S. 11, Cl. (2), Arbitration Act.

Usual notices of the filing of the award were served on the defendants, but they failed to appear and object to the award within the time allowed by the rules of the Court. After the defendants defaulted in payment of the instalment of Rs. 1000 and the first annual instalment of Rs. 2000, the plaintiffs got the execution proceedings transferred to the Larkana Court and applied there for execution. The defendants then put in appearance in this Court, and for the first time filed objections to the award which are dated 7th May 1934 and pleaded that they were not served with the notice of filing of the award and could not therefore object to the award earlier. On 20th July 1934 the defendants filed a further list of objections. In this list of objections which was filed more than two years after the award was presented to this Court, the defendants for the first time pleaded that this Court had no jurisdiction to entertain the award. On 14th August 1934, Lobo A. J. C. gave effect to that objection and consequently the plaintiffs presented the award in the Larkâna Sub-Civil Court under Para. 20, Sch. 2, Civil P. C.

Now unless S. 14, Limitation Act, is applicable to the circumstances of this case, and the period during which the proceedings were pending in this Court is excluded, the application made to the Larkana Court to file the award under Para. 20 of Sch. 2, would be statute barred. The learned Subordinate Judge has allowed this time to be excluded and we have now to decide whether he was right in doing so. The defendants have not and cannot possibly challenge the bona fides of the plaintiffs in attempting to give jurisdiction in the first instance to this Court. The plaintiffs asked the arbitrator to file the award in Court at once and were in no way dilatory. The only ground on which the defendants succeeded in getting the award taken off the file was on the point that as the immovable property over which a lien had been given under the award was outside the territorial limits of this Court in the exercise of its original civil jurisdiction, this Court could not entertain the award. It is however argued that S. 14, Limitation Act, has no application to proceedings taken under the Arbitration Act on the ground that the award passed in favour of the plaintiffs was presented to this Court by the arbitrator and not by the plaintiffs who like the defendants were under the rules of the Court placed in the same category as respondents. It is further argued that in any case, as objections to the award which according to the rules of this Court had to be filed in the form of an application praying that the award be taken off the file, were filed by the defendants as applicants, the plaintiffs were merely resisting the proceedings to take the award off the file and were not prosecuting such proceedings within the meaning of S. 14, Limitation Act, and could not therefore rely upon it.

We are afraid, both these arguments are founded on a misconception of the relative provisions of the law which apply. The learned advocate who represents the defendants appears not to have applied his mind carefully either to the provisions of S. 11, Cl. (2), Arbitration Act, or to the provisions of S. 14, Lim. Act. S. 11, Cl. (2), Arbitration Act, requires an arbitrator to file the award made by him in Court only when requested to do so by one of the parties to the submission and not otherwise. In this case it was the plaintiffs in whose favour the award was given, who asked him to file the award in this Court. The mere fact that the award was presented in Court by the arbitrator, is therefore not sufficient to warrant our holding that the person who seeks to enforce the award by process of the Court is not the claimant but the arbitrator. Nor can the rules framed by the Court under the Arbitration Act requiring parties to arbitration proceedings being styled as respondent 1 and respondent 2 have the effect of changing their relative position of claimant or creditor and debtor respectively into any other position. Again S. 14, Lim. Act, nowhere lays down that before a plaintiff or applicant may claim exemption under this section, he should have been described as plaintiff or applicant in the previous proceedings. All that is required of him to prove is that he prosecuted the previous civil proceedings in good faith, and if he proves that, he may avail himself of S. 14 even though he was not described as a plaintiff or as an applicant in the previous proceedings. If any authority was wanted in support of that proposition, it will be found in the decision of their Lordships of the Privy Council in 43 Cal 660.[1] In that suit the plaintiffs were only co-defendants in the previous proceedings and yet they were allowed to take advantage of S. 14, Lim. Act. At page 663 it is said :

> Limitation would no doubt run against them from that time. But it would equally without doubt remain in suspense whilst the plaintiffs were bona fide litigating for their rights in a Court of justice. They had in the suit of 1896 before Henderson J. associated themselves with the plaintiffs in that action, and had asked for an adjudication in those proceedings of their rights. A distinct issue was framed in respect of their claim, to which no objection seems to have been made by the appellant Nrityamoni; and the learned Judge who decided the case pronounced with reference to their prayer the following order:
>
> The defendants, the representatives of Money Madhub, will be declared jointly entitled to a one-third share in the scheduled properties, and the Official Referee will make similar enquiries with regard to their share and the share of Nemye Charan Sen, as to mesne profits and the deeds, assurances and other things which may be necessary. These defendants will be entitled to get possession of the shares to which they have been declared entitled.
>
> It was an effective decree made by a competent Court, and was capable of being enforced until set aside. Admittedly, if the period during which the plaintiffs were litigating for their rights is deducted, their present suit is in time. Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court.

These observations apply with a much greater force in the present case. The plaintiffs were not mere co-defendants but they were the claimants. It was at their instance that the award was sent by the arbitrator to this Court so as to enable them to enforce it. Until the award was taken off the file of this Court, it was capable of being enforced in execution proceedings as if it was a decree. Not only that, but the plaintiffs had, as a matter of fact, applied in execution proceedings to enforce the award and the defendants resisted those proceedings by contending that the award had been filed in a wrong Court and that therefore it should not be enforced under the Arbitration Act. S. 14, Lim. Act, 1908, and similar provisions contained in the prior Acts have always received a liberal interpretation. In 24 W R 405[2] at p. 407, which is one of the earliest decisions of the Calcutta High Court, McDonell J. has said :

> The decision in 13 Beng L R 146[3] shows how leniently the Privy Council are inclined to deal with cases like the present, and how they consider that a law of limitation must not be construed too literally, but a fair construction be put upon it.

In view of the recent pronouncement of their Lordships of the Privy Council in 56 Cal 1048=A I R 1929 P C 103,[4] where their Lordships have again very liberally construed S. 14, Lim. Act, it is hardly necessary to refer to the numerous decisions of different High Courts on the point. In that case, Messrs. E. D. Sassoon & Co. obtained ex parte awards on 28th September 1916, against Ramdutt in pursuance of a submission clause contained in the contracts between the parties. They got the awards filed in Court under the provisions of the Arbitration Act and obtained a warrant directing the Sheriff to levy the amounts awarded to them by seizure of Ramdutt's goods. Thereafter on 8th January 1917 Ramdutt filed a suit for declaration that the awards were void and inoperative on the ground that the appointment by Messrs. E. D. Sassoon & Co. of their arbitrator as sole arbitrator was illegal. This suit went up in appeal to the Privy Council and ultimately on 20th July 1922 the Privy Council confirmed the decree passed by the High Court of Calcutta holding that the awards were invalid. The decision of the High Court was given on 7th April 1920. Taking either of those dates, much more than three years had elapsed from the date of the accrual of the cause of action. It was after 1922 that Messrs. E. D. Sassoon & Co. again went to arbitration. The case again went up to the Privy Council for consideration whether their claim was in time. Their Lordships of the Privy Council propounded two questions for their decision : (1) the general question whether the Limitation Act applies to arbitration proceedings, and (2) whether in the circumstances of that particular case limitation applied so as to bar their claim. On the first question their Lordships held in the affirmative and on the second question in the negative, but on grounds other than those on which the Calcutta High Court had proceeded. On the second point at page 1056 it is said :

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[1] Nrityamoni Dassi v. Lakhan Chandra Sen, (1916) 3 A I R P C 96=33 I C 452=43 Cal 660 (P C).

[2] Banu Kant Ghose v. Haran Kisto Ghose, (1875) 24 W R 405.

[3] Luckhi Narain Mitter v. Khettro Pal Singh, (1874) 13 Beng L R 146=20 W R 380.

[4] Ramdutt Ramkissendass v. E. D. Sassoon & Co., (1929) 16 A I R P C 103=115 I C 713 =56 I A 128=56 Cal 1048 (P C).

> Their Lordships are unable to agree in this view. They think that these proceedings came to an end with the decision of the single arbitrator whose award was ultimately set aside and that the proceedings instituted at a later date, after the decision in the Privy Council had been announced, cannot be regarded as a mere continuation of the first proceedings. It is quite clear that where a suit has been instituted in a Court which is found to have no jurisdiction, and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject matter and the parties to the suits were identical. The hardships that might arise in such a case have however been expressly provided for by the sections to which reference will now be made. The Indian Limitation Act, unlike the corresponding English Act, contains an elaborate code of provisions which deal, inter alia, with the mode of computing the period of limitation prescribed for any suit, etc., and also with the exclusion from the period of limitation of time which has been occupied in legal proceedings. The clause, especially founded on S. 14 (1), is as follows : . . . .
>
> It may be assumed that it had been ascertained before these provisions were formulated that there was a serious risk of injustice arising if the period of limitation which is in many cases shorter than in England should be too strictly applied. In Indian litigation it is consistent with the experience of their Lordships that the time necessary for the decision in a suit may be of much longer duration than one is accustomed to in the Courts of Great Britain. Hence the necessity for some provision to protect a plaintiff acting bona fide from the consequences of some mistake which had been made by his advisers in prosecuting his claim.

It is no doubt true that in this case directions were required whether the second arbitrator would be justified in excluding the period occupied in the previous proceedings or not, but the ground on which it was held that he could do so was that S. 14, Limitation Act, was intended to cover cases of hardship due to delays of Courts in deciding questions of jurisdiction and that this section applied equally to arbitration proceedings. It was accordingly held that not only the period actually taken by the first arbitrator to make his awards but also the subsequent period taken by different Courts from the lowest to the highest (the trial Court, the Court of first appeal and the Privy Council), in deciding whether the first awards were valid or not, should be excluded. It is also noticeable that the time taken by the Courts from 1917 to 1922 was taken not in the arbitration proceedings, but in a separate suit filed against Messrs. E. D. Sassoon & Co. for a declaration that the awards obtained by them were invalid. But it was only after the proceedings in that suit had terminated against them that the previous arbitration proceedings failed and there was a need for the second arbitration. It would appear that if Messrs. E. D. Sassoon had not claimed a second arbitration and had filed a suit on the original cause of action, they would have been in no worse position and would equally have been entitled to exemption under S. 14 of the Act.

The present case is much stronger. The award has not been set aside but it has been returned to be filed in the proper Court. If the time taken in the proceedings before an arbitrator and in the Court where the award is filed can be excluded on the award being set aside, there is no reason why the time taken in the Court for ascertaining whether it has jurisdiction to entertain the award or not, should not likewise be excluded. There is another way of looking at the same question. So long as this Court was determining upon the question whether the award should be taken off the file on the plea of jurisdiction or not, the award was enforceable as a decree. No proceedings could be taken in any other Court for the purpose of enforcing the award. That being so, to use the words of their Lordships of the Privy Council in 43 Cal 660,[1] limitation remained "in suspense" so long as the award was capable of being enforced by execution proceedings and the plaintiffs were bona fide litigating for their rights in a Court of justice. Our attention has been invited to the case in A I R 1933 Nag 130.[5] In that case the learned Judge has said :

> I am of opinion then that S. 14, Lim. Act, cannot apply in the present case, because in the first place, although, as held in 56 Cal 1048,[4] the Lim. Act should be applied by analogy to proceedings before arbitrators and S. 14 can be invoked with regard to proceedings before arbitrators with reference to previous proceedings before arbitrators,

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[5] Maharaj Sai v. Kedar Nath, (1933) 20 A I R Nag 130=144 I C 948=29 N L R 272.

still proceedings before arbitrators will not be proceedings before a Court within the meaning of S. 14 with reference to a subsequent civil suit. Secondly, I hold that the decree of a Civil Court, that an award delivered by arbitrators is not valid and binding, does not deprive the arbitrators of their jurisdiction and the cancellation of the award cannot be considered a cause of a like nature within the meaning of S. 14.

A bare reading of the above passage makes it abundantly clear that the decision given in that case does not apply to the circumstances of the present case. Therefore the above case hardly requires discussion. However, it might be pointed out that the decision of their Lordships of the Privy Council which is distinguished and explained in the above case is not so circumscribed as the learned Additional Judicial Commissioner has attempted to show. For these reasons given above, we are of opinion that the learned Judge was perfectly right in applying S. 14, Lim. Act, in the present case. We accordingly dismiss this appeal with costs.

D.S./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Sind 54

RUPCHAND BILARAM AND
DADIBA C. MEHTA JJ.

*Commissioner of Income-tax, Bombay Presidency and Aden* — Referring Officer.

v.

*Lokumal Bhojomal of Sukkur* — Assessee.

Civil Ref. No. 152 of 1935, Decided on 16th February 1937, made by Commissioner of Income-tax, Bombay Presidency and Aden, D/- 26th November 1935.

*** Income-tax Act (1922), S. 34 — Words "escaped assessment"—Scope.**

The words "escaped assessment" in S. 34 cover the case where the assessee has evaded his liability to pay the tax by making a return which did not contain a full and proper or true statement of his accounts : *A I R 1934 P C 30, Disting.*

[P 55 C 1, 2]

Partabrai D. Punwani — *for Applicant.*

Dipchand Chandumal — *for Opponent.*

**Rupchand Bilaram J.** — This is a reference under S. 66, Cl. (2), Income-tax Act. The facts giving rise to it are as follows : The assessee made a return for the year 1932-33 showing that he had suffered a net loss of Rs. 20,397 during the previous year ending with 31st March 1932. The Income-tax Officer examined the account books of the assessee and held that the assessee had suffered a loss of Rs. 19,227 during that year. He accordingly passed an order dated 25th October 1932, exempting the assessee from income-tax for the year 1932-33. The assessee made a return for the following year, that is for the year 1933-34, and showed that he had again suffered a loss of Rs. 12,045 for the year ending with 31st March 1933. This time the Income-tax Officer examined the accounts with greater care and discovered that notwithstanding the alleged loss sustained by the assessee for two succeeding years, the account books showed a substantial increase in the capital invested by the assessee in his business which the assessee could not satisfactorily account for. He came to the conclusion that the real profits made by the assessee from his business had been concealed by making false entries in the account books, and accordingly rejected the account books of the assessee and taxed him on an income of Rs. 11,000, calculated upon a certain percentage basis on the turnover.

The assessee filed an appeal against that order, but subsequently withdrew it. The Income-tax Officer then proceeded to revise the decision given by him exempting the assessee from income-tax for the year 1932-33. He purported to do this by taking proceedings under S. 34 of the Act. On 17th February 1934, that is to say within the period of one year prescribed by that section for taking action, he called upon the assessee to make a fresh return for that year. The assessee avoided submitting a return during the time allowed to him by the notice and was assessed on an income of Rs. 30,000. He then submitted a return showing a loss of Rs. 7459 as against the loss of Rupees 20,397 previously shown by him in his first return. The Income-tax Officer then again went into the question and fixed the income of the assessee at Rs. 15,000. He did this because he thought that certain credit entries were falsely entered as cash received. On appeal, the Assistant Commissioner of Income-tax did not disturb the finding of the Income-tax Officer as to the total profit which the assessee was supposed to have made in his business; but as a part of this profit had been made by the assessee from a separate business in which he was a partner and which fact had been suppressed, the Assistant Commissioner of Income-tax increased the incidence of taxation on that profit and in addition levied a fine of Rs. 100 on him for suppressing that fact. The assessee then applied in revision to the Commissioner of Income-tax and on obtaining no relief from him asked for a reference to this Court upon the following questions :

(1) Whether the assessment in this case is in accordance with the provisions of S. 34 of the Act ? (2) Whether the assessment is valid within the provisions of S. 13 of the Act for the following reasons : (a) Whether the method of accounting is such as can clearly reflect the income, profit or gain of the previous year and whether it is the one usually adopted by the petitioner and accepted in the past ? (b) Whether the assessment is made on proper basis as required by proviso to S. 13 ?

The learned Commissioner of Income-tax has referred only the first question to us, he being of the opinion that the second question was under the circumstances of the present case a question of fact and not a question of law. Now, there can be no doubt that on the merits, the assessee has no case whatsoever. It is however argued on his behalf that as he had been assessed once and was held to have suffered a loss and therefore not liable to pay income-tax for that year, he could not, in law, be re-assessed by the Income-tax Officer by resorting to the provisions of S. 34 of the Act and that in any case he could not be re-assessed on a profit of Rs. 15,000. We are afraid there is no substance in these contentions. The words of S. 34 are very wide and inter alia provide that when an income has escaped assessment, whatsoever be the reason, proceedings may be taken against the assessee under that section within the prescribed period. Under the corresponding section of the English Act, which is S. 125, an inspector is entitled to take proceedings against an assessee if he discovers (1) that any property or profit chargeable to tax have been omitted from the first assessment or (2) that a person chargeable has not delivered a full and proper statement, or (3) that a person has not been assessed to tax or (4) that a person has been undercharged on the first assessment, or (5) that a person has been allowed or has obtained from the first assessment any allowance, deduction, exemption, abatement, or relief not authorized by the Act.

The procedure laid down in that section is somewhat different from that laid down in the present section. But there can be no doubt that the present section is intended to cover within its ambit all cases referred to above. In the present case the assessee evaded his liability to pay the tax by making a return which did not contain a full and proper or true statement of his accounts and thus escaped assessment. Considerable reliance has been placed by Mr. Dipchand on the observations of their Lordships of the Privy Council in A I R 1934 P C 30[1] at p. 33, where it is said :

> The appellants however submit that this is a case of income escaping assessment within the meaning of S. 34. Assessment, they argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year then that income, they submit, has escaped assessment within that year and can be subsequently assessed only under S. 34 with its time limitation. This involves reading the expression "has escaped assessment" as equivalent to "has not been assessed". Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word "assessment" and too wide a meaning to the word "escaped". That the word "assessment" is not confined in the statute to the definite act of making an order of assessment appears from S. 66 which refers to "the course of any assessment". To say that the income of Burn & Co. which in January 1928 was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin & Co., has "escaped" assessment in 1927-28 seems to their Lordships an inadmissible reading. The fact that S. 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have "escaped" assessment.

But these observations do not apply to the present case. In the case referred to above, Messrs. Burn & Co. had made a true return of their income. They had not been assessed to income-tax because the Income-tax Officer thought that that income was an income for which Messrs. Martin & Co. should be assessed and he had accordingly added that income to the income returned by Messrs. Martin & Co. In doing so, he was wrong and when after his decision was set aside and Messrs. Burn & Co. were being assessed, they raised the plea that as the period of limitation contained in S. 34, had expired they could not be assessed. Under those circumstances, the fact that no assessment was made on the income of Messrs. Burn & Co. could not possibly be said to indicate that the said income had escaped assessment. Messrs. Burn & Co. had made no attempt to evade their income being assessed and as a matter of that that income had not only not escaped assessment, but had been assessed although against a wrong party. Our attention has also been invited to the rulings of some of the Indian High Courts in which words "escaped assessment" have been given a much more limited meaning than that indicated by the words themselves. All those rulings have been referred to and discussed in 8 I T C 198[2] and it has been rightly pointed out there that those rulings have not given due effect to the words "for any reason" which appear in the section.

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[1] Rajendra Nath Mukerjee v. Commissioner of Income-tax, (1934) 21 A I R P C 30=147 I C 668=61 I A 10=61 Cal 285 (P C).

It is rather unfortunate that S. 34 unlike the corresponding section of the English Act does not specifically refer to the cases in which the Income-tax Officer may take action and the words "escaped assessment" are somewhat vague and indefinite; but reading the section as a whole, we have no hesitation in holding that the facts of the present case do come both within the meaning and spirit of the section. The income of the assessee has certainly escaped assessment by the simple process of a false return having been filed and the fraud perpetrated by him was not detected at the commencement. As the fraud was detected within the time limit prescribed by the section, it is not necessary for us to consider the dictum of Lord Reading C. J. in (1921) 37 T L R 88,[3] which supports the proposition that in cases of fraud, the Crown is not prevented by such a time limit from recovering a tax, nor is it necessary for us to go into the further question whether the assessee is not liable to be assessed under any other provision of the Act. For these reasons we answer the first question which is the only question referred to us by the learned Commissioner in the affirmative.

With regard to the second question propounded by the assessee, we agree with the learned Commissioner that that question is in the circumstances of the present case one of fact and not of law and we hold accordingly. It is no doubt true that the unexplained items discovered by the Income-tax Officer amounted only to Rs. 15,000 and it was no doubt open to argument that if these items were transferred to the account of sale proceeds, the loss of Rs. 7000 odd, as shown by the assessee in his second return, would disappear and his profit would amount to Rs. 8000 and not Rs. 15,000. But on appeal the Assistant Commissioner of Income-tax discovered another very big item of Rs. 21,000. The explanation of the assessee with regard to that item also was not accepted specially in view of the fact that the account books of that particular concern from which according to the assessee he had received Rs. 21,000 were not produced. If this item were added to the items discovered by the Income-tax Officer the profit of Rs. 15,000 for which income-tax has been levied from him is in no sense excessive. It would therefore appear that the assessee has rather been lightly dealt with and has not been made to pay more than what would be his estimated profit. There is therefore no substance in the argument that the income of the assessee should have been fixed on a percentage basis on the turnover as was done in the next year. Under the circumstances, it is not necessary for us to go into the further question whether or not it is open to the assessee to raise a point on which the Income-tax Commissioner has refused to submit a case in the absence of his having applied to this Court under S. 66, Cl. (3) to compel the Commissioner to state a case upon this point within the time allowed by law.

In the course of his arguments the learned advocate raised a third point and that was that the Assistant Commissioner of Income-tax had no power to increase the incidence of income-tax on Rs. 2500 or to impose a penalty of Rs. 100 on the assessee. But we are afraid it is not open to the learned advocate to raise new points not raised by him before the Commissioner at the proper time and that also without even giving previous notice to the Government Pleader and therefore we decline to go into that question. The Income-tax Commissioner will have costs of this reference which will be taxed in the ordinary course.

D.S./R.K. *Answer accordingly.*

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[2] Amir Singh Sher Singh v. Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, (1935) 22 A I R Lah 361=158 I C 349=8 I T C 198.

[3] R. v. Broadbury, (1921) 1 K B 562=90 L J K B 133=125 L T 31=85 J P 128=15 Cri App R 76=37 T L R 88.

## A. I. R. 1938 Sind 57

LOBO J.

*Karamali Manji* — Appellant.

v.

*Emperor.*

Criminal Appeal No. 45 of 1937, Decided on 25th August 1937.

**Penal Code (1860), S. 409—Existence of trust does not depend upon legal terms used but upon actual facts—Complainant agreeing to finance accused for purchase and sale of bags—Goods to be kept in complainant's godown as security and accused required to pay rent—Accused to pay interest on money advanced and also to pay sale proceeds to complainant—No trust held created—Accused held not guilty under S. 409 for default in paying sale proceeds.**

The existence or non-existence of a trust in any particular case does not depend upon the use of legal terms employed by the parties but upon the actual facts of the case. [P 58 C 1]

The complainant's firm had agreed to finance the accused in carrying on business of purchase and sale of gunny bags. The goods were to be purchased and sold by the accused in his own name and were to be stored in the godown of the complainant as a security for which he was to pay rent. The complainant's firm was to receive certain interest on the money advanced and also a commission on sales effected by the accused. The sale proceeds of the goods sold were to be paid into the complainant's firm. As soon as the goods were stored in the godown, the ownership in the bags was to vest in the complainant. The accused was solely responsible for the sale proceeds of goods sold:

*Held* that the money with which the goods were purchased or the goods after they had been purchased were not the property of the complainant's firm entrusted to the accused as his agent. Therefore there could be no offence under S. 409 in the event of any default in payment of the sale proceeds by the accused: *A I R 1914 L B 1 (FB), Rel. on*; *(1884) 15 Cox C C 466, Disting.* [P 58 C 1, 2]

P. S. Shahani — *for Appellant.*

Parsram Tolaram (Assistant Public Prosecutor) — *for the Crown.*

**Judgment.**—The appellant in this case has been convicted by the Special First Class Magistrate of Karachi (Mr. Bulchand Alumal) of an offence under S. 409, I. P. C. He has been sentenced to rigorous imprisonment for a period of three months and to pay a fine of Rs. 500 or in default to undergo rigorous imprisonment for six months. There is scarcely any dispute with regard to the facts of the case. Appellant Karamali and another Khoja named Hashim are, by profession, dealers in gunny bags, old and new. They were in need of capital to carry on their business and in October 1934 they approached the complainant's firm to finance their business. The complainant's firm agreed to do so to the extent of Rs. 2000 to Rs. 3000 and the terms of this agreement were reduced to writing on 1st November 1934. This agreement is Ex. 1-A in the case. The agreement reads as follows:

> We, Hashim Moolji and Karamali Mowji, caste Khojas, residents of Karachi, do hereby agree and give in writing that we shall do the business of purchasing bardana bags by borrowing money from the firm of Seth Uttamchand Moolchand on the following terms:
>
> 1. That we shall do the business of purchasing gunny bags.
>
> 2. Whatever gunny bags whether old or new will be purchased in the town, shall be purchased by us in our own name, and on delivery of the goods we shall store the same in the godown of Seth Uttamchand Moolchand.
>
> 3. That we shall take the purchase money from Seth Uttamchand Moolchand after storing the goods in the godown.
>
> 4. That we shall pay interest on whatever amount is invested by Seth Uttamchand Moolchand at 0-8-0, eight annas per cent. per mensem.
>
> 5. That we shall pay rent of the godown which will be taken by Seth Uttamchand Moolchand for our aforesaid bardana.
>
> 6. That in lieu of the investment of money and labour, we shall pay commission at 0-8-0, eight annas on 100 bags.
>
> 7. That as soon as the goods are placed in the godown of Seth Uttamchand Moolchand, the ownership of the Bardana bags shall vest in Seth Uttamchand Moolchand.
>
> 8. That as the goods will be disposed of by Seth Uttamchand Moolchand from time to time he shall credit the amount to us in our account; and he shall at the very time debit to us the commission at 0-8-0, eight annas per 100 bags.
>
> 9. That if any merchant fails, runs away, dies or the amount of bardan be not recoverable in any other circumstances then Seth Uttamchand Moolchand is not bound to give us credit for that amount.
>
> 10. That if any merchant refused to pay the amount or raised dispute of any manner and if on account of that dispute Seth Uttamchand Moolchand has to go to Court then we shall pay up all the costs, etc., thereof at the very time. If we refused to pay the cost at the very time Seth Uttamchand Moolchand is not bound and responsible to go to Court.

Clause 8 of this agreement provides that the goods purchased by the appellant and Hashim were to be disposed of by the complainant's firm and the proceeds credited to Hashim and Karamali in their account with the complainant's firm. As a matter of fact however, the complainant's firm only made a single purchase and five or seven days after 1st November 1934 and up to the time when trouble arose in April 1936, all purchases of gunny bags and all sales of these gunny bags were made by the appellant and Hashim in their own names. In April 1936 after the agreement had been in force for nearly two and a half years Hashim owing to financial difficulties disappeared. During the month of April 1936 the appellant and Hashim had effected sales of gunny bags worth about Rs. 1542. The sales had been reported by the appellant to the complainant's firm but the sale proceeds to the extent of Rs. 1542 had not been paid to the complainant's firm. The complainant thereupon reported matters to the police who after investigation challaned the appellant for an offence under S. 409, I. P. C. The appellant was thereafter tried, convicted and sentenced as set out above.

Learned counsel for the appellant has argued that the conviction of the appellant cannot be sustained as the appellant was not in law entrusted with the goods in question or with the sale proceeds thereof and that therefore there has been no criminal breach of trust on his part; that at most, the appellant has committed breach of contract for which he may be civilly liable to the complainant's firm. In 24 I C 332,[1] decided by the Full Bench of the Lower Burma Chief Court, it was held that:

> The question whether *A* entrusted property to *B* is one which depends upon the actual facts of the case and not merely upon the legal terms employed by the parties. If the real nature of the transaction is a loan, the fact that the parties in writing call it a trust, or agree that for the purposes of the Penal Code the property in the money shall be deemed to remain in the original owner or agree that the party receiving the money shall be liable for criminal breach of trust if he applies the money to a purpose other than that agreed upon, would not bring that transaction within the scope of S. 405, I. P. C. The Penal Code cannot be altered by agreement of parties so as to make S. 405 applicable to a transaction which is in its real nature a loan. If *A* receives money from *B* for certain specified purposes, the money is not entrusted to *A* within the meaning of S. 405, I. P. C., if *A* is liable to return the money in any event. Therefore the trust, if any, in this case is merely a technical or colourable trust.

Applying this test to the facts of the present case, it would appear that the complainant's firm merely financed the appellant and his partner in carrying on their business of purchase and sale of gunny bags. As security the goods were stored in the godown of the complainant and the appellant and his partner were required to pay into the complainant's firm the sale proceeds of the goods. There was no trust either in respect of the money advanced to the appellant and his partner or in respect of the goods purchased therewith. That this was the true position between the parties is evident from the following facts: (a) The goods were to be purchased by the appellant and his partner in their own names. (b) After purchase the goods were to be stored in the godown of the complainant's firm for which the appellant and his partner had to pay rent. (c) On moneys advanced by the complainant's firm the appellant and his partner had to pay interest. (d) Complainant's firm was to receive commission at the rate of eight annas per 100 bags on sales effected by the appellant and his partner. (e) Goods were to be sold by the appellant and his partner in their own names. (f) The appellant and his partner were solely responsible for the sale proceeds of goods sold "if any merchant fails, runs away, dies or the amount of bardan be not recoverable in any other circumstances." (g) All litigation in connexion with the recovery of outstandings in the business, if carried on by the complainant's firm, had to be paid for by the appellant and his partner. On these facts, it is to my mind idle to contend that either the money with which the goods were purchased or the goods after they had been purchased were the property of the complainant's firm entrusted to the appellant and his partner as their agents. As against all the points indicated above, there is a mere statement in cl. 7 of the agreement to the effect that:

> As soon as the goods are placed in the godown of Seth Utamchand Moolchand the ownership of the bardana bags shall vest in Seth Utamchand Moolchand.

As stated in the Full Bench ruling referred to above, the existence or non-existence of a trust in any particular case does not depend upon the use of legal terms employed by the parties but upon the actual facts of the case. The actual facts in this case make out no trust. The Full Bench ruling of the Lower Burma Chief Court was cited with approval by Raymond A. J. C. in the unreported case of *Pahlajrai v. Crown.* In that case Pahlajrai, the indentor of a large consignment of biscuits was unable to pay for them on arrival and obtained possession thereof from the exporter's local agent by executing in favour of that agent a trust receipt. Pahlajrai sold the goods and appropriated the sale proceeds to himself. The learned Additional Judicial Commissioner held, following the case decided by the Lower Burma Chief Court, that the mere use of the words "trust" or "entrusted" in the trust receipt did not create a trust of which the accused in that case had committed a breach. The learned Assistant Public Prosecutor in supporting the conviction has invited my attention to the case in (1884) 15 Cox C C 466.[2] The case is entirely distinguishable. In that case an indentor had obtained money from a bank by handing over to them bills of lading recovering the goods consigned to him. Thereafter he obtained possession of the bills of lading in order to enable him to clear the goods and sell them. He appropriated to himself the sale proceeds. It was held that under these circumstances he was guilty of larceny. The bills of lading were documents of title to the goods and in passing the bills of lading over to the bank he passed over to the bank the ownership of the goods. The goods therefore belonged to the bank and when the sale proceeds thereof were misappropriated by the broker, there was a clear case of criminal breach of trust. I am of opinion that this conviction cannot be sustained. I accordingly allow this appeal and reverse the conviction and sentence of the appellant. The fine if paid to be refunded. The appellant is on bail and his bail bond is cancelled.

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[1] Nga Po Ywet v. Emperor, A I R 1914 L B 1 = 24 I C 332 = 15 Cr L J 452 = 7 L B R 278 (F B).

K.B./R.K. *Appellant acquitted.*

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[2] Reg v. Townshend, (1884) 15 Cox C C 466.

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## A. I. R. 1938 Sind 59

RUPCHAND BILARAM AG. J. C.
AND LOBO J.

*Vishindas Khushaldas* — Appellant.

v.

*Tejumal Khushaldas and others* — Respondents.

First Appeal No. 57 of 1934, Decided on 12th August 1937, against order of First Class Sub-Judge, Hyderabad.

**(a) Civil P. C. (1908), Sch. 2, Paras. 20 and 21—Immovable property dealt with by award and parties to it within jurisdiction of Court—Mere fact that certain business which is subject matter of award is carried on by parties outside Court's jurisdiction cannot oust jurisdiction of Court.**

Where all the immovable property dealt with by the award is within the jurisdiction of the Court and so also the parties to the award, the mere fact that the business which is one of the subject matters of the award is carried on by the parties at a place not within the jurisdiction of the Court is not sufficient to oust the jurisdiction of the Court and the Court has jurisdiction to entertain an application under Para. 20 of Sch. 2 and to order the award to be filed under Para. 21. [P 60 C 1, 2]

**(b) Arbitration — Award — Finality of — Court will presume that arbitrators have decided only those matters that are referred to them — Burden of proving that award is not within the submission lies upon party who seeks to impeach it.**

The Courts will make every reasonable intendment in favour of an award being a final, certain and sufficient termination of the matters in dispute, and unless and until the contrary is shown, the Court will presume that the arbitrator has determined only such matters as were in dispute and were referred to him, and that the burden of proving that the arbitrator has awarded on matters not within the submission or has failed or omitted to award on matters which were within the submission lies upon the party who seeks to impeach the award: *(1818) 36 E R 291, Rel. on.* [P 62 C 2]

**(c) Arbitration—Award—Setting aside.**

An award cannot be set aside on the ground of uncertainty upon a point upon which there is no controversy between the parties: *(1823) 2 B & C 170 and (1837) 2 M & W 495, Rel. on.* [P 62 C 2]

**(d) Arbitration—Award—Uncertainty of.**

Where an award directs certain produce to be sold at market price, the amount to be realized is sufficiently certain and cannot make the award uncertain: *(1844) 1 Doul & L 560, Rel. on.* [P 63 C 1]

Assudomal Rewachand—*for Appellant.*

Dingomal Narainsing and Pahlajsing Bijasing — *for Respondents.*

**Rupchand Bilaram Ag. J. C.**—This is an appeal against the order of the learned First Class Subordinate Judge, Hyderabad, disallowing objections to an award and passing a decree in terms thereof under Paras. 20 and 21 of Sch. 2, Civil P. C. Several interesting points have been argued before us, and we propose to deal with them in the order in which they have been raised. The first point is as to the jurisdiction of the Court to pass the order complained against. It is argued that as the award related to property some of which was not within the jurisdiction of the Hyderabad Court, that Court had no jurisdiction to order the award to be filed under Paras. 20 and 21 of the schedule and that the remedy if any of the opponents was by a regular suit to enforce the award. Reliance has been placed on 51 Cal 361=51 I A 72=A I R 1924 P C 95[1] and on 55 Mad 689=A I R 1932 Mad 462.[2] But neither of these rulings have any bearing on the present case. In the Privy Council case referred to above, a somewhat similar argument was advanced by the appellant but their Lordships found it unnecessary to deal with that argument. Their Lordships held as a fact that there was no substantial question decided by the award which affected property within the jurisdiction of the Court of first instance and accordingly non-suited the plaintiff, observing :

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[1] Ramlal v. Kisanchandra, A I R 1924 P C 95 =83 I C 581=51 I A 72=20 N L R 83=51 Cal 361 (P C).

> It is the duty of the Court in which an award has been filed, to proceed to pronounce judgment according to the award, and upon that a decree is to follow. Their Lordships cannot see that any decree could be framed upon this award which would affect any person or property within the jurisdiction.

In the present case however the decree passed by the Court not only affects the immovable property which is within the jurisdiction of the Court but also the parties who reside within its jurisdiction. In the Madras case referred to above all that has been held is that a Court entertaining an application under Para. 20, Sch. 2 should have jurisdiction over the whole subject matter of the award and not only over a part of the subject matter of the award. It is true that the subject matter of the present award deals both with moveable and immovable property, but in order to determine the jurisdiction of the Court in entertaining an application of this nature, reference must necessarily be made to the Civil Procedure Code. That Code no doubt excludes the jurisdiction of a Court over immovable property which is not within its territorial limits, but it contains no such limitation in respect of moveable property provided of course the persons sought to be held liable are within its jurisdiction. In the present case all the immovable property dealt with by the award is within the jurisdiction of the Court of first instance and so are the parties to the award. The mere fact that the business which is one of the subject matters of the award was carried on by the parties at Karachi is not sufficient to oust the jurisdiction of the Court over the said subject matter. As the Hyderabad Court had jurisdiction over the whole of the subject matter of the award, that Court had jurisdiction to entertain the present application.

The second objection pressed before us is that, as the arbitrators failed to give their award on the termination of the proceedings in terms of the reference, they were functus officio and the award subsequently passed by them was not valid in law. This objection is based on a misreading of the reference. The parties who are all descended from a common ancestor Khushaldas had been quarrelling over the partition of their property ever since the death of Khushaldas which took place in 1926. A former reference to the same arbitrators had in consequence of the cantankerous conduct of one of the parties proved infructuous. It was therefore considered necessary to provide for arbitration proceedings being held without any delay or obstruction being caused by any party. The reference was signed on 6th April 1931 and its pertinent terms which require consideration in connexion with this, and some of the other objections which follow are these :

> (2) It has been hereby agreed by all the brothers, that all the brothers shall start here at Bhagudero from this day the work of partition in accordance with the order of the arbitrators, and that they shall do and shall be bound to do the work of the arbitrators as required by them. It has been further agreed by the brothers that any brother, who is required by the arbitrators to do any work in respect of the partition shall be bound to do it, and he shall not evade from doing the same.
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> (3) It has also been further agreed by all the brothers that the work of the above partition shall be continued from this day, the date of the execution of this reference, without any break. No grounds of any works of any brother, however urgent they may be, shall be heard, and the work of partition shall continue. The arbitrators have also agreed that they shall stay here at Bhagudero from this day, the date of the execution of this reference up to the date of giving their award and complete the work of the partition. If any brother remained absent, then the arbitrators shall, at the saying of any other brother, give ex parte award during his absence, and no plea of his on account of his remaining absent shall be heard. Neither there is necessity of giving any notice to the brother who remains absent, nor shall the objection of any brother be maintainable. And the work of above partition shall be completed by sitting continuously from this day, the date of the execution of this reference, once on one mat. If any brother left in the middle, or if he left during the partition, then the arbitrators shall at the saying of one brother only, give ex parte award.
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> (4) Moreover it has also been agreed by all the brothers that if owing to unavoidable circumstances the arbitrators have to attend to some urgent business of their own, during the work of the present partition, and if they left, then all the

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[2] Krishna Iyer v. Subbarama Iyer, A I R 1932 Mad 462=139 I C 877=55 Mad 689=62 M L J 550.

brothers shall be present on the day on which the arbitrators will ask them to be present. And if any brother remained absent then it shall not be necessary for the arbitrators to give notice to that brother; and at the request of one brother only the arbitrators shall give their ex parte, joint and complete award; and in that case no plea of the brother who remains absent shall be heard.

(5) It has been further agreed by all the brothers that if no award is given on the adjourned occasion also, or if no award is given on account of the arbitrators' not coming, or on account of the brothers remaining absent, or on account of the work not going on continuously, or if the arbitrators do not give their award on account of any brother's absence, then every brother shall have the right of considering this reference as cancelled, and all the brothers shall have the same rights which they had before the execution of this reference; . . . .

There is no dispute that the arbitrators proceeded with the inquiry regularly and without any delay. They completed the proceedings on 26th May 1931. As they experienced some difficulty in drafting their award particularly on account of some of the immovable properties having been partitioned by the parties during the continuance of the arbitration proceedings in order to avoid heavy stamp duty being levied on the award, they thought it advisable to come to Karachi to consult a lawyer as to the form of the award and as to the necessity, if any, of having it registered. They consulted Mr. Dingomal advocate of this Court. After getting the award drawn up by him, they went to Nawabshah to have it registered. The award purports to bear the date 29th June 1931 and was registered on that very day. Now, there is nothing in the reference to suggest that the arbitrators were not to consult a lawyer or that they were prohibited from going to Karachi for that purpose. It would appear that the course adopted by them was the only proper course to adopt under the circumstances. Notwithstanding the care devoted by Mr. Dingomal, one of the objections raised by the appellant, is that the award is neither final nor certain. We are of opinion that there is nothing in the reference to suggest that if the arbitrators came to Karachi after completing their proceedings for the purpose of getting an award written by a lawyer they became functus officio. We accordingly disallow this objection.

The third objection urged is that, the arbitrators have made certain interpolations in the award after they had put their signatures to it; and therefore their award is invalid. But this objection was practically abandoned by the learned advocate when, on a reference to the award itself, it was discovered that the alterations in question were made in the office of the Sub-Registrar and at his instance with the object of meeting certain technicalities of the Registration Act. It was also discovered that the award was not signed at Karachi before the alterations were made but it was signed in the Registrar's office on the day on which the document was presented for registration; and that presumably it was signed after the alterations were made in order to meet the objections of the Registrar. Moreover none of these alterations affect the merits of the award. This objection therefore fails.

The fourth objection is equally unsubstantial. It appears that in 1928 the parties had made an interim settlement between themselves by which the Karachi karkhana was allotted to the appellant at a certain valuation. But he was not prepared to abide by that settlement inter alia on the ground that his exclusive ownership of the karkhana had been interfered with and that by diverse means he was prevented from realising the outstandings of the karkhana. This was denied by the respondents, and the arbitrators were given full power to deal with all the disputes which were raised before them with regard to this karkhana and its outstandings. They came to the conclusion that the appellant had been in possession of the karkhana and had not been prevented from realising the outstandings. There was however one item in the list of outstandings which gave them some trouble. This item was a sum of Rs. 58,455-2-0 due by two persons named Kiratrai and Kimatrai which had not been realized upto the date of the award and in respect of which it was expected that a good part of it would not be realized. The appellant contended that the relative documents on which he could have sued for recovery of the debt were suppressed by the respondents. He contended that the respondents Pribhdas and Tejumal should be awarded the right to recover this item and should be made liable for the whole amount. The arbitrators found in favour of the respondents in so far that they held that the relative documents had not been suppressed by them. They however found that the documents were, as a matter of fact, lying in the family safe with the result that the appellant did not get possession of the documents, and could not sue. They therefore upheld the contention of the appellant and held that this item should be allotted to Pribhdas and Tejumal. In view of that finding they had also to determine what amount should be debited to them in respect thereof.

When in 1928 the outstandings were allotted to the appellant, he was not required to pay their full value, but much less. It was not the fault of the respondents that the money could not be recovered for nearly three years and there were difficulties ahead in the recovery of the full amount of such an old debt. The arbitrators therefore allotted this item to Pribhdas and Tejumal for Rs. 24,000. They had jurisdiction to do so, and it is not open to us to go into the question whether the arbitrators should have fixed a higher amount than Rs. 24,000 as the value of this item. It is also not open to the appellant to challenge the award on the ground that the arbitrators could not separate one item of the outstandings from the other or put a value thereon in the manner they have done, specially when the arbitrators did this at the appellant's own request.

The last objection urged before us is that the award is not certain and that it purports to delegate the functions of the arbitrators to one of the parties. This objection is based on para. 15 of the award which is as follows:

> That we further award that the produce of their agricultural lands and comprising generally of the last two years or so has not been sold and has been stored away in Bhandas at Bhagudero and Haji Khan Mari's village. We award and direct that the same be sold by Tejumal as soon as possible and out of the proceeds which will amount to Rs. 3090-1-1 he do pay certain sundry joint debts of the family as shown in the list marked AA, and the balance if any he will divide in four equal parts and pay one fourth to each of his other three brothers, namely, Pribhdas, Sobhraj, and Vishindas without any impediment or excuse or claim or right of set-off. . . .

It is urged that the award is uncertain because it does not say what was the quantity of produce to be sold and in which of the godowns of the parties it was stored. Now, if it was the contention of the appellant that there was a dispute between the parties as to the quantity of the produce or as to the godowns where it was stored, he should have said so. He has not only not said so, but has put no questions whatsoever to the arbitrators or to any other witness in the case on those points. It is well settled that the Courts will make every reasonable intendment in favour of an award being a final, certain and sufficient termination of the matters in dispute. One of the oldest cases on this point is (1818) 36 E R 291[3] at p. 294. In that case Lord Eldon has said:

> It is extremely clear that every award must be certain and final; but it has, particularly in more modern times, been considered the duty of the Court, in construing an award, to find that it is certain and final; and instead of leaning to a construction, which in effect would destroy nine tenths of the awards made, if possible, to put one consistent sense on all the terms.

It is equally well settled that unless and until the contrary is shown, the Court will presume that the arbitrator has determined only such matters as were in dispute and were referred to him, and that the burden of proving that the arbitrator has awarded on matters not within the submission or has failed or omitted to award on matters which were within the submission lies upon the party who seeks to impeach the award: Halsbury, Vol. 1, para. 1118. And it goes without saying that an award cannot be set aside on the ground of uncertainty upon a point upon which there is no controversy between the parties: (1823) 2 B & C 170[4] and (1837) 2 M & W 495.[5] In the absence therefore of any allegation much less proof, that the question of the produce stored in the godowns or the identity of the godowns was in controversy it is not possible to hold that the award is uncertain.

The next argument advanced on behalf of the appellant is that by the award the arbitrators have delegated their function to one of the parties to sell the produce and to distribute the sale proceeds. This is again begging the question. It was incumbent upon the appellant to allege and prove that under the terms of the reference the arbitrators were required to sell the produce and to distribute the sale proceeds before they made their award. Not only is there nothing in the reference to require the arbitrators to do so personally, but there is a clear indication in the reference that they could ask one of the parties to do such acts. The reference inter alia recites that:

> If any brother was required by the arbitrators to do any work in respect of the partition he shall be bound to do so.

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[3] Wood v. Griffith, (1818) 36 E R 291=1 Swanst 43=1 Wils Ch 34=18 R R 18.

[4] Cargey v. Aitcheson, (1823) 2 B & C 170=3 Dowl & Ry. 433=2 Bing 199=1 L J K B 252=26 R R 298.

[5] Plummer v. Lee, (1837) 2 M & W 495=5 Dowl PC 755=6 LJ Ex 141=1 Jur 658=M&H 152.

Selling the produce and distributing the sale proceeds in accordance with specific directions contained in the award is undoubtedly a work which is required to be done "in respect of the partition" and could therefore be entrusted to one of the parties. There is no limitation in the reference that the arbitrators may not require such work to be done by their award and that they should get such work done before making the award.

The arbitrators were required to complete their award without any delay. They could not conveniently do that unless they gave directions for certain ministerial acts being carried out by one or the other party in terms of the award. The directions contained in the award are clear and specific. Tejumal is required to carry out his duties without any impediment or excuse or claim or right of set-off. The creditors to whom the sale proceeds were to be paid are all mentioned in the schedule and the amount payable to each of them is specified therein. The balance, if any, is required to be distributed in four equal shares. Had the award directed that the work of selling the produce and distributing the sale proceeds be done in execution proceedings through a receiver appointed by the Court, nothing could have been alleged against the validity of the award; and therefore if Tejumal was appointed to do that work, that fact alone cannot vitiate the award. This is the more so, when there is an express clause in the reference which amply supports the directions given by the arbitrators.

Lastly, it was urged that the price which the produce would fetch being uncertain that would make the award uncertain. But the produce was to be sold at the market price and the amount to be realized was therefore sufficiently certain. In (1844) 1 Dowl & L 560,[6] Lord Abinger C. B., Parke, B. and Alderson, B. held that in a dispute as to (inter alia) the value at which certain iron rings and shafts should be taken an award of "such sum of money as the same amounts to according to the present market price of pig iron" was sufficiently certain. The appellant has therefore failed to justify his attack on this ground as well. We accordingly dismiss the appeal with costs.

K.B./R.K. *Appeal dismissed.*

## A. I. R. 1938 Sind 63

DAVIS J. C. AND LOBO J.

*Ghulam Hyder Imam Baksh*
Appellant.

v.

*Emperor.*

Criminal Appeal No. 6 of 1937, Decided on 8th April 1937, from order of Addl. Sess. Judge, Sukkur, D/. 30th Nov. 1936.

**(a) Criminal Trial—Benefit of doubt—Duty of Court — Judge should not find accused guilty even in alternative of offence in respect of which reasonable doubt exists — Charge under S. 302, Penal Code – Prosecution proving knowledge — Conviction should be under S. 304, Part 2.**

It is the duty of a Judge to make up his mind upon the facts of the case before him, and if there is any real doubt as to the facts, then he must give the accused the benefit of that doubt, not by finding him guilty, even in the alternative of the offence in respect of which the reasonable doubt exists, but by acquitting him of that offence. He should remember that the burden lies on the prosecution to prove the guilt of the accused. If in a case of murder, the prosecution has failed to prove the intention which is necessary in order that an accused should be convicted of murder, then it fails to prove that the accused is guilty of murder and the accused should not be convicted of murder even in the alternative. If the prosecution can prove the knowledge which is necessary for the conviction of an offence under S. 304, Part 2, Penal Code, the proper course is to convict the accused of an offence under S. 304, Part 2, and not in the alternative : *5 S L R 16 Foll.* [P 65 C 1]

**(b) Criminal P. C. (1898), S. 236—Applicability — S. 236 only applies to case where facts are not in doubt but it is doubtful which provision of law applies.**

Section 236 is limited in its application. It is not intended to be applied to a case where the facts are left in doubt or to enable the Judge to leave the facts in doubt and thus to escape responsibility and duty of making up his mind which the law places on him. It applies to a case where the facts are not in doubt but it is doubtful which provision of law applies to these facts. [P 65 C 1, 2]

**(c) Penal Code (1860), Ss. 302, 304, Parts 1 and 2—Murder — Reasonable doubt as to intention of accused — Only one blow with hatchet struck and in circumstances which are in doubt—Probably no intention in mind of accused either to kill or to cause fatal injury—Offence falls under S. 304, Part 2, and not under S. 302, or S. 304, Part 1.**

In a case of murder, where intention is one of the essential elements of the offence, it is always necessary that there should be a definite finding as to whether the necessary guilty intention is or is not present, and when it is reasonably doubtful upon the evidence of the prosecution whether this intention is present, then the accused is entitled to the benefit of that reasonable doubt and he must be acquitted of the charge of murder even if he is to be convicted of the charge of culpable homicide not amounting to murder. [P 65 C 2]

Where only one blow with a hatchet was struck and suddenly in circumstances which are in doubt and there was not probably in the mind of the accused an intention either to kill or to cause a fatal injury :

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[6] 6. Weddle v. Downman, (1844) 1 Dowl & L 560.

*Held* that there was a reasonable doubt as to intention of the accused and the offence fell more under S. 304, Part 2, than under S. 302 or S. 304, Part 1. [P 65 C 2]

Partabrai D. Punwani, Advocate General — *for the Crown.*

**Davis, J. C.** — This is an appeal from jail by one Ghulam Hyder, son of Imam Baksh, who has been convicted by the Additional Sessions Judge of Sukkur of the offence of murder under S. 302, I. P. C. or in the alternative of the offence of culpable homicide not amounting to murder under S. 304, I. P. C. and sentenced to rigorous imprisonment for seven years. This is a most unusual conviction, and we can only ascribe it to the fact that the learned Judge has been quite unable to make up his mind as to the offence which the accused committed because he has been unable to make up his mind as to the facts. In this case there can be no doubt that one Kassim was killed by the appellant Ghulam Hyder by a hatchet blow on the head though the fatal injury was inflicted on 24th May and the deceased died only on 5th June 1936. The hatchet was taken out of the hand of the accused by Illahi Baksh witness and the offence was committed in the village of Detha in broad daylight. The accused in his own statement in Court admitted that he struck the deceased with the hatchet which was taken from his hand by Illahi Baksh, but he says he struck in self-defence as the deceased had struck him with a lorh. Another witness to the killing of Kassim was one Trooh. The medical evidence shows that the deceased died of an oblique incised wound 3″ x ½″ deep to the bone on the right frontal eminence, the bone being cut and the eye being ecchymosed. He was sent to the hospital on 24th May, and died on 5th June. After his death, the post mortem showed the frontal bone was cut through and the brain injured. The medical officer was of the opinion that the injury from which the deceased died was sufficient in the ordinary course of nature to cause death.

The learned Judge found no difficulty in coming to the conclusion that Kassim was dead, and his death was caused by the appellant. But on the third point as to the offence committed he found himself in a condition of doubt and difficulty. He says: "A decision on the third point however is neither so simple nor so clear." It appeared to him that in view of the fact that the injury was inflicted with an axe upon the head, it was quite reasonable to presume that the accused must at least have known and probably even intended that by his act he was causing such bodily injury to his victim as was likely to cause his death and further that the bodily injury contemplated to be inflicted upon Kassim was sufficient in the ordinary course of nature to cause death. Even after a discussion of S. 300 and S. 304, I. P. C., and a consideration of the case in 9 S L R 99,[1] the learned Judge found himself still in doubt. He says :

> Unfortunately in this case it is extremely difficult to arrive at any definite conclusion as to what the accused's intention was at the time of the offence.

After a further discussion of the evidence and a further expression of his doubts and a reference to Gour's Penal Law, the learned Judge appeared to come to the conclusion that the offence was of murder within S. 300, I. P C., because he says :

> The nature and position of this hatchet wound therefore to my mind clearly point out to both the knowledge as well as the intention of the accused falling within S. 300, I. P. C.

Then the learned Judge considers the exceptions to S. 300, I. P. C., and comes to the conclusion that none of these exceptions applies. It would then appear that the learned Judge had by then come to the conclusion that the appellant was guilty of murder. However, after further discussion of the evidence, the learned Judge says:

> Considering however the fact that only one blow was given by the accused, it might well be held that there is some doubt as to the homicidal intention of the accused and he was therefore entitled to the benefit thereof. In this connexion the reasoning in 41 Bom 27[2] appears to have some bearing.

The case in 41 Bom 27[2] has however been overruled in the case in 36 Bom L R 210.[3] Finally, the learned Judge endeavours to give his doubts legal form by finding the accused guilty of murder, or in the alternative, of culpable homicide not amounting to murder for reasons with which we are unable to agree, for it is the duty of a learned Judge to make up his mind upon the facts of the case before him, and if there is any real doubt as to the facts, then he must give the accused the benefit of that doubt, not by finding him guilty, even in the alternative, of the offence in respect of which the reasonable doubt exists, but by acquitting him of that offence. In other words, he should remember that the burden lies on the prosecution to prove the guilt of the accused, and if the prosecution fail to prove the intention which is necessary in order that an accused should be convicted of murder, then they fail to prove the accused is guilty of murder, and the accused should not be convicted of murder even in the alternative. If the prosecution can prove the knowledge which is necessary for the conviction of an offence under S. 304, Part 2, I. P. C., the proper course is to convict the accused of an offence under S. 304, Part 2, I. P. C., and not in the alternative. We would invite the attention of the learned Judge to the case in 5 S L R 16,[4] in which this whole position of alternative charges is discussed. Unless we further confuse the learned Judge, we would quote only that part of the judgment which is strictly relevant. At p. 20, Pratt J. C. says:

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[1] Saidino v. Emperor, (1915) 2 A I R Sind 23=30 I C 998=16 Cr L J 710=9 S L R 99.

[2] Emperor v. Sardarkhan, (1916) 3 A I R Bom 191=36 I C 578=41 Bom 27=17 Cr L J 530=18 Bom L R 793.

[3] Emperor v. Samat Kala, (1934) 21 A I R Bom 156=148 I C 1004=1934 Cr C 543=35 Cr L J 829=36 Bom L R 210.

> So also when the difference between the offences arises out of the intention imputed to the accused, i. e. the intention which is presumed from the facts proved. This also cannot be left in doubt for, it is the duty of jury to decide which view of the facts is true. Illus. (a) to S. 299, Criminal P. C., makes it quite certain that an alternative charge of murder or culpable homicide not amounting to murder is not permissible. Indeed if the intention imputed to the accused could be left in doubt in an alternative charge the most extraordinary and anomalous results would ensue. An accused who had overdriven and killed a foot passenger might be convicted in the alternative of murder or of causing death by a rash and negligent act. Or again in a case of death from a ruptured spleen the accused might be convicted in the alternative of murder or of simple hurt. A finding which left in doubt whether the convicted person was convicted of murder or not would be bad in law for the jury would have failed in their duty to ascertain the true view of the facts. The result therefore is that an alternative charge cannot be framed in respect of distinct offences nor even in respect of cognate offences when the difference is one of degree, i. e. as to the intention imputed to the accused or as to some circumstance of aggravation.

We would add that S. 236, Criminal P. C., is generally regarded as limited in its application : it is not intended to be applied to a case where the facts are left in doubt or to enable the Judge to leave the facts in doubt and thus escape that responsibility and duty of making up his mind which the law places on him : it applies to a case where the facts are not in doubt, but it is doubtful which provision of the law applies to these facts. But a question of intention is a question of fact. A state of a man's mind is as much a question of fact as the state of his digestion. The Judge must make up his mind as to the intention of the accused, and having made up his mind, there can be no doubt as to the provision of the Penal Code which applies. It is not a case where, for instance, upon proved facts, it is doubtful whether the accused is a thief or receiver of stolen property, where the facts are not in doubt, but it is doubtful upon the facts which of two offences has been committed. But in a case of murder, where 'intention' is one of the essential elements of the offence, it is always necessary that there should be a definite finding as to whether the necessary guilty intention is or is not present, and when it is reasonably doubtful upon the evidence of the prosecution whether this intention is present, then the accused is entitled to the benefit of that reasonable doubt, and he must be acquitted of the charge of murder even if he is to be convicted of the charge of culpable homicide not amounting to murder.

In this particular case however we are of the opinion, upon the evidence, that there is a reasonable doubt as to the intention of the accused. Only one blow was struck and suddenly in circumstances which are in doubt. There was not probably in the mind of the accused an intention either to kill or to cause a fatal injury. The act was sudden; and it appears to us it is more proper under the circumstances to impute to him 'knowledge' rather than 'intention'. The offence therefore would fall more probably under S. 304, Part 2, I. P. C., than under S. 302 or S. 304, Part 1, I. P. C. We therefore set aside the conviction under S. 302, I. P. C., and confirm the conviction under S 304, Part 2, I. P. C., and the sentence of seven years rigorous imprisonment, and we dismiss the appeal accordingly.

R.M./R.K. *Order accordingly.*

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[4] Ganesh Krishna v. Emperor, (1911) 5 S L R 16=10 I C 168=12 Cr L J 224.

### A. I. R. 1938 Sind 66

DAVIS J. C. AND LOBO J.

*Gajadhar Bhagchand* — Applicant.

v.

*Emperor.*

Criminal Revn. Appln. No. 204 of 1937, Decided on 5th November 1937, from order of Dist. Magistrate, Larkana, D/- 20th July 1937.

**Criminal P. C. (1898), S. 526 (8)—Adjournment granted on condition that applicant should within reasonable time apply to High Court—Application wrongly but in good faith made to local Court—Delay should be pardoned.**

Where an adjournment under S. 526 (8) is granted to an applicant on condition that he should within reasonable time, apply to the High Court for transfer of the case, if the applicant in mistake but in good faith first moves the local Court for transfer he should, if the mistake is made for the first time, be pardoned the delay. [P 66 C 2]

Amarlal W. Hingorani — *for Applicant.*

Partabrai D. Punwani, Advocate General — *for the Crown.*

**Davis J. C.** — This is an application in revision asking us to set aside an order of the District Magistrate dismissing the applicant's appeal against an order of the Resident Magistrate of Kambar forfeiting a bond for Rs. 200 taken by the Magistrate under S. 526 (8), Criminal P. C. on the application of the applicant for adjournment of his case, so that an application for transfer could be made to the High Court. The learned District Magistrate has written a very brief order indeed in which he has given no reasons for his dismissal of the applicant's appeal. The reasons in the Resident Magistrate's order which presumbly the learned District Magistrate has made his own are set out in the paper book and these reasons briefly are that the applicant was granted an adjournment on condition that he applied within a reasonable time to the High Court ; that this reasonable time must be considered to have been fixed by the date to which the case was adjourned, namely, 13th March for no date was given in the order and that the fact that the applicant first made an application to the Sub-Divisional Magistrate at Kambar for transfer is no good ground for delay, for an adjournment under S. 526 (8), Criminal P. C., is granted not for the purpose of making an application for transfer to a Court in the District but to the High Court itself.

Shortly however we think this application should succeed because the Resident Magistrate has by his own orders shown that he did not consider the applicant had unduly delayed at least until about 13th April, because though the case was adjourned until 13th March, on 13th March the learned Magistrate himself granted an adjournment until 31st March and himself noted that this adjournment was granted because an application could not be made to the High Court until an application in the first instance had been made to the Sub-Divisional Magistrate's Court. This note is consistent with a circular of this Court which rightly or wrongly provides that in a case of application for transfer the local Court should be first moved, but this circular has been cancelled by a later circular dated 16th June 1936. Nevertheless if a party in good faith does first move the local Court we think he should, if his mistake is made for the first time, be pardoned some delay. Again on 31st March the learned Magistrate noted without further comment or objection that the Sub-Divisional Magistrate had rejected the transfer application, but that on receipt of true copies an application would be made to the Court of the Judicial Commissioner. An application was in fact made on 13th April although the applicant had to make his application without having obtained a copy of the order of the Sub-Divisional Magistrate.

Therefore it appears to us a little unreasonable for the Resident Magistrate on 24th May 1937 to call upon the applicant to forfeit Rs. 200 because he had not applied before 13th March to the High Court. The learned Magistrate's own note in the diary appears to have given reasons why the application was not made more promptly to the High Court and at the time when he made his notes in the diary it does not appear that he considered that there was unreasonable delay on the part of the applicant or there was any thing that should lead to comment or objection or lead to the forfeiture of this penalty of Rs. 200. Apart therefore from any other consideration, we think it cannot be said that conditions of the bond were broken and that Rs. 200 are rightly forfeited. Therefore we set aside the order of the District Magistrate and direct that Rs. 200 if paid be refunded to the applicant.

D.S./R.K. *Order set aside.*

## A. I. R. 1938 Sind 67

DAVIS J. C. AND LOBO J.

*Emperor*

v.

*Ghulamali Bahawal and others*
Respondents.

Criminal Acquittal Appeal No. 165/8 of 1937, Decided on 20th December 1937, against order of First Class Magistrate, Kambar, D/. 24th June 1937.

**(a) Criminal Trial—Acquittal—Appeal from —Acquittal based on facts and appreciation of evidence—Powers of High Court in entertaining appeal explained.**

In dealing with an appeal from an order of acquittal on a matter of fact, the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. Such power is not limited to cases of obstinate blunder on the part of the lower Court and incompetence, stupidity or perversity of conduct or misconduct resulting in a clear miscarriage of justice. In exercising this power, the High Court will always give proper weight and consideration to such matters as the views of the trial Court as to the credibility of the witnesses, the presumption of innocence in favour of the accused, his right to the benefit of any doubt, and the slowness of an Appellate Court in disturbing a finding of fact by a Judge who had the advantage of seeing the witnesses: *A I R 1934 P C 227 Foll.; 16 All 212 Ref.* [P 68 C 1]

**(b) Criminal Trial—Appeal — Appeal from conviction and one from acquittal—Distinction between—Criminal P. C. places them on equal footing — Difference in position — Appeal from conviction — Easy position of appellant — Position of appellant in appeal from acquittal is however different.**

Although Criminal P. C. makes no distinction between an appeal from a conviction and an appeal from an acquittal yet there is a real distinction, apart from the provisions of the Criminal Procedure Code. Every man is to be presumed innocent until his guilt is established ; if there is a reasonable doubt, the accused must have the benefit of that doubt. An appellant from a judgment of conviction can always invoke the support of these principles. If he can show that the essential evidence against him is not sufficiently reliable, as the lower Court thought, or that all reasonable doubt as to his guilt is not removed thereby, he is bound to succeed on these principles. An appellant from a judgment of acquittal has, on the contrary, to work in the face of these principles and satisfy the Court that the accused can derive no benefit from them on the facts of the case under appeal. His task is thus naturally more difficult than that of the convict appellant. The effect of this and other considerations is to make in fact a considerable difference between an appeal from a conviction and one from an order of acquittal though both appeals are placed on the same footing in the statute law of procedure : *A I R 1915 Sind 8, Ref.* [P 69 C 2; P 70 C 1]

**Partabrai D. Punwani, Advocate-General — *for the Crown.***

**R. G. Mani — *for Respondents.***

**Lobo J.**—This is an appeal filed by the Officiating Advocate-General for Sind under instructions from the Local Government against the order of acquittal passed by the First Class Magistrate of Kambar in a case under Ss. 457, 380 and 323, I. P. C., in which the six opponents were the accused. The case for the prosecution was that on the night between 18th and 19th January 1937 at village Ghalu taluka Kambar the accused broke into the cattle-pen of the complainant Mahomed Hassan Khuhawar by making a large breach in his wall and stole therefrom 3 buffaloes and 3 bullocks valued at Rs. 470 belonging to the complainant. It is alleged that the complainant Mahomed Hassan and his father Haji Din Mahomed were sleeping within the compound of their house not far from the cattle-pen. They were aroused at midnight by some noise and found 4 men standing guard over their cots. The complainant and his father lay quiet for a while and the men who had mounted guard over them soon proceeded towards the cattle-pen whereupon the complainant and his father rose and followed them. Complainant had an electric torch which he flashed in the direction of the cattle-pen and at the same time raised cries. His father also joined in the cries. One Mir Mahomed who was the first to be attracted by the cries came running up with a torch. By the light of the torches the witnesses recognized the 6 accused and one Gahno who is absconding as the thieves who were driving off the cattle.

The thieves were pursued by the complainant, his father and Mir Mahomed. In the course of the pursuit Haji Din Mahomed was struck with a lathi by accused Gullan. Accused Ghulam Kadir who ran towards the south was caught hold of by Mir Mahomed. While the accused Ghulam Kadir was striving to rescue himself from Mir Mahomed's clutches, the complainant came up and struck him with a hatchet and accused Ghulam Kadir was ultimately captured. The remaining thieves escaped leaving the cattle behind. The complainant then went and reported the matter to Serai Allah Bakhsh and Kewalmal a Hindu living in the village and these two persons came to the scene of offence. Thereafter during the last quarter of the night complainant set out for the Mahyun police outpost to lodge a first information report. At the Mahyun police outpost the constable who was not authorized to record the first report, directed the complainant to the police station at Kambar. The complainant's first report was recorded at the thana at Kambar at 3 p. m. on 19th January. The police investigation thereafter started and resulted in the 6 accused and Gahno being challaned on 2nd February 1937. Gahno was absconding and the case proceeded against the other accused, the present opponents, in the Court of the First Class Magistrate of Kambar who on 24th June 1937 acquitted the accused. The learned Magistrate at the conclusion of his judgment states :

> Accordingly since the prosecution has hopelessly failed to bring home the offences to all the accused in the case, I think it unnecessary to discuss the defence evidence, and giving them the benefit of doubt acquit all the six accused under S. 258, Criminal P. C.

The above recital of the facts of the prosecution case makes it clear that there was in this case no point of law involved and that the judgment of acquittal of the learned Magistrate which is attacked in this appeal is one involving merely appreciation of the oral evidence in the case. The principles upon which a High Court should deal with an appeal from an order of acquittal based merely on facts and appreciation of evidence have been recently laid down by their Lordships of the Privy Council in 39 Cal W N 15.[1] Their Lordships state :

> In dealing with an appeal from an order of acquittal on a matter of fact the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. Such power is not limited to cases of obstinate blunder on the part of the lower Court and incompetence, stupidity or perversity of conduct or misconduct resulting in a clear miscarriage of justice. In exercising this power, the High Court will always give proper weight and consideration to such matters as the views of the trial Court as to the credibility of the witnesses, the presumption of innocence in favour of the accused, his right to the benefit of any doubt, and the slowness of an Appellate Court in disturbing a finding of fact by a Judge who had the advantage of seeing the witnesses.

In 16 All 212,[2] it was held by a Bench of the Allahabad High Court that ;

> An appeal on behalf of Government in the exercise of the powers conferred by S. 417, Criminal P. C., should not be entertained when the judgment appealed from is based upon facts and the conclusions of the Court are such as may reasonably be arrived at upon the facts found.

Now no doubt the learned Magistrate's judgment is poor and does not invite confidence. At one place he quotes the Latin maxim *falsus in uno falsus in omnibus* and states that he is compelled in view of this maxim, or 'axiom' as he calls it, to disbelieve the prosecution witnesses. The learned Magistrate has also no doubt overstressed and overemphasized various discrepancies in the depositions of the prosecution witnesses which are of a trivial nature or of not much importance such as the following : (His Lordship after citing such instances proceeded.) There are several other instances which can be quoted from the judgment in which the learned Magistrate has similarly emphasized discrepancies in the statements of the prosecution witnesses when it is obvious that such discrepancies must necessarily occur where witnesses are cross-examined at great length in regard to incidents which took place in the darkness of the night and in circumstances of much confusion. But the conclusion arrived at by the learned Magistrate is not really based upon the discrepancies which he has thus over-estimated. His order of acquittal, if the judgment is carefully examined, is rather based on certain broad facts in the case. The prosecution case is based upon the evidence of the complainant, his father, Mir Mahomed, Allah Bakhsh, and Kewalmal. The learned Magistrate points out that 4 of these witnesses are closely interrelated and that Kewalmal, the Bania, is a creature of the witness Allah Bakhsh. The Magistrate further points out that the accused are all inter-related, that Ghulam Ali and the absconding Gahno are brothers, accused Khushu is their nephew, accused Dosu is son of accused Ghulam Kadir and accused Gulan and Duro are brothers. The learned Magistrate also refers to the enmity existing between the prosecution witnesses and the accused. (After referring to evidence his Lordship proceeded.) Considering the connexion of the prosecution witnesses inter se, considering further the enmity existing between the prosecution witnesses and the accused who are all inter-related, the learned Magistrate in our opinion took a proper view when he states in the judgment :

> In the interests of justice it is incumbent on one to scrutinize the evidence of the prosecution with all due care and caution,

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[1] Sheo Sarup v. Emperor, (1934) 21 A I R P C 227=1934 Cr C 1134=151 I C 322=61 I A 398=56 All 645=39 C W N 15 (P C).

[2] Queen-Empress v. Robinson, (1894) 16 All 212 =1894 A W N 49.

and this is exactly what he has done but with perhaps excessive emphasis.

Again the learned Magistrate rightly finds that it was highly improbable that the accused could have breached a solid mud wall and made an entrance therein 6 feet by 4 feet when the complainant and his father were sleeping within a few paces of the wall without arousing them from sleep. In this the learned Magistrate is perfectly right. The movement of cattle farther away from the sleepers than the mud wall, it is alleged, aroused them from sleep; but while the wall was being breached to such an extent that cattle could pass through it their slumbers were not disturbed. It is impossible to believe such a story. Again, though the learned Magistrate has not specifically referred to the point in his judgment, it is obvious that he must have noticed the improbability that in a village with a considerable population no one would be aroused and come up on the cries raised by the complainant and his father other than the prosecution witness Mir Mahomed a relation of the complainant. The learned Magistrate must also have had before his mind the fact that such a case as the one set up against the accused could easily be got up by a few witnesses related to each other.

The case of the accused Ghulam Kadir was that he was on terms of illicit intimacy with the wife of the complainant's father, that on the night in question he had gone by appointment to meet her, that the complainant and his party fell upon him and caused him severe injuries with a hatchet and thereafter got up this false case against him and his relations. There is no doubt that Ghulam Kadir was very severely handled. In fact the injuries inflicted upon him were so severe that he had to be detained in hospital till the 5th of March. It is not at all unlikely, and this the learned Magistrate must have had before his mind, that the complainant and his party having assaulted and beaten Ghulam Kadir so severely and realizing that Ghulam Kadir would prosecute them for the assault, found it necessary to get up some sort of a case in order to explain the injuries inflicted upon Ghulam Kadir. A case of attempted theft of cattle frustrated by the timely waking up of complainant and his party and the flight of the thieves was the simplest case to be put forward. We feel quite satisfied that the judgment of the learned Magistrate is in essence not unreasonable, that it is based on an appreciation of the evidence of the witnesses whom he saw and who deposed before him and that he was in a better position correctly to appreciate that evidence than we are. The filing of this acquittal appeal by Government appears to us to have been ill advised. We have in this case observed the principles set out by their Lordships of the Privy Council in the case we have referred to. We have given proper weight and consideration to the views of the trial Court as to the credibility of the witnesses; we have given due weight to the presumption of innocence in favour of the accused, and his right to the benefit of the doubt; we have been mindful that an Appellate Court should be slow to disturb a finding of fact by a Magistrate who has had the advantage of seeing the witnesses and we are of opinion that this acquittal appeal must be dismissed.

One other point only need be referred to. It was said in the course of arguments that the Criminal Procedure Code makes no distinction between an appeal from an acquittal and one from a conviction; and reference in this connexion was made to the case in 9 S L R 17[3] in the headnote of which it is stated :

> The Criminal Procedure Code makes no distinction between an appeal from a conviction and an appeal from an acquittal.

This no doubt is to some extent correct but as has been pointed out in various rulings of the High Courts yet there is a real distinction, apart from the provisions of the Criminal Procedure Code. Every man is to be presumed innocent until his guilt is established; if there is a reasonable doubt, the accused must have the benefit of that doubt. An appellant from a judgment of conviction can always invoke the support of these principles. If he can show that the essential evidence against him is not sufficiently reliable, as the lower Court thought or that all reasonable doubt as to his guilt is not removed thereby, he is bound to succeed on these principles. An appellant from a judgment of acquittal has, on the contrary, to work in the face of these principles and to satisfy the Court that the accused can derive no benefit from them on the facts of the case under appeal. His task is thus naturally more difficult than that of the convict appellant. The effect of this and other considerations is to make in fact a considerable difference between an appeal from a conviction and one from an order of acquittal though both appeals are placed on the same footing in the statute law of procedure.

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[3] **Emperor v. Kadirbux, (1915) 2 A I R Sind 8 =30 I C 156=16 Cr L J 604=9 S L R 17.**

We accordingly dismiss this appeal.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Sind 70

DAVIS J. C. AND LOBO J.

*Choithram Menghraj* — Applicant.

v.

*Emperor.*

Criminal Revn. Appln. No. 237 of 1937, Decided on 14th December 1937, from order of Bench of Hon. Magistrates, Karachi, D/. 20th July 1937.

**(a) Bombay Prevention of Adulteration Act (5 of 1925), S. 4 (1) — Conviction under S. 4 (1) generally is bad.**

Section 4 (1) contemplates three distinct offences, under Cls (a), (b) and (c) respectively and a conviction under S. 4 (1) generally is bad in law. [P 71 C 1]

**(b) Criminal P. C. (1898), Ss. 263, 342 and Chap. 22 — Although expedition is necessary in summary trial, summary procedure laid down in Criminal P. C. should not be made more summary — S. 263 lays down the minimum requirements of law.**

Although a certain expedition is necessary and is most desirable in summary trials, yet the summary procedure laid down in the Criminal Procedure Code must not be made more summary. S. 263 lays down the minimum requirements of law. Although S. 263 dispenses with the formality of recording evidence, it does not dispense with the necessity of hearing evidence or of following the procedure laid down in Chap. 22, Criminal P. C., for summary trials Nor does it dispense with the necessity of complying with the provisions of S. 342, the examination of the accused after the case for prosecution is closed. S. 263 merely relieves the Court of the burden of recording evidence. [P 71 C 1, 2]

**(c) Bombay Prevention of Adulteration Act (5 of 1925), Ss. 3 (a), 4 (4) (a), 13 — Accused relying on defence of warranty must prove it and must have witnesses ready on date of hearing — He is not entitled to adjournment for purpose of proving warranty — Particulars of offence charged must, however, be stated clearly by prosecution.**

In a trial for an offence under the Bombay Prevention of Adulteration Act, if the accused rely on the defence of warranty they must prove it and must have the witnesses ready on the date of hearing These are not entitled to an adjournment as of right for the purpose of proving warranty. [P 71 C 2]

Where however neither the summons served on the accused nor the evidence for the prosecution makes it clear as to what case the accused has to meet, the accused can be excused if he fails to state clearly his defence of warranty before the case for prosecution is closed. S. 13 requires that the particulars of the offence charged shall be stated in a manner which will clearly inform the accused of the case which he has to meet. [P 71 C 2]

**(d) Revision — Interference by High Court — Summary trial.**

The High Court will not ordinarily interfere in revision in a case tried summarily in which a small fine has been imposed. But where it appears that there has been a confusion in the mind of the lower Court about the offence committed and the accused has been prejudiced thereby, it would do so. [P 70 C 2]

**Thakurdas Tikamdas** — *for Applicant.*

**Partabrai D. Punwani** — *for the Crown.*

**Davis J. C.** — The applicant in these proceedings has been convicted by a Bench of Magistrates of an offence under S. 4 (1), Bombay Prevention of Adulteration Act, 1925, and sentenced to a fine of Rs. 10. Ordinarily we should not interfere in revision in a case of this kind tried summarily in which a relatively small fine has been imposed, but we think there has been such confusion in the minds of the learned Magistrates and in consequence in the mind of the accused as to the offence with which the accused has been tried and charged, a confusion which is shared by the learned advocate for the applicant when he states in the application that there is no Cl. (c) in S. 4 (1) of the Act (relying upon a reprint of the unamended Act) that we think the only proper course open to us is to set aside the conviction and sentence and order a retrial of the accused. The confusion appears to have started first in the complaint which refers to S. 4 (c), Bombay Prevention of Adulteration Act, read with R. 8 (A) (1) and 8 (A) (2) and the Report of the Public Analyst. Reference to S. 4 will show that there is no S. 4 (c) but there is S. 4 (1) (c). We should not let a mere clerical error influence us did it not appear that this error was the cause of prejudice to the accused.

Clause (c) was introduced into S. 4 (1) by the Amending Act of 1935 and relates to a breach of prescribed conditions of sale, manufacture etc. 'Prescribed' means prescribed by rules made under S. 19 of the Act. The summons served under S. 13 of the Act upon the accused is vaguer still. It refers only to S. 4. We think that S. 13 requires that the particulars of the offence charged shall be stated in a manner which will inform the accused clearly of the case he has to meet. The learned Advocate General states that the offence with which the accused was really charged and of which he was convicted was for selling a ghee substitute under the name of Vegetable Tawda when he should have sold it under the name of Vegetable Product or Vanaspati, in fact, for a simple breach of a prescribed rule. If that is so, it would have been a very simple thing to have said so, when the question of the warranty might not have arisen, if, as the learned Advocate General now states, the provisions of sub-ss. (3) and (4), of S. 4 which relate to the question of warranty do not apply in a case where the offence is a simple case of misdescription, a breach of R. 8 (B). But if the offence complained of was one under S. 4 (1) (b) because the accused offered for sale a vegetable product which contained a certain percentage of butter fat, then the question of warranty would be relevant and the complaint of the accused that this evidence as to warranty was shut out by the Magistrates would be also relevant. But the learned Magistrates do not appear to have made up their minds whether the accused was charged and to be convicted of an offence under S. 4 (1) (b) or 4 (1) (c), both different offences, for they have convicted for an offence under S. 4 (1) generally. But S. 4 (1) contemplates three separate and distinct offences, under Cls. (a), (b) and (c) respectively.

We appreciate the fact that in summary proceedings a certain expedition is intended and indeed is most desirable, and in this case it appears that many months elapsed between the complaint dated 12th November 1936 and the hearing on 13th July 1937. But the summary procedure laid down in the Criminal Procedure Code must not be made yet more summary. S. 263, Criminal P. C., lays down the minimum requirements of the law. We observe however that the Magistrates do not appear to have used the prescribed form and entered the required particulars and the judgment is written on the back of a page of the case diary. Moreover, while S. 263, Criminal P. C., dispenses with the formality of recording evidence, it does not dispense with the necessity of hearing evidence or of following the procedure set out in Chap. 22, Criminal P. C., for summary trials. Nor does it dispense with the necessity of complying with the provisions of S. 342, Criminal P. C., the examination of the accused after the case for the prosecution is closed. In short S. 263, Criminal P. C., merely relieves the Court of the burden of recording evidence. It may be that the accused delayed his defence based on the warranty because his defence was defective, but the fact that he sent a copy of the warranty within the three days prescribed by S. 4 (4) (a) makes it extremely probable that he relied on the warranty for his defence. We think the complainant should have produced the copy of the warranty served on him under S. 4 (4) (a) when he gave evidence so that the accused could have cross-examined him upon it, when the case so far as the warranty is concerned would have been cleared up. And if the complainant did not give evidence he should have done so.

In any case, the learned Magistrates refused to consider the question of warranty. They do not say they will not consider it because it is irrelevant to a charge under S. (4) (1) (c). They say they will not consider it because the written application was made after the case was closed. But if a summons served under S. 13, Bombay Prevention of Adulteration Act, on the complainant did not make it clear, or if the complainant in his evidence did not make it clear, what was the case the accused had to meet, the accused may be pardoned if he did not state clearly the defence of warranty before the case for the prosecution was closed. Nor does it appear clear how he could have written out his application before his oral request was refused. On the other hand, accused persons in cases of this nature must realize, if they rely upon the defence of warranty that they must prove it, and they must have their witnesses present at the date of hearing. They are not entitled to adjournments as of right. We do not say that the applicant has good defence of warranty or will prove it. We do not say that the defence of warranty is a defence at all to a simple charge of selling a ghee substitute as Vegetable Tawda instead of Vegetable Product, an offence under S. 4 (1) (c) by reason of Rr. 8 (A) and (B). That aspect of the case will presumably be properly argued and considered by the Magistrates when this case again comes before them. But in view of the room for misunderstanding the complaint and the summons afford, and the doubt even to the last as to the offence of which or the sub-section under which the accused has been convicted, we think it only proper, we should set aside his conviction and sentence, and order a retrial, and we do so accordingly. Papers to be sent back through the District Magistrate.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Sind 72

DAVIS J. C. AND LOBO J.

*Girdharilal Mohanji* — Applicant.

**v.**

*Emperor.*

Criminal Revn. Appln. No. 260 of 1937, Decided on 1st December 1937, from order of Bench Magistrates, Karachi, D/. 21st September 1937.

**(a) Bombay Prevention of Adulteration Act (5 of 1925), Ss. 4 (4) (b), 5 — Warranty must be proved by personal attendance of warrantor — His absence can be excused only in exceptional circumstances.**

Under S. 4 (4) (b), it is the rule that a warranty must be proved by the personal attendance in Court, of the person by whom or on whose behalf it was given and it may well be that this provision of S. 4 (4) (b) is to be read with S. 5 whereby provision is made for the punishment of the warrantor in case a false warranty is given. It is the rule that the warrantor must personally attend in Court, and it is only in exceptional circumstances that he should not do so. [P 72 C 2]

**(b) Bombay Prevention of Adulteration Act (5 of 1925), S. 4 (4) (b)—Magistrate has power to ask for issue of commission to warrantor under S. 506, Criminal P. C., in proper cases — Power should be exercised only in rare cases — Magistrate rejecting application for issue of commission is not however bound to give his reasons in writing.**

The words in the 'exception' contained in S. 4 (4) (b) are wide enough to cover the power of a Magistrate to ask for the issue of a commission under S. 506, Criminal P. C., in case where he thinks that it is only just and proper that that power should be exercised. The cases in which the Court would grant a request for the issue of a commission to a warrantor would be rare but there is nothing in S. 4 (4) (b) to prevent the Court asking the District Magistrate to issue a commission for the examination of the warrantor. It is not however necessary for the Magistrate rejecting the application for the issue of commission to give his reasons for doing so in writing. [P 72 C 2; P 73 C 1]

Khubchand — *for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.** — This is a revision application against the order of a Bench of Honorary Magistrates, in which they dismissed an application of the applicant who was charged with an offence under S. 4 (1) (b), Bombay Prevention of Adulteration Act for the issue of a commission for the examination of a warrantor. The case as put first before us was that the learned Magistrates had misdirected themselves, because, apparently they were under the belief that in all cases where the defence was of one of warranty, the warrantor should be personally present in Court under the provisions of S. 4 (4) (b), and that they had no power to issue a commission under S. 506, Criminal P. C., even if they desired to do so. But we cannot see from the record, that the Magistrates have misdirected themselves, but it would appear that it was the applicant or his learned advocate who is under a misapprehension as to what the law is. They appear to be of the opinion that they have only to serve a copy of the warranty under the provisions of S. 4 (4) (a) to provide themselves with a complete defence. But we can see nothing in S. 4 (4) (a) or (b) which justifies this statement of the law. On the contrary, it would appear under S. 4 (4) (b), that it is the rule, that a warranty must be proved by the personal attendance in Court of the person by whom or on whose behalf it was given, and it may well be that this provision of S. 4 (4) (b) is to be read with S. 5, whereby provision is made for the punishment of the warrantor, in case a false warranty is given. It is the rule that the warrantor must personally attend in Court, and it is only in exceptional cases that he should not do so. It is clear from the wording of S. 4 (4) (b) that this is so. This Cl. (b) reads :

> Except in a case where the Court itself is otherwise satisfied of the genuineness of the warranty, unless such warranty is proved by the personal attendance in the Court of the person by whom or on whose behalf it was given.

It was first contended by the learned Advocate-General who opposed the revision application that the words in the 'exception' are not sufficiently wide to include the power of the Magistrate to ask for the issue of a commission under S. 506, Criminal P. C., if they saw fit. But we think these words are wide enough to cover that power in cases where the Court thinks that it is only just and proper that that power should be exercised. For instance, there might be a case where the Court was satisfied that what the accused said was true, when he said that the warrantor was struck down with paralysis and could not appear, but that if his evidence were taken on commission the Court would be satisfied as to the genuineness of the warranty. We think that in such a case there is nothing in law to preclude the Magistrates from asking the District Magistrate for the evidence of this paralytic warrantor to be taken on commission. We imagine cases where the Court would grant such a request would be rare, but taking the words of the Section as they stand, we do not think there is anything to prevent the Court asking the District Magistrate to issue a commission for the examination of the warrantor. It appears to us that cases under Cl. (b) fall clearly under two classes: (1) the ordinary case where the personal attendance of the warrantor is necessary; and (2) the exceptional case where the personal attendance of the warrantor is dispensed with by the Court. But there is nothing so far as we can see to prevent the Court, in order that it might be "otherwise satisfied" within the meaning of Cl. (b), to ask the District Magistrate to arrange for the evidence of a witness to be taken on commission. But when we have said this, we have said as much as possible in favour of the applicant. It said that the Magistrates should have given their reasons for the rejection of the application for the evidence of the warrantor to be taken on commission. But we can see no reason why in proceedings of this nature the Magistrate should give their reasons in writing. We see no reason so far to interfere with the order of the Magistrates. We therefore dismiss this revision application.

R.M./R.K. *Application dismissed.*

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## * A. I. R. 1938 Sind 73

DAVIS J. C.

*Gobindram C. Motwani* — Applicant.

v.

*Emperor.*

Criminal Revn. Appln. No. 26 of 1936, Decided on 30th April 1937, against order of Addl. City Magistrate, Karachi, D/. 7th September 1936.

*** Penal Code (1860), S. 405—Person hypothecating goods in his shop as collateral security against advance and agreeing to hold goods and proceeds thereof in trust for another — Dealing with proceeds in violation of terms of trust is offence under S. 405 provided there is criminal intent.**

It cannot be broadly stated that a person cannot commit criminal breach of trust of his own property and that in order to bring a case within S. 405 there must be actual delivery by the owner: *Case law discussed.* [P 74 C 2]

Where a person hypothecates goods in his shop as a collateral security against an advance and agrees to hold the goods and the proceeds thereof in trust and to pay the proceeds received by him, the person, by this trust receipt, gives a beneficial interest in the goods to another and holds the goods, with which he is entrusted as legal owner, in trust for another. Hence if he deals with the proceeds in violation of the terms of the trust, he commits an offence under S. 405 provided he has the necessary criminal intention. [P 76 C 2]

K. H. Nagrani — *for Applicant.*

Hatim B. Tyebji — *for the Crown.*

**Order.** —This is an application in revision against an order of the Additional City Magistrate, Karachi, discharging two accused upon a complaint of the applicant of an offence under S. 406, Penal Code. The complaint was that the two accused, the opponents, had hypothecated goods in their shop as collateral security against an advance and had agreed to hold the goods and the proceeds thereof in trust and to pay the proceeds when and as received by them. They did not so pay the proceeds and thereby committed an offence of criminal breach of trust. The learned Magistrate took the view that as the hypothecated goods were still the property of the accused they could not commit criminal breach of trust in respect of their own property, and that in any case he was satisfied that there was no dishonest intent. Now so far as the first point is concerned, that a person cannot commit criminal breach of trust in respect of his own property, that proposition, as it stands, appears to me to require some qualification. In support of the view that a person cannot commit criminal breach of trust of his own property, my attention has been drawn to a judgment of a Bench this Court in 23 S L R 18,[1] where in the course of his judgment Rupchand A. J. C. says:

> But the expression 'entrusted' in that section (S. 405, I. P. C.) is used in its legal and not in its figurative or popular use. The section makes no distinction between different kinds of moveable property. If the expression 'entrusted' is applied to a thing which is not money, it would indubitably indicate that such thing continues to remain the property of the prosecutor, during the period in which the accused is permitted to retain its

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[1] Emperor v. Ghanshamdas Khatumal, (1928) 15 A I R Sind 106=108 I C 663=29 Cr L J 431=23 S L R 18.

possession or is permitted to have any domain (sic) over it.

I think it probable that the judgment was intended to apply to the facts of that particular case, and it was not intended to lay down a general principle that in no case can a person be guilty of criminal breach of trust with respect to his own property. S. 406, I. P. C., is intended among other things to punish defaulting trustees but a trustee is in law the owner of trust property. He is the legal owner while the beneficiaries are the beneficial owners, so that if the proposition is to be accepted without qualification that a man cannot be guilty of criminal breach of trust of his own property, defaulting trustees would go unpunished. Moreover there is some authority for the proposition that a person may commit criminal breach of trust of his own property. In A I R 1923 Mad 597,[2] Spencer J., was of the opinion that it was not

> impossible under any circumstances for a person to commit criminal breach of trust in respect of his own property. The possession of promissory notes even without endorsement in the hands of the person with whom they were pledged was of some value to the complainant as it gave him control over the accused, and so long as they remained with him prevented the accused from using them to discharge the debts due by him to other creditors in preference to him. The complainant had thus some sort of beneficial interest in this property, and when he gave the notes to the accused for a definite purpose and the accused dishonestly disposed of them in violation of the legal contract he had made with him, there was both entrustment and dishonest misappropriation.

Nor is this judgment really in conflict with a later judgment of the same High Court in A I R 1931 Mad 235,[3] for, though in that case Pandalai J., was of the opinion that an accused who was the legal owner of a pronote could not be convicted of criminal breach of trust in respect of the proceeds of the note merely because he had agreed to use the proceeds in a particular way, he goes on to say:

> There can be no entrustment and therefore no breach of trust in such cases merely because the owner of the property repudiates his obligations or commits other breach of contract in respect of them. The property, in respect of which criminal breach of trust can be committed, must be the property of some person other than the accused or the beneficial interest in or, ownership of it must be in some other person, and the offender must hold such property on trust for such other person or in some way for his benefit: per Fox C. J. 13 Cr L J 888.[4]

Moreover it is clear that entrustment within the meaning of S. 405, I. P. C., does not necessarily imply actual delivery by the owner of the property to the accused, for instance, Illus. (*o*) to S. 405, I. P. C., itself contemplates a case where there is no physical delivery by the owner to the accused. A Revenue-officer is described as entrusted with public money and under a duty to pay it into a Government treasury. In such a case Government does not actually hand over the money to the Revenue officer, but the Revenue officer receives it from those who owe it to Government, and pay it to him, and Fawcett, Acting C. J. in A I R 1928 Bom 521,[5] emphasises the words "in any manner" used in conjunction with the word "entrusted" in S. 405, I. P. C. He does not interpret the Section narrowly nor speak of the word being used 'in its legal and not in its figurative or popular use'. He says: "S. 405, I. P. C., which defines criminal breach of trust, is in very wide language", and in that case he was of the opinion that property in S. 405, I. P. C., covers not only the goods entrusted but their sale-proceeds. This also was the opinion of a Bench of this Court in A I R 1932 Sind 169.[6]

It is therefore clear that the propositions broadly stated that a person cannot commit criminal breach of trust of his own property and that in order to bring a case within the provisions of S. 405, I. P. C., there must be actual delivery by the owner, require some qualification. But we are concerned here with a case of the hypothecation of shop goods and the proceeds as collateral security for the payment of a loan and the fact that the word 'trust' or 'trustee' is used does not change the real nature of the transaction. If a transaction is a loan, the fact that it is called a trust will serve no other purpose but to confuse the issue: 24 I C 332.[7] Now, neither the Assistant Public Prosecutor nor the advocate for the applicant

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2. In re Venkatagurunatha Sastri, (1923) 10 A I R Mad 597=72 I C 612=24 Cr L J 452=45 M L J 133.
3. Ramaswami Reddy v. Emperor, (1931) 18 A I R Mad 235=1931 Cr C 331=131 I C 449=32 Cr L J 743.
4. Nga Po Seik v. Emperor, (1912) 6 L B R 62=17 I C 824=13 Cr L J 888 (F B).
5. Dwarkadas Haridas v. Emperor, (1928) 15 A I R Bom 521=114 I C 399=30 Cr L J 329=30 Bom L R 1270.
6. Dharamdas Lilaram v. Emperor, (1932) 19 A I R Sind 169=1932 Cr C 733=140 I C 647=34 Cr L J 51.
7. Nga Po Ywet v. Emperor, (1914) 1 A I R L B 1=24 I C 332=7 L B R 278=15 Cr L J 452 (F B).

referred to a case of this Court in which the question of an equitable charge upon moveable property was discussed. That case is the case in 7 S L R 61,[8] at p 68. That case related to the reputed ownership clause in S. 16 (5), Provincial Insolvency Act, but in the course of the judgment the nature and effect of a contract of hypothecation of goods was considered. One J. Forstner, an insolvent, had prior to his insolvency hypothecated to the National Bank of India, by a certain document, as security for an overdraft, certain hides and skins as per an appended list, and the proceeds were to be paid to his account in the Bank as the goods were sold. He gave the Bank authority so long as the debt was unpaid to take possession of the goods, to hold as pawnee under the Contract Act, and failing payment, to sell. On a petition in insolvency being filed, the Official Receiver took possession of the goods in the godown of the insolvent and advertised them for sale. The Bank through their representative asked the Official Receiver to sell the goods on their behalf as they were hypothecated to them, and on his refusal applied to the Court. An important factor in that case was the fact that it was not proved that the goods sold by the Official Receiver were the goods hypothecated to the Bank because Forstner did not, as he had bound himself to do on the last day of each month, furnish a list of the goods in his godown subject to the lien. In considering this aspect of the case, Crouch A. J. C. said at p. 69 :

> Forstner was, by the terms of the document to be at liberty to sell all goods under lien, in the ordinary course of business, but the proceeds were to be earmarked for the Bank's debt. The goods were to remain his property; he was to have power of disposal over them; the money received on their sale was his money, he was merely under a contractual obligation to hand it over to the Bank. Even had a bona fide purchaser for good consideration in the ordinary course of business had notice of the document held by the Bank, he would still have had a good title indefeasible by the Bank. Hence, the document does not, in my opinion, amount to a true charge, or simple mortgage, notwithstanding the use of the word 'hypothecate.' And this view is supported by the fact that the document is stamped not as a document creating a mortgage, or equitable charge, but as an agreement, a document giving personal rights only. But the document can no doubt be quite fairly construed as being a true equitable charge, subject to the proviso that the debtor had a right to dispose of any of the goods charged, in the ordinary course of business.

Now on the question as to whether there could be in India an equitable mortgage or charge of goods, Crouch A. J. C. and Hayward A. J. C. differed. Crouch A. J. C. was of the opinion that in Indian law as in English law there was no such splitting up of the rights of ownership or *jura in re* when goods are mortgaged as in the case of immovable property. He said : (page 68)

> But, in English law, and, in my opinion, in Indian law also, there is no such splitting up of the rights of ownership, or *jura in re*, when goods are mortgaged If there is a mortgage in the English form, by assignment, the mortgagee becomes, in law, the true owner, the mortgagor having only the equity of redemption. But when, as is frequently done in this country, the debtor purports to mortgage goods, without making an assignment, or hypothecates them, or in terms, gives his creditor the right to bring them to sale to discharge the debt, the creditor thereby obtains rights which may be fairly described by the English term 'equitable charge'. He has a right over the goods to secure payment of his debt, he has a right to have the goods sold through the Court to discharge the debt, and this right obtains as against purchaser who takes with notice of, or as against an execution creditor, but not as against a bona fide purchaser for consideration without notice. For, such a purchaser has the legal ownership, and has also equities as strong as those of the creditor. The difference therefore in this country between a simple mortgage of immovable property, and a simple mortgage of goods is that in the former case the mortgagee obtains a *jus in re*, or estate in the premises, and in the latter he does not. The difference has practical consequences only, when there is conflict between a mortgagee and a bona fide purchaser for consideration without notice.
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> But the term 'hypothecate', as also the term 'lien' are frequently used by commercial men to denote that some right has been given over, or in respect of the property of a borrower, not necessarily an equitable charge or true lien, and where the rights are given by a document, the document must be construed as a whole. Though from the use of the term 'hypothecate' or the term 'mortgage', it may ordinarily be inferred that the parties intended that there should be an equitable charge, the inference may be rebutted if on applying the ordinary rules of construction it be ascertained that such was not the intention.
>
> The document now under consideration is not a mortgage in the English sense, for, there is no assignment of any goods; nor is it an equitable mortgage; nor does it, in my opinion, amount to an equitable charge. No present and immediate charge was created by it, for no list was appended. Forstner merely agreed to hypothecate goods to be specified in a statement to be furnished on the last day of each month, and the goods so held under lien were to be kept separate from all other goods. The document therefore had effect only on such goods as were specified in such monthly lists, or were otherwise made subject to it, and on no others.

Hayward A. J. C. said : (page 73)

> I cannot however agree with my learned brother that the bond is other than what it proclaims

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[8] David Sassoon & Co. v. National Bank of India Ltd. Karachi, (1913) 7 S L R 61=21 I C 520.

> itself to be, namely, an agreement to hypothecate future goods, or, in other words, to give an equitable, that is, simple mortgage, without possession. The effect of such an agreement is to assign the right of sale upon ascertainment of the goods to the mortgagee while leaving the possession and other rights of ownership with the mortgagor. This is the rule laid down in (1862) L R 10 H L Cas 191[9]: Such an agreement differs from a pawn or pledge in not assigning the possession and from a bill of sale, that is, a legal or English mortgage, in not assigning the other rights of ownership of the mortgagor. Such agreements have been recognized in this country in the cases in 13 Cal 262,[10] 10 All 133[11] and 23 Cal 592.[12] The rule in (1862) L R 10 H L Cas 191,[9] has also been further discussed in 31 Cal 667[13] and 29 All 163.[14] It is necessary to pursue the line of reasoning suggested in 31 Bom 165,[15] at pp. 171-173, as this province is not affected by S. 6, T P. Act. Simple mortgages without possession have themselves been recognized from the cases in 3 N W P 54[16] and 3 N W P,[17] down to the case in 4 Bom L R 577,[18] and have been legislated in S. 2 (17) and Arts 40 and 41 of Sch. 1, Stamp Act 1899, and in Notification No. 3616 exac. dated 16th July 1909, No. 80, at p. 664 of Vol. 4, General Statutory Rules and Orders 1910. There is indeed no *a priori* reason why there should not thus be simple mortgages of goods without possession just as much as and with precisely the same effect as simple mortgages of landed property as expressly defined in Chap. 4, T. P. Act. The reason for prohibiting simple mortgages of goods without possession in England was the necessity of preventing fraud as has been succinctly explained by Mr. Ghose at pages 23 and 147 to 149 of his Law of Mortgage, 3rd Edn. The prohibition was effected by the series of special enactments called the Bills of Sale Acts. No similar prohibitions were necessary in the cases of landed property owing to the different conditions prevailing as to land in England.

This case was not referred to, and was not argued before me by learned counsel concerned, but it appears to me not without relevance to the case before me. I myself, with respect, agree rather with the view of Hayward A. J. C. than Crouch A. J. C.

The test in this case appears to me to be whether the owners of the goods, the accused, created an equitable charge over the goods in their possession when they executed the trust receipt. If they did so, they held the goods as trustees, they were "in some manner entrusted" with the goods, and if they dealt with them in violation of the terms of the trust, they committed an offence under this Section, provided they had the necessary criminal intent. I can myself see no reason why it should be said that by this trust receipt the accused did not give a beneficial interest in the goods to the applicant and did not hold the goods, with which they were entrusted as legal owners, in trust for the applicant. That being so, I think the learned Magistrate was wrong in his decision that the accused could not be guilty of criminal breach of trust because the goods were their own property.

But the learned Magistrate has found that in this case there was no criminal intent. I cannot accept the argument of the learned advocate for the applicant that because wrongful loss occurred to the applicant the accused therefore necessarily intended it. My own view is that under the circumstances of this case, there was so much room for an honest difference of opinion as to the rights and liabilities of the parties to this trust receipt that no useful purpose would be served in setting aside the order of discharge because the Magistrate would be bound to give the accused the benefit of the reasonable doubt which exists in this case. I therefore decline to interfere with the order of discharge, and dismiss this revision application accordingly.

D.S./R.K. *Application dismissed.*

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## A. I. R. 1938 Sind 76

DAVIS J. C. AND LOBO J.

*Zenab daughter of Sukhio* — Applicant.

v.

*Mahomed Haji Allahdino* — Opponent.

Civil Revn. Appln. No. 67 of 1937, Decided on 23rd December 1937, against order of Havelivala A. J. C. D/. 19th March 1937.

**(a) Civil P. C. (1908), S. 115—Order setting aside ex parte decree under O. 9, R. 13 is case decided and revision therefore lies.**

An order purporting to set aside an ex parte decree under O. 9, R. 13 is an order deciding a case within the meaning of S. 115, Civil P. C. and revision therefore lies. The fact that an appeal lies against an order made under O. 9, R. 13 refusing to grant an application to set aside an ex parte decree and that no appeal lies against an order granting an application to set aside a decree does not exclude the remedy by revision in the latter case, much more restricted though the remedy by revision is: *A I R 1931 All 294 (F B), Rel. on.* [P 78 C 1]

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[9] Holroyd v. Marshall, (1862) L R 10 H L Cas 191=33 L J Ch 193=9 Jur (N S) 213=7 L T 172=11 W R 171.

[10] Misri v. Mozbar Hossain, (1886) 13 Cal 262.

[11] Bansidhar v Santlal, (1888) 10 All 133=1888 A W N 35.

[12] In re Ambrose Summers, (1896) 23 Cal 592.

[13] Baldeo Prashad v. Miller, (1904) 31 Cal 667.

[14] Gava Din v. Kashi Gir, (1907) 29 All 163=4 A L J 57=1907 A W N 7.

[15] Sumsuddin v Abdul Hossein, (1907) 31 Bom 165=8 Bom L R 781.

[16] Deans v. Richardson, (1871) 3 N W P 54.

[17] Shyam Soonder v. Cheita, (1871) 3 N W P 71.

[18] Shivram v. Bhau, (1902) 4 Bom L R 577.

**(b) Civil P. C. (1908), S. 115 — Suit for declaration that applicant was validly divorced from her husband—Dispute referred to arbitration—Defendant absent and reference superseded—Date fixed for hearing—Defendant again absent without adequate excuse —Ex parte decree passed—Application to set aside ex parte decree—Application granted by Judge on ground that his predecessor made no order that suit was to be put down for ex parte hearing—Order setting aside ex parte decree held amounted to material irregularity.**

The applicant sued for a declaration that she was validly divorced from her husband. The dispute was referred to arbitration and extension of time was granted until certain date. On that date applicant was present through her pleader but the defendant was not present and the reference was superseded. The case was fixed for hearing for certain date. Again the defendant was not present and an ex parte decree was passed. The defendant applied to have the ex parte decree set aside alleging various grounds for his non-appearance. The Judge before whom the case then came allowed the application and set aside the ex parte decree on ground that his predecessor made no order that the suit was to be put down for ex parte hearing:

*Held* that the Judge acted with material irregularity in setting aside the ex parte decree: *A I R 1935 P C 185, Ref.* [P 78 C 2]

Deepchand Chandumal — *for Applicant.*

Hukumatrai M. Eidnani—*for Opponent.*

**Davis J. C.** — This is an application in revision against an order of Havelivala A. J. C. in District Court Jurisdiction, setting aside an ex parte decree in which the applicant was granted a declaration that she was divorced from the opponent her husband. A preliminary objection was taken that this revision application would not lie because of the Full Bench decision of this Court in 24 S L R 277,[1] but the proper scope and effect of that decision has, we think, become much exaggerated. That case, it is true, decides that S. 115, Civil P. C., does not apply in the case of an interlocutory order but the interlocutory order before the Court in that case was an order of Judge rejecting an application of certain persons to be appointed next friends of a minor plaintiff. But there was not appended to that decision a schedule setting out the orders to which it applies, or what are interlocutory orders for the purpose of S. 115, Civil P. C. Decisions are to be considered in relation to the particular facts of the case in which they are given and there is nothing in the Full Bench decision of *Panjo's case*[1] preventing us from considering and deciding whether a particular order is or is not an interlocutory order for the purposes of S. 115, Civil P. C. It is true the Full Bench decision in *Panjo's case*[1] binds us to find that S. 115 does not apply to an interlocutory order but it does not bind us to find that any particular order other than an order of a like kind to that made the subject of the Full Bench decision is an interlocutory order, or rather we should say, is not an order deciding a case within the meaning of S. 115, Civil P. C. Indeed we observe that the words "interlocutory order" do not occur in S. 115, and we prefer in this case, as in other cases, to adhere to the words of the Section we are to interpret and to decide not whether the order now sought to be revised is an interlocutory order but whether it is an order deciding a case within the meaning of S. 115; and on this point we think there can be no doubt.

A Full Bench of the Allahabad High Court in A I R 1931 All 294,[2] decided that an order purporting to set aside a decree under O. 9, R. 13, which is the order in this case, was an order deciding a case within the meaning of S. 115, Civil P. C., and the High Court interfered and revised the order. The learned Judges in that case after considering the case law said:

> We hold that an order setting aside an ex parte decree is a case and is not merely an interlocutory order during the pendency of the suit. As soon as an ex parte decree was passed, the curtain was rung down upon the suit itself. There was no pending suit before the Court. Proceedings in the suit could not be revived till the ex parte decree had been set aside. The proceedings leading up to the setting aside of the ex parte decree were proceedings distinct from and independent of the proceedings constituting the suit.

The learned advocate for the opponent relies on a ruling of the Oudh Chief Court in 11 Luck 529[3] but that case merely decided that an order as to the court-fee to be paid was not an order that decided a case within the meaning of S. 115; and with that decision we shall, we think, on a suitable occasion find no difficulty in agreeing. Similar is the case in A I R

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[1] Khudabux v. Panjo, (1930) 17 A I R Sind 265 =127 I C 673=24 S L R 277 (F B).

[2] Radha Mohan Datt v. Abbas Ali Biswas, (1931) 18 A I R All 294 = 133 I C 129 = 53 All 612=1931 A L J 877 (F B).

[3] Paras Nath v. Ran Bahadur, (1936) 23 A I R Oudh 22=158 I C 949=11 Luck 529=1935 O W N 1158 (F B).

1934 All 620.[4] Similarly it has been held that an order allowing an amendment of a plaint is not an order deciding a case within the meaning of S. 115: A I R 1933 All 189.[5] We do not think the fact that an appeal lies against an order made under O. 9, R. 13 refusing to grant an application to set aside an ex parte decree and that no appeal lies against an order granting an application to set aside a decree excludes the remedy by revision in the latter case, much more restricted though the remedy by revision is. It appears to us unreasonable that there should be no power to revise an order made, it may be, entirely without jurisdiction merely because there is no appeal

We therefore disallow the preliminary objection and hold that a revision application will lie against an order of a Judge setting aside an ex parte decree under O. 9, R. 13. We have then to consider whether there has been in this case any such material irregularity in the exercise of jurisdiction as should compel us to interfere. We have come to the conclusion that the learned Judge in this case has so misdirected himself that in granting the application to set aside the ex parte decree he has acted with material irregularity within the meaning of S. 115, Civil P. C.: *see* 62 I A 257.[6] In this case the applicant was plaintiff and she sued for a declaration that she was validly divorced from her husband. The dispute was referred to arbitration and extension of time was granted until 20th November. On 20th November plaintiff was present through her pleader but the defendant was not present and the reference was superseded. On 21st November the case was fixed for hearing for 3rd December. Again the defendant was not present and an ex parte decree was passed. On 7th December the defendant applied to have the ex parte decree set aside alleging various grounds for his non-appearance. Affidavits were filed and on 5th February the Judge made an order that persons who had filed affidavits should appear for cross-examination. No persons were cross examined and on the affidavits Havelivala A. J. C. before whom the case then came allowed the application and set aside the ex parte decree.

Now the learned Judge makes a point of the fact that his predecessor made no order that the suit was to be put down for ex parte hearing. He says so twice but orders are not made or required to be made that cases should be put down for ex parte hearing. The case was put down for hearing in the ordinary and proper way. The defendant failed to appear and the suit was decreed ex parte against him. He was to blame for his non-appearance and not the Court, as the learned Judge appears to hold. Then the learned Judge appears to think that it is the duty of the Court to inform the defendant that the reference is superseded and the suit is put down for hearing. It is not of course the duty of the Court to inform the defendant but it is the duty of the defendant to keep himself informed of the Court's orders. To hold otherwise would be to bring the work of the Court on the civil side into confusion and to subject proceedings, already delayed sufficiently by the indifference or wilful default of defendants, to yet further delay. The opponent in these proceedings who was the defendant in the suit had no adequate excuse for not keeping himself so informed. As the learned Judge has put upon the Court the blame that should have been put upon the defendant, we do not think his order is an order that can be supported. We think he has acted with material irregularity and we set aside his order. As it is argued by the learned advocate for the opponent that it will now be open to him further to argue before the Judge on the affidavits filed we make it clear that our order setting aside the order of the learned Judge setting aside the ex parte decree is final and that the ex parte decree granted in the applicant's favour stands unless and until it is set aside by a Bench of this Court in an appeal which we are informed has been admitted to a regular hearing. This revision application is therefore granted with costs. Order accordingly.

D.S./R.K. *Application granted.*

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[4] Gupta & Co. v Kripa Ram Brothers, (1934) 21 A I R All 620=149 I C 1183=1934 A L J 381 (F B).

[5] Dilsukh Rai v. Dwarka Dass, (1933) 20 A I R All 189=146 I C 491=55 All 169 = 1933 A L J 27.

[6] Atma Ram v. Beni Prasad, (1935) 22 AIR PC 185=157 IC 894=62 IA 257=57 All 678 (PC).

## A. I. R. 1938 Sind 79

DAVIS J. C.

*Emperor*

v.

*Waroo and another.*

Criminal Ref. No. 274 of 1937, Decided on 22nd November 1937, reference made by First Addl. Sess. Judge, Hyderabad (Sind), D/. 25th October 1937.

**(a) Criminal Trial — Commitment — Commitment cannot be quashed merely because Sessions Judge thinks that there was no sufficient evidence on which accused could have been convicted.**

Commitment cannot be quashed merely on the ground that upon the record there was no evidence on which the accused could reasonably have been convicted because this is a matter which should better be left to the Magistrate who is trying the case. [P 79 C 2]

**(b) Criminal Trial—Commitment—Accused stealing water melons of value of six annas and inflicting injury which might have been fatal but in fact was not so — Case can be tried by Magistrate himself and committal to Sessions Judge is bad.**

The Magistrate who having the powers to punish adequately for an offence which is within his jurisdiction fails to do so and commits the accused to Sessions Judge, fails to comply with the provisions of S. 254, Criminal P. C., and the committal may on that ground be held bad as being an error of law. [P C]

Where therefore the property stolen is water melons of the value of six annas and an injury has been inflicted by the accused, the mere fact that an injury might have been fatal, when it is in fact not so is no sufficient reason by itself to commit the accused to the Court of Session. A case should be considered from the point of view, not of what injury might have been inflicted but what injury was in fact inflicted : *A I R 1937 Sind 82, Rel. on.* [P 79 C 2]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Order.**—This is a reference from the First Additional Sessions Judge, Hyderabad, to this Court to quash the commitment to the Court of Session of two accused Waroo and Nuroo on charges under Ss. 382 and 326, I. P. C. on the ground that the Magistrate who committed the accused to the Court of Session could himself have punished the accused adequately if he had found that there was sufficient evidence to convict them. The Additional Sessions Judge is also of the opinion that the commitment is bad and should be quashed because there is no sufficient evidence on which the accused could have been convicted. I would not quash this commitment merely on the ground that upon the record there was no evidence on which the accused could reasonably have been convicted because I think that this is a matter which should better be left to the Magistrate who is trying the case. But I do agree with the Additional Sessions Judge in his opinion that this was clearly a case in which the Magistrate could himself have adequately punished the accused, and therefore it is a case which should not have been committed to the Court of Session. It is true that one of the accused had one previous conviction and that a hatchet was used in the commission of one of the offences charged. But each case must, I think, be dealt with upon its own facts.

Here the property stolen was water melons of the value of six annas and it appears the accused might have killed the complainant if the injury inflicted had been a very little nearer the main artery of the neck. But a miss is as good as a mile. The mere fact that an injury might have been fatal, when it is not, is, in my opinion, no sufficient reason by itself to commit the accused to the Court of Sessions. A case should be considered from the point of view, not of what injury might have been inflicted but what injury was in fact inflicted. The Additional Sessions Judge has referred to many cases including a recent case of this Court in 31 S L R 403,[1] wherein it was held that the Magistrate who having the powers to punish adequately for an offence which is within his jurisdiction fails to do so, fails to comply with the provisions of S. 254, Criminal P. C., and that the committal may on that ground be held bad as being an error of law. There is no reason to suppose that the law as laid down in this ruling is wrong, and in my opinion it would apply to the facts of this case. Therefore, I accept the reference to this extent that I would quash the commitment of the two accused and order the Magistrate to deal with the case himself and dispose of it according to law.

D.S./R.K. *Commitment quashed.*

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[1] **Emperor v. Ghous Baksh Abdul Rahman. (1937) 24 A I R Sind 82=167 I C 379=38 Cr L J 379=31 S L R 403.**

## A. I. R. 1938 Sind 80

DAVIS J. C. AND LOBO J.

*Emperor*

v.

*Haji Gulab Shah Kadir Shah*
Accused.

Criminal Acquittal Appeal No. 164/7 of 1937, Decided on 20th December 1937.

**(a) Criminal P. C. (1898), S. 417 — Reasonable doubt as to guilt of accused—High Court will not interfere with acquittal — Prosecution must prove guilt of accused.**

Where there is a reasonable doubt as to the guilt of the accused, the High Court will not interfere with an acquittal in an appeal from an acquittal. Nor will the Court forget that the burden of proof lies upon the prosecution. It is for the prosecution to prove the guilt of the accused; it is not for the accused to prove his innocence. The High Court will not interfere and reverse an order of acquittal merely because there is room for an honest difference of opinion, merely because upon evidence the lower Appellate Court might have come to the conclusion that the accused was guilty, unless it is quite clear that the Judge or Magistrate whose judgment of acquittal is appealed against is wrong. It would in every case give careful consideration and due weight to the findings of the lower Court. S. 417 of Criminal P. C. is not intended to be used in every case in which the Government thinks that there should be a conviction. It is not a power lightly to be used and should be used only where there is no reasonable doubt upon the record as to the guilt of the accused : *A I R 1934 P C 227 and (1935) A C 462, Rel. on.* [P 81 C 1 ,2]

**(b) Bombay Abkari Act (5 of 1878), S. 43 (b)—Burden of proof on prosecution does not shift until factum of possession is proved.**

The burden of proof on prosecution which shifts under proceedings under the Abkari Act, does not shift until the factum of possession is proved. [P 81 C 1, 2]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

P. S. Shahani — *for Accused.*

**Davis J. C.** — This is an appeal by Government against the acquittal in appeal by the Second Additional Sessions Judge of Hyderabad of one Haji Gulab Shah of an offence under S. 43 (a), Bombay Abkari Act, of which he had been convicted by the First Class Magistrate, Hyderabad, and for which he had been sentenced to three months rigorous imprisonment and a fine of Rs. 200 or in default rigorous imprisonment for one month and a half. The decision in this case turns upon a simple question of fact whether, when the accused was arrested by the Excise Officers on the night of 13th January, he had 36 bottles of contraband liquor in his possession. The trial Court found that he had; the Appellate Court found that it was not so proved. Hence the appeal. The learned Advocate-General explained at the beginning of his argument that there was professional jealousy between the Excise Officers concerned in this case. On the one hand there were two officers put on special duty, the complainant Nabibaksh and Nihalchand and on the other hand there were the local officers Messrs. Assudomal and Ellicot and in support of this professional jealousy which was to explain and presumably to resolve the conflicting evidence in this case, the Advocate-General referred to Exs. 9, 10 and 11. But the learned Advocate-General did not sufficiently appreciate the fact that his argument was an argument why we should reject rather than accept as he wished us to do, the judgment of the trial Court, for the Magistrate rejected the defence evidence as wholly made up because there was no such jealousy. The Magistrate says :

> Besides it passes comprehension why the special party people would shield Sumar when he was being secured by the accused on behalf of the same department unless they had some professional jealousy with Mr. Assudomal for which presumption there is no data . . . . . . . . . . The defence is thus wholly made up and I do not believe it;

yet the first thing the Advocate-General does is to refer us to such data. It appears quite clear that in this case the officers on special duty and the officers on ordinary duty were working at cross-purposes, for, it was the case of the prosecution that they arrested on the night of the 13th, the smuggler, the accused, who was undoubtedly the informant of Assudomal and who had received from Assudomal an advance of Rs. 25 as an earnest of further payments to be made when Soomar, the smuggler, would be caught. It may well be that both the party on special duty and the party on ordinary duty were being double crossed by their informants who were smugglers and informers both, the accused, the smuggler, being the informant of Assudomal to catch his rival smuggler Soomar, while Soomar the smuggler, was the informant of the complainant, to catch his rival the accused. But be this as it may, there appears to us such conflicting evidence in this case that it is unreasonable to ask us to set aside the judgment of the Additional Sessions Judge acquitting the accused. It appears to us that this appeal is made on the principle that the benefit of the doubt is to be given not to the accused but to the prosecution.

The Advocate-General relies upon the general rule that the Criminal Procedure Code does not distinguish between an appeal against an acquittal and an appeal against a conviction. He referred us to a case of this Court which he did not cite but he did not refer to the case in 56 All 645,[1] where the judgment of the Privy Council places certain qualifications upon the generality of this rule. For instance, in an appeal against a conviction it is only necessary to satisfy the Appellate Court that there is a reasonable doubt as to the guilt of the accused to induce the Appellate Court to interfere but when there is a reasonable doubt as to the guilt of the accused, the Appellate Court will not interfere with an acquittal. Nor will the Court in this or any other proceedings forget that the burden of proof lies upon the prosecution. It is for the prosecution to prove the guilt of the accused; it is not for the accused to prove his innocence and the burden of proof which the Advocate-General says shifts on proceedings under the Abkari Act does not shift until the factum of possession is proved. The attention of the learned Advocate-General is invited to the case in (1935) A C 462.[2]

It is true that in this case the Additional Sessions Judge was himself an Appellate Court and did not see the witnesses so that he has not that advantage over this Appellate Court which a trial Court possesses but we will not interfere and reverse an order of acquittal merely because there is room for an honest difference of opinion, merely because upon the evidence the Judge might have come to the conclusion that the accused was guilty. We will not interfere unless it is quite clear to us that the Judge or the Magistrate whose judgment of acquittal is appealed against is wrong and we must in every case, assuming that Government have appointed competent judges and competent Magistrates, give careful consideration and due weight to the findings of the lower Courts. In this case the Additional Sessions Judge has carefully considered the case for the defence, a case very summarily dealt with and dismissed by the trial Magistrate on a presumption which the Advocate-General himself at the outset of the case was prepared to show was wrong. The Additional Sessions Judge points out that it is improbable that the accused would be standing by the roadside some 15 paces from a railway station with 36 bottles of liquor without any means of conveyance and this combined with the undoubted fact that the accused was acting on behalf of Assudomal to arrest Soomar whose house was nearby and who was known to the complainant, raised a real doubt in his mind as to the truth of the prosecution case. We cannot say there is anything unreasonable in this.

It is true that both the complainant and Nihalchand and the two mashirs swear that the accused was arrested with these 36 bottles in his possession and against them is the evidence only of the two drivers of the cars in which the complainant and his party went to Kathar Station to arrest the accused and that one of these motor drivers stood surety for the accused. But we cannot say that this evidence combined with the evidence of Assudomal and Mangharam and the other circumstances of the case does not arouse in our minds, as it did in the mind of the learned Judge, a real doubt as to the truth of the prosecution case. We do not think it is intended that S. 417, Criminal P. C., should be used in every case where Government thinks there should be a conviction. It is not a power lightly to be used. It should, in our opinion, be used only when there can be no reasonable doubt upon the record as to the guilt of the accused, bearing in mind that when considering whether there is or is not such a doubt, the Appellate Court will bear in mind those rules both of justice and prudence to which the Privy Council in the case of *Sheo Swarup*[1] refers. We therefore dismiss this appeal of Government. Order accordingly.

R.M./R.K. *Appeal dismissed.*

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**[1] Sheo Swarup v. Emperor, (1934) 21 A I R P C 227=1934 Cr C 1134=151 I C 322=61 I A 398=56 All 645 (P C).**

**[2] Woolmington v. Director of Public Prosecutions, (1935) A C 462=104 L J K B 433=25 Cr App R 72=51 T L R 446=153 L T 232=79 S J 401.**

**1938 Sind/11 & 12**

## * A. I. R. 1938 Sind 82

DAVIS J. C. AND LOBO J.

*Bhawanidas Jethanand and another* — Appellants.

v.

*Jethsing Ramsing and others* — Respondents.

Misc. Appeals Nos. 39 and 47 of 1936, Decided on 14th December 1937, against order of Rupchand Bilaram A. J. C., D/- 6th August 1936.

**(a) Presidency-Towns Insolvency Act (1909), S. 56 — Fraudulent preference — Transfer in favour of one creditor related to transferor — At time of transfer, transferor not able to pay debts from his own money — No evidence of any threat or coercive action by transferee creditor — Transfer amounts to fraudulent preference.**

Where a person makes a transfer to one of the creditors who is related to him and at the time of the transfer the transferor is unable to pay his debts as they become due from his own money and there is no evidence of any threat of any criminal proceedings or any coercive action taken or threatened by the transferee creditor, the transfer in these circumstances amounts to fraudulent preference within meaning of S. 56 : *A I R 1928 P C 77 and A I R 1934 Rang 17, Ref.* [P 84 C 1]

*** (b) Partnership — Dissolution — No business after particular date does not amount to dissolution.**

A firm carries on business so long as its business debts remain undischarged. The mere fact that no new business was done after a particular date does not amount to a dissolution of the firm : *A I R 1931 Sind 179 and A I R 1925 Mad 1249, Rel. on.* [P 84 C 2]

*** (c) Presidency - Towns Insolvency Act (1909), S. 9 — Members of joint Hindu family carrying on partnership business — Fraudulent transfer by managing partner of firm property to pay debt due by firm — Act of insolvency by such partner is act of insolvency on part of other partners also.**

Where members of a joint Hindu family carry on partnership business and if the elder member of the family who is also the managing partner of the firm makes a fraudulent transfer of the firm property to pay a debt due by the firm, the act of insolvency constituted by the transfer is an act of insolvency on the part of the other partners also as the managing partner is an agent within the meaning of Explanation to S. 9. [P 85 C 1]

*** (d) Presidency - Towns Insolvency Act (1909), S. 13 (4) (b) — Deposit, before adjudication, of amount of debt due to petitioning creditors is not "sufficient cause".**

A deposit by the debtor before the date of adjudication of the whole of the amount of debt due to petitioning creditors is not a "sufficient cause" within the meaning of S. 13 (4) (b) so as to refuse an order of adjudication. [P 85 C 1]

**(e) Presidency-Towns Insolvency Act (1909), S. 8 (2) — Third person whose title to property is affected by adjudication is person aggrieved — But he cannot succeed in appeal merely on ground of absence of notice by insolvency Court before adjudication.**

A third person whose title to property is affected by an adjudication order is a person aggrieved by it and is entitled to appeal from it. But he is not entitled in any appeal under Clause (2) of S. 8 to succeed on the basis merely of absence of notice by the Insolvency Court before it passed the order appealed against. He can only urge that the circumstances of the case are such that it is highly inequitable and unjust that an order so vitally affecting his interests should have been passed behind his back and without notice to him and in circumstances when he had no means of knowing of the existence of the proceedings in which that order was passed against him. [P 85 C 2; P 86 C 1]

Kodumal L. — *for Insolvents.*

Fatehchand Assudamal—*for Appellants.*

Pahlajsing B. Advani—*for Respondents.*

**Lobo J.** — On 6th August 1936, Rupchand A. J. C. in case No. 15 of 1934, Insolvency Jurisdiction, passed an order adjudicating the firm of Kodumal Jethanand and its partners insolvents. The act of insolvency which the petitioning creditors pressed before the learned Judge in order to secure the order of adjudication is thus set out in their application under S. 12, Presidency-Towns Insolvency Act and in the learned Judge's order :

> That on or about 11th January 1934 the firm of Kodumal Jethanand through its principal partner Dwarkadas Jethanand made a transfer or assignment in favour of Bhojraj Nevandram of all their rights and claims as mortgagees over the property . . . . by Seth Jassim Mahomed Budhai . . . . This transfer by the debtor firm through its principal partner Dwarkadas Jethanand was by way of fraudulent preference, as on the date of this transfer, the debtor firm was unable to pay its debts as they became due from their own money and the transfer was in favour of a close relative of Dwarkadas Jethanand being father-in-law of Ganeshdas, the son of Dwarkadas. The said transfer was with a view to give Bhojraj Nevandram . . . a preference over the other creditors of the firm. The consideration of the transfer was said to be Rs. 6000, Rs. 5000 of which was an old debt due to Bhojraj Nevandram under two pro-notes of Rs. 2500 each executed by the firm in favour of the said Bhojraj Nevandram.

In concluding his order, the learned Judge states as follows :

> I hold that the transfer was fraudulent and I adjudicate the firm of Kodumal Jethanand and its partners Dwarkadas, Ganeshdas, Bhawanidas and Jessaram as insolvents.

Against this order two appeals have been presented. In Appeal No. 39 of 1936, the order of adjudication passed by the learned Judge is attacked by Bhawanidas and Jessaram, sons of Jethanand and Ganeshdas, son of Dwarkadas. In Appeal No. 47 of 1936, the same order is attacked by Bhojraj Nevandram, the transferee, as a person aggrieved within the meaning of S. 8, Presidency-Towns Insolvency Act. In the proceedings before the learned Judge, no notice was issued to the transferee Bhojraj Nevandram, the appellant in Appeal No. 47, but Bhojraj Nevandram was admittedly a resident of Karachi and closely connected with the members of the insolvent firm. It is not disputed that Bhojraj is the father-in-law of Ganeshdas, the son of Dwarkadas, the eldest member of the joint Hindu family consisting of three brothers Dwarkadas, Bhawanidas and Jessaram, and of Ganeshdas, the son of Dwarkadas. Nor is it disputed that Dwarkadas was the managing partner of the firm of Kodumal Jethanand in Karachi. Another point which it is very necessary to bear in mind in dealing with the arguments which have been placed before us in these two appeals by the learned advocates for the appellants is that in the proceedings before the learned Judge none of the insolvents ever appeared. Nor did they produce the books of account of the firm of Kodumal Jethanand. Commenting upon this aspect of the case, the learned Judge states as follows :

> For reasons best known to the debtors none of them has come to Court to give evidence. From time to time they were summoned to produce their account books and the first summons and subsequent notices issued for that purpose were served in the ordinary course upon their advocates. For about ten hearings preceding the present hearing their advocates accepted the summons and notices without demur. On the last notice being tendered to the learned advocates of the debtors calling upon them to produce the books in Court today they have thought fit to note on it that the debtors should be served personally. I am afraid this they could not do and I cannot accept the endorsement made by them on the notice as a good ground for excusing the debtors to produce their books in Court and I have no hesitation in holding that the account books of the debtors are being purposely withheld from the Court and that if produced they would go greatly against the contention of the debtors.

Yet another point which needs to be noted is that though the insolvents did not themselves appear in these proceedings they were represented by advocates and the same firm of advocates appeared for Dwakadas and the three appellants in Appeal No. 39 of 1936.

We proceed to deal in the first instance with Appeal No. 39 of 1936. The learned advocates who appeared for the appellants have placed four points before us: (1) that the transfer in favour of Bhojraj Nevandram was not a fraudulent preference and an act of insolvency within the meaning of S. 9, Presidency-Towns Insolvency Act ; (2) that even if it was a fraudulent preference and an act of insolvency, it was the act of an individual partner Dwarkadas after the dissolution of the firm and such an act cannot be regarded as an act of insolvency on the part of the firm or of the other members thereof ; (3) that as in this case the amount of the debt claimed by the petitioning creditors was deposited in Court before the date on which the learned Judge passed the order of adjudication, the learned Judge should have regarded this fact as "sufficient cause" within the meaning of S. 13 (4) (b) for refusing an order of adjudication ; (4) that appellant Ganeshdas was not proved to be a partner in the firm of Kodumal Jethanand and therefore no order of adjudication could have been passed against him. We will deal with these points seriatim :

The learned advocate for the appellants has referred us to Ss. 9 (c) and 56, Presidency-Towns Insolvency Act and has argued on the basis of these sections that the burden lay upon the petitioning creditors to establish that at the time of the transfer attacked as being a fraudulent preference, the debtors were unable to pay their debts as they became due from their own money and that the dominant intention of the debtors in making the transfer was to give the creditor in question preference. He has argued that the evidence on the record does not establish these two essential points. We cannot agree ; we are of opinion that the evidence on the record and the circumstances established afford ample ground for the inference that on the date of the transfer in question, 11th January 1934, the debtors were insolvent and unable to pay their debts as they became due and that the one and only intention of effecting the transfer was to prefer the creditor Bhojraj Nevandram and thus commit a fraud upon the other creditors. This inference to our minds is irresistible and the appellants having failed to appear in these proceedings and to give evidence therein there is nothing to rebut it. The evidence of Jethsing, one of the petitioning creditors, Ex. 13, and the evidence of Parsram former manager of the insolvent firm, Ex. 14, clearly establishes that the debt in respect of which the transfer was made was an old debt ; that evidence further establishes the fact that the transferee is closely connected with the transferors ; it further establishes that on 11th January 1934 when the transfer was effected the firm of Kodumal Jethanand was in insolvent circumstances, that their debts far exceeded their assets, that in fact besides the property transferred to Bhojraj Nevandram they had in January 1934 only two immovable properties in Shikarpur worth Rs. 4000 to Rs. 5000 unencumbered, while their unsecured debts at that period amounted to more than Rs. 50,000. There is no doubt in our minds therefore that on 11th January 1934, the firm of Kodumal Jethanand were insolvent and unable to discharge their debts as they became due from their own money.

The learned advocate has argued that in any event the transfer was made under pressure from the creditor Bhojraj Nevandram and that there was no question of preference. This argument is based upon one sentence in the deposition of the petitioning creditor Jethsing who stated in examination-in-chief :

> When we went to Registrar's office to register Ex. 13/2 Bhojraj came there and pressed the debtors to execute a sale deed in his favour in discharge of his debt.

It is hardly open to the learned advocate on this flimsy basis to ask us to hold that the transfer was the effect of pressure brought to bear upon transferors and not undue preference of one creditor over the others. No questions were asked of Jethsing to explain what he meant by 'pressure'; none of the appellants have stepped into the witness box to give evidence as to what kind of pressure was brought to bear upon Dwarkadas by the transferee. Dwarkadas himself has not appeared in the proceedings. There is no evidence of any threat of criminal proceedings or any coercive action taken or threatened by the creditor as a consequence of which the transfer was effected by the debtors. Reference may be made in this connexion to the remarks of their Lordships of the Privy Council in 30 Bom L R 290[1] and to the case in 11 Rang 489.[2] The learned Judge held on the material before him, and in our opinion rightly held, that the transfer effected by the insolvents in favour of Bhojraj Nevandram on 11th January 1934, a certified copy of which is Ex. 13/5 in the case, was a fraudulent preference within the meaning of S. 56, Presidency-Towns Insolvency Act and an act of insolvency within the meaning of S. 9 (c).

The learned advocate for the appellants next argued that in January 1934 the firm of Kodumal Jethanand had been dissolved; that the transfer being one by Dwarkadas alone it might afford good ground for the adjudication of Dwarkadas as an insolvent, but it could not be used against the appellants or the firm of Kodumal Jethanand as an act of insolvency justifying an order of adjudication against them. Now on the evidence on the record, the argument is really without foundation. In fact, as the learned Judge points out, the appellants have seized upon stray statements in the evidence of Jethsing and Parsram as the basis of their argument. Jethsing has stated in his deposition: "Two months after execution of Ex. 13/1 they had closed their business." Ex. 13/1 is dated 9-9-33. Parsram in his deposition stated :

> After April 1933 I was winding up the business. The other branches had also stopped carrying on business and were winding up then.

It is argued that this evidence establishes a dissolution of partnership prior to January 1934. Now in the first place none of the appellants has chosen to go into the witness box to state that there was any dissolution of the partnership in writing or otherwise prior to January 1934. Not only so, but in Ex. 13/2, the sale deed executed by the appellants and Dwarkadas in favour of the petitioning creditors on 10th January 1934, the vendors Dwarkadas Jethanand, Jessaram Jethanand, Bhawanidas Jethanand and Ganeshdas Dwarkadas have described themselves as constituting a joint Hindu family "carrying on business at Karachi, Bombay, Shikarpur and elsewhere in the name and style of Messrs. Kodumal Jethanand". Twice in the preamble of this document it is definitely stated that the vendors

> are and have been carrying on business for several years jointly in the name and style of Kodumal Jethanand at Karachi, Bombay, Shikarpur and elsewhere.

Further even if it be conceded that no new business was transacted by the firm of Kodumal Jethanand after about April 1933, that fact alone does not amount to a dissolution of the firm. In 25 S L R 322[3] it was held that a firm carries on business so long as its business debts remain undischarged. Reliance was placed in support of this proposition on the case in 48 Mad 795.[4]

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[1] Sime Darby & Co. Ltd. v. Official Assignee, (1928) 15 A I R P C 77=107 I C 233=30 Bom L R 290 (P C).

[2] Adakammi Achi v. Official Assignee, (1934) 21 A I R Rang 17=149 I C 145=11 Rang 489.

[3] Chaturbhuj v. Firm of Kewalram, (1931) 18 A I R Sind 179=134 I C 996=25 S L R 322.

[4] Gokaldoss Goverdhandoss v. Parry & Co., (1925) 12 A I R Mad 1249=91 I C 127=48 Mad 795 =49 M L J 457.

It appears therefore that the firm of Kodumal Jethanand was undissolved in January 1934; that Dwarkadas, the eldest member of the joint Hindu family consisting of the brothers and their nephew and managing partner of the firm of Kodumal Jethanand in Karachi, was the authorized agent of the other partners in the firm; that the property transferred was in respect of a debt due by the firm; that the property transferred was property belonging to the firm and that Dwarkadas Jethanand was the agent of the other members of the firm within the meaning of the Explanation to S. 9, Presidency-Towns Insolvency Act so as to bind by his act the other members of the firm.

The learned advocate next referred us to an order of the learned Judge appearing on pp. 8 and 9 of the paper book from which it appeared that on 3rd April 1936, long before the date of the order of adjudication, the appellants and the firm of Kodumal Jethanand had deposited in Court for withdrawal by the petitioning creditors unconditionally the whole amount of the debt on the basis of which the petitioning creditors had filed their petition. The learned advocate referred us to S. 13 (4) (b), Presidency Towns-Insolvency Act and argued that in view of this deposit the learned Judge should have exercised his discretion and refused to adjudicate the appellants and the firm of Kodumal Jethanand insolvent. But this can hardly be considered as "sufficient cause" within the meaning of the section, for, it would be open to a petitioning creditor and a debtor sought to be adjudicated insolvent to collude with each other and use the Court as an instrument to commit a fraud upon the remaining body of creditors. The legal position of this point is made clear in Halsbury's Laws of England (Hailsham Edition), Vol. 2, p. 84 where it is said:

> If the debtor can procure a substantial guarantee for the payment of his debts in full, this, it seems, would be a sufficient cause for the dismissal of a petition against him.

Reference may also be made in this connexion to the case in (1910) 1 K B 825[5] at p. 836, and to the case in 5 Rang 685.[6] The learned advocate has been unable to cite before us any case where a Court refused an order of adjudication and terminated insolvency proceedings because the debtor had paid into Court the debt due by him to the petitioning creditor alone.

The last point urged by the learned advocate for the appellants is that Ganeshdas is not proved to have been a partner in the firm of Kodumal Jethanand and that therefore the order of adjudication as against him is without jurisdiction. There is no substance in the argument. Ganeshdas has not stepped into the witness box to deny that he was a partner. Ganeshdas was one of the executants of Ex. 13/2 to which reference has been made above and in this document he is described as a member of a joint Hindu family and a member of the firm carrying on business at Karachi, Bombay, Shikarpur and elsewhere in the name and style of Messrs. Kodumal Jethanand. Ex. 13/2 was executed on 10th January 1934. In our view the learned advocate has signally failed to satisfy us that the learned Judge was not justified in adjudicating insolvent the firm of Kodumal Jethanand, Dwarkadas and the three appellants and this appeal must in our opinion therefore be dismissed with costs.

We now proceed to deal with Appeal No. 47. The learned advocate who appeared for Bhojraj Nevandram contended that the transfer in favour of this appellant was a bona fide transaction; that no notice of the proceedings in insolvency had been given to Bhojraj Nevandram and that he was entirely ignorant of the existence of such proceedings; that he was equally ignorant of the fact that the basis of the insolvency proceedings was the transfer made to him on 11th January 1934; that the order of the learned Judge in insolvency holding the transfer to be a fraudulent preference would be held binding upon him and that this order, so vitally prejudicial to his interests made behind his back, should be set aside by the Appellate Court and that he should be given a reasonable opportunity to place his case and his evidence before the Insolvency Court. Now no doubt the appellant is a person aggrieved by the order against which he appeals and there were open to him two remedies under S. 8, Presidency-Towns Insolvency Act. He could have asked the Insolvency Court to review, rescind or vary its order under Cl. (1) of this section. Under Cl. (2) of the section he has a right of appeal from the order of the learned Judge to the High Court. In (1879) 10 Ch D 3[7] it was held that a third person whose title to property is affected by an adjudication order is a person aggrieved by it and is entitled to appeal from it. The appellant took no action under Cl. (1) of S. 8. He did not apply to the insolvency Court to review or rescind its order as he could have done within 30 days of the date of that order. Nor is he entitled in any appeal under Cl. (2) of S. 8 to succeed on the basis merely of absence of notice by the Insolvency Court before it passed the order appealed against. He can only urge before us that the circumstances of the case are such that it is highly inequitable and unjust that an order so vitally affecting his interests should have been passed behind his back and without notice to him and in circumstances when he had no means of knowing of the existence of the proceedings in which that order was passed against him.

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[5] In re Gentry, (1910) 1 K B 825=79 L J K B 585=102 L T 553=17 Manson 104=54 S J 377=26 T L R 374.

[6] M. E. Moolla & Sons Ltd. v. Chartered Bank of India, Australia & China, (1928) 15 A I R Rang 36=107 I C 860=5 Rang 685.

[7] Ex parte Learoyd; In re Foulds, (1879 )10Ch D 3=48 L J Bk 17=39 L T 525=27 W R 277.

In the present case however, it appears to us idle to contend that the appellant was placed in such a situation. On the contrary we have every reason to hold that the appellant deliberately refrained from participating in the proceedings which culminated in the order of adjudication. The appellant is a resident of Karachi; he is the father-in-law of Ganeshdas, one of the partners of the firm of Kodumal Jethanand and son of its managing partner; the insolvency proceedings were pending for more than two years before the order appealed against was passed. The appellant has not dared to enter the witness box to affirm that he had no knowledge of the insolvency proceedings. He has filed no affidavit even to this effect and in these circumstances it appears to us perfectly obvious that this is not a case of an order vitally affecting the appellant passed behind his back and in circumstances when he might have been in total ignorance of the proceedings in which the order was passed. It appears that this appellant as well as his relatives, the appellants in Appeal No. 39 of 1936, deliberately did all in their power to obstruct the Insolvency Court in these proceedings with the object thereafter of taking advantage of any flaw technical or otherwise and any lacuna in the proceedings occasioned by their failure to participate therein and their failure to place their books of account at the disposal of the Court. We have no hesitation in dismissing this appeal as well with costs.

D.S./R.K. *Appeals dismissed.*

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## * A. I. R. 1938 Sind 86

DAVIS J. C. AND HAVELIWALA J.

*Abdul Ghani Nasurullah*
Applicant.
v.
*Emperor.*

Criminal Revn. Appln. No. 281 of 1937, Decided on 13th January 1938, from order of Addl. City Magistrate, Karachi, D/- 21st September 1937.

*** Penal Code (1860), S. 279 — Camel cart running parallel to and in same direction as tram car—Tram driver driving fast but not at excessive speed—Camel cart suddenly swerving to wrong side and colliding with tram car—Tram driver cannot be convicted under S. 279.**

Under S. 279 the rashness or negligence shown must be what may fairly be described as criminal rashness or criminal negligence. There must be something more than mere error of judgment or mere carelessness. [P 87 C 2]

A tram driver when running his car on the lines is entitled to expect that if other vehicles are on the lines, they will give passage to him, and will not obstruct his ordinary progress. Where therefore a tram driver is driving his car at a fast but not at excessive speed and a camel cart or a bullock cart running parallel to it in the same direction suddenly swerves to the wrong side and collides with the tram car, the tram driver cannot be said to be rash or negligent within the meaning of S. 279 merely because he does not anticipate that the other vehicle would suddenly swerve to the wrong side instead of to the right side. [P 87 C 1, 2]

Hiranand K. Vaswani — *for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.**—In this case the applicant who is a driver of a tram car has been found guilty of an offence under S. 279, I. P. C. and sentenced to a fine of Rs. 20. Tried with this applicant was another accused, a driver of a camel cart. He also was fined Rs. 20 under the same section, the Magistrate having come to the conclusion that there was a collision in which both were to blame. Although we are reluctant to interfere with the judgments of Magistrates, we think that there was an important aspect of this case which was not brought to the notice of the learned Magistrate and which he has not therefore considered, and that this is a case where the benefit of a reasonable doubt should be given to the applicant. Now, we think the fact that the applicant is the driver of a tram car and was driving his tram car upon a tram line must make some difference in the consideration of his liability for an offence under S. 279, I. P. C., because a tram driver drives his tram car upon the tram lines and he is entitled to expect that other traffic so far as it can will give way and will move from off the lines. He cannot move his vehicle from off the tram lines. The main position in a case such as this is summed up in Halsbury's Laws of England, Vol. 23, p. 643, para. 904 which is as follows :

> Though Tramway Companies have a statutory right to the use of a highway for the construction of tramlines and the running of tramway cars, this right is subject to a duty to take care that the safety and convenience of the public are preserved. They have no monopoly of the highway, and are bound to permit others to use it as freely as if there were no tramway except where they would be intercepting or interfering with the use of the tramway as such. They are subject to the same liability as the owners or drivers of other vehicles for driving recklessly or dangerously, or for the use of defective apparatus.

So far as Karachi is concerned, the right of the public is also reserved by S. 15, Karachi Tramways Act 2 of 1883 which says :

> Nothing in this Act, or in any bye-law made under this Act, shall take away or abridge the right of the public to pass along or across every or any part of any road along or across which any tramway is laid, whether on or off the tramway, with carriages not having flange-wheels or wheels suitable to run on a grooved rail.

On the other hand, the right of tram cars to the unobstructed use of the tramways is recognized by S. 19 of the Act which imposes a penalty on any person who without lawful excuse (the proof whereof shall lie on him) wilfully does or causes to be done anything in such a manner as to obstruct any carriage using the tramways. It is clear therefore, that it is the duty of any person driving another vehicle on the same road as that on which a tram car is running not to bring his vehicle on the tram lines in front of the car, so as to obstruct its ordinary progress. It follows then that a driver of a tram car while he must not drive negligently or rashly is entitled to expect that other traffic along the road will keep clear off, or remove itself from, the tramway line so far as is reasonably possible. This does not mean of course that a driver of a tramcar is entitled to travel with excessive speed, that he is entitled, for instance, to ignore a blind man who is trying to cross the road or when he sees another vehicle is on the line and cannot get clear in time, that he is entitled to hold on his way regardless of all other considerations. His position is privileged to this extent that he has acquired the right by law to the use of the line and he is entitled to expect that if other vehicles are in the way that they will give passage to him. Judged then from this point of view, it appears here that this tramcar was being driven by the applicant at a fast, but it is not alleged at an excessive speed, upon the tram line, and that there was nothing so far we can see upon the tram line directly in front of the tramcar but on the other line parallel to it a camel cart was proceeding in the same direction ; and it would appear that if the camel had not suddenly swerved to the wrong side instead of to the right side there would have been no collision. This being so, we do not think that it can be said that the driver of the tramcar was rash or negligent within the meaning of S. 279, I. P. C., merely because he did not anticipate that this camel would suddenly swerve to the wrong side instead of to the right side. He was entitled to expect that the camel cart would continue on its way or that if it made any effort to move, the effort would be directed towards moving away from the line upon which his car was proceeding and not moving across it. The mere fact that when he did see the camel swerve he put on his brakes but that there was not sufficient time to stop his car and avoid the collision is not sufficient to prove him guilty of culpable negligence. In our opinion in the circumstances of this case he was not to blame.

Moreover, there is another aspect of the case with which, we think, the learned Magistrate has not sufficiently dealt and that is that under S. 279, I. P. C. the rashness or negligence shown must be what may fairly be described as criminal rashness or criminal negligence. We are here dealing with a criminal offence and therefore we think that before an accused can be convicted of an offence under this section, there must be something more than a mere error of judgment or we might say something more than mere carelessness because the word "carelessness" is not used in S. 279, I. P. C. at all. The word "negligent" is used and the word "negligent" is a stronger word than the word "careless". S. 279, I. P. C., reads as follows :

> Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished, with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

So, it is not sufficient to say either the person has been merely rash or negligent to convict him of an offence. He must be rash or negligent within the meaning of S. 279, I. P. C. A cardinal principle in dealing with a case of this nature is, we think, that laid down by Alderson B. in (1856) 11 Ex 781[1] at p. 784 and adopted by Brett J. in (1870) L R 5 C P 98[2] at p. 102:

> Each case must be judged in reference to the precautions, which, in respect to it, the ordinary experience of men has found to be sufficient, though the use of special or extraordinary precautions might have prevented the particular accident which happened.
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> The question whether the accused's conduct amounted to culpable rashness or negligence therefore depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient upon all the circumstances of the case.

And considering the circumstances in this case, we think we must bear in mind that the driver of the tramcar has certain rights or we might say certain privileges as to the use of the tract or line upon which his tramcar runs and which has been laid for that purpose. We think that when a driver of a tramcar sees either a camel cart or a bullock cart proceeding parallel with the tram lines, he must not necessarily anticipate that when he passes the camel or bullocks they will swerve or move the wrong way instead of the right way or that he should go at so slow speed that he can under any circumstances pull up in time and avoid a possible collision. If he did, he would take so long in reaching his destination that the services of the tramways would be disorganized and we do not think that such extreme care or circumspection can, under the circumstances, be expected from him. We do not wish it to be inferred from what we have said in this case that the driver of a tramcar is entitled to proceed at an excessive speed indifferent and regardless of the fate of any person or any vehicle upon the line. He is entitled only to act upon the reasonable assumption that persons and vehicles will, if possible, give him the right of way on the tract specially provided for him, but if it be clear to him that it is not probable nor possible that they will do so and if he continues on his way regardless of the danger of hurt, then the case will be very different. He will not escape criminal liability under the section. The Court will hold, taking all the circumstances into consideration, that he did not show that care and circumspection which he, as a prudent and a reasonable driver of a tramcar should have shown. He will then be punishable as any other person for an offence under S. 279, I. P. C.

In view however of the particular circumstances of this case, in view also of the fact that the learned Magistrate does not appear to have considered the question of the rights of the driver of a tramcar upon the tramway or the necessity for proof of negligence or rashness of the criminal nature required by the provisions of S. 279, I. P. C., we think, it should be said that the prosecution have failed to prove their case or that at least there is a reasonable doubt as to the guilt of the accused to the benefit of which he is entitled. We think therefore we should interfere, set aside the conviction and sentence of the applicant and order the fine if paid to be refunded, and we order accordingly.

D.S./R.K. *Conviction set aside.*

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## A. I. R. 1938 Sind 88

DAVIS J. C.

*Ahmedali Adamali and another*
Appellants.
v.
*Emperor.*

Criminal Appeal No. 118 of 1937, Decided on 14th January 1938, against conviction and sentence passed by Addl. City Magistrate, Karachi, D/- 13th September 1937.

**(a) Penal Code (1860), S. 499, Expl. 2—Where complaint is complaint of an individual as such, Expl. 2 has no application.**

According to Expl. 2, S. 499 if a collection or company of persons as such is defamed, one of their members may make a complaint on behalf of the collection or company of persons as a whole but the defamation must be shown to be of all the persons in the association or collection as such: the defamation is of the collection or association as such. Where the complaint is the complaint of an individual as such, Expl. (2) has no application. [P 90 C 2]

**(b) Defamation—Defamatory matter against class of individuals—Descriptions in defamatory matter capable of being, by innuendo, shown to be applicable to any one individual of that class—Such individual can maintain action in respect of such defamatory matter.**

A defamatory matter may appear only to apply to a class of individuals ; yet, if the descriptions in such matter are capable of being, by innuendo,

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[1] Blyth v. Birmingham Waterworks Co., (1856) 11 Ex 781=25 L J Ex 212=2 Jur (N S) 333=4 W R 294.

[2] Smith v. London and South Western Ry. Co., (1870) L R 5 C P 98.

shown to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter. If it is clear that the libel designates the complainant in such a way as to let those who know him understand that he was the person meant, it is not necessary that all the world should understand the libel; it is sufficient if those who know him can make out that he is the person meant: *Case law referred.*
[P 92 C 1, 2]

Fateh Chand Assudomal—*for Appellants.*

Parsram Tolaram, Asst. Public Prosecutor — *for the Crown.*

**Judgment.** — The appellants in this case are the editors and publishers respectively of a Gujrati monthly journal "Age Kadam" published in Karachi, and they have been convicted of and fined each Rs. 250 for defaming the complainant as a member of the Dowdi Borah community of Karachi and as a member of graveyard committee of the same community. One Jagjiwan Pradhan, Hindu, was also tried with them as being the printer but he was acquitted by the Magistrate. I have heard arguments in this case at length. The publication of the magazine is not disputed nor is it disputed that the appellants are the editor and publisher of the magazine, nor was it seriously argued before me that the words, satan's companions, rogues, rascals, Moulana's slaves, hired Fidais, which appear in the alleged libel would not be highly defamatory of the complainant if applied to him, but it is argued that they do not apply and cannot fairly be applied to him. They apply to the hired goondas or hooligans shown in the picture behind the graveyard wall.

The only points then that arise for my decision are: (1) whether the words and picture complained of are defamatory; (2) whether they are defamatory of the complainant and (3) whether any of the Exceptions to S. 499, I. P. C. apply. I find on the first two points in the affirmative, and on the third in the negative.

Now, there appears to be a dispute in the Dowdi Borah community of Karachi between the orthodox and the reformers. One Hatim Alavi appears from his own evidence and the evidence of the complainant Fida Hussain Noorbhoy to be the leader of the reformers, and this Hatim Alavi and some 17 fellow members of the Youngmen's Borah Association have been excommunicated by the Pir Sahib. There had been trouble and a criminal case about the entry of Hatim Alavi and his companions to the mosque and there was trouble again on 7th May 1935 about the admission of Hatim Alavi and his companions on the occasion of the burial of Hatim Alavi's mother; and the libel complained of appeared in the May-June number of 1936, about a year after the trouble at the graveyard, on the occasion, as Hatim Alavi says in his evidence, of the twelfth month death ceremony of his mother. The writing and the pictures must then be read in the light of what happened and what was known to have happened among members of the Dowdi Borah community on 7th May 1935, until the date of the publication of the alleged libel in May-June of the following year. If it would then appear that the complainant as a member of the Dowdi Borah community or as a member of the graveyard committee and in the light of what transpired on 7th May 1935, was named by the accused to his fellow members of the orthodox Dowdi Borah community of Karachi as one of the companions of satan, as one of the rogues or rascals or slaves of the Maulana or a hired Fidai, referred to in the alleged libel, then clearly in the absence of proof of the application of any one of the Exceptions the case against the accused is proved.

Now the Magistrate is of the opinion that the accused named the complainant as one of the companions of satan, rogues, rascals and so on, shown as defending the graveyard and preventing the entry of the coffin in the lower picture; and it is quite clear that these words relate, so far as they are appropriate, to both pictures, to the upper picture which relates to the trouble in Bombay in one case and to the lower picture which relates to the trouble in Karachi on 7th May 1935 in another case. There can be no question about that. To make the publication even more pointed, it was made, as Hatim Alavi himself says, on or about the date of the twelfth month ceremony of the death of his mother. The happenings on 7th May 1935 must have been well known to the members of the Dowdi Borah community in Karachi and as the Magistrate has pointed out, the picture given is substantially a false picture of what in fact occurred. It is not necessary to accept the account given by the complainant in its entirety to come to the conclusion that the picture shown on the cover of the magazine is a false picture. I attach no importance to any gloss or explanation given at p. 3 of the magazine. Readers when they see the picture and read the words on the cover of the magazine are not presumed to know what gloss or explanation is given on one page inside the covers. The writing and picture on the cover must be taken as they stand, and so far as they show, the sanctity and inviolability of the graveyard, as the orthodox thought it, being protected by armed goondas or hooligans, it shows what is false and false to the knowledge of the members of the Borah community at Karachi, whether orthodox or reformers, present at the graveyard. Granted that the photo *A* published in the earlier issue of the magazine shows only the peaceful outward scene and not what was behind the walls, it is clear from the evidence of Lieut. Colonel Ziauddin that there were that day no companions of satan, rogues, rascals, slaves or hirelings or armed goondas or hooligans to defend the graveyard, but members of the orthodox community greatly angered and probably excited at what they thought to be the proposed desecration of the graveyard, but generally speaking there were present to defend the graveyard ordinary decent members of the Karachi Borah community in no way comparable, for instance, with the Makranis who accompanied the funeral procession and who in one case, at least, appear to have jumped upon the walls with a view to effecting entry into the graveyard.

The fact that Lieut. Colonel Ziauddin though not himself a Borah was allowed entry into the graveyard as a peacemaker shows the generally reasonable spirit of those present, and the fact that Lieut. Colonel Ziauddin was able without injury to himself to snatch an iron bar from one "virile" Borah appears to me to require some modification of his statement that the Borahs present were in a wild state of frenzy. The only quarrel he saw going on was between two outsiders whom he took for Makranis and had no right there and Borahs one of whom had an iron bar which Lieut. Colonel Ziauddin seized and brought away. He says he also saw cudgels, bamboos and some heaps of stones gathered in the graveyard presumably for the purpose of resisting the entry of those who were excommunicated, but this does not in my opinion justify in any way the description and picture of those that day engaged in preventing the entry of Hatim Alavi and his companions, including the accompanying Makranis, in the manner shown upon the cover of a magazine. Clearly the words and the picture are defamatory and intended to be defamatory of those members of the orthodox Borah community of Karachi who were present there that day to prevent the entry of Hatim Alavi and his companions, and the question then to be considered is whether the description and the known circumstances of the case point to the complainant as one of those companions of satan, rogues, rascals and so on.

Now in the charge the accused are charged with defaming the complainant by the publication of the words and picture complained of, as a member of the Dowdi Borah community and of the Kabristan Committee; and it is argued in defence, inter alia, that the Magistrate is wrong in his application of Explanation 2 to S. 499, I. P. C., as he has failed to appreciate the meaning of the word "such" in Expln. 2. This Explanation is as follows:

> It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such;

so that if a collection or company of persons as such is defamed one of their members may make a complaint on behalf of the collection or company of persons as a whole, but the defamation must be shown to be of all the persons in the association or collection as such: the defamation is of the collection or association as such, and I think on this point the Magistrate has fallen into error, for, the complaint of the complainant is the complaint of an individual as such, and Expln. 2 has no application. In this case the charge really is that being alleged to be a companion of satan, rascal, rogue, slave and hireling, the complainant's reputation as a decent man, as a member of the Dowdi Borah community and member of the graveyard committee has been lowered among his fellows, and if it is proved, as I think it is, that the publication in the light of the surrounding circumstances and in the light of the knowledge of what occurred on 7th May 1935 reasonably to be attributed to the members of his community, alleges the complainant's presence as a companion of satan, rascal, rogue, a slave and hireling among those of that description gathered that day to prevent the entry of Hatim Alavi and his companions and to preserve the graveyard from desecration or what they thought was desecration, I do not see how the accused can reasonably complain of their conviction on the charge as framed.

It is true the Magistrate in the charge uses the word "such" but in a different context from that in which the word is used in Expln. 2—he says "such Borahs were satan's companions etc."—and I think the charge when carefully read in the light of the complainant's evidence shows an alleged libel upon the complainant as a member of the Borah community because he was present and objected to the entry of Hatim Alavi and his companions to the graveyard, and to the knowledge of the fellow members of his community the complainant was clearly one of those. The description by the complainant of himself as a member of Dowdi Borah community, as he admittedly is, and a member of the graveyard committee, as the Magistrate finds him to be, merely shows the capacities in which he is alleged to be defamed. It is just as if another said his reputation as a Brahmin and as a gentleman or as a Christian and a gentleman had been injured. Therefore, I think Expln. 2 to S. 499, I. P. C. has nothing to do with and does not affect the merits of the Magistrate's conclusions.

Now, so far as the general law of defamation is concerned, reference may be made to the judgment of Buckland J. in a case referred to him, reported in 29 C W N 904[1] at p. 916. In that case the complainant complained that he had been defamed as an individual. There were therefore combined in one charge two incompatible charges, a libel of the police force as such and the libel of the complainant as an individual, and the Judge was of the opinion that two such charges should not have been so combined and he set aside the conviction and ordered a retrial. On this point he said:

> Under S. 499, I. P. C., whoever by words .... makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person is said to defame that person. The person concerning whom the imputation is made, whom it is intended to harm in his reputation, and who in consequence is defamed is the same throughout.
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> There is confusion in these charges between the complainant and the police force at Char Maniar in relation to the various ingredients of the charge. It is charged that the complainant was defamed by imputations made concerning the police force at Char Maniar, and that the reputation intended to be harmed was that of the complainant and the police force.
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> It is obvious that charges so framed do not conform to the requirements of the definition. The defects seem to have originated in a failure to appreciate Expln. 2 to the section and the principles applicable when the words making the imputation appear to be general expressions but the complaint is that they are directed against a particular individual. The Explanation in my opinion is intended to include a company or an association or collection of persons as such within the word "person" as used in the definition so that the latter should not be limited to individuals. In a case in which the Explanation is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such, with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such—and the last two words of the Explanation are most material to its correct application—cannot by virtue of this Explanation justify a charge of defaming an individual, and a charge cannot combine the Explanation with the definition for such a purpose. Nor does it carry the matter any further to state as has been done by the charges in this case that the complainant was a member of the police force at Char Maniar.
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> These charges seem to have assumed that the police force at Char Maniar is an association or collection of persons such as the Explanation contemplates; but without expressing any definite opinion on the point, as it does not directly arise, I have considerable doubt whether such a view is correct. 34 Cal 662,[2] which is some authority on the point, was a civil suit but that would not appear to affect the principle: *vide* the observations of Fletcher Moulton, L. J. in (1909) 2 K B 444[3] at page 460.
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> In this case the petitioner is charged with having defamed an individual. The imputations in the charges are general expressions assuming that they concern the complainant. This would appear to be the case notwithstanding the reference in the first to the District Magistrate and the Daroga, because neither of these officers, who are capable of identification, if the investigation referred to in the charge is specified, which has not been done, is the complainant in the case. As regards the second charge though no one is referred to by name or by reference to his office in the imputations charged, the nature of the imputations is indicative of the fact that an individual may be meant.
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> It may be that the general nature of the imputations has led to the confusion in the charges. There is no necessity for that to have occurred.

The learned Judge then goes on to consider the cardinal rule in proceedings for defamation:

> The cardinal rule is that the offence consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it:

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[1] Pratap Chandra Guha Roy v. Emperor, (1925) 12 A I R Cal 1121=90 I C 387=26 Cr L J 1539=29 C W N 904=42 C L J 178.

[2] Aldridge v. Barrow, (1907) 34 Cal 662=11 C W N 680.

[3] Jones v. Hulton & Co., (1909) 2 K B 444=78 L J K B 937.

per Lord Loreburn L. C. in (1910) A C 20.[4] Lord Shaw of Dumferline in his speech cited (1826) 2 C & P 307,[5] in which Abbott C. J. said: 'The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel: it is sufficient if those who know the plaintiff can make out that he is the person meant.'

Following upon the rule so laid down, it becomes a matter of comparative indifference whether the words are general or refer to a specific individual, but lest this be taken too literally I should explain that it may be that an individual is as much defamed by words apparently only of more general application as by words referring to him by name. The test is that formulated by the learned Judges whose observations I have quoted. A very good instance of a case, where defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable of being, by innuendo, shown to be directly applicable to any one individual of that class an action may be maintained by such individual in respect of the publication of such matter, is to be found in (1848) 1 H L C 637.[6] The defamatory matter is too long to be reproduced here seriatim: all that I need quote are a passage from the judgment of Lord Cottenham, L. C.:

> If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to, and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels

and the following passage which is to be found in the judgment of Lord Campbell:

> The first objection which has been relied on by the counsel for the plaintiff in error, who certainly has argued the case with his usual ability, and has brought forward all the arguments that learning and talent could supply: the first objection is that this libel applies to a class of persons, and that therefore an individual cannot apply it to himself.
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> Now I am of opinion that that is contrary to all reason, and is not supported by any authority. It may well happen that the singular number is used: and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated.

If therefore it is clear the libel in this case, namely the words and picture, designate the plaintiff in such a way as to let those who know him understand that he was the person meant, it is not necessary that all the world should understand the libel; it is sufficient if those who know him can make out that he is the person meant—the conviction against the accused is proper and must be upheld. We are not concerned here with a case where some out of many have been libelled so that it is not clear who out of those many the libel identifies as in one class of cases. We are also not concerned with a case such as the case in 1 Pat 414,[7] where four constables brought a complaint of defamation but failed because the libel attacked only two of their members and not all four, and it was not clear which two of the four were libelled. It is not the case of the complainant that the words and picture complained of libelled some only of those Borahs present to resist the entrance of Hatim Alavi and his fellows, but it is his case essentially that all those members of the orthodox Borah community of Karachi present who resisted the entry are libelled by the words and picture and that he was among them, particularly as he among them was a member of the graveyard committee, and therefore necessarily present and concerned with the events of that day. Nor is the case in 55 Cal 1280,[8] to which I have been referred by the learned advocate for the appellants of much assistance, nor the case in 26 Mad 43.[9] Nor are we concerned with the class of case illustrated by 29 S L R 39,[10] where a member of this same community brought a complaint for defamation and failed because he was not the person defamed.

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[4] Hulton & Co. v. Jones, (1910) A C 20=79 L J K B 198.

[5] Bourke v. Warren, (1826) 2 C & P 307.

[6] Le Fanu v. Malcolmson, (1848) 1 H L C 637.

[7] Government Advocate, Bihar and Orissa v. Gopalbandhu Das, (1922) 9 A I R Pat 101=67 I C 609=23 Cr L J 433=1 Pat 414=3 P L T 209.

[8] Mahim Chandra Roy v. A. H. Watson, (1929) 16 A I R Cal 191=115 I C 35=30 Cr L J 407=55 Cal 1280.

The case of the complainant is that he himself was defamed and if, as is suggested by the advocate for the defence in Court, the person defamed is the Mullaji Sahib or his agents who employed those goondas, then the libel should have said so instead of taking refuge in what they believed to be a vague and safe but defamatory obscurity. What is to be considered is whether the complainant himself is defamed either in general or special terms. It is clear he is not named nor is his likeness to be found among those armed Borahs behind the wall, and it is clear he must show by evidence that the events of the day known to the members of his community and his own position in that community would clearly point to the libel as directed against him either alone or among others.

Now it is the case of the defence, or rather the case of Hatim Alavi, that there is no graveyard committee of which the complainant was a member and which would render his presence at the graveyard on the day in question necessary : but the Magistrate has found, and I agree with his finding, that there was such a committee and the complainant was a member of it. There is the evidence of the complainant himself that there is a Kabristan Committee and he is a member of it. There is the evidence of Hussainbhoy Ismailji, a man of sixty-two years of age, an Honorary First Class Magistrate and a member of the Borah Jamait to the same effect. There is the evidence of Ebrahimji Karimji, the secretary of the Kabristan Committee who produced the account books. I do not think it material for this case whether the committee maintains its minutes in a proper form, but it is clear that some authority must control the graveyard of this community, and to me the evidence of Hatim Alavi on this point appears evasive and unsatisfactory. It is also significant that his brother Muhammadali Alavi, the writer of the letter asking for permission for the burial of his mother in the graveyard, which permission the complainant himself wrote out, and which the complainant himself says was given on condition that those excommunicated should not enter the graveyard, did not come as a witness. The evidence of Hussainbhoy Ismailji, the Honorary Magistrate above referred to, shows that the complainant was concerned with the burial of 7th May and this Honorary Magistrate advised the complainant to go to the graveyard. It is true that the witness considered the picture and writing defamed the whole of the Jamait, and the witness Abdul Karim Noorbhoy considered the words and picture referred to defamed the whole of the Dowdi Borah community of Karachi as well as the Kabristan Committee, but this does not in my opinion affect the case or give the accused a good defence.

It is the case of the complainant that he as an individual member of the community and the graveyard committee was defamed. The simple point is whether this picture and the writing pointed clearly even among others to the complainant. There is ample material on the record on which a jury could find they did. The Magistrate so finds, and I agree with him. That being so, it appears to me the case is concluded against the accused. There is nothing in the circumstances of the case which can justify the scurrilous nature of the words used, nor, in my opinion, can there be any room for the application of any of the exceptions. The libel is a scurrilous and malicious libel. There can be here no defence based on good faith, and it appears to me a matter of regret that a man of the position of Hatim Alavi should for a cause which he appears to hold so noble and so dear, be prepared to stoop so low. My attention has been drawn to a consent decree in the High Court of Bombay in which a dispute between Borahs in Bombay was decided by a suit brought by those aggrieved, as Hatim Alavi feels he is aggrieved, in a decent and seemly manner. I suggest therefore that it is in the public interest that the reformers seek a remedy for their grievances not by direct action but by a suit in a Civil Court and that they cease to adopt methods which may lead to violence and to consequences which all one day may bitterly regret. The presence of Makranis at the graveyard that day, purporting to be on the side of the reformers and the evidence of Lieut. Colonel Ziauddin, show clearly the dangers which attend the avoidance of the Civil Court. The conviction and sentences are confirmed and the appeal dismissed.

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[9] **H. K. Beauchamp v. C. M. J. Moore, (1903) 26 Mad 43=2 Weir 232=12 M L J 413.**

[10] **Hussainbhoy Ismailji v. Emperor, (1935) 22 A I R Sind 98=1935 Cr C 516=156 I C 567=36 Cr L J 975=29 S L R 39.**

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Sind 94

DAVIS J. C. AND LOBO J.

*Dengo Kandero* — Appellant.

v.

*Emperor.*

Criminal Appeal No. 123 of 1937, Decided on 12th November 1937, against judgment of Addl. Sess. Judge, Larkana, D/- 22nd June 1937.

**(a) Evidence Act (1872), Ss. 10, 30 — Confession of person who is dead and not brought to trial is not admissible under S. 30 — It cannot also be admitted under S. 10 — S. 10 does not apply to confession made, after conspiracy and acts done in pursuance thereof are at an end.**

The confession of a person who is dead and has never been brought to trial is not admissible under S. 30 as the confession of a co-accused. Nor can it be admitted under S. 10, because S. 10 applies to acts done in furtherance of a conspiracy or which bear some relation to the conspiracy and does not apply to a confession made after the conspiracy, and the acts done in pursuance thereof were at an end. S. 10 cannot be extended to cover the case of a confession of a person who was co-accused or who might have been a co-accused on the charge of conspiracy and the offences which were its purpose or committed in pursuance of it : *25 Bom L R 248 and 38 Cal 169, Rel. on*; *A I R 1935 Cal 26, Dissent.* [P 96 C 1]

**(b) Criminal Trial — Murder — Evidence — Dying declaration by deceased indicating existence of conspiracy to wrongly implicate particular person—High Court would not rely on evidence of witnesses so conspiring unless there is other evidence to enable it to distinguish the true from the false.**

Where from the dying declaration made by a person, who is alleged to have been murdered, it appears that there was clearly a conspiracy wrongly to implicate a particular person, the High Court before it would rely on the evidence of witnesses who have so conspired, and who have had such an influence over the deceased making a dying declaration that they could have induced him to make a particular dying declaration to suit their purpose, must have some other evidence before it which would enable it to distinguish the true from the false. [P 97 C 1]

Gobindram H. — *for Appellant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.** — This is an appeal against the judgment of the learned Additional Sessions Judge, Larkana, who has convicted the appellant Dengo walad Kandero of the murder of one Rahimbux under very brutal circumstances in the garden of one Rahmatullah near the village of Dadu Hullio on 5th May 1936 and has sentenced Dengo to transportation for life. Tried also with Dengo was one other person Amin, who, the case for the prosecution was, had incited Dengo and another Haji, who died before he could be brought to trial, to commit this murder of Rahimbux and it was on the basis of this concerted action that these two accused Dengo and Amin were charged with conspiracy. The learned Judge acquitted Amin on all charges and he acquitted Dengo of the charge of conspiracy because he thought there was no evidence of any substance to support it and because he thought that as the accused had been convicted of the substantive offence, the charge of conspiracy was superfluous. Incidentally a man cannot be convicted of conspiracy with himself.

We have heard very careful arguments in this case. We have carefully considered them and after hearing, given them our best consideration. We have come to the conclusion that as the evidence was not sufficient to convict Amin, as clearly it was not sufficient, so it follows that it cannot be sufficient to convict Dengo, unless there is further evidence which would satisfy us that, while all the witnesses, Alihassan, Jurial, Habibullah, Karimdad and Chhutal give false evidence against Amin, their evidence against Dengo is true; so that, while we reject their evidence against Amin, we can accept it as regards Dengo. But the only other evidence we can find is the evidence of the bania Hotalmal who says that when he went to the field between 1 and 2 o'clock and questioned the dying man, he implicated only Haji and Dengo and not Amin. But again this Hotalmal lends himself to support a false case by his signature on the dying declaration recorded by the Sub-Inspector in his presence, wherein Rahimbux is made to implicate both Haji and Dengo and Amin too, and we think that a witness who can be induced to act as he has acted under the circumstances, is not a person upon whom very great reliance can be placed and if we cannot place very great reliance upon Hotalmal, there is no evidence sufficiently strong to support the evidence of Alihassan, Jurial and Habibullah and other witnesses against Dengo who, so far as they implicated Amin, we consider deliberately gave false evidence. Therefore upon the case as put before us we come to the conclusion that the only proper course to take is to acquit Dengo because the prosecution have failed, upon the evidence brought before the Court, to prove his guilt.

Now the case for the prosecution is that one deceased Rahimbux who lived in the village of Dadu Hullio in Kambar Taluka, was cultivating the garden land of Rahmatullah and on 5th May his maternal uncle Jurial took his mid-day meal to the field and when he approached it, he saw to his horror Dengo and Haji striking Rahimbux with axes while Amin stood there inciting them to strike and kill. He called out to the assailants and his call apparently brought upon the scene another uncle of Rahimbux, Habibullah, who by chance was collecting Babul pods on a tree near by. Both Jurial and Habibullah went forward to where the accused were attacking the deceased, but they were frightened by the threats of the accused and kept away. After the accused had gone, however, Jurial and Habibullah picked up the deceased, who had fallen into the cistern of the well and placed him upon a mattress in the landhi. He was terribly injured, having 17 injuries upon his body, but he was able according to both Habibullah and Jurial to tell them that he was attacked by Dengo and Haji while Amin incited them. Habibullah stayed by Rahimbux while Jurial hastened to the village to the otak of one Alihassan a relation and told him of what had happened. Chhutal and Karimdad other relations were sitting with Alihassan and all three went at once to the field where Rahimbux was lying. Rahimbux, according to the prosecution again named Haji, Dengo and Amin and told them of the manner of his assault and Alihassan left for Kambar to make the first report which he did at 7 o'clock in the evening. Shortly after this at about 8 o'clock the Sub-Inspector arrived at the scene of offence. Before Alihassan left however, he told Jurial to bring Hotalmal and Bakhshomal, two Hindus so that Rahimbux could tell not only his relations and fellow Mussalmans of what had been done but two Hindus also. When the Sub-Inspector arrived, he took down the dying declaration of Rahimbux in which he implicated these three men as his assailants and sent the deceased to Kambar dispensary. Dengo and Haji were arrested that very night, but early that morning Rahimbux being, it appeared, in danger of his life the Medical Officer sent for the Third Class Magistrate of Kambar, who recorded the dying declaration of Rahimbux shortly before 4 o'clock in the morning. On the evening of the same day at about 7 o'clock Rahimbux died. Amin was not arrested until the 9th.

Now, there can be no doubt that Rahimbux died of the injuries that were inflicted upon him some time on the morning of 5th May and there appears no reason to doubt the truth of the prosecution case to this extent that he was attacked while he was lying down, because there are no less than 17 injuries upon him and most of these injuries are upon his left side. The important question to consider, as the learned Judge says, is whether these accused caused these dreadful injuries and he has come to the conclusion that so far as Dengo is concerned, the evidence of Habibullah and Jurial is true and that this evidence is corroborated by the evidence of other witnesses, who came upon the scene, by the dying declaration of Rahimbux made to the Sub-Inspector and to the Magistrate. But the learned Judge does not seem to us sufficiently to consider the circumstances of this case or to explain why if he acquits Amin as he has done, he can upon much the same evidence convict Dengo of this very serious offence. He, and apparently the assessors too are of the opinion that Jurial and Habibullah are true eye-witnesses, but he has not explained to us, nor does he appear to have considered how it came to pass that just on this day two uncles of this unfortunate Rahimbux should be present at the scene of offence and have witnessed the assault. Jurial says that he was bringing the mid-day meal to Rahimbux who was cultivating Rahmatullah's garden land, but Jurial does not live with Rahmatullah and when we consider the evidence of Jurial on this question of why it was that on that day of all days he was taking Rahimbux's food to him we can only say that we find it extremely unsatisfactory; nor can we see that the evidence of Habibullah as to why he should just that day be collecting pods from a Babul tree so close at hand, was any more satisfactory than the evidence of Jurial.

The learned Judge himself has rejected the evidence of Habibullah and Jurial so far as it has implicated Amin. We cannot see how he can justify his rejection of the evidence as regards Amin and justify its acceptance as regards Dengo, the accused;

nor can we see that he has sufficiently considered the delay which admittedly took place in this case before the first information was recorded. The first information shows that it was recorded by Alihassan at 7 o'clock, but Kambar is only 4 miles away from the place where this crime took place and if it took place at noon—and Hotalmal says that he came to the field between 1 o'clock and 2—this delay of 7 hours appears to us unexplained and that the only true and likely explanation of this delay is that this Jurial and Habibullah and others were making inquiries and were making up a case against Amin, Haji and Dengo.

Alihassan gives in his first complaint a motive for the attack upon Rahimbux, which we find far fetched and which we see, the learned Judge himself has been unable to accept. There was some quarrel apparently between Alihassan and a Pir a relation of Amin, and Alihassan brings in Amin in his first information because of this and explains the complicity of Haji and Dengo in the crime as they were "Murids" or followers of this Pir but, the learned Judge has referred to some other motive as the possible motive of the crime—trouble about a woman, about the wife of Dengo and her familiarity with Rabimbux and he has admitted upon the record a confession made by Haji to the Magistrate in which this motive for the crime is given. Though when he admitted this confession he appears to have been of the opinion that it was admissible evidence, thereafter he appears to have changed his mind, for he does not refer to it in his judgment. In view of the fact that Haji was dead and was never brought to trial, clearly this confession would not be admissible under S. 30 as the confession of the co-accused. Nor, if it was admitted, do we think it could be admitted under S. 10, because S. 10 applies to acts done in furtherance of a conspiracy or which bear some relation to the conspiracy and cannot be said to apply to a confession made after the conspiracy and the acts done in pursuance thereof were at an end and the accused is challaned on this very charge. We do not think the words of S. 10 can be extended to cover the case of the confession of a person who was co-accused or who might have been a co-accused on the charge of conspiracy and the offences which were its purpose or committed in pursuance of it. We refer to the cases in 25 Bom L R 248[1] and 38 Cal 169[2] in support of this view. The judgment in the case reported in A I R 1935 Cal 26[3] does not refer to 38 Cal 169[2] and is not a case reported in the authorized law reports. We do not think it is correct ruling and we do not follow it. But the learned Judge, as we have pointed out, has not relied in his judgment upon this confession of Haji, nor do we think it should in any way be allowed to affect the case. This being so, we find ourselves referred again to the evidence of Habibullah, Jurial, Alihassan, Chhutal and Karimdad and the dying declaration of the deceased made to the police, the Sub-Inspector and the Magistrate. In addition we find no evidence of adequate motive explaining this crime. Evidence of motive of course is not always necessary, but evidence of motive or evidence of an adequate motive does assist and we have not in this case that assistance. Therefore, the other evidence must be such as to leave no real doubt in our mind that the accused is guilty.

Now, according to the evidence of Jurial he went to fetch Alihassan and brought back Karimdad and Chhutal and both Karimdad and Chhutal say that Rahimbux implicated all three accused and where the learned Judge says in his judgment that Karimdad does not say that Rahimbux mentioned the name of Amin, he is wrong because we have carefully referred to the evidence of Karimdad and find he does. The learned Judge has therefore rejected the evidence of Alihassan and Chhutal as regards Amin and has not rejected the evidence of Karimdad because he says he does not implicate Amin, but he should have rejected the evidence of Karimdad because he does implicate Amin. The evidence of Karimdad is no better than the evidence of the others. We reject therefore the evidence of Jurial, Habibullah, Karimdad and Chhutal so far as they implicate Amin and so far as they implicate Dengo. The evidence of Alihassan quite clearly is the evidence of a man who had some quarrel or who imagines he had some quarrel with Amin or with the Pir. We think his evidence the least reliable of all, so that at last we come to the evidence of Hotalmal. It was urged by the learned Advocate General that Hotalmal is a true witness because he says that when he first went to the field and spoke to Rahimbux, Rahimbux implicated only Haji and Dengo. It may be that in this matter Hotalmal speaks the truth, but if he speaks the truth in this matter then it is improbable that Jurial saw the assault upon Rahimbux because Hotalmal explains how Jurial passed his shop going to fetch Alihassan and yet did not mention the names of the assailants. We think this rather shows that Jurial when he first went to fetch Alihassan did not know the names of the assailants, but if Hotalmal speaks the truth when he says that Rahimbux implicated only Haji and Dengo and if what he says is true, then we must come to the conclusion that Jurial, Habibullah, Alihassan Chhutàl and Karimdad have all falsely and wrongly implicated Amin and further they have been able to induce the dying man wrongly to implicate Amin because in the dying declaration recorded by the Sub-Inspector on the evening of the 5th May and in the dying declaration recorded by the Magistrate early on the morning of the 6th, Amin and the part he played is mentioned in both. When however we read through the dying declaration made by Dengo to the Sub-Inspector, we think that it is doubtful whether at that time Rahimbux had at all identified his assailants because he said he saw them from behind. Indeed the nature of the injuries upon Rahimbux is such; they were so serious and so many that we think it improbable that this unfortunate man attacked in his sleep would have had the time or capacity to identify his assailants. But apparently this unfortunate man Rahimbux was induced to implicate in both his dying declarations Amin and in our opinion to implicate him falsely.

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[1] Emperor v. Keshav Narayan, (1923) 25 Bom L R 248.

[2] Emperor v. Abani Bhushan, (1910) 38 Cal 169 =8 I C 770=15 C W N 25=11 Cr L J 710.

[3] Kunjlal Ghose v. Emperor, (1935) 22 A I R Cal 26=1935 Cr C 40=155 I C 261=36 Cr L J 678=38 C W N 1015.

It is true that the learned Judge says neither the deposition of the witnesses nor the dying declaration should be rejected in whole because it is false in part, but when we have a case as here where clearly there is a conspiracy wrongly to implicate a particular individual, we think that before we can rely upon the evidence of witnesses who have so conspired and who had such influence over the dying man that they can induce him to serve their purpose, there must be some other evidence which will enable us to distinguish the true from the false. It does not appear to us the learned Judge has in this case sufficiently considered this aspect of the matter. Merely to refer to it and to quote a Latin maxim is not enough and we think if he had considered it and discussed it, he would have found that the only evidence which could sustain the false evidence of Jurial and Habibullah and the other witnesses was a few words in the evidence of Hotalmal. This in our opinion is not sufficient. We think therefore that the accused Dengo should be acquitted. We allow the appeal and set aside the conviction and sentence.

R.M./R.K. *Appeal allowed.*

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## * A. I. R. 1938 Sind 97

DAVIS J. C. AND HAVELIWALA J.

*Raban Lalu Shaikh* — Appellant.

v.

*Emperor.*

Death Confirmation Case No. 23 and Criminal Appeal No. 178 of 1937, Decided on 20th January 1938, against conviction and capital sentence passed by Sessions Judge, Larkana, D/- 30th September 1937.

**(a) Criminal Trial — Evidence — Prosecution failing to examine in committal proceedings important witness on whose evidence prosecution and Judge rely — Conviction is not proper.**

Where the prosecution have failed to examine an important witness in the committing Magistrate's Court on whose evidence the prosecution and the Judge largely rely, and with whose evidence the evidence of other witnesses is closely connected, conviction is not justified : *A I R 1935 Sind 31, Rel. on* ; *A I R 1930 Sind 99, Disting.* [P 98 C 2]

**(b) Criminal P. C. (1898), Ss. 342, 537 — Confession forming integral part of prosecution case — Failure to examine accused about it is not covered by S. 537.**

The failure of a Judge to question the accused about a confession, which forms an integral and substantial part of the prosecution case, is a serious omission, not covered by the provisions of S. 537 : *A I R 1937 Sind 221, Rel. on.* [P 99 C 2]

*** (c) Criminal Trial — Evidence—Murder of mother—Passers by attracted by cries of child—Witnesses may speak not only of nature of cries but also of what child said, so far as it explains their conduct.**

The evidence of the child is not admissible as evidence of the truth of what she said but as explaining the conduct of the other witnesses; even what she said is admissible in evidence. Thus in a trial for murder of mother of a child whose cries attracted the passers by, the witnesses can speak not only of the nature of the child's cries, but even as to what the child said so far as it explains their conduct. [P 99 C 2; P 100 C 1]

**Jethanand J. T.**—*for Appellant.*

**Partabrai D. Punwani, Advocate-General**
—*for the Crown.*

**Davis J. C.** — The accused in this case is one Raban, son of Lalu, and he has been convicted by the Sessions Judge of Larkana of the murder of his wife Janat on 4th June 1937, and sentenced to death. He has appealed and the death sentence has come before us for confirmation. The case of the prosecution is that Janat was a woman of good character but that her husband, the accused, quarrelled with her, and on the morning of 4th June killed her with an axe. Raban and Janat lived in the village of Pir Baksh. They had three children, one, a girl Sapuran, who was married and lived in another village, a son Lalu married to a girl aged about eight, Alma, but that morning both were in the fields grazing buffaloes, and a third, a child of five years called Bashi, whose cries attracted the neighbours and passers by who found Raban with the murdered woman Janat, with an axe in his hand. The girl Bashi was tendered by the prosecution as a witness, but the Judge having satisfied himself that this child could not understand the meaning of truth did not record her evidence. One Allahdino, a hari of Khan Bahadur Ahmed Khan Bhutto, who lived in his bungalow near by went and informed his zamindar of what had happened. Ahmed Khan Bhutto sent his kamdar Inayat and his hari Haji to bring Raban before him and Allahdino, Inayat, Haji, Fazul, a neighbour who had come, and one Muhammadali who was passing by, seized and bound Raban and brought him and his bloodstained axe to the zamindar. To those who seized and bound him Raban said he had killed his wife on the order of Lal Shahbaz.

It is the case of the prosecution that Raban confessed the murder to the zamindar who told his men to take Raban and his axe back to his hut and wait until the police came, and he sent Allahdino to make a report to the police. This he did at Ratodero on 4th June at 2 P. M. The head constable reached the scene of the offence about 3.30 that afternoon: he found the dead body of Janat lying in the landhi of the accused. He found Raban, the accused, tied to a pole of the landhi, He sent the body of Janat to the hospital at Ratodero. He found blood upon the scene of the offence and the bloodstained hatchet near the accused. He made a mashirnama of the scene of the offence, sent the axe and a bloodstained shirt found upon the child Bashi to the Chemical Analyser. The Sub-Inspector, Inspector and Superintendent of Police came and verified the investigation, and on 5th June the accused was sent up before the Mukhtiarkar and First Class Magistrate of Ratodero.

The case for the defence is that the accused did not murder his wife; he made no confession to those who seized and bound him, but that when he came home he found his wife dead and saw two men whom he did not recognize, going away. He said his wife was of doubtful character and that several times she had run away. The defence of accused's counsel was that the accused was of unsound mind. Before us the learned advocate advanced three further points in favour of the accused, firstly, that as the child Bashi was held by the Judge not to be a competent witness, what she said should not have been allowed upon the record, and, secondly, that the Judge should not have relied upon the alleged confession to the zamindar Ahmed Khan Bhutto because he was not examined as a witness before the committing Magistrate, and, thirdly, the Judge did not question the accused about this confession under S. 342, Criminal P. C., though the Judge himself described this confession as a very important piece of evidence.

Now we have carefully considered this question of the failure of the prosecution to call in the committing Magistrate's Court the zamindar Khan Bahadur Ahmed Khan Bhutto on whose evidence the Judge so largely relies to convict the accused, and his failure to question the accused as to this confession, and though we appreciate the force of the argument that there is much more evidence upon the record on which the Judge might have based the conviction, we consider the evidence of the other witnesses on whom the Judge relies—Allahdino, Inayat, Haji, Fazul — so connected with the evidence of the zamindar, whose evidence has been made by the learned Judge so important a part of the prosecution case, that it is only proper in the circumstances that we should set aside the conviction and sentence and order a retrial. We would invite the attention of the learned Judge to the case in 28 S L R 317,[1] on the question of the failure of the prosecution to call all their important witnesses before the Court of the committing Magistrate. Reference to the case in 24 S L R 96,[2] sometimes quoted as authority for the argument that the prosecution need not produce all the evidence on which they rely, clearly does not apply to a case such as this where an important witness on whose evidence the prosecution and the Judge in his judgment largely rely, but to matters of detail. Percival J. C., said (p. 108):

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[1] Nandram Bhimbahadur v. Emperor, (1935) 22 A I R Sind 31=1935 Cr C 160=154 I C 455=36 Cr L J 563=28 S L R 317.

> I am of opinion that there is no obligation on the part of the prosecution to get recorded by the committing Magistrate every jot and tittle of the evidence which they intend to place before the Sessions Court.

To those who know the ordinary meaning of English words used in their context, this statement does not apply, and clearly was not intended to apply to a case where the prosecution have failed to examine an important witness in the committing Magistrate's Court, and so far as the Judge failed to question the accused on the question of this confession to the zamindar, we would invite the attention of the Judge to the recent case of this Court in 31 S L R 470,[3] and the Privy Council judgment in 37 C W N 514[4] at p. 526, on which that case was based.

We have considered carefully the argument that the case for the prosecution is amply proved without the evidence of the zamindar and that the Judge believes the other witnesses, but the Judge has not considered the evidence of these witnesses at length apart from the evidence of the zamindar. Where on p. 35 of the paper-book in the first paragraph the Judge refers to the evidence of Allahdino, Inayat, Haji and Fazul, he refers to it in conjunction with the evidence of Khan Bahadur Ahmed Khan the zamindar, and goes on to consider not the evidence of these other witnesses at length but the evidence of the zamindar, and whatever our opinion may be as to the evidence of these other witnesses, we must bear in mind that we have not seen these witnesses, we have not before us a careful consideration of their evidence by the Judge, and that it will be difficult for us to deal with the evidence of these witnesses as it stands on the record, apart from the evidence of the zamindar, whose absence in the committing Magistrate's Court the Judge has not noted or explained or commented upon.

It may of course be argued that the accused was not taken by surprise by the evidence of this zamindar. Other witnesses had testified to this confession in the lower Court, but that is no substitute for the evidence itself. What the accused had to meet was the evidence of the zamindar, not only the reference to it by other witnesses and their evidence. We think therefore it would not be proper for us to deal with this case merely on the basis of excluding the evidence of the zamindar and excluding the failure of the Judge to question the accused on that confession, on the ground that as we exclude the confession, so the failure of the Judge to question the accused on it is immaterial. For, as the case is put before us, the confession to the zamindar has been made an integral and substantial part of the prosecution case, and the failure of the Judge to question the accused about it is clearly a serious omission not covered by the provisions of S. 537, Criminal P. C., but more of the nature of the omission referred to in the recent case of this Court in 31 S L R 470.[3]

We should perhaps for the guidance of the Judge refer to the question of the admissibility of the statements made by the child Bashi. It is argued that the Judge should not have admitted upon the record evidence of Allahdino and Fazul as to what this child said, and the learned Advocate-General was prepared to agree with the learned advocate for the accused to this extent, that evidence only as to the fact that the child cried and that the cries attracted the attention of Allahdino and Fazul, was admissible upon the record and not evidence of what she said. We are not certain however that the Advocate-General was not too cautious. It is true of course that the evidence of the child is not admissible as evidence of the truth of what she said but as explaining the conduct of other witnesses; it appears to us that even what she said is admissible in evidence. As the child is not called as a witness, her evidence in a way is hearsay evidence, but she is deemed by reason of her tender years to be an incompetent witness; she does not understand the meaning of the truth. To this extent she is regarded by the law as an irrational creature, but if, for instance, instead of being concerned with the cries of a child we were concerned with the barking of a dog, clearly witnesses would be entitled to speak to the barking of the dog to explain their conduct. They could say the dog barked so long and so loudly that they were attracted to the place; it continued barking and would not be quietened by their voices, so they went aside a hut to investigate and found the dog's master murdered. So in this case it appears to us the witnesses can speak to the nature of the child's cries and even as to what the child said so far as it explains their conduct. While, for instance, Fazul as a neighbour was attracted by the child's cries, clearly if the child had not said to him that her father had killed her mother but that both her mother and father had gone out and left her, Fazul might not have gone into the hut and found the mother dead and the father with a bloodstained axe. He might merely have questioned the child or taken the child into his own hut: therefore as explaining why Fazul did go inside the hut and investigate what the child said, as explaining his conduct, as giving to it the value of probability, what the child said, for this purpose and not for the purpose of proving its truth, would be, in our opinion, admissible in evidence.

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[2] **Nur Khan v. Emperor, (1930) 17 A I R Sind 99=1930 Cr C 282=120 I C 520=31 Cr L J 117=24 S L R 96.**

[3] **Khairo Sumar v. Emperor, (1937) 24 A I R Sind 221=170 I C 922=31 S L R 470=38 Cr L J 995.**

[4] **Dwarkanath Varma v. Emperor, (1933) 20 A I R P C 124=142 I C 885=1933 Cr C 442=34 Cr L J 322=37 C W N 514 (P C).**

We must therefore for the reasons we have given, set aside the conviction and sentence of the accused and order him to be retried. As the Sessions Judge who tried the case has been transferred, the case can go for retrial before the Sessions Judge or Additional Sessions Judge at Larkana, and the accused should be given a reasonable opportunity to call, if he wishes, and if he is able, relevant evidence rebutting the evidence of the zamindar Khan Bahadur Ahmed Khan Bhutto as to the confession made to him; and we order accordingly.

V.B.B./R.K. *Retrial ordered.*

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## * A. I. R. 1938 Sind 100

DAVIS J. C.

*Kanji Juma Khoja* — Appellant.

v.

*Emperor.*

Criminal Appeal No. 120 of 1937, Decided on 3rd December 1937, against conviction and sentence passed by Additional City Magistrate, Karachi, D/- 20th October 1937.

*** (a) Penal Code (1860), S. 304-A — Lorry driver driving lorry loaded with wooden sleepers through gateway several times without accident — On one occasion one projecting sleeper striking stone pillar of gateway — Pillar falling upon person standing behind it and causing his death — Death, though direct result of driver's act, held was caused through error of judgment and not by criminal rashness.**

Section 304-A, like other sections of the Penal Code, requires a *mens rea* or guilty mind. The rashness or negligence must be such as fairly to be described criminal. Mere carelessness is not sufficient for conviction under S. 304-A. [P 102 C 2]

A lorry driver was driving a lorry loaded with wooden sleepers through a gateway. He drove the lorry several times without any accident. On one occasion when the lorry was overloaded and was not being driven fast, one projecting sleeper struck one of the stone pillars. The stone pillar fell upon the person standing behind it and caused his death :

*Held* that it could not be said that the death was not caused directly by the act of the driver. The fact that it was not the lorry itself but part of its load which struck the pillar was a matter of no consequence. Similarly the fact that it was not the sleeper itself but a stone in a pillar which struck the deceased did not make the act of the driver merely the indirect and remote cause of the deceased's death. However, in the circumstances of the case, the driver was guilty of only an error of judgment and not of criminal rashness. He therefore could not be convicted under S. 304-A. [P 102 C 1; P 103 C 2]

**(b) Penal Code (1860), S. 304-A— Contributory negligence of deceased is of itself no defence** ***(Obiter).***

Contributory negligence on the part of the person killed is no defence of itself to a charge under S. 304-A : *6 All 248, Rel. on.* [P 102 C 1]

Khemchand Sukhramdas — *for Appellant.*

Parsram Tolaram — *for the Crown.*

**Judgment.** — The facts of this case are unusual. The appellant, a lorry driver, was driving a lorry loaded with wooden sleepers through the gateway of the compound where they had been stored and from where he was removing them when one of the sleepers projecting over the side of the lorry struck one of the stone pillars of the gateway and knocked it down and the pillar fell upon one Fakirmahomed, a barber who was standing behind it, and inflicted injuries upon him wherefrom he died on the night of the same day. The appellant was tried for an offence under S. 304-A, I. P. C., and sentenced to six months' rigorous imprisonment. Now many of the facts in this case are not disputed. It is not disputed, for instance, that the appellant was the driver of the motor lorry loaded with wooden sleepers which knocked down the pillar of the gateway which on its fall inflicted injuries upon the barber Fakirmahomed from which he died. Fakirmahomed was a barber who lived in an outhouse in the compound of Edulji Dinshaw where the sleepers were stored, and he was returning home about 5-30 P. M. on 22nd January when he met the lorry coming out of the gateway and stepped aside and stood by the pillar to let it pass. There is the dying declaration of Fakirmohamed himself recorded before Sergeant Hannighan to this effect : Ex. 6.

There is the evidence of Nadirshah, a Parsi who lives in Edulji Dinshaw's bungalow, and of Sardar Khan, a peon who lives in the same compound. Nadirshah heard cries and went out and found the lorry, loaded with sleepers, stuck in the gateway and the deceased lying upon the ground and the pillar knocked down. The accused was in the driver's seat. The peon Sardar Khan returning to his house in the compound also saw the deceased lying on the ground injured, the lorry loaded with sleepers and a big stone from the pillar lying near the deceased. Sergeant Hannighan measured the gateway, the width of the lorry and the projection of the wooden sleepers and made a mashirnama. The width of the gateway was 12 feet 9 inches, the width of the lorry was 6 feet 6 inches, the sleepers protruded 2 feet 1 inch on one side and 3 feet 6 inches on the other. The mashir Shawak who was called as a witness states he only signed the mashirnama and did not see the measurements taken, but there is no reason to doubt the correctness of the measurements taken by Sergeant Hannighan, but it is to be noted that the mashirnama mentions that only one sleeper appears to have struck the pillar because only one sleeper bore marks of powdered stone and this fact is to be remembered when the defence of the appellant that one sleeper slipped out of place is considered. The medical evidence shows Fakirmahomed died of shock and internal bleeding from injuries which might have been caused by the falling pillar.

The accused admits that he was driving a lorry and that a sleeper in the lorry struck the pillar and that the pillar fell and struck Fakirmahomed. There can then be no doubt as to how and why Fakirmahomed died. He died because he was struck by a falling pillar which itself fell because it was struck by a wooden sleeper projecting from the lorry which the appellant was driving. The prosecution also rely upon the fact that the lorry was overloaded. Its proper load was five tons and it was that day carrying 6 tons 3 cwts. 14 lbs. This is proved by the evidence of Sergeant Mules and is not disputed by the defence.

Now the first argument taken in defence is that it was not the act of the appellant which killed the deceased. It was not the lorry which struck the deceased, it was not even the sleeper the lorry carried, but a stone in a pillar which the sleeper struck. Thus, it is argued, the cause of death was something too remote to make the appellant liable, and I am referred to the cases 4 Bom L R 679[1] and 32 Cal 73,[2] in support of the argument that to sustain a conviction under S. 304, I. P. C., the act of the accused must be the direct cause of the death of the person killed. The facts in the Bombay case however were entirely different. All that the Bombay case[1] lays down is that in order to impose criminal liability on the accused, it is necessary that death should have been the direct result of a rash and negligent act of the accused, and that act must have been the proximate and efficient cause without the intervention of another's negligence. It must have been the *causa causans* : it is not enough that it may have been the *causa sine qua non*. In that case, it was the case of the prosecution that the women who had been engaged in grinding sulphur had died as the result of an explosion from gunpowder store on the premises, but the evidence showed they did not die from the effect of an explosion. Their death was not shown as due to the acts of the accused and they were acquitted.

In the Calcutta case[2] an Assistant Station Master and a railway guard were both convicted under S. 304-A, I. P. C., because as the result of their negligence two trains came into collision and some passengers were killed and the Court set aside the conviction of the Assistant Station Master because though he had contrary to rules filled up a form and left the book lying on his table, yet he was not expected to know that the guard of the train also contrary to rules would take the form from the book and use it before it was completed, but it was held that the guard who had started the train which came into collision in which lives were lost was rightly convicted.

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[1] **Emperor v. Omkar Rampartap, (1902) 4 Bom L R 679.**

[2] **Shankar Balkrishna v. King-Emperor, (1905) 32 Cal 73=8 C W N 645=1 Cr L J 634.**

I do not think it can be said that the death of this barber was not caused directly by the act of the accused. I think the fact that it was not the lorry itself but part of its load which struck the pillar is a matter of no consequence. It is the loaded lorry and not the empty lorry the accused was driving. The lorry and the loaded sleepers must be looked on as one vehicle under the control of the appellant ; nor do I think the fact that it was not the sleeper itself which struck the deceased but a stone in a pillar which the sleeper struck makes the act of the accused merely the indirect and remote cause of the deceased's death. It may well be a fact that must be taken into consideration when the question of his rashness or negligence is concerned, but it is not in itself a complete defence. If I were to accept this argument, I should have to hold that a man who was driving rashly, and negligently and who drove at great speed into a wall and broke down the wall which killed a child who was sitting in its shade would be guilty if the child was killed by the car he was driving, but not by a stone from the wall which his car broke down. Stated thus, I think that is a proposition which could not be accepted. Moreover, S. 304-A, I. P. C., is far wider in its terms than S. 302 or S. 304, I. P. C. It does not require either intention or knowledge to be proved. The test applied in the Bombay case[1] above referred to was whether the act was caused without the intervention of another's negligence though it must be remembered that contributory negligence on the part of the person killed is no defence of itself to a charge under this section : *see* 6 All 248.[3]

There is in this case no question of the intervention of another's negligence. It cannot be suggested that the pillar of the gateway was such that it should have stood without falling down the shock of the impact of a heavy wooden sleeper. The only question in this case which remains to be considered is, in my opinion, whether on the facts of this case, it is proved that the appellant was rash or negligent within the meaning of S. 304-A, I. P. C., and it is because I think this is not proved that I think he should be acquitted.

The prosecution have relied, according to the learned Public Prosecutor mainly upon the fact that the lorry was overloaded and that the gateway left but a clearance of eight inches for the lorry loaded as it was with the projecting sleepers. The overloading of a vehicle is not in itself evidence of rash and negligent driving. It may certainly be an important factor in the case, a lorry overloaded must be more difficult to control than a lorry loaded only to its proper limits, and therefore requires more careful driving, but it is not in itself, I think, sufficient without more to convict of an offence under S. 304-A, I. P. C. Moreover mere carelessness is not sufficient. S. 304-A, I. P. C., like other sections of the Penal Code, requires a *mens rea* or guilty mind. The rashness or negligence must be such as fairly to be described criminal. The phrase "criminal negligence" as used in ordinary conversation conveys something of the meaning. Mere carelessness is not sufficient. The question is discussed at length in 53 Cal 333.[4] Mukerji J. in his judgment said :

> The difficulty in dealing with a case of this nature is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that lives have been lost and the responsibility for the same ultimately rests with none else but the accused. This prejudice is bound more or less to reflect on the question of the culpability of the accused and gives rise to false issues which tend to cloud judicial vision.
>
> Section 304-A has been judicially interpreted in a number of decisions of which two stand out as the most valuable. In 7 M H C R 119,[5] Holloway J. said this : 'Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have the consciousness. The imputability arises from the neglect of the civic duty of circumspection.'
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> In 3 All 776,[6] Straight J. observed as follows : 'Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without the intention to cause injury or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with reckless-

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[3] Queen-Empress v. Nand Kishore, (1884) 6 All 248=1884 A W N 71.

[4] Smith v. Emperor, (1926) 13 A I R Cal 300=91 I C 889=53 Cal 333=27 Cr L J 153=30 C W N 66.

[5] Nidamarti Nagabhushanam, In re, (1872) 7 M H C R 119=1 Weir 324.

[6] Reg. v. Idu Beg, (1881) 3 All 776=1881 A W N 132.

ness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to the public generally or to an individual in particular which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.'

The learned Deputy Legal Remembrancer has cited before us a number of other decisions in which S. 304-A, I. P. C. or the English Law of Manslaughter by Negligence has been explained, and also referred to some cases dealing with negligent use of public way, in order to show under what circumstances special care is necessary, want of which will make one liable for the offence. The one principle of universal applicability deducible from all these cases is that which was laid down by Alderson B. in (1856) 11 Ex 781[7] at p. 784, and adopted by Brett J. in (1870) L R 5 C P 98[8] at p. 102. 'Each case must be judged in reference to the precautions, which, in respect of it, the ordinary experience of men has found to be sufficient, though the use of special or extraordinary precautions might have prevented the particular accident which happened.'

The question whether the accused's conduct amounted to culpable rashness or negligence therefore depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient upon all the circumstances of the case.

In this case, I think the learned Magistrate himself feels this difficulty when he says in his judgment "the accused Kanji has conducted himself in a careless manner". It is true he goes on in the following sentence to say that "his act was negligent being without deliberation and caution," but this appears to me more the text book speaking than the Magistrate himself, and I do not think that the case against the accused at its very highest can be placed at more than mere carelessness. It seems true that he had driven this lorry through the gateway five times that afternoon without accident. Apart from the statement of the accused, the muccadam to whom the lorry belongs says it was being driven out for the sixth and last time. There seems no reason to disbelieve this statement. This does not in itself prove that the accused had not been rash and negligent on the sixth occasion. On the previous occasions he may have been merely lucky, but where, as here, there is no case of furious driving, the fact that a lorry driver has driven his lorry loaded with sleepers five times through the same gateway that same afternoon without an accident is evidence that the driving of the loaded lorry did not necessarily involve negligence or rashness, rather is it evidence to the contrary. Moreover, in this case, the evidence is that only one sleeper bore marks of having struck the pillar. This appears to me strongly to support the case of the appellant that only one sleeper had slipped, for, if more than one sleeper had been projecting sufficiently far to strike the pillar, it appears to me that more than one sleeper must have shown signs of the impact. This was not the case. It is not suggested that the lorry was being driven fast. The fact that there were ruts on the road would account for the slipping of the sleeper which struck the pillar though this of course would necessitate more careful driving.

On this reading of the evidence, I cannot find the accused was rash or negligent. Carelessness is not enough, for the section does not punish carelessness alone. I am not even sure the appellant was guilty of carelessness. I should say myself that he was guilty of an error of judgment and nothing more. I think therefore the conviction must be set aside and the accused acquitted and discharged. Order accordingly.

D.S./R.K. *Conviction set aside.*

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[7] **Blyth v. Birmingham Water Works Co., (1856) 11 Ex 781=25 L J Ex 212=2 Jur (N S) 333 =4 W R 294.**

[8] **Smith v. L & S W Ry. Co., (1870) L R 5 C P 98.**

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## ✲ A. I. R. 1938 Sind 103

DAVIS J. C. AND LOBO J.

*Kartarchand Shankerdas and others*
Applicants.
v.
*Emperor.*

Criminal Revn. Applns. Nos. 184, 187 and 188 of 1937, Decided on 11th November 1937, from order of Addl. City Magistrate, Karachi, D/- 22nd May 1937.

**✲ (a) Criminal P. C. (1898), S. 367 — High Court when would expunge remarks from Magistrate's judgment or order stated.**

It is a serious matter for the High Court to expunge remarks from a Magistrate's judgment or order. High Court will interfere to expunge remarks which are libellous and irrelevant. But, if they form an integral part of the judgment or its argument, and if they are inseparable, High Court will not interfere and mutilate a judgment so that it reads disjointedly or incoherently nor will it interfere merely because the Court may have passed remarks adverse to a witness provided the judgment shows there is some basis for them, however inadequate may appear this basis to the higher Court. **It may well be the bounden duty of a Judge or Magistrate in giving his judgment and his reasons to comment adversely upon the conduct of witnesses; so also it may be his duty to comment adversely upon the conduct of accused** persons even though he may not consider the evidence sufficient to commit them for trial to the Court of Session. Nor will High Court in revision inquire into question of fact, but in dealing with applications of this nature it will take the Magistrate's judgment as it stands. [P 104 C 1, 2]

**✲ (b) Criminal P. C. (1898), S. 367 — Order of Magistrate exculpating rather than inculpating accused—Remarks seriously to prejudice of accused are not justified.**

Where a Magistrate by his own order exculpates rather than inculpates an accused, he is not justified in making remarks seriously to his prejudice which will be justified only if his order tended to inculpate rather than exculpate. [P 105 C 2]

**✲ (c) Criminal P. C. (1898), S. 367—Person neither accused nor witness — Magistrate is not justified in condemning him without giving him opportunity of being heard.**

Though a Magistrate may have to consider facts in relation to a particular individual who is not an accused or witness in order to weigh fairly the evidence against the accused or the evidence given by witnesses, yet he is not justified in condemning such person without his being given an opportunity of being heard. [P 105 C 2]

Syed Aslam — *for Applicant No. 1.*

K. H. Nagrani — *for Applicants Nos. 2 and 3.*

Partabrai D. Punwani — *for the Crown.*

**Davis J. C.** — These are revision applications made on behalf of Kartarchand and Rijhumal, employees in the Karachi General Post Office, against whom proceedings were taken for offences under S. 52, Post Office Act in the Court of the Additional City Magistrate, Karachi. The Additional City Magistrate discharged the accused being of the opinion that there was not sufficient evidence for their commitment to the Sessions Court to take their trial, but at the same time he passed in his order certain remarks which, it is said, if allowed to stand will be highly prejudicial to the accused in their service in the Post Office and may even lead to their dismissal and that these remarks are in no way justified and indeed are contrary to the findings of the learned Magistrate himself.

Now, it is a serious matter for this Court to expunge remarks from a Magistrate's judgment or order. This Court will interfere to expunge remarks which are libellous and irrelevant. But if they form an integral part of the judgment or its argument, and if they are inseparable, this Court will not interfere and mutilate a judgment so that it reads disjointedly or incoherently, nor will it interfere merely because the Court may have passed remarks adverse to a witness provided the judgment shows there is some basis for them, however inadequate may appear this basis to the higher Court. It may well be the bounden duty of a Judge or Magistrate in giving his judgment and his reasons to comment adversely upon the conduct of witnesses; so also it may be his duty to comment adversely upon the conduct of accused persons even though he may not consider the evidence sufficient to commit them for trial to the Court of Session. Nor will this Court in revision inquire into question of fact, but in dealing with applications of this nature it will take the Magistrate's judgment as it stands. Therefore we asked the learned advocates in these applications to confine themselves to the written orders of the Magistrate and to show from the orders themselves that the Magistrate's remarks could in no way be justified.

Now, so far as Kartarchand is concerned, it appears that in the Magistrate's Court the inquiry was directed to offences relating to letters Nos. 28 and 1800, and 63 and 735. But the remarks to which objection has been taken about Kartarchand relate to two letters Nos. 63 and 735, and these remarks are as follows:

> All that can reasonably be said is that these circumstances create suspicion against the accused and justify his exclusion from a job of delicate responsibility or trust but no conviction can possibly be based on the strength of these circumstances.

Now, reading through the order of the Magistrate, it appears the whole tendency of his order was to exculpate Kartarchand. He says the bag from which the letter No. 735 was taken could have been under the control of Kartarchand hardly for a minute or two and that also in the immediate presence of the packer. He goes on to say:

> The opportunity open to Kartarchand to steal a letter was small as compared to the opportunity available to Murajmal and those who were helping him . . .

and then he goes on to point out that persons other than Kartarchand had control over the letters for as long as two hours during which time there was ample opportunity to substitute a bogus letter. The omission of Kartarchand to sign on Ex. 12, the Magistrate points out, might well have been due to inadvertence. He points out like omissions by other persons. Therefore so far as letter No. 735 is concerned, the Magistrate's order is to exculpate and not to inculpate Kartarchand.

The case against Kartarchand so far as letter No. 63 is concerned, is, as the Magistrate points out, subject to the same remarks as the case regarding letter No. 735, and it would appear from the order of the Magistrate that the case against Kartarchand so far as letter No. 63 is concerned is even weaker than the case concerning letter No. 735. Therefore the Magistrate's further remark against Kartarchand so far as letter No. 735 is concerned, namely,

> although the above mentioned circumstances against Kartarchand do not suffice to entrap him in connexion with the removal of letters Nos. 735 and 63, still they do tend to create considerable suspicion against him disentitling him to a position of trust,

appears to us to be unjustified on the Magistrate's own order. While therefore we cannot without mutilating the judgment expunge these remarks which reflect upon Kartarchand, we give our opinion that we do not think upon the Magistrate's own order the remarks which reflect upon the conduct of Kartarchand in this manner are justified.

So far as letters Nos. 28 and 1800 are concerned, it appears from the Magistrate's order that there is no case at all against Kartarchand and the remarks made by the Magistrate in the beginning of his order which have been taken to reflect upon the conduct of Kartarchand with respect to these letters do not appear, according to the Magistrate's own order, to have been intended so to be applied, and if they were intended to apply they appear in our opinion to have even less justification than in the case of the letters Nos. 63 and 735. So far as the accused Rijhumal is concerned, he also was concerned with letters Nos. 63 and 735, and the Magistrate made remarks reflecting upon him. He said :

> Although the above mentioned circumstances do not suffice to inculpate Rijhumal, they do tend to create certain amount of tangible suspicion against him disentitling him to a post involving trust.

Reading through the order of the Magistrate it would appear the utmost the Magistrate was prepared to say against Rijhumal was that it was wrong that he did not admit that the number slip had fallen off from letter No. Nil, and that this error was due to carelessness to which no criminal significance of any kind could attach, and a reference to the Magistrate's order will show the whole tendency of his order is to exculpate rather than inculpate Rijhumal.

And so far as letter No. 63 is concerned, the Magistrate is of the opinion that the same remarks which apply to letter No. 735 apply with equal force to letter No. 63. Indeed, the Magistrate seems to think that the case against Rijhumal so far as letter No. 63 is concerned is mere conjecture. Therefore, we do not see how on the Magistrate's own order which exculpates rather than inculpates Rijhumal, he is justified in making remarks seriously to his prejudice which will be justified only if his order tended to inculpate rather than exculpate. Therefore, so far as Rijhumal is concerned, we give it as our opinion that the remarks made by the Magistrate which are to his prejudice are on his own order unjustified.

There is one third application in this matter, and it relates to one Bhagwanani who was not called as a witness nor was he an accused, and so far as he is concerned his advocate objects particularly to the following passage :

> Perhaps it may still be possible to deal with Bhagwanani and Bhagirath departmentally to the end of attempting to purge the highly trusted and deservingly famous department of unusual and rare impurities, if detectable.

The learned advocate objects most strongly to his client Bhagwanani being described as an unsual and rare impurity. The language of this paragraph is the language of absurd exaggeration. We cannot however say that a Magistrate when he is called upon to investigate a case of this nature in which a large number of persons may be involved and may appear to be implicated in some offence must not in his order consider the case against a person who is neither a witness nor an accused. He may have to consider facts in relation to a particular individual who is not an accused or witness in order to weigh fairly the evidence against the accused or the evidence given by witnesses, but we do not think a Magistrate is justified in condemning any person without his being given an opportunity of being heard. For instance, it may be that in this case the learned advocate for Bhagwanani is correct when he says that Bhagwanani has not been punished departmentally for the theft of a registered letter from the registered packet, and that the Magistrate was wrong in relying upon the evidence of Sabhandas to that effect. It may be that Sabhandas' evidence on this point is wrong, and the Magistrate should not have relied upon it, but this we cannot say. And upon this we cannot and do not give any opinion. The Magistrate had before him Sabhandas as a witness, and it was within his authority to rely or not to rely upon the evidence of this witness, and we cannot interfere in an application of this kind merely because the advocate for the applicant was prepared to say that Sabhandas' evidence on this point must be false. We will not in an application of this nature go into the Magistrate's findings on facts, and if what Sabhandas says is false that Bhagwanani has not been punished departmentally for the theft of the registered letter, the department concerned can easily from its record ascertain the truth. But when the Magistrate goes on to describe Bhagwanani as an unusual and rare impurity, he goes far beyond what the case justifies or requires. It is more than merely a comment on the conduct of one who was neither an accused nor a witness. He goes on to condemn him.

The case of disparaging remarks against the conduct of a person in the course of an investigation was the subject of a ruling of this Court in 27 S L R 13,[1] and in that judgment one of the learned Judges said :

> Now, it may often be the duty of a Sessions Judge to comment adversely upon the conduct of an investigation. But great care should be taken, when it is necessary to do anything of this kind, that no disparaging or libellous remarks should be made upon any person who has had no opportunity to defend himself and who has not even appeared in the witness-box.

The learned Judges in that case were of the opinion that a Sessions Judge was justified under certain circumstances in making comments upon the conduct of the investigation, and to say that there were circumstances which appear to the Court to call for an explanation, but he was not entitled to use language which was injudicious and uncalled for. There is no great difference in the application of this principle to a Judge or a Magistrate or where the investigation is made by a Police Officer or an officer of the Postal Department. The principle to be applied is the same : A man should not be condemned without being given an opportunity of being heard in his defence.

We do not think that we can expunge this paragraph relating to Bhagwanani because the Magistrate has rightly or wrongly made the case of Bhagwanani an integral part of his order and this paragraph also relates to Bhagirath who was a witness in the case. But we also give as our opinion in this case that the Magistrate's remarks as regards Bhagwanani made in this paragraph to which objection has been taken are unjustified upon the Magistrate's own order. We direct, as requested, that a copy of this order be appended to the order of the Magistrate.

D.S./R.K. *Order accordingly.*

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# A. I. R. 1938 Sind 106

DADIBA C. MEHTA AND LOBO JJ.

*Ashi w/o Abdul Kadar* — Plaintiff.

v.

*Abdul Kadar and another*—Defendants.

Reference No. 90 of 1936, Decided on 9th February 1938, made by Judge, Small Cause Court Karachi.

**(a) Karachi Small Cause Courts Act (4 of 1929), S. 14 — Maintenance suit is cognizable by Small Cause Court.**

Section 14 does not exempt suits relating to maintenance from cognizance of Court of Small Causes, Karachi. [P 107 C 2]

**(b) Karachi Small Cause Courts Act (4 of 1929), S. 14 (h)—Suit by wife against husband for maintenance amount though not recognized as debt, is not for specific performance.**

A suit for recovery of money can in no sense be treated as a suit to enforce a contract unless the contract is for the delivery of particular coins. Therefore a suit by a wife against her husband for the recovery of a certain amount for maintenance even though it be not acknowledged as a debt, is cognizable by the Court of Small Causes, Karachi, as it is not a suit for specific performance of any contract : *A I R 1924 Mad 485 and A I R 1929 Sind 43, Rel. on.* [P 108 C 1]

**(c) Karachi Small Cause Courts Act (4 of 1929), S. 32 — Aggrieved party deliberately choosing circuitous method—Review will not be granted.**

Where a remedy is open to an aggrieved party to move the Judicial Commissioner's Court of Sind direct, and that party deliberately refrains from doing so and resorts to a circuitous method of approaching that Court, the Judicial Commissioner's Court should not exercise its extraordinary jurisdiction under S. 32 and review the whole case as if there had been an application for that from the aggrieved party. [P 108 C 2]

Fatehchand Asudomal *Amicus Curiæ.*

Srikishendas H. Lulla — *for Judgment-creditor.*

**Dadiba C. Mehta J.** — The facts on which this reference is made by the learned Judge of the Court of Small Causes under O. 46. R. 1, Civil P. C. are as under: A suit was filed in the Court of Small

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[1] Tejumal v. Emperor, (1933) 20 A I R Sind 91= 1933 Cr.C 219=142 I C 587=34 Cr L J 367= 27 S L R 13.

Causes, being Suit No. 765 of 1935 on the Registrar's file, by one Ashi, a Mahomedan minor, against her husband Abdul Kadar and her father-in-law, Ali Mahomed to recover Rs. 48 as maintenance for six months at the rate of Rs. 8 per month. In the plaint she stated that she was legally married to defendant in April 1933 ; that the Nikahnama had been duly executed by the two defendants under which both of them agreed to maintain her especially if her husband lived separate from her ; that for some months defendant 1 had been living separate from the plaintiff out of Karachi and had failed to give her any maintenance as agreed ; that about seven months prior to the suit, to be more exact in the month of August 1934, both the defendants jointly and severally agreed to pay her Rs. 8 per month for her maintenance, but that in spite of repeated demands no maintenance allowance had been given and that therefore the plaintiff was entitled to recover maintenance for six months, that is, in all Rs. 48. The defendants denied to have agreed to pay Rs. 8 by way of maintenance; and No. 2 appears to have further contended that a suit for past maintenance cannot lie. The learned Registrar gave a judgment after hearing the evidence of both the sides to the effect that the plaintiff had based her claim on the Nikahnama (Ex. 20) and also on the subsequent oral agreement between the parties; that the plaintiff had reasonable cause for not living with her husband; and that therefore she was entitled to a decree for the amount claimed.

The decree was made on 30th April 1936. An execution application was filed by the plaintiff on 22nd May 1936. The father-in-law of the plaintiff who was defendant 2 made a petition to the learned Judge of the Small Cause Court in which the petitioner brought to the notice of the Judge certain facts, whereupon the Judge ordered the execution to be transferred to his own file from that of the Registrar, and thought fit to make this reference in which he submits one question to be decided by this Court under O. 46, R. 1, Civil P. C. The question proposed in the reference is:

> Whether a suit by a wife against her husband for recovery for a certain amount as maintenance without its being acknowledged as a debt, is cognizable by the Court of Small Causes, Karachi?

That is how the question has been formulated in the reference. The learned Judge seemed to be of the opinion that this particular suit was in the nature of a suit for the specific performance of a contract and as such barred from cognizance by this Court. S. 14 (h), Karachi Small Cause Courts Act does provide that "the Court shall have no jurisdiction in suits for specific performance or rescission of contracts". On the reference coming up for hearing, Mr. Fatehchand Assudomal was good enough to argue amicus curiæ whilst Mr. Lulla appeared to oppose it on behalf of the plaintiff-judgment-creditor. Mr. Lulla first of all challenges the competency of the reference on the ground that the validity of the decree was not to be questioned by the executing Court, because such a question cannot arise in execution when the decree itself is not on the face of it without jurisdiction. He argues that this is not a matter which the learned Judge in execution had to decide, and in the decision of which he entertained certain doubts which he wanted to have solved. The terms of the decree, it is contended, are perfectly clear. As it is drawn up it is a decree for Rs. 48 for a debt adjudged which the defendants had to pay with costs.

Now, on the face of the decree there was surely nothing to justify the presumption that in passing the decree the Registrar who passed it had committed an error on any question of law. It is further argued however that even if such a question does arise in execution, and the reference is not incompetent, still the answer to the reference must be in the negative. If we review the history of the provisions with regard to suits relating to maintenance, it appears that in the Provincial Small Cause Courts Act of 1887 which is applicable to the mofussil of Sind, and was till 1929 applicable to Karachi as well, a suit relating to maintenance was exempt from the cognizance of the Provincial Small Cause Court, and specifically mentioned as such under Art. 38 of Sch. 2, Provincial Small Cause Courts Act. But the Presidency Towns Small Cause Courts Act, the Rangoon Small Cause Courts Act, and the Karachi Small Cause Courts Act (4 of 1929) do not exempt suits relating to maintenance from the cognizance of the respective Small Cause Courts; see S. 19, Presidency Towns Small Cause Courts Act, S. 14, Rangoon Small Cause Courts Act and S. 14, Karachi Small Cause Courts Act. Under the circumstances, it is perfectly obvious that after the Act of 1929 a suit relating to maintenance may be instituted in a Court of Small Causes, and that Court would be competent to take cognizance of it.

The view of the learned Judge that a suit for maintenance on an agreement by the husband to maintain his wife is a suit for specific performance of that agreement does not commend itself to us; in 4 Rang 227[1] the view taken was that a suit for money due on a promissory note is a suit based on and to enforce the contract. The contention that it was a suit for specific performance of a contract and so within the class of cases excluded from the jurisdiction of a Court of Small Causes did not find favour with the learned Judges who decided the case. A suit for the recovery of money can in no sense be treated as a suit to enforce a contract unless the contract is for the delivery of particular coins. In laying down this proposition, the learned Judges followed the ruling in A I R 1924 Mad 485.[2] In 23 S L R 411,[3] a decision of our own Court, it has been held that a suit to recover an amount due under an award passed under the Arbitration Act, 9 of 1899, is not one for specific performance of a contract, and is therefore not outside the jurisdiction of a Court of Small Causes; nor is the jurisdiction of such Court ousted by Art. 24 of Sch. 2 or S. 23, Provincial Small Cause Courts Act, 9 of 1887. The view taken was that a suit to recover under an award was not a suit for the specific performance of the award, and that therefore the suit was not exempt from the jurisdiction of the Small Cause Court.

We have therefore no hesitation in answering the reference in the negative on the question submitted to us, because we are of the opinion that a suit by a wife against her husband for the recovery of a certain amount for maintenance even though it be not acknowledged as a debt, is cognizable by the Court of Small Causes, Karachi. It is a suit relating to maintenance, which under the Act of 1929 is not exempted. The learned Judge in the reference has remarked that since he was making the reference, he might as well point out that the judgment of the Registrar is fit to be revised under S. 32, Karachi Small Cause Courts Act, the Registrar having proceeded to base his decree upon the Nikahnama which was against public policy. In the nikahnama there is a stipulation that the husband was to live with his wife in his mother-in-law's house and if he made default he was to give his wife maintenance. We do not think we should be justified in going into the merits of this question. The aggrieved party had a remedy. It was open to the judgment-debtors or any of them to come in revision to this Court after the decree was passed, instead of urging the Judge to refer the matter to this Court. All that the judgment-debtors actually prayed during execution was that the decretal amount may be recovered by instalments as they were too poor to pay the whole amount at once. We do not think that where a remedy is open to an aggrieved party to move this Court direct and that party deliberately refrains from doing so and resorts to a circuitous method of approaching this Court, we should exercise our extraordinary jurisdiction under S. 32 of the Act and review the whole case as if there had been an application for that from the aggrieved party. There are no special circumstances to warrant this procedure. We therefore return the reference with the answer as given above.

V.B.B./R.K. *Answered in the negative.*

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[1] Maung Ni v. Maung Aung Ba, (1926) 13 A I R Rang 198=97 I C 1032=4 Rang 227.

[2] Thirumurthy Chetty v. Ponnan Chetty, (1924) 11 A I R Mad 485=76 I C 843=46 M L J 51.

[3] Bansidhar Mangatrai v. Dinanath & Co., (1929) 16 A I R Sind 43=112 I C 11=23 S L R 411.

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## ⁎ A. I R. 1938 Sind 108

DAVIS J. C. AND LOBO J.

*Emperor*

v.

*Pursumal Gerimal and another*

Accused.

Criminal Acquittal Appeal No. 143/6 of 1937, Decided on 21st January 1938, against order of Sessions Judge, Sukkur, D/- 27th February 1937.

**⁎ (a) Criminal P. C. (1898), Ss. 177 and 180 —Conspiracy—Jurisdiction of Court is determined by place where conspiracy was formed or made and not by place where act in pursuance of conspiracy is done—Accused charged with conspiracy formed in U. P.—Accused alleged to have made another conspiracy at Sukkur but never charged with it nor was it the case that two conspiracies formed one transaction—Sukkur Court has no jurisdiction to try offence of conspiracy formed in U. P.**

Conspiracy is a substantive offence in itself. It is not given in one of the illustrations to S. 180, Criminal P. C., as one of the offences which is an offence because of its relation to another offence, such as abetment which would give the Court jurisdiction either where the principal offence or the connected offence was committed, nor can it be brought within the meaning of this section itself. It is not one of the offences named in

S. 181. The gist of the offence of conspiracy lies not in doing that act of effecting the purpose for which the conspiracy is formed nor in attempting to do any of the acts nor in inducing others to do them, but in the forming of the scheme of agreement between the parties. In certain cases it may be difficult for the Courts to decide whether a particular agreement which forms the basis of a criminal charge was made or concluded at a particular time or at a particular place. But it does not follow therefrom that the scope of the conspiracy would determine the place where the conspiracy or part of it occurred. It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court and in an indictment for conspiracy the venue should be laid where the conspiracy was and not where the result of such conspiracy was put in execution. [P 109 C 2; P 110 C 2; P 111 C 1]

The criminal conspiracy was formed, that is to say, the offence was committed in U. P., that is outside the jurisdiction of the Sukkur Court. The accused also entered into a further conspiracy at Sukkur. The accused were however not charged with this second or further conspiracy at all. The two conspiracies were not parts of one transaction:

*Held* that S. 177 applied and the Sukkur Court had no jurisdiction to try the offence of criminal conspiracy formed in U. P. [P 112 C 1, 2]

**(b) Criminal Trial—Appeal against acquittal—Government should be bound in argument to grounds raised in memorandum of appeal—It should not be allowed to snatch conviction by making out new case against accused.**

It is not proper in an appeal against an acquittal for Government to attempt to snatch a conviction by making out another case against the accused. An appeal against an acquittal is a serious matter. The liberty of a person once acquitted is again to be put in jeopardy, and cases, in which an appeal against an acquittal is to be made, should be carefully considered in all their aspects before the appeal is filed, and Government should be bound in argument and should consider themselves bound in argument to the grounds raised in the memorandum of appeal: *19 Bom 51, Ref.* [P 113 C 1]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

P. S. Shahani — *for Accused 1.*

Mangharam Ailmal — *for Accused 2.*

**Davis J. C.**—Five accused persons were tried by the Sessions Judge of Sukkur of offences under S. 120-B, conspiracy, under S. 366, kidnapping, and S. 420, cheating. All were acquitted on the charge of conspiracy as the Court held that the offence of conspiracy was completed outside its jurisdiction, and that there was no offence of abduction committed because the young woman in this case was not abducted, so he acquitted all the five accused on these two charges. On the charge of cheating he acquitted the woman accused, the wife of Dhooji, because he was of the opinion that she merely lived with her husband, accused 2, in his house but he convicted the husband Dhooji. He also convicted one Parumal accused 4, but acquitted Pursu and Thaku, accused 1 and 5, and it is against the acquittal of these two accused on the charges of conspiracy and cheating that Government has appealed.

Accused Dhooji and Parumal appealed to this Court against their conviction on the charge of cheating and their appeals were dismissed. It is not clear to us why if Government considered it proper to appeal against the acquittal of the two accused Pursu and Thaku, they did not appeal against the acquittal of their two fellow conspirators Dhooji and Parumal of the charge of conspiracy. We think however the appeal of Government against the acquittals of these two accused Pursu and Thaku should be dismissed. The case for the prosecution was that the five accused with three others, two women, Mt. Neepali and Mt. Parpati, and a man Lal Bahadur not before the Court, entered into a criminal conspiracy about the month of March 1936 to abduct women so that they may be compelled to marry against their will and to cheat by deceiving persons into marrying the abducted women and to pay money for them, and that in pursuance of this conspiracy they abducted Mt. Saraswati from Chamti in Gonda district on or about 5th April 1936, and compelled her to marry Sugnomal against her will at Sukkur on 1st May 1936, and on the same day cheated Sugnomal by deceiving him by falsely representing that Saraswati was a widow without relations, which she was not, and thus induced him to marry Saraswati and pay them Rs. 475. This is the case for the prosecution as stated in the amended charge, for the Sessions Judge of Sukkur amended the charge as framed by the committing Magistrate.

Now conspiracy is a substantive offence in itself. It is not given in one of the illustrations to S. 180, Criminal P. C., as one of the offences which is an offence because of its relation to another offence, such as abetment which would give the Court jurisdiction either where the principal offence or the connected offence was committed, nor can it be brought within the meaning of the section itself. It is not one of the offences named in S. 181. It is not alleged in the charge that the conspiracy to abduct and the abduction was made in Sukkur where all the five accused live. Clearly the criminal conspiracy was formed, that is to say, the offence was committed outside the Province of Sind and outside the jurisdiction of the Sukkur Court, whether in Cawnpore or in some other place in another province does not matter. The three persons most closely connected with the conspiracy, Mt. Neepali, Mt. Parpati and Lal Bahadur were not before the Court. Indeed, Government in their memorandum of appeal seem to rely not upon the conspiracy made outside the jurisdiction but upon another conspiracy made in Sukkur. In para. 4 in the memorandum it is stated that the conspiracy of cheating could only have taken place in Sukkur or in Shikarpur, and in para. 5 it is complained that the Judge did not apply his mind to the question whether the accused did not enter into a further conspiracy at Sukkur; but the accused were not charged with this second or further conspiracy at all and we cannot say that a Judge is wrong because when the accused are charged with one conspiracy at one place, he does not convict them of another conspiracy at another place. We think the complaint in this case should be directed not against the Judge but those responsible for the conduct of the prosecution at Sukkur.

From para. 9 of the memorandum of appeal, the Advocate-General appears to be of the opinion that a novel and important question of jurisdiction is raised in this appeal. But the point is not novel. The learned Advocate-General could assist us in his argument only by reference to a decision of the Punjab Chief Court in a single Judge judgment reported in an unauthorized law report, the case in 24 P R Cr 1917 = 18 Cr L J 847[1] mentioned on page 456 of Mitra's Criminal Procedure Code, Edn. 8. That case however was decided on different facts and a different section, and can be of no assistance in this case, and the learned Advocate-General could, we think, have more profitably referred to the case mentioned by the Sessions Judge in his judgment, a case of this Court — and reported in 148 I C 135, at p. 138 and also reported in 27 S L R 392.[2] In that case the learned Additional Judicial Commissioner whose order was set aside in revision fell into precisely that error into which the learned Advocate-General invites us to fall. The learned Additional Judicial Commissioner said: "The scope of the conspiracy would, in my opinion, determine the place where the conspiracy or any part of it occurred"; but the Court was of the opinion that there was no warrant for this proposition.

The Court said :

> The definition of conspiracy as given by Wiles J. at p. 317 in the very case referred to by the learned Additional Judicial Commissioner, (1886) L R 3 H L 306,[3] is with all respect to the learned Additional Judicial Commissioner, a complete answer to the reasoning adopted by him. The definition is as follows :
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> 'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as a design rests in intention only, it is not indictable. When two or more agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise *actus contra actum* capable of being enforced, if lawful, is punishable if for a criminal object or for the use of criminal means.'

This definition forms the foundation of S. 120-A, Penal Code. The gist of the offence of conspiracy lies not in doing that act or effecting the purpose for which the conspiracy is formed nor in attempting to do any of the acts nor in inducing others to do them, but in the forming of the scheme of agreement between the parties: (1800) 1 East 462,[4] (1760) 2 Burr 993=97 E R 669,[5] (1844) 11 C and F 155=1 Cox C C 413.[6] It is no doubt true that sometimes it is difficult to ascertain the point of time when the alleged agreement is said to have been made, that is to say, the point at which a combination of several persons for a common object becomes unlawful. But the factum of the criminal agreement should not be confounded with its proof. So far as proof goes, as said by Gross J. in (1803) 4 East 164[7] at page 171 :

> Conspiracy is generally a matter of inference deducted from certain criminal acts of the parties accused done in pursuance of an apparent criminal purpose common between them.

In certain cases it may therefore be difficult for the Courts to decide whether a particular agreement which forms the basis of a criminal charge was made or concluded at a particular time or at a particular place. But it does not follow therefrom that the "scope of the conspiracy would determine the place where the conspiracy or part of it occurred." It is also difficult to appreciate the sense in which the learned Additional Judicial Commissioner has used the expression "any part" of the conspiracy occurring in one place and any other part of it occurring in another place. The learned Additional Judicial Commissioner has further said :

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[1] Gurdit Singh v. Emperor, (1917) 4 A I R Lah 304=41 I C 671=27 P R Cr 1917=18 Cr L J 847.

[2] Gokaldas Amarsee v. Emperor, (1933) 20 A I R Sind 333=1933 Cr C 1130=148 I C 135=35 Cr L J 585=27 S L R 392.

[3] (Denis Dowling) Mulcahy v. Queen-Empress, (1886) L R 3 H L 306.

[4] Domina Regina v. Best & Co., (1800) 1 East 462.

[5] Rex v. John Spragg and Mary Elizebeth Spragg, (1760) 2 Burr 993=97 E R 669.

[6] O'Connel v. Reg, (1844) 11 Cl & F 155=1 Cox C C 413=8 E R 1061.

[7] Rex v. Brisac, (1803) 4 East 164=7 R R 551.

> A conspiracy may be a continuous offence. Its duration may depend on the achievement of its object. After forming a common intention with regard to the main purpose details may be left to be settled as and when they arise. The conspirators may think and act in concert during the attainment of their purpose. This continuous activity which may be characterized as conspiracy may be coterminous with the commission of a crime. Thus where the conspiracy is a scheme to do certain acts towards an offence (as in this case) for the purpose of cheating, then whatever any such act may be, if it is done by any of the conspirators in furtherance of the scheme, that act would decide the jurisdiction to try the offence of conspiracy.

Again with all respect there is, we think, no warrant for either of the above propositions.

> It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court and it has been consistently held that in an indictment for conspiracy the venue should be laid where the conspiracy was and not where the result of such conspiracy was put in execution: Russell on Crimes and Misdemeanours, Edn. 8, page 185.

There are however two judgments of this Court in the Sind Law Reporter to which we would invite the attention of the learned Advocate-General: the one is 20 S L R 18[8] and the other, 20 S L R 140.[9] In both those cases stress is laid on the fact that the conspiracy itself is a substantive offence, and the acts done in pursuance of the conspiracy are evidence of that conspiracy. The offence is the conspiracy. In 20 S L R 140[9] Kennedy J. C. said at page 142 :

> **It must be remembered that conspiracy is a substantive offence and has nothing to do with abetment. It is to be remembered also that though an overt act may be specified in the charge, yet this is not (except when the end of the conspiracy is not to commit an offence) necessary. In any** case, the overt act or acts is or are introduced not as partially constituting the offence but as giving information and example as to what the conspiracy was. Nor is there any limit to the number of overt acts which can be given in the charge. The accused is not charged with committing them but with committing the offence of conspiracy in the course of which these events took place. It is thus clear that it may be specified in a charge that a certain act has been committed which could not possibly be committed by one of the alleged conspirators, nevertheless such conspirator may be guilty of that conspiracy in the course of which such act was committed. Thus Lady Rochford might well have been charged with conspiracy to commit high treason in connexion with the seduction of Anne Boleyn.
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> Again, it is not by any means necessary that each conspirator should be aware of all the acts done by each of the conspirators in the course of the conspiracy. This necessarily follows from what has been said above. His offence is the conspiracy. The acts done by any of the conspirators in furtherance of the purpose of the conspiracy are merely indications of what the object of the conspiracy was.
>
> What is necessary however is that there should be one conspiracy and not a series of conspiracies and criminal acts unconnected by unity of intention. It is quite possible that the same gang may commit conspiracy after conspiracy, all of the same nature yet actually unrelated. Again it is quite possible that there may be a band of conspirators working for a common criminal end, and that for the purpose of that conspiracy they may find it necessary to procure the doing of unlawful acts by persons who are not members of the conspiracy. In that case, if the persons so seduced into unlawful acts are not aware of the conspiracy, the fact that they do unlawful acts does not make them members. Thus let it be supposed that a gang of men conspire to murder some one and to that end borrow a gun from a license holder, who thus commits the offence of parting with his gun contrary to his license, but who imagines that the conspirators have borrowed the gun for Shikar; that will not make the license holder a conspirator.

It might be that in certain cases the prosecution could rely on a series of connected conspiracies so as to bring the charge within the provisions of S. 239 (d), Criminal P. C., or on the argument that a conspiracy and acts done in pursuance thereof are all parts of one transaction so as to bring the case within that section, and on the class of cases illustrated by 30 Bom 49,[10] 7 Rang 821[11] and 28 S L R 119[12] at p. 132. But it was never the case of the prosecution that these two conspiracies were part of one transaction, nor was

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8. **Kishanchand v. Emperor, (1926) 13 A I R Sind 171=92 I C 419=27 Cr L J 243=20 S L R 18.**
9. **Emperor v. Chandiram, (1926) 13 A I R Sind 174=92 I C 462=20 S L R 140=27 Cr L J 286.**
10. **Emperor v. Dato Hanmant, (1906) 30 Bom 49 =7 Bom L R 633=2 Cr L J 578.**
11. **Maunga Bat Chit v. Emperor, (1930) 17 A I R Rang 114=1930 Cr C 402=122 I C 273=7 Rang 821=31 Cr L J 387.**
12. **Dur Mahomed v. Emperor, (1934) 21 A I R Sind 57=1934 Cr C 628=151 I C 494=28 S L R 119=35 Cr L J 1337.**

it the case of the prosecution, nor was it argued before us, that the Sukkur Court had jurisdiction because the conspiracy in the United Provinces and the acts of cheating in Sukkur or Shikarpur were parts of the same transaction. The question of the territorial jurisdiction of the Courts dealt with in Chap. 15, Criminal P. C., would then have had to be argued and considered. Nor do the provisions of S. 181, Criminal P. C., which in the case of kidnapping or abduction give jurisdiction to several Courts be of any help to Government in this appeal.

In the memorandum of appeal the further conspiracy at Sukkur is emphasized and the Sukkur Court's jurisdiction in consequence is stressed. But the answer to those arguments is that the accused were not charged with a conspiracy at Sukkur. They might well have been so charged and convicted, if the prosecution at Sukkur had not been mishandled, but they were not so charged. Nor is the case of Government as set out in the memorandum of appeal based upon S. 239, Criminal P. C., nor did the learned Advocate-General refer to one case based on that section. We are not prepared in an appeal against an acquittal of a charge of one conspirancy in the United Provinces to convict the accused of another conspiracy at Sukkur, or to allow a case to be argued on grounds other than those set out in the memorandum of appeal. Moreover, as the evidence of the charge of conspiracy to cheat is the cheating of Sugnomal, and no Court would give consecutive sentences for the conspiracy and the cheating, the acquittal on the charge of conspiracy to cheat is in this case of no practical importance. Moreover, we would point out that the worst aspect of these cases is not the offence of cheating, but the offence of kidnapping or abduction, but the learned Judge has found quite rightly that in this case there was no abduction, for the woman was over the statutory age; she was a married woman, a bad character and a willing agent, while Sugnomal, the middle aged bania, who so eagerly and so imprudently married this woman in circumstances almost bound to excite suspicion, is deserving of little sympathy.

We think, therefore, that on the facts of this case, and on the charge as framed, the Judge was perfectly justified in applying to the charge of the substantive offence of conspiracy the simple provision of S. 177, Criminal P. C., and to acquit the accused on this charge. The appeal on this charge must clearly fail. On the charge of the substantive offence of cheating, the learned Advocate-General does not press the charge against Thaku, accused 5, but he presses the charge against accused Pursu, and he relies mainly on what he describes as an error of the learned Judge in confusing Thaku and Pursu in his judgment and stating that Sugnomal did not implicate Pursu in his application Ex. 20. It is true the learned Judge's words invite some argument because reference to Ex. 20 will show that Sugnomal names Pursu as a trafficker in women and as an accomplice. But when the learned Judge uses the word 'implicates,' he means, we think, implicated in the offence of cheating, as a principal in the offence and not as an abettor or an accomplice. We think, in deciding to convict some and acquit others, he has drawn the line broadly between those who executed the deed and as such can be deemed to have been a party to the actual misrepresentations and those who took some lesser part, whether by attesting or otherwise. We cannot say, on the evidence before us, that the learned Judge was wrong. He had before him some very unsatisfactory witnesses. Khanu and Jhaman, the go-betweens, appear to have been accomplices. Lakha was a partner with Jhaman. Pewandbai apparently was anxious to get her simple and middle aged unmarried brother married. The learned Judge appears to have been impressed by the simplicity of Sugnomal, the dupe, but not to the extent of convicting all whom Sugnomal implicates. He states:

> Sugno no doubt implicates Thaku and Pursu too in his evidence, but they are not implicated by him in the application nor have they executed the deed; Thaku did not even attest it.

The learned Judge had therefore clearly in his mind the fact that Pursu attested the deed but he acquits him. When we turn to Sugno's evidence we find a general indictment of all the accused. For instance, he says: "Pursu, Paru and a Punjabi asked her if she would marry". They appear to have spoken in chorus. Then "Pursu and Paru said that the girl was the daughter of Umrah and that her husband was dead and so I should be at ease". This was a duet. Sugno also says: "I did not hear the deed completely but Khanu assured me that it was all pukka business". It is clearly impossible to place great reliance upon a witness such as Sugno and we think the Judge was right when he convicted only those whose signatures as the executants of the deed corroborated the evidence of Sugnomal. In the course of his arguments, the learned Advocate-General said that if Pursu could not be convicted of the offence of cheating, he could have been convicted of abetment of the offence. There is at least the authority of the Bombay High Court in A I R 1924 Bom 432,[13] that an accused charged with the substantive offence cannot be convicted of the abetment of that offence. We do not wish to commit ourselves to the statement that in no case can an accused charged with the principal offence be convicted of abetment on the same charge, because while "attempt" is specifically mentioned in S. 238, Criminal P. C., "abetment" is not. But we do say that it is not proper in an appeal against an acquittal for Government to attempt to snatch a conviction by making out another case against the accused. We think that an appeal against an acquittal is a serious matter. The liberty of a person once acquitted is again to be put in jeopardy, and we think we are justified in asking that cases, in which an appeal against an acquittal is to be made, should be carefully considered in all their aspects before the appeal is filed, and that Government should be bound in argument and should consider themselves bound in argument to the grounds raised in the memorandum of appeal. In 19 Bom 51,[14] the High Court of Bombay refused to consider the question whether a charge under S. 211, I. P. C. was or was not maintainable as no objection was urged on that point. Jardine J. said :

> At the same time it seems to me that it would not be proper for this Court to consider the appeal on grounds not contained in the objections urged on behalf of Government.

There is no hint or suggestion in the memorandum of appeal that the accused should have been convicted of the abetment of the offence of cheating. Abetment and conspiracy are two quite different offences. We refuse therefore to consider a case of abetment now. We think therefore the judgment of the Sessions Judge was clearly right on all the points on which Government have raised objection, and we dismiss this appeal accordingly.

D.S./R.K. *Appeal dismissed.*

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## ✲ A. I. R. 1938 Sind 113

### FULL BENCH

DAVIS J. C., DADIBA C. MEHTA AND LOBO JJ.

*Emperor*

v.

*Bikha Moti.*

Criminal Ref. No. 270 of 1937, Decided on 22nd March 1938, made by District Magistrate, Thar Parkar, and referred by Divieion Bench of Davis J. C. and Haveliwala J.

**✲ Criminal P. C. (1898), S. 202—Complaint referred by Magistrate to police for investigation under S. 202—Police have power to arrest but cannot investigate offence independently of Magistrate's directions and send accused for trial upon charge sheet :** *27 S L R 67 = A I R 1933 Sind 136=144 I C 409, Overruled.*

There is nothing in S. 202 which debars the police from exercising their powers under S. 54 and arresting the accused, merely because the Magistrate had referred a case for investigation by them under S. 202. But when a Magistrate has referred a complaint of an offence to the police for investigation under S. 202, it is not competent to the police to investigate the offence complained of independently of the Magistrate's directions and to send up the accused for trial for the offence complained of upon a charge sheet: *27 S L R 67= A I R 1933 Sind 136=144 I C 409,* **Overruled.**

[P 113 C 2 ; P 114 C 1 ; P 116 C 1,2]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.** — The question referred to us for our decision is as follows :

> Whether when a Magistrate has referred a complaint of an offence to the police for investigation under S. 202, Criminal P. C., it is competent to the police to investigate the offence complained of independently of the Magistrate's directions and to send up the accused for trial for the offence complained of upon a charge sheet.

In our opinion, the answer to that question should be in the negative. It is, in our opinion, not competent to the police when they have been directed by the Magistrate to enquire into a complaint of an offence of which he has taken cognizance, in effect to ignore the Magistrate's direction and to start proceedings of their own. To hold otherwise would, in our opinion, be to ignore the purpose and effect of S. 202, Criminal P. C., and merely to invite a conflict of jurisdictions between the police and Magistrate such as this reference by the District Magistrate illustrates, and which in the public interest, should be avoided. It is true that there is a judgment of a Division Bench of this Court to the contrary effect, but that judgment, as well as the judgments of certain other Courts, appear based upon a misapprehension. In 27 S L R 67,[1] Aston A. J. C. in concurring with the opinion expressed by the Patna High Court in 2 Pat 379[2] said:

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[13] Emperor v. Raghya Naghya, (1924) 11 A I R Bom 432=81 I C 959=25 Cr L J 1135=26 Bom L R 323.

[14] Queen-Empress v. Karigowda, (1895) 19 Bom 51.

> It is possible to conceive of offenders who had committed grave crimes making good their escape if the mere fact that some one had made a complaint to a Magistrate which had been forwarded to the police for investigation under S. 202, Criminal P. C., debarred the police from arresting the accused and placing him before the Magistrate on a charge sheet, if there were sufficient grounds for so doing.

But with all respect to the learned Judge we cannot see that there is anything in S. 202, Criminal P. C., which debars the police from exercising their powers under S. 54 and arresting the accused, merely because the Magistrate had referred a case for investigation by them under S. 202, Criminal P. C., and indeed S. 202 (2) appears to contemplate the police using such power of arrest and all other such powers as they would have, had proceedings been started on a first information recorded under S. 154 by them, instead of upon a complaint made to a Magistrate of which he has taken cognizance under S. 190 (a). It is perhaps as well to set out S. 202, Criminal P. C., at length, for, it is our experience that reliance upon reported cases, almost inevitably coloured by their own particular facts, rather than reference to the words of the statutory sections which apply, is a frequent cause of error and confusion. S. 202, Criminal P. C., is as follows:

> *202.* (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him under S. 192, may, if he thinks fit for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:
>
> Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of S. 200.
>
> *(2)* If any inquiry or investigation under this section is made by a person not being a Magistrate or a police officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police station, except that he shall not have power to arrest without warrant.
>
> *(2-A)* Any Magistrate inquiring into a case under this section, may, if he thinks fit, take evidence of witnesses on oath.
>
> *(3)* This section applies also to the police in the towns of Calcutta and Bombay.

Now S. 202 (1) refers not only to an enquiry but also to an investigation; and S. 202 (2) confers upon a person other than a Magistrate or a police officer all powers conferred upon a police officer in charge of a police station except the power of arrest without warrant. Surely this implies that a police officer to whom a complaint has been referred for investigation has the power to arrest without warrant under S. 54, Criminal P. C. and all other powers which may be exercised by a police officer in the course of an investigation. To us the scheme of the section appears to be, that when a complaint is sent to the police for investigation and report, they are to investigate in precisely the same manner and to arrest in precisely the same way as they would have done if their powers had been first invoked by a first report under S. 154, their being only this difference, that in the one case the police embody the result of their investigation to the Magistrate in a report which the Magistrate proceeds to consider under S. 203, while in the other case the police embody the result of their investigation in what is called a challan or charge-sheet, but which is really a police report under S. 190 (b), the term challan or charge sheet not occurring in the section, the accused person, in any case, if arrested by the police, being produced before the Magistrate in the ordinary way. To hold otherwise would be to leave the proceedings started by the Magistrate under S. 202, Criminal P. C. unfinished, and in the air; for, he would not have, as the law contemplates, a report of the investigation but he would have a refusal by the police to report as in this case, and other and independent proceedings in the same matter initiated by them. But the law contemplates that proceedings, begun by the acceptance by a Magistrate of a complaint under S. 200, Criminal P. C. and sent to the police for investigation under Section 202, should be terminated by the Magistrate as set out in Section 203 and the following sections. The proceedings are not terminated when the Magistrate's authority is defied, his jurisdiction in effect denied and the order to investigate and report disobeyed. The law does not contemplate this, and we cannot see that this aspect of the case has been considered in any of the judgments which have been cited to us in support of the case of this Court in 27 S L R 67.[1]

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[1] Emperor v. Ghulam Nabi, (1933) 20 A I R Sind 136=1933 Cr C 334 = 144 I C 409=27 S L R 67=34 Cr L J 763.

[2] Emperor v. Bhola Bhagat, (1923) 10 A I R Pat 547=72 I C 375=24 Cr L J 375 = 2 Pat 379=4 P L T 521.

The Patna case, 2 Pat 379,[2] is clearly distinguishable from the case before us. In that case, the Judges held that the order was not an order by a Magistrate under Section 202, Criminal P. C. The remark that even if it had been an order under Section 202, Criminal P. C. the police could have jurisdiction to arrest and send up a charge sheet is obiter. With the further remark that the police would have powers to arrest and investigate, we respectfully agree because Section 202 clearly contemplates that the police would have such powers; but we do not think that the section contemplates the termination of the investigation by the police sending up a charge sheet, for, the Magistrate would have no need of a police report or challan or charge sheet to take cognizance under S. 190 (b), having already a complaint under S. 190 (a). The Madras case in 54 Mad 598,[3] is a short judgment of a single Judge and appears to proceed upon the ground that because a Magistrate has ordered the police to investigate and report, they could not arrest a dangerous murderer. But, for the reasons we have given, we see no reason why the police should not have power to arrest a dangerous murderer even if the Magistrate has sent a complaint for investigation under S. 202; and they can still report to the Magistrate as directed, and need not defy his authority.

Moreover, we are dealing here with a case where the police have sought to challan accused persons upon the same facts and allegations as are contained in the complaint, although they choose to consider the offence complained of as an offence under S. 406, I. P. C., while the Magistrate is of the opinion that the complaint disclosed an offence only under S. 403, I. P. C. Should the police in the course of their investigation of a complaint sent to them under S. 202, Criminal P. C., find different facts and a different offence; should they, for instance, upon a complaint of simple hurt find facts which show a case of murder, it is not suggested that they could not themselves record a first information and challan the accused for murder; but even this would not relieve them of the duty to report to the Magistrate the result of their investigation of the complaint referred to them, so that he could deal with the complaint according to the provisions of S. 203, Criminal P. C. In fact, if the words of the material sections are carefully read and followed, no difficulty in practice and no conflict in jurisdiction would appear to us to arise at all. In the Lahore case in 14 Lah 194,[4] the question is dealt with in general terms. The difficulty which arises in the co-existence of a complaint and challan is not resolved, but with the general proposition that there is nothing in S. 202 to restrict the powers of the police in investigation we respectfully agree because our reading of S. 202 (2) is that all these powers are by implication clearly preserved but the power to investigate and arrest is not necessarily dependent upon the power to send up the accused upon a charge sheet.

In support of the view taken by the learned Advocate-General on behalf of Government that when the Magistrate has referred a complaint to the police for investigation under S. 202, Criminal P. C., the police cannot themselves start independent proceedings under S. 154, Criminal P. C., but must investigate and if need be, arrest in consequence of the reference to them by the Magistrate, we are referred to two cases, 54 Cal 303[5] and 53 Bom 339.[6] In the Calcutta case the simple proposition is laid down that when a Magistrate takes cognizance of a case under S. 200, Criminal P. C. and refers the complaint to the police for enquiry under S. 202, Criminal P. C., he must pass the necessary order on the

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**3. Gopal Naick v. Alagirisami Naick, (1931) 18 A I R Mad 770=1931 Cr C 1026=131 I C 176=32 Cr L J 690=60 M L J 520=54 Mad 598.**

**4. Rashid Ahmad v. Emperor, (1932) 19 A I R Lah 579=1932 Cr C 807=139 I C 139=14 Lah 194=33 Cr L J 787=33 P L R 840.**

**5. Isaf Nasya v. Emperor, (1928) 15 A I R Cal 24=102 I C 545=54 Cal 303=28 Cr L J 577.**

**6. Emperor v. Haji Nur Mohamed, (1929) 16 A I R Bom 72=117 I C 329=53 Bom 339=30 Cr L J 781=31 Bom L R 84.**

police report under Ss. 203 and 204, Criminal P. C. To us, this proposition appears indisputable, and is obviously incompatible with independent proceedings by the police upon the same facts, for the Magistrate cannot pass orders upon the complaint after considering the report of the police, when the police do not report to him the result of their investigation but take independent proceedings of their own. When the police do take such independent action, the obvious course is for the Magistrate to treat the police report as made, not independently by the police but in proper obedience to his order, and act accordingly. In the Bombay case the general proposition is laid down that the police cannot, when a complaint is referred to them by a Magistrate under S. 202, Criminal P. C., for report, exercise their independent powers of investigation and send up the accused on a charge sheet or even arrest the accused. Baker J. said :

> It is quite clear, on the ruling of the Calcutta High Court in 54 Cal 303,[5] that the Magistrate to whom a complaint is made can only proceed under Ss. 202, 203, and 204, and in the present case, from the Magistrate's own order, it would be seen that he sent the case for investigation to the police after examining the complainant on oath. That must be taken to be an order under S. 202. In that case the police had no power to arrest the accused or send him up for trial on a charge sheet. The only action they could take was to make a report to the Magistrate, after consideration of which it was open to him to proceed either under S. 203 by dismissing the complaint, or S. 204 by issuing process. The view taken by the learned Presidency Magistrate, is, therefore, in my opinion, correct, and must be upheld. The sole remaining point is as to the result of the proceedings. It is quite clear that the result is that the original complaint made by Cunningham is still undisposed of, because no order has been passed by the Magistrate on the result of the investigation made by the police. The question whether such an order should be made by the Chief Presidency Magistrate to whom the complaint was originally made or by the Presidency Magistrate to whom the proceedings under the charge sheet were transferred is of minor importance. I agree that what appear to be transferred to the Third Presidency Magistrate were the proceedings initiated upon the charge sheet. In any case, as the complaint is still undisposed of, it will be necessary for the proceedings to be taken up at the point where the irregularity commenced, that is to say, it will be necessary that the police report should be made in reply to the reference under S. 202, and the Chief Presidency Magistrate should then proceed to dispose of it in accordance with law, that is to say, under S. 203 or S. 204 as the case may be.

But with all respect to the learned Judge, we do not think it can be said that a reference by a Magistrate under S. 202, Criminal P. C., prevents the police from arresting the accused. Our reading of S. 202 (2), Criminal P. C., is that by implication the sub-section very clearly reserves this power to the police as we have before explained. For the reasons we have given, we think the case in 27 S L R 67[1] is wrongly decided by the Divisional Bench of this Court and should no longer be followed. We would answer the reference accordingly.

D.S./R.K. *Answered in negative.*

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## * A. I. R. 1938 Sind 116

DAVIS J. C. AND LOBO J.

*Tarachand Pribhdas* — Applicant.

v.

*Emperor.*

Criminal Revn. Appln. No. 248 of 1937, Decided on 1st March 1938, to quash the proceedings pending in the Court of Resident Magistrate, Dadu.

*** (a) Bombay Local Boards Act (6 of 1923 as amended by Act 13 of 1935), Ss. 136 (2), 119, 50—Sub-overseer of Local Board preparing false bills and overcharging Board in course of his duty of taking measurements of work and preparation of bill—He acts or at least purports to act under Act—Prosecution after three months is barred even if act is not a bona fide one.**

A part of the duties of a sub-overseer under Local Board was the taking of measurements of repair and other work done and the preparation of bills in respect thereof. The overseer prepared false bills and overcharged the Board :

*Held* that the acts which were alleged to constitute a criminal offence on his part were acts done by him, or, in any case, purported to have been done by him, in pursuance of the Local Boards Act, and whether they were bona fide or otherwise, he was immune from prosecution after a lapse of three months from the date of the act complained of : *A I R 1930 Sind 144* ; *A I R 1933 Sind 161*; *A I R 1933 Sind 165 and A I R 1937 Sind 129*, *Rel. on* ; *(1916) 1 A C 242*, *Disting.* [P 118 C 2; P 119 C 1]

**(b) Interpretation of Statutes—Case interpreting English Act is no guide in interpreting Indian Act.**

An English case interpreting an Act of Parliament is no guide for the interpretation of a section of an Indian Provincial statute, especially where the wordings in the two Acts are different: *A I R 1937 P C 306*, *Rel. on.* [P 121 C 1]

Hashmatrai G. Chainani — *for Applicant.*

Partabrai D. Punwani — *for the Crown.*

**Lobo J.** — The applicant Tarachand Pribhdas was during the year 1934-35 a sub-overseer in the employ of the District Local Board of Dadu and in charge inter alia of the Mehar taluka roads and other engineering works. A part of his duties as Sub-Overseer was the taking of measurements of repair and other work done and the preparation of bills in respect thereof. In 1935 the overseer and other superiors of the applicant discovered that in respect to certain works the applicant had prepared and preferred false bills overcharging the Board to the extent of Rs. 562-2-0. At the instance of the District Local Board a complaint was filed against the applicant in the Court of the Resident Magistrate of Dadu of offences under Ss. 417/511, I. P. C. and the learned Magistrate thereon issued process against him. The case proceeded, and on 2nd June 1936 the learned Magistrate framed a charge against the applicant the material portion of which reads as follows :

> I, Rochiram Bulchand Hiranandani, Resident Magistrate, Dadu, hereby charge you Tarachand Pribhdas as follows: That you between December 1934 and April 1935 at Mehar Taluka District Dadu being a public servant to wit, Sub-overseer Taluka Local Board Mehar and being as such public servant, charged with preparation of documents relating to Local Board works framed the documents to wit, bills for repairs to Mehar Nasirabad Road, Mehar-warah Road and Sir Shah Nawaz Bhutto Park in a manner which you knew to be incorrect, intending thereby to cause injury to Local Board to the extent of Rs. 295-4-0 or in the alternative 'you by deceiving the Local Board dishonestly attempted to induce the Local Board to make payment to the aforesaid amount as detailed below to the contractor . . . . and thereby committed an offence punishable under S. 167 or S. 417 read with S. 511 of the Indian Penal Code and within my cognizance.

In the meanwhile, a prosecution had been launched by the Tatta Taluka Local Board in or about March 1936 against one Nuralhaqshah a Sub-overseer in the employ of the Board, against Muhammad Usman Sumro, the President of the Board, and Sheikh Umar, a contractor, for conspiring to commit criminal breach of trust in respect of certain moneys of the Board and other offences under Ss. 120-B, 409 or 406, 420 and 477-A read with S. 109, I. P. C., in the Court of the City Magistrate of Karachi, and that learned Magistrate had on 29th May 1936 framed charges against the accused in that case. Thereupon Nural-Haq Shah presented an application to the learned Magistrate in which he prayed that the Court "would be pleased to terminate the proceedings against him and acquit him" on the ground inter alia that the prosecution was barred under the provisions of S. 136 (2) of the Local Boards Act 6 of 1923, as amended by Act 13 of 1935. This application being rejected by the learned Magistrate, both Nuralhaq Shah and Muhammad Usman Sumro brought the matter before the High Court in Revision Applications Nos. 167, and 176 of 1936[1]. A Divisional Bench consisting of the present learned Judicial Commissioner and Dadiba Mehta A. J. C. were of opinion that the contention of the applicants in these revision applications was well founded. At the end of a long and elaborate discussion as to the construction to be placed upon S. 136 (2), Local Boards Act as amended, the learned Judicial Commissioner who delivered the judgment of the Divisional Bench concludes as follows:

> It may be, as was said in 25 S L R 395,[2] that the result of sub-section (2) of Section 136 of the Bombay Local Boards Act is unfortunate, and the sub-section is one which the Legislature might well amend, but it is not our duty to make the law. It is our duty to administer it.

The Divisional Bench however, in view of the importance of the question involved, referred the point for decision to a Full Bench. The present learned Judicial Commissioner and Dadiba Mehta A. J. C., two out of the three learned Judges constituting the Full Bench, adhered to the view already adopted by them. Rupchand A. J. C. however recorded a dissenting judgment. This was in January 1937. Availing himself of the majority Judgment of the Full Bench, the applicant before us on 18th February 1937 applied to the Resident Magistrate of Dadu that

> the proceedings against him be terminated and he be acquitted in view of the decision of the High Court in the *Tatta Taluka Local Board case*.[1]

The learned Magistrate passed no order on the application, and Tarachand moved the High Court in Revision Application No. 58 of 1937. In a brief order delivered by the present Bench on 23rd April 1937 the application was dismissed as premature and it was pointed out that it was for the learned trial Magistrate, on the materials placed before him, "to consider and give his decision on the question raised", it being open to Tarachand, if the decision was against him, to come to this Court in revision. The learned Resident Magistrate having on 21st July 1937 on the evidence and other material placed before him rejected

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1. Nuralhaq Shah v. Emperor, *Reported in* (1937) 24 A I R Sind 129=169 I C 27=38 Cr L J 723.
2. Emperor v. Abdulla Khan, (1932) 19 A I R Sind 28=1932 Cr C 114=136 I C 513=25 S L R 395=33 Cr L J 298.

Tarachand's application, he has come before us again in revision against that order. The case of Tarachand, the applicant, is not distinguishable from the case of Nuralhaq Shah dealt with by the Full Bench, and in fact presents fewer difficulties for, it is not complicated by the joinder of the President of the Local Board and a contractor as co-accused, nor is a charge of conspiracy involved. Both Tarachand and Nuralhaq Shah were Sub-overseers in the employ of a Local Board : in the case against the applicant, as in the case against Nuralhaq Shah, the act charged as criminal is the recording of alleged false measurements in connexion with road repairs and preparation of false bills in order to defraud the Local Board. As in the case of Nuralhaq Shah, so in the present case therefore in view of the Full Bench ruling, this revisional application must be allowed and the proceedings pending against the applicant must be quashed. I would however like to record as briefly as possible the reasons for my agreement with the majority judgment in the Full Bench case, quite apart from the fact that that decision is binding on this Bench. S. 136, Bombay Local Boards Act 6 of 1923, as it stood before the amending Act of 1935, was clear and unambiguous and presented no difficulty in the matter of construction. It read as follows :

> *136 (1).* No suit shall be commenced against any local board, or against any officer or servant of a local board, or any person acting under the orders of a local board, for anything done, or purporting to have been done, in pursuance of this Act, without giving to such local board, officer, servant or person one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of.
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> *(2)* In the case of any such suit for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

The section was however recast and amended by Bombay Act 13 of 1935 and the section as amended now reads as follows :

> 136 (1). No suit, prosecution or other legal proceeding shall lie against any member, officer or a servant of a local board, or any person acting under the order of a local board in respect of anything which is in good faith, done or intended to be done under this Act or under any other law for the time being in force which entitles or requires a member, officer, or servant as such, or other person so acting, to exercise any powers or perform any duties.
>
> (2) No suit, prosecution or other legal proceeding shall be commenced against any local board, or against any member, officer or servant of a local board, or any person acting under the order of a local board, for anything done, or purporting to have been done, in pursuance of this Act, or any other law for the time being in force which entitles or requires a local board, member, officer, servant as such, or other person so acting to exercise any powers or perform any duties without giving to such local board, member, officer, servant or person one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of.
>
> (3) In case of any such suit for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

Now, Clause (1) of the section is plain and unambiguous; it affords immunity to any member, officer or servant of a Local Board or any person acting under the orders of a Local Board from a suit, prosecution or other legal proceeding in respect of an act done or intended to be done by him in good faith under the Act or any other law for the time being in force. But the applicant in this case claims the benefit of the second clause, and it is here that difficulties begin. The language of the sub-section again is plain and unambiguous but when the sub-section is carefully considered its faulty drafting is apparent. The sub-section as it reads contemplates a prosecution against a Local Board when in law such a prosecution is not possible; it requires one month's previous notice of an intended prosecution which has no meaning as it is clear from sub-s. (3) that this provision is intended to afford an opportunity to avoid action by tender of sufficient amends, and as there can be no compounding of a felony, therefore no occasion can arise of tendering sufficient amends for an act constituting a non-compoundable criminal offence.

The applicant however has every right to contend as he does, that he has no concern with these inaccuracies and intricacies; the plain language of the sub-section affords him immunity from prosecution after a lapse of three months from the date of the act complained of, and that is sufficient for him; the acts which are alleged to constitute a criminal offence on his part were acts done by him, or, in any case, purport to have been done by him, in pursuance of the Local Boards Act, and whether they were bona fide or otherwise this is all the sub-section requires. It is necessary therefore first to consider this claim of the applicant: Were the measurements taken by him in pursuance of the Local Boards Act; or was he purporting to act in pursuance of the Local Boards Act when he took the measurements and prepared the bills?

The construction, maintenance and repair of roads is under S. 50 of the Act an obligatory duty of a District Local Board. When a road is constructed or repaired in pursuance of such a contract, the contractor has to be paid ordinarily by measurement and he is paid out of the Local Board's funds which are built up from the tax-payers money. S. 119 empowers a District Local Board to appoint officers and servants to carry out its duties and provides that the Board

> shall from time to time prepare and sanction a schedule of the staff to be so maintained .... their respective duties and the amount and nature of the salaries, fees and allowances to be paid to each . . .

The applicant must therefore have been appointed a servant of the District Local Board under this section. S. 135 states:

> Every member of a Local Board and every officer and servant maintained by or employed under a District Local Board shall be deemed to be a public servant within the meaning of S. 21, I. P. C.

The applicant was therefore a public servant. It is true that no schedule such as is required by S. 119 has, according to the evidence in this case, been prepared, but that evidence nevertheless makes it clear that the duties of the applicant were well defined and included the taking of measurements of repair work and the preparation of bills. The learned advocate for the applicant puts his case thus: the repair of roads is an obligatory duty of the District Local Board to fulfil which, as the Board cannot itself carry out the work, it must contract with some one to do so. When the work is done, it has to be paid for from the taxpayers' moneys: the amount to be so paid has to be ascertained by the Board through its servants who are public servants. When therefore the applicant, in performance of the duties assigned to him as a servant of the Board, took the measurements of the work in this case and prepared the bills for payment, he was performing a public duty as a public servant, he was acting in pursuance of the Act, or, in any case, he purported to do so. If this argument is sound, then surely there is no answer to the applicant's case. I would therefore proceed to consider the possible objections to the learned advocate's proposition.

It may be objected that the applicant was not acting in pursuance of the Act or purporting to do so; he was merely carrying out the obligations imposed upon him by his contract of service with the District Local Board and was not performing a public duty when he took the measurements and prepared the bills. The answer to this objection is that he was doing both. In so far as he was a servant of the Board he was performing his contract with his masters; in so far as he was assessing the amount to be paid to the contractor from the tax-payers' moneys for carrying out a work which was imposed upon the Board by statute as an obligatory duty he was as a public servant in pursuance of the Act performing a public duty or purporting to do so. I do not intend to enter upon the question of the import of the phrase "purporting to act". The identical phrase is used in S. 197, Criminal P. C., and a mass of authorities including those of our own High Court reported in 24 S L R 385,[3] 27 S L R 3[4] and 27 S L R 36,[5] make it clear that in this case the applicant if he was not acting under, was certainly purporting to act under the District Local Boards Act.

Again, it may be objected that it could never have been the intention of the Legislature to afford protection to members, officers, or servants of a Local Board committing criminal offences while acting or purporting to act in pursuance of the District Local Boards Act: the Legislature could only have intended to protect them in respect of acts done in good faith. These words are specifically used in sub-cl. (1) of the section, and if they do not appear in sub-cl. (2) this is a mere accidental omission. The intention of the Legislature being clear, sub-cl. (2) must be read and construed as if the words "in good faith" appeared between the words "purporting to have been done" and the words "in pursuance of this Act".

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**3. Karachi Municipality v. Mukhtiarkar of Karachi, (1930) 17 A I R Sind 144=1930 Cr C 527=128 I C 701=31 Cr L J 597=24 S L R 385.**

**4. Hidayatullah v. Emperor, (1933) 20 A I R Sind 161=141 I C 583=1933 Cr C 525=27 S L R 3=34 Cr L J 191.**

**5. Harumal Hotchand v. Hazi Imambux Jatoi, (1933) 20 A I R Sind 165=1933 Cr C 529=144 I C 477=27 S L R 36=34 Cr L J 819.**

To such an objection, it appears to me, there are several answers. In the first place, the very fact that the words "in good faith" are used in sub-cl. (1) of the section makes it manifest that the phrase and what the use of it connotes was present to the mind of the Legislature when it recast and amended S. 136 of the Act. How can it then be argued with any force whatever that the omission thereof in sub-cl. (2) was accidental? On the contrary, it could be urged and with considerable force, that in these circumstances there is every indication that the omission was designed and intentional. Then again, why should the intention of the Legislature in enacting Cl. (2) of S. 136 be assumed to be the protection of bona fide act only? In 25 S L R 395,[2] it was held by a Bench of this Court that the intention of the Legislature in enacting Cl. (3), S. 80, Bombay District Police Act "as expressed" was to give protection even to the mala fide acts of a police officer acting as such, and the argument that

> it was absurd that a police officer who had been so clever as to escape detection for six months should on that account escape scot-free

was not accepted. The learned Judges composing the Bench stated that the result was unfortunate but it was for the Legislature to amend the section. This was as far back as 1931 and I am not aware of any amendment of sub-cl. (3), S. 80, District Police Act by the Legislature up to date. It appears to me that any argument based on the intention of the Legislature stands upon unsafe foundations.

I am aware that in the dissenting judgment of Rupchand A. J. C. in the Full Bench case, the learned Judge cites in support of his construction of S. 136, sub-cl. (2), Bombay District Local Boards Act, a number of English and Indian High Court decisions on sections embodied in other statutes containing provisions similar to those contained in S. 136, Bombay District Local Boards Act. With all respect to the learned Judge, however, I feel it is a weak argument, if any, to advance in support of an interpretation of S. 136, sub-cl. (2). The provisions referred to in these decisions either contained the phrase "in good faith" or implied it in unmistakable terms: it can scarcely be contended that because the intention of the Legislature in enacting those provisions was the protection of acts done in good faith, therefore the same intention must be attributed to the Legislature in enacting S. 136, Bombay District Local Boards Act, regardless of the language of the section itself.

Yet another objection presents itself and calls for an answer, and this objection is based on (1916) 1 A C 242.[6] The objection takes this form: the particular matter in which the applicant in this case is alleged to have prepared false measurements and false bills was a contract between the District Local Board of Dadu and a contractor; the entering into such contracts is not a duty imposed upon the Board by statute; in so far as the Board enters into such contracts for the fulfilment of its statutory duties it has power to do so and is not acting ultra vires; but the provisions of S. 136 of the Act cannot be availed of in actions civil or criminal arising out of and connected with such contracts; the applicant in this case cannot be said to have acted or purported to have acted "in pursuance of this Act". The objection needs to be carefully examined. In (1916) 1 A C 242[6] the action was by Myers, a private individual, against the Corporation for damages sustained by him by reason of the negligence of the agent of the Corporation in delivering a load of coke at Myer's premises whereby part of the coke was precipitated through a plate glass window in Myer's shop. The action was not commenced by Myers within six months next after the act, neglect or default complained of. The Corporation set up the statutory defence that the action was barred by the Public Authorities Protection Act 1893. Now, the relevant section of the statute is S. 1, the material part of which is in the following terms:

> Where after the commencement of this Act any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, the following provisions shall have effect:
>
> (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof;

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[6] Bradford Corporation v. Myers, (1916) 1 A C 242=85 L J K B 146=114 L T 83=80 J P 121=14 L G R 130=60 S J 74=32 T L R 113.

> (b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client.

Now it will easily be observed that there is a most material distinction between the wording of the English statute and that of S. 136, Bombay District Local Boards Act, for, whereas the English statute affords protection to "any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament", S. 136 uses the words "for anything done, or purporting to have been done in pursuance of this Act", and the latter phrase is undoubtedly far wider and includes within its ambit acts which cannot be covered by the wording of the English Statute. Then again Lord Buckmaster, the Lord Chancellor, has in his judgment pointed out that the words "any person" in the section of the English statute must be limited so as to apply only to public authorities. He says :

> Now it must be conceded that the Act applies only to a definite class of persons and to a definite class of action. If the section stood alone, and were construed without reference to the introductory words of the statute, it would be wide enough to grant protection to any person who was acting in pursuance of a private Act of Parliament, but on more than one occasion the Courts have pointed out that this cannot be its true interpretation, and that 'any person' must be limited so as to apply only to public authorities. The case in (1900) 1 Ch 749[7] is an excellent illustration of such a case, and this was expressly approved by Channell J. in (1904) 2 K B 501.[8] While the preamble is necessary thus to construe the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform.

On the other hand, S. 136, Bombay Local Boards Act specifically refers to officers and servants of the Board. It is no doubt true that a contrary view was taken on this point by Viscount Haldane in his judgment in the same case, but these and other considerations illustrate the danger of accepting an English case interpreting an Act of Parliament as a guide for the interpretation of a section of an Indian Provincial Statute. And nowhere is this danger more clearly and pointedly emphasized than in the very recent case in 31 S L R 686[9] decided by their Lordships of the Privy Council which involved the interpretation of S. 142, Calcutta Port Act (Bengal Act 3 of 1890), Lord Alness says there (page 694) :

> Reliance was placed by the respondents on (1916) 1 A C 242.[6] Now, inasmuch as that case related to the construction of the Public Authorities Protection Act (1893) which contains language not to be found in the Indian statute, and which omits language to be found in the latter, manifestly the decision falls to be handled with care. In particular, the English Act does not contain the words 'purporting or professing to act in pursuance of the statute'. Their Lordships regard these words as of pivotal importance. Their presence in the statute appears to postulate that work which is not done in pursuance of the statute may nevertheless be accorded its protection, if the work professes or purports to be done in pursuance of the statute. The English Act was properly treated by the house in (1916) 1 A C 242[6] as one from which the words 'professing or purporting' were omitted, and the observations of the house must, of course, be construed '*secundum subjectum materiam.*' They have, in their Lordships' judgment, no application to this case. Their Lordships can find nothing in the *Bradford's case*[6] which forbids the interpretation which they propose to attach to the Indian Act.

In my humble opinion therefore this objection as well cannot stand, and (1916) 1 A C 242[6] cannot be usefully invoked in interpreting S. 136, Bombay District Local Boards Act. On these grounds and for these reasons I agree with the majority judgment in the Full Bench case and think that another reference to a Full Bench is not necessary. This revision application is accordingly allowed and the proceedings pending against the applicant are quashed.

**Davis J. C.**—I agree with the order my learned brother proposes to make. The question raised in this revision application has already been made the subject of a decision by a Full Bench of this Court in *Nuralhaq Shah* v. *Emperor*[1] in the Tatta Taluka Local Board case. That decision unfortunately was not a unanimous decision and we admitted this revision application so that we could again hear arguments, as in view of the importance and the difficulty of the question raised, I as a party to the majority judgment in the Full Bench decision, would have agreed to a further reference to another Full Bench did any new argument or authority reinforce the dissenting judgment. But no new argument and no new authority in support of that judgment has been cited to us. On the contrary, a very recent judgment of the Privy Council in 31 S L R 686,[9] is an argument for, rather than against, the majority judgments of the Full Bench.

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[7] Attorney General v. Margate Pier and Harbour Co., (1900) 1 Ch 749 = 69 L J Ch 331 = 82 L T 448 = 48 W R 518 = 64 J P 405.

[8] Parker v. London County Council, (1904) 2 K B 501=73 L J K B 561=90 L T 415 = 52 W R 476 = 68 J P 239 = 2 L G R 662 = 20 T L R 271.

[9] Commissioner for the Port of Calcutta v. The Corporation of Calcutta, (1937) 24 A I R P C 306 = 170 I C 332 = 64 I A 363 = 31 S L R 686 (P C).

The case in (1916) 1 A C 242,[6] was greatly relied on as an authority in the dissenting judgment in the Full Bench decision but a further careful consideration of the case in (1916) 1 A C 242[6] appears to me only to emphasize the difference between the English law and the provisions of the particular statute, a statute of the Bombay Legislature, with which we have to deal and to interpret. In (1916) 1 A C 242[6] certain points are emphasized. In his judgment Lord Buckmaster L. C. points out that the English statute has been interpreted only to apply to public authorities. But S. 136, Bombay Local Boards Acts refers specifically to any officer or servant of the Board. It is true Viscount Haldane was of the opinion that a natural person or a Common law corporation is equally within the statute, but on this point the interpretation of the English statute is obviously no certain guide. In (1916) 1 A C 242[6] the distinction between duties imposed and powers conferred, between the obligatory and enabling provisions of an Act is emphasized, but whatever be the case when the local authority itself is concerned with a matter of contract, so far as the officers and servants of the Board are concerned, S. 119, Bombay Local Boards Act refers to duties imposed upon the servants of the Board under statutory provision. Such officers and servants are under S. 135 of the Act declared public servants within the meaning of S. 21, I. P. C. and though this is not in itself conclusive, for a public servant as such may exercise powers as well as perform duties, the very S. 167, I. P. C. under which the accused is charged refers to a public servant "charged" with the preparation of any document; and the charge itself is so framed.

In (1916) 1 A C 242[6] the difference between rights and duties arising out of a private individual bargain and the provisions of a statute is emphasized. In that case, it was held that the act complained of arose out of a private individual bargain. It is possible to argue in this case that the taluka overseer, when he was drawing up a map or estimate or measuring up a work was acting in pursuance of a private individual bargain struck between him and his employers, the Local Board, but this position appears to me inconsistent with the public nature of the office and duties of the overseer, created as the office is, and imposed as the duties are, by statutory provision. Moreover this argument would be as applicable to the case in 31 S L R 686,[9] recently decided by the Privy Council, as to this case: but it was not an argument that was accepted; and, indeed, if it were accepted, it would nullify in the great majority of cases the protection which the Legislature intended to give and which, in my opinion, the law gives, though in excessive measure, to officers and servants of the Board.

One other case to which our attention was again drawn, 56 Bom 448[10], is more in favour of than against the majority decision of the Full Bench, as is a very recent English case of the Court of Appeal reported in (1937) 3 All E L R 227,[11] which was not referred to in the arguments before us. I agree, therefore, with the order my learned brother proposes to make.

K.S./R.K. *Application allowed.*

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10. Govind Dhondshet v. Chiplun Municipality, (1932) 19 A I R Bom 562=140 I C 213=56 Bom 448=34 Bom L R 1216.
11. McManus v. Bowes, (1937) 3 All E L R 227.

## ✲ A. I. R. 1938 Sind 122

DADIBA C. MEHTA AND LOBO JJ.

*Kewalmal Gobindram and others* — Applicants.

v.

*Sobhomal Mulchand* — Opponent.

Civil Revn. Appln. No. 2 of 1937, Decided on 15th February 1938, to revise the Judgment and decree of Sm. C. C., Larkana, in Suit No. 324 of 1935.

**✲ Provincial Small Cause Courts Act (1887), Art. 4, as amended by Bombay Act 6 of 1930— Court can look into not only plaint but also statement in defence to determine jurisdiction.**

In cases under Art. 4 for purposes of deciding as to whether the Court has got jurisdiction to entertain the suit both the plaint and the allegations in the written statement can be considered: *A I R 1936 Bom 98, Rel. on.* [P 123 C 2]

Plaintiff sued for recovery of rent and ejectment of defendants. The rent deed was executed by only one of the defendants and the others were impleaded on the ground that they were in possession as members of joint family along with the executant of rent note. These defendants denied the title of the plaintiff :

*Held* the substantial issue as between these defendants and plaintiff being one of title, the Small Cause Court had no jurisdiction to try that issue. [P 124 C 1]

Khanchand Gopaldas — *for Applicants.*

Dipchand Chandumal — *for Opponent.*

**Dadiba C. Mehta J.** — This is an application under S. 25, Provincial Small Cause Court Act 9 of 1887 to revise the Judgment and decree of the Small Cause Court, Larkana, in the Suit No. 324 of 1935. The plaintiff Sobhomal sought to eject the defendants on the ground that defendant 1 had executed a rent-note for a period of eleven months and a half on 9th April 1934 the rent fixed being Rs. 3 per month; that defendant 1 had not paid rent for a period of 12 months and 15 days the accumulated rent in arrears being Rs. 37-8-0; and that the defendant though asked to vacate was not vacating although in the rent note he had agreed to give vacant possession on the expiry of the lease. The plaintiff averred in the plaint that defendant 2 is father of defendant 1, whilst defendants 3 and 4 are step brothers of defendant 1; that defendants 2, 3 and 4 along with defendant 1 formed a joint Hindu family; that defendants 2, 3 and 4 had been joined in the suit because they were members of a joint Hindu family and were in possession of the suit house along with defendant 1, and that therefore the plaintiff was entitled to evict all the defendants from the suit house.

Defendants 1 and 2 remained absent; so the hearing of the suit proceeded as against them ex parte. On behalf of defendant 4 it was contended that the house in suit did not belong to the plaintiff, but that when the plaintiff purchased it at the court-auction he was supplied with funds by the mother of defendant 4; and that therefore the plaintiff was merely a benamidar. It was also urged that the Court had no jurisdiction to try a suit of this nature.

The parties went to trial on the following issues: (1) Whether the house in suit belongs to the plaintiff? (2) Whether defendant 4 is tenant of the plaintiff? (3) Whether the plaintiff is entitled to possession from defendant 4? (4) Whether the Court has jurisdiction to try this suit? The learned Judge after hearing the evidence adduced by both sides found that the plaintiff was the owner of the suit house; that the defendants were tenants of the plaintiff; that the plaintiff was entitled to recover possession from all of them; and that the Court had jurisdiction to try the suit. The defendants have come in revision; and the only point of law relied on on their behalf is that it was beyond the jurisdiction of the Court of Small Causes to try the suit because the substantial issue in the case was one which necessitated an adjudication of the rival claims of the plaintiff and defendant 4 with regard to the ownership of the house.

In order to determine the question of jurisdiction it is necessary to see what limitations have been imposed by law on the powers of the Small Cause Court in trying suits for possession of immovable property. According to Cl. 4 of Sch 2, to the Provincial Small Cause Courts Act 9 of 1887 a suit for possession of immovable property or for the recovery of an interest in such property is exempted from the cognizance of that Court. By the amending Act, viz. Bombay Act 6 of 1930, however, after the words 'such property' in Cl. 4 the following is added:

> But not including a suit for ejectment where (a) the property has been let under a lease made by a written instrument, and (b) the Court of Small Causes would be competent to take cognizance of a suit for the rent of the property, and (c) the only substantial issue arising for decision is as to whether the lease has determined by efflux of the time limited thereby or has been determined by a notice in accordance with clause (h) of section 111 of the Transfer of Property Act, 1882.

The question in the present suit therefore is: What was the substantial issue in the case? According to the lower Court, for the purposes of jurisdiction, the Court had only to look to the plaint and not to what was alleged in the defence. That view however does not commend itself to us, because, an issue presupposes the assertion of a claim by one party and the denial of it by the opposite party; hence the determining factor is not the one-sided version in the plaint; but the assertion of a claim in the plaint and the denial of it in defence. That is the view also taken by the learned Chief Justice of the Bombay High Court in A I R 1936 Bom 98.[1] Looking at the question from that point of view we are of opinion that the Court exceeded its powers in trying the issue whether the suit house belonged to the plaintiff so far as the suit related to recovery of possession from defendants 2, 3 and 4 who were admittedly not the executants of the rent-note which was the basis of the suit. The suit so far as it related to the recovery of rent and possession of the house from defendant 1 on the expiry of the lease was perfectly within the jurisdiction of the Small Cause Court, because the execution of the rent-note had not been denied by defendant 1; the arrears of rent had not been denied by defendant 1; and the fact that the lease had run out was also not denied by defendant 1. It was perfectly competent to the learned Judge on these facts straightway to give a decree to the plaintiff as prayed for against defendant 1.

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[1] **Jivkore Bai v. Himatlal Girdharlal, (1936) 23 A I R Bom 98=161 I C 210=37 Bom L R 965.**

With regard to defendants 2, 3 and 4 who were impleaded in the suit not because they were tenants under the rent-note, but because they were alleged to be in possession of the suit house as members of a joint family along with the executant of the rent-note, the plaintiff made no claim in the suit. He only asked for the relief of ejecting all the defendants on the ground that they were members of a joint Hindu family. On behalf of defendant 4, who was a minor, the Nazir had taken up the defence that the suit house did not belong to the plaintiff but that it belonged to defendant 4. Defendant 3 by his written statement adopted the defence taken up on behalf of defendant 4. Thus as between the plaintiff and these two defendants the dispute was one of title; and that was the substantial issue to be decided. The substantial issue between these parties was not whether the lease had determined by efflux of time, but whether the plaintiff had proved his ownership. The Court exceeded its jurisdiction in determining such an issue. The decree against defendants 3 and 4 must therefore be vacated and the plaintiff's suit as against them must be dismissed.

With regard to defendant 2, no doubt he was also not an executant of the rent note which was the basis of the suit; but there was an averment in the plaint that the plaintiff had purchased this house in the execution of a decree against defendants 1 and 2; that defendant 1 had executed a rent-note and defendant 2 as a member of the joint family of defendant 1 had been in possession of the house; and that therefore defendant 2 should also be ejected along with defendant 1. Defendant 2 did not defend the suit. It is therefore not open to him now in appeal to say that he was not liable to be ejected along with defendant 1. The decree for rent and for ejectment as against defendants 1 and 2 must therefore be affirmed. We modify the decree of the lower Court according to the above findings.

With regard to the costs in the lower Court, we think that the plaintiff is entitled to his costs from defendants 1 and 2. With regard to the costs of defendants 3 and 4 we think that we should make no order, because they appear to have colluded with defendant 1 in order to have the whole suit dismissed even as against the ex parte defendants. On behalf of defendants 3 and 4 if it had been merely contended that they were unnecessarily joined as parties to the suit and that the dispute with regard to the ownership of the house was not within the cognizance of the Court, the defendants would have been entitled to have costs. It appears to us however that on behalf of defendants 3 and 4 it was thought that instead of filing a suit for declaration that the plaintiff was merely a benamidar, they might as well take a shorter cut by achieving their object in the Small Cause Court. Under these circumstances we do not think that defendants 3 and 4 are entitled to have their costs provided for. Coming to the costs of the appeal, we think that the most equitable order would be, and that is the order we propose to pass, namely that the parties should bear their own costs. Order accordingly.

K.S./R.K. *Order accordingly.*

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## A. I. R. 1938 Sind 124

DADIBA C. MEHTA AND LOBO, JJ.

*Khiomal Dewandas*—Appellant.

v.

*Gopaldas Dayaldas and others* —
Respondents.

Misc. Appeal No. 18 of 1937, Decided on 3rd February 1938, against decision of First Class Sub-Judge, Hyderabad, D/- 6th February 1937.

**(a) Practice — Issues — Defendant alleging that plaintiff has inflated claim to file suit in higher Court—Specific issue on point and not preliminary issue about jurisdiction should be framed.**

Where the defendant alleges that the plaintiff has inflated his claim in the plaint in order to bring his suit in a higher Court, the Court should frame a specific issue on the point as to whether there was any mala fides on the part of the plaintiff and not merely frame a preliminary issue about jurisdiction. [P 125 C 2]

**(b) Civil P. C. (1908), O. 7, R. 10 and O. 43, R. 1 and S. 151—Plaint returned on ground of pecuniary jurisdiction—Order is appealable.**

Order 7, Rule 10 is not restricted only to those cases in which the Court for want of territorial jurisdiction returns the plaint. A plaint returned on the ground of pecuniary jurisdiction is also to be considered as returned under this provision and not under S. 151. Hence the order returning the plaint on this ground for presentation to proper Court is appealable : *6 S L R 256, Expl.* [P 125 C 2; P 126 C 1]

Kimatrai Bhojraj—*for Appellant.*

Fatechand Assudomal—*for Respondents.*

**Dadiba C. Mehta J.** — The plaintiff instituted a suit in the Court of the Subordinate Judge of Hyderabad, being Suit No. 85 of 1935 for the recovery of Rupees 5702-8.0, made up of Rs. 4204 by way of principal and Rs. 1609-8-0 by way of interest. The plaintiff's case was that he had deposited a certain amount with the defendants which with interest had come to the total claimed in the plaint. Defendant 1 inter alia contended that the plaintiff had calculated the amount claimed in the plaint at the rate of 12 per cent per annum from the date of the last settlement; but that the defendant had never agreed to pay as much as 12 per cent and that the plaintiff's allegation about this agreement to pay at this rate of interest was simply with a view to inflate the claim so as to give the first class Court jurisdiction and oust the jurisdiction of the second class Court at Naushahro, where, if the suit had been for less that Rs. 5000, it should have been filed.

The learned Subordinate Judge on the day of hearing tried as preliminary issues, Issues 1 and 9, namely "whether the Court has no jurisdiction to entertain this suit," and "whether there was an oral stipulation regarding interest as alleged in para. 6 of the plaint." Holding that the agreement to calculate interest at 12 per cent. had not been proved and that the averment in the plaint to that effect was not bona fide, the learned Subordinate Judge thought that it was a fit case in which the plaint should be returned for presentation to the second class Court at Naushahro, and directed the plaintiff to modify the plaint claim so as to calculate interest at the rate of 6 per cent. After the plaint was so amended, it was ordered to be returned to what was considered to be the proper Court, that is, to the Court of the Subordinate Judge at Naushahro. The plaintiff being thus directed and thinking that he had no option but to comply with the order, presented the amended plaint to the second class Court, and at the same time preferred the present appeal.

Apart from the question as to under what circumstances in a suit to recover with interest an amount alleged to have been deposited with the defendant the Court would be justified in determining the real value of the claim on the score of the principal and interest, before disposing of the suit on its merits, the main issue for decision in this appeal is whether the finding of the lower Court that the plaintiff has deliberately over-valued his claim in order to avoid having to file a suit in the second class Court at Naushahro is justifiable on the record as it stood. In the first place, we think that there should have been a specific issue on the point raised in the Court below, instead of two preliminary issues about jurisdiction and the rate of interest, so as to give the plaintiff a notice that what was required to prove was that there was no mala fides on his part in alleging in the plaint that the rate of interest agreed to was 12 per cent. It appears to us however that the plaintiff knew what he was required to meet, and that therefore he was not prejudiced.

Before we decide this issue, we have however to consider the objection urged on behalf of the respondents by Mr. Fatehchand that this is not an appeal and that therefore the Court is precluded from reconsidering the finding of the lower Court on facts. The first point to be determined therefore is whether this is an appeal or whether it is to be considered an application for revision. Now the only provision in Civil Procedure Code for the returning of a plaint for presentation to proper Court is admittedly that which is contained in O. 7, R. 10, Civil P. C., the material part whereof reads thus :

> The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

**The provision does not appear to be restricted only to those cases in which the Court for want of territorial jurisdiction returns the plaint. It would appear therefore that a plaint returned on the ground of pecuniary jurisdiction is also to be considered as returned under this provision.**

**Mr. Fatehchand for the respondents contends that when a plaint is returned, as it**

has been returned by the lower Court, on the ground of pecuniary jurisdiction, it is an order under S. 151, Civil P. C. But there is no warrant for this proposition. The learned advocate relies on a ruling of this Court reported in 6 S L R 256.[1] Reliance is placed particularly on certain observations of Pratt J. C., with regard to the principle that the jurisdiction of the Court properly having cognizance is not to be ousted by unwarranted additions to the claim is a principle referable to S. 151, Civil P. C., and it is argued therefrom that the Court has considered that an order returning the plaint for presentation to the proper Court on the ground of pecuniary jurisdiction is an order under that section of the Civil Procedure Code, and not under O. 7, R. 10 of the Code. But it appears that there is no foundation for this argument because the Court treated the appeal as an appeal and disposed of it as an appeal, the final order being: "We therefore confirm the order of the lower Court and dismiss this appeal with costs." We have therefore no hesitation in coming to the conclusion that an appeal does lie under O. 43, R. 1, Civil P. C. from the order of the First Class Subordinate Judge returning the plaint for presentation to the Court at Naushahro, and we are prepared to proceed on that basis. That being so, we are not precluded from determining the issue, as to whether it is satisfactorily established on the record that in claiming interest at 12 per cent. in the plaint the plaintiff wanted to play a fraud on law or on the Court.

The reasons given by the learned Subordinate Judge for coming to the conclusion that the plaintiff's intention in calculating interest at the rate of 12 p. c. was not bona fide are two-fold; in the first place, it is held that the plaintiff has not succeeded in proving the rate of interest at 12 p. c. because the plaintiff has no other witness to support him and the defendant naturally enough denies that there was any such agreement. In the second place, it is stated that because the plaintiff although originally a resident of Dabhro, Taluka Kindiaro, is now residing in Karachi, it would therefore be more convenient for him to have this suit tried by the Hyderabad Court which is nearer to Karachi than the Naushahro Feroze Court. We think that both these grounds are not such as might justify the conclusion reached with regard to the intention of the plaintiff. It is admitted by the defendant himself that the rates charged varied from time to time. The abstracts of accounts put in show that on one occasion interest charged was ten annas a month, which will work out at 7½ p. c. Even calculating interest at the rate of 7½ p. c. the total claim of the plaintiff would exceed Rs. 5000. There was therefore no particular point in the plaintiff choosing to mention 12 p. c. in the plaint. Moreover, every time that the account was settled between the parties and a balance was drawn, the rate of interest was mentioned at the time of the drawing up of such balance; but at the time that the balance was drawn for the last time there is no such mention; and it might perhaps support the plaintiff's version that at the time the last balance was drawn, because the defendant had no money to pay, he agreed to pay a higher rate of interest. In any case it is not proved definitely that the plaintiff's allegation about 12 per cent. being the rate of interest is proved to be false. If a plaintiff fails to establish his claim because he has not adduced corroborative evidence, that is no reason to think that the allegation is false; and there is no justification for the inference that because the plaintiff has not proved what he has claimed in the plaint, that therefore he was wanting in bona fides.

As for the other grounds, namely that the plaintiff having shifted his residence to Karachi may have found it more convenient to have his suit tried by the Hyderabad Court, it appears to us to be too far fetched to be accepted as a good ground. It is hardly likely, because the plaintiff has now chosen to reside in Karachi, that therefore he would take the risk of filing his suit in a wrong Court, because on detection he would render himself liable to pay the costs of the defendant and the further discomfiture of having his plaint to be returned to him for presentation to the proper Court. Even if the plaintiff calculated interest at the rate of six per cent., the amount of interest added to the principal would total Rs. 4958 and odd annas so that the total claim would fall short of Rs. 5000 by about Rs. 41 or 42. We do not think that the plaintiff for the sake of this small amount would take the risk of having his plaint returned and being mulcted in costs.

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[1] **Wadhumal v. Chellomal, (1912) 6 S L R 256 =19 I C 870.**

We do not think therefore that the finding of the lower Court that the plaintiff has deliberately inflated his claim for the purpose of ousting the jurisdiction of the second class Court is justifiable; and we must therefore set aside the order of the lower Court returning the plaint and throwing costs on the plaintiff at this stage.

We therefore direct that the plaint which is filed in the second class Court at Naushahro should be accepted again in the Court of the First Class Subordinate Judge at Hyderabad, and disposed of according to law. With regard to the costs of this appeal, it appears to us that the fairest order to make under the circumstances of this case would be that the parties should bear their own costs of this appeal; and we order accordingly.

K.S./R.K. *Appeal allowed.*

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## * A. I. R. 1938 Sind 127

DAVIS J. C. AND LOBO J.

*Mt. Kalan w/o Hassomal*
Applicant.
v.
*Emperor.*

Criminal Revn. Appln. No. 298 of 1937, Decided on 25th March 1938, from order of Second Addl. Sess. Judge, Hyderabad, D/- 12th November 1937.

**(a) Penal Code (1860), Ss. 494, 497 and 498 —Duty of Court.**

Judges should be particularly careful to see that Ss. 494, 497 and 498 are not abused for the purpose of private spite or persecution. [P 127 C 2]

*** (b) Penal Code (1860), S. 494 — Going through form of marriage recognized or known to law must be proved—Marriage need not be otherwise valid.**

The word 'marries' used in S. 494 means marries by some form of marriage known to or recognized by the law. Merely showing that some form of marriage ceremony was gone through is not sufficient. The section does not refer to a valid marriage. A bigamous marriage cannot be a valid marriage, and apart from the bar of the first marriage, it may be that there may be some other legal impediment to the validity of the marriage of the man or woman, some legal impediment personal to the man or woman, such as consanguinity, yet if the second marriage be a form recognized by or known to the law, that would be sufficient to satisfy this particular provision of the section. [P 127 C 2; P 128 C 1]

D. N. O'Sullivan — *for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.** — This is an application in revision against an order of the Second Additional Sessions Judge, Hyderabad, setting aside an order of the First Class Magistrate, Hyderabad, in which he discharged eight persons accused of offences under Ss. 494 and 494 read with S. 109 of the Penal Code, and ordering further enquiry to be made. On behalf of the applicant, Mt. Kalan, whose alleged bigamous marriage is the subject of the complaint by the husband Hassomal, it is urged that the Additional Sessions Judge should not have interfered with the finding of the Magistrate, who is an experienced Magistrate, so far as it is based on facts, and that so far as the order of the Magistrate is based on law, the law is correctly set out by the Magistrate.

It does not appear that the complaint of Hassomal, the supposedly aggrieved husband, has much merit in fact. It appears quite clear that his wife Mt. Kalan left him because he married her own sister and that this complaint of bigamy by Hassomal is a mere answer to the application of his wife for maintenance. That application for maintenance can be dealt with on its merits, and an answer by way of a complaint of bigamy may quite easily be an attempt to prevent the application for maintenance being decided on its merits, and judges should be particularly careful to see that Ss. 494, 497 and 498, Penal Code, are not abused for the purpose of private spite or persecution. Nevertheless, if we thought that in law the husband had a good case, however conducive to the commission of the offence of bigamy his own oppressive or improper conduct might have been, we should not have interfered with the order of the Additional Sessions Judge though in the result the proper punishment for the offence if committed by the woman might have been a day's simple imprisonment. In this case however we think not only was it not necessary for the Judge to interfere on the merits of the case, but he is himself in error on the law. He says in his judgment:

> The learned Public Prosecutor concedes, and I think rightly, that on the evidence accepted by the learned Magistrate that some form of marriage ceremony was performed at Jakhro where the seven witnesses of the complainant named above were present, he cannot support the order of the learned Magistrate.

But we do not think it is sufficient for the prosecution on whom the burden lies merely to show that something which the prosecution chooses to assert is "some form of marriage ceremony" was gone through.

We think it is necessary for the prosecution to prove that the form of marriage was a form recognized by or known to the law, otherwise it would be open to the prosecution by mere assertion to constitute any mutual act on the part of the man and woman a form of marriage. For instance, taking an absurd example—and the error in a proposition is often most easily and clearly shown by an absurd example, if the complainant chose to come forward and say that the man and woman held hands while the man crowed like a cock and the woman clucked like a hen, that was a "form of marriage," would the learned Judge have accepted that assertion as sufficient? Clearly when the word "marries" is used in S. 494, I. P. C. it means marries by some form of marriage known to or recognized by the law. S. 494, when it uses the word "marries" does not of course refer to a valid marriage. A bigamous marriage cannot be a valid marriage, and apart from the bar of the first marriage, it may be that there may be some other legal impediment to the validity of the marriage of the man or woman, some legal impediment personal to the man or woman, such as consanguinity, yet if the second marriage be a form recognized by or known to the law, that would, we think, be sufficient to satisfy this particular provision of the section.

Reference may usefully be made to a recent English case in (1938) 1 All E L R 301.[1] The Indian cases to which we have been referred do not appear particularly helpful. In 11 Lah 178,[2] the learned Judges disposed briefly of the point referring to a Calcutta case while reference to 45 Cal 641[3] will show that the learned Judges disposed of the point in a manner almost equally brief. Two Madras cases, 30 Mad 550[4] and 33 Mad 371,[5] are of limited interest as relating to the marriage of Indian Christians and are of doubtful assistance as the two judgments do not agree. We think the short paragraph in Halsbury's Laws of England, Vol. 9, page 533, relating to the invalid second marriage offers a surer and sufficient guidance. This is as follows :

> A person already married when having the intention of appearing to contract a second marriage goes through a form of marriage known to and recognized by law as capable of producing a valid marriage is guilty of bigamy, although the second marriage, even if it were not bigamous, would be otherwise invalid.

But, in this case, the prosecution have failed to prove that the ceremony, to which it is alleged the man and woman were a party, was a form of marriage recognized by or known to the law. The evidence only shows some acts which show if they showed anything at all, part only of a form of marriage. We have to go to the Magistrate's judgment, for the Judge does not mention in his judgment what was the ceremony the witnesses saw or say they saw. They say, they saw the shawl of the woman tied with the shawl of the man and the distribution of sweetmeats, but the Magistrate does not accept their statement, and we think quite rightly, that they saw anything else. There is no reliable evidence that the Granth or Anand Sahib was read ; there is no reliable evidence that the ceremonies necessary for a form of marriage under the Anand Marriage Act were performed ; there is no evidence of a sacred fire or walking round a sacred fire, as in the Nagpur case in A I R (1936) Nag 13[6] on which the learned advocate for the husband strongly relies. In fact, the evidence of the witnesses shows, if it shows anything at all, a ceremony unknown to the law, or some small part of a ceremony known to the law. In any case, the evidence shows no form of marriage known to or recognized by the law. Nor do we think this is a case for enquiring into an offence of attempted bigamy.

We think therefore the learned Judge should not have interfered with the order of the learned Magistrate. We therefore set aside the order of the learned Judge and restore the order of the Magistrate. The revision application is allowed accordingly.

K.S./R.K. *Application allowed.*

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[1] Re Robinson, (1938) 1 All E L R 301.

[2] Sant Ram v. Emperor, (1929) 16 A I R Lah 713=1929 Cr C 305=124 I C 310=11 Lah 178=31 Cr L J 648=30 P L R 573.

[3] Taher Khan v. Emperor, (1918) 5 A I R Cal 136=45 I C 688=19 Cr L J 640=45 Cal 641 =22 C W N 695=27 C L J 436.

[4] Emperor v. Lazar, (1907) 30 Mad 550=17 M L J 476=6 Cr L J 338.

[5] Emperor v. Antony, (1910) 33 Mad 371=8 I C 572=11 Cr L J 682.

[6] Emperor v. Mt. Soni, (1936) 23 A I R Nag 13 =1936 Cr C 35=159 I C 855=37 Cr L J 161.

## A. I. R. 1938 Sind 129

DAVIS J. C. AND LOBO J.

*Kalumal Motiram* — Applicant.

v.

*Mulchand Kimatrai* — Complainant.

Criminal Revn. Appln. No. 263 of 1937, Decided on 1st December 1937.

**Criminal P. C. (1898), S. 476—Defamatory statements made in affidavit in course of judicial proceedings not definitely constituting offence relating to administration of justice—Complaint of defamation can be made under S. 500, Penal Code, without complaint of Court—Filing of such complaint does not amount to evasion of law.**

It cannot be said that where defamatory statements are made in an affidavit in the course of judicial proceedings a complaint of defamation cannot in any case be made without complaint of the Court. [P 129 C 2]

Where it is a matter of doubt whether the fact complained of constitutes one of the offences relating to the administration of justice as provided in S. 193, Penal Code, or one of its cognate sections, the complainant is not thereby debarred from placing his complaint under S. 500 of the Code. The complaint of the Court not being necessary in such a case, the filing of the complaint under S. 500 does not amount to an evasion of law : *A I R 1925 Sind 263 and A I R 1936 Sind 123, Disting.* [P 129 C 2]

Stephen Menezes — *for Applicant.*

Jessaram B. Hingorani — *for Complainant.*

Partabrai D. Punwani, Advocate General — *for the Crown.*

**Davis J. C.** — This is an application in revision asking us to quash proceedings relating to a complaint under S. 500, Penal Code in the Court of the Additional City Magistrate, Karachi, on the ground that the facts alleged in the complaint constitute an offence under S. 193 or some other section of the Penal Code for which complaint of the Court is required under Sec. 476, Criminal P. C. In support of this application reference was made to two reported cases of this Court in 18 S L R 83[1] and 29 S L R 356.[2] Reference was also made to the case reported in 21 S L R 130[3] where however the point before us was not raised or decided and reference was also made to cases reported in an unauthorized law report to which we need not refer.

It appears that in a civil suit between the applicant and the opponent, the opponent filed an affidavit in support of his application for attachment before judgment and in that affidavit he made statements relating to the applicant which were highly defamatory. But, it is said that as these false statements were made on oath in civil proceedings, so the offence was under S. 193 or S. 199. It is an offence which relates to the administration of justice ; the complaint of the Court is necessary and for the opponent simply to place his complaint under S. 500, Penal Code, is a mere evasion of the law.

We do not think it necessary to consider or decide in this case whether we follow the judgment of the Calcutta High Court in 48 Cal 388[4] or of the Bombay High Court reported in 50 Bom 162,[5] because we do not think either the case reported in 18 S L R 83[1] or 29 S L R 356,[2] is authority for the statement that because defamatory statements are made in an affidavit in the course of judicial proceedings, no complaint of defamation relating to them can be made without complaint of the Court. It is not difficult to imagine circumstances where the conditions necessary for successful prosecution for an offence under S. 193 or one of its cognate sections are not present and yet the conditions necessary for a complaint under S. 500 are present. The principle upon which the two cases reported in 18 S L R 83[1] and 29 S L R 356[2] have been decided, is that a complainant cannot, by placing his complaint under one section rather than another, evade the provisions of law which provide that offences relating to the administration of justice must be kept within the control of the Court. But where it is a matter of doubt, as in this case, whether the facts complained of do constitute one of such offences, we do not think it can be said that the complainant is thereby debarred from placing his complaint under S. 500, Penal Code. We do not think he is evading the provisions of the law. We do not think therefore that at this stage we should interfere and quash these proceedings, having regard to the statements made in the affidavit about which the complainant has made his complaint. We dismiss the revision application accordingly.

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[1] **Gangoomal v. Emperor, (1925) 12 A I R Sind 263=86 I C 1005=18 S L R 83=26 Cr L J 941.**

[2] **Bhimomal v. Jalo, (1936) 23 A I R Sind 123=1936 Cr C 804=164 I C 797=29 S L R 356=37 Cr L J 1007.**

[3] **Bhikachand v. Emperor, (1927) 14 A I R Sind 54=98 I C 124=21 S L R 130=27 Cr L J 1276.**

[4] **Satish Chandra v. Ram Dayal, (1921) 8 A I R Cal 1=59 I C 143=22 Cr L J 81=24 C W N 982=48 Cal 388=32 C L J 94 (S B).**

[5] **Shanta Bai v. Umrao Amir Malek, (1926) 13 A I R Bom 141=93 I C 151=50 Bom 162=27 Cr L J 423=28 Bom L R 1 (F B).**

R.M./R.K. *Application dismissed.*

## A. I. R. 1938 Sind 130

DADIBA C. MEHTA J.

*Fazal Ellahie Rahmat Khan — Respondent 1* — Petitioner.

v.

*Nazir Ahmed Ghulamkadir — Respondent 2* — Opposite Party.

Misc. No. 265 of 1937, Decided on 24th March 1938.

**Arbitration—Award—Criminal complaint of misappropriation — Disputes between parties (chief of which concerned misappropriation) referred to arbitration — Criminal Court not compounding case—Award acquitting accused holding that there was no misappropriation—Award held invalid—Rest of award also held could not be upheld.**

After filing a complaint for criminal misappropriation the parties submitted their disputes, the chief one concerning misappropriation, to arbitration. One of the parties moved the Criminal Court to have the case compounded, but the application was rejected. The result was that while the arbitrators were engaged in settling the disputes, one of the main disputes concerning misappropriation was being agitated in the Criminal Court. The award delivered held that no amount had been misappropriated and acquitted the accused. The whole award mainly depended on the finding on the issue:

*Held* that under the circumstances although the reference did not succeed in stifling the criminal prosecution, still the arbitrators did arrogate to themselves the powers of a Magisterial Court. Hence the award was invalid. [P 131 C 1]

*Held also* that the rest of the award also could not be upheld. That would have been possible only if the arbitrators had acquitted the accused of the charge pending against him by merely stating that fact. [P 131 C 2]

J. B. Kadri — *for Petitioner.*

Murlidhar G. Mani—*for Opposite Party.*

**Order.** — These are objections to an award made outside the Court. The facts leading up to the reference in the case are briefly as follows: Both the respondents are poulterers, doing business in Karachi Camp. Respondent 2, Nazir Ahmed, secured a contract with the Mess of the First Battalion Royal West Kent Regiment, Karachi, in the beginning of November 1936 for the supply of poultry and eggs. He took respondent 1 Fazal Ellahie as a partner in that business. An agreement of partnership was entered into dated 17th November 1936, under which respondent 1 Fazal Ellahie was to finance the concern and also to supply the poultry and eggs as and when required, which respondent 2 Nazir Ahmed was to deliver to the Mess and obtain payments from time to time. A quarrel arose in the first week of February 1937 between the two partners as a result of which respondent 1 Fazal Ellahie filed a criminal complaint in the Court of the Additional City Magistrate, Karachi, against respondent 2 Nazir Ahmed for criminal misappropriation. Whilst that criminal case was pending in the Court, the parties entered into a reference on 6th August 1937 whereby all the disputes pertaining to the partnership agreement and in respect of shop dealings were referred to the arbitration of Messrs. Hiranand Motiram and C. M. Shahani advocates respectively for the complainant Fazal Ellahie and the accused Nazir Ahmed. From the proceedings of the arbitrators it appears that the first hearing was fixed to take place on 11th August 1937; but although the parties attended, one of the arbitrators, Mr. Hiranand, was absent; hence the hearing was postponed to 16th August. On that date none of the parties appeared, so the hearing was again postponed to 23rd August, on which day Fazal Ellahie was absent, and the hearing was again postponed to 25th August, when in the absence of Fazal Ellahie ex parte proof was taken from Nazir Ahmed and the arbitrators then arrived at their award which is the subject-matter of the objections in this case.

The objections have been filed by Fazal Ellahie, respondent 1. The first ground on which the award is attacked by him is that the offence complained of was really one punishable under S. 406, I. P. C. and as such not compoundable, and that consequently the reference to arbitration of a dispute of this nature was tantamount to the stifling of criminal prosecution. Another objection is that although the arbitrators who were pleaders of the parties knew fully well that the Criminal Court had refused permission to compound the case they nevertheless in hot haste proceeded with the matter of the arbitration and gave a one-sided award which amounts to misconduct. The third objection is to the effect that respondent 1 Fazal Ellahie had been made to sign the reference under a misrepresentation. The misrepresentation alleged is that the arbitrators had told Fazal Ellahie that they would see to it that he got the money which he alleged had been misappropriated. The fourth objection is that although one of the arbitrators, Mr. Hiranand, was a pleader of respondent 1, the complainant in the criminal case, and knew very well that evidence his client had to counter the allegations of the other side, did nevertheless proceed with the arbitration as if there was no evidence in support of the claim of respondent 1 and consequently the award is vitiated.

The answer of respondent 2, Nazir Ahmed, to the objections of respondent 1, Fazal Ellahie, is that there was no stifling of a criminal prosecution because as a matter of fact the criminal case is still going on; and that as respondent 1 deliberately absented himself from the arbitration proceedings he had to thank himself if the evidence was recorded ex parte and the award given thereon. The parties have not chosen to adduce any evidence before me. I have heard Mr. Kadri for respondent 1 and Mr. Murlidhar Mani for respondent 2. I think that the award in this case cannot stand and it should not be filed and made a rule of the Court for the following reasons: In the first place, there is no doubt that there was a criminal case pending at the time of the reference, and obviously the idea was that on the submission of the parties to arbitration the prosecution should be withdrawn. The arbitrators, according to respondent 1, actually moved the criminal Court to have the case compounded, but the Court rejected the application. It may be that this was because the complainant was not willing at that stage to withdraw his complaint. The fact however remains that whilst the arbitrators were engaged in settling the disputes between the parties, one of the main disputes, namely in respect of the alleged misappropriation of the amount of a certain bill was being agitated in the criminal Court. Under these circumstances, although the reference did not succeed in stifling the criminal prosecution, still the arbitrators did arrogate to themselves the powers of a magisterial Court in order to decide whether respondent 2 had or had not committed the offence of misappropriation. That the arbitrators did so is clear from the finding in the award which reads: "We find and hold that Nazir Ahmed has not misappropriated any moneys of Fazal Ellahie."

The learned advocate for respondent 2 with his usual candour admits that the arbitrators exceeded their powers in recording such a finding: he however contends that it is a mere surplusage and can be got rid of easily so that the rest of the award may stand without any legal objection thereto. I have no doubt that if the arbitrators had acquitted the accused, respondent 2, of the charge pending against him by merely stating that fact, that would not have vitiated the rest of the award. In this case however, the arbitrators' finding that there was no misappropriation amounted to a finding with regard to the alleged liability of respondent 2 to respondent 1 in respect of the bill amount alleged to have been misappropriated. That being so, if the rest of the award is upheld, it would be a great hardship on respondent 1. Whereas respondent 1 would be made to pay under part 2 of the award, he could not possibly recover any money even if he succeeded in establishing that there was criminal misappropriation by respondent 2 of the amount of the bill recovered under the contract. The final result arrived at by the arbitrators depends mainly on the finding on the issue about misappropriation. What the amount of misappropriation could possibly be if the alleged misappropriation is proved cannot be ascertained. Therefore it is difficult to ascertain what amount should be deducted from the amount found due to respondent 2 on part 2 of the reference, viz. with regard to the shop dealings between the parties. Reluctant as I am to interfere with the decision of a private tribunal of the choice of the parties, this is one of those cases in which I do not think that the arbitrators have acted properly. They have exceeded their authority in recording a sort of an acquittal of respondent 2 on the criminal charge; and consequently the award is not such as in fairness should be allowed to remain on the file. As I understand that the criminal case is still going on, I refrain from making any further remarks with regard to the evidence recorded by the arbitrators and the circumstances in which the award was made. The result is that the Court will not allow the award to be filed.

Respondent 1 succeeds not because of any fraud on the part of respondent 2, but because of the wrongful arrogation of the magisterial powers by the arbitrators, and therefore I do not think that this is a case in which although respondent 1 is successful he should be given his costs from the other side. The order is that the award should not be filed and the parties should bear their own costs.

V.B.B./R.K. *Award set aside.*

## A. I. R. 1938 Sind 132

DAVIS J. C. AND DADIBA C. MEHTA J.

*Tahilram Tackchand and another* — Appellants.

v.

*Mt. Miral w/o Jamalshah and others* — Respondents.

Second Appeal No. 2 of 1937, Decided on 20th January 1938, against Judgment and decree of Second Asst. Judge, Hyderabad (Sind), D/- 30th October 1936.

**(a) Criminal P. C. (1898), S. 145 — Orders under, partake nature of interim proceedings in Civil Court.**

Orders under S. 145 relate essentially to the possession of land and partake something of the nature of interim proceedings in a Civil Court and the order itself partakes something of the nature of a decree, so that a judgment which relates to such orders is not necessarily to be applied without some modification to ordinary criminal proceedings for offences leading to a conviction or an acquittal. [P 136 C 2]

**(b) Evidence Act (1872), S. 13 — Judgment not inter partes is admissible — But findings of fact in previous suit are inadmissible.**

The purpose of S. 13 is to enable a right which may be constituted by a number of acts by the exercise of the right itself *animo domini*, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied, but by evidence otherwise admissible. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding, a transaction within the meaning of S. 13 for the purpose of ascertaining the parties to the dispute and the contentions of the parties, the subject of the dispute, and the final decision of the Court, but not for the purpose of proving the reasons for the Court's decision and for using its findings of fact as evidence of those facts in another case. Thus, though a judgment in other proceedings even though not inter partes is admissible in evidence as, what has been described as an integration of judicial proceedings, themselves held to be a transaction within the meaning of S. 13, its admissibility is subject also to other provisions of the Evidence Act, and is subject to the overriding principle that the Evidence Act does not make a finding of fact arrived at on the evidence before one Court in one case evidence of that fact in another case : *Case law discussed.* [P 137 C 1, 2]

**(c) Adverse Possession — Question whether adverse possession has been proved is question of fact — But whether adverse possession shall be inferred from proved facts is question of law.**

It is a question of fact whether adverse possession has been proved, but where the decision is whether adverse possession shall be inferred from facts, it is not a question of fact; it is a question of the legal inference to be drawn from facts : *19 Cal 249 and 19 Cal 253, Rel. on.* [P 138 C 2]

**(d) Adverse Possession — Hostile possession by co-owner — It must be actual, visible, exclusive and continued for statutory period.**

Where one co-owner asserts a title hostile to his co-owners, he must do so by an open and unequivocal assertion of a hostile title. The possession must be actual, visible, exclusive, hostile and continued for the statutory period. Mere intention to possession is not a substitute for actual possession, or actual possession of one survey number would not be possession of say sixty : *A I R 1929 Sind 212 and 19 Cal 253, Rel. on.* [P 139 C 2]

**(e) Adverse Possession — Breach in continuity of adverse possession — Land reverts to rightful owner — Held in circumstances of case that plaintiff's adverse possession was established.**

Whether continuity of the possession be broken by flood or by draught, or because the nature of the land itself is such that it is not susceptible of continued acts or user or possession, once there is a breach in the continuity of adverse possession, the chain of years is broken and the land reverts to its rightful owner. [P 140 C 1]

In a suit for adverse possession of certain Mahomedan family lands, which though they were described as waste, were susceptible of agricultural uses, it was found the plaintiff not only appropriated all the proceeds of cultivation, but used the lands, so far as they could be, for grazing purposes and appropriated the grazing fees. Such possession by the plaintiff was for more than the statutory period. No ejectment suit was ever brought. But the defendant, who was entitled to such lands by sale, got entries made, got receipts for the payment of assessment, for payment of boundary marks, got compensation money when some land was acquired by Government, and got the entries made in the Record of Rights :

*Held* that the defendant's possession was paper possession only, and the plaintiff had acquired a title by adverse possession : *A I R 1917 P C 6 Rel. on; (1888) 13 A C 793 and 29 Cal 518, Disting.* [P 141 C 1, 2]

**(f) Record of Rights—Entries in—Value of.**

The importance and weight of entries in the Record of Rights varies with the circumstances of each case: *A I R 1930 P C 93, Foll.* [P 141 C 1]

**(g) Adverse Possession — Acts of possession must vary with nature of land.**

Acts indicative of possession must vary with the nature of the land over which possession is to be exercised and asserted: *31 Cal 397, Disting.* [P 141 C 2]

D. N. O' Sullivan and Dingomal Narainsing—*for Appellants.*

Fatehchand Assudomal and Santdas Idanmal—*for Respondents.*

**Davis J. C.**—This is an appeal from the judgment of the Second Assistant Judge of Hyderabad by which he dismissed an appeal against the judgment of the Subordinate Judge of Mirpur Khas in which he decreed the plaintiff's suit for partition of the suit lands. The suit land is arable land in Deh Garar, Taluka Khipro, and the deed whereby one Pirushah, a dumb Mahomedan zamindar, transferred his eight annas share in this land to two banias Amuldas and Issardas whose successors in title are defendants 12 to 16, is dated as far back as 1898. It is common ground between the parties that eight annas share of the suit lands belonged to Pirushah and eight annas share to the three sons of Lal Muhammad whose successors are defendants 1 to 11, and the only question really in dispute in this appeal is, whether the plaintiff who is now the widow of the original plaintiff Jamalshah, the son of Pirushah, proves a title of adverse possession to the eight annas share of Pirushah in the suit lands sold to the two banias in 1898. The Subordinate Judge found that the eight annas share of Pirushah was sold by Pirushah under the sale deed of 1898 to the two banias Amuldas and Issardas, and that sale was binding upon Pirushah's heirs. This finding of the Subordinate Judge was not challenged in the lower Appellate Court, and in fact the decision of the first appeal in that Court, as the decision of the second appeal in this Court, must turn upon the question of the proof by the plaintiff of the title by adverse possession.

Now the argument before us on the first point taken by the learned advocate for the appellants-defendants 12 to 16 was that the Subordinate Judge was wrong in admitting and relying in evidence upon a Magistrate's judgment of March 1908, in criminal proceedings between Amuldas and Ghulam Nabi defendant 6, in the suit. It appears that in 1908 there was a dispute between the parties about the produce of the land and Ghulam Nabi was tried for an offence under S. 424, I. P. C. on the complaint of Amuldas and was acquitted, and it is about the admissibility of this judgment in evidence and the extent to which it can be relied on in these proceedings that there has been much argument.

Now there appears to us no doubt that the judgment is admissible under S. 13, Evidence Act, for the limited purposes of that section; but in relying upon that judgment as proving in this suit the possession and cultivation by Ghulam Nabi Shah on behalf of Pirushah and the other Syeds we think the learned Subordinate Judge has gone too far in that though judgments even not inter partes are admissible under S. 13, as evidencing a transaction within the meaning of S. 13, Evidence Act, in which a right was asserted or denied, this admittedly is subject to the limitation that findings of fact in one case cannot be used as evidence of facts in another case. For instance, in his judgment the Subordinate Judge has appeared to rely upon the finding of the Magistrate that the "accused has made out his defence", which means, the learned Judge says, in other words, that the accused, that is defendant 6, was in sole possession of the land, and got the land cultivated; and the learned Judge finds as one of the facts established from the rival contentions of the parties and the judgment, that Ghulam Nabi defendant 6 "got the land cultivated and appropriated the produce to the exclusion of the vendees." But mere assertions or denials of parties in previous proceedings or findings of facts by a Magistrate in those proceedings are not evidence of the truth of those assertions or denials or of those findings of facts in other proceedings; and we do not think that the Court should, when a judgment is admitted under S. 13, Evidence Act, look at the reasons of the Magistrate or at his findings of fact. The fallacy in such a course is proved by a finding of the Subordinate Judge himself in this very suit; for, while the Magistrate in the criminal case accepted the defence of the accused, part of that defence was that the land was the land of the accused and of Pirushah and that Pirushah had not and could not have transferred the land to the banias because he was deaf and dumb, the Subordinate Judge has himself found that Pirushah could and did transfer the land. He finds then that to this extent the Magistrate was wrong when he accepted the defence of the accused; and as he was wrong on the question of the transfer of the land, so he might have been wrong on other findings of fact or law, for instance, on the question of sole possession of the accused, on the cultivation of the accused and the exclusion of the vendees.

It is true that the Magistrate found the accused not guilty of an offence under S. 424, Penal Code, with respect to the produce of one survey number of the suit lands, but we do not think the Subordinate Judge should have looked at or relied upon the reasons given by the Magistrate for his decision. He may have acquitted the accused because he gave him the benefit of doubt or because there was a bona fide dispute and no criminal intention. The fact that the accused was acquitted is indeed admissible in evidence, and is best proved by a copy of the judgment under S. 43, Evidence Act ; but the fact that the judgment is otherwise admissible under S. 13 for the purposes of that section, does not, we think, make the finding of facts or the reasons given by the Magistrate for the findings evidence of facts in these proceedings. So far as the admissibility of this judgment under S. 13, Evidence Act is concerned, the advocate for the appellants has referred us particularly to three cases, firstly, the case in 15 Pat 336,[1] and secondly the case in 59 Cal 136,[2] and thirdly, to the case in 56 I A 119.[3] So far as the Patna and Calcutta cases are concerned, the judgments do not refer to or consider the question of the admissibility of the judgments under S. 13, Evidence Act ; while we can more conveniently refer to the third case later. On the question of the admissibility of judgments under S. 13, Evidence Act, however, we would refer to two cases, the Bombay case in 24 Bom 591[4] and the Calcutta case in 25 Cal 522.[5] In the Bombay case, Ranade J. said :

> As regards the judgments in the former suit, the appellants' contention was that the judgments operated as res judicata. The Court of first instance took this view but the lower Appellate Court held that they were not res judicata, and were not even relevant evidence. There can be no doubt that the lower Court was right in holding that they were not res judicata, because the decision was not inter partes, though it related to the same subject-matter ; but while the lower Court was right so far, it was wrong in holding that these judgments were not admissible in evidence. There has, no doubt, been some conflict of opinion on this point. On the one hand there is the judgment of the Full Bench in 6 Cal 171,[6] where it was held by four Judges that former judgments which are not of the nature of judgments in rem, nor judgments relating to public matters, cannot be admitted in evidence, where the parties are different, either as 'transactions' under S. 13 or as evidence of relevant facts under S. 11 or under any other section of the Act. This ruling in 6 Cal 171[6] was followed in 12 Cal 207,[7] 12 Cal 82,[8] 13 Cal 352[9], 10 Bom 439[10]and 11 Mad 116.[11] On the other hand, previous judgments not inter partes were held admissible in evidence for certain purposes: 12 Mad 9,[12] 16 Mad 361[13] and 1 W R 270.[14] The leading case is 4 Cal 633,[15] where the Privy Council admitted as evidence a certain rajinama made between the tenants and acted upon by the landlord, and held it to bind the landlord in a subsequent suit, though the plaintiff was not a party to the previous rajinama. In two more recent cases, the same principle was affirmed by the Privy Council. In the first of these cases 22 Cal 533[16] certain decrees passed in 1817 and 1845, to which the plaintiff zamindar's predecessors-in-title were not parties, were admitted as evidence on behalf of the defendants' claim to ancient possession. In the other case, 19 All 277,[17] a decree obtained against the defendant that the will was revoked was held not to be res judicata in a suit against him brought by other plaintiffs, but was held to be admissible as evidence against him. In the earlier Calcutta case 22 W R 365[18] Sir R. Couch had held that the word 'transaction' in S. 13 included judgments, not conclusive, but still admissible as evidence for what they are worth, even when they might not be admissible under Ss. 40 to 43. The Allahabad High Court in a recent case in 12 All 1,[19] has noticed the decision in 6 Cal 171,[6] and held that though the judgment as to whether a certain person was or was not heir, was not a transaction of fact under Ss. 13 and 11, yet it was admissible under S. 13 as showing an instance in which the right was claimed; only in such cases the whole record, and not the judgment, should be admitted as evidence. Former judgments and other documents were held admissible on these and other grounds in 15 Mad 12,[20] 16 Mad 194,[21] 2 W R 267[22] and 23

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1. Raghunath Singh v. Emperor, (1936) 23 A I R Pat 537=165 I C 289=15 Pat 336=17 P L T 526.
2. Trailokyanath Das v. Emperor, (1932) 19 A I R Cal 293=1932 Cr C 262=137 I C 163 =59 Cal 136=33 Cr L J 441.
3. Gopika Raman Roy v. Atal Singh, (1929) 16 A I R P C 99=114 I C 561=56 I A 119= 56 Cal 1003 (P C).
4. Lakshman Govind v. Amrit Gopal, (1900) 24 Bom 591=2 Bom L R 386.
5. Tepu Khan v. Rajani Mohun Das, (1898) 25 Cal 522=2 C W N 501.
6. Gujja Lall v. Fatteh Lall, (1881) 6 Cal 171= 6 C L R 439 (F B).
7. Mahendra Lal v. Rosomoyi Dasi, (1896) 12 Cal 207.
8. Radha Gobind v. Rakhal Das, (1896) 12 Cal 82.
9. Surender Nath v. Brojo Nath, (1897) 13 Cal 352 (F B).
10. Ranchoddas v. Bapu, (1886) 10 Bom 439.
11. Subramanyan v. Paramaswaran, (1888) 11 Mad 116.
12. Ramasami v. Appavu, (1889) 12 Mad 9.
13. Nilkanta v. Imamsahib, (1893) 16 Mad 361= 3 M L J 364.
14. Dost Muhammad Khan v. Soolochana Dabia, (1864) 1 W R 270.
15. Ramessur Persad Narain Sing v. Koonj Behari Pattuk, (1879) 4 Cal 633=3 Sar 856=6 I A 33 (P C).
16. Ram Ranjan v. Ram Narain Singh, (1895) 22 Cal 533=22 I A 60=5 M L J 7=6 Sar 530 (P C).
17. Bhitto Kunwar v. Kesho Persad, (1897) 19 All 277=24 I A 10=1 C W N 265=7 Sar 131 (P C).
18. Neamut Ali v. Gooroo Doss, (1874) 22 W R 365.
19. Collector of Gorakhpur v. Palakdhari Singh, (1890) 12 All 1 (F B).
20. Venkatasami v. Venkatareddi, (1892) 15 Mad 12.
21. Vythilinga v. Venkatachala, (1893) 16 Mad 194.
22. Ashrufoonissa Begum v. Rughoonath Sohoy, (1865) 2 W R 267.

W R 162.[23] It is not easy to reconcile this conflict of views in particular instances, but apparently, the cases, which decide that judgments not inter partes, are not admissible in evidence proceed chiefly on the ground that those judgments are sought to be used as having the effect, more or less, of res judicata. For that purpose, a judgment inter partes alone can be admitted in evidence, but for other purposes where judgments are sought to be used to show the conduct of the parties, or show particular instances of the exercise of a right, or admission made by ancestors, or how the property was dealt with previously, they may be used under Ss. 11 or 13 as exceptions recognized under S. 43, as relevant evidence: 15 Mad 12,[20] 3 Bom 3,[24] 12 All 1,[19] 18 Mad 73,[25] 24 W R 470,[26] and 22 W R 457.[27] In the present case, the judgments in the former suit raised the question now in issue in a pointed manner. It is true that the former suit was brought by certain creditors of respondent 1, while the present suit was instituted by a purchaser from respondent 1. This is however a difference which did not affect the merits. The real question at issue was the same, viz. the bona fide character of the partition deed of 1885. Though the decision in the former suit will not estop the respondents-defendants from contesting the claim as being res judicata, still the record and the judgment in that case, showing the conduct of the parties and their admissions, would be admissible in evidence under S. 13. The interpretation placed upon the words 'right' and 'transaction' in 6 Cal 171,[6] seems not to have been accepted by the Privy Council, and its correctness is questioned in the Full Bench judgment of the Allahabad High Court in 12 All 1,[19] in so far as the exclusion of such judgments from being received as evidence under any section is concerned. Except where they are judgments in rem, or where they relate to public matters, judgments not inter partes have been always held to be not res judicata, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property. The cases show that such judgments may have very high value as evidence, and may even shift the burden of proof: 22 W R 365.[18]

In the Calcutta case, the question of the admissibility of judgments not inter partes was raised and referred to a Full Bench, but it was not considered necessary to decide the question because in the course of further argument it appeared that the property in suit was not identical, but, in the course of his referring judgment, Banerjee J. put the case for and against the admissibility of judgments not inter partes in the following words :

> Next as to the relevancy of the judgment in Suit No. 742 of 1887 under S. 13. If the existence of judgment is not a transaction within the meaning of Cl. (a) of S. 13, it proves that a litigation terminating in the judgment took place ; and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted. So again the litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of Cl. (b) of S. 13, in which the right of possession now claimed by the defendants was claimed. It has been said that the right spoken of in this section is an incorporeal right. I do not think that there is any sufficient reason for putting this limitation on the meaning of the terms as used in the section. The judgment therefore is in my opinion relevant under S. 13.
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> If such judgments were not relevant under either of the two Ss. 11 and 13, they could not be admissible in evidence, as the Privy Council have held them to be in the two cases referred to above.
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> The strongest argument against the admissibility of such judgments in evidence is, to use the language of a well-known writer on the Law of Evidence (see Taylor on Evidence, Edn. 9, S. 1682), 'that no man ought to be bound by proceedings to which he was a stranger and over the conduct of which he could therefore have exercised no control'. But in the first place, the judgments in question are sought to be used, not as binding and conclusive evidence, but only as evidence for what they are worth, the weight to be attached to the evidence being left to the Court to determine. And in the second place, the reason stated above, though it is a good reason for excluding from consideration as against a stranger, the evidence afforded by a judgment, so far as it is the opinion of a Court upon materials in the placing of which before the Court the stranger could have had no control, does not appear to hold equally good where what is sought to be taken into consideration is the evidence afforded by the existence of the judgment as to a litigation relating to the right in question and the way in which that litigation terminated. For such collateral purposes, judgments are admissible in evidence against strangers under the English law: *see* (1843) 6 M & G 471.[28] It is true that their Lordships of the Privy Council in the two case referred to above while overruling in effect the decision of this Court in 6 Cal 171[6] and 13 Cal 352,[9] do not refer to any section of the Evidence Act. But I may add that the view I take is supported to some extent by the cases in 11 C L R 528,[29] 15 Mad 12[20] and 12 All 1.[19] It has sometimes been said, *see* 10 Bom 439,[10] that if the Legislature in this country had intended to make judgments admissible in evidence against strangers, as it was an important departure from the English law, the intention would have been expressed, not indirectly by the provisions embodied in Ss. 11 and 13, but directly by some express provisions in that part of the Evidence Act which relates to judgments. I think the answer to this remark is furnished by S. 43, which is one of the group of sections relating to judgments, and which contains the provision applicable to cases like the one before us, relating to the relevancy of judgments as evidence against strangers.

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[23] Roop Chand Bhukut v. Hur Kishen Doss, (1875) 23 W R 162.

[24] Naranji v. Dipa Umed, (1878) 3 Bom 3.

[25] Krishnasami v. Rajagopala, (1895) 18 Mad 73.

[26] Omer Dutt Jha v. Colonel James Burn, (1875) 24 W R 470.

[27] Guttee Koiburto v. Bhukut Koiburto, (1874) 22 W R 457.

[28] Davies v. Lowndes, (1843) 6 M & G 471= 7 Scott N R 141=12 L J Ex 506=64 R R 783.

[29] Hira Lal Pal v. A. Hills, (1882) 11 C L R 528.

The Bombay case is subsequent in point of time to and is of greater assistance in this case than the Calcutta case; and it is clear that the fact that a judgment is not inter partes is not in itself a reason for holding it inadmissible under the provisions of S. 13, Evidence Act. In this case however, Amuldas and Ghulam Nabi, the parties in the criminal proceedings or their successors-in-title, are parties to the civil suit, and both the Courts have found that Ghulam Nabi in the criminal proceedings was acting and was asserting a title on behalf of his dumb brother Pirushah. There is thus then an identity of interests between Ghulam Nabi and Pirushah, and the question of whether a judgment not inter partes is admissible under S. 13, Evidence Act, does not arise. There is clear authority however that subject to the limitation involved by the provisions of S. 13, Evidence Act itself, a judgment not inter partes is admissible for the purpose of that section. The Subordinate Judge has relied largely on the judgment of the Privy Council in the Calcutta case in 29 Cal 187,[30] as supporting his conclusion that the judgment and the rival contentions of the parties established the exclusive possession and cultivation by the accused of the suit lands; but, though that judgment admits certain police orders made under S. 145, Civil P. C. as evidence of possession at the date when they were made, that judgment is careful to refer not to the finding of the Magistrate on the fact of possession but as to who was declared entitled to retain possession. As however this judgment was largely relied on by the Subordinate Judge and has been made the subject of argument and does indeed stress the very wide nature of the words used in S. 13, it should be here referred to. On page 198 their Lordships say:

> These police orders are in their Lordships' opinion admissible in evidence on general principles as well as under S. 13, Evidence Act, to show the fact that such orders were made. This necessarily makes them evidence of the following facts, all of which appear from the orders themselves, viz. who the parties to the dispute were; what the land in dispute was; and who was declared entitled to retain possession. For this purpose and to this extent such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained. If the lands referred to in such an order are described by metes and bounds, or by reference to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence i. e. the testimony of persons who know the locality. If the orders refer to a map that map is admissible in evidence to render the order intelligible ; and the actual situation of the objects drawn or otherwise indicated on the map must, as in all cases of this sort, be ascertained by extrinsic evidence. So far there appears to be no difficulty. Reports accompanying the orders or maps and not referred to in the orders may be admissible as hearsay evidence of reputed possession: Taylor on Evidence, S. 517. But they are not otherwise admissible, unless they are made so by S. 13, Evidence Act. To bring a report within that section the report must be 'a transaction in which the right or custom in question was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence.' These words are very wide and are wide enough to let in the reports forming part of the proceedings in 1867, 1876 and 1888. Their Lordships are of opinion that the High Court did not err in receiving the report made in the proceedings of 1876 to the reception of which Mr. Cohen objected.

And on page 199 their Lordships say :

> As regards possession under a Magistrate's order although the order confers no title, the fact of possession remains, and the person in possession can only be evicted by a person who can prove a better right to the possession himself. The order of 1888 and possession under it threw upon the plaintiff the burden of proving her title and she did so to the satisfaction of the High Court so far as the larger part of the land in dispute is concerned. But the onus is not now on her to show that the judgment in her favour is right ; it is for the appellant to show that it is wrong, and where and why it is wrong.

It is to be remembered that orders under S. 145, Criminal P. C. relate essentially to the possession of land and partake something of the nature of interim proceedings in a Civil Court and the order itself partakes something of the nature of a decree, so that a judgment which relates to such orders is not necessarily to be applied without some modification to ordinary criminal proceedings for offences leading to a conviction or an acquittal. But the case in 29 Cal 187[30] must, we think, be read with a subsequent case of the Privy Council reported in 56 I A 119.[3] In that case, the appellant brought a suit against numerous defendants claiming possession of land which they held, as being part of his zamindari estate, and the appellant-plaintiff finally found himself forced to rely upon a decree obtained in a suit instituted by his predecessors-in-title in 1854 to prove a case he was then relying on, of landlord and tenant; and the Board then considered the question whether the decree in the suit of 1854 established the relations of landlord and tenant between the appellant-plaintiff and the respondents-defendants. The Board came to the conclusion that it did not do so. In considering this question however, the Board looked at the plaint in the suit of 1854 and found it inconsistent with the view that there subsisted a relation of landlord and tenants between the plaintiff and defendants. They looked at the summary of the written statement contained in the judgment to see what were the assertions or denials of the defendants; they looked at the findings on certain issues, but it would appear only for the purpose of interpreting the decree; but when they were asked to look at and rely upon certain findings of fact, as to the payment of rent, recorded by another Court in another case, they declined to do so. Their Lordships said :

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[30] Dinamoni Chowdhrani v. Brojo Mohini Chowdhrani, (1902) 29 Cal 187=29 I A 24=6 C W N 386=8 Sar 224 (P C).

> The plaintiff also relied on a certified copy of an award of the Deputy Collector of Sylhet in certain boundary cases under Reg. 7 of 1822. The plaintiffs in those cases were the predecessors of the plaintiff, and one case related to the alleged inclusion of 5636 bighas of estate No. 85 in other mauzas. The defendants' names are given as Ramanand Singh, Mohan Singh and Munai Singh who are not shown to have been the predecessors of defendants 1 to 160 or any of them. The plaintiff relies on certain statements of the Deputy Collector in his award in this case as to rent having been realized by the plaintiffs in Suit No. 9 of 1854 from the defendants in that suit. In their Lordships' opinion these statements are not admissible as evidence of rents having been realized from the defendants in that suit. The Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case. Their Lordships also agree with the Courts below that this evidence, even if admissible, would be of very little weight.

Therefore though a judgment in other proceedings even not inter partes is admissible in evidence as, what has been described as an integration of judicial proceedings, themselves held to be a transaction within the meaning of S. 13, its admissibility is subject also to other provisions of the Evidence Act, and is subject to the overriding principle that the Evidence Act does not make a finding of fact arrived at on the evidence before one Court in one case evidence of that fact in another case. And after all the purpose of S. 13 is clear. It is to enable a right which may be constituted by a number of facts by the exercise of the right itself *animo domini*, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied, but by evidence otherwise admissible. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding, a transaction within the meaning of S. 13, Evidence Act, for the purpose of ascertaining the parties to the dispute and the contentions of the parties, the subject of the dispute, and the final decision of the Court, but not for the purpose of proving the reasons for the Court's decision and for using its findings of fact as evidence of those facts in another case. S. 13 and the Illustration are as follows :

> *13.* Where the question is as to the existence of any right or custom, the following facts are relevant : (a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence ; (b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.
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> *Illustration.*
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> The question is whether *A* has a right to a fishery. A deed conferring the fishery on *A's* ancestors, a mortgage of the fishery by *A's* father, a subsequent grant of the fishery by *A's* father irreconcilable with the mortgage, particular instances in which *A's* father exercised the right, or in which the exercise of the right was stopped by *A's* neighbours, are relevant facts.

The section does not abrogate all other sections of the Evidence Act; it does not, for instance, make any gossip or rumour or hearsay, evidence. It has to be read with the other sections of the Evidence Act. It merely lays down, subject consistently with other sections of the Evidence Act, what is relevant evidence of a right or custom when the question is as to the existence of any right or custom. But while the learned Subordinate Judge gives to this judgment an important part in the case, the lower Appellate Court appears more correctly to have appreciated the nature and limitations of this kind of evidence. On page 39 of the paper book the Assistant Judge says :

> **The judgment in the criminal case gives us an idea about the contention of the parties, and the case of the Syeds even as early as 1907-08. A perusal of the judgment (Ex. 232) shows that defendant 6 Ghulam Nabishah asserted the exclusive right of Syed to this property. It is worthwhile re-producing his statement in extenso : 'Yes, I have taken away the produce as the land is mine and of Pirushah. Possession of the land is mine. I am in possession of the mukhtiarnama in the name of my father which was given to him by mother of Pirushah. Pirushah could not give the mukhtiarnama as the Deputy Commissioner said that he is deaf and dumb. Pirushah has not transferred the land. There has been cheating. If he had given the land, I would have certainly known it. He cannot talk nor can he hear.' The**

perusal of the judgment shows in unmistakable terms that Ghulam Nabi asserted openly and to the knowledge of Amuldas the exclusive right to this property on his behalf and on behalf of the heirs to Pirushah. This is certainly a disclaimer by open and unequivocal assertion of hostile title. This was not only a false threat but it was accompanied by a resolute act on his part for he took away the produce and compelled Amuldas to file a criminal prosecution against him. He was not daunted by this and asserted in the Court of law the exclusive ownership and possession. He was acquitted in that and nothing was done by Amuldas or his heirs or even defendant 16 or his father, to assert their claim to the property. The vendees of Pirushah should thank themselves if they allowed the Syed to be in an undisturbed possession, and did not dare to come to the Civil Court at any time. This was either due to uncertainty of their position or was with a view to allow the evidence of exclusive possession in 1907-08 and 1910-11 to disappear.

If the learned Judge means that the judgment is evidence of the fact that the accused took away the crops in dispute, we think to that extent he is wrong because a finding of fact of that Court in those proceedings is not evidence of that fact in these proceedings, but to his final acceptance of the judgment in evidence as showing "what the case of the Syed defendants was even at the outset in 1907-1908, even at that time they claimed the whole property and asserted the right of exclusive possession to the knowledge of the vendees of Pirushah", there can be no objection. Our conclusion then is that this judgment is admissible to show who were parties to the dispute, what were their contentions, what was the subject-matter of the dispute, what was the offence the accused was charged with, and what was the final order of the Court; but this in itself falls far short of establishing the actual fact of the exclusive possession and cultivation of the suit lands by Pirushah and the Syeds or his exclusive possession and cultivation by Pirushah or some one else on his behalf of this eight annas share. It is evidence to be considered with other evidence of an assertion by Ghulam Nabi of the exclusive cultivation and possession of the land adverse to the defendants and a successful assertion to the extent that he was acquitted by the Magistrate of a charge of an offence under S. 424, I. P. C., with relation to the produce of one survey number of the sixty now in suit of the right in dispute.

But the evidence of this judgment does not stand alone, and we have now to consider whether the plaintiff establishes the title by adverse possession to the land transferred by Pirushah to the bania in 1898. The lower Appellate Court is of the opinion that it is a question of fact whether adverse possession has been proved, but where the decision is whether adverse possession shall be inferred from facts, as is the case here, it is not a question of fact; it is a question of the legal inference to be drawn from facts. What facts are or are not proved is ordinarily a question for the lower Courts, and not for us in second appeal; nor in view of the fact that all the evidence is not upon the record but only selections made by the appellants for their own purposes, could we, if we had wished, go into questions of fact; but whether the facts as found by the lower Courts do or do not prove or justify an inference of adverse possession is a question of law. In 19 Cal 253,[31] the Privy Council held that the decision that the defendants' possession had been adverse having been an inference from facts in the Courts below, the correctness of this as a legal conclusion to be drawn or not was a question open to second appeal, and the High Court was not precluded from deciding to the contrary. But as to the facts themselves, apart from the legal inference to be drawn, this Court as the third Court must accept the finding of fact of the second Court, and if there is evidence to be considered, however unsatisfactory the finding of fact might be if examined, it must stand final: 19 Cal 249.[32]

Now the learned advocate for the appellants has argued that it is not shown at any time that Pirushah asserted an adverse title to the appellants, far less exercised rights of exclusive possession and cultivation, and that Ghulam Nabi, defendant 6 was an interloper concerned not with the interest of Pirushah but with his own interests, and he argues that the Judges in the lower Courts are wrong when they have identified Pirushah and his interests with the other Syeds and their interests, and that the co-owners with Ghulam Nabi were, by virtue of the transfer of 1898, which the lower Courts have found was a valid transfer, the banias Amuldas and Issardas, but this aspect of the case did not escape the notice of the lower Courts. The Subordinate Judge refers to this aspect of the case at the bottom of p. 32 of the

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31. Lachmeswar Singh v. Manowar Hossein. (1892) 19 Cal 253=19 I A 48=6 Sar 133 (PC).
32. Ramratan Sukal v. Nandu, (1892) 19 Cal 249 =19 I A 1=6 Sar 119 (P C).

paper book. The Subordinate Judge refers to the association of Pirushah himself with defendant 6 in subsequent proceedings when the title of the banias was disputed. There is the oral evidence of Ghulam Nabi himself which both the Courts have believed. There is the evidence of the judgment to which we have already referred at length as to the assertions and denials of the parties. We cannot say there is not evidence on which the lower Courts could come to the conclusion that Ghulam Nabi, defendant 6, did act on behalf and with the authority of Pirushah when he challenged the right and title of the banias to the lands transferred by the deed of 1898 ; and these being conclusions of facts, we as the third Court are bound to accept them as correct.

But it is then argued that even if Ghulam Nabi, defendant 6, did act on behalf and with the authority of his dumb brother, no actual possession is proved. The only acts of possession are fugitive acts of possession. It is argued that it is proved that at the very highest from 1908 to the date the suit was filed the land was only cultivated twice, once in 1907-1908 and once in 1910-1911; that any continuity of possession was broken and indeed was not possible by reason of the waste nature of the land itself; and that it matters not whether the continuity of possession was broken by the *vis major* or natural causes or by voluntary abandonment. Once the continuity of possession was broken, possession previous to that breach must be excluded for the purpose of proving a title based on adverse possession. It is argued that the land here was waste or derelict, and abandoned from time to time by those who now claim a title by adverse possession; and the learned advocate refers us to the well known case in (1888) 13 A C 793.[33] The learned advocate also argues that if there is adverse possession there must be the corresponding remedy of a suit for the ejectment of the trespassers, and that at no time during the years which have elapsed from 1907-1908, the year found by the lower Courts as the beginning of adverse possession, could it be said that the banias could have brought a suit to eject the Syeds. The possession with Syeds was merely a transitory possession; the possession with the banias was the permanent possession.

Now the case of the plaintiff depends upon assertion of title and acts of possession. It is not possible to say that the lower Courts have approached this case from the wrong point of view. They have not overlooked the fact that where one co-owner asserts a title hostile to his co-owners, he must do so by an open and unequivocal assertion of a hostile title, 23 S L R 461[34] at p. 468, and that there is a difference between cases where the alleged ouster is by a stranger or a co-owner: 19 Cal 253.[31] The lower Appellate Court has stated that the possession must be actual, visible, exclusive, hostile and continued for the statutory period. There is nothing in the judgment to suggest that the Judges have regarded mere intention to possess as a substitute for actual possession or that they have lost sight of the fact that actual possession of one survey number would not be possession of sixty. Our attention has been drawn to the case in A I R 1935 Cal 760,[35] as summarizing in a convenient way the case relating to adverse possession ; but even when tested by the conditions therein laid down, it would not appear the Judges have misdirected themselves on the principle of the law to be applied or the pitfalls to be avoided.

Now so far as an assertion of title is concerned, it is clear that defendant 6 in the criminal proceedings in 1908, and the judgment is admissible for this purpose, asserted the claim and the possession of Pirushah and himself to all the suit lands. They were mentioned in the complaint by Amuldas, the complainant. Defendant 6 did not confine his assertion to the produce of one survey number, but he asserted his claim and the claim of Pirushah to all the land in suit. This clearly was an open and public and unequivocal disclaimer of the title of the banias, and the fact that they did not then have recourse to the Civil Courts in spite of the fact that defendant 6 was acquitted of the offence with relation to the produce of even only one survey number, read with the evidence of Ghulam Nabi on the record, and the evidence of Pamoomal, the son of Issardas, to which the Assistant Judge refers, abundantly justifies, in our opinion, the findings of the lower Courts that the adverse possession of Pirushah dated from 1908, for excluding the judgment in the criminal case as evidence of facts, to be found on the evidence in this case, it is clear upon the other evidence on the record, to which we have referred, that the Judges are justified in their conclusions that in 1908 Pirushah and his Syed cosharers were in sole occupation of the disputed land and that they asserted a title hostile to the banias in explicit terms. But the evidence only definitely shows that the land was cultivated only twice in all these years and though we accept the findings of the lower Courts that when the land was cultivated on those two occasions in 1907-1908 and 1909-1910 the Syeds took all the produce and the banias took none, we should have found it difficult in the absence of any other acts of ownership to find two such isolated and distant acts of possession sufficient to constitute a title by adverse possession of which continuity is an essential attribute. For, whether the continuity of the possession be broken by flood as in 29 Cal 518,[36] or by draught, or because the nature of the land itself is such that it is not susceptible of continued acts or user or possession, once there is a breach in the continuity of adverse possession the chain of years is broken, and the land reverts to its rightful owner.

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[33] **Trustees, Executors & Agency Co. Ltd., v. Short (1888) 13 A C 793=58 L J P C 4 = 59 L T 677=37 W R 433=53 J P 132.**

[34] **Abdul Rahman v. Mahomed Idris, (1929) 16 A I R Sind 212=118 I C 207=23 S L R 461.**

[35] **Bhabani Prosanna Lahiri v. Manindra Chandra Roy, (1935) 22 A I R Cal 760 = 159 I C 752.**

Now the lower Appellate Court has found in this case not only that when the land was cultivated the Syeds including Pirushah appropriated all the proceeds of the cultivation, but that they used the land, so far as it could be used, for grazing purposes and took the grazing fees. It cannot be said that on this point there is no evidence. There is the evidence of Haji for the plaintiff, and there is the evidence of Tahilram for the defendants, to the effect that there is grass on the land after rain, that cattle owners come and graze their cattle and that they give cash or goods as grazing fees, and it is clear that throughout all the years the banias got nothing from this land in the way of grazing charge. We think care must be taken to give to the facts of each case their proper weight and not to confuse for instance, the facts of this case with the facts of the case in (1888) 13 A C 793[33] or 29 Cal 518.[36] We are not dealing with Australian scrub or desert land or lands submerged, nor are we dealing with squatters or trespassers in the ordinary sense of that word. We are dealing with waste land in the Mirpurkhas District and waste land in this part of India at least, it is notorious, is ordinarily used for the grazing of cattle. It is not useless scrub jungle, and we are dealing not with trespassers but with the claim of a Mahomedan family to family lands of which there has been no partition, and of the whole area of which the members of the family would ordinarily be in actual physical possession. The Subordinate Judge presumed the joint possession of the bania vendee on the basis of a document of title then in the suit before him over 30 years old, and even on this assumption the Subordinate Judge himself comes to the conclusion that from 1908 this joint possession or possession by the Syeds on behalf of the vendees came to an end and that it is an irresistible conclusion on the facts of this case that the Syeds including Pirushah were in possession, if they were in possession at all, of all the family lands.

The facts then in this case are very different from the facts in either the case in (1888) 13 A C 793[33] or 29 Cal 518.[36] And it is clear we are dealing here not with derelict or abandoned lands subject only to the transitory occupation of a squatter, but family lands though described as waste, susceptible of agricultural uses, never abandoned and tenaciously claimed and held by members of the family. Taking the test the learned advocate himself suggests, the test of whether an ejectment suit would lie, it is clear that at any time in the 30 years preceding this suit a suit would have lain and have been stubbornly contested. The lower Courts came to findings of fact that cattle grazed upon these lands after rain and that there was rain and that the Syeds took the grazing fees. They do not say specifically that it rained every year and that the grazing fees were taken every year without exception, but it is clear they find that the Syeds took grazing fees continuously over the years from 1907-1908 to the date when the suit was filed, in all a period of over 30 years, sufficiently continuous to evidence acts of continuous physical possession; and it cannot be said that there is no evidence on the record to justify this finding. The Courts find in fact that the banias or their successors-in-title did not even once exercise over this land from the year 1907-1908 any acts of possession. Moreover when they could or should have produced books to rebut the plaintiff's case, they did not do so; and the Subordinate Judge was clearly justified in the circumstances in drawing in this matter an inference adverse to the defendants relying upon a judgment of the Privy Council in 40 Mad 402.[37]

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[36] Secretary of State v. Krishnamoni Gupta, (1902) 29 Cal 518=29 I A 104=6 C W N 617 =8 Sar 260 (P C).

Clearly it is the opinion of both the Courts that the possession of the banias was a paper possession only. They got entries made, they got receipts for the payment of assessment, for repairs to boundary marks, they got part payment of compensation money when some of the land was acquired by Government for barrage purposes, they got the entries made in the Record of Rights, but to any one acquainted with the conditions of life of the parties to these proceedings and the witnesses, all this is evidence, having no necessary relation to the physical possession of the land. The Subordinate Judge has carefully considered and weighed the value to be attached to the entries in the various registers and he has relied on a judgment of the Privy Council in 32 Bom L R 368,[38] as authority for the statement that the importance and weight of entries in the Record of Rights varies with the circumstances of each case; and, in our opinion, the Subordinate Judge was right in rejecting these entries as evidence of any weight or value in the circumstances of this case on the question of the actual possession of the suit lands. There remains only the argument of the learned advocate that the acts of cultivation and the acts of grazing were in themselves only fugitive acts of possession and that in the land acquisition proceedings the land was described as waste. But the description of land as waste land does not in this part of the country mean desert land incapable of being made the subject of continued acts of possession except by acts of active physical occupation such as fencing. The waste lands here described are waste lands only cultivable at long intervals of time but offering at much shorter intervals of time grazing for cattle. The Subordinate Judge does not err when he says that acts indicative of possession must vary with the nature of the land over which possession is to be exercised and asserted. It is true, that in the case the Subordinate Judge refers to the case in 31 Cal 397,[39] the claim of adverse possession based on the cutting of grass and the grazing of cattle failed, but that was due to the special circumstances of that case. We do not think therefore we have here a case where possession is abandoned over land not susceptible of acts of continuous user and susceptible only of fugitive acts of possession. We do not think we have here a case of merely fugitive acts of possession or a possession which is constructive only. We are of the opinion that the lower Courts were right in their conclusions that the evidence shows that the Syeds (including Pirushah or his heirs and successors) were in actual and exclusive and continuous occupation of the suit lands adverse to the defendants for over thirty years immediately preceding the suit, and that the defendants have been unable to show one positive act of possession throughout this long period of time. We think therefore the lower Courts were right when they decreed the plaintiff's claim, and we dismiss this appeal with costs.

V.B.B./R.K. *Appeal dismissed.*

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[37] Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, (1917) 4 A I R P C 6=39 I C 659=40 Mad 402=44 I A 98 (P C).

[38] Gangabai Baswantrao v. Fakirgowda Somayyagowda, (1930) 17 A I R P C 93=123 I C 166=57 I A 61=54 Bom 336=32 Bom L R 368 (P C).

[39] Wali Ahmed v. Tota Meah, (1904) 31 Cal 397.

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## A. I. R. 1938 Sind 141

DAVIS J. C. AND HAVELIWALA J.

*Emperor*

v.

*Gulab, son of Laloo*—Opposite Party.

Criminal Ref. No. 250 of 1937, Decided on 10th January 1938, made by Dist. Magistrate, Sukkur, asking to quash proceedings.

**Criminal P. C. (1898), Ss. 198, 199—Purpose of Ss. 198 and 199 is that offences to which they refer should not be made subjects of complaint except by aggrieved person—Husband himself not complaining of offence under S. 494, I. P. C.—Court cannot force upon him character of aggrieved husband.**

**The purpose of Ss. 198 and 199 is to make sure that the offences to which they refer are not made the subjects of complaint except by aggrieved persons. [P 142 C 1]**

**Where therefore the husband files a complaint under Ss. 363, 342 and 506, I. P. C., and does not himself complain of an offence under S. 494, I. P. C., it is not open to the Court to force upon him, as a complainant, the character of an aggrieved husband, which he does not wish to assume : *25 All 209, Disting.* [P 142 C 1]**

**Partabrai D. Punwani, Advocate-General — *for the Crown.***

**Davis J. C.**—This is a reference by the District Magistrate of Sukkur, asking us to quash proceedings against certain persons for an offence under S. 494, I. P. C., and for abetment of the offence on the ground that the husband is not the complainant as required by S. 198, Criminal P. C. It appears that in the first instance complaint was made by the husband for offences under Ss. 363, 342 and 506, I. P. C., but that the learned Magistrate came to the conclusion on the evidence that the facts did not disclose an offence under any one of these sections but disclosed an offence under S. 494, I. P. C. But it is clear that he did not come to this conclusion either from the facts stated by the husband, the complainant, in his complaint or from any facts stated by the husband in his deposition in Court; because we have before us the complaint and the deposition of the husband. We have read them through and it is clear that the husband does not complain of an offence under S. 494. Therefore, we do not think that it was competent for the Magistrate to force upon the complainant this character of an aggrieved husband which he did not wish to assume.

The purpose of Ss. 198 and 199, Criminal P. C. is to make sure that the offences to which they refer are not made the subject of complaint except by aggrieved persons. For instance, bigamy is a matter which closely affects husband and wife and if the husband does not wish to prosecute his wife for bigamy, it is not for the Court to compel him to do so. We have been referred to the case in 25 All 209.[1] In that case the husband in the first instance made a complaint under S. 498, I. P. C. and all that Ss. 198 and 199, Criminal P. C. require is that the person aggrieved shall be the complainant. In that case the husband was the aggrieved party both in the case of the offence under S. 498, I. P. C. and in the case of the offence under S. 494, I. P. C. These were both matrimonial offences, the husband was the complainant in one: he became the complainant in the other. In this case however the facts are different. The husband does not complain of an offence under S. 498 nor of an offence under S. 494, I. P. C. We therefore accept the reference by the learned District Magistrate, Sukkur, and quash the proceedings.

R.M./R.K. *Proceedings quashed.*

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[1] Emperor v. Alli, (1903) 25 All 209 = 1903 A W N 7.

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## A. I. R. 1938 Sind 142

DADIBA C. MEHTA AND LOBO JJ.

*Menghomal Topandas and others* — Appellants.

v.

*Varumal and another* — Respondents.

Misc. Appeal No. 25 of 1936, Decided on 31st March 1938.

**Civil P. C. (1908), O. 17, R. 3 — Suit for partnership accounts — Preliminary decree passed and commissioner appointed for taking accounts — Trial Court ordering plaintiff to deposit commissioner's fees — Deposit not having been made even on adjourned date, Court dismissing suit — Appeal — Appellate Court admitting appeal on condition of plaintiff making required deposit — Decision of Appellate Court in so far as it interfered with lower Court's discretion held not justifiable—But trial Court's order dismissing suit without reference to materials on record held against provision of O. 17, R. 3—After passing of preliminary decree suit held could not be dismissed.**

In a suit for taking partnership accounts a preliminary decree was passed and a commissioner was appointed for settling partnership accounts. The trial Court ordered the plaintiff to deposit a certain sum towards the commissioner's fees. The plaintiff did not make the deposit and obtained adjournment. On the adjourned date, the plaintiff was warned that if the deposit was not made within a week the suit was liable to be dismissed for want of prosecution. No deposit having been made within the time allowed, the Court dismissed the suit. On appeal against this order the Appellate Court admitted the appeal on condition that the plaintiff deposited the required sum:

*Held* (1) that the order of the Appellate Court in so far as it interfered with the discretion exercised by the trial Court was unjustifiable; [P 143 C 2]

(2) that the order of the trial Court dismissing the suit fell under O. 17, R. 3. Hence in dismissing the suit because of the failure of the plaintiff to deposit the sum and without reference to the materials on the record the trial Court acted against the provisions of O. 17 R. 3; [P 144 C 1]

(3) that the preliminary decree having been passed the Court had no jurisdiction thereafter to dismiss the suit, [P 144 C 1]

(4) that the suit should not be placed on the dormant file till such time as the plaintiff chose to come forward and comply with the order of the Court and apply that the suit should be removed from the dormant file and brought up for disposal. [P 144C 1]

Asudamal Rewachand — *for Appellants.*

Pahlajsing B. Advani — *for Respondents.*

**Lobo J.** — This miscellaneous appeal arises in the following way. The respondents filed Suit No. 860 of 1927 in the Sub.Civil Court of Sehwan against the appellants for taking of partnership accounts. There was a preliminary decree passed in this suit and a commissioner was appointed for the purpose of going into and settling the partnership accounts. On 26th September 1935 the Court ordered the respondents-plaintiffs in the case to deposit a sum of Rs. 200 towards the commissioner's fees. On the record before us, it does not appear whether this was a first deposit or whether as contended by the respondents the amount ordered to be deposited by the respondents was required to complete the commissioner's fees before he submitted his report. The respondents-plaintiffs did not make the deposit as ordered and obtained an adjournment for this purpose from time to time. On 7th November 1935 the respondents-plaintiffs were peremptorily ordered to deposit the sum of Rs. 200 and specifically warned that if the money was not deposited within 7 days, the suit was liable to be dismissed for want of prosecution. No deposit having been made till 14th November 1935, the learned Subordinate Judge on that day passed the following order :

> Rupees 200 ordered to be deposited have not been deposited. Mr. Valiram asks for time. I do not think he is entitled to any time now. The order for deposit of this money was passed as long ago as 26th September 1935 and plaintiff has been obtaining time thereafter for this purpose. On the last occasion, viz. on 7th November 1935, plaintiff was specifically warned that if money was not deposited, the suit was liable to be dismissed for want of prosecution and yet there has been default. Plaintiff has been negligent and must bear the consequences. Suit dismissed with costs. Recall papers from commissioner.

Against this order, the respondents appealed to the District Court of Larkana. The appeal was admitted by the learned District Judge on condition that the respondents deposited the sum of Rs. 200 in the lower Court. This the respondents did. The learned District Judge, on 8th May 1936, allowed the appeal of the respondents. He states :

> On the merits, I think the appellants should not be penalized for failure to deposit expenses by having their entire suit dismissed. I therefore allow the appeal and remand the suit to the lower Court for further proceedings on the preliminary decree.

It is against this order of remand of the learned District Judge of Larkana that the appellants, the original defendants in the case, have come to us in appeal, such appeal being allowed by O. 43, Rule 1, Cl. (u), Civil P. C. It appears to us in this matter that the order of the learned District Judge, in so far as it interferes with the discretion deliberately exercised by the trial Court when it penalized the respondents for their repeated failure to comply with the Court's orders, is entirely unjustifiable and cannot be supported. The suit was one of 1927. It was a simple suit for taking of partnership accounts. In November 1935 it had been pending for seven years. The learned Judge of the trial Court was therefore quite reasonably desirous and anxious that this suit should come to a conclusion and be removed from his file of pending cases. The respondents were given time from 26th September 1935 to 14th November 1935, a period of over 6 weeks, to comply with the order of the Court. They had failed to do so and in our opinion the learned Judge was perfectly justified in the circumstances of the case and exercised a judicial discretion in deciding to penalize the respondents for their continuous flouting of the Court's order. The only reason given by the learned District Judge for so interfering is contained in the words :

> On the merits I think the appellants should not be penalized for failure to deposit expenses by having their entire suit dismissed.

No doubt the order of the learned Judge of the trial Court is in law subject to appeal, and the learned District Judge hearing the appeal was in law authorized to allow it. In our opinion however in the circumstances of this case, the learned Judge has unnecessarily and unjustifiably interfered with a discretion judicially exercised by the learned Judge of the trial Court and on this ground we would not have been prepared to uphold the order of remand. But there is an aspect of the case which has not been considered either by the trial Court or by the learned District Judge and it is this aspect that induces us to make an order of remand. Although the learned Judge of the trial Court does not specifically say so, his order of dismissal of the suit is evidently under the provisions of O. 17, R. 3, Civil P. C. which reads as follows :

> Where any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

The rule does not say that the Court shall proceed to dismiss the suit. The words used are "the Court may proceed to decide the suit forthwith." This can only mean that the Court may proceed in such circumstances as the rule refers to, to decide the suit on such material as there is on the record before it. Had the learned Judge of the trial Court decided the suit on the materials before him, he would, without doubt, have acted according to law, but the learned Judge has not done so. From the order passed by him it is apparent that he dismissed the suit because of the failure of the respondents to deposit the sum of Rs. 200 ordered to be deposited by them and without reference to the materials on the record before him. This, in our opinion, he could not do.

It has been argued for the respondents, and rightly so, that the procedure adopted by the learned trial Judge was illegal; that a preliminary decree having been passed in the suit, the Court had no jurisdiction thereafter to dismiss the suit, and reliance was placed in support of this proposition on the decision of their Lordships of the Privy Council in 51 I A 321[1] which formed the basis of the decision of a Bench of this Court in 28 S L R 167.[2] So far, we are in agreement with the contention on this point of the learned advocate for the respondents. But the learned advocate went further and argued that in the events that happened the only order that the learned Judge could have passed was that the suit should be placed on the dormant file till such time as the respondents chose to come forward and comply with the order of the Court and apply that the suit should be removed from the dormant file and brought up for disposal. The learned advocate attempted to convince us that his contention received support from the decision of their Lordships of the Privy Council in the case above referred to. The case with which their Lordships were dealing, however, is entirely distinguishable, as that was a case of default of appearance covered by O. 17, R. 2, Civil P. C. where entirely different considerations enter. Under R. 2 the manner of disposal of the suit after default of appearance is restricted to one of the modes directed in that behalf by O. 9, Civil P. C. No such restriction appears in R. 3 of O. 17, Civil P. C. and the remarks of their Lordships of the Privy Council in *Lachmi Narain's case*[1] which have been relied upon can only be read as applicable to the facts and circumstances of that case. The general principle however there enunciated that after a preliminary decree has once been passed in a partition suit and the rights of the parties have been fixed the suit cannot be dismissed otherwise than by an Appellate Court, is undoubtedly applicable in this case. To accept the argument of the learned advocate for the respondents would further, it can easily be seen, lead to results most undesirable and disastrous. In every case of a similar kind the Court would be at the mercy of the parties in the matter of disposal of the suit. The orders of a Court could be defied with impunity and suits would lie indefinitely perhaps for years on a so-called "dormant file". We cannot for a moment accept such an argument. The learned advocate for the respondents contended that O. 17, R. 3, Civil P. C. had no application. He was unable however to support his contention by reference to any authority and left us unconvinced. We think that in this case the proper order to pass is to set aside the order of the learned District Judge and to remand the case to the trial Court to be proceeded with and decided forthwith on such materials as are on the record before the Court, and we order accordingly. The costs in this appeal and those of the lower Appellate Court to be borne by the respondents. The costs in the original Court to be costs in the cause.

D.S./R.K. *Case remanded.*

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## A. I. R. 1938 Sind 144

LOBO J.

*Kewalmal Salamatrai* — Judgment-creditor.

v.

*Rodrigues F. G.* — Judgment-debtor.

Misc. Case No. 335 of 1934 and Exn. Appln. No. 1056 of 1936, Decided on 24th February 1938.

**Civil P. C. (1908 as amended in 1937), Ss. 60 and 73—S. 73 is not affected by amendment of S. 60.**

**The amendment of S. 60 by S. 3 of Act 9 of 1937 does not affect the provisions of S. 73. Thus a decree-holder has still a right under S. 73 to come in for a share in the rateable distribution of salary attached under a decree, though his suit in which the decree is obtained may have been brought after June 1937. [P 145 C 1]**

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[1] Lachmi Narain v. Balmakund, (1924) 11 A I R P C 198=81 I C 747=4 Pat 61=51 I A 321 (P C).

[2] Naoomal Tourmal v. Tarachand Sobhraj, (1933) 20 A I R Sind 200=144 I C 883=28 S L R 167.

L. A. D'Sa (in 1380) —
*for Judgment-creditor.*
Santdas Idamal (in 1056) —
*for Judgment-creditor.*

**Order.** — In this matter the salary of one F. G. Rodrigues, an employee in the North Western Railway has been attached in execution of a decree and amounts under the order of attachment are being received by this Court from month to month. A number of decree-holders—13 in number—have applied for rateable distribution under the provisions of S. 73, Civil P. C. One of these is the applicant in Execution Application No. 1380 of 1937. The suit which resulted in the decree of this decree-holder was filed after June 1937, and the remaining decree-holders, 12 in number, are seeking to exclude the applicant in Exn. Application No. 1380 of 1937 from receiving a share in the rateable distribution on the basis of the amendment of S. 60, Civil P. C. by Act 9 of 1937. As the matter is contested, it has been submitted for the orders of the Court by the Second Registrar. Of the 12 decree-holders who are opposing the application in Exn. Application No. 1380 of 1937 only one has appeared before me.

In my opinion the applicant in Exn. Application No. 1380 is entitled to share in the rateable distribution. All that the amendment to S. 60, Civil P. C. provides is that in respect of proceedings arising out of any suit instituted after 1st June 1937, the amount attachable out of the salary of an employee in a Railway Company is half the amount of that salary over a hundred rupees. The amendment however does not affect the provisions of S. 73, Civil P. C. Had the applicant in Exn. Application No. 1380 of 1937 himself attached the salary of F. G. Rodrigues, he could not have attached more than a moiety of that salary over a hundred rupees, but that does not affect his right under S. 73 to come in for a share in the rateable distribution of salary attached under a decree which is not covered by S. 3 of the Amending Act. I accordingly order that the applicant in Exn. Application No. 1380 of 1937 should be allowed his share in the rateable distribution.

**V.B.B./R.K.** *Application allowed.*

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## A. I. R. 1938 Sind 145

DADIBA C. MEHTA AND LOBO JJ.

*Missir Saligram Mathradas* —
Appellant.

v.

*Missir Bansiram and others* —
Respondents.

Second Appeal No. 12 of 1935, Decided on 31st March 1938.

**Easement — Quasi easements — Rights in haveli are attached to buildings abutting and opening thereon — Owners of such alone are entitled to enjoy them qua owners — Such are not easements proper but partake nature of quasi easements — Their nature and extent are governed by custom.**

A haveli is not like property held jointly in co-ownership in the sense that all the rules and incidents of joint property are applicable to it, where any co-owner may alienate his rights therein, for such a power of alienation would immediately defeat the very object of maintaining a haveli. The law of easements as such cannot be applied to a haveli, for an easement predicates a dominant and a servient tenement vested in different persons. The rights of the owners over the haveli partake of the character of easements. They are quasi easements though not easements proper, the nature and extent of such rights being regulated by custom. Such rights can in law and in the nature of things only be attached to immovable property and can only be enjoyed by the owners of such property qua owners.

[P 147 C 1, 2; P 148 C 1]

There was a Shingrapota Brahmins' haveli, entirely enclosed by buildings, built originally by the inter-related Shingrapota Brahmins, with the intention that the open space should serve as a common courtyard to which they should all have access and over which they should all have rights of enjoyment consistent with each other's convenience. To the north of the haveli was a plot which, though abutting on the haveli, had a building thereon which did not originally open on to the haveli. This building was bought by a non-Shingrapota Brahmin, who owned a building encircling the haveli. He, on the same site, built a new house, with doors and windows overlooking the haveli and a door on the ground floor providing entrance from the haveli. The owners of the buildings enclosing the haveli brought a suit for a declaration that the non-Shingrapota Brahmin house owner could not open doors, etc., on the side of the haveli or build projections over it and for an injunction directing the defendant to close the doors, etc. The lower Court dismissed the suit on the ground that the defendant as owner of the house which abutted on and opened on to the haveli, had a personal right of ownership in the haveli which he could exercise in respect of the new plot, which he had purchased and which abutted on the haveli :

***Held*** **that the original owner of the plot having enjoyed no rights in the haveli qua the plot, could and did convey none to the defendant. By opening doors, etc., the defendant had materially affected its privacy and placed an additional burden on the restricted use of the haveli. Hence the plaintiffs were entitled to the relief asked for :** *1*

*Sel Dec 179 and (1875) Bom P J 266, Rel. on; A I R 1930 Sind 34, Expl.* [P 148 C 2; P 149 C 1]

Dipchand Chandumal — *for Appellant.*

Hakumatrai M. Eidnani — *for Respondents.*

**Lobo J.** — This is a second appeal from the judgment of the Assistant Judge of Sukkur by which the learned Judge upheld the judgment and decree of the Judge of the subordinate Court of Shikarpur in Suit No. 992 of 1928 dismissing the suit of the appellant. The facts need to be set out in some detail. In the town of Shikarpur there is a haveli called the Shingrapota Brahmins' haveli. It bears survey No. 15/38 in the Record of Rights. Abutting on the haveli and opening on to it are buildings on plots bearing survey Nos. 39 to 45. On survey No. 41 is the temple or thawn of these Brahmins. To the north of the haveli and abutting on it is survey No. 46 with a building thereon which did not originally open on to the haveli. The haveli is entirely enclosed by the buildings above referred to except that towards the north between survey Nos. 46 and 39 there is an opening with a gateway which leads into a narrow street which ultimately connects with the public road. Abutting on this street are buildings on survey Nos. 37, 47 and part of 46. The owners of the buildings on survey Nos. 39 to 45 are all Shingrapota Brahmins. By two sale deeds dated 19th July 1911 and 12th January 1912 the respondents, the owners of plot No. 39, purchased the plot of land with buildings thereon bearing survey No. 46 on the northern side of the haveli. The vendors were not Shingrapota Brahmins. Shortly before this suit the respondents built a new house on this plot with doors and windows in the wall overlooking the haveli and a door on the ground floor providing entrance into the house from the haveli. They also placed beams in the wall of this house projecting therefrom over the haveli, evidently with the intention of erecting thereon a terrace or wadhawa. They further connected the drain of the new building with the main drain in the haveli. The appellant who is the owner of plot No. 45 thereupon filed Suit No. 992 of 1928 against the respondents for a declaration that the respondents' house on plot No. 46 was not "of Shingrapota Brahmins haveli" and that they were not entitled to open doors, windows, drains or spouts on the side of the haveli or build projections over the haveli and for an injunction directing the respondents to close the spouts, doors, windows, etc. and not to prevent the appellant from closing the same by erecting a wall or otherwise. The suit was originally filed by the appellant in his individual capacity but later he was given permission to sue on behalf of all the owners of houses abutting and opening on the haveli other than the respondents.

The respondents contested the appellant's suit mainly on two grounds. They contended in the first instance that the original building on survey No. 46 had the same rights over the haveli as the buildings on plots Nos. 39 to 45. Their second line of defence was that the haveli was the joint property of all the owners of the houses abutting and opening on to the haveli and that the defendants, having purchased plot No. 46 which also abutted on the haveli, were entitled as owners of plot No. 46 to the same rights over the haveli as they enjoyed by reason of their ownership of plot No. 39. According to their first contention the haveli extended beyond the gate and included the street up to the road. The learned Judge of the trial Court found that the haveli terminated with the gate on the north between survey Nos. 46 and 39 and did not include the street beyond. He found that the original building on survey No. 46 did not open on to the haveli and for this reason had not over the haveli the rights enjoyed by the buildings on plots Nos. 39 to 45. He held however relying on the case in 24 S L R 208,[1] that the respondents as owners of a house which abutted on and opened on to the haveli had a personal right of ownership in the haveli which they could exercise in respect of plot No. 46 which they had purchased and which abutted on the haveli. The learned Judge states:

> I am not able to agree that this case is distinguishable from the express decision of the Judicial Commissioner's Court in 24 S L R 208.[1] It has been expressly ruled in that decision that the right of ownership in a haveli is a personal right independently of the old house abutting on the haveli.

The learned Judge of the trial Court accordingly dismissed the suit of the appellant. There was an appeal against this decision being Civil Appeal No. 24 of 1931 which was heard by the Assistant Judge of Sukkur. The learned Judge of the Appellate Court disposed of that appeal quite summarily. He states:

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[1] **Girdharidas Radhakishendas v. Tirathdas Gokaldas, (1930) 17 A I R Sind 34=120 I C 497=24 S L R 208.**

I do not propose to enter into a discussion of the evidence in the case. On the admitted facts the appellant was rightly nonsuited. The decision reported in 24 S L R 208[1] is on all fours with the present case. There also the defendants owned a house in a particular haveli and they were sued for a declaration and injunction on exactly the same facts as in this case. Following the above decision, I would dismiss the appeal with costs.

The appellant having lost in both the lower Courts has now come to us in second appeal. The learned advocate who appeared for the appellant has taken three points before us. He contends in the first instance that the ruling of the High Court in 24 S L R 208[1] is not and was never intended to have general application to all havelis in the Province, but must be confined in its application to the particular haveli dealt with in that case. Secondly, the learned advocate contends that in the present case, it is admitted that rights in the haveli are not independent of the ownership of the houses abutting and opening on the haveli. His third contention is that a haveli is not like ordinary property held in co-ownership. It is not alienable by itself. It is established by authority that in the absence of a custom or of evidence to the contrary, rights in a haveli are attached to the buildings abutting and opening thereon, the owners of which alone are entitled to enjoy them, qua owners. We have read the case in 24 S L R 208[1] and can find nothing in it indicating that it has or was intended to have application to havelis in general or to any haveli other than the one with which the learned Judges were there dealing. The learned Judge who tried the present case is therefore wrong when he states,

> it has been expressly ruled in that decision that the right of ownership in a haveli is a personal right. . . .

Nor was the learned Judge of the Appellate Court justified in summarily disposing of the matter because "the decision reported in 24 S L R 208[1] was on all fours with the present case." There are passages in that judgment of the High Court which make it clear that its finding was based on the evidence in the case and admitted facts. At p. 209, Kalumal A. J. C. in reciting the facts states: "It is common ground that this haveli is the joint property of these men". At p. 210 the learned Judge refers to a finding of the lower Appellate Court,

> that the right of ownership of the haveli was distinct and separate from that of those houses in the haveli and was capable of transfer independently of the said houses.

In dealing with the appeal before us we therefore feel ourselves entirely untrammelled by the decision in 24 S L R 208.[1] In support of the second contention the learned advocate for the appellant relies on the following passage in the evidence of respondent Bansiram, one of the defendants in the suit, which is quoted by the learned Judge of the trial Court in his judgment:

> The haveli yard belongs to the houses abutting on the haveli and also to the houses in the street leading from the haveli to the main road. If the house is transferred, then the transfer passed the right in the yard also. That is my personal opinion. I know of no instance where the house having the right to a haveli is sold to one man and the right to the haveli yard to a different person. Any co-owner can use the haveli yard.

Now this can scarcely be regarded as an admission. The Court is only concerned with admissions of fact and in this passage no fact is admitted. It is the opinion of the witness asserted explicitly as opinion. There is therefore no force in the contention that the trial Court should have decreed the appellant's suit on this admission alone or that the appellant is entitled to succeed in this appeal on this so-called admission. No attempt appears to have been made to place before the trial Court any material bearing on the origin and history of this haveli and in fact the only document to which we have been referred is an entry in the Record of Rights relating to survey No. 15.138 wherein this survey number is merely described as 'compound of plots Nos. 41, 46, 39 40.' There can be no doubt however that at some time the predecessors-in-title of the present owners of plots Nos. 39 to 45, all Shingrapota Brahmins and inter-related, built their houses around this open space intending that this open space should serve as a common courtyard or haveli to which they should all have access, through which they should have access to the thawn which they built on plot No. 41 and over which they should all have rights of enjoyment consistent with each other's convenience. Brahmins are essentially exclusive and hence it is not difficult to understand that the owner of plot No. 46 who was not a Shingrapota Brahmin could get no access to the haveli. It is extremely difficult to define with any degree of precision the legal position in regard to such a common courtyard or haveli of those for whose benefit it was formed or exists. A haveli is not like property held jointly in co-ownership in the sense that all the rules and incidents of joint property are applicable to it, where any co-owner may alienate his rights therein, for such a power of alienation would immediately defeat the very object of maintaining a haveli. The law of easements as such cannot be applied to a haveli, for, an easement predicates a dominant and a servient tenement vested in different persons.

But we think that the true legal position is that indicated in 1 Sel Dec 179[2] to which reference has been made by the learned advocate for the appellant. Candy J. was there considering the rights of the several occupiers of contiguous houses over a common lane for their common use as passage. The case is closely analogous to the case of a haveli for the common use of the houses abutting on and opening upon it. The plaintiff in that case who had purchased one of the houses abutting on a common lane rebuilt the house and in doing so erected a step in front of his door. The other occupants in the lane destroyed this step one night and the plaintiff brought the suit to establish his right to have such a step. Dealing with the nature of the plaintiff's right Candy J. says :

> This is not the case of an easement proper; then there would be dominant and servient tenements, but here there is a lane, which is as much the property of the plaintiff as of defendants. . . . No doubt it is a quasi easement. As Gale says page 17—'there are many rights which in their mode of enjoyment partake of the character of easements ; as however the existence and validity of these rights generally depend upon some local custom, excluding the operation of the general rules of law, and as they are sometimes entirely independent of any express or implied agreement between the parties, they generally stand upon a different footing, and are not in all respects governed by the same principles as those which determine the boundaries of private easements'.

Candy J. upheld the decree granted to the plaintiff by the two lower Courts as it was found as a fact that the common user of the lane included a right to erect a step outside the door of any occupant's house provided that this did not obstruct the general right of way. It would appear then that the rights of the owners of plots Nos. 39 to 45 over the haveli partake of the character of easements, that they are quasi easements though not easements proper, the nature and extent of such rights being regulated by custom. Such rights can in law and in the nature of things only be attached to immovable property and can only be enjoyed by the owners of such property qua owners. That being so, the original owner of plot No. 46 having enjoyed no rights in the haveli qua plot No. 46 could and did convey none to the respondents : and it is difficult to see on what basis other than custom the respondents can claim such rights of easement qua owners of plot No. 46 because they enjoy such rights qua owners of plot No. 39. No such custom has been pleaded or proved. Again, a haveli is essentially the same as the common "mahla" so frequently to be found in Bombay and parts of the Presidency and the legal rights of the joint holders of a 'mahla' have been the subject-matter of a decision of the Bombay High Court in (1875) Bom P J 266.[3] In this case the defendants, the majority of the joint holders of a common 'mahla', against the wishes of the minority encroached to the extent of only a foot on one side of the entrance to the 'mahla'. No substantial injury was caused to any one holder, the passage into the 'mahla' was unaffected. Still the High Court held that the defendants had no legal right to do what they had done.

We think this case has a direct bearing on the issue before us for decision and that it is good authority for holding that the respondents have by their admitted acts in regard to the building on plot No. 46 encroached upon the haveli and imposed upon the haveli additional burdens which they have no right to do except with the consent of all the joint holders of the haveli. By opening doors and windows in the wall of the building on plot No. 46 which overlook the haveli they have materially affected its privacy; by opening a door on the ground floor providing entrance into the house from the haveli they have placed an additional burden on the restricted use of the haveli: the projecting beams are an encroachment on the haveli and so will be the wadhawa when constructed; by connecting the drain of the new building with the main drain of the haveli they have thrown upon that drain and therefore upon the haveli an additional burden. It may be that the other joint holders have not sustained any substantial injury but that makes no difference whatever. For these reasons we think that the learned advocate for the appellant must succeed on his third contention which involves the real issue in this case and which both the lower Courts have entirely failed to appreciate; the appellant is entitled to the declaration and injunctions he claims in this suit against the respondents. We accordingly reverse the judgment and decree of the lower Appellate Court and allow this appeal with costs throughout.

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[2] **Chuhermal Jethmal v. Kewalram Menghraj, 1 Sel. Dec. 179.**

[3] **Hemchand Virchand v. Pitamber Amichand, (1875) Bom P J 266.**

V.B.B./R.K. *Appeal allowed.*

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## A. I. R. 1938 Sind 149

DAVIS J. C. AND LOBO J.

*Pir Shahdino Shah Ali Bux Shah*
Applicant.
v.
*Emperor.*

Criminal Revn. No. 306 of 1937, Decided on 19th March 1938, from order of Second Addl. Sess. Judge, Hyderabad, D/- 24th September 1937.

**Mussalman Wakf Act (42 of 1923 as amended by Bombay Act 18 of 1935), Ss. 10, 10-B—Jurisdiction to try offences under Act is not confined to District Court alone but extends to ordinary Criminal Courts excepting Second or Third Class Magistrates, provided necessary sanction to prosecute is obtained.**

After the Bombay Amending Act of 1935, so far as Bombay Presidency and presumably Sind is concerned, it is not now the scheme of the Act that offences under the Act should be punished only by the District Court as the only Court contemplated by the Act, for the Amending Act has now created other offences besides the offence under S. 10 and added S. 10-B which applies generally to offences committed under the Act as a whole. The scheme of the Act is that offences under the Act are ordinary criminal proceedings to be tried by the ordinary Criminal Courts with the provisos that sanction for prosecutions must be given by a Court in the manner prescribed and that no Criminal Court of the Second or Third Class Magistrate shall be competent to try an offence under that Act : *A I R 1930 All 81; A I R 1932 Oudh 210; A I R 1935 Bom 207 and A I R 1934 Bom 169, Ref.* [P 149 C 2; P 150 C 1]

Tarachand Khimandas — *for Applicant.*

Partabrai D. Punwani, Advocate. General — *for the Crown.*

**Davis J. C.**—This is an application in revision to set aside the order of the Second Additional Sessions Judge of Hyderabad in which he dismissed an appeal by the applicant who had been convicted by the City Magistrate of Hyderabad of an offence under S. 10, Mussalman Wakf Act and fined Rs. 100. When this application first came before us, it appeared to us from the record that neither of the lower Courts knew of an Amending Act—Bombay Act 18 of 1935—which has now very largely amended the original Mussalman Wakf Act 42 of 1923. We asked the learned advocate for the applicant if he had considered the effect of the Amending Act of 1935 upon his client's case; but he had to confess that he also had not heard of the Amending Act of 1935, so that we put the case back for hearing in order that the learned advocate could acquaint himself with the provisions of this Act which, after it received the assent of the Governor-General on 14th September 1935, was published in the Bombay Government Gazette on 23rd September 1935. Now that the case has come up before us again for hearing, it is clear that the application must succeed but on grounds quite different from those advanced in the application itself.

In the revision application itself reliance is placed upon two rulings : one in 52 All 167[1] and one (Full Bench ruling) in 7 Luck 601,[2] in which it is held that the District Court only has jurisdiction to deal with the offences punishable under S. 10, and, presumably, the learned advocate hoped to be able to persuade us, when he came to know of the ruling of this Court to the contrary effect, that this Court was wrong and that the Allahabad and Lucknow High Courts were right. He may also have intended to refer to the case decided by one learned Judge of the Bombay High Court in 37 Bom L R 207,[3] in which the learned Judge agreed with the Allahabad High Court and disagreed with this Court. He may also have intended to refer to another case of the Bombay High Court, 58 Bom 302,[4] in which a Division Bench of the Bombay High Court has held that under S. 10, Mussalman Wakf Act of 1923 a Magistrate's Court has jurisdiction under the Act. So far as Bombay Presidency and presumably Sind is now concerned, however, whatever may have been the case before the Amending Act of 1935, there appears now no doubt that it is not now the scheme of the Act that offences under the Act should be punished only by the District Court as the only Court contemplated by the Act as Broomfield J. held, for the Amending Act has now created other offences besides the offence under S. 10 and added S. 10-B, which appears to us to apply generally to offences committed under the Act as a whole. S. 10-B reads :

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[1] Nasrullah Khan v. Wajid Ali, (1930) 17 A I R All 81=118 I C 717=52 All 167=1930 A L J 288.

[2] Mahomed Baqar v. Mahomed Qasim, (1932) 19 A I R Oudh 210=138 I C 725=7 Luck 601=9 O W N 538 (F B).

[3] Kalekhan Mahomedkhan v. Karim Rehman Malik, (1935) 22 A I R Bom 207=156 I C 263=37 Bom L R 207.

[4] Sirdar Sayedna Taher Saifuddin v. Emperor, (1934) 21 A I R Bom 169=154 I C 940=1934 Cr C 546=58 Bom 302=36 Bom L R 311.

> (1) No prosecution under this Act shall be instituted except by or with the previous sanction of the Court given in the prescribed manner. (2) No Criminal Court inferior to that of a Presidency Magistrate or of a Magistrate of the First Class shall try an offence under this Act.

It does not now appear to us possible to say that the scheme of the Act is that offences under the Act are not ordinary criminal proceedings to be tried by the ordinary Criminal Courts with the provisos that sanction for prosecutions must be given by a Court in the manner prescribed and that no Criminal Court of the Second or Third Class Magistrate shall be competent to try an offence under this Act. Now neither the learned City Magistrate nor the learned Judge makes any reference whatever to this Amending Act of 1935 and the learned Judge in fact deals at length with Government Resolutions containing instructions to their executive officers, but all passed long before the Amending Act, and as neither the lower Courts were cognizant of the existence of the Amending Act, so neither of the lower Courts considered whether the conditions precedent to the institution of a prosecution as required by S. 10-B had been satisfied. We see on the record a complaint under S. 10, Mussalman Wakf Act, but we can find no reference to any sanction given under S. 10-B, and this is not surprising, in view of the fact that the Assistant Public Prosecutor, who it appears, made the complaint on 12th January 1937 did not in all probability know the Amending Act. The learned Advocate-General informs us that he has made inquiry and no rules, so far as he can ascertain, have been made which prescribe the manner in which sanction of the Court should be given. But be this as it may, we cannot say upon the record that the sanction of the Court has been given in the prescribed manner contemplated by Sec. 10-B of the Amending Act. The prosecution therefore failed in limine; the conviction and sentence must be set aside and the fine refunded and the revision application allowed.

V.B.B./R.K. *Conviction set aside.*

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## A. I. R. 1938 Sind 150

DAVIS J. C. AND HAVELIVALA J.

*E. L. Wise* — Accused.

v.

*Emperor.*

Criminal Revn. Appln. No. 305 of 1937, Decided on 20th January 1938, to quash the charge framed by the City Magistrate, Karachi, D/- 20th November 1937.

**(a) Criminal P. C. (1898), Ch. 33—Proceedings under Ch. 33 taken — Charge cannot be cancelled and accused, if not discharged, must be committed to Sessions.**

Once a Magistrate has taken proceedings under Ch. 33 his powers are curtailed. He cannot for instance under S. 213 (2) cancel the charge, and if he does not discharge the accused under S. 209 or S. 253, he must, as S. 446 of the Code directs, commit the accused for trial : *A I R 1931 All 366, Rel. on.* [P 151 C 1]

**(b) Criminal P. C. (1898), Ch. 33— Privilege of Ch. 33 can be waived.**

There is no reason why an accused should be compelled to continue to avail himself of a privilege, which there is good reason to believe, his impoverished state wlil render infructuous, if not harmful. Ch. 33 is a special procedure of which certain individuals at their own request are permitted to avail themselves. There is therefore no reason why the accused cannot waive a right which he need never have claimed, provided his request can be granted without prejudice to the trial of his co-accused or the business of the Courts. [P 151 C 1]

H. T. Raymond — *for Accused.*

Partabrai D. Punwani — *for the Crown.*

**Davis J. C.** — This is an application by one E. L. Wise, who has been charged with others as a European British subject by the City Magistrate Karachi with offences under S. 120-B read with S. 420 and Sec. 420 read with S. 109, I. P. C., that he and his co-accused should not be committed to the Court of Session under S. 446, Criminal P. C., as he does not now wish to take advantage of the privileges Ch. 33 confers but wishes to be tried by the City Magistrate. He first made an application to the City Magistrate explaining that the cost of a Sessions trial would be greater than he could bear and that the special privileges which Ch. 33, Criminal P. C. confers and of which he first desired to take advantage may prove a curse rather than a blessing. The learned Magistrate himself states he would willingly have granted the applicant's request but he has framed a charge though he has not yet committed the accused, but the proceedings having been taken at the applicant's request under Ch. 33, Criminal P. C., he has no option but to commit the accused to the Court of Session to take his trial. It does appear that once a Magistrate has taken proceedings under Chapter 33, Criminal P. C., his powers are curtailed. He could not, for instance under S. 213 (2), Criminal P. C., cancel the charge, and if he does not discharge the accused under S. 209 or S. 253, Criminal P. C., he must as S. 446 of the Code directs, commit the accused for trial. Reference may be made to the case in 53 All 690.[1] We think therefore the Magistrate was right in his opinion that he could not himself grant the applicant's request and he has granted an adjournment to enable the applicant to apply to this Court.

All that we are really asked to do is to direct that these proceedings be taken out of Ch. 33 and be placed under Ch. 21, Criminal P. C., and to make such verbal alterations in the charge as will make it appropriate to a trial by the Magistrate himself of the applicant and the co-accused as in a warrant case, and we think the most appropriate section under which we should act is S. 561-A, Criminal P. C. We see no reason why we should compel the applicant to continue to avail himself of a privilege which, there is good reason to believe, his impoverished state will render infructuous, if not harmful. We are not concerned here with provisions of the Code which the Legislature has enacted for the conduct of trials generally, with mandatory provisions of the Code, the observance of which the accused cannot waive; but we are dealing with a special procedure of which certain individuals at their own request are permitted to avail themselves. We therefore see no reason why the applicant cannot waive a right which he need never have claimed provided his request can be granted without prejudice to the trial of his co-accused or the business of the Courts. It appears that the foundation of these proceedings is the finding of the Magistrate under S. 443 (1) (6), Criminal P. C. that the case is one which ought to be tried under the Chapter. This is the basis of this particular jurisdiction, but, curiously enough, though the applicant claimed at the outset of his trial that the case was one that fell under this Chapter, and the Magistrate granted an adjournment, and thereafter proceeded to hear the case as one under this Chapter, no finding such as S. 443, Criminal P. C., requires to be recorded, was in fact recorded, so that it is not necessary for us in terms to set aside the order of the Magistrate on this point.

The advocates who represent the applicants concerned have been present and have been asked if they wish to object to the removal of the proceedings from Ch. 33 to Ch. 21, the corresponding alteration in the charge and a direction to the Magistrate to proceed with the case as a warrant case from the stage at which the charge has been framed, and they state that they have no objection. Though we are asked to deal with this application as a revision application under S. 439, Criminal P. C., and we might make the necessary orders under that section read with S. 423 (1) (c) and (d), we think this case can be better dealt with as a case under S. 561-A, Criminal P. C., under which we pass the necessary orders to secure the ends of justice. We therefore grant the application, direct these proceedings be deemed proceedings under Ch. 21, Criminal P. C., make the necessary verbal alteration in the charge to make the offences charged within the cognizance of the City Magistrate, and to be tried by him, and direct the case to be proceeded with as a warrant case from the stage which it has reached. Order accordingly.

D.S./R.K. *Application granted.*

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## A. I. R. 1938 Sind 151

DAVIS J. C. AND LOBO J.

*Chetibai w/o Naroomal* — Applicant.

v.

*Naroomal Shehoomal.*

Criminal Revn. Appln. No. 308 of 1937, Decided on 22nd March 1938.

**(a) Criminal P. C. (1898), S. 488 — Joint order in favour of woman and her child — Reasons depriving woman of her right do not affect child.**

Where a maintenance order is jointly passed in favour of a child and his mother, consideration which would deprive the mother of her right to maintenance would not prevent the child from asking and recovering it. [P 152 C 1]

**(b) Criminal P. C. (1898), S. 488 (3) Proviso — Maintenance cannot be allowed to be accumulated.**

Proviso to sub-s. (3), S. 488 means that a person in whose favour an order for maintenance has been made must, to enable her to recover arrears of maintenance, apply to the Court to recover such arrears within one year from the date the arrears became due. Such person cannot allow arrears to accumulate indefinitely and apply for the recovery of those arrears for the first time after several years. [P 152 C 2]

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[1] Rashid Ahmad v. S. F. Rich, (1931) 18 A I R All 866=1931 Cr C 622=132 I C 332=32 Cr L J 866=53 All 690=1931 A L J 526.

**(c) Criminal P. C. (1898), S. 488 Cls. (4) and (5)—Difference between explained.**

Under sub-cl. (5) the Magistrate is entitled to cancel the previous orders of maintenance and render them of no effect for the future on a finding that the applicant in whose favour the order had been made was "living in adultery". Under sub-cl. (4) the Magistrate is entitled to refuse to enforce the maintenance order on a finding that during the period in respect of which maintenance was sought to be recovered the applicant was "living in adultery" : *A I R 1928 Bom 59 and AIR 1936 Rang 446, Ref.* [P 152 C 2; P 153 C 1]

Hassomal M. Gurbuxani — *for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Lobo J.** — This is an application to revise an order passed by the Additional City Magistrate of Hyderabad by which he rejected the applicant's prayer for issue of process for the recovery of a sum of Rupees 262-11-9 being arrears of maintenance from the opponent who by successive orders under S. 488, Criminal P. C. dated 28th April 1933, 25th March 1935 and 1st February 1936 was required to pay sums of Rs. 12, Rs. 6 and Rs. 4 per month respectively for the maintenance of his wife and minor son. We have come to the conclusion that for reasons we proceed to state the order in its present form cannot be maintained, but in view of the order we propose to make we think it fair to refrain as far as possible from entering into the merits of the applicant's claim or of the grounds on which that claim is opposed so as not to prejudice either the applicant or the opponent in the further proceedings which our order will render necessary. In the first place the learned Magistrate's order is wrong in that it leaves out of consideration altogether the fact that the maintenance allowance under the three orders referred to under S. 488, Criminal P. C. were in favour jointly of the applicant and her minor son by Naroomal the opponent, and that even if the applicant had forfeited her claim to a maintenance allowance for the reason found by the learned Magistrate that reason did not affect the claim of the minor son who was jointly entitled to the maintenance allowance. This is clearly an error on the part of the learned Magistrate which renders his order unsustainable. That the maintenance orders were in favour of Chetibai and her minor son jointly appears clearly from the learned Magistrate's order itself. Another error into which the learned Magistrate has allowed himself to fall appears from the following passage in his order:

> Under S. 488, Criminal P. C., claim for maintenance allowance has to be enforced for a period of 12 months and not more. This application is dated 3rd February 1937. It can be enforced from 2nd February 1936 and not for any period before that.

This is an obvious error as it involves a misreading of Proviso 2 to sub-cl. (3) of S. 488, Criminal P. C. The Proviso reads:

> No warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

This can only mean that a person in whose favour an order for maintenance has been made must, to enable her to recover arrears of maintenance, apply to the Court to recover such arrears within one year from the date the arrears became due. She cannot allow arrears to accumulate indefinitely and apply for the recovery of those arrears for the first time after several years. In the present case it appears from the statement presented to us and prepared by reference to the record by the learned advocate for the applicant and the Advocate-General jointly that successive applications for recovery of arrears of maintenance had been made by the applicant within a year of each other from 17th July 1933 to 2nd February 1937. The application dated 10th July 1935 was about 15 months after the previous application dated 4th April 1934 but between these dates a sum of Rs. 64-8-0 had been recovered. Any other interpretation of the Proviso would clearly lead to an absurdity, for a party who at any time successfully evaded execution of a maintenance order for the period of a year would escape all liability for that period and this could hardly be said to be the intention of the Legislature. In our opinion in this respect as well the learned Magistrate's order has to be revised and needs re-adjustment. Yet a third error into which the learned Magistrate has fallen is his failure to distinguish between the provisions of Cls. (4) and (5) of S. 488, Criminal P. C. Under sub-cl. (5) the Magistrate was entitled to cancel the previous orders of maintenance and render them of no effect for the future on a finding that the applicant in whose favour the order had been made was "living in adultery". Under sub-cl. (4) the learned Magistrate was entitled to refuse to enforce the maintenance orders on a finding that during the period in respect of which maintenance was sought to be recovered the applicant was "living in adultery".

Now while on the one hand the learned Magistrate was dealing with the applicant's prayer to issue process for the recovery of Rs. 262-11-9, he had also before him the opponent's applications dated 16th April 1937 and 26th April 1937 praying inter alia for cancellation of the orders granting maintenance, and as will appear from his order he purported to deal with the whole matter before him. In these circumstances the proper issues the learned Magistrate should have proposed for determination and should have determined were: (1) whether the existing orders for maintenance should be cancelled in whole or in part on the ground that the applicant was living in adultery; (2) whether the prayer for recovery of arrears of maintenance should be refused in whole or in part on the ground that the applicant was living in adultery during the whole or part of the period during which the arrears had accumulated. But this the learned Magistrate did not do. He ignored the opponent's prayer under sub-cl. (5) of S. 488, Criminal P. C., and by erroneously interpreting Proviso 2 to sub-clause (3) confined his finding on the question of the applicant "living in adultery" to the period of one year prior to the date of the applicant's application which was dated 3rd February 1937. As to this period however, he came to a definite finding that applicant was living in adultery and not entitled to receive maintenance. On this ground as well therefore the order of the learned Magistrate cannot be sustained. In dealing with the question of "living in adultery" the learned Magistrate would do well to refer to the case in 52 Bom 160[1] and the case in 1937 R L R 86.[2] We accordingly allow this revision application and set aside the order of the learned Magistrate and return the record of the case to him with directions to dispose of the matter according to law and in the light of the observations contained in this order. He will consider separately the claim of the minor son under the applicant's application; he will dispose of the opponent's prayer for cancellation of the orders of maintenance; he will come to a finding on the question of "living in adultery" as to the whole of the period to which the arrears of maintenance sought to be recovered by the applicant relate.

B.D./R.K. *Case remanded.*

## A. I. R. 1938 Sind 153

DAVIS J. C. AND DADIBA C. MEHTA J.

*Harchandrai Karamchand*—Applicant.

v.

*Municipality of Tando Adam* — Opponents.

Civil Revision Appln. No. 19 of 1938, Decided on 20th May 1938, from orders of District Judge, Hyderabad, Dated 23rd February 1938.

**Bombay District Municipal Act (3 of 1901), Ss. 22 and 11 (1) (c) (iv)—Orders of District Judge and Assistant Judge in appeal relating to amendment of list of voters – Orders are in capacity of persona designata and not as Court —Application against such orders does not fall under S. 115, Civil P. C.**

The whole scheme of Act 3 of 1901 is that in matters of dispute relating to Municipal election, while inquiry shall be held by a Judicial Officer as distinct from a Revenue Officer, that Judicial Officer shall hold an inquiry as a persona designata and not as a Court. It was not the intention of the Legislature that the words "judicial authority" in Cl. (iv) of sub-s. (1) (c) of S. 11 should be construed to mean a Court as such. There is no distinction between an inquiry relating to the validity of the election itself and objections regarding the lists of voters. Hence the orders of the District Judge and of the Assistant Judge in an appeal relating to the amendment of the list of voters are in the capacity of persona designata and therefore an application against such orders does not fall under S. 115, Civil P. C.: *A I R 1924 Mad 561 (FB) and A I R 1931 Nag 82 (FB), Expl.; Case law referred.* [P 155 C 1; P 156 C 1; P 157 C 1, 2]

Khanchand Gopaldas — *for Applicant.*
Kimatrai Bhojraj — *for Opponents.*

**Davis J. C.**—This is a revision application purporting to fall under S. 115, Civil P. C. against the orders of the District Judge of Hyderabad and of the Assistant Judge of Nawabshah, made in relation to an appeal of the applicant relating to the amendment of the list of voters in the Tando Adam Municipality, and the first question which falls to be considered is, whether this application can fall under S. 115, Civil P. C. at all, for, it is contended by the respondents that the appeal presented to the District Judge of Hyderabad and to the Assistant Judge of Nawabshah were both presented to them in their personal capacity, as persona designata, persons nominated personally under the Act to deal with matters such as the one before us. The District Judge returned the appeal for presentation to the proper Court, the Assistant Judge Nawabshah, who is named in the Sind Government Gazette as the person, being an Assistant Judge, empowered to hold inquiries in Municipal election cases, and the Assistant Judge, when the appeal was presented to him, returned it on the ground that as the appeal related to the wrong entry on the election roll of 250 persons, so there should be 250 appeals. But we are not concerned whether the orders of the District Judge or the Assistant Judge were right or wrong, once we are satisfied that they acted not as a Court but as persona designata under the Act.

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[1] In re Fulchand Maganlal, (1928) 15 A I R Bom 59=108 I C 24=29 Cr L J 314=52 Bom 160=30 Bom L R 79.

[2] Ma Mya Khin v. Godenho, (1936) 23 A I R Rang 446=1936 Cr C 864=165 I C 205=37 Cr L J 1115=1937 R L R 86.

Words similar to those we are now called upon to interpret have already been made the subject of a ruling of this Court in A I R 1934 Sind 110[1] where an application purporting to fall under S. 115, Civil P. C. was made against the order of the Assistant Judge, Larkana, acting under S. 19 (3) (b), Bombay Local Boards Act, and the relevant words of S. 19 are as follows :

> *19.* (1) If the validity of any election of a member of a local board, or the legality of any order or proceeding made or held under S. 18 is brought in question by any person qualified to vote at the election to which such question refers, such person may, at any time within fifteen days after the date of the declaration of the result of the election or the date of the order or proceeding, apply to the District Judge of the district within which the election has been or should have been held for the determination of such question.
>
> (2) An inquiry shall thereupon be held by a judge, not below the grade of an Assistant Judge, appointed by the Government either specially for the case or for such cases generally ; and such Judge may, after such inquiry as he deems necessary, pass an order confirming or amending the declared result of the election or the order of the Collector under S. 18, or setting the election aside. For the purposes of the said inquiry the said Judge may exercise any of the powers of a Civil Court, and his decision shall be conclusive. If he sets aside an election, a date shall forthwith be fixed and the necessary steps taken, for holding a fresh one. * * * * *

Now, with respect to these words, and in the matter of the argument directed to the question of persona designata, the learned Judges said :

> Now, these words really leave little scope for argument. They are the formula which has been used with very little variation in a number of similar pieces of legislation and they have been more than once the subject of judicial interpretation. The authorities all agree that the Judge who discharges this duty is a persona designata appointed by Government for a particular purpose and authorized for that purpose to exercise the powers of a Civil Court. The same authorities show that when quasi judicial functions are delegated to an officer ordinarily subject to the revisional powers of a High Court, he is not with reference to the delegated power necessarily subject to appellate or revisional authority. On this proposition, it is scarcely necessary to cite a great number of authorities, but the whole law on the subject has been carefully considered, and all the authorities reviewed in 55 All 1008.[2]

Now, it is true that the learned Judges were here referring to Section 19 of Act 6 of 1923, but these words are, with such trifling variations as are necessary to make them apply to Municipalities as against Local Boards, repeated in S. 22 of Act 3 of 1901, which is the Act that we are interpreting. In S. 22 (1) of this Act the words "the District Judge of the district within which the election has been or should have been held" occur, and in sub-s. (2) "and enquiry shall thereupon be held by a Judge . . , . appointed by the Governor-in-Council either specially for the case or for such cases" also occur as in Act 6 of 1923, while further directions as to the manner in which the Judge shall conduct the enquiry, declaring that for the purpose of the said enquiry the Judge may exercise any of the powers of the Civil Court and a declaration that his "decision shall be conclusive" are contained in similar words in sub-s. (2) of S. 19 of Act 6 of 1923 as in sub-s. (2) of S. 22 of Act 3 of 1901, the Act under which this Municipal election at Tando Adam, to which the present application relates, was held. So that, if we were now dealing in this application with words identical with or similar to words used in S. 22 of Act 3 of 1901, it could not properly be the subject of much argument or debate or really of any doubt at all.

But the learned advocate for the applicant has, and from his point of view, quite rightly seized upon a slight verbal difference that occurs in S. 22 and S. 11 of the Act under which the rules, the operation of which we have now to consider, were made, for the rules we have to consider are sub-rr. (5) and (6) of R. 9 of the Rules of Tando Adam Municipality, and although the rules are silent as to the section or sub-section under which they are made, it is clear that they are made, as the learned advocate for the applicant contends, under Cl. (4) of sub-s. (1) (c) of Section 11, which reads :

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[1] Hemandas Sataondas v. Bhai Nichaldas Pamandas, (1934) 21 A I R Sind 110=151 I C 89.

[2] Masoom Ali Khan v. Ali Ahmed Khan, (1933) 20 A I R All 764=147 I C 148=55 All 1008=1933 A L J 971.

> The Governor-in-Council shall from time to time, generally or specially for each Municipality make rules consistent with this Act, for determining the manner in which and the authority by whom any objection to such lists in regard to the names entered therein or omitted therefrom may be heard and decided, and to what judicial authority the appeals as to such entries and omissions shall lie.

And it is the words "judicial authority" which he has so heavily emphasized in his arguments and on which he has so heavily relied to distinguish this case from a case falling under S. 22, Bombay District Municipal Act, 1901, or the Sind reported case falling under S. 19, Local Boards Act, 6 of 1923. But we do not think that the use in this place and in this manner of these particular words make any difference at all, for we think the simple answer to the learned advocate's contention that "judicial authority" in Cl. (4) of sub-s. (1) (c) of Sec. 11, District Municipalities Act means "the Court" is that if the Legislature intended to mean "a Court" they would have said so, and there appears to us no doubt at all that the whole scheme of this Act 3 of 1901, as the whole scheme of Act 6 of 1923, is that in matters of dispute relating to Municipal election, while enquiry shall be held by a Judicial Officer as distinct from a Revenue Officer, that Judicial Officer shall hold an enquiry as a persona designata and not as a Court, so that the application against his order would not fall under S. 115, Civil P. C., which relates to Courts and not to persons subordinate to this Court.

Now, sub-rr. (5) and (6) of R. 9 of the Tando Adam Municipality are as follows :

> (5) A second appeal may be preferred to the District Judge from the decision of the appellate authority on any such application or reference ; but no such second appeal be entertained which is not presented within ten days from the date when the decision of the appellate authority was despatched to the appellant.
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> (6) The appeal shall be heard by a Judge, not below the second grade of an Assistant Judge, appointed by the Governor-in-Council either specially for the case or for such cases generally, and such Judge shall after such inquiry as he deems necessary pass a decision or order on such appeal. For the purpose of said inquiry the said Judge may summon and enforce the attendance of witnesses and compel them to give evidence as if he were a Civil Court, and he may also direct by whom the whole or any part of the cost of such inquiry shall be paid and such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure. The decision or order of the Judge shall be conclusive.

We have read the rules through with their misprints, but it appears to us there is no essential difference between these sub-rules (5) and (6) and sub-ss. (1) and (2) of S. 22 of Act 3 of 1901, this very Act, or sub-ss. (1) and (2) of S. 19 of Act 6 of 1923. But, the learned advocate for the applicant argues, it may be that under sub-rule (6) the Assistant Judge is a persona designata, although this he denies, but the District Judge under sub-rule (5) cannot be a persona designata because it is not even he who is to hear the enquiry under sub-rule (6) ; he is not specially or generally empowered in the Government Gazette ; most important it is, so he argues, that an appeal is to be preferred ; this is the first step ; therefore it is to be preferred to him as a Court and not as Judge or persona designata.

To this, we think, the answer is that sub-rules (5) and (6) must be read together, and that the words "District Judge" in sub-rule (5) are merely used to indicate the person to whom the appeal shall be preferred, and it is a matter of some interest that in the Bombay case in 35 Bom L R 89,[3] the learned Judges of the Bombay High Court in deciding that case noted that in S. 15, Bombay City Municipalities Act 18 of 1925, there was an amendment substituting the words 'District Court' for those of "District Judge" in the Act of 1901, and they said :

> The difficulty, in fact, had been in the case dealt with by Sir Norman Macleod in 28 Bom L R 519[4] that the application had been presented to the Clerk of the Court and not to the District Judge personally, and this was clearly the difficulty sought to be got over by the change. Sub-section (2) however is substantially what it was in the Act preceding the present one, and that is what we have to interpret. Under S. 15 an application has to be made to the District Court under sub-s. (1) and an enquiry has then to be held by the District Judge or Assistant Judge specially empowered under sub-s. (2) by Government. The same sub-section then goes on further to empower the specially empowered Judge to summon and enforce the attendance of witnesses and compel them to give evidence as if he were a Civil Court, and he may also direct by whom the whole or any part of the costs of such enquiry

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3. Jagmohan Surajmal v. Venkatesh Gopal, (1933) 20 A I R Bom 105 = 142 I C 378 = 35 Bom L R 89.
4. Gangadhar v. Hubli Municipality, (1926) 13 A I R Bom 344 = 94 I C 660=50 Bom 357= 28 Bom L R 519.

shall be paid ; and such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure and that the decision or order shall be conclusive. It seems to me that a clearer case of a persona designata is hard to frame. It is not the District Court, but one of its officers who has to be specially designated. Such officer does not exercise his ordinary powers in summoning and enforcing the attendance of witnesses, but those specially conferred upon him by the section.

Therefore even if in sub-rule (5) the words "District Court" and not "District Judge" had occurred, we should then even have held that a "District Court" used in that context meant the officer presiding in that Court, and that the words were used not to change the nature of those tribunals but to indicate the place in which the appeal was to be preferred and to be received. But this really is beside the point.

The words used in sub-r. (5), which we have to interpret, are "District Judge" and not "District Court" and there are a long series of Bombay cases which follow one consistent view, and that is that in these Municipal Acts the judicial officers referred to are referred to not as Courts but as persons, and the fact that in Cl. (4), sub-s. (1) (c) of S. 11 of Act 3 of 1901, the words "judicial authority" instead of "judicial officer" are used appears to us a matter of no importance. In 21 Bom 279[5] as long ago as in 1895, the Bombay High Court held that under S. 23, Bombay District Municipal Act (Amendment Act 2 of 1884) the District Judge holding an enquiry under Municipal elections acted as a persona designata and not as a Court. In 50 Bom 357[4] the Chief Justice held that a District Judge acting under S. 22 of Act 3 of 1901 was not acting as a Court but as persona designata. And in 25 Bom L R 463,[6] the Chief Justice held that the Chief Judge of the Small Cause Court of Bombay, acting under the powers granted him by S. 33, City of Bombay Municipal Act 1888, is a persona designata, and not a Court subordinate to the High Court, and in the course of their judgment, the Chief Justice referred to another case in 9 Bom L R 417,[7] a case under S. 33, City of Bombay Municipal Act, in which the Chief Justice said :

> But under S. 33 the Chief Judge has jurisdiction to determine the validity of a contested election, and so he is the tribunal appointed by the Act for that purpose. But where a special tribunal, out of the ordinary course, is appointed by an Act to determin equestions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive . . . Here not only is the Chief Judge appointed the tribunal, but it also is expressly provided that his order shall be conclusive and that every election not called in question in accordance with the provisions of S. 33 shall be deemed to have been to all intents and purposes a good and valid election.

In the Madras case in 38 Mad 581[8] the High Court held that a Magistrate deciding the competency or otherwise of a candidate for a Municipal election under the Madras City Municipal Act 3 of 1904, was not a Court subject to the appellate jurisdiction of the High Court within the meaning of that word, and they referred in that case to a judgment of the Privy Council in 11 Mad 26[9] at p. 34 in which the Privy Council held that even the expression "Civil Court" in S. 10 of Act 20 of 1863 does not import that the presiding officer is subject to the appellate authority of the High Court. Their Lordships of the Privy Council said :

> In the opinion of their Lordships the tenth section places the right of appointing a member of the committee in the Civil Court not as a matter of ordinary civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority, and with the best means of knowing the movements of local opinion and feeling and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the district and with all the surroundings.

The learned Judges of the Madras High Court then go on to say :

> We are of opinion that similar considerations are responsible for Local Government vesting in the Presidency Magistrate the discretion to pronounce an opinion on the competency or otherwise of a candidate for election.

And in view of the fact that the learned advocate for the applicant in the course of his arguments referred us to Halsbury's Laws of England, and Stroud's Judicial Dictionary, the following passage in this judgment may be of interest:

> A reference may be made to the functions of the Court as pointed out in Blackstone, pages 22

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[5] Balaji Sakharam Gurav v. Merwanji Naoroji, (1897) 21 Bom 279.

[6] R. S. Navalkar v. Mrs. Sarojini Naidu, (1923) 10 A I R Bom 421=73 I C 133=25 Bom L R 463.

[7] Bhaishankar v. Municipal Corporation of Bombay, (1907) 31 Bom 604=9 Bom L R 417.

[8] Vijiaraghavalu Pillai v. Emperor, (1915) 2 A I R Mad 360=25 I C 345=38 Mad 581=27 M L J 227.

[9] Minakshi v. Subramanya, (1888) 11 Mad 26=14 I A 160=5 Sar 54 (P C).

and 23 Fry L. J. in (1892) 1 Q B 431[10] at pp. 447 and 448 makes some general observations regarding the functions of a Court of law. Applying the tests mentioned by the Lord Justice, the Magistrate acting under the rules could not be regarded as a Court of law. In 9 Halsbury, p. 9, it is said: "Many bodies are not Courts, although they have to decide questions, and in so doing have to act judicially, in the sense that the proceedings must be conducted with fairness and impartiality."

We find it difficult to persuade ourselves that while the Legislature considered that an enquiry under S. 22 of Act 3 of 1901 would be properly and adequately conducted by an Assistant Judge as a persona designata an enquiry relating to the validity of the election itself, yet in a far smaller matter, objections regarding the lists of voters, the Legislature would have thought it necessary to adopt a different procedure, and to provide that objections to the lists should be heard not by a Judge as a persona designata but by a Judge as a Court. We ourselves can see no justification for such a distinction, either by reason of the words used or for any other reason.

But the learned advocate for the applicant has referred us to and has argued at greater length perhaps than the relevance of the ruling justified, a case, 47 Mad 369[11] and there is no doubt in that case that a Full Bench of the Madras High Court did decide that an election tribunal was a Court subject to the revisional jurisdiction of the High Court under S. 115, Civil P. C. But when that judgment is read through, it is perfectly clear that that decision was finally influenced by the fact that in rules themselves governing the enquiries into elections, the word "Courts" was used, "Courts" were referred to and "Courts" were clearly contemplated. That case therefore was decided, as a case of this nature must be decided, upon the words of the sections and the rules. Similarly, the case of the Nagpur Court cited to us is of little assistance in the decision of this case, because in A I R 1931 Nag 82,[12] it is clear from that judgment that the words of the Act itself referred to "Courts" and not to "Judges."

We think therefore that it is clear that it was not the intention of the Legislature that the words "judicial authority" in Cl. (iv) of sub-s. 1 (c) of S. 11 of Act 3 of 1901, should be construed to mean a Court as such. To do so, we think, would be to do violence to the words of that section read with other sections, to the intention of the Legislature and to the long practice of the Legislature in keeping matters relating to municipal elections for special tribunals, constituted, it is true, of judicial authorities, but not as Courts under the Act whereby the rights in dispute themselves were created. We think then, it is clear we have no power to interfere under S. 115, Civil P. C. and this revision application must be dismissed with costs accordingly.

D.S./R.K. *Application dismissed.*

## A. I. R. 1938 Sind 157

Lobo J.

*Khudabadi Amil Co-operative Credit Bank Ltd. Hyderabad, Sind* — Applicants.

v.

*Hyderabad Amil Co-operative Urban Bank Ltd. Hyderabad, Sind and another* — Opponents.

J. Misc. No. 305 of 1937, Decided on 6th May 1938.

**Bombay Co-operative Societies Act (7 of 1925), S. 59 (1) (b) — Award executed under S. 59 (1) (b) according to procedure provided for recovery of arrears of land revenue — Sale proceeds in hands of Collector are not liable to attachment at the instance of other creditor — Principle of S. 73, Civil P. C. cannot apply.**

Section 59 (1) (b), Bombay Co-operative Societies Act, provides for the execution of an award according to law applicable for the recovery of arrears of land revenue. S. 183 of the Bombay Land Revenue Code provides that the sale proceeds shall be applied towards payment of the arrears due by the defaulter. S. 184 provides that the surplus shall not except under an order of a Civil Court be payable to any creditor of the person whose property has been sold. [P 158 C 2; P 159 C 2]

Where therefore an award under the Bombay Co-operative Societies Act is executed under Sec. 59 (1) (b) of that Act according to the procedure provided for recovery of arrears of land revenue by the sale of the judgment-debtor's land, the sale proceeds in the hands of the Collector are not liable to attachment at the instance of other creditor of the person whose land is sold as the sale proceeds are specifically to be applied in payment of the claim of the person obtaining award. The principle of S. 73, Civil P. C., cannot be applied to such a case. [P 159 C 1, 2; P 160 C 2]

**Pahlajsing B. Advani**—*for Applicants.*

**Jamiatrai Lalchand** — *for Opponent No. 1.*

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[10] **Royal Aquarium and Summer & Winter Garden Society, Ltd. v. Parkinson, (1892) 1 Q B 431=61 L J Q B 409=66 L T 513=40 W R 450=56 J P 404.**

[11] **Parthasarathy Naidu v. C. Koteswara Rao, (1924) 11 A I R Mad 561=78 I C 98=47 Mad 369=46 M L J 201 (F B).**

[12] **Nilkanthrao v. Jagnath, (1931) 18 A I R Nag 82=131 I C 424=27 N L R 61 (F B).**

**Order.** — This is an application under O. 21, R. 58, Civil P. C. which arises in the following circumstances. The Khudabadi Amil Co-operative Credit Bank Ltd. of Hyderabad Sind, which I will hereafter refer to as the applicant Bank, obtained an award under the Bombay Co-operative Societies Act 7 of 1925 for a sum of Rupees 2000 costs and interest against certain persons one of whom was Hashmatrai Navalrai Advani, opponent No. 2. The applicant Bank after obtaining a certificate from the Registrar of Co-operative Societies under S. 59 (1) (b), Co-operative Societies Act applied to the Collector of Karachi for recovery of the amount of the award. This was in the years 1929 and 1930. The proceedings after the application to the Collector appear to have been for some reason or other of a protracted nature, but ultimately on 12th June 1937 certain agricultural land belonging to Hashmatrai Navalrai Advani was sold and a sum of Rs. 2116-6-0 was realized and came into the hands of the Collector. About this time the Hyderabadi Amil Co-operative Urban Bank also obtained an award against certain persons inter alia Hashmatrai Navalrai Advani, opponent No. 2, under the Bombay Co-operative Societies Act. This Bank, which I will hereafter refer to as the opponent Bank, obtained a certificate from the Registrar of Co-operative Societies under S. 59 (1) (a), Co-operative Societies Act, and on 1st July 1937 applied to this Court for recovery of the amount in execution. They sought execution for a sum of Rupees 2026-13-0

> by attachment of the amount in the hands of the Collector, Karachi, being the sale proceeds of the lands of defendant 3 sold in execution of Khudabadi Amil Co. Bank Ltd. of Hyderabad against Hashmatrai Navalrai under O. 21, R. 52, Civil Procedure Code.

A writ of attachment was issued on 2nd July 1937. In the present application the applicant Bank seeks to raise the attachment on the sum of Rs. 2116-6-0 in the hands of the Collector of Karachi levied by the opponent Bank on the following ground which is embodied in para. 7 of their application :

> The applicants submit that the said sale proceeds are not liable to attachment at the instance of the opponents as the net sale proceeds are to be specifically applied in payment of the claim of the applicants and the surplus, if any, can be claimed by the opponents under the provisions of the Bombay Land Revenue Code.

For the opponent Bank it has been contended that there is no substance in the application of the applicant Bank. The case, it is contended by the learned advocate, is parallel to the ordinary case where a decree-holder in a Civil Court in execution of his decree attaches and brings to sale an immovable property and other decree-holders apply for rateable distribution after the sale proceeds have been realized and received by the Court. It is contended that there is no reason whatever why the position should be different merely because the applicant Bank in this case has obtained by means of a special procedure execution through the Collector instead of through the instrumentality of the Civil Court. The learned advocate contends that S. 73, Civil P. C., is clearly applicable by analogy and the opponent Bank is entitled to rateable distribution in regard to the money in the hands of the Collector. Now S. 59, Bombay Co-operative Societies Act 7 of 1925 reads as under :

> *59.* (1) Every order passed by a liquidator under S. 50, or by the Registrar or his nominee or arbitrators on disputes referred to him or them under Cl. (g), S. 50 or under S. 54 or under sub-s. (3), S. 54-A, every order passed in appeal under S. 56 and every order passed by the Provincial Government in appeal against orders passed under Ss. 50, 54 or sub-s. (3), S. 54-A shall, if not carried out, be executed . . .
>
> (a) on a certificate signed by the Registrar or a liquidator by any Civil Court in the same manner as a decree of such Court ; or
>
> (b) according to the law and under the rules for the time being in force for the recovery of arrears of land revenue, provided that any application for the recovery in such manner of any such sum shall be made to the Collector and shall be accompanied by a certificate signed by the Registrar or by an Assistant Registrar to whom the said power has been delegated by the Registrar.

The applicant Bank acting under Cl. (b), sub-s. (1) of this section applied to the Collector for the recovery of the amount awarded to him and filed the certificate signed by the Registrar. Under this Cl. (b) he is entitled to recover, "according to the law and under the rules for the time being in force, for the recovery of arrears of land revenue." The reference in S. 59 is obviously to the Bombay Land Revenue Code. S. 187, Bombay Land Revenue Code provides inter alia that

> all sums declared by this or by any other Act or Regulation at the time being in force or by any contract with the Secretary of State for India in Council to be leviable as an assessment, or as a revenue demand, or as an arrear of land revenue, shall be levied under the foregoing provisions of this chapter and all the foregoing provisions of this chapter shall, so far as may be, be applicable thereto.

This section appears in Ch. 2, Bombay Land Revenue Code and clearly makes applicable all the provisions of Ch. 2 as far as they may be applicable. Sale of immovable property under the Land Revenue Code is provided for in Ch. 2, Ss. 173 to 186. S. 173 provides for the deposit to be made by a purchaser in the case of a sale of immovable property; S. 174 provides for the payment of the balance of the purchase money; S. 175 deals with a case of default in payment of the balance of purchase money; S. 176 makes the purchaser liable for any loss by re-sale; Sec. 177 requires a notification to be published of a re-sale consequent upon default of payment of purchase money; S. 178 provides for an application to set aside a sale on the ground of some material irregularity, mistake or fraud; S. 179 provides for confirmation or setting aside of a sale and S. 180 for the refund of deposit of purchase money. S. 183 reads as follows :

> When any sale of moveable property under this chapter has become absolute, and when any sale of immovable property has been confirmed, the proceeds of the sale shall be applied to defraying the expenses of the sale and to the payment of any arrears due by the defaulter at the date of the confirmation of such sale, and recoverable as an arrear of land revenue, and the surplus (if any) shall be paid to the person whose property has been sold.

Section 184 reads as follows:

> The said surplus shall not, except under an order of a Civil Court, be payable to any creditor of the person whose property has been sold.

It is upon the provisions of Ss. 183 and 184 that the learned advocate for the applicant has relied in support of the contention raised by him in para. 7 of the application that the sale proceeds in this case are not liable to attachment at the instance of the opponent Bank and are to be applied specifically in payment of the claim of the applicant Bank. The matter appears to be res integra, for neither have the learned advocates been able to place before me any decided case on the point, nor have I myself been able to come upon any such case. The matter must then be decided upon a construction of Ss. 183 and 184, Bombay Land Revenue Code and the general intention of the Legislature in providing that awards under the Bombay Co-operative Societies Act may be enforced and moneys recovered as arrears of land revenue under the provisions of the Land Revenue Code. If Ss. 183 and 184, Bombay Land Revenue Code are carefully examined. there can, to my mind, be no doubt that the applicant Bank in this case must succeed and that the attachment levied by the opponent Bank on the moneys in the hands of the Collector of Karachi must be raised. S. 187, Land Revenue Code, as I have said above, makes applicable to a sale under Ch. 2 all the provisions of that Chapter. S. 183, Land Revenue Code specifically provides that when an immovable property has been sold and the sale thereof confirmed the proceeds of the sale shall be applied : (1) to defraying the expenses of the sale, (2) to the payment of any arrears due by the defaulter at the date of the confirmation of such sale and recoverable as an arrear of land revenue, (3) the surplus, if any, to be paid to the person whose property has been sold. S. 184 makes it further clear that 'the said surplus' referred to in S. 183 shall not be payable to any creditor or to the general body of creditors of the person whose property has been sold except under an order of a Civil Court. I think the language of these two sections read together is clear and unambiguous and when applied to the facts of the case before me, must work out the following result. Immovable property belonging to opponent No. 2, Hashmatrai Navalrai Advani has by reason of S. 59 (1) (b), Bombay Co-operative Societies Act been sold under the provisions of Ch. 2 of the Bombay Land Revenue Code according to the law and under the rules for the time being in force for the recovery of arrears of land revenue; the sale has been confirmed and the sale proceeds are to be applied, in conformity with the provisions of Ss. 183 and 184 (1) to defraying the expenses of the sale, (2) to payment of the amount for which the property was sold as if that amount were arrears due by the defaulter at the date of the confirmation of the sale and recoverable as an arrear of land revenue and (3) the surplus, if any, is to be paid to opponent No. 2 and not to his creditors except under an order of a Civil Court. To my mind no other reasonable interpretation can be placed upon the wording of these two sections.

But even apart from the language of the sections referred to such an interpretation appears reasonable and proper. What was the intention of the Legislature in providing in S. 59 (1) (b) for recovery of the amount of an award under the provisions of the Land Revenue Code if not to place the holder of such an award in the same position as Government itself in the recovery of its dues under the Land Revenue Code and under various enactments such as the Bombay Abkari Act which contain provisions for the recovery of the dues of Government in the shape of license fees, etc. through the Collector under the provisions of the Land Revenue Code. The intention clearly appears to have been to give the holder of such an award a preferential claim over the proceeds of a sale carried out under the provisions of the Land Revenue Code to other ordinary creditors. It could not have been as I at one stage thought merely to provide an alternative remedy because no such provision was necessary. If the Civil Court was asked to execute an award under the Bombay Co-operative Societies Act by sale of agricultural land belonging to the debtor that Court itself had the power to transfer the award for execution to the Collector under Sch. 3, Civil Procedure Code.

The learned advocate for the opponent Bank has tried to unnecessarily complicate a simple question by reference to the case in 26 Mad 230[1] and to the judgment of Aston A. J. C. of our Court in A I R 1932 Sind 121[2] in the latter of which cases it was held that a sale by Government of the land of an abkari licensee for recovery of abkari revenue is subject to a prior mortgage on the land. It appears to me that these rulings have no bearing on the point before me for decision. There is no question here of any mortgage on the land which has been sold for the recovery of dues of the applicant Bank and no useful purpose can therefore be served by referring to such cases. S. 184 of the Bombay Land Revenue Code specifically provides what in the case of a sale of immovable property under Ch. 2 is to be available to the general body of creditors of the person whose property has been sold. It is the surplus after defraying the expenses of the sale and the payment of moneys due by the defaulter at the date of the confirmation of such sale and recoverable as an arrear of land revenue.

There can be no question as to the applicability of S. 73, Civil P. C., for that section distinctly refers to assets held by a Court and applications made by more decree-holders than one for the execution of decrees for the payment of money passed against the same judgment-debtor. Indeed it was not attempted to be argued that S. 73, Civil P. C., applied to this case as such. The only argument urged was that the principle of the section applied by analogy. To my mind the argument has no force in view of the specific provisions of S. 59 (1) (b), Bombay Co-operative Societies Act, and the provisions of Ss. 187, 183 and 184 of the Bombay Land Revenue Code. On these grounds I grant the application of the applicant Bank and order the attachment levied by the opponent Bank on the moneys in the hands of the Collector of Karachi to be raised. The applicant to have the costs of this application.

D.S./R.K. *Application granted.*

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## A. I. R. 1938 Sind 160

LOBO J.

*In re Madhu Krishna* — Applicant.

Misc. Appln. No. 74 of 1937, Decided on 12th May 1938.

**(a) Provident Funds Act (1925), S. 5—Estate of deceased.**

Provident fund and gratuity do not form part of a deceased's estate : *A I R 1936 Mad 477, Rel. on.* [P 161 C 1]

**(b) Succession Act (1925), S. 383 — Succession certificate—Grant of, on untrue allegations and fraudulent concealment—Grant can be revoked.**

Where a succession certificate is obtained on behalf of a minor by his next friend on allegations which were false as to the deceased's property and on allegations which in law would not justify the grant and by fraudulent concealment of material facts from Court, the grant can be revoked. [P 162 C 1]

Tarachand Chandanani — *for Sonoo Kundelik.*

Goverdhandas T. Vazirani—*for Shankar Vithoo.*

**Lobo J.**—On 22nd December 1937 on an application for a succession certificate under Act 39 of 1925 by Madhu son of Krishna a minor through his next friend Sonoo son of Kundelik, a succession certificate was granted to the minor by his next friend. The order reads :

> Certificate to issue on the next friend executing a bond for Rs. 2500 with one or more sureties in the like amount.

It transpires that in this case the security taken was by a personal bond of the next friend and one surety. On 25th March 1938 an application was filed by one Shankar Vithoo for revocation of this certificate under the provisions of S. 383, Succession Act 39 of 1925 and it is this application which is before me at present for disposal. Now S. 383, Succession Act, provides that a certificate granted may be revoked inter alia for any of the following causes : (a) that the proceedings to obtain the certificate were defective in substance; (b) that the certificate was obtained fraudulently by the making of a false suggestion or by the concealment from the Court of something material to the case ; (c) that the certificate was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant thereof, though such allegation was made in ignorance or inadvertently. The learned advocate for the applicant argues that his case falls under Cls. (a), (b) and (c) of S. 383. The proceedings, he argues, to obtain the certificate were defective in substance in that the certificate prayed for was to enable the applicant to recover amounts forming part of the estate of the deceased. Three items have been shown in the schedule attached to the application out of which the items of provident fund and gratuity recoverable from the Port Trust do not form part of the estate of the deceased Krishna Kundelik. The learned advocate has referred me to the provisions of S. 5, Provident Funds Act, and to the case in 59 Mad 855.[1] It would appear that neither the provident fund nor the gratuity items 2 and 3 in the schedule attached to the application form any part of the estate of the deceased. The learned advocate contends and with considerable force that in so far as the inclusion of these items in the application is concerned the case falls within Cl. (a) of S. 383 and the proceedings to obtain the certificate were defective in substance. The learned advocate for the applicant further contended that by including these items in the schedule attached to the application there was being made to the Court an untrue allegation of fact essential in point of law to justify the grant of a certificate and that even if the allegation was made in ignorance or inadvertence it still falls within the purview of Cl. (c) of S. 383.

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[1] Kadir Mohideen Marakkayar v. Muthukrishna Ayyar, (1903) 26 Mad 230=12 M L J 368.

[2] Ahmed Haji Ismail v. Parmanand Meghraj, (1932) 19 A I R Sind 121=139 I C 47=26 S L R 390.

It appears to me again that there is considerable force in this contention. The items of provident fund and gratuity recoverable from the Port Trust form more than two thirds of the estate shown in the schedule attached to the application. The learned advocate has also pointed out to the Court that there has been concealment of material facts from the Court falling within the purview of Cl. (b) of Sec. 383. The learned advocate contends that Sonoo Kundelik who acts as next friend of the minor is a convict and that besides being an improper person to act as next friend of the minor in the proceedings he has fraudulently filed a schedule of debts which is Sch. B attached to the application showing debts due by the deceased to the extent of Rs. 1494-2-9, which debts, he argues, are either bogus or largely exaggerated. He therefore contends that the case also falls under Cl. (b) of S. 383, and that the certificate has been obtained fraudulently by making false suggestions and by concealing from the Court facts material to the case.

To satisfy myself on this particular aspect of the case, I have examined Sonoo Kundelik and the result of his examination convinces me that there is considerable substance in the allegations made by the learned advocate for the applicant. Sonoo Kundelik has denied that he was convicted and sentenced to imprisonment for an offence of theft in about the year 1913. He admits that he was in the service of the Karachi Port Trust for 15 years but says he left Karachi 20 years ago. His own explanation as to why he left Karachi and Port Trust service is that he was ill. Evidence has been given by one Laxman Bhikaji Head Time-Keeper of the Karachi Port Trust who has been in Port Trust service for the past 28 years and who has deposed that he is personally aware that Sonoo Kundelik along with 2 or 3 others was in 1913 concerned in a theft of piece-goods and was convicted and sentenced to rigorous imprisonment in Karachi. This witness appears to me to be a reliable person. He has been in Port Trust employ for 28 years and is drawing a salary of Rs. 145 a month. I have every reason to believe that his evidence is true and that Sonoo's denial is disingenious.

Sonoo's cross-examination with regard to Sch. B has brought out the important fact that he has shown these items of debts amounting to nearly Rs. 1500 merely upon the statements of his nephew and his son; that he has no documents in his possession showing the existence of these debts; that he never approached any one of the creditors shown in Sch. B to ascertain whether the debts shown in the schedule are due to him and whether he had any document in support of his claim. The largest debt shown in the schedule is one of Rs. 260 said to be due to Mahadev Keshav and this man Sonoo admits is his nephew who is responsible for the list of debts in Sch. B. It appears to me that this is a case in which the certificate granted by the Court must be revoked. The proceedings to obtain it were defective in substance. It has been obtained fraudulently by making a false suggestion and by the concealment from the Court of material facts. It has been obtained by the making of untrue allegations of fact essential in point of law to justify the grant of a certificate. I accordingly revoke the certificate granted on 22nd December 1937 to Madhu son of Krishna minor through his next friend Sonoo Kundelik and this order of revocation should be communicated to the Karachi Port Trust and the Gresham Life Insurance Co. There will be no order as to costs.

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[1] Mon Singh v. Mothi Bai, (1936) 23 A I R Mad 477=162 I C 956=59 Mad 855=71 M L J 790.

B.D./R.K. *Certificate revoked.*

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## * A. I. R. 1938 Sind 162

**SPECIAL BENCH**

DAVIS J. C., DADIBA C. MEHTA AND LOBO JJ.

*Mrs. Feliciana Hope* — Petitioner.

v.

*Douglas W. Hope* — Respondent.

*Miss. Shelverton* — Co-Respondent.

Civil Ref. No. 106 of 1937, Decided on 25th April 1938.

*** Divorce Act (1869), S. 14 Proviso — Husband living in adultery treating wife with cruelty and deserting her — Wife marrying Mahomedan husband believing thereby that her marriage with former husband would be dissolved and leading respectable life—Discretion under S. 14 held should be exercised in her favour.**

Where a woman who has been treated with gross cruelty and has been deserted by a husband guilty of habitual adultery under the most aggravating circumstances and who, after her husband had left the place where he had in fact long deserted her, married a Mahomedan husband according to Islamic law believing that by so doing and by herself becoming a Mahomedan, her marriage with her Christian husband would ipso facto be dissolved, it cannot be said, merely because she was wrongly advised as to the law, that exercising discretion in her favour and granting her decree nisi would encourage immorality. Hence, discretion under S. 14 should be exercised in her favour. [P 164 C 1]

Santdas Idanmal — *for Petitioner.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.** — We have before us for making absolute a decree nisi of this Court as a High Court made by a Judge of this Court as a High Court under S. 16, Divorce Act, and as more than the prescribed period of six months has elapsed this decree comes properly before us. This case is a case of adultery and desertion and also of gross cruelty towards the petitioner by the husband, one Douglas W. Hope, and although the learned Judge in his judgment has not raised specific issues of adultery and desertion, or adultery and gross cruelty, and, indeed, the petition is itself not drafted with any great precision, we have no doubt that the learned Judge by his judgment intended to find that there was adultery and desertion and adultery and gross cruelty, and that the petitioner was entitled to the leniency which S. 14 of the Act permits the Court in proper circumstances to show towards an erring petitioner, and that he found, and intended to find, that the petitioner was entitled to her decree nisi. We ourselves think this is a case where the petitioner has been very cruelly treated, where she has submitted for some years, because she was helpless, to most abominable conditions, her husband actually living in the conjugal house with another woman and having children by that other woman, refusing to associate with the petitioner, who was his lawful wife, as a wife at all, and then leaving her, when he was transferred from Sukkur, to her own devices to support herself as best she might. It was not then surprising that she sought protection and marriage with another man who would treat her in a less brutal manner. That being so, we find it very difficult to hold, that merely because she was wrongly advised as to the law, because she was wrongly advised that she could lawfully marry a Mahomedan, the man with whom she went to live after the husband had left Sukkur, and whom she believed she had married, after she had herself become a Mahomedan, it is possible to say that in granting her petition we would do anything which may be said probably to encourage immorality.

The petitioner in this case is one Feliciana Hope, and it is now clear from the evidence on the record that she was married on 13th April 1920 according to the rites of the Catholic Church to one Douglas W. Hope. After her marriage, she lived for some time with this Douglas Hope at Jhansi and then at Lahore where this Douglas Hope was employed as Loco Foreman on the North Western Railway. In 1929 he was transferred from Lahore to Sukkur. During the period of her marriage, 1920-29, the petitioner and the respondent had lived as husband and wife and there were five children from that marriage, of whom four were living when the parents removed to Sukkur. But soon after they came to live at Sukkur, the respondent introduced in his house a voung woman named Shelverton and he lived with this young woman in the house as his wife, giving the petitioner one room and refusing to associate with the petitioner as her husband. The petitioner protested, as one may well infer she would protest, against this scandalous treatment of herself, and she says, as one may well believe to be the truth, that her protests were met with cruelty. This state of things persisted till October 1932 when the respondent was transferred again to Lahore and he went with this co-respondent—this woman Shelverton—to Lahore taking with him his children and leaving his lawful wife, the petitioner, to do as best she might. Apparently she knew one Abdul Razak who lived opposite and she married him according to Islamic law believing that by so doing and by herself becoming a Mahomedan, her marriage with her Christian husband would ipso facto be dissolved. Thus in December 1932, she believed she had become a Mahomedan and believed she had lawfully married a Mahomedan according to the rites of the Mahomedan religion. In this however she was, in law, mistaken; but since that time she has lived with him as his wife and she had two children by him. This was at Sukkur, but thereafter the petitioner and this Abdul Razak were transferred to Karachi and she discovered that her marriage with Abdul Razak was not a valid marriage because her first marriage had not been lawfully dissolved, and she petitioned the District Court at Sukkur in Suit No. 6 of 1936 for the dissolution of her marriage with her Christian husband on grounds which she has made the basis of her subsequent petition to this Court. But the District Judge, though he makes it clear that he would, if it were in his power, exercise his discretion in favour of the petitioner, was unable to do so because there was not upon record sufficient evidence to prove the marriage. Therefore her petition was dismissed, but she subsequently on 15th January 1937 brought another petition to this Court as a High Court, as she was entitled under S. 13 of the Act read with S. 3 to do, and it is upon this petition that the learned Judge of this Court granted her a decree nisi which is now before us to be made absolute.

It is clear that the learned Judge was justified in finding that the Court had jurisdiction and that both adultery and desertion and gross cruelty were proved. The only point that we have left seriously to consider is whether the learned Judge was justified in exercising his discretion under S. 14, Divorce Act? It is undoubted that the petitioner from 1932 was living in adultery with Abdul Razak whom she believed to be her husband; therefore under the Proviso to S. 14 this Court is not bound to pronounce a decree in her favour, and indeed, it should not do so, according to the rulings, if it is satisfied that by so doing, it will encourage in any way immorality. But we do not think it is possible to say that by making this decree absolute, we should in any way encourage immorality. On the contrary, if we do not make this decree absolute, we should compel the petitioner who has been most cruelly and shamefully treated by her husband to depart from the ways of public morality and decency and indefinitely live in a state of immorality with this man, Abdul Razak. This of course would be no concern of ours if she were not entitled to the discretion of the Court in her favour, but we think the treatment of her by her husband has been so outrageous as to call for leniency upon our part. It may well be said that the desertion started long before 1932, that it started in 1929 when this respondent brought another woman into his house and refused to live with his wife at all. The fact that he gave her one room for shelter and her food and possibly sufficient for the purchase of clothes does not appear to us to make his conduct any the less desertion, than if he had actually driven her by force and violence out of the house. We do not think the husband is entitled to take advantage, and, in fact, this husband does not endeavour to take advantage, of the fact that the woman has not left him, so that he may say that he has not deserted her. In any case, he obviously cannot be allowed to take advantage in any way of his abominable and cruel treatment of his wife.

We have had cited to us certain cases in which the Courts have exercised their discretion under the Proviso to S. 14 in favour of women who have taken to a life of prostitution. In this case this woman has not taken to a life of prostitution and therefore fortunately it is not necessary for us to decide whether if she had taken to a life of prostitution, we would have condoned her misconduct under the particular circumstances of this case. All we are asked now is to exercise our discretion in favour of a woman who has been treated with gross cruelty and has been deserted by a husband guilty of habitual adultery, under the most aggravating circumstances, and who, after her husband had left the place where he had in fact long deserted her, married, as she thought, in good faith, another husband and endeavoured to lead a decent and self-respecting life. We cannot see how by exercising our discretion in her favour it can be said we have done anything in any way to encourage public or, indeed, private immorality. We think therefore that this is a case where we should exercise our discretion in favour of the petitioner, that she has proved all the facts necessary to entitle her to a divorce and to our discretion in her favour, and that this is a case where we should make the decree absolute. We therefore make the decree nisi passed by the learned Judge and dated 30th April 1937 absolute. Order accordingly. The petitioner is entitled to costs throughout.

D.S./R.K. *Decree nisi made absolute.*

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## * A. I. R. 1938 Sind 164

DAVIS J. C. AND HAVELIVALA J.

*Chuharmal Nirmaldas and another*
Applicants.

v.

*Emperor.*

Criminal Revn. Appln. No. 276 of 1937, Decided on 8th March 1938, to revise convictions and sentences confirmed by Additional Sess. Judge, Hyderabad, D/- 11th November 1937.

**(a) Criminal P. C. (1898), S. 239—'Offence' includes minor offences.**

The term 'offence' under S. 239 includes minor or alternative offences within the meaning of Sec. 235 (2) or S. 236: *33 Bom 221, Rel. on.*[P 165 C 2]

**(b) Criminal P. C. (1898), S. 239 — Three transactions of same kind cannot be tried together—Meaning of transaction explained.**

Under Cl. (c) of S. 239, Criminal P. C., three offences of the same kind may be tried at once, but not three transactions of the same kind: *A I R 1917 Sind 40, Ref.; A I R 1932 Bom 277, Rel. on.* [P 165 C 2 ; P 166 C 1]

The meaning and nature of transaction is a question which commonsense and the ordinary use of language must decide on the particular facts of the case : *A I R 1936 Bom 154, Rel. on.* [P 166 C 1]

*** (c) Criminal P. C. (1898), S. 239 — Exclusive nature of different clauses explained — More than one person charged and tried in same trial—Case must come under some clause of S. 239.**

The clauses of S. 239, Criminal P. C., are mutually exclusive in the sense that they cannot be added one to another so as to bring some of the persons charged under one clause and some under another and so to put them upon their trial all together at one and the same time ; but they are not mutually exclusive in the sense that persons accused of an offence and persons accused of abetment or of an attempt can only be tried at one trial because their case comes under Cl. (b). But if more than one person are to be tried and charged together, their case must be brought within one of the clauses of Sec. 239 before they can be tried together, or the trial is contrary to law. [P 167 C 1]

**(d) Charge—Misjoinder— Defect is vital and vitiates whole trial** (*Obiter.*)

It makes no difference whether the acts charged are fortyone, fourteen or four, provided they exceed the statutory number and are not covered by the provisions of S. 234, Criminal P. C., or the following provisions relating to the joinder of charges ; the misjoinder of charges is a vital defect in the trial which cannot be cured by the provisions of S. 537, Criminal P. C. : *25 Mad 61 (P C), Foll.; A I R 1927 P C 44, Explained.*[P 168 C 2]

D. N. O'Sullivan and P. S. Shahani — *for Applicants 1 and 2, Respectively.*

Partabrai D. Punwani — *for the Crown.*

**Davis J. C.** — In the proceedings out of which this revision application arises, three accused persons, Chuharmal, Tekumal and Lokumal were jointly charged with a multiplicity of offences under different Sections of the Bombay Abkari Act and the Opium Act, and in the case of Chuharmal also with abetment under Sec. 109, I. P. C., and sentenced to various terms of imprisonment and fines. For instance, Chuharmal, accused 1, was sentenced to three months' rigorous imprisonment and a fine of Rs. 200 under Cl. (a) and (i) of sub-s. (1), S. 43, Bombay Abkari Act, read with Ss. 3-A, 45-C and 47 of the same Act and S. 109, Penal Code, the sentences of imprisonment to be concurrent. He was sentenced to three months' rigorous imprisonment and a fine of Rs. 600 under S. 9, Opium Act. In all he was sentenced to six months' rigorous imprisonment and a fine of Rs. 1000 or six months' rigorous imprisonment in default. In much the same way with the difference that there was no conviction for abetment under S. 109, I. P. C., the accused Tekumal was sentenced under the several Sections and Acts to a fine of Rs. 200 in all, mercy being shown to him as he was the informant; and in much the same way, the accused Lokumal was sentenced under the several Sections and the several Acts to a total of four months' rigorous imprisonment and a fine of Rupees 400. In the appeal, the First Additional Sessions Judge of Hyderabad confirmed the convictions and sentences of Chuharmal and Lokumal who appealed and dismissed the appeals. The accused Tekumal did not appeal nor has he applied in revision to this Court. We must however deal with the case of all three accused as we must deal with the case and judgment as a whole.

In revision, in argument before us the first and principal objection taken is that the trial is bad on the ground of the misjoinder of charges. It is argued firstly, that the accused are charged with many acts of possession and sale between the months of October 1935 and 14th January 1936, these charges being supported by accounts Exs. 11, 12 and 13, which purport to show possession and sales over a period of months, but that each act of possession is a separate offence under S. 43 (1) (a), Abkari Act, and that each act of sale is a separate offence under S. 43 (1) (i), Abkari Act, and that, in any case, no one accused could be tried at the same time for more than three offences of the same kind within 12 months. Moreover, it is argued, offences relating to the possession and sale of opium cannot be tried at the same time with offences relating to the possession and sale of foreign liquor for they are not offences of the same kind; they are offences under different Acts.

It is strange that this question of misjoinder did not attract the attention of the Additional Sessions Judge apart from its mention in the memorandum of appeal. The learned advocate for the applicants states that it was raised and argued, but the judgment of the Appellate Court is silent on the point, and the Advocate-General who appears for the Crown states that he can only admit that the misjoinder of charges in this trial is such that S. 537, Criminal P. C., will not avail to cure an irregularity of these dimensions, and he states that if the prosecution had been content to charge the accused with offences arising from possession of the illicit opium, charas and brandy found when the premises were raided on 14th January 1936, there would have been no misjoinder, for the possession of the different articles at one and the same time would have been part of the same transaction; a conviction was assured and an adequate punishment could have been imposed; or the accused could have been tried for the different offences under the different Acts at separate trials. It is however clear that the convictions of the accused must be set aside, and as we have set aside the convictions on grounds other than that of merit, we direct them to be re-tried either separately or jointly at one or more trials, as the case may be, in accordance with the provisions of the law, as we shall explain it, on all or any of the charges the Crown may think it is in the public interest proper again to prosecute the accused. We wish however to make it clear that nothing we may say in this judgment is intended in any way to fetter the discretion of the Government not to proceed with the cases against the accused if it thinks proper.

The three accused have been tried jointly for several offences at one trial. Therefore, it is clear that the relevant Section of the Criminal Procedure Code to which reference should have first been made by the the lower Courts is S. 239, Criminal P. C., because we are dealing here with more persons than one being charged and tried together. S. 239 (c) relates back to S. 234, but there is no reason also to suppose that the term "offence" under S. 239 does not include minor or alternative offences within the meaning of S. 235 (2) or S. 236, as "offence" under S. 234 was held to include a minor or alternative offence within the meaning of S. 235 (2) or 236 by the Bombay High Court in 33 Bom 221.[1] But whether S. 234 or S. 239, Criminal P. C., is to be applied, the distinction to be borne in mind to prevent errors is the distinction between offences and transactions, subject to the overriding principle that an accused must not be prejudiced in his trial by a multiplicity of charges. Under Cl. (c) of S. 239, Criminal P. C., three offences of the same kind may be tried at once, but not three transactions of the same kind: 10 S L R 192.[2]

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[1] In re Bal Gangadhar Tilak, (1909) 33 Bom 221 =2 I C 277=10 Bom L R 978.

In 34 Bom L R 590[3] the Bombay High Court set aside the conviction of an accused person who had been charged and convicted at one trial of one offence and one transaction, on the ground that while S. 235, Criminal P. C., permits the trial at the same time of three offences, it does not permit the trial of more than one transaction. To the same effect is the case in 49 Bom 892,[4] but that case is of interest as referring to the judgment of the Bombay High Court in 33 Bom 221,[1] which is authority against the argument advanced before us that the Sections, which constitute exceptions to the general rule laid down in S. 233, Criminal P. C., namely, that for every distinct offence there shall be a separate charge and each such charge shall be tried separately, are all mutually exclusive, for in that case the Judges said:

> We find it difficult to believe that the Legislature intended that a joint trial of three offences under S. 234 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of. For these reasons we think that the exceptions are not necessarily exclusive; and that Ss. 235 (2) and 236 may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

But this ruling leaves untouched the principle that while three offences of the same kind committed within the year may be tried at the same trial only one transaction can be so tried. The meaning and nature of transaction is discussed at length by Broomfield J. in 60 Bom 148.[5] It is, as he says, a question which commonsense and the ordinary use of language must decide on the particular facts of the case. There is however no doubt in our minds that the charges as supported by the evidence in this case, Exs. 11, 12 and 13, relate to many more than three acts of possession and many more than three acts of sale, each a separate transaction, within the meaning of Sec. 239, Criminal P. C. Moreover, these accused have been charged with and convicted of offences under Ss. 45 and 43, Abkari Act, which are offences punishable under different Sections of the Act and for offences under the Opium Act, that is to say, for offences under different Acts. Reference however may be made to the case of this Court in A I R 1933 Sind 255[6] as illustrating circumstances under which an accused person might be convicted and tried at one trial of offences under Ss. 43 and 45, Abkari Act. In this case however the joint trial of all these offenders for all these offences could only be valid if brought within S. 239 (d) or S. 239 (c), Criminal P. C., interpreted, if need be, as S. 234 is interpreted in 33 Bom 221[1] or under some other clause of S. 239, Criminal P. C., and the prosecution do not now contend that this could be done. This same case in A I R 1933 Sind 255[6] also explains the application of S. 47 and by analogy S. 3-A, Abkari Act. In that case one Jethanand was charged firstly, with selling liquor off the hotel premises, secondly, with serving liquor without food in contravention of Cl. (6) of his license under Ss. 47 and 43 (1) of Bombay Act 5 of 1878, and thirdly, with having allowed Bhagwandas to conduct this business without a nokarnama in contravention of cl. (2) of his license under S. 45, Bombay Act 7 of 1878. In appeal, the Court acquitted him of the charge under S. 45 on the ground that it was not proved that the accused had violated any term or condition of his license and confirmed the conviction and sentence for an offence under S. 43 (1) (i) read with S. 47 of the Act, and with reference to the argument, that an accused person could not be tried for offences under S. 45 and S. 43 (1) (i) read with S. 47 at one and the same trial, the Court said:

> Under S. 233 for every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned under Ss. 234, 235, 236 and 239. It is clear that S. 234 is not applicable to the present case. The offences under S. 45 and under S. 43 (1) (i) are not offences of the same kind, since they do not comply with the conditions laid down in the Proviso to S. 234. It is contended on behalf of the Crown that S. 235 is the Section which is applicable, that the offences were committed by the same person and were so connected together as to form the same transaction. Against this, it is argued that the liability of a person charged under S. 47, Abkari Act, is not an offence committed by him; S. 47 merely imposes liability in respect of

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[2] Gerimal Hemanmal v. Emperor, (1917) 4 A I R Sind 40=40 I C 312=10 S L R 192.

[3] Emperor v. Krishnaji Anant, (1932) 19 A I R Bom 277=1932 Cr C 389=138 I C 520=33 Cr L J 619=34 Bom L R 590.

[4] Emperor v. Manant K. Mehta, (1926) 13 A I R Bom 110=92 I C 689=27 Cr L J 305=49 Bom 892=27 Bom L R 1343.

[5] Shapurji Sorabji v. Emperor, (1936) 23 A I R Bom 154=1936 Cr C 338=162 I C 399=37 Cr L J 688=60 Bom 148=38 Bom L R 106.

[6] Jethanand Murijmal v. Emperor, (1933) 20 A I R Sind 255=1933 Cr C 811=147 I C 55=35 Cr L J 256.

an offence committed by his servant. It is therefore contended that the joinder of the charge under S. 45 in which the holder of the license is directly implicated with a charge under S. 43 (1) (i) read with S. 47, is a joinder of charges in which the offences are not committed by the same person. I am unable to agree with this contention. It seems to me clear that S. 47 provides for liability for the holder of a license, as if he himself had committed an offence and his trial under S. 43 (1) (i) read with S. 47 is a trial as to his criminal liability. That being so, I see no valid objection to a charge under S. 45 being joined with a charge under S. 43 (1) (i) read with S. 47.

The prosecution must in this case take their choice in the trial of these accused between trying them for three offences of the same kind committed by them jointly within one year within the meaning of S. 239 (c), or for different offences in one transaction within the meaning of S. 239 (d), or each accused may be tried separately in accordance with the provisions of S. 234 or S. 235, Criminal P. C., as explained by us. We think that offences under S. 43 (1) (a) and (1) (i) will fall within the definition of offence as given in sub-s. (2) of S. 234; for, though within different sub-sections, these offences are in the same Section and punishable with the same amount of imprisonment. Apart then from the general question of the application of S. 537, Criminal P. C., to the case of misjoinder of charges, with which we shall deal hereafter, there remains the question of the joinder of the charge of abetment in the case of accused Chuharmal with the other charges, and the learned Advocate-General was of the opinion that it is wrong because the clauses of S. 239, Criminal P. C., are mutually exclusive. They are, we think, mutually exclusive in the sense that they cannot be added one to another so as to bring some of the persons charged under one clause and some under another and so to put them upon their trial all together at one and the same time, but they are not mutually exclusive in the sense that persons accused of an offence and persons accused of abetment or of an attempt can only be tried at one trial because their case comes under Cl. (b). Their case might, for instance, come under Cl. (d). Cl. (e) refers also to attempts or abetments of offences within the meaning of S. 234 and Section 239 (c) is now amended to include attempt; but if more than one person are to be tried and charged together their case must be brought within one of the clauses of S. 239, Criminal P. C., as we have interpreted it, before they can be tried together, or the trial is contrary to law.

Here Chuharmal is charged jointly with others with the abetment of offences under S. 43 (1) (a) and (1) (i), Abkari Act, and S. 9 (a) and (d), Opium Act, but the charge does not fall under S. 239 (c) or S. 239 (d) or under any other clause of S. 239 of the Code. Therefore the charge of abetment is a misjoinder even when read with S. 235 or S. 236. As the learned Advocate-General agreed that under the circumstances the misjoinder in this case could not be cured by the provisions of S. 537, Criminal P. C. and a retrial should be ordered, it is not strictly necessary for the decision of this case for us to decide the question which the learned advocate for the applicants so ably argued, that S. 537, Criminal P. C., can never be invoked to cure a misjoinder, because a misjoinder goes to the root of the trial, and S. 537 cures irregularities and not illegalities. The Privy Council case in 5 Rang 53,[7] has, he argues, been misunderstood.

Now it is no doubt often argued that the effect of the judgment of the Privy Council in 5 Rang 53[7] is to nullify the judgment of the Privy Council in 28 I A 257=25 Mad 61,[8] but this argument proceeds on the assumption that the effect of their Lordships' judgment in 25 Mad 61[8] was that no breach of any mandatory provision of the Code could be cured under the provisions of S. 537, Criminal P. C., and that the effect of their Lordships' judgment in 5 Rang 53[7] was that the breach of any mandatory provisions of the Criminal Procedure Code could be cured under the provisions of S. 537, but a careful reading of these two cases will show that these presumptions are in no way justified and that it is more accurate to say that the judgment of the Privy Council in 5 Rang 53[7] now deprives of its effectiveness the rule in accordance with which some High Courts once distinguished between illegalities which could not be cured by S. 537 and irregularities which could, holding that the breach of a mandatory provision of the Criminal Procedure Code was an illegality which could not be cured under the provisions of S. 537, while the breach of a provision that was merely directory and not mandatory was an irregularity only which could be cured under the provisions of that

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7. **Abdul Rahman v. Emperor, (1927) 14 A I R P C 44=100 I C 227=28 Cr L J 259=54 I A 96=5 Rang 53 (P C).**

8. **Subramania Aiyer v. King-Emperor, (1902) 25 Mad 61=28 I A 257=8 Sar 160 (P C).**

Section. In 5 Rang 53[7] the Board held that in the case before it a breach of the provisions of S. 360, Criminal P. C., could be cured under the provisions of S. 537, and S. 360 is a mandatory provision because in Sec. 360 (1) occurs the word 'shall'. Section 360 (1) reads:

> As the evidence of each witness taken under S. 356 or S. 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

The reading of the depositions of witnesses is quite a different matter from the misjoinder of charges, and so far as 5 Rang 53[7] related to the question of the charge, the relevant provisions in the opinion of their Lordships were Ss. 190 (a) and (c) and S. 535, Criminal P. C., and their Lordships distinguished the case before them as a case under S. 190 (a) from 28 All 212,[9] which was a case under S. 190 (c) and, so far as we can see, 5 Rang 53[7] leaves unaffected the particular question dealt with in 25 Mad 61,[8] that of misjoinder, which case must still guide the Courts on questions of misjoinder. Indeed, in 5 Rang 53,[7] referring to 25 Mad 61,[8] their Lordships said:

> There have been a number of decisions in India upon these enabling or curing Sections, but the only important one which came before this Board is the case in 28 I A 257[8]. There the trial of a man on charges of extortion in which 41 criminal acts extending over a period of two years were brought against him in contravention of a Section of the Code which provides that a man can only be tried for three offences and those committed within a period of 12 months, was held bad, and the conviction was quashed because the provisions of S. 537 of the then Criminal P. C., did not cure it. The distinction between that case and the present is fairly obvious. The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused.

It does not appear therefore that the Board's judgment in 5 Rang 53[7] gives any countenance to the argument that 25 Mad 61[8] was wrongly decided. Turning then to 25 Mad 61[8] an authority of the highest Court binding upon this as on other Courts in India, it appears from the judgment of their Lordships that misjoinder, so far as it is a misjoinder of a larger number of charges than the law permits, is not an irregularity which can be cured under the provision of S. 537, Criminal P. C. It is true, of course, that in a sense all irregularities as being departures from or contraventions of statutory provisions or rules of law are illegalities, but the word 'irregularity' was used in Sec. 537 purposely as conveying an idea familiar to the English system of Jurisprudence, but it was not intended to cure vital defects, defects that went to the root of the trial. In 25 Mad 61[8] the appellant was tried on an indictment and with no less than forty one acts, these acts extending over a period of more than two years, and their Lordships were of the opinion that the defect in the trial was not such as could be cured by the provisions of S. 537, Criminal P. C. "This" their Lordships said

> was plainly in contravention of the Code of Criminal Procedure, S. 234, which provided that a person may only be tried for three offences of the same kind if committed within a period of twelve months,

and

> their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the Section itself sufficiently shows what was meant.

Lastly their Lordships said:

> But this trial was prohibited in the mode in which it was conducted and their Lordships will humbly advise His Majesty that the conviction should be set aside.

And it appears to us that it makes no difference whether the acts charged are fortyone, fourteen or four, provided they exceed the statutory number and are not covered by the provisions of S. 234 or the following provisions relating to the joinder of charges; the misjoinder of charges is a vital defect in the trial which cannot be cured by the provisions of S. 537, Criminal P. C. It is quite different from the failure to read over the statement of a witness which is something merely incidental to the trial itself. We do not think it can be said that any error which affects jurisdiction is necessarily a fatal error. For instance, S. 531, Criminal P. C., deals with an error in territorial jurisdiction and in certain circumstances cures it. Nor can we accept the argument of the Advocate-General that a misjoinder of charges is not a vital defect or fatal error, because it is not mentioned in S. 530, Criminal P. C., which refers to irregularities which vitiate proceedings. Obviously in the face of the Privy Council judgments this Section is not exhaustive. For the purpose of this case it suffices for us to say that we consider the Privy Council decision in 25 Mad 61[8] still binds the Courts on the question of the misjoinder of charges.

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[9] Emperor v. Chedi, (1905) 28 All 212=2 Cr L J 809=1905 A W N 258=2 A L J 745.

The learned Advocate-General has not been able to draw our attention to one case where a High Court has held that a misjoinder of charges is not a vital defect in a trial curable under the provisions of S. 537, Criminal P. C. In 5 Rang 53[7] a case of the Calcutta High Court in 8 W R (Cr.) 47[10] is referred to and not approved. To the contrary effect are four cases 21 Bom L R 732,[11] 27 Bom L R 1343,[4] 49 All 312[12] and 34 Bom L R 590.[3] We therefore set aside the convictions and sentences of all the accused including Tekumal and direct them to be re-tried according to law. In giving that direction we do not mean, as we have already said, to fetter the discretion which is normally vested in the Crown of deciding whether the prosecution should proceed or not.

B.D./R.K. *Retrial ordered.*

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10. Queen v. Sheikh Bazu, (1867) 8 W R Cr 47= Beng L R Sup Vol Cr 750.
11. Emperor v. Ramnarayan Amarchand, (1919) 6 A I R Bom 111=52 I C 481=20 Cr L J 657= 21 Bom L R 732.
12. Emperor v. Raman Lal, (1927) 14 A I R All 223=99 I C 603=28 Cr L J 171=49 All 312 =25 A L J 217.

## A. I. R. 1938 Sind 169

DADIBA C. MEHTA AND LOBO JJ.

*Premchand Nanikmal and another* — Appellants.

v.

*Manomal Harsumal* — Respondent.

First Appeal No. 15 of 1937, Decided on 31st March 1938.

**Deccan Agriculturists' Relief Act (17 of 1879), S. 2—Status agreed to be waived at the time of passing of decree can still be claimed in execution.**

An agriculturist judgment-debtor who at the time of passing the decree agrees to waive his status, can be allowed to go back upon the agreement and claim all the benefits of an agriculturist at the time of execution : *A I R 1925 Sind 49 ; A I R 1930 Sind 16 and A I R 1935 Bom 433, Rel. on.* [P 170 C 1]

**Sunderdas Jethanand** — *for Appellants.*

**Kodumal Lekhraj** — *for Respondent.*

**Dadiba C. Mehta J.**—This is an appeal against the order of the learned First Class Sub-Judge, Larkana, passed in execution proceedings holding that the appellants, who were defendants 2 and 3 in the suit, are estopped from raising the plea that they are agriculturists, and consequently directing sale of certain immovable property through the Court. The order is very short and may be reproduced here in toto :

> Heard pleaders. There is a clause in the decree based on an agreement of the parties that the judgment-debtor would not raise a plea of agriculturist for the purpose of sending the papers to the Collector for sale of the property. This plea in spite of the agreement has been taken and the argument of Mr. Siroomal, advocate, based on A I R 1935 Bom 433[1] is that that agreement in the decree has no force. I am not inclined to agree with him. The ruling relied upon by him is distinguishable. There it was a case of arrest and it was held that the judgment-creditor could not by an agreement take away the statutory right and thereby defeat the policy of the Act. The question involved in the present case is however a different one. Nowhere in the Deccan Agriculturists' Relief Act is it provided that the immovable property of an agriculturist is to be sold by the Collector in execution of the decree. In such a case the agreement entered into by the judgment-debtor is legally enforceable. I accordingly hold that the judgment-debtor is estopped from raising this plea. Objection disallowed. Sale proclamation to issue.

The facts leading up to the above order may briefly be reviewed to start with. One Gulomal, grandfather of appellant Premchand and great grandfather of appellant Sadoromal (a minor) had mortgaged certain arable lands with possession. The mortgagees brought a suit on the mortgage in the Court of the First Class Sub-Judge, Larkana, being Suit No. 3 of 1933 of that Court, claiming Rs. 16,000 with costs and interest. During the pendency of the suit, Gulomal the mortgagor who was defendant 1 died. The suit was then compromised ; and a consent decree was passed, paras. 3 and 4 of which are as follows :

> Para. (3) Gulomal, deceased, was not an agriculturist and defendants 2 and 3 cannot raise the plea of status for the purpose of getting the sale effected through the Collector.
>
> Para. (4) Defendants 2 and 3 are agriculturists and they are not personally liable for the above amount.

As the decretal amount was not paid, the decree-holders sought execution in which the order above reproduced was passed. Defendants 2 and 3 referred to in paras. 3 and 4 of the decree had insisted that according to law the decree should be

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1. Shankarlal Bansilal v. Raghunath Das, (1935) 22 A I R Bom 433=160 I C 38=37 Bom L R 776.

transferred to the Collector for execution because admittedly they were agriculturists. On their behalf reliance was placed on the ruling in A I R 1935 Bom 433.[1] The learned Judge distinguished that ruling from the facts of the present case, because in the Bombay case the agreement not to plead the status of an agriculturist was an agreement virtually amounting to waiver of the right of the agriculturist not to be arrested; whereas in the present case there is no question of arrest of the judgment-debtors. Consequently the learned Sub-Judge decided that the mortgaged lands should be sold through the Court and not through the Collector. Hence, the present appeal; and the only question for determination is whether the order of the lower Court refusing to transfer the decree to the Collector for execution is legally maintainable. There is no doubt that the lands to be sold now belong to the appellants, who, it is admitted, are agriculturists. It may be that partly or wholly the lands are theirs as heirs of their deceased ancestor, the mortgagor Gulomal. The fact nevertheless remains that it is their property which the decree-holders seek to have sold in execution of the decree. According to the tenor of the decree which must be construed liberally in favour of these acknowledged agriculturists, one of whom is a minor, all that the appellants as defendants 2 and 3 in the suit agreed to was not to raise the plea of the status of the deceased Gulomal. The agreement appears to relate to the status of Gulomal who was by consent not to be put forward as an agriculturist and not to the status of the appellants. This is clear from the fact that defendants 2 and 3 were by consent specifically declared as agriculturists. Assuming however for the sake of argument that the appellants had agreed not to plead their own status at the time of the execution of the decree they were consenting to, the question resolves itself into this: "Whether an agriculturist judgment-debtor who at the time of the decree agrees to waive his status, cannot be allowed to go back upon the agreement and claim all the benefits of an agriculturist at the time of execution."

Now in this case the appellants were admittedly agriculturists under the decree; but even if they had pleaded such a status in the suit and their plea had been rejected there was nothing to prevent them from claiming that status at the time of execution. There is the authority of a Full Bench decision of our own Court on the point: 18 S L R 19.[2] It was held that:

> The definition of an agriculturist in S. 2, Deccan Agriculturists' Relief Act is not limited to the judgment-debtor being an agriculturist at the date of the suit or of the decree.
>
> There is no bar to a judgment-debtor applying for the transfer of his decree for execution to the Collector under R. 28 of the Rules of the Judicial Commissioner's Court provided the decree is of the description falling under the rule.
>
> A judgment-debtor for the purpose of R. 28 is entitled to plead in execution proceedings that he is an agriculturist though he has not raised the plea before. *(Head-note of 18 S L R 19.)*

It may be noted that the above proposition of law is without reservation. In a subsequent Bench decision of this Court in A I R 1930 Sind 16[3] it has been held that:

> The legal representative of the judgment-debtor is entitled to plead and lead evidence to prove that he is an agriculturist even though the judgment-debtor had already raised the plea and it was decided that he was not an agriculturist. *(Head-note of A I R 1930 Sind 16.)*

In our opinion the reason for this indulgence is not far to seek. As observed by Murphy J. in A I R 1935 Bom 433[1]:

> The object of the Act is well known. It was to prevent the peasant proprietors of the original four districts losing all their proprietary interest and becoming landless day-labourers, or at least no more than yearly tenants of the money-lenders. All the provisions of the Act are framed to this end and its policy is clearly to protect the agriculturist against misfortune, or his own improvidence as the case may be. That it is a statute based on public policy has been held in several of the cases quoted above as in 7 Bom L R 688[4] and 8 Bom 340.[5]

Sen J. has also aptly observed in his concurring judgment that:

> No Court can neglect or omit the performance of the imperative duty cast on it under the Act on the ground that the party for whose benefit it was created waived it.

Although the insistence on the part of the agriculturist judgment-debtor to have his land sold through the Collector is not in virtue of any of the provisions of the Deccan Agriculturists' Relief Act, it is clear that there are other provisions of law the object of which is the same as that of the Act, viz. to prevent the peasant proprietors of certain districts losing all their proprietary interest and becoming landless day labourers or at least no more than yearly tenants of the money lenders. Let us now see what provision of law there is with regard to transference to Collectors of execution of certain decrees. S. 68, Civil P. C. reads :

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[2] Hariomal v. Hazarising, (1925) 12 A I R Sind 49=78 I C 583=18 S L R 19 (F B).

[3] Showkomal v. Jagatmal Tharumal, (1930) 17 A I R Sind 16=118 I C 221.

[4] Patho v. Naru, (1905) 7 Bom L R 688.

[5] Shivaram Udaram v. Kondiba Muktaji, (1884) 8 Bom 340.

> The Local Government may declare, by notification in the Local Official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immovable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of interest in immovable property shall be transferred to the Collector.

The Local Government has issued a notification which is embodied in R. 28 given at p. 134 of the Rules of this Court. It reads as follows :

> In each of the revenue districts in the Province of Sind the execution of decrees shall be transferred to the Collector of that district in the following cases, viz.:
>
> The execution of decrees ordering the attachment or sale of immovable property shall be transferred to the Collector of the district in cases where such property belongs to a person who is an agriculturist within the meaning of the Deccan Agriculturists' Relief Act, 1879, and has been specifically mortgaged for the repayment of the debt to which the decree relates, and the security still subsists.

Having regard to the mandatory nature of this provision of law, it is not open to a Court to disregard it by reason of the fact that at a time when it was not necessary for an agriculturist to claim his status, he to the detriment of his own interest had given an undertaking not to do so at any subsequent stage of the suit or execution. A money-lender should be prevented from frustrating the declared policy of the Legislature by somehow securing the consent of an agriculturist to waive the provision for his benefit when the Legislature wants to protect the agriculturist in spite of himself. It is therefore against public policy to allow a money-lender to enforce such an agreement ; and the lower Court has erred in giving effect to the agreement in the present case by refusing to transfer the execution of the decree to the Collector. For the foregoing reasons then we reverse the order of the lower Court and allow the appeal with costs.

B.D./R.K. *Appeal allowed.*

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## A. I. R. 1938 Sind 171

DAVIS J. C. AND LOBO J.

*Emperor*

v.

*Balumal Hotchand and others*

Accused.

Criminal Revn. Appln. No. 292 of 1937, Decided on 21st April 1938, to enhance sentences passed on accused by Addl. City Magistrate, Hyderabad, D/- 10th September 1937.

**(a) Criminal Trial—Appeal— Summary dismissal—Judge must use independent discretion after reading copy of judgment—Failure of accused to prosecute appeal —Appeal cannot be summarily dismissed.**

A Court cannot dismiss an appeal summarily simply because the accused fails to prosecute his appeal. The law requires that the dismissal of the appeal shall depend upon the exercise by the Judge of his independent and impartial judgment after he has read a copy of the judgment and not upon the failure of the accused to prosecute his appeal. [P 172 C 2]

**(b) Criminal Trial — Alternative charges — Conspiracy to commit breach of trust and commission of breach of trust in pursuance thereof —Alternative charges of abetting and committing breach of trust against different accused —Conviction should be under one and not both charges.**

Where the accused were charged with offences in the alternative, with conspiracy to commit criminal breach of trust and with committing criminal breach of trust in pursuance of that conspiracy, and in the alternative, upon the same facts, when one of the accused is charged as the principal offender with criminal breach of trust and the others as abettors, the accused should be convicted under one or other of the alternative charges ; they should not be convicted under both. [P 173 C 1]

**(c) Criminal Trial — Misjoinder — Test of— Not conviction under various charges but trial under different charges vitiates trial.**

The test whether a trial is or is not bad owing to a misjoinder of charges is not the number of offences with which he has been charged. The trial is bad not because the accused has been wrongly convicted but because he has been wrongly tried. It is the multiplicity of charges which vitiates the trial and prejudices the accused in his defence : *A I R 1938 Sind 164, Rel. on.* [P 173 C 2]

**(d) Criminal Trial—Conspiracy to commit offence — Proof of offence going to prove conspiracy— Charges under both in one trial are valid.**

Special considerations attach to a charge of conspiracy and things done in pursuance thereof. In many cases the offence of conspiracy is only provable by proof of the offences done in pursuance thereof. If the proof of these offences can be used to prove the conspiracy, it follows that it is only reasonable, they can be proved as substantive offences against the accused in the same trial. Hence, a person can be charged with offences under conspiracy and acts done in pursuance thereof as they form part of the same transaction : *A I R 1934 Sind 57, Foll.; A I R 1938 P C 130, Rel. on.* [P 173 C 2; P 174 C 1]

**(e) Criminal P. C. (1898), S. 537—Erroneous statement of charge—Distinction from misjoinder—Error is curable.**

There is a distinction between a misjoinder of charge and an erroneous statement of a charge otherwise lawful. Such error in charge can be cured under S. 537 : *A I R 1938 P C 130, Rel. on.* [P 174 C 1]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

U. B. Chandiramani and D. N. O'Sullivan — *for Accused.*

**Davis J. C.**— This is a revision application by Government to enhance the sentences passed upon the three opponents, one R. A. Gordon, formerly a Station Master at Hyderabad, and one Balumal a Jamadar of coolies at that station, and one Hundomal, the sister's son of Balumal, who kept the accounts of the earnings of the coolies at the station and himself nominally a cooly, who have been convicted by the Additional City Magistrate of Hyderabad of offences under S. 120-B, Penal Code, conspiracy, of criminal breach of trust, under S. 406, Penal Code, and abetment of criminal breach of trust, S. 406 read with S. 109, Penal Code, and sentenced to imprisonment till the rising of the Court and to fines. Gordon, the Station Master, was sentenced to a fine of Rs. 1000 while Balumal, the jamadar of coolies and his sister's son Hundomal the accountant, were sentenced each to a fine of Rs. 500. Gordon, the Station Master, and Balumal the jamadar, appealed against their convictions and sentences to the Sessions Court at Hyderabad. Hundomal, the sister's son of Balumal and accountant did not appeal. It appears from the record that Gordon and Balumal wished to withdraw their appeals, and the Sessions Judge in consequence dismissed them summarily, and the point was raised in argument before us on behalf of the opponents that, as that Court did not adjudicate upon the appeals but merely dismissed them summarily, the accused are entitled under Sec. 439 (6), Criminal P. C., to show cause against their convictions not only on questions of law but on questions of fact, and that the rulings of this Court in 21 S L R 107[1] and 22 S L R 453,[2] that accused persons can be heard against their conviction in proceedings for enhancement of sentence, only as if the case had come before the Court in its revisional jurisdiction, do not apply.

We think the Sessions Judge was wrong when he dismissed the appeals of the accused summarily on the ground that the accused themselves did not wish to prosecute them. He had before him a criminal case and not a civil suit. His proceedings were to be controlled by the Criminal Procedure Code and not by the Civil Procedure Code, and if he had referred to S. 421, Criminal P. C., he would have found no provision for the dismissal of appeals on default of prosecution. He would have found that the law requires that before an Appellate Court dismisses an appeal summarily, it shall read a copy of the judgment, and then, if there is no sufficient ground for interfering, it may dismiss the appeal summarily. But, clearly, the law requires that the dismissal of the appeal shall depend upon the exercise by the Judge of his independent and impartial judgment after he has read a copy of the judgment, and not upon the failure of the accused to prosecute his appeal. We can have no doubt from the order of the learned Judge and the great length of the judgment that he did not dismiss the appeal in the manner the law requires. We therefore informed the learned advocates for the accused that we would hear arguments within reason upon the facts. In any case, the accused Hundomal had not appealed to the Sessions Court. The first and most important point raised by the learned advocate for the opponent Gordon was a point of law. He argued that the charge against the accused set out on p. 230 of the paper book was bad on the ground of misjoinder. If he had been successful in his argument and could have shown that there was a misjoinder, we should have had to set aside the convictions and sentences, but we should most certainly have ordered a re-trial, though the trial of these accused lasted almost for four years, but fortunately we are not under that necessity.

We think that the learned Magistrate who has dealt most carefully with the mass of evidence on record is entirely correct in his appreciation of the facts of his lamentable case, and we think also that he has understood and correctly applied the law relating to criminal breach of trust,

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1. Emperor v. Lukman, (1927) 14 A I R Sind 39 =98 I C 49=27 Cr L J 1233=21 S L R 107.
2. Emperor v. Shidoo Mahomed, (1929) 16 A I R Sind 26=111 I C 856=29 Cr L J 936=22 S L R 453.

and, we think, the charge itself was legal; but whereas in a case of this nature the accused were charged with offences in the alternative with conspiracy to commit criminal breach of trust and with committing criminal breach of trust in pursuance of that conspiracy, and in the alternative, upon the same facts, when one of the accused is charged as the principal offender with criminal breach of trust and the others as abettors, the accused should be convicted under one or other of the alternative charges; they should not have been convicted under both. For instance, in this case, the accused have been convicted upon the first charge of conspiracy and upon the alternative charge of abetment. We do not think that this was right though in effect, the accused have suffered no real injury in consequence because one sentence has been passed for all the offences of which they have been convicted. Moreover, as the Magistrate has acquitted the accused of the offences of criminal breach of trust committed in pursuance of the conspiracy, for reasons which we think insufficient, and we cannot, as a Court of Revision, convert this acquittal into a conviction, and as the two parts of each alternative charge must be read as a whole, we think the proper course to be to confirm the conviction of the accused of the offences under the alternative charge and acquit them of the offence under the first charge, of which they have been convicted.

We ourselves think it was unnecessary for the Magistrate to frame alternative charges, for save that in the first charge the offences of criminal breach of trust in pursuance of a conspiracy are alleged to have continued over a period of three years, and in the alternative charge these offences are limited to a period of one year, presumably in accordance with the Proviso to S. 222, Criminal P. C., the two charges in this case really say much the same thing in two different ways. In the first charge the criminal acts with which these accused are charged are set out in the form of a conspiracy, and in the alternative charge the criminal acts are set out in the form of abetment which under S. 107 of the Penal Code also includes conspiracy. The learned advocate for the opponent Gordon contends that, assuming for the sake of argument that these charges are alternative charges under the provisions of Sec. 236, Criminal P. C., yet a charge even in the alternative must conform to the provisions of Ss. 233, 234, 235 or 239, Criminal P. C., and that in alternative charges, each charge must be a legal charge. To this argument, so put, we think no proper objection can be taken, but when the charges on p. 230 are examined in themselves, we see nothing that offends against the provisions of Sec. 233 and the following Sections, or against Sec. 222, Criminal P. C. A Bench of this Court in a recent case in Cr. Rev. Appln. No. 276 of 1937[3] has discussed at length the question whether a misjoinder of charges is or is not fatal to the trial, and came to the conclusion that a misjoinder of charges is something which the law positively prohibits and is fatal to the trial, and it is to be noted that the test whether a trial is or is not bad owing to a misjoinder of charges is not the number of offences of which the accused has been convicted. It is the number of offences with which he has been charged. The trial is bad, not because the accused has been wrongly convicted but because he has been wrongly tried. It is the multiplicity of charges which vitiates the trial and prejudices the accused in his defence. But, in this case, each of the alternative charges can be brought within the provisions of one of those Sections which form the exceptions to S. 233, Criminal P. C.

It is urged that on the first charge, which we may conveniently call the charge of conspiracy, the accused are charged with offences of criminal breach of trust extending over a period of three years, and this must in itself offend against the provisions of S. 222, Criminal P. C., where the period of such offences is to be limited to one year. But special considerations attach to a charge of conspiracy and things done in pursuance thereof. In many cases, the offence of conspiracy is only provable by proof of the offences done in pursuance thereof. If the proof of these offences can be used to prove the conspiracy, it follows that it is only reasonable they can be proved as substantive offences against the accused in the same trial. This question, in fact, has been already decided by a Bench of this Court in a reported case by which we are bound: 28 S L R 119.[4] But there is a very recent judgment of the Privy Council which is to the same effect:

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[3] Chubarmal Nirmaldas v. Emperor, *Reported in* (1938) 25 A I R Sind 164.

[4] Dur Mahomed Ghulam Mahomed v. Emperor, (1934) 21 A I R Sind 57=1934 Cr C 628=151 I C 494=35 Cr L J 1337=28 S L R 119.

174 I C 1=A I R 1938 P C 130.[5] The first of the two alternative charges therefore falls under S. 239 (d), Criminal P. C., the conspiracy and acts done in pursuance thereof forming part of one transaction. We do not think that there is much force in a further objection taken that as it was the case of the prosecution that money was taken at intervals of ten days from the coolies, so the charge should have alleged separate acts of criminal breach of trust at intervals of ten days and not at intervals of one month ; but though there is oral evidence to show that money was taken from the coolies at intervals of ten days, there is evidence and accounts to show that the accounts were kept on a monthly basis and payments only disguised as charity were made on a monthly basis, so that it was proper to charge the accused with criminal breach of trust of a sum of Rs. 210 month by month, rather than of a sum of Rs. 70 every ten days. But even had it been otherwise, we could not have held under the circumstances of this case that any one of the accused was prejudiced in his trial by this multiplication of Rs. 70 by 3. We could have only held that there was an absence of particularity in the charge which was to be regretted, but which was an irregularity curable, and in fact cured under the provisions of S. 537, Criminal P. C., within the ruling of the Privy Council in 174 I C 1[5] above referred to. We distinguish between a misjoinder of charges and an error in the statement of a charge otherwise lawful.

As far as the second of the alternative charges is concerned, the accused are charged with criminal breach of trust or abetment thereof, of about Rs. 210 a month from April 1931 to March 1932. This charge appears to us to fall clearly within the provisions of S. 239 (b) read with S. 222, Criminal P. C. We think therefore that the arguments against the conviction of the accused based upon misjoinder must fail, and that any illegality in their convictions can be cured by our acquitting the accused of all the offences with which they are charged, and of which they have been convicted on the first of the two alternative charges, and confirming the convictions of all the offences with which they have been charged and convicted on the second of the alternative charges. We note also the Government resolution which authorizes this application for enhancement of sentences refers only to offences under S. 406 and S. 406 read with S. 109, I. P. C. We do not however wish it to be inferred that we do not consider that there is not abundant evidence on the record on which the accused could not have been convicted of conspiracy and criminal breach of trust committed in pursuance thereof. The second point taken by the learned advocates for the opponents was that however bad ethically the acts of the Station Master may have been, they are not offences under the criminal law. (Their Lordships after going through the evidence, oral and documentary, proceeded.) There remains then only the question of sentence. The learned Magistrate has given reasons why he considers a nominal sentence of imprisonment sufficient, but, with all respect to the learned Magistrate, we cannot accept his reasons as sufficient. The accused have no claim to pity because the trial has lasted long, nor do we consider old age in itself mitigation of an offence of the nature of which the accused have been found guilty. Old age should have taught them pity. Nor can we see that the death of the son of the accused Gordon in an accident during the course of the proceedings good ground for mitigation of the punishment for an offence marked in this case by greed and oppression. We interfere but rarely in revision to enhance sentences, and only when we consider the sentences so grossly inadequate as to make them fail of their purpose, and the learned advocate has pleaded with us on behalf of Gordon on the ground of his ill-health and that this trial and these convictions must lead the railway authorities to take effective steps to root out the corruption and oppression which the record of this case may show exist in this system of cooly labour. This may well be so ; and, in our opinion, the evidence clearly shows that this system as it existed at this particular time and place was a vicious system and calls for enquiry and appropriate action by the railway authorities concerned. But any such action will not relieve us of our duty, which is to impose upon the accused such a penalty as will serve as some deterrent against corruption and oppression such as this case reveals. The only plea that weighs with us at all is the plea, that the accused Gordon is suffering from grave heart disease, and even so, it influences us only to this extent, that we will instead of passing upon the accused a sentence of rigorous imprisonment, pass upon him a sentence of simple imprisonment.

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[5] Babulal Choukhani v. Emperor, (1938) 25 A I R P C 130 = 174 I C 1 = 39 Cr L J 452 (P C).

We therefore confirm the conviction of the accused Gordon of the offence under S. 406 read with S. 109, I. P. C., of which he has been convicted, and while maintaining the sentence of fine, enhance the sentence to one of simple imprisonment for six months. We take into account the fact that he is old and ill and the disgrace and shame which imprisonment of any kind for any time must inflict upon him. So far as the accused Hundomal, the accountant and Balu the jamadar are concerned, we confirm their convictions for offences under S. 406 and S. 406 read with S. 109, I. P. C., respectively, and because we think they acted under the influence of their co-accused Gordon and because they are also old men, we will not differentiate between their case and his, and we will, while maintaining the sentence of fine, pass upon them each a like sentence of simple imprisonment for six months, and we enhance the sentences passed upon them accordingly. It is of course open to Government at any time before the expiry of the sentences which we have thought it our duty to impose, to exercise their prerogative of mercy and release the accused, should they wish to do so. We direct a copy of this judgment to be sent to the Railway Board, to the Agent of the North Western Railway and to the Chief Secretary to the Government of Sind.

B.D./R.K. *Sentences enhanced.*

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## A. I. R. 1938 Sind 175

LOBO J.

*Hindu Co-operative Bank* —
Judgment-creditor.

v.

*Mahadev Kalianji and others* —
Judgment-debtors.

Exn. Appln. No. 283 of 1937, Decided on 20th May 1938.

**Civil P. C. (1908), Ss. 63, 73 — Certain decree-holders applying for execution of decree in Court of Small Causes attaching salary of judgment-debtor and realizing money — Other decree-holders subsequently applying to High Court for execution by attachment of salary — Garnishee sending monthly instalment to High Court and discontinuing sending instalment to Small Cause Court — Former decree-holders applying to High Court for rateable distribution — Held that they were entitled to rateable distribution.**

Certain decree-holders applied for execution of the decree in the Court of Small Causes, their decrees being of that Court. The Small Cause Court attached the salary of the judgment-debtor and money was actually being realized by the Court. Subsequently other decree-holders holding decrees against the same judgment-debtor, having applied to the High Court for execution by attachment of the salary of the judgment-debtor, the garnishees began to send the monthly instalments to the High Court and discontinued sending instalments to the Small Cause Court. Thereupon the decree-holders executing their decrees in the Court of Small Causes filed their application for execution in the High Court. It was contended that they were not entitled to rateable distribution with regard to money received prior to their applications being received in the High Court :

*Held* that the decree-holders were entitled to rateable distribution along with other decree-holders in all the money received in the High Court by attachment of the salary of the judgment-debtor : *A I R 1936 Cal 723 and A I R 1914 Mad 454, Rel. on; 16 Bom 683, Disting.*
[P 176 C 1, 2]

Gobindram Golani, C. M. Shahani and Haricharan Jagumal — *for Judgment-creditor.*

**Order.**—This is a dispute between various decree-holders as to rateable distribution of certain moneys attached and received by the Court in execution of F.C.D. No. 101 of 1937 against Devsi Kara. In this execution application the judgment-creditor attached the salary of one judgment-debtor Devsi Kara in the hands of the Karachi Municipality and under the attachment various sums of money have been received by the Court from the Karachi Municipality on various dates between 12th August 1937 and 9th April 1938. Besides decree No. 101 of 1937 there were other decrees against Devsi Kara and execution applications thereunder are execution applications Nos. 631 of 1937, 1250 of 1937, 1556 of 1937, 5 of 1938 and 309 of 1938. Execution applications Nos. 1556 of 1937 and 309 of 1938 had been filed by decree-holders in the Small Cause Court, Karachi. The moneys now realized in Court are therefore also claimed by decree-holders in execution applications Nos. 283 of 1937, 631 of 1937, 1250 of 1937, 1556 of 1937, 5 of 1938 and 309 of 1938. The decree-holders in execution application No. 283 of 1937 contend that the decree-holders in execution application No. 1556 of 1937 are not entitled to rateable distribution of money received in the Court prior to 30th November 1937 and the decree-holders in execution application No. 309 of 1938 are not entitled to rateable distribution in respect of money received in Court prior to 12th January 1938 as execution applications by these decree-holders were not pending in the Court prior to the dates referred to.

Reliance is placed by the learned advocate on behalf of the decree-holders in execution application No. 283 of 1937 on the case in 16 Bom 683.[1] It would appear however that the case relied upon was a decision upon S. 295, Civil P. C., 1882, and not a decision relating to the corresponding S. 73, Civil P. C. Quite apart from this, however, the case is not applicable because the facts here are different. The decree-holders in execution applications Nos. 1556 of 1937 and 309 of 1938 had applied for execution of their decrees originally in the Small Cause Court, their decrees being of that Court and the Small Cause Court had in execution attached the salary of Devsi Kara in the hands of the Karachi Municipality and under these attachments, money was actually being received in the Court of Small Causes prior to August 1937. When however the judgment-creditors in execution application No. 283 of 1937 applied to this Court for execution by attachment of the salary of Devsi Kara, the garnishees commenced to send monthly instalments to this Court and discontinued sending instalments to the Small Cause Court under the attachment levied by that Court. When the decree-holders in execution applications Nos. 1556 of 1937 and 309 of 1938 became aware of this fact, they filed the present execution applications in this Court, and in these circumstances it would appear that they are entitled to rateable distribution along with the other decree-holders in all the moneys now lying in Court and received from the Karachi Municipality between 12th August 1934 and 9th April 1938. This view of the matter receives support from the decision of Mitter J. in A I R 1936 Cal 723[2] as will be indicated by the following passage from the judgment of the learned Judge. Referring to S. 63 the learned Judge says:

> The principle underlying it is the principle of convenience, the principle of avoiding multiplicity of proceedings, the principle of fair distribution and not the principle of exclusion. The distribution is to be made by the superior Court and if all the Courts be of the same grade, the distribution is to be made by the Court which first attached the property.

For this purpose it is the duty of the Court of inferior grade or the Court of the same grade which had attached last of all to send the sale proceeds to the superior Court, or if all the Courts are of the same grade, to the Court which first attached the property and the proceeds so received shall be deemed to have been so received on behalf of all the Courts in which there had been attachments in execution of the money decrees prior to the receipt of the assets. The decree-holders in all such Courts shall be entitled to rateable distribution under S. 73. The learned Judge has relied upon the judgment of Wallis J. in the case reported in 26 M L J 406.[3] I am therefore of opinion that the contention of the judgment-creditors in execution application No. 283 of 1937 cannot be sustained and that there is no reason to exclude the judgment-creditors in execution applications Nos. 1556 of 1937 and 309 of 1938 from rateable distribution.

R.M./R.K. *Order accordingly.*

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[1] Nimbaji Tulsiram v. Vadia Venkati, (1892) 16 Bom 683.

[2] Surendra Kumar Guha v. Jamini Kumar Guha, (1936) 23 A I R Cal 723=166 I C 178 =40 C W N 1307=I L R (1937) 1 Cal 391.

[3] Narasimhachariar v. Krishnamachariar, (1914) 1 A I R Mad 454=23 I C 909=26 M L J 406.

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## A. I. R. 1938 Sind 176

LOBO J.

*Karachi Urban Co-operative Bank Ltd.* — Judgment-creditor.

v.

*Mahomedshah Saidullah* — Judgment-debtor.

Execution Darkhast No. 898 of 1935, Decided on 17th May 1938.

**Civil P. C. (Second Amendment Act 9 of 1937), S. 3—Word 'suit' in S. 3 is not confined to execution proceedings initiated by presentation of plaint but also applies to proceedings resulting on award.**

The word 'suit' in S. 3 of the Amending Act 9 of 1937 is not necessarily confined to execution proceedings which are initiated by the presentation of a plaint, but is also applicable to execution proceedings resulting on an award. The Legislature never intended that the word 'suit' in S. 3 should be used in a restricted sense: *A I R 1936 Bom 250 and A I R 1935 Sind 208, Rel. on.* **[P 177 C 2]**

Jamaitrai Lal Chand — *for Judgment-creditor.*

A. P. Fonseca — *for Judgment-debtor.*

**Order.** — The judgment-creditors in this matter held an award against several persons, inter alia, Mahomedshah Saidullah.

In November 1935 they applied to this Court to enforce the award in execution. In respect of Mahomedshah Saidullah they prayed for attachment of his salary in the hands of the Karachi Municipality. The application for execution was granted and the salary of Mahomedshah was attached; and in consequence of the attachment a sum of Rs. 60 was being paid into this Court for the benefit of the judgment-creditors. Later, on 15th September 1936, Mahomedshah Saidulla arrived at an arrangement or settlement with the judgment-creditors under which it was agreed that Rs. 30 and not Rs. 60 a month should be attached and remitted to this Court under attachment. Mahomedshah has now filed an application purporting to be under Ss. 47, 151 and O. 21, R. 40, O. 21, R. 58 read with S. 141, Civil P. C., the substantial part of which reads as follows:

> According to law salary of Rs. 100 cannot be attached after 1st June 1937. As there is an award decree passed in this case and is not a suit, it is prayed that the Court will be pleased to raise the attachment on the salary of the opponent.

Sub-section 1 of S. 60, Civil P. C., has been amended by Act 9 of 1937. The salary of Mahomedshah is Rs. 100 per month and if the amendment referred to above is applicable to the applicant's case no part of his salary is liable to attachment. S. 3 of the Amending Act however reads as follows:

> The amendments made by S. 2 shall not have effect in respect of any proceedings arising out of any suit instituted before 1st day of June 1937.

It is contended for the applicant that the restriction in S. 3 does not apply in the present case because these execution proceedings do not arise out of any suit instituted before 1st June 1937 but out of proceedings under the Arbitration Act and an award thereunder. The application is opposed by the learned advocate for the judgment-creditors who has in his turn raised two points: (1) that it is not open to the applicant to raise the contention that he has raised, because of the adjustment arrived at between the judgment-creditors and the applicant in September 1936; secondly, that the applicant's remedy if any, is by a suit and not by such an application as he has made. Now the argument for the learned advocate for the applicant is that the words 'suit instituted' in S. 3 of the Amending Act must be strictly construed and that the restriction contained in the Section must be confined in its application to suits and not to other proceedings. He has however been unable to satisfy me that there is any reason whatever why the Legislature should in S. 3 of the Amending Act have made a distinction between execution proceedings arising out of a suit and execution proceedings resulting upon an award. Why in respect of the latter S. 2 of the Amending Act should have application, when it has no application in respect of proceedings arising out of a suit. It would appear therefore that the Legislature never intended that the word 'suit' should in this Section be used in any restricted sense. In 60 Bom 645[1] it was held that the provisions of O. 1, R. 8 apply to a petition for setting aside an award under S. 14, Arbitration Act. In A I R 1935 Sind 208[2] it was held that the expression 'suit' in S. 16, Provincial Small Cause Courts Act, was wide enough to include in its ambit an application under Para. 20, Sch. 2, Civil P. C., which is not a suit but is required to be registered as a suit. I do not think therefore that it was the intention of the Legislature that the word 'suit' in S. 3 of the Amending Act should necessarily be confined to a proceeding which is initiated by the presentation of a plaint. I accordingly dismiss the application with no order as to costs.

R.M./R.K. *Application dismissed.*

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[1] Abdul Gani Sumar v. Reception Committee of the 48th Indian National Congress, (1936) 23 A I R Bom 250=163 I C 532=60 Bom 645=38 Bom L R 380.

[2] Lokumal v. Dilsher, (1935) 22 A I R Sind 208 =158 I C 1102.

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## * A. I. R. 1938 Sind 177

LOBO J.

*Hariram Dipchand* — *Plaintiff* —
Judgment-creditor.

v.

*Raghunath Jethabhai* — *Defendant* —
Judgment-debtor.

Suit No. 98 of 1936 and Execution No. 384 of 1937, Decided on 28th March 1938.

*** (a) Civil P. C. (1908), O. 21, R. 89 — Court sale — Judgment-debtor subsequently selling such property to third person — Though judgment-debtor can apply under O. 21, R. 89, purchaser from him cannot so apply.**

A judgment-debtor who, after the Court sale, transfers his interest in the property sold in execution of a decree, retains sufficient "interest" within the meaning of O. 21, R. 89 to allow him to apply under the Rule. But the purchaser of such properties after Court sale is precluded from applying under the Rule: *A I R 1921 Mad 157; A I R 1926 All 204 and A I R 1922 Cal 271, Rel. on; A I R 1927 All 561, Disting.* [P 179 C 1]

**✲ (b) Civil P. C. (1908), O. 21, R. 89 — Deduction can be allowed only of money actually received by decree-holder — Deposit made in Court but not accepted by decree-holder cannot be said to be received.**

Rule 89 has to be strictly construed and even a mistake cannot be availed of as justifying a departure from the requirements of the Rule. The judgment-debtor cannot be allowed to take credit for any amount which he might have deposited in Court behind the back and without the consent of the judgment-creditor and which the judgment-creditor has refused to accept. The only deduction allowed by the Rule is the amount which since the date of the proclamation of sale has been actually received by the decree-holder : *A I R 1933 All 292, Dissent.; Case law referred.* [P 181 C 1; P 182 C 1]

**(c) Civil P. C. (1908), O. 21, R. 89 — Application under R. 90 and alternative application under R. 89 — Latter to be considered only if former not granted — Deposit made under R. 89 also conditional—Such application is not maintainable.**

Neither the judgment-debtor nor a person interested in the property sold can attach any condition to his deposit under O. 21, Rule 89 and the Court cannot accept the deposit subject to any condition or protest : *A I R 1935 Mad 842; A I R 1930 Mad 921; 30 All 192 and A I R 1932 Cal 216, Rel. on.* [P 182 C 1, 2]

A judgment-debtor made applications under Rr. 90 and 89. The prayer under R. 89 was in the first place " in the alternative. " It was to be taken into consideration only if the first prayer in the application which was the main prayer was not granted, namely if the sale was not set aside under R. 90. Further, even this alternative prayer was hedged round with conditions. The deposit made was to be retained only if the sale was set aside. If the sale was confirmed it was to be refunded. The main prayer under R. 90 was dropped by the judgment-debtor subsequently :

*Held* that the application was conditional and hence not maintainable and the date on which the application under R. 90 was dropped must be taken to be the date on which the application under Rule 89 was filed. The application if more than thirty days after the date of the sale was accordingly time-barred. [P 182 C 1, 2]

W. Lobo — *for Judgment-creditor.*

Dipchand Chandumal — *for Judgment-debtor.*

**Order.** — This is an application under Order 21, Rules 89, 90 and S. 151, Civil P. C. These execution proceedings arose out of Suit No. 98 of 1936 filed by the judgment-creditor against the judgment-debtor on a mortgage. A final decree was passed in the suit on 26th February 1937 for a sum of Rs. 26,609-7-3. On 4th March 1937, the judgment-creditor applied in execution for sale of the mortgaged property. The sale proclamation was issued on 10th August 1937, the sale being fixed for 24th September 1937. On 21st September the judgment-debtor filed an application under S. 151, Civil P. C., read with O. 21, R. 83, Civil P. C., praying for postponement of the sale, undertaking to deposit immediately a sum of Rs. 5000 towards the decretal amount and undertaking also to pay a further sum of Rs. 10,000 in October 1937 and the balance of the decretal amount within two months thereafter. The application was disposed of ex parte on 23rd September and the sale was postponed to 9th November 1937. On 24th September, the judgment-debtor deposited a sum of Rs. 5000 towards the decretal amount. The judgment-creditor apparently came to hear of this and on 24th September presented an application under S. 151, Civil P. C., pointing out that O. 21, R. 83 had no application as the decree was a mortgage decree. The judgment-creditor prayed that the auction as advertised for 24th September 1937 should proceed. The Honourable Mr. Mehta before whom this application came for orders rejected it by an order passed on the same date. The mortgaged property was sold by auction on 9th November 1937 and was purchased by the judgment-creditor, who had obtained leave to bid, for the decretal amount. The present application was filed on 9th December 1937. It sets out alleged material irregularities in publishing the sale. It further sets out alleged material irregularities in conducting the sale and this part of the application concludes with the words:

> It is submitted that the judgment-debtor has suffered substantial injury on account of the above irregularities and if the sale is not set aside he will be very seriously prejudiced.

The second part of the application reads thus:

> In the alternative it is submitted that in case this Honourable Court is not prepared to set aside the sale, on the above grounds, Messrs. Hiranand Vensimal on behalf of the judgment-debtor have deposited in Court today a sum of Rs. 22,880-1-0 as purchasers of the said property from the judgment-debtor for Rs. 35,000 being the balance of the decretal amount after giving credit for Rupees 5000 and a further sum of Rs. 1375, being five per cent. of the sale price, which amounts are to be refunded to Messrs. Hiranand Vensimal in case the sale in favour of the plaintiff is confirmed.

The application is signed by " Dipchand Chandumal & Co., advocates for the judgment-debtor." The application came up for hearing before me on 23rd February 1938 and at this hearing Mr. Dipchand, the learned advocate for the judgment-debtor, stated that in view of the provisions of sub-cl. (2) of O. 21, Rule 89 he dropped that part of the application which prayed for the sale being set aside under R. 90. The application was opposed on behalf of the judgment-creditor but as no objections in writing had been filed on behalf of the judgment-creditor his learned advocate was ordered to do so and the hearing was adjourned to 24th February. Written objections on behalf of the judgment-creditor were filed on the following day. The first objection reads as follows:

> The application is incompetent inasmuch as it has been filed virtually on behalf of the purchasers Messrs. Hiranand Vensimal and not actually on behalf of the judgment-debtor.

Now R. 89 of O. 21 indicates specifically who alone may apply under this Rule to have a sale set aside. Cl. (1) reads:

> Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside . . . .

There is no dispute that the sale of this property by the judgment-debtor to Hiranand Vensimal was made on 9th December 1937 after the sale. The learned advocate for the judgment-debtor has produced the registered sale deed in Court. In 44 Mad 554[1] a Full Bench of the Madras High Court has held that:

> A judgment-debtor who after the Court sale, transfers his interest in the property sold in execution of a decree retains sufficient 'interest' within the meaning of O. 21, R. 89 to allow him to apply under the Rule.

But the Full Bench also held that "the purchaser of such properties after Court sale is precluded from applying under the Rule." In 48 All 188[2] a Bench of the Allahabad High Court held that:

> A judgment-debtor whose property has been attached and sold has until the confirmation of the sale a right to make an application under O. 21, R. 89, Civil P. C., to have the sale set aside but he cannot, by selling such property to a third party, enable the purchaser so to apply.

In 49 Cal 454[3] it was held that:

> A purchaser of an immovable property from a judgment-debtor, subsequent to the sale of the same in execution of a decree, cannot apply to have the execution sale set aside on deposit under O. 21, R. 89, Civil P. C.

**If the application under O. 21, R. 89 before me is therefore one by the judgment-debtor this first objection raised on behalf of the judgment-creditor cannot stand. But this is not so; for, if the application with which I am now dealing be carefully examined** it becomes at once manifest that so far as it is an application under O. 21, R. 89, it is not only virtually an application by the purchaser but actually one by him. No doubt the application begins with the words "It is prayed on behalf of the judgment-debtor" and is signed at the end by "Dipchand Chandumal, advocate for judgment-debtor". But in between the application is sharply divided into two distinct parts. The first concludes with the words:

> It is submitted that the judgment-debtor has suffered substantial injury on account of the above irregularities, and if the sale is not set aside he will be very seriously prejudiced.

The second part of the application which is the part with which I am now concerned reads:

> In the alternative it is submitted that in case this Honourable Court is not prepared to set aside the sale on the above grounds, Messrs. Hiranand Versimal on behalf of judgment-debtor have deposited in Court today a sum of Rs. 22,880-1-0 as purchasers of the said property from the judgment-debtor for Rs. 35,000 being the balance of the decretal amount after giving credit for Rs. 5000 and a further sum of Rs. 1375 being 5 per cent. of the sale price, which amounts are to be refunded to Messrs. Hiranand Versimal in case the sale in favour of the plaintiff is confirmed.

There can be no doubt that this part of the application is one on behalf of Hiranand Vensimal, the purchaser. It sets out in clear terms that the deposits of Rupees 22,880-1-0 and Rs. 1375 have been made by Hiranand Vensimal as purchaser of the said property from the judgment-debtor. It further sets out that these amounts are to be refunded to Messrs. Hiranand Vensimal in case the sale is confirmed. It is true that the words "on behalf of the judgment-debtor" have been added, but this makes no difference. The person depositing is Hiranand Vensimal as purchaser and if the sale is not confirmed the deposit is to be returned to Hiranand Vensimal. The words "on behalf of the judgment-debtor" can in these circumstances only mean "for the benefit of the judgment-debtor". **I feel no doubt whatever that the only interpretation that can be placed upon this part of the application is that it is an application made by Hiranand Vensimal who purchased the property in question from the judgment-debtor after the sale. Such an application cannot, under the provisions of R. 89, be entertained and the Rule has been so interpreted by the authorities to which reference has been made above. It is worthy of note that this very objection was raised by the Deputy Registrar of this**

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[1] **Sundaram v. Mamsa Mavuthar, (1921) 8 A I R Mad 157=63 I C 937=44 Mad 554=40 M L J 497 (F B).**

[2] **Fatima-ul-Hasna v. Baldeo Sahai, (1926) 13 A I R All 204=93 I C 24=48 All 188=24 A L J 69 (F B).**

[3] **Saroda Kripa Lala v. Harendra Lal Das, (1922) 9 A I R Cal 271=68 I C 289=49 Cal 454=26 C W N 149.**

Court when the application was originally filed on 9th December 1937 as will appear from his endorsements on the reverse of the application. The learned advocate for the judgment-debtor appears to have successfully evaded the difficulty so far as the admission of the application is concerned by adding the words "on behalf of judgment-debtor" in the second part of the application. The learned advocate for the judgment-debtor did not fail to appreciate this position and was constrained to rely on the case in 49 All 839,[4] the head-note of which reads as follows :

> Certain judgment-debtors whose property had been sold in execution of a decree executed a mortgage of the property, and then the mortgagees and themselves by means of separate applications paid into Court the amount needed to get the sale set aside, one party tendering approximately two-thirds and the other one-third.
>
> Held that there was nothing illegal in payment being made in this way; the two payments should be treated as one and as being the payment of the judgment-debtors.

At first sight it would appear that this is an authority very much in favour of the judgment-debtor but that it is entirely distinguishable, and that it can be of no assistance to the judgment-debtor is indicated in the following sentence which appears at the end of the judgment : "The amendment of the Rules by the rule making powers has made the point raised in this case clear." At p. 1441 of Mulla's Civil Procedure Code the rules framed by the Allahabad High Court under O. 21, Civil P. C., are set out. Under the heading "Rule 89" the following appears :

> In sub-r. (1) of this rule for the words "any person . . . before such sale," read the words "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property".

It is not necessary to elaborate the point. R. 89 as it appears in the Civil Procedure Code is not in force in Allahabad. What is in force there is R. 89 with the amendment referred to in the Allahabad High Court Rules set out at p. 1441 of Mulla's Civil Procedure Code. According to the Allahabad High Court Rules, a person who has acquired an interest from the judgment-debtors in the property sold even after such sale would appear to be entitled to apply. The case reported in 49 All 839[4] is thus clearly distinguishable. The application under O. 21, R. 89 being thus an application not only virtually but actually by Hiranand Vensimal, the purchaser of the property from the judgment-debtor after the date of the sale, this application must on this ground alone be dismissed. But other objections have been raised and as this matter has been argued before me so strenuously by the learned advocates for the opposing parties, it is obvious that one or other of them will take this matter on appeal or revision to the High Court and it appears to me proper in these circumstances to dispose of all the objections. The second objection raised on behalf of the judgment-creditor reads as follows :

> The application is incompetent as the full amount shown in the proclamation has not been paid into Court. The full amount was Rupees 27,752-8-6 whereas the amount deposited was only Rs. 22,880-1-0.

What is to be deposited in order that an application under R. 89 of O. 21 should be successful, is clearly set out in the Rule :

> (a) For payment to the purchaser, a sum equal to 5 per cent. of the purchase money, and
>
> (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

In this case 5 per cent. amounts to Rs. 1375. The amount shown in the sale proclamation is Rs. 26,614-15-3. This makes a total of Rs. 27,989-15-3. The deposit actually made is Rs. 1375 and Rs. 22,880-1-0 making a total of Rs. 24,255-1-0. But credit is claimed for the sum of Rs. 5000 deposited in Court by the judgment-debtor on 24th September 1937. The learned advocate for the judgment-debtor argues that including the sum of Rs. 5000 referred to above the deposit made under R. 89 amounts to Rs. 29,255-1-0 which is considerably over the amount required to be deposited. The learned advocate argues the deposit of Rs. 5000 was made by the judgment-debtor. It is idle to contend that he should have paid Rs. 5000 twice over. What was the point of depositing Rs. 5000 more than was actually deposited when the sum of Rs. 5000 had already been paid in by the judgment-debtor and was lying in Court available to the judgment-creditor. But the requirement of R. 89 is clear and specific. Five per cent of the purchase money has to be deposited for payment to the purchaser and for payment to the decree-holder the amount specified in the proclamation of sale less any amounts which may since the date of such proclamation of sale have been received by the decree-holder. It appears to me that R. 89 has to be very strictly construed. The rule is intended to confer a special benefit on a judgment-debtor whose immovable property has been sold in execution of a decree. There is a chance that at a Court auction his property may have been sold at an undervalue. To enable the judgment-debtor to obviate such a disadvantage to him the Rule entitled him to have the sale set aside by deposit of the amounts specified in the Rule. The judgment-debtor cannot be allowed to take credit for any amount which he might have deposited in Court behind the back and without the consent of the judgment-creditor and which the judgment-creditor has refused to accept. The only deduction allowed by the Rule is the amount which since the date of the proclamation of sale has been received by the decree-holder. Authority is not wanting in support of my interpretation of the Rule. In 46 Bom 171[5] it was held that:

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[4] Madhuri Saran v. Bishambhar Nath, (1927) 14 A I R All 561=102 I C 471=49 All 839=25 A L J 576.

> The provisions of O. 21, R. 89 being a concession allowed to the judgment-debtor must be strictly complied with in order to enable the judgment-debtor to obtain the advantage of the concession.

To the same effect are the remarks of a Bench of our own Court in 22 S L R 82.[6] At page 89 Rupchand A. J. C. states:

> A Court auction is not a voluntary contract between the vendor and the vendee which may be broken at the will of either party. It is held in pursuance of statutory powers, and can be set aside only on certain conditions. If those conditions do not exist or are not otherwise availed of, the sale must be confirmed.

The words "received by the decree-holder" in R. 89, sub-cl. (1) (b) have been strictly construed in 23 Bom 723[7] where it was held:

> The words in Cl. (b) of S. 310-A, Civil P. C., as amended by Act 5 of 1894, 'less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder' contemplate an actual receipt of the amount by the decree-holder. A mere payment of the sale-proceeds into Court does not satisfy the requirements of the Section.

Section 310-A referred to in this ruling corresponds to O. 21, R. 89 of the present Civil Procedure Code. In 25 Bom L R 446[8] it is held that the phrase "any amount which may . . . . have been received by the decree-holder" in Cl. (b) of O. 21, R. 89, Civil P. C., means "money actually received by the decree-holder, and does not include payment of sale proceeds into Court." In A I R 1933 All 155[9] it was held that:

> In order to avail himself of the provisions of R. 89, the judgment-debtor must bring himself strictly within its purview and must fulfil all the conditions required by it.

He could not take advantage of the fact that other sales had taken place on the same date and that auction-purchasers had deposited amounts and claimed credit for those sums and deduct the same from the amount which he offered to pay. In 39 Mad 429[10] it was held that:

> Order 21, Rule 89, Civil P. C., is in the nature of an indulgence to judgment-debtors; and a judgment-debtor who wishes to take advantage of its provisions must strictly comply with the same, by paying all the amounts as directed by the Rule, less any amount that may have been paid by himself, and he cannot take credit for any amount paid by a co-judgment-debtor who has not joined him in the application; and according to the Rule, credit can be taken only for any amount that may have been actually or constructively received by the decree-holder and not for one which, having been deposited could have been received by him, had he been minded to do so.

A contrary view appears to have been taken by the Allahabad High Court in 55 All 200.[11] The facts in that case however were somewhat different and in any event with all respect to the learned Judges of the Allahabad High Court, I am not prepared to follow this ruling in preference to the decisions of the Bombay and Madras High Courts to which reference has been made. In the case before me the judgment-debtor had so to say surreptitiously deposited the sum of Rs. 5000 in Court against the decretal amount. The judgment-creditor on coming to know had refused to accept the amount. The money lay in Court and could have been attached by any person in execution of a decree against the judgment-debtor, or before judgment by any person having a claim against the judgment-debtor and filing a suit against him. To my mind it can by no means be said that this amount of Rs. 5000 had been 'received' by the judgment-creditor since the date of the proclamation of the sale within the meaning of R. 89 so as to enable the judgment-debtor to take credit for this amount in connexion with an application under R. 89. As I have stated above, R. 89 has to be strictly construed and even a mistake cannot be availed of as justifying a departure from the requirements of the Rule. In A I R 1934 Lah 790[12] it was held:

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[5] Manaji Kaverji v. Aramita, (1922) 9 A I R Bom 193 = 63 I C 39 = 46 Bom 171=23 Bom L R 847.

[6] Shewakram Gurdinomal v. Ghulam Shah, (1927) 14 A I R Sind 225 = 108 I C 440 = 22 S L R 82.

[7] Trimbak Narayan v. Ramchandra Narsingrao, (1899) 23 Bom 723=1 Bom L R 215.

[8] Totaram Chunilal v. Chhoturam Motiram, (1928) 10 A I R Bom 299 = 73 I C 454 = 25 Bom L R 446.

[9] Mannu Naik v. Mathura Prasad, (1933) 20 A I R All 155 = 143 I C 127 = 55 All 123 = 1932 A L J 1107.

[10] M. Karunakara Menon v. M. Krishna Menon, (1916) 3 A I R Mad 717=27 I C 952=39 Mad 429=28 M L J: 262.

[11] Ahmadi Begam v. Ishaq Muhammad, (1933) 20 A I R All 292=145 I C 872=55 All 200 = 1933 A L J 78.

> Where the decretal amount is wrongly stated in the proclamation of sale through mistake as being less than the original decretal amount, the judgment-debtor cannot be allowed to take advantage of such a mistake. Therefore if he deposits the amount less than the decretal amount taking advantage of such a mistake he does not comply with the provisions of R. 89.

In 26 Cal 449[13] at page 450, Full Bench, a judgment-debtor was held not to have complied with the provisions of the Rule, though his failure to do so was the result of a mistake in calculation by an officer of the Court. Now in the present case I have held that the application under O. 21, R. 89 is one by Hiranand Vensimal, but even if the application were by the judgment-debtor himself I hold that he has failed to comply with the provisions of O. 21, R. 89 in respect of the deposits he had to make under that rule and that for this reason as well the application must be dismissed. The last objection urged on behalf of the judgment-creditor reads as follows :

> The application is incompetent inasmuch as the application filed on 9th December 1937 was conditional. If the application be treated as one filed yesterday (23rd February 1938), it is submitted it is out of time.

The prayer under R. 89 of O. 21 is in the first place "in the alternative." It is to be taken into consideration only if the first prayer in the application which is the main prayer is not granted, namely if the sale is not set aside under R. 90. Further, even this alternative prayer is hedged round with conditions. The deposit made is to be retained only if the sale is set aside. If the sale is confirmed it is to be refunded to Messrs. Hiranand Vensimal. Now this is surely not a kind of application contemplated by R. 89 of O. 21. In 58 Mad 972,[14] Full Bench, it was held :

> Neither the judgment-debtor nor a person interested in the property sold can attach any condition to his deposit under O. 21, R. 89, Civil P. C., and the Court cannot accept the deposit subject to any condition or protest.

The cases in 53 Mad 943[15] and 30 All 192,[16] on this point were followed. To the same effect is the ruling in 35 C W N 1056.[17] It is further worthy of note that the prayer under R. 89 was an alternative prayer subsidiary to the main prayer under R. 90. The main prayer was dropped by the learned advocate for the judgment-debtor only on 23rd February 1938, and it is argued with considerable force that this must be taken to be the date on which the application under R. 89 was filed, even assuming the application is one by the judgment-debtor; that the application is thus more than thirty days after the date of the sale and is accordingly time-barred. I hold that the judgment-creditor is entitled to succeed on this objection as well, even if it be held that the application under R. 89 is one by the judgment-debtor. I accordingly uphold the objections raised to this application on behalf of the judgment-creditor, dismiss this application with costs, and confirm the sale on payment of poundage fee.

D.S./R.K. *Application dismissed.*

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[12] Mt. Uda Bai v. Ram Autar Singh, (1934) 21 A I R Lah 790=154 I C 641.

[13] Chundi Charan Mandal v. Banke Behary Lal, (1899) 26 Cal 449=3 C W N 283 (F B).

[14] L. A. Krishna Ayyar v. Arunachalam Chettiar, (1935) 22 A I R Mad 842 = 158 I C 207 = 58 Mad 972=69 M L J 349 (F B).

[15] Kummakutty v. Neelakandan Nambudri, (1930) 17 A I R Mad 921 = 128 I C 509 = 53 Mad 943=59 M L J 893.

[16] Tuhi Ram v. Izzat Ali, (1908) 30 All 192=5 A L J 253=1908 A W N 77.

[17] Nurjahan Khatun v. Asia Khatun, (1932) 19 A I R Cal 216=136 I C 478=35 C W N 1056.

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## A. I. R. 1938 Sind 182

Lobo J.

*In the matter of Seth Moosaji Amiji Valiji.*

Misc. No. 334 of 1937, Decided on 29th March 1938.

**Trusts Act (1882), S. 34 — Summary nature — Question of conversion of trust property — Separate suit is better — Proceedings under S. 34 are not proper.**

Proceedings in an application under S. 34 are intended to be summary and the Court would not be exercising a proper discretion if it disposed of matters of such vital importance as involving the conversion of the entire trust property, especially when there is no question of emergency : *18 Mad 443, Rel. on ; A I R 1924 Bom 252, Expl. and Disting.* [P 184 C 2; P 185 C 1]

Fatehchand Asudamal —*for Applicant.*

Rewachand V. Thadani—*for Opponents.*

**Order.** — This is an application under S. 34, Trusts Act, which arises in the following way : One Badruddin Budhabhoy died in the year 1924 leaving considerable property moveable and immovable. He also left very large debts. In 1926 a suit was filed for administration of the property of the deceased being Suit No. 523 of

1926 of this Court. The suit terminated in a decree which is dated 21st June 1927 and which embodied a scheme for the administration as a trust of one of the properties belonging to the deceased Badrudin Budhabhoy, namely plot No. 26, Sheet D-1 in the jail quarter of the City of Karachi with buildings thereon measuring 782 sq. yards. Under the decree the present applicants were appointed trustees. The trustees were required under the trust scheme to have the property transferred in their name in the Government records. They were required to appoint a managing trustee. The scheme provided that the income of the property after payment of all outgoings was to be utilized in paying a sum of Rs. 100 monthly to four beneficiaries, members of the family of Badrudin Budhabhoy and the balance, if any, to certain charitable institutions mentioned in the scheme. The trustees have been carrying on the trust since 1927 and with regard to their management of the trust, nothing has been or can be said. They have published printed yearly and biennial reports of their management of the trust and of the accounts thereof. It would appear however that in the course of years, the trust property has depreciated and deteriorated in spite of the fact that between August 1927 and December 1937 the trustees have expended sums amounting to nearly Rs. 2700 on repairs. At the same time the income from the trust property has been proportionately reduced. It has come down from Rs. 4072-8-0 in the year 1928-29 to Rs. 2083-7-6 in the year 1936-37.

In these circumstances the trustees have filed the present application under Sec. 34, Trusts Act. The application states that the trust property has deteriorated and depreciated in the course of years and that the income therefrom has been proportionately reduced; that the costs of substantial repairs to the property are estimated to be Rs. 16,000; that the present value of the property would be about Rs. 40,000; that the trustees hold in their hands, apart from the immovable property referred to, securities which are likely to realize a sum of Rs. 10,000; it is pointed out in the application that the tenure upon which the property is held is unfavourable because though the lease is one from Government for 99 years in perpetuity, yet it provides for the enhancement of land rent after each period of 20 years; that at present the land rent payable is 5 annas per sq. yard and that in 20 years hereafter it will be 10 annas per sq. yard. Part 10 of the application reads thus:

> The trustees therefore pray that permission may be given to them to convert the property now in trust and purchase another rent producing property to carry out the purposes and objects of the trust.

The four beneficiaries referred to above oppose the application of the trustees in no uncertain terms. They contend that the property in question was the family dwelling house and that the four beneficiaries who belong to the family of the deceased, two of them being his sons and the remaining two his widows, have all along been residing in this property. They further contend that this property is an extremely valuable property situated as it is in the Napier or Jail quarter of the city of Karachi where the value of property is very high; that this is a residential quarter where they have been residing for many years and that in these circumstances it would be highly prejudicial to them to have to vacate their family residence and seek residence elsewhere. Mr. Rewachand however who appears for the beneficiaries was unable to indicate any provision in the decree in Suit No. 523 of 1926, which embodies the scheme, under which the beneficiaries were given the right of residence in the trust property or in any part thereof. It has also been contended on behalf of the beneficiaries that the property can be substantially repaired so as to become a thoroughly good rent-earning property for something like Rs. 10,000 to Rs. 12,000 and as the trustees actually hold this money or a very large part of it, there is no reason why that money should not be utilized in renewing the property in the manner indicated instead of selling it. But a more serious point which has been raised by the learned advocate for the beneficiaries is that this is not a matter in which the Court should act under the provisions of S. 34, Trusts Act. He contends that the question involved upon which the trustees have sought the directions of the Court is one of difficulty and importance and one which it is not proper for the Court to dispose of in an application under S. 34, the procedure connected with which is of a summary nature. In support of his contention the learned advocate had drawn my attention to the case in 18 Mad 443[1] at p. 444. This was a case under Sec. 34 Trusts Act, and the judgment of Subramania Ayyar J. therein is entitled to very considerable weight. The question involved in that case was the investment of a sum of Rs. 8700 which the trustees held over and above two lakhs of rupees which under the trust deed they were required to keep intact as principal. The trustees had applied under S. 34 for the directions of the Court to enable them to apply the sum of Rupees 8700 upon the repairs of certain buildings and premises held by them under the Trust. The learned Judge rejected the application quoting as his reason the words of Vice-Chancellor Sir William Page-Wood in (1860) 1 J & H 142[2] at p. 143, where the Vice-Chancellor said:

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[1] In re Madras Doveton Trust Fund, (1895) 18 Mad 443.

> My reason for not giving an express opinion is, that the case goes into details, with which the Court cannot effectually deal, without having a superintending power and being informed by affidavits; whereas, under this statute, the facts must be taken to be as they are stated in the petition of the trustees, who take the risk of misstatement and the Court has no means of exercising any controlling power over the subject-matter.

Subramania Ayyar J. then proceeds:

> For similar reasons, it appears to me that the present is not a case in which I can authoritatively advise and direct the trustees to lay out the money referred to in the petition on repairs, which it is alleged, the buildings stand in need of.

The learned Judge thereafter proceeds to point out that the proper course for the trustees is to institute a regular suit. He states:

> I am therefore inclined to hold that the proposed expenditure could, on the Court being satisfied of its necessity, be sanctioned, if the matter comes before it in the form of a suit in its original jurisdiction.

The learned Judge accordingly left the trustees to file a plaint if they should be so advised to do. In the case before me the matter is even more serious than the one referred to in the judgment of Subramania Ayyar J. in the case referred to. Here there is the question of selling the trust property and investing the proceeds and other trust money in another property, which is a far more serious question than whether a sum of Rs. 8700 should or should not be expended on effecting repairs to trust property. For the applicants, my attention has been invited to several rulings of the Bombay High Court which establish the proposition that a Court has power in the exercise of its extraordinary jurisdiction to go beyond the express provisions of the trust instrument in cases of emergency or in cases not foreseen or provided for by the author of the trust. The learned advocate argues that it may be that the scheme contained in the decree in Suit No. 523 of 1926 does not reserve the power to the trustees to sell the trust property but he argues that this is a case of emergency, a case which was not foreseen or contemplated at the time the scheme was drawn up and sanctioned by the Court, and that the circumstances which have arisen call for the exercise of the Court's extraordinary jurisdiction. In 25 Bom L R 610[3] Mulla J. states as follows:

> That the High Court of Bombay has this jurisdiction is beyond all doubt. This jurisdiction was recognized in 25 Bom 353[4] where Sir Lawrence Jenkins sanctioned the sale of a minor's interest in Hindu joint family property. It was also recognized in 43 Bom 519[5] where Marten J. sanctioned a sale by trustees of immovable property vested in them. But this jurisdiction is of an extremely delicate character and has to be exercised with the greatest caution. "The principle" as observed by Romer, L J in (1901) 2 Ch 534[6] at p. 543 "seems to be this that the Court may, on an emergency do something not authorized by the trust. It has no general power to interfere with or disregard the trust; but there are cases where the Court has gone beyond the express provisions of the trust instrument, cases of emergency, cases not foreseen or provided for by the author of the trust, where the circumstances require that something should be done." But the Court will not in the exercise of its extraordinary jurisdiction sanction an unauthorized change of investment proposed on the mere ground that it will be to the advantage of the beneficiaries: (1903) 1 Ch 955.[7]

In the present case there can be no doubt that the matter on which the directions of the Court are sought by the trustees is a matter of difficulty and of great importance. It involves the conversion of the entire trust property. The action which the trustees propose to take and for which they asked the directions of the Court is stoutly opposed by the beneficiaries. There is no real question of emergency nor are the circumstances in this case similar to those in 43 Bom 519[5] wherein an emergency had arisen, namely the depreciation of the entire trust property by a substantial portion thereof being acquired by the Bombay Improvement Trust. In these circumstances it appears to me that it would not be proper for the Court to accede to this application under S. 34 made by the trustees. Proceedings in an application under Section 34 are intended to be summary and the Court would not be exercising a proper discretion if it disposed of matters of such vital importance in a summary manner when it is open to the trustees at all times to file a regular suit. For these reasons I reject the application under S. 34, Trusts Act. There will be no order as to costs.

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[2] In re Barrington's Settlement, (1860) 1 J & H 142=29 L J Ch 807=6 Jur (N S) 1073=128 R R 313=8 W R 577.

[3] P. D. DeSouza v. K. R. Daphtary, (1924) 11 A I R Bom 252=87 I C 230=25 Bom L R 610.

[4] In re Manilal Hargovan, (1901) 25 Bom 353=3 Bom L R 411.

[5] In re Shirinbai Merwanji, (1919) 6 A I R Bom 119=49 I C 882=43 Bom 519=21 Bom L R 41.

[6] In re New's Settlement, (1901) 2 Ch 534=70 L J Ch 710=50 W R 17=85 L T 174.

[7] In re Tollemache, (1903) 1 Ch 955=72 L J Ch 539=88 L T 670=51 W R 597; affirming (1903) 1 Ch 457=72 L J Ch 225=51 W R 568=88 L T 13.

B.D./R.K. *Application rejected.*

## A. I. R. 1938 Sind 185

HAVELIWALA AND LOBO JJ.

*Ahmedbux Sujawal and others* — Appellants.

v.

*Balchand Menghraj* — Respondent.

First Appeal No. 27 of 1935, Decided on 25th May 1938.

**Contract Act (1872), S. 74—Penal clause—On construction of decree, clause in it held penal—Executing Court held had power to relieve against penalty even though decree was on award.**

The amount which was found due under a decree was Rs. 5600. This included a sum of Rs. 850 compound and penal interest provided for in the original document as penalty. The decree provided that if the amount less the penalty was paid in certain instalments the debtor would be allowed a rebate of this amount of penalty imposed in the original document between the parties. In default of the payment of instalments the defendant would be liable to pay the whole sum of Rs. 5600:

*Held* that there was clearly a penal clause: *A I R 1934 Bom 370 and A I R 1929 Sind 98, Expl. and Disting.* [P 186 C 2]

*Held further* that the executing Court as a Court of equity had the power to relieve against the penalty, even if the decree was one on award: *A I R 1934 Bom 370, Foll.; A I R 1928 Mad 193, Not foll.; A I R 1935 Sind 140, Disting; A I R 1933 All 252; A I R 1931 Sind 42; A I R 1924 Pat 387 and A I R 1922 Bom 170, Ref.* [P 187 C 1]

Sunderdas Jethanand — *for Appellants.*

Thanwerdas Isardas — *for Respondent.*

**Lobo J.**— This is an appeal against an order passed by the learned First Class Sub-Judge, Larkana, in execution proceedings arising out of Suit No. 49 of 1930 of his Court. The respondent in this appeal held an award decree against the appellants passed on 6th January 1931. The terms of that award decree are as follows:

> That the defendants do pay to the plaintiff a sum of Rs. 5600, but if they pay Rs. 4750 as under, in instalments and on due dates, they are only bound to this amount of Rs. 4750 and the plaintiff will only be entitled to receive Rs. 4750. For the balance of Rs. 850 the defendants will have rebate. If the defendants commit default in payment of the amount in this way the defendants will not be entitled to the rebate. Interest on the above amount should run at eight annas per cent. per mensem from 19th December 1930 till the date of recovery. If the defendants do not pay any instalment on due date, they should pay Rs. 5600 with interest at the rate of twelve annas per cent. per mensem.
>
> In the same way the undermentioned mortgaged property should remain liable for the payment of the above amount and in case the money is not paid, the plaintiff has the power to recover his amount with interest by way of execution either by getting the mortgaged property auctioned or from some other property or from the defendants personally, whichever the plaintiff prefers. If the defendants pay any amount to the plaintiff before the due date the plaintiff is bound to receive it and on receipt of the moneys, the interest should cease to run on that amount. The above mentioned rebate is allowed from the compound interest and penal interest shown in the document so that the defendants may be able to pay the amounts of instalments on the dates shown in proper way. If they do not make proper compliance, they will not be entitled to the rebate.

The first instalment under the decree was of Rs. 2300 and was payable on 31st January 1931. It was paid. The second instalment under the decree was of Rs. 2450 and interest. This was payable on 1st August 1931 and was not paid. Before that date however the opponents had applied to the Court for extension of time for the payment of the second instalment. Notice had been issued of this application to the respondent and the order of the Court on the application made on 9th October 1931 is as follows:

> If I extend the time for payment of the instalment till the next kharif season the plaintiff will stand to lose Rs. 850 as shown in the decree. I however grant time to the defendants to pay the amount under O. 34, R. 4, Civil P. C., on 15th February 1932 subject to the condition that they would be liable to pay Rs. 850 in addition.

It is clear from this order that extension of time for payment of the second instalment was granted to the appellants till 15th February 1932 subject to their paying the additional sum of Rs. 850 but not subject to their paying an enhanced rate of interest provided by the decree. The appellants before 15th February 1932 paid the entire amount of the second instalment provided in the decree with interest. They had made payments of Rs. 900 on 25th January 1932, Rs. 1100 on 13th February 1932 and Rs. 624-7-0 on 15th February 1932 making in all Rs. 2624-7-0 which was equivalent to the amount of the second instalment with interest up to 15th February 1932. It appears that some months later the appellants applied for an order of the Court relieving them from the payment of the sum of Rs. 850 referred to in the order of the Judge dated 9th October 1931. The order on this application which is dated 27th May 1932 reads thus: "I don't think I can go behind the decree. Rejected with costs."

On 30th June 1934 the respondent applied for execution of the decree against the appellants. In that execution application he claimed from the appellants a sum of Rs. 1104-12-0 the greater part of which consisted of the Rs. 850 referred to in the decree and in the order of the Judge dated 9th October 1931 and the higher rate of interest provided in the decree. Objections were filed to the application by the appellants, the main objections being (1) that the Court should relieve the appellants from the payment of the sum of Rs. 850 and interest as this constituted a penal provision; and (2) that the appellants were agriculturists. The order of the learned Judge on the execution application is dated 6th April 1935 and reads thus:

> The two orders of my predecessor are quite clear. He has never excused the default clause. The same defence raised to this application therefore cannot be permitted. The other objections raised have no substance. Objections disallowed.

It is against this order in execution proceedings that the present appeal has been presented. The learned advocate who argued the appeal has raised three points before us: (1) he contends that the lower Court failed to exercise a proper discretion in not relieving the appellants from what was a penal provision in the decree of which execution was sought; (2) that the learned Judge of the lower Court failed to consider the fact that his predecessor had by his order dated 9th October 1931 already relieved the appellants from the payment of the higher rate of interest provided in the decree and had granted an extension of time on condition of the payment of a sum of Rs. 850 only; and (3) that the learned Judge of the lower Court erred in summarily rejecting the other objections raised by the appellants specially the objection as to their being agriculturists.

For the respondent it has been argued that there was no penal clause in the decree; that all that the decree provided for was the payment of a certain sum of money with certain concessions available to the appellants in the event they paid certain instalments on certain dates; and he has relied in support of his contention upon the case in 36 Bom L R 798 = 58 Bom 610.[1] No doubt the document which the learned Judges in that case were dealing with was one which provided for payment of a particular sum followed by a condition allowing to the debtor a concession; but each case must be decided on its own facts and it does not appear to us after a perusal of the case referred to by the learned advocate that the decree in that case corresponds in any manner in its terms with the decree in the case before us. Reliance was placed on the case in 23 S L R 375,[2] but the decision in this case also turned on the special terms of the decree. The decree in the present case, it appears to us, is not one which provides for the payment of a certain sum of money followed by a condition allowing the debtor a concession. The decree must be read as a whole and so read it amounts to this: Rs. 5600 is the amount which is found due. This includes a sum of Rs. 850 compound and penal interest provided for in the original document as penalty; if the amount less the penalty is paid in certain instalments the debtor will be allowed a rebate of the amount of penalty imposed in the original document between the parties. That this so-called rebate is a provision *in terrorem* is clear from the final words of the decree which read:

> Thus above-mentioned rebate is allowed from the compound interest and penal interest shown in the document, so that the defendants may be able to pay the amounts on the date shown in proper way. If they do not make proper compliance, they will not be entitled to the rebate.

We are of opinion that we have here very clearly a penal clause. The next question that arises then is whether the Court executing the decree had the power to relieve against the clause. The learned advocate for the appellants has drawn our attention to a series of cases in which Courts in the exercise of their equitable jurisdiction have granted relief against penal clauses in decrees. Reference in particular has been made to the cases in 55 All 334,[3] 25 S L R 279,[4] 2 Pat 906[5] and

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1. Barjorji Shapurji v. Madhavlal Jesingbhai, (1934) 21 A I R Bom 370=152 I C 575 = 58 Bom 610=36 Bom L R 798.
2. Dayaram Gidumal v. Nabibux, (1929) 16 A I R Sind 98=116 I C 577=23 S L R 375.
3. Mohi-uddin v. Mt. Kashmiro Bibi, (1933) 20 A I R All 252=142 I C 419=55 All 334 (FB).
4. Hotchand Tolaram v. Premchand, (1931) 18 A I R Sind 42=131 I C 710=25 S L R 279.
5. Mt. Nand Rani Kuer v. Durga Dass Narain, (1924) 11 A I R Pat 387=82 I C 505=2 Pat 906=5 P L T 401.

46 Bom 463.[6] In these cases, some of which relate to consent decrees and others to decrees *in invitum*, relief has been granted by the Court in respect of penalty clauses contained in decrees. It has been contended for the respondent that this being a decree on an award, the executing Court had no power to alter the terms of the award and relieve against any penalty, and in support of this proposition the learned advocate for the respondent has relied on the case in A I R 1935 Sind 140[7] and the case in 51 Mad 157.[8] We do not think however that the case in A I R 1935 Sind 140[7] has any application as that was a case of an award outside the Court under Sch. 2, Para. 20, Civil P. C. It is true that in 51 Mad 157,[8] it is held that relief against forfeiture on default of payment incurred under decrees other than consent decrees, cannot be granted by a Court in execution; but, we prefer to follow the decision of the Bombay High Court in 36 Bom L R 798[1] where Beaumont C. J. says:

> There is no general principle of equity that the Court can relieve a party in default in respect of money payments whenever the Court thinks it just so to do. Courts of equity will in cases which have become well defined relieve against the rigours of the common law and for the purpose of this case two heads of relief are relevant. A Court of equity will relieve against a penalty, and will also refuse to enforce strictly stipulations as to time where it is satisfied that the parties themselves did not intend those stipulations to be acted upon strictly. Those two matters are dealt with in this country by Ss. 55 and 74, Contract Act, and unless the present case can be brought under one of those heads, in my judgment, the Court has no power to relieve the respondents from the consequences of their failure to carry out strictly the terms of their agreement.

Now, in the case before us, as already stated we have held that the provision for the payment of Rs. 850 is a penalty and it appears to us therefore that as a Court of equity the lower Court had the power to relieve against the penalty and in the circumstances of the case should have done so. It appears to us therefore that in this view of the matter the order of the lower Court cannot be sustained. In so far as it grants the execution application in respect of the higher rate of interest provided by the decree, the learned Judge acted illegally because that higher rate of interest had already been relieved against by the order of the Court dated 9th October 1931. In so far as the learned Judge ordered execution to proceed in respect of the amount of Rs. 850, it appears to us that he erred in refusing to relieve the appellants from what was clearly a penalty clause. The appellants had paid interest at a reasonable rate for the period of extension of time which they enjoyed. The respondent had sufficient security for his money and in these circumstances the learned Judge should have relieved the appellants from the penal clause without any compensation to the respondent. In so far as the learned Judge refused to consider the plea of the appellants that they were agriculturists, the learned Judge was again in our opinion wrong. We accordingly reverse the order of the lower Court and dismiss the execution application filed by the respondent. We think that the proper order as to costs in this matter will be that each party should bear his own costs. Order accordingly.

D.S./R.K. *Order reversed.*

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## ✻ A. I. R. 1938 Sind 187

DADIBA C. MEHTA AND LOBO JJ.

*Vazirmal Kewalram and others* — Appellants.

v.

*Makran Coast Steam Navigation Co. Ltd.* — Respondents.

First Appeal No. 11 of 1934, Decided on 6th October 1937.

✻ **Companies Act (1913), S. 184—Signatories to Memorandum of Association are deemed to have agreed to become members—Fact that no shares are allotted to them and that they have ceased to be treated as members for considerable time does not relieve them from liability of being placed on list of contributories.**

Signatories to the Memorandum of the Association of a company become the first members of the Company as from the date of incorporation mentioned in the Registrar's certificate. They are deemed to have agreed to become members of the Company and on its registration are to be entered as members in its register of members. But neither this entry nor the allotment of shares is a condition precedent. Each subscriber at once by subscribing irrevocably agrees to take from the Company the number of shares placed opposite his signature unless all its share capital has been allotted to other persons. The fact that no shares are allotted to him and that he has ceased to be treated as a member for a considerable time does not relieve him from liability and he is liable to be placed on the list of contributories. [P 188 C 1; P 189 C 1]

**Kundanmal Dayaram** — *for Appellants.*

**Pahlajsingh B. Advani**—*for Respondents.*

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[6] Narsinha Gopal v. Balvant Madhav, (1922) 9 A I R Bom 170 = 64 I C 570=46 Bom 463=23 Bom L R 1238.

[7] Gangaram Khemsingh v. Ali Mahomed, (1935) 22 A I R Sind 140=157 I C 331.

[8] Girdharidass & Co. v. Para Appadurai, (1928) 15 A I R Mad 193=107 I C 792=51 Mad 157 =54 M L J 816.

**Lobo J.**—This is an appeal under Sec. 202, Companies Act, against an order of the learned Rupchand B., A. J. C., in the liquidation proceedings relating to a Company called the Makran Coast Steam Navigation Co. Ltd. The learned Judge while settling a list of contributories under Sec. 184 ordered that the present appellants among others should be included therein. This Company was registered on 20th November 1929. The Memorandum and Articles of Association and a declaration of their willingness to be directors were signed by the present appellants among others on 19th November 1929. The learned Judge who held that the appellants were liable to be placed on the list of contributories set out the following proposition of law as the ground of his decision:

> It is well settled that signatories to the Memorandum of Association of a Company become the first members of the Company as from the date of incorporation mentioned in the Registrar's certificate. They are deemed to have agreed to become members of the Company and on its registration are to be entered as members in its register of members. But neither this entry nor the allotment of shares is a condition precedent. Each subscriber at once by subscribing irrevocably agrees to take from the Company the number of shares placed opposite his signature unless all its share capital has been allotted to other persons. The fact that no shares are allotted to him and that he has ceased to be treated as a member for a considerable time does not relieve him from liability.

The learned Judge proceeded to quote in support of this proposition of law a number of authorities referred to mainly in Halsbury's Laws of England. The learned advocate who appeared for the appellants was asked by us whether or not he controverted the position of law as set out by the learned Judge. He did not attempt to controvert that legal position but argued instead that whether or not the proposition of law was correct, he attacked the order of the learned Judge on the ground that the appellants had as a matter of fact surrendered the shares they had taken up and that surrender had been duly accepted by the Directors of the Company under the powers conferred upon the Directors by Art. 103 of the Articles of Association. On this ground he argued the appellants were freed from all liability as share-holders and their names had been wrongly included in the list of contributories settled by the learned Judge. Art. 103 of the Articles of Association of the Company refers to the general powers of Directors and includes the power

> to accept from any member, on such terms and conditions as shall be agreed, a surrender of his shares or any part thereof.

The learned advocate for the appellants however has been wholly unable to satisfy us that the appellants at any time surrendered their shares or that any such surrender was at any time accepted by the Directors of the Company. The learned advocate referred us in support of his contention to Exs. 32/24 and 32/23. The first of these is a letter addressed to the Directors of the Makran Coast Steam Navigation Co. Ltd. by three of the present appellants in which they state that for the reasons mentioned in the letter, they are unable to allow their names to be associated with the Company as Directors. The letter concludes :

> Under the circumstances, you will please call a meeting and pass a resolution to the above effect, otherwise we shall be obliged to take legal steps as advised.

Exhibit 32/23 is a reply to the above letter by Sonalkar & Co., the Managing Agents of the Company, in which they state :

> Your letter of the 22nd instant addressed to the Directors of this Company will be placed before the next meeting of those Directors who, on account of their qualifications, are now competent to transact business on behalf of this Company.

These letters are dated 22nd and 24th January 1930 and the learned advocate for the appellants has been unable to point to anything on the record which would show that any such meeting of Directors was held or any resolution was passed at any meeting of the Directors accepting any surrender of shares by the signatories of Ex. 32/24. On the contrary it is clear from the record that Rughnath Sonalkar, one of the firm of the Managing Agents, definitely stated before the liquidator that no meeting of the Directors of the Company was ever held. The learned advocate next relied upon the evidence of Rughnath Sonalkar who was examined as a witness in the proceedings before the learned Judge. He has stated in his evidence :

> We held a meeting of the Directors after 24th January 1930; three or four Directors were present then. We had four Directors then; two of them were Sonalkars and the other two were Ladharam Jeoomal and Jhamandas Khubchand . . . . . . We decided to release all the four Directors from their liability to pay for the shares. Vazirmal was one of those who was released from his liability.

This is directly contradictory to the statement made by the witness before the Official Liquidator. No documentary evidence has been produced in support of the statement, and we cannot for a moment therefore accept a statement of this kind coming from the mouth of a witness such as Rughnath Sonalkar who along with his brother Dattatraya has been described by the learned Judge of the Court below as "two inexperienced raw and penniless youths." There is therefore in our opinion no substance in the contention put forward by the learned advocate for the appellants.

The learned advocate next contended that the appellants are absolved from liability on the shares they took up by reason of the provisions of S. 156, Companies Act. He has however been unable to satisfy us that S. 156 has any application to the case of the appellants. Whatever may be said with regard to their having ceased to be Directors of the Company, they never ceased to be members of the Company and in any case they cannot be held to be 'past members' who had ceased to be members for one year and upwards before the commencement of the winding up. Lastly, the learned advocate for the appellants has contended that in any event appellant Basarmal has been wrongly included in the list of contributories as he was not even served with a notice of the proceedings before he was so included. Quite apart from the question whether it is open to appellant Basarmal to raise this question at this stage, the learned advocate for the appellants has been unable to show us from the record that appellant Basarmal was not served with notice of the proceedings in the lower Court. In our opinion there is no substance whatsoever in this appeal which we accordingly dismiss with costs.

D.S./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Sind 189

RUPCHAND BILARAM J. C. AND
LOBO A. J. C.

*Hussain Baksh Imam Baksh and others* — Appellants.

v.

*Muhammad Musa Muhammad Tayab and others* — Respondents.

First Appeal No. 2 of 1935, Decided on 12th July 1937, against decree of First Class Sub-Judge, Shikarpur, D/- 12th October 1934.

**Court-fees Act (1870), S. 7 (iv) (c) and Sch. 2, Art. 17 (6)—Compromise during plaintiffs' minority between adult members of family for partition — Preliminary decree passed but no partition by metes and bounds — Plaintiffs all along in joint possession—Suit by them for declaration that preliminary decree was inoperative and for partition—Suit falls under S. 7 (iv) (c) and Sch. 2, Art. 17 (6).**

In a suit for partition of property court-fee is to be determined solely on the consideration of the cause of action as stated in the plaint. A denial by the defendant that the plaintiff was not in joint possession at the date of suit does not alter the character of the suit: *6 S L R 72 and 6 S L R 74, Rel. on.* [P 189 C 2]

Plaintiffs alleged that during their minority their brothers and sisters, who were adults, entered into a collusive compromise with defendant, who was their uncle, by which a much larger share of the property was to be given to the defendant than what he was entitled to according to law. But they said that only a preliminary decree had been passed in that suit and no partition by metes and bounds had been effected. They contended that they were still in joint possession of the property and brought a suit praying for two reliefs: (1) for declaration that the previous compromise and the preliminary decree passed thereon were inoperative and not binding upon them, and (2) for partition of the property which was in their joint possession according to law:

*Held* that as regards first relief the suit fell under S. 7 (iv) (c). The second relief fell under Art. 17 (6) of Sch. 2. As the plaintiff contended that they were in joint possession of the property, it was open to them to put such value as they thought proper under S. 7, Cl. (iv) (c): *8 Cal 757, Rel. on.* [P 190 C 1]

Dipchand Chandumal — *for Appellant.*

Partabrai D. Punwani, Advocate General — *for the Crown.*

**Rupchand Bilaram J. C.** — The only point with which we are at present concerned is whether the suit falls within the purview of S. 7, Cl. (iv) (c), Court-fees Act, and Art. 17 (c) of Sch. 2 of the Act or of S. 7, Cl. (v) of that Act. Now, it is well settled that in a suit for partition of property, court-fee is to be determined solely on the consideration of the cause of action as stated in the plaint. A denial by the defendant that the plaintiff was not in joint possession at the date of suit does not alter the character of the suit: 6 S L R 72[1] and 6 S L R 74.[2] In such a case if the defendant is able to establish his defence that the plaintiff was not in joint possession of the property which was the subject matter of the suit, the plaintiff's cause of action as laid fails and his suit is liable to be dismissed unless he is permitted to amend the plaint and pay the additional court-fee. In the present case, the plaintiffs have alleged that they are in joint possession of the property in suit. Their case is that during their minority their brothers and sisters, who were adults, entered into a collusive compromise with defendant 1, who is their uncle, by which a much larger share of the property was to be given to defendant 1 than what he was entitled to according to law. But they say that only a preliminary decree has been passed in that suit and no partition by metes and bounds has up to now been effected. They contend that they are in joint possession of the property and have brought the present suit praying for two reliefs: (1) for a declaration that the previous compromise and the preliminary decree passed thereon are inoperative and not binding upon them, and (2) for partition of the property which is in their joint possession according to law.

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[1] Manghanmal v. Tolaram, (1912) 6 S L R 72= 16 I C 773.

[2] Haji Yusif v. Ghulam Hussein Kassim, (1912) 6 S L R 74=16 I C 771.

Now so far as the first part of their case is concerned, it is a suit for a declaration and at most for an additional prayer for consequential relief, flowing from such declaration, namely that the contesting defendant be prohibited from asking the Court to give effect to the preliminary decree by effecting a partition by metes and bounds in accordance therewith. So far as that relief goes, the suit clearly falls under S. 7 (iv) (c). The second relief claimed by the plaintiffs for partition of the property, which is in their joint possession in accordance with the ordinary law applicable to the circumstances of the case, clearly falls under Art. 17 (6) of Sch. 2. One of the earliest cases on the question of court-fee payable by a plaintiff seeking partition of property which is in joint possession is 8 Cal 757.[3] In that case Garth C. J. has said :

> If the plaintiff's suit had been to recover possession of, or establish his title to, the share which he claims in the property, he must have paid an ad valorem stamp-fee upon the value of that share. But, as I understand, he is already in possession of his share, and all that he wants is, to obtain a partition, which is merely, as explained by the learned Judges in 4 C L R 418,[4] to "change the form of his enjoyment" of the property, or, in other words, to obtain a divided, instead of an undivided share. It seems to me impossible to say what will be the value to the plaintiff of this change in the nature of his property . . . . It was quite right, of course, for the purpose of jurisdiction, to be guided by the value of the property in suit, but the amount of the stamp-fee is governed by a different principle.

These observations equally apply to the present case, and the plaintiffs' contention that as they are in joint possession of the property in suit it is open to them to put such value as they think proper under S. 7, Cl. (iv) (c) must be upheld. This appeal is therefore allowed. It is held that the court-fee paid on the plaint is a proper court-fee. The learned trial Judge is directed to take the suit back on his file and dispose of it according to law. This order is however without prejudice to the trial Court going into the question whether or not the plaintiffs were in joint possession of the property at the date of the suit or not. As the respondents have not appeared, costs will be costs in the cause.

D.S./R.K. *Appeal allowed.*

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[3] Kirty Churn Mitter v. Aunath Nath Deb, (1882) 8 Cal 757=11 C L R 95.

[4] Rajendro Loll Gossami v. Shama Churn Lahori, (1880) 5 Cal 188=4 C L R 418.

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## A. I. R. 1938 Sind 190

DAVIS J. C. AND LOBO J.

*Bhojraj Pheroomal*
v.
*Abdul Waheed.*

Criminal Ref. No. 48 of 1938, Decided on 4th April 1938, made by First Addl. Sessions Judge, Sukkur, D/- 31-1-1938.

**Bombay Public Conveyances Act (7 of 1920), S. 24—For conviction under S. 24 it must be proved that when the unlicensed driver was driving he was driving public conveyance for use as such—It is not sufficient to show that accused is licensee of public conveyance and that he permitted it to be driven by driver who is not licensed.**

To convict an accused under S. 24 it is not sufficient merely to show that the accused is a licensee of a public conveyance and that he permitted it to be driven by a driver who is not licensed; it must be shown that when this unlicensed driver was driving, he was driving a public conveyance for use as such. S. 24 does not mean that if the licensee of a public conveyance himself takes his family out for a treat or permits an unlicensed driver to take his family out for a treat, an offence is committed; for, the public conveyance is not then used for the purpose of public conveyance at all. It is used for the purpose of private conveyance. [P 190 C 2; P 191 C 1]

**Davis J. C.**—This is a reference to us by the First Additional Sessions Judge of Sukkur recommending that the conviction of one Mamtazali for an offence under S. 24, Bombay Public Conveyances Act 7 of 1920, to a fine of Rs. 10 be quashed. The learned Judge is of the opinion that the conviction is wrong because the Magistrate has taken the test whether the accused should be convicted or not to be simply whether the driver of a public conveyance was or was not a licensed driver, whereas the proper test is whether the public conveyance was used as such at the material time. Now to convict an accused under S. 24 of the Act, it is not sufficient merely to show that the accused is a licensee of a public conveyance and that he permitted it to be driven by a driver who is not licensed; it must be shown that when this unlicensed driver was driving, he was driving a public conveyance for use as such. S. 24 reads :

> Any licensee of a public conveyance who shall, when the same is used for the purpose of a public conveyance, permit any person to act as driver thereof other than a driver duly licensed under this Act, or who shall, when such conveyance is used for the purpose aforesaid, permit the same to be drawn by a horse other than a horse for which a license is in force under this Act, shall be punishable with fine which may extend to fifty rupees.

The material words in this case, we think, are "when the same is used for the purpose of a public conveyance". The Section does not mean that if the licensee of a public conveyance himself takes his family out for a treat or permits an unlicensed driver to take his family out for a treat an offence is committed, for, the public conveyance is not then used for the purpose of public conveyance at all. It is used for the purpose of private conveyance. It is not being plied for hire or for carrying members of the public for hire. It is used by a private individual for his private purposes. In this particular case it is the case of the driver, which there seems no reason to doubt, that the horse was sick and at 11 P. M. on the night in question he was driving the horse to the horse doctor. Apparently this plea did not avail him in another case in which he was charged as a non-licensed driver with driving a licensed public conveyance. But in this case we are concerned only with the case of the licensee. We think the learned Sessions Judge was right when he says that this conviction of the accused cannot be sustained. We therefore set aside the conviction and order the fine imposed upon the accused to be refunded.

R.M./R.K. *Conviction set aside.*

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## A. I. R. 1938 Sind 191

DAVIS J. C. AND DADIBA C. MEHTA J.

*Gustad Bahram Irani* — Applicant.

v.

*Dr. A. Said* — Opponent.

Civil Revn. Appln. No. 117 of 1937, Decided on 17th May 1938, from order of Judge, Small Cause Court, Karachi, D/- 18th December 1937.

**Karachi Small Cause Courts Act (4 of 1929), S. 24—Scope — Security should not be excessive or punitive.**

**The purpose of S. 24 is to allow the Court power to demand such security as to ensure the prompt institution by the applicant of his suit and as a proof that he is in earnest. The security can be** fixed in such a sum as will test the good faith of the applicant and induce him to do that which the bond requires, so that he and his surety may be free of the liability which the bond imposes. This can be done within the provisions of the Section but excessive or punitive security cannot be demanded : *A I R 1937 Sind 153, Ref.*

[P 191 C 2; P 192 C 1]

W. Lobo — *for Applicant.*

Fatehchand Assudomal—*for Opponent.*

**Davis J. C.**—This is a revision application against an order of the Judge of the Small Cause Court, Karachi, under S. 24, Karachi Small Cause Courts Act, 1929, in which the Court directed the applicant to give security in the sum of one lakh of rupees for the stay of a suit of ejectment against him, the Judge being of the opinion that the application to stay the suit was mala fide and therefore, according to him, punishable by a punitive order as to the security to be furnished under S. 24 of the Act. But we do not think it was contemplated that the security demanded under S. 24 would be such as to render this Section inoperative and it is clear that to demand under the circumstances of this case a security of one lakh of rupees would debar the applicant from filing his suit at all. For, in the ordinary way an applicant could not find security for a lakh of rupees. The purpose for which this security is to be given under S. 24 has been discussed by this Court in the case in 30 S L R 221[1] and there it is made clear that the Court cannot refuse to stay a suit merely because it is thought that the application made under S. 24 is made for the purpose of delay. There this Court has explained that the bond itself is intended to provide against delay and that the security to be given is to be determined not only having regard to the probable costs, but also having regard to the value of the property. Clearly the purpose of that Section was to allow the Court power to demand such a security as to ensure the prompt institution by the applicant of his suit and as a proof that he was in earnest. Therefore, the order security under S. 24 can be for a la amount but it cannot, we think, be fo excessive amount and we think in the cumstances of this case in view of th that the monthly rental of the prope Rs. 75, the security of a lakh of demanded is excessive though the value of the building may be on half lakhs. We think the security should be reduced from one lakh to Rs. 10,000. That, we think, would be a sufficient incentive to the applicant to institute his suit without delay — and we are informed that it was instituted without delay—and act as a deterrent against frivolous applications. The purpose of the security demanded under S. 24, according to the words of the Section itself is the institution of the suit without delay. In any case, the security can be fixed in such a sum as will test the good faith of the applicant and induce him to do that which the bond requires, so that he and his surety may be free of the liability which the bond imposes. This can be done within the provisions of the Section but excessive or punitive security cannot be demanded. We think therefore the order of the learned Judge should be modified, as we have said, and the revision application to this extent allowed. Order accordingly. No order as to costs.

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[1] Kersondas Shamji v. Devchand Ana 24 A I R Sind 153=169 I C 248= 221.

D.S./R.K. *Order modified.*

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## A. I. R. 1938 Sind 192

DAVIS J. C.

*Pherumal Lilaram* — Applicant.

v.

*Emperor.*

Criminal Revn. Appln. No. 17 of 1938, Decided on 1st June 1938, from order of Addl. City Magistrate, Karachi, D/- 25th February 1938.

**Criminal Trial—Complaint — Dismissal of— Granting of summary A, B or C is administrative matter but dismissal under S. 203, Criminal P. C., requires judicial order — Procedure on taking cognizance of complaint explained.**

The granting of a summary A, B or C is a mere administrative matter, while the dismissal of the complaint requires a judicial order under S 203, Criminal P. C. Ordinarily, when a Magistrate takes cognizance of an offence on a complaint, he should examine the complainant on oath and reduce the substance of his examination to writing, and if he wishes to postpone the issue of process, he acts in accordance with S. 202, Criminal P. C., and then if after inquiry he wishes to dismiss the complaint he acts under S. 203, Criminal P. C. But that Section contemplates that he should exercise his own independent judgment, and if he does not wish to postpone the issue of process, then he acts under S. 204 and the following Sections: *Criminal Revn. Appln. No. 15 of 1938, Rel. on.* [P 192 C 2]

Balkrishen H. Lulla — *for Applicant.*

Kazi Khuda Baksh, Assist. Public Prosecutor — *for the Crown.*

**Order.**—This is an application in revision against an order of the Additional City Magistrate, Karachi. Apparently he has dismissed the applicant's complaint under S. 203, Criminal P. C., by an order granting a "C" summary. But, as I have just pointed out in my order in the case of *Jeoomal Tikamdas* v. *Crown* (Cri. Revn. Appln. No. 15 of 1938), which has preceded this, this is not a proper dismissal of the complaint under S. 203, Criminal P. C., at all. The granting of a summary A, B or C is a mere administrative matter, while the dismissal of the complaint requires a judicial order under S. 203, Criminal P. C. The learned Magistrate would save himself much time and save much time of this Court if he would carefully refer to the provisions of Ss. 200, 202 and 203, Criminal P. C., and also S. 204, and he would then find that ordinarily when he takes cognizance of an offence on a complaint, he should examine the complainant on oath and reduce the substance of his examination to writing, and if he wishes to postpone the issue of process, he acts in accordance with S. 202, Criminal P. C., and then if after inquiry he wishes to dismiss the complaint he acts under S. 203, Criminal P. C. But that Section contemplates that he should exercise his own independent judgment, and if he does not wish to postpone the issue of process, then he acts under S. 204 and the following Sections.

The learned Assistant Public Prosecutor pointed out one possible difficulty in the way of my ordering further inquiry because this matter comes before me in Sessions Court jurisdiction; and S. 436, Criminal P. C., contemplates a further inquiry if any complaint has been dismissed under S. 203 or sub-s. (3) of S. 204, or when a person accused of an offence has been discharged; and it may be said the Magistrate has not in this case dismissed the complaint under S. 203, Criminal P. C., therefore he suggested it might be necessary to refer this matter to the High Court. But, it appears to me, the Magistrate, when he ordered the issue of summary "C", intended to dismiss the complaint under S. 203, Criminal P. C., and his order can be taken as such. Therefore, it enables me to follow the simple process of sending this case back through the District Magistrate, Karachi, for further inquiry by this or any other Magistrate in accordance with the provisions of S. 436, Criminal P. C. Order accordingly.

B.D./R.K. *Case remanded.*

## A. I. R. 1938 Sind 193

DAVIS J. C.

*Ayodhya Parsad Sital Parsad*

v.

*Emperor.*

Criminal Appeal No. 26 of 1938, Decided on 28th March 1938, against conviction and sentence passed by Addl. City Magistrate, Karachi, D/- 18th February 1938.

**(a) Penal Code (1860), S. 417 — Sending bogus insured letter is not cheating.**

Whatever offence may be committed when a bogus insured cover is sent through the post, the offence of cheating the addressee within the provisions of S. 417 is not committed: *A I R 1927 Mad 199; A I R 1924 Cal 215 and A I R 1924 All 205, Rel. on; A I R 1933 Pat 183, Dissent.* [P 193 C 2]

**(b) Penal Code (1860), S. 417—Cheating—Mere deceit or doing something fraudulently is insufficient—Necessary ingredients explained—Act or omission should in itself cause damage or harm.**

It is clear from the words of S. 415, that mere deceit of a person is not sufficient. The mere doing of something fraudulently or dishonestly is not sufficient. The deceipt of the fraudulent or dishonest person must induce the person deceived to deliver some property, or to consent that some property shall be retained, or intentionally induce the person deceived to do or omit to do something which he would not otherwise do or omit to do, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. But when the Section says "which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property," it clearly means which act or omission in itself causes or is likely to cause damage or harm to that person in body, mind, reputation or property and that if that damage or harm is dependent upon the future act of some other person, then such damage or harm is too remote to be within the provisions of the Section, which contemplates that the act done is in itself likely to cause damage or harm and which is not dependent for damage or harm upon the entirely problematical action of some other person. To use a trite phrase, the act done or omitted to be done must be the *causa causans* of the harm caused or likely to be caused: *A I R 1924 Cal 215; A I R 1924 All 205 and A I R 1927 Mad 199, Discussed and Rel. on; A I R 1933 Pat 183, Dissent.* [P 193 C 2; P 194 C 1]

Dipchand Chandumal — *for Appellant.*

Hatim B. Tyabji, Assistant Public Prosecutor — *for the Crown.*

**Judgment.**—In this case the accused, who is a Municipal peon, named Ayodhya Parsad has been convicted by the Additional City Magistrate of an attempt to cheat, an offence under S. 417 read with S. 511, I. P. C., and sentenced to six months' rigorous imprisonment. The offence of which the accused has been convicted is said to lie in the fact that he sent to one Raghurajsing, son of Shivnathsing, at Rangi, Tahsil Tarab Gunj, District Gonda, a registered and insured cover which was supposed to have contained Rupees 300 in currency notes, but which, when opened by the addressee, contained only worthless pieces of paper.

This case has been argued before me as a question of law because it appeared from the authorities with which both the learned advocate for the appellant and the learned Assistant Public Prosecutor had quite rightly fortified themselves, that the offence of attempting to cheat had not been committed, neither had the offence of cheating. Indeed, even if reliance be placed upon cases decided by the Patna High Court, which is the only Court which, it can be said, takes the view that a conviction such as this can be sustained, reference to the latest judgment of that Court in A I R 1933 Pat 183,[1] will show that in the judgment of the Judges in that case the previous judgment of that Court in 1 Pat L J 391[2] was wrong and has misled other Courts. But it appears to me, with all respect to the learned Judges of the Patna High Court, who decided the case in A I R 1933 Pat 183,[1] that the view taken by the Allahabad High Court in A I R 1924 All 205,[3] by the Calcutta High Court in 50 Cal 849[4] and by the Madras High Court in 28 Cr L J 70[5] is the better view, and that whatever offence may be committed when a bogus insured cover is sent through the post, the offence of cheating the addressee within the provisions of S. 417, I. P. C., is not committed and I think that this is clear from the words of S. 415, I. P. C., itself. It is clear from the words of S. 415 that mere deceit of a person is not sufficient. The mere doing of something fraudulently or dishonestly is not sufficient. The deceit of the fraudulent or dishonest person must induce the person deceived to deliver some property, or to consent that some property shall be retained, or intentionally induce the person deceived to do or omit to do something which he would not otherwise do or omit to do, and, these words are important, "and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property." But when the Section says "which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property," it appears to me, it clearly means—which act or omission in itself causes or is likely to cause damage or harm to that person in body, mind, reputation or property and that if that damage or harm is dependent upon the future act of some other person, then such damage or harm is too remote to be within the provisions of the Section, which contemplates that the act done is in itself likely to cause damage or harm and which is not dependent for damage or harm upon the entirely problematical action of some other person. To use a trite phrase, the act done or omitted to be done must be the *causa causans* of the harm caused or likely to be caused. This interpretation of the Section is strongly supported and clearly put in the Calcutta and Madras cases and also in the Allahabad case to which I shall refer.

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[1] Baijnath Sahay v. Emperor, (1933) 20 A I R Pat 183=1933 Cr C 514=145 I C 671=34 Cr L J 1020=14 P L T 48.

[2] Sadho Lal v. Emperor, (1917) 4 A I R Pat 699 =34 I C 992=17 Cr L J 272=1 Pat L J 391.

[3] Tula Ram v. Emperor, (1924) 11 A I R All 205=88 I C 993=26 Cr L J 209=21 A L J 865.

[4] Raman Behari Roy v. Emperor, (1924) 11 A I R Cal 215=78 I C 780=24 Cr L J 684=50 Cal 849=28 C W N 252.

[5] Kunju v. Emperor, (1927) 14 A I R Mad 199=99 I C 102=28 Cr L J 70=51 M L J 800.

In the Calcutta case, 50 Cal 849,[4] the accused handed over to the Postmaster of the Nilambazar Post Office an insured letter purporting to contain currency notes to the value of Rs. 800 addressed to one Nobin Chunder Chowdhury, Beliaghata Post Office, Calcutta. The letter was delivered by the latter post-office to the addressee's agent, on his signing the receipt slip, and was made over by him to the addressee who, on opening the same, found it to contain only a letter advising the despatch of the notes and pieces of waste paper. It appeared that the sum in question was due by the petitioner to Nobin Chunder. The petitioner was put on trial under S. 417, I. P. C., and was convicted and sentenced to imprisonment and fine. His appeal to the Sessions Judge of Sylhet was dismissed and he then applied to the High Court. The learned Judges assuming that the facts alleged by the prosecution to be true, after having divided S. 415, I. P. C., into its separate parts said :

> Now, in this case, having regard to the facts found, it is difficult for us to say that the person deceived has been induced to deliver any property to any other person, or to consent that the said other person should retain any property, or that the person deceived has been induced to do or omit to do anything which he would not have done or omitted, if he were not so deceived, and which act or omission has caused, or was likely to cause, damage or harm to that person in body mind, reputation or property. All that the person deceived has been induced to do is that he has signed a receipt acknowledging the delivery of a cover. He has not acknowledged by that the receipt of any sum of money alleged to be contained in the cover. That being so, we are unable to say that the charge of cheating has been brought home to the accused in the circumstances which appear on the record before us.

In the Madras case, 28 Cr L J 70,[5] a debtor purporting to send an insured packet containing currency notes in discharge of his debt actually sent waste paper and he was sued for his debt, and he brought forward and relied upon the postal acknowledgment in support of his plea that the debt had been discharged. The addressee had also been induced to acknowledge the receipt of the insured cover. The accused was in the first instance charged with attempting to cheat the plaintiff by inducing him to sign the acknowledgment to the receipt, an offence under S. 417, Penal Code, and thereafter he was further charged with offences under Ss. 193 and 511, Penal Code, in that he had caused circumstances to exist as detailed in the charge under Ss. 417 and 511, Penal Code and made a document containing a false statement, intending that such circumstances and false entry may appear in a judicial proceeding and may cause an erroneous opinion regarding the offence of cheating, an offence under Ss. 193 and 511, Penal Code. The accused was convicted of the offence under S. 417 read with S. 511, Penal Code. The Magistrate in that case appears to have relied upon the Patna case, 1 Pat L J 391[2] and to distinguish the case then before him from the case in A I R 1924 All 205,[3] on the ground that in the case before him the accused had actually endeavoured to use the postal receipt as proof of the discharge of his debt. The learned Judge of the High Court, after referring with approval to the Calcutta case, 50 Cal 849,[4] and pointing out that in the Patna case the Judges were of the opinion that only an attempt to cheat was committed, goes on to say :

> The Judge would have been better advised to follow 50 Cal 849,[4] for the point is quite plain. The act of signing a postal acknowledgment by itself is not likely to cause damage. To satisfy the definition of cheating, there must be immediate causation, and the act itself must involve the probability. It is not enough to say that the

signed acknowledgment is likely to be used so as to cause damage; the act of signing itself must be likely to cause damage. Nor can there be said to have been an attempt as distinguished from a preparation as already shown in discussing the trial Court's judgment.

And if we substitute for the word 'probability' in that passage of the judgment the word 'likelihood,' it appears to me that, that case states as concisely and clearly as possible the case against the conviction of this accused, the appellant in the case before me. In A I R 1924 All 205,[3] to which reference has already been made, the accused sent certain khilafat bonds, which were worthless, in an insured postal cover instead of Government currency notes, and the Court held that while there might be an offence of fabricating false evidence, it was no offence of cheating for the mere fact that a cover insured for a certain amount is sent, raises no presumption in law that that cover contains the necessary amount of Government currency notes. In that case, the accused had in fact borrowed money from the complainant. He borrowed Rs. 562.8.0 some years before. The complainant was asking for the payment of the loan, and the accused made promises to repay, and some time before the alleged occurrence he sent a letter to the complainant saying he would be sending the money in a registered cover, and on 8th March 1923 the accused did send a registered and insured cover to the address of the complainant. When the cover was received by the complainant he did not open it in the post office but took it home and opened it in the presence of a number of witnesses, and on opening it he found that instead of five currency notes of Rs. 100 each, there were khilafat bonds and no money. He reported the matter to the post office; there was an inquiry, the accused's statement was taken and his defence was that he had sent Government currency notes and not khilafat bonds. He was put on his trial and charged with cheating Krishen Das Harrumal at Moradabad in that he had dishonestly induced him to receive and accept an insured letter which he would not have accepted if he had not been so deceived and thereby he caused him damage. It is to be noted that there was no charge of any attempt to cheat the postal authorities. The Magistrate convicted the accused under S. 417, Penal Code, and on appeal the conviction was altered to one under S. 417 read with S. 511, Penal Code. On the facts thus set out the learned Judge of the Allahabad High Court says:

It is obvious that no question of an offence of any actual cheating having been committed arises in this case. Under S. 415, I. P. C., mere deceiving a person fraudulently is not sufficient unless that deception is coupled with dishonestly inducing that person to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induce the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission is likely to cause damage or harm to that person. It is conceded that in the present case no offence of cheating was committed.

I have then to see whether the accused can be convicted of an attempt to cheat. There can be no doubt that the sending of these worthless bonds was not by way of a mere joke. In his statement before the postal authorities, as well as in his defence at the trial, the accused stuck to his story that he had in fact sent Government currency notes. In cases of this kind one may very well imagine that the object is to cheat the postal authorities and try to recover the amount for which the contents were said to have been insured. But that is not the offence with which the accused has been charged. I may therefore leave that possibility entirely out of account.

The question to be answered is whether the accused did attempt to cheat the complainant, and if so, in what way. It cannot be imagined that the accused expected that on the receipt of these false notes the complainant would be induced either to give a valid discharge of his debt, or to grant him any receipt, or to deliver any property to him, or to consent to retaining any property.

The point to be further considered is whether the object was not to induce the complainant to do or omit to do anything which he would not have done or omitted to do. The only possible suggestion that has been made, and that can be made, is that by these means of fraud the accused hoped that when a suit for recovery of the debt was instituted, he would have in substance some sort of evidence to bolster up a defence that the debt had been discharged. I cannot see how on receipt of these false bonds the complainant would have been prevented from bringing a suit altogether. The mere fact that a cover insured for a certain amount is sent raises no presumption in law that that cover contains the necessary amount of Government currency notes. It is therefore not easily conceivable, what is the thing which the complainant would have done or omitted to do, if the fraud contemplated by the accused had succeeded. The only thing that can be said is that the accused imagined that he would have had some sort of proof that the debt had been paid off.

If however that be the view, the offence that the accused committed was an attempt to cause a circumstance to exist, intending that such circumstance may appear in evidence in a judicial proceeding or proceeding taken by law before a public servant, or before an arbitrator, and such circumstance so appearing in evidence, may cause a person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion on any point material to the result of the proceeding. Then the offence would be an attempt to fabricate false evidence within the meaning of S. 192, I. P. C. The accused however has not been charged with any such offence.

The learned Judge therefore set aside the conviction for an offence under S. 417, read with Sec. 511, I. P. C. He made it clear that he did not wish to say that no offence of any kind whatsoever had been committed.

Now, the only authority by which it can now be said that the conviction of this accused can be sustained is the Patna case, A I R 1933 Pat 183.[1] In that case the accused, desiring to evade payment of his debt, and to procure a document which would assist him in evading payment sent to his creditor a registered and insured cover containing only blank pieces of paper in order to obtain from him an acknowledgment of receipt which could subsequently be used in order to evade payment; and it was held that the offence under S. 417, I. P. C., was actually committed, for, where the creditor signed the acknowledgment which he would not have done if he had not been so deceived, he committed an act which was likely to cause damage or harm to him within the meaning of S. 415, I. P. C. The accused in this case owed a sum of Rs. 120 to one Sant Ram who asked one Banarsi Singh to recover from the accused the money which he owed. But the accused said that he would send the money direct to Sant Ram and he sent a letter insured for Rs. 120 from the Post Office at Barth addressed to Sant Ram, but Sant Ram, after he had signed the acknowledgment of the receipt of this insured letter, discoverd that it contained nothing but blank sheets of paper, and the accused was convicted of the substantive offence of cheating. It was pointed out on behalf of the Crown that the Judges in the previous case in 1 Pat L J 391,[2] should have convicted the accused of cheating and not of attempted cheating and it was pointed out that the offence of cheating was committed as an acknowledgment intended to be put forward as a proof of payment of debt had been obtained fraudulently and dishonestly by deception.

But, with all respect, it does not appear to me that this is sufficient, for the mere obtaining of something by deception fraudulently and dishonestly is not cheating, unless it is brought within the provisions of S. 415, I. P. C., and unless, in my opinion, it is in itself likely to cause damage or harm within the meaning of that Section. But the learned Judge in this case in A I R 1933 Pat 183[1] said:

> On the findings, the petitioner, desiring to evade payment of his debt, and to produce a document which would assist him in evading payment, sent to Sant Ram a registered and insured cover, in order to obtain from him an acknowledgment of receipt which could subsequently be used in order to evade payment. Sant Ram would not have signed the acknowledgment of the receipt of the insured letter, if he had imagined that it contained nothing but blank sheets of paper. When he did this act which he would not have done if he had not been so deceived he committed an act which was likely to cause damage or harm to him within the meaning of S. 415, I. P. C.
>
> If I might be permitted to criticize the grounds for the decision given by those learned Judges who have differed from the decision of this Court, I would say that too much stress has been laid throughout upon the question of whether the acknowledgment of receipt of an insured letter obtained in this fashion amounts in itself to a valid quittance or to anything which might be described as a valuable security, and it appears to me that although the Division Bench of this Court rightly convicted in 1 Pat L J 391,[2] the learned Judges by themselves laying unnecessary stress on this point, and by adopting the view that the commission of the substantive offence of cheating would be postponed until the fabricated evidence was used, created the difficulties which were subsequently found in following their decision. In A I R 1924 All 205,[3] which is the important link in the chain, the Assistant Government Advocate appears to have weighed scales in the wrong directions by conceding that no offence of cheating had been committed; and the learned Judge confined himself to considering whether the effect of signing the acknowledgment would be to debar the creditor from instituting a suit.
>
> These decisions differing from that of the Patna High Court proceed on the assumption that to trick a creditor into fabricating evidence which may be used against him is not an offence punishable under S. 417, I. P. C., unless the evidence is such as would afford conclusive proof of payment. I would say, with due respect to the learned Judges who have in my judgment thus been misled, that the question of whether what is obtained from the creditor is a valid quittance or merely something to be used as evidence of payment, is unimportant. If he had been tricked into giving what, if obtained honestly, would have been a valid quittance, he would no more be debarred from instituting a suit than if he had been tricked into giving a receipt which was to be used merely as a piece of evidence. A person commits an offence punishable under S. 417 if by deceiving his creditor he obtains from him a document, not necessarily a legal quittance or a valuable security, but such a document as is likely to facilitate the evasion of payment by the debtor and to cause embarrassment to the creditor when he seeks to enforce his claim. The terms of S. 415 of the Code are wide; in this particular case, it is clear that the intention of the petitioner was fraudulent, and he has been rightly convicted.

But, with all respect to the learned Judge, this appears to me to make the commission of this offence dependent upon some future contingency which may or may not arise upon something less than a likelihood, upon something even less than a probability, upon a mere possibility. The Section says "causes or is likely to cause harm." It does not say "causes or may possibly cause harm" nor can the Section be intended to apply where the harm is dependent upon an uncertain future event. The act of the person deceived in accepting the cover or giving the receipt is not in itself likely to cause damage or harm in body, mind, reputation or property. At the most it might be said that if in the future a suit was brought, the person deceived would have to meet the fact that the accused had in his possession a receipt showing that he had accepted delivery of a cover insured for a certain sum. But that in itself would not be proof that the cover did contain currency notes of the insured value, nor can it be said with any certainty that the mere assertion of the debtor that he had in this manner evidence of the payment of his debt was likely to cause the person deceived damage or harm in body, mind, reputation or property; even less would the acceptance of the cover or the giving of the receipt itself do so. Speaking with all respect, it appears to me that the learned Judge who decided the case in A I R 1933 Pat 183[1] omitted to give due weight to that aspect of the case which the Calcutta and the Madras cases emphasize, that is to say, the thing done or omitted to be done must in itself be the cause of likely damage or harm.

Considering the facts of this case, assuming for the sake of argument that the facts alleged by the prosecution are true, it is not possible not to notice their similarity with the facts of these cases cited. This is a case like the other cases where the accused owed money. The accused was a Karachi Municipal peon named Ayodhya Parsad, and the person he owed money to was Raghurajsing of Rangi, Tahsil Tarab Gunj, District Gonda, and the accused sent an insured cover through the Napier Market Post Office to Raghurajsing, in purported payment of a mortgage debt. When the cover was examined by the Registration clerk at the Post Office, it was properly stringed and sealed. It was weighed and assigned No. 142 and its weight was 20 ratis. The Registration clerk noted the weight on the insured cover in his own handwriting, enclosed by a red pencil circle and gave a receipt to the accused. He booked it and put it in another envelope, sealed this envelope with the Sub-Postmaster's seal in the Sub-Postmaster's presence, and noted its weight on the second envelope as 32 ratis. He handed this envelope to the Sub-Postmaster, who saw the seals, verified the weights and put it in the bag which was sealed in his presence, and the bag was sent to the Karachi General Post Office. This was on 8th February 1937, and on 23rd February the Sub-Postmaster, Napier Market received a telegram from the Inspector of Post Offices, Gonda, that the insured letter No. 142 dated 8th February 1937, addressed to Raghurajsing did not contain currency notes. The Sub-Postmaster sent a telegram to the Postmaster, General Post Office, and the Town Inspector Post Offices, one Mr. Bhagwandas, was sent to inquire into the matter, and he sent a complaint to the officer-in-charge of the City Police Station. On 24th February the accused sent a letter to the officer-in-charge Police Station at Boulton Market that Raghurajsing had wired to him that currency notes of Rs. 300 were not to be found in the insured cover which the accused had sent to him. This letter was given to the Sub-Inspector in charge of the case to put it along with the complaint received from the Postmaster, General Post Office, and the accused was challaned on 30th March 1937.

The accused's defence was that he had put Rs. 300 notes in the insured envelope sent from the Napier Market Post Office to Raghurajsing at his village Rangi, Tahsil Tarab Gunj, District Gonda. The Magistrate disbelieving the defence of the accused convicted him of an attempt to cheat. Even on the judgment of the Patna High Court the conviction of an attempt to cheat was not correct. The offence, if any, was completed; it was the offence of cheating. The learned Magistrate accepted the evidence of Kundanmal, the Registration clerk, Basantsing, the Sub-Postmaster, which showed that the accused presented the letter insured for Rs. 300 at the Napier Market Sub-Post Office on 8th February; that the letter was examined and found in sound condition, stringed through and sealed, weighed, given its assigned number and the receipt duly given to the accused. He accepted the evidence of the Sub-Postmaster and the clerk that this insured letter was put in another cover, sealed with the Postmaster's seal handed over to the Sub-Postmaster, weighed and its weight noted as 32 ratis. He accepted the evidence which showed that this insured cover was opened before the Branch Postmaster at Rangi but no currency notes were found inside. Nothing was found except three blank papers and two Hindi letter ends. He accepted the evidence that the accused said that he had sent six currency notes of Rs. 50 each in the insured letter with two Hindi letters, but he could not give the numbers of currency notes, and he accepted the evidence that the Hindi letters and blank papers found in the insured cover corresponded with the samples of papers which the accused had in his possession. He also accepted the evidence of the Sub-Inspector that the insured envelope when weighed with the blank papers in the presence of the mashirs weighed 20 ratis, and that when he put six currency notes of Rs. 50 of the new pattern along with the two letters which the accused said he had sent, the weight was not 20 ratis but 17. Therefore the Magistrate accepted the case that the insured cover contained the two letters and the blank papers which weighed 20 ratis and not the two letters and six currency notes which weighed 17 ratis.

He also accepted the fact that the holes in the papers corresponded with the holes in the envelope when the envelope was stringed, and therefore showed quite clearly that the insured cover had not been tampered with after it was stringed and sealed and until it was opened by Raghurajsing in the Branch Post Office at Rangi. He accepted the evidence of Raghurajsing that the accused owed him Rs. 300 on the mortgage of a garden, that he received intimation through one Jugal postman of an insured cover for him at Rangi five miles distant and he left his village of Karaora at 12 noon and reached Rangi at about 1 P.M.; he opened the insured cover in the presence of the Branch Postmaster and found two written and three blank papers but no currency notes, and the insured cover was intact; that there is no Telegraph Office at Rangi, and therefore he went to Nawab Gunj Post Office six or seven miles away on the advice of the Branch Postmaster and sent telegrams to the Superintendent of Posts at Faizabad, Inspector of Posts at Godha and to Karachi. The Magistrate accepted the evidence of the Postmaster at Rangi, that the insured letter No. 142 was received on 12th February and its seals were intact; that the Postmaster at Rangi has only one postman and sends him once a day on the same beat, and that on 12th February when the insured letter No. 142 had arrived, the postman had already left; that he gave a notice to the postman for Raghurajsing on the 16th, but on account of pressure of work he could not deliver it till the 19th and Raghurajsing came to the Post Office on the 20th; that the letter was delivered in good condition; that Raghurajsing passed the receipt and opened the letter in his presence which contained three blank and two written papers but no currency notes.

The accused in his defence examined five witnesses: (1) Vasudev, the camel cart jamadar, (2) Mr. P. M. Gopal Aiyer, Advocate, (3) Sant Baksh, (4) Shiv Varan, both peons in the Municipal Corporation where the accused was a peon, and (5) one Rajaram who has a private service. It is unnecessary for me, in view of the course the case has taken, to discuss this defence evidence. It might fairly be said that a more effective answer to the prosecution case than the evidence of this camel cart jamadar, or the advocate, or of the two peons or of the private servant, would have been the numbers of currency notes, but assuming the case of the prosecution to be true, it is clear the facts as set out so closely resemble the facts in the Madras, Calcutta and Allahabad cases as to be in essential points in no way differentiated or distinguishable from them. I think myself that the view taken by the High Courts of Madras, Calcutta and Allahabad is the better view and is more consistent with the words of the Section itself. It is a view with which, with all respect, I agree. I therefore set aside the conviction of the accused and order him to be acquitted and discharged.

B.D./R.K. *Accused acquitted.*

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## A. I. R. 1938 Sind 198

DAVIS J. C. AND DADIBA C. MEHTA J.

*Arab Jhanglu* — Appellant.

v.

*Panjalshah Yakubalishah and another* — Respondents.

Second Appeals Nos. 24 to 31 of 1935, Decided on 16th May 1938, against decree by Asst. Judge, Sukkur, D/- 8th June 1935.

**(a) Civil P. C. (1908), O. 41, R. 27—Appellate Court basing its judgment on new case raised for first time in appeal and in support of case relying on evidence admitted by it but not under O. 41, R. 27—Its judgment cannot be upheld.**

Where an Appellate Court bases its judgment on an entirely new case, raised for the first time in the appeal, and in support of the case admits and relies on evidence, which is improperly admitted inasmuch as it does not come under O. 41, R. 27, Civil P. C., its judgment cannot be upheld in second appeal and the Court sitting in second appeal will not take into consideration the new case : *38 Cal 153, Rel. on.* [P 200 C 1]

**(b) Finding of fact—Binding effect.**

A finding of fact by one Court in one judgment is not binding upon another Court in another case. [P 200 C 1]

**(c) Limitation Act (1908), Arts. 142, 144 — Suit based on title and dispossession—Art. 142 or Art. 144 will apply—Suit based on title and alleged permissive occupancy — Article 144 applies — Case can be decided on question of adverse possession — Long uninterrupted possession of jagir land without rent or any conditions, in the full sight of jagirdars, evidenced by permanent houses, constitutes adverse possession.**

Dispossession, referred to in Article 142, is a forcible dispossession or ouster and the discontinuance referred to in it being interpreted ejusdem generis with possession, means something of the nature of an abandonment. So where a suit is based on title and dispossession Article 142 or Art. 144 will apply as the case may be, for a plaintiff may fail to prove title and may yet prove possession within twelve years and win his suit. Where, however, a suit is based on title and an alleged permissive occupancy, Art. 144 applies and the case can be decided fairly on the question of adverse possession : *15 Bom L R 445 (P C), Expl.; A I R 1916 P C 21 and A I R 1922 P C 181, Rel. on.* [P 201 C 1]

Long and uninterrupted possession of jagir land without rent or term or conditions, in the full sight of the jagirdars, evidenced by permanent houses and not temporary hutments, constitutes adverse possession in the full sense of that word. [P 202 C 2]

**(d) Civil P. C. (1908), S. 100—Judge sitting in appeal basing his judgment on new case made out for first time in appeal and in doing so failing to adequately consider more important aspect of the case and arriving at wrong conclusion—His judgment is liable to be set aside in second appeal.**

Where a Judge sitting in appeal bases his judgment on a new case made out for the first time in appeal, and it is clear that the new case has coloured and influenced his consideration of the facts and his decision on another aspect of the case, which, although treated by the Appellate Court as a minor aspect, turns out in fact to be the most important aspect of the case, and it appears that the Court has not adequately considered that aspect and consequently has arrived at a wrong conclusion, his judgment is liable to be set aside in second appeal. [P 200 C 1, 2]

**(e) Practice—New case—Duty of Court.**

It is not within the judicial duties of a Judge to raise a case not raised by the party himself and to decide it for him. [P 201 C 2]

**Aasudomal Rewachand**—*for Appellant.*

**D. N. O'Sullivan** — *for Respondents.*

**Davis J. C.**—This is a second appeal from the judgment of the Assistant Judge, Sukkur, allowing the appeal of the appellants, Syeds of Rohri, against a judgment of the Subordinate Judge, Rohri, in which he dismissed their suit for possession of a plot of land measuring about 400 square feet in Survey No. 31 in their jagir in deh Yakub-alishah. The plaintiffs who are the respondents in this second appeal sued for possession of the suit land and to eject the appellant on the ground that he was in possession of this land in virtue of a permission granted to him some 15 years before to occupy the land and build his house thereon in return for certain services to be rendered by him—the use on certain occasions of his horse and carriage, for the appellant is a tonga-driver—and that the appellant had refused to render this service and was therefore liable to be evicted.

The defendant, now the appellant, took the defence that the land was not granted 15 years before on the alleged terms and conditions but had been occupied by him and by his predecessors-in-title for at least 80 years and his title was now secure by reason of his adverse possession. The Subordinate Judge found that the plaintiffs' case as set out in their pleadings was false and that the defendant had proved adverse possession and dismissed the suit. The plaintiffs appealed and the Assistant Judge allowed the appeal and decreed the plaintiffs' suit finding for the plaintiffs two new cases they had not made out for themselves in the trial Court, firstly, that though they had failed to prove an express grant of some 15 years before which they had pleaded or an express grant by their ancestors, their case in the witness-box, they had proved an implied grant by their ancestors which they had not pleaded, and that secondly, that as the jagir was a khairati grant, it was inalienable, and that the defendant could not therefore acquire adverse possession.

This case — the case of the khairati grant, an entirely new case—was raised in first appeal after a remand from this Court refusing to allow the plaintiffs to amend their plaint in first appeal as the appellate Judge had allowed them to do; it was a case which the present appellant had no opportunity of meeting, and it is a case we cannot consider in appeal. The learned appellate Judge appears entirely to have overlooked the provisions of O. 41, R. 27, Civil P. C., as to the admission of fresh evidence, and has, in support of this new case, to admit which, it is clear to us the plaintiffs wanted the pleadings to be amended, which this Court refused to permit, referred to the first and second volumes of the History of Alienations in Sind, and has referred to a decision of this Court as a Saddar Court in 2 Sind S D 380.[1] But these books, even if Government publications, came in the class of documentary evidence admissible in appeal, if at all, only under the provisions of O. 41, R. 27, Civil P. C., while a finding of fact by one Court in one judgment is not a finding of fact binding upon another Court in another case. Whether the lands in suit were granted to the Syeds, the plaintiffs, on certain terms and conditions, and what these terms and conditions are, are all questions of fact to be proved by evidence properly admitted. So the evidence to prove that the jagir was a khairati jagir on which the lower Appellate Court has relied, is evidence improperly admitted, and the learned advocate for the respondents, when this aspect of the case was pointed out to him, did not argue or press the matter further. Reference may be made to 38 Cal 153.[2]

Though we reject from our consideration this new case, the case of the khairati grant raised and decided by the learned Judge in this unusual manner in first appeal, it is clear that both this new case and the other new case, the one of an implied possession by ancestors made out by the learned appellate Judge for the plaintiffs, have coloured and influenced his consideration of the facts and his decision on yet another aspect of this case, which in fact turns out finally to be its most important aspect, that of adverse possession. It is clearly to him a minor aspect of the case and has not received from him adequate attention. His decision on the question of adverse possession has, it is clear, been greatly influenced by the two new cases for the plaintiffs which he found for them, the case of the khairati grant and the case of implied possession by ancestors so much so that we think there is no doubt he has not adequately considered the facts of the case of adverse possession, and that his conclusion that these facts do not prove adverse possession is a wrong conclusion which we can and should set right in second appeal.

Now, as often happens in the mofussil, the pleadings were badly drafted, and the first question argued before us was, whether this suit was a suit for ejectment and possession based on title. As there was no clear and unequivocal assertion of title in the plaint, so there was no clear and unequivocal assertion of adverse possession in the written statement, but both the lower Courts have in effect held, and we agree, that a reasonable construction of both plaint and written statement must be that the plaintiffs pleaded title as owners and the defendant pleaded adverse possession. When this question of the amendment of the plaint was before the Judges of this Court in 27 S L R 341[3] the Judges treated the suit as one based upon title, the defence being a defence of adverse possession, and were clearly of the opinion that the plaintiffs' suit must fail because while according to their own case the defendant was in possession for fifteen years, they, suing upon title for ejectment, must prove not only title but possession within twelve years and this obviously they could not do on their own pleadings. Therefore, we treat this case as a suit for ejectment and possession based upon title as owners, and the defence as a defence of adverse possession.

The question whether this suit was one to which Art. 142 or Art. 144, Limitation Act, applied was argued before us. This question does not appear to have been raised and decided in the trial Court; the lower Appellate Court merely refers to the plaintiffs' case as a case to which Art. 144 applies, while the Judges of this Court in the reported case clearly treated this suit as one to which Art. 142 applies by reason of the ruling of the Privy Council case in 15 Bom L R 445[4] at p. 451 and which must therefore inevitably fail because the plaintiffs could not prove that they had been in possession of the land within twelve years, as they themselves pleaded an occupation by the defendant of fifteen years. But we do not think we can hold that the Privy Council ruling decided, or was intended to decide, that whenever a suit for ejectment and possession was brought, even a suit based on title, the plaintiff was bound to prove possession within twelve

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1. Hassomal v. Shah Nawaz Shah, (1902) 2 Sind S D 380.
2. Durga Prasad Singh v. Ram Doyal Chaudhuri, (1910) 38 Cal 153=10 I C 955.
3. Khanu Chuhar v. Panjalshah, (1933) 20 A I R Sind 279=146 I C 777=27 S L R 341 (F B).
4. Dharani Kanta Lahiri v. Gabar Ali Khan, (1913) 15 Bom L R 445=18 I C 17 (P C).

years or fail, because if that were so, the doctrine of adverse possession could have no real purpose or existence. If the plaintiffs proved possession within twelve years, they won; if they failed to prove possession within twelve years, they lost; so that the defendant would never be called upon to prove adverse possession. The plaintiffs' failure to prove possession within twelve years, even when the suit was based on title, would enable the defendant to succeed without proof of adverse possession, or indeed, of anything else. We ourselves think that the dispossession referred to in Art. 142, Limitation Act, is a forcible dispossession or ouster and that the discontinuance referred to in that Article being interpreted ejusdem generis with possession, means something of the nature of an abandonment. So where a suit is based on title and dispossession, Art. 142 or Art. 144 will apply as the case may be, for a plaintiff may fail to prove title and yet prove possession within twelve years and win his suit. Where however a suit is based upon title and an alleged permissive occupancy, as in this case, Art. 144 applies. This, we think, is the interpretation of the Privy Council case[4] above referred to and finds support from two subsequent cases of the Board: 39 Mad 617[5] at p. 631 and 44 Mad 883.[6] But we do not think it necessary for us to discuss this point further, because, we think, this case can be decided fairly and squarely on the question of adverse possession, and the two Privy Council cases last referred to are authority, if authority is required, for so dealing with this case.

Now the trial Court held that the defendant had proved his plea of adverse possession, and the Appellate Court has found that he had not, and it is for us, accepting the finding of facts of the lower Courts, to decide whether the facts as found do or do not prove adverse possession on the part of the defendant. Now it is quite clear the plaintiffs failed to prove their case as set out in the plaint, namely that the defendants were in permissive occupation by reason of a grant made by them fifteen years before. As the trial Judge points out, this is a case demonstrably false, for a Government map prepared years before in 1892-93 shows the village in which the defendant's house and the houses of the defendants in the cognate suits are situate, in existence as Baroch villages. The trial Judge points out that the two witnesses brought to prove an express grant, Abdul Rahim Shah and Rahim Baksh, clearly failed to do so. The only plaintiff who had the courage to go into the witness-box had not the courage to state there what he had stated in the plaint. The plaintiffs changed their case from one of grant by them fifteen years before to one of a grant by their ancestors, and the two witnesses on this point succeeded apparently only in contradicting each other and in satisfying the Judge that they were false witnesses. The plaintiffs therefore quite clearly failed to prove either their case in the plaint — an express grant by them, or their new case in the witness-box, an express grant by their ancestors; and it is not possible to say that the trial Judge has not considered the plaintiffs' evidence carefully and given good reasons to reject it.

But let us see how the learned Judge of the Appellate Court dealt with this part of the case. He cannot differ from the finding of the trial Judge that the case of an express grant must fail, but he takes the view that the Judge failed to consider another aspect of the case, the case that there was an implied as against an express permission. In view of the fact that this was not the plaintiffs' case at all, it is not surprising that the trial Judge failed to consider it, and we can only say that the learned Judge of the Appellate Court in raising in favour of the plaintiffs a case they did not raise themselves, and deciding their case in their favour, appears to us to have accepted a burden his judicial duty did not lay upon him. The evidence of trivial and friendly service which the appellate Judge found proved by witnesses whom the trial Judge saw and disbelieved as false witnesses for good reasons given, fails in any way, in our opinion, to sustain the burden of the new case favourable to the plaintiffs which the appellate Judge places upon it.

It is our opinion that there was no sufficient evidence on which the Judge in the lower Appellate Court was justified in finding an implied permissive occupancy, but that, in any case, this was not the case of the plaintiffs, and that it was not within the judicial duties of the Judge to raise and decide it for them. The learned appellate Judge then comes to consider the question of adverse possession, having found, we consider wrongly, that there was proved an implied grant by the plaintiffs' ancestors; but while we hold the defendant had not to disprove the case of an implied grant which was not pleaded and is not proved, he must prove his title by adverse possession as against the title of the plaintiffs as co-owners and sharers in the jagir. The trial Judge has given good reasons for holding that the defendant has proved his title by adverse possession; the lower Appellate Court has given no good or sufficient reasons for finding to the contrary. It is urged before us that the houses in which the defendant and other people lived were poor temporary hutments, and our attention was drawn to the Bombay case in 16 Bom 338.[7] But clearly the houses of these people and of the defendant are not temporary hutments at all. From the Appellate Judge's own reference to the evidence the houses would be worth Rs. 300 to 600 each, and indeed, the learned Judge, unable to disbelieve the evidence of the deh map and the evidence of long and undisturbed occupancy by the defendants, suddenly leaves this aspect of the case and says :

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[5] Secretary of State v. Chellikani Rama Rao, (1916) 3 A I R P C 21=35 I C 902=39 Mad 617=43 I A 192 (P C).

[6] Kuthali Moothawar v. Peringati Kunharankutty, (1922) 9 A I R P C 181=66 I C 451=44 Mad 883=48 I A 395 (P C).

> The only point therefore for determination solvent of our difficulty in present case will be whether defendants' ancestors occupied the land and built village with permission of jagirdars and their descendants continued to hold occupancy of the same as such.

And the solution of this difficulty the learned Judge finds is this implied permissive occupancy which was never the plaintiffs' case and to which we have already referred. But another solution of the difficulty is the proof by the appellant of adverse possession, and the learned Judge deals but inadequately with this on p. 15 of the paper-book. To his declaration of the law that the possession to be adverse must be adequate in continuity, publicity and extent, that it must be actual, visible, and exclusive and hostile, provided by "hostile" is meant adverse, and not that the defendants must be expected to defend their title at intervals from forcible attempts of the jagirdars to dispossess them, there can be no objection ; but with his finding that the evidence proves only possession and not adverse possession we cannot agree. It is true that the trial Judge when referring to a case reported in A I R 1929 Rang 170[8] has referred to, as presumption of law, what might more aptly be referred to as an inference from facts, namely that where the plaintiffs allege and fail to prove a permissive occupancy, adverse possession can be inferred. But the defendant proves that his house, with others, has been built upon the jagir land in full sight of the jagirdars for some eighty years. His witnesses, old men, though Hindus, have supported him in this. The trial Judge has held, and we think rightly, that the occasional loan and service of the carriage were but friendly respectful acts, in no way constituting the land service land on the terms and conditions on which the defendants held, and we have no doubt the trial Judge is right in his conclusions that the land now of little value, then of no value at all, was left by the jagirdars to their neighbours without complaint, and that it is only the plaintiffs, the younger men and not their elders, who seek now harshly to enforce their supposed rights. We assume that the appellate Judge is right in his findings of fact when he finds that Wahid Baksh Shah did not try to disturb Allahwarayo's possession 18 or 19 years ago and that the story of Dai or the sale of houses of lands are not satisfactorily proved, but even so, we say that this long and uninterrupted possession of this jagir land, without rent or terms or conditions, in the sight of the jagirdars, evidenced by permanent houses and not temporary hutments constitutes adverse possession in the full sense of that word and that the plaintiffs must fail in the suit.

We therefore allow the appeal with costs throughout and restore the decree of the trial Court and dismiss the plaintiffs' suit.

R.M./R.K. *Appeal allowed.*

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[7] Framji Cursetji v. Goculdas Madhowji, (1892) 16 Bom 338.

[8] Ba Thein v. Sein Win, (1929) 16 A I R Rang 170=120 I C 662.

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## * A. I. R. 1938 Sind 202

DAVIS J. C. AND LOBO J.

*Jado Rahim* — Appellant

v.

*Emperor.*

**Criminal Appeal No. 176 and Ref. No. 254 of 1937, Decided on 18th March 1938, against conviction and sentence passed by Addl. Sess. Judge, Sukkur, Dated 13th September 1937.**

**(a) Criminal Trial — Confession — If confession is accepted, part which exculpates though inherently incredible, should be accepted when there is no evidence to prove that such part is false — Evidence includes circumstantial evidence.**

It is true that a confession must be accepted or rejected as a whole if it is to be relied on—the part which implicates as well as the part which exculpates, though the part which exculpates may appear inherently incredible because there is no evidence to prove that the part which exculpates is false. But by "evidence" is meant not only direct evidence but circumstantial evidence, and a Judge must not leave out of his consideration, when considering the truth or falsity of a confession or its parts, those probabilities and those presumptions which may properly arise from the other evidence on record, regard being had to the common course of natural events and human conduct, because little evidence is necessary to rebut statements which are in themselves inherently incredible, even when made by an accused in a confession : *A I R 1931 All 1 (F B) and A I R 1937 Sind 212, Expl.* [P 203 C 2; P 204 C 2]

**(b) Criminal Trial — Evidence — Interested evidence.**

Interested evidence is not necessarily false. [P 205 C 1]

✲ **(c) Criminal P. C. (1898), S. 439 (4) — Bar in S. 439 (4) applies to partial acquittal as well.**

The bar in sub-s. (4) of S. 439 applies to a partial as well as to a total acquittal. Hence where an accused is convicted under S. 304 (1), I. P. C., and is thus acquitted of offence under S. 302, he cannot in revision be convicted under Sec. 302 : *A I R 1928 P C 254, Rel. on; A I R 1927 Sind 16 held no longer good law; A I R 1924 Bom 456, Approved.* [P 205 C 1, 2; P 206 C 1]

✲ **(d) Criminal P. C. (1898), S. 423 (1) (b)— S. 423 (1) (b) does not apply to cases of acquittal, partial or total, but to cases of conviction.**

The words "alter the finding, maintaining the sentence" occurring in S. 423 (1) (b) (2) must be read as a whole. The powers under S. 423 (1) (b) of altering the finding and then as a Court of revision enhancing the punishment cannot turn upon chance. Cl. (b) of S. 423 (1) does not apply to cases of acquittal, partial or total, but to cases of conviction, and Cl. (a) applies to cases of acquittal; and if the appellate powers of the Court are to be exercised to convert an acquittal into a conviction, then they should be exercised on an appeal against an acquittal under S. 423 (1) (a) and not on an appeal against a conviction under S. 423 (1) (b). [P 206 C 1]

Tikamdas Wadhumal — *for Appellant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.** — The accused in this case is one Jado, son of Rahim, and he has been convicted by the learned Additional Sessions Judge, Sukkur, of an offence under S. 304 (1), I. P. C., and sentenced to ten years' rigorous imprisonment, and he has not been convicted of the murder of his wife, a young woman of some 20 years of age, with whose murder he was charged. But we think the learned Additional Sessions Judge has so failed to appreciate the evidence and to apply the law correctly, doubtless because of his inexperience, that we think the only proper course for us is to set aside the conviction and sentence of the accused who has appealed and direct him to be retried for the murder of his wife by the Sessions Judge himself. We do not wish to prejudice the case of the accused by a detailed consideration of the evidence. We will therefore give as briefly as we can reasons why we think the learned Judge has failed correctly to appreciate the facts and law in this case.

It is not disputed in this case that the woman Hayatan was killed by her husband in a field of cotton, but the learned Judge felt himself compelled to accept the confession of the accused in its entirety because of two rulings, 52 All 1011[1] and A I R 1937 Sind 212=31 S L R 460,[2] one of this Court, which he felt left him no alternative. A confession, he argues, must be accepted or rejected as a whole if it is to be relied on, the part which implicates as well as the part which exculpates though the part which exculpates may appear inherently incredible because there is no evidence to prove that the part which exculpates is false. So far the learned Judge is right. But we would point out that by "evidence" is meant not only direct evidence but circumstantial evidence, and a Judge must not leave out of his consideration when considering the truth or falsity of a confession or its parts, those probabilities and those presumptions which may properly arise from the other evidence on record, regard being had to the common course of natural events and human conduct to which S. 114, Evidence Act, refers. Moreover while the burden always rests upon the prosecution to prove the guilt of the accused, if the accused seeks to take advantage of an exception to the general law, he must under S. 105, Evidence Act, bring himself within it. He may, of course, do this by a confession which in part exculpates when there is no other evidence on the record whereby the exculpatory part of the confession can be proved false.

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[1] **Emperor v. Balmakund, (1931) 18 A I R All 1=1931 Cr C 1=129 I C 258=32 Cr L J 362 =52 All 1011=1930 A L J 1481 (F B).**

[2] **Noukar Mouledino v. Emperor, (1937) 24 A I R Sind 212=170 I C 827=38 Cr L J 968 =31 S L R 460.**

After all, the principle on which the two cases cited by the learned Judge proceed is not difficult to understand and is not unreasonable. If a Court is to rely upon a confession made by an accused it does so because it believes that confession to be true, and if there is no other evidence on the record by which its truth or falsehood may be judged, then that part of the confession which exculpates cannot be rejected as inherently improbable, while that part of the confession which implicates only is accepted. When therefore there is no other evidence on the record to show affirmatively that the exculpatory part of the confession is false, the part which exculpates must be accepted along with the part that implicates; it cannot be rejected on the ground that it is inherently incredible; but only so long as there is no other evidence on the record by which that part which appears inherently incredible can be proved false. But the evidence that proves a statement, in itself inherently incredible, to be false, may be circumstantial evidence and clearly less evidence can reasonably be required to prove a statement which is inherently incredible to be false than is required to prove false a statement which is not inherently incredible. Moreover the learned Judge should consider the definition of "proved" in S. 3, Evidence Act.

In this case it would appear that circumstantial evidence against the truth of that part of the accused's confession in which he says he killed his wife with an axe may be the medical evidence which the learned Judge does not appear to have considered; and also the fact that the accused did not produce the axe. The medical evidence shows that there was one deep wound running right across the neck 10″ × 2″ deep to the vertical column on the front of the neck. The edges were irregular. The learned Judge does not comment upon the nature of this wound at all: the doctor was not even asked if it was caused by an axe or a knife. The size of this wound, the fact that there was only one, the irregular edges, may make it probable that the woman was killed not by an axe at all but by a knife; this would also explain why when the accused came to the Deputy Commissioner to confess he did not bring the axe nor was the axe found, nor, as the learned Judge points out, did any of the prosecution witnesses see an axe in the hand of the accused. It may be that the woman was killed by the accused who, when he took her out, had a knife concealed in his clothing. Now, so far as the implication of Khan Bahadur Dil Murad Khan by the accused is concerned, the learned Judge in one part of his judgment appears extremely doubtful as to the truth of Dil Murad Khan's implication by the accused. He says:

> Then it appears inherently incredible that a man of means and influence like K. B. Dil Murad Khan would have sexual intercourse with accused's wife in an open field instead of a house or some such secret place, even assuming he was on terms of criminal intimacy with her. Accused says he used to have sexual intercourse with her in the field, because he was afraid of his keeping Mt. Zeni. But this seems hardly believable as, even in spite of her, it would not have been difficult for a wealthy man like K. B. Dil Murad Khan to find out a more suitable place than an open field for sexual intercourse with her.

Yet when K. B. Dil Murad Khan comes and swears on oath that he did not do this apparently incredible thing, the learned Judge says in effect: "I am sorry, I cannot believe you for you are interested." Surely this is unreasonable; surely little evidence is necessary to rebut statements which are in themselves inherently incredible, even when made by an accused in a confession. Moreover, the learned Judge should have considered, in considering this confession, and he has failed so to do, the past trouble between the accused and his wife to which Mr. Sharples' evidence refers, and the man with whom this accused then implicated his wife was not K. B. Dil Murad Khan at all but another man, Audho, son of Balo. The woman had been in such fear of her husband that she had sought shelter with the police, but Mr. Sharples called the parties, peace was made between them and one Hisar Khan was accepted as surety. This was in June and the woman was killed by the husband on 30th September. But among Baluchis an outward show of amity may be preserved towards the suspected woman till fears and suspicions are lulled and the woman can be killed at leisure. Consideration by the learned Judge of this previous charge of infidelity might have satisfied him that that which appeared to him inherently incredible was in fact untrue and that the accused did not charge the woman with infidelity with Audho because it would at once have raised the inference that the murder was premeditated. Another man, his master Dil Murad Khan, was therefore implicated.

Moreover, the manner in which the learned Judge has regarded the evidence appears to us to leave the most innocent and decent man powerless against the most infamous charges. His evidence and the evidence of those most likely to be able to testify on his behalf is to be rejected in limine as interested. Interested it must be, but not necessarily false, and if a man before he can be taken to have refuted the most infamous charges is to rely upon the evidence of strangers, his lot is hard indeed. On page 51 of the paper-book the learned Judge rejects the evidence of Zahro, the father of Hayatan, because he is the servant of Dil Murad Khan. The evidence of Zahro's wife, Sahib Khatun, and of his mother Sodhi is rejected because they are Zahro's wife and mother. The evidence of Shahal Khan, the brother of Dil Murad Khan, is rejected because he is the brother of Dil Murad Khan. The evidence of Samano, the carriage driver, is rejected because he is carriage driver of Dil Murad Khan. The evidence of Sumar, a potter, is rejected because he goes to Dil Murad Khan's otak and is therefore, the Judge says, intimately connected with Dil Murad Khan. The discrepancies to which the Judge refers in his further discussion of the evidence of some of these witnesses are not serious discrepancies. No good reason is given for rejecting the testimony of Khan Bahadur Dil Murad Khan when he swears that he did not do that which the Judge himself apparently considers incredible. We must therefore set aside the conviction and sentence, and order the accused to be retried by the Sessions Judge himself.

When the appeal of the accused was admitted, this Court ordered notice to issue upon the accused to show cause why his sentence should not be enhanced by this Court, but it is clear that if we confirm the conviction under S. 304 (1), Penal Code, this is not a case where we could properly impose a sentence of transportation, for had the accused seen his wife naked with K. B. Dil Murad Khan and his servant in a cotton field on the early morning, a sentence of ten years' rigorous imprisonment is in no way inadequate; and we cannot in exercise of our revisional jurisdiction change an acquittal into a conviction, and since the judgment of the Privy Council in 50 All 722[3] the bar in sub-s. (4) of S. 439, **Criminal P. C., applies to a partial as well as to a total acquittal, and clearly the accused has been acquitted of the murder of his wife.**

It was suggested by the learned Advocate-General that we could, by a combined exercise of our powers as an Appellate Court and a Revisional Court, alter the finding from one of culpable homicide not amounting to murder to one of murder under S. 423 (1) (b), Criminal P. C., and enhance the sentence under S. 439 (1) and in support of this view, which he did not press, the learned Advocate-General drew our attention to the case in A I R 1933 Lah 661,[4] a judgment of the Lahore High Court, in which the learned Judges followed two cases, the Madras case in 37 Mad 119[5] and a Rangoon case, 1 Rang 436,[6] remarking that the Privy Council in 50 All 722[3] had not decided the point as to the exercise by the High Court of their combined powers, as a Court of Appeal and a Court of revision. But the Privy Council did not approve the exercise of these combined powers, while in a recent case the Privy Council approved, not the exercise by a High Court of its combined powers as a mixed Court of Appeal and revision, but the exercise by the High Court of its powers in appeal and its powers in revision, not simultaneously but in succession. In 37 Bom L R 160,[7] the accused were convicted of murder and sentenced to transportation and they appealed. The High Court dismissed their appeals but in exercise of their revisional jurisdiction enhanced the sentences to sentences of death, but there was in that case no question of converting an acquittal into a conviction. It was a simple and straightforward case of enhancing sentence, a power specifically conferred by Sec. 439 (1), Criminal Procedure Code.

Under S. 423 (1), Criminal P. C., the High Court as a Court of Appeal dismissed the appeal and under S. 439 (1), as a Court of revision, it enhanced the sentence, but it is difficult to read into S. 423 (1) (b) the power to convert an acquittal into a conviction on an appeal against a conviction. We think the words "alter the finding, maintaining the sentence" occurring in S. 423 (1) (b) (2) must be read as a whole, and we could not in this case, for instance, alter the finding from one of a conviction under S. 304 to one of a conviction under S. 302, I. P. C., and maintain the sentence because we could not for an offence under S. 302, I. P. C., maintain a sentence of ten years rigorous imprisonment. And even if the Judge in this case had imposed a sentence of transportation for life, we do not think we could for that reason have altered the finding from a conviction under S. 304 to a conviction under S. 302, I. P. C., and then as a Court of revision have enhanced the punishment to one of death under S. 439, Criminal P. C., because we do not think the exercise of these powers can turn upon chance. We do not think the exercise of these powers can depend upon the chance that in a case under S. 304 (1) the Judge has imposed the maximum penalty under the Section. We think the better view to take is that Cl. (b) of S. 423 (1), Criminal P. C., does not apply to cases of acquittal, partial or total, but to cases of conviction, and that Cl. (a) applies to cases of acquittal; and that if the appellate powers of the Court are to be exercised to convert an acquittal into a conviction, then they should be exercised on an appeal against an acquittal under S. 423 (1) (a) and not on an appeal against a conviction under Sec. 423 (1) (b), Criminal P. C., which is the case here.

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[3] Kishan Singh v. Emperor, (1928) 15 A I R P C 254=111 I C 332=29 Cr L J 828=50 All 722=55 I A 390 (P C).

[4] Mehdi v. Emperor, (1933) 20 A I R Lah 661=1933 Cr C 883=146 I C 949=35 Cr L J 250 35 P L R 238.

[5] Balli Reddi v. Emperor, (1914) 1 A I R Mad 258=22 I C 756=15 Cr L J 180=37 Mad 119.

[6] On Shwe v. Emperor, (1924) 11 A I R Rang 93=76 I C 711=25 Cr L J 247=1 Rang 436.

[7] Chunbidya v. Emperor, (1935) 22 A I R P C 35=1935 Cr C 199=158 I C 936=37 Bom L R 160=36 Cr L J 482=57 All 156=62 I A 36 (P C).

In view of the Privy Council decision in 50 All 722,[3] the judgment of this Court in 20 S L R 352[8] appears no longer good law and the judgment of the Bombay High Court in 48 Bom 510[9] has proved to be correct. In any case we should think it desirable in a case of this serious nature to order a retrial rather than that we should as a mixed Court of Appeal and revision convert an acquittal into a conviction and enhance the sentence. It is not necessary therefore to discuss further the question of law involved. This is clearly a case which should be retried by a Sessions Judge and is not a case which should be decided by a Court which has not seen the witnesses. Under S. 423 (1) (b), Criminal P. C., we reverse the finding and the sentence and order the appellant to be retried for the murder of his wife by the Sessions Judge of Sukkur.

D.S./R.K. *Retrial ordered.*

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[8] Emperor v. Shahu, (1927) 14 A I R Sind 16 =97 I C 641=27 Cr L J 1121=20 S L R 352.

[9] Emperor v. Shivputraya Durdundaya, (1924) 11 A I R Bom 456=86 I C 478=26 Cr L J 830=48 Bom 510=26 Bom L R 438.

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## * A. I. R. 1938 Sind 206

DAVIS J. C. AND DADIBA C. MEHTA J.

*Smt. Viranbai (alias Dadanbai) w/o Hiranand Chugh* — Appellant.

v.

*Parmanand Jhangaldas and others* — Respondents.

Second Appeal No. 22 of 1935, Decided on 24th May 1938, against Judgment of Asst. Judge, Sukkur, D/- 25th February 1935.

**(a) Benami — Benami purchase — Another's money and benami intention must be proved— Evidence insufficient in England may be sufficient in India.**

In order that a property may be shown to be benami, it is not only necessary to show that it was purchased by another's money, but it is necessary to show that it was purchased by that other, benami. But circumstances in India are such and the habits of society are such, that evidence which might not be sufficient in England to show that the property was benami would be sufficient in India : *11 M I A 28 (P C); 15 Cal 20 (P C) and A I R 1925 P C 181, Explained.* [P 207 C 2]

*** (b) Practice — Evidence — Party which should be first witness refusing but desiring to enter witness-box at late stage — Refusal by Court held justified.**

Where a person should have been the first witness to go into the witness-box, but did not do so and desires to go into the witness box at a late stage and the Court in its discretion refuses to allow him at that stage there is no irregularity in the procedure adopted : *20 Cal 470, Disting.* [P 209 C 1]

**(c) Second Appeal—Findings of fact—Legal conclusion drawn from findings can be considered.**

Where a Court is dealing with the question as to whether from the facts found the legal inference drawn by the lower Courts is correct in cases such as of adverse possession, or under S. 53, T. P. Act, or S. 82, Trusts Act, it is entitled to consider in second appeal whether the facts found by the lower Court justified the conclusions in law that they have drawn. [P 207 C 1]

Kimatrai Bhojraj — *for Appellant.*

**Davis J. C.**—This is an appeal against the judgment of the Assistant Judge at Sukkur who dismissed an appeal against a judgment of the Joint Subordinate Judge of Shikarpur, in which he found that the suit house purchased by defendant 1, the husband, in the name of defendant 2, his wife, was a benami purchase, and that the plaintiff was entitled to the declaration he sought in his suit to this effect. Now, a preliminary objection was taken that we could not hear this case in second appeal because it was an appeal based upon facts, that whether a transaction was or was not a benami transaction was a question of fact upon which two lower Courts had given concurrent findings. But, we think, in this case, as in other cases, we are dealing with the question as to whether from the facts found the legal inference drawn by the lower Courts is correct; and as we can in a case of adverse possession, or in a case under S. 53, T. P. Act, consider whether the facts found by the lower Court justified the conclusions in law that they have drawn, so we can consider in this case whether the facts found justify the conclusion drawn by the lower Courts that the transaction in question is a benami transaction or within the provisions of S. 82, Trusts Act, 2 of 1882. Now, we have heard arguments of the learned advocate for the appellant based principally upon a judgment of the Privy Council in 11 M I A 28,[1] followed by a decision of the Bombay High Court in 5 Bom L R 784[2] at p. 788 and the words stressed by the learned advocate in the case reported in 11 M I A 28,[1] are :

> If we were to take away men's estates upon inferences derived from such circumstances as these, it would be impossible that any property could be safe ;

while in 5 Bom L R 784[2] the learned advocate relies particularly upon the following passage :

> The law of benami is founded on principles which are not limited to India; it is nothing more or less than an application of the equitable rule that where there is a purchase by *A* in the name of *B* there is a resulting trust of the whole to *A*. It is no doubt an accepted rule of guidance in reference to benami transactions to see from what source the purchase money has proceeded, and the argument here has been that the purchase money proceeded from John Joseph De Silva, and so Anna Estellita De Silva must be regarded as benamidar for him; but it appears to me that ordinarily something further is required. It should I think be shown that the person, whose money has gone to effect the purchase, furnished it as purchaser. That this is the doctrine of the Court of Equity in England with regard to the resulting trusts is clear.

And, put briefly, what the learned advocate for the appellant says is this, that while the lower Courts have found that the property in question was purchased by the husband, the Courts have not found that it was purchased by the husband for himself, and that before the wife the appellant can be deprived of her property, this must be shown. Now, the learned Subordinate Judge has dealt very carefully with the arguments raised by the learned advocate before us in this case, which are the arguments raised by the learned advocate in the case in the trial Court, and it is pointed out that this decision of the Privy Council in 11 M I A 28,[1] must be read with the subsequent decisions of the Privy Council in which the full force of that judgment as applied to Indian cases is somewhat modified. In 15 Cal 20[3] Lord Hobhouse has said :

> It is familiar to us all that the system of putting property benami is so extremely common in India that the mere fact of a deed being executed in proper form and apparently effecting a valid transfer to another, is not as good evidence of a real transfer as it would be in other countries, and even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. Still such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a benami or sham transaction.

In A I R 1925 P C 181[4] Sir John Edge said :

> There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India.

But we do not think the result of the two later judgments to which we have referred affect the principle that in order that a property may be shown to be benami, it is not only necessary to show that it was purchased by another's money, but it is necessary to show that it was purchased by that other benami. What all these later judgments do is to point out that circumstances in India are such, the habits of society are such, that evidence which might not be sufficient in England to show that the property was benami would be sufficient in India.

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[1] **Sreeman Chunder Dey v. Gopaul Chunder Chuckerbutty, (1867) 11 M I A 28=7 W R 10 (P C).**

[2] **John Joseph De Silva v. John Joseph De Silva, (1903) 5 Bom L R 784.**

[3] **Uman Parshad v. Gandharp Singh, (1888) 15 Cal 20=14 I A 127=5 Sar 71 (P C).**

[4] **Sura Lakshmiah Chetty v. Kothandarama Pillai, (1925) 12 A I R P C 181=88 I C 827=48 Mad 605=52 I A 286 (P C).**

These two later rulings of the Privy Council affect rather the amount of evidence which is necessary to prove the benami nature of the transaction than the nature of the transaction itself; the purchase of property by one person for himself in the name of another must still be proved, but in the case of a purchase by a husband in the name of his wife much less evidence is required in India than in England.

In this case a dispute arose as to a house and because the husband was a partner indebted to the partnership, in a suit brought by the plaintiffs against the husband for this partnership debt, two houses one in the name of the husband and one in the name of the wife were attached in execution of their decree, whereupon the wife filed a petition claiming the house in question as her own, and in consequence this suit for a declaration was brought, in which defendant 2, Viranbai the wife, from the outset took the case that the house was hers and was purchased by her money. But this was not the case to which she was in the first instance and at the proper time prepared to justify. Neither she nor her husband, the persons most concerned, were prepared to go into the witness-box at the proper time. But the chief protagonist in the suit was her father, and it was his case, and not the case of the wife and husband in the witness-box that this property was purchased partly with his money, partly with money provided by the sale of his daughter's ornaments; but the lower Courts rejected and for good reason this case as false, and came to the conclusion that the money was provided by the husband. It is true that the trial Court was in error on a question of fact when it stated that Rs. 1600 only had been provided by the husband and that Rs. 1900 were not deposited in Court, and therefore the question as to the balance of this purchase money, that is Rs. 1900, was left by the trial Court undecided. But the lower Appellate Court corrected this error of the trial Court and pointed out that on the evidence it was clear Rs. 1900 were deposited in Court and found that these Rs. 1900 were deposited by the husband.

Now, as far as the sum of Rs. 1600 is concerned, the lower Appellate Court shows quite clearly that from accounts it can be proved that Rs. 1600 was borrowed by the husband some few days before the sale-deed. The wife herself had nothing, as the lower Courts have found, and the lower Courts were justified in finding that her father did nothing in this matter but to have an agreement for the purchase made out first in his name, though the actual deed of sale was made out in the name of the wife, his daughter. So that the plaintiffs have clearly proved that these Rs. 1600 came from the husband and were used in the purchase of the house, and by a process of inference the lower Appellate Court was justified in the conclusion that it came to, that the husband alone provided the balance of Rs. 1900; but it was argued that conceding that the husband paid this money for this house, it is not sufficient. It must be shown that he intended that this money should be used for the purchase of the house for himself and not for his wife. Now it is true that there is one passage in the judgment of the trial Court which is open to attack where it refers to the purchase of the property by the husband for the wife out of affection for her; and, indeed, if the lower Courts were of the opinion that the house was in fact purchased by the husband with his money out of affection for his wife, then it could not be held that it was purchased by the husband for himself.

It is argued that here there was no question of screening the property from the creditors; the house was purchased at the beginning of the partnership and if it was purchased out of affection by the husband for the wife, she was the beneficial owner of the house and it could not be taken away from her. But in this case we think, the lower Courts were bound to draw an adverse inference from the fact that the husband and wife, most interested in the suit, in fact, the two defendants, kept themselves out of the witness-box, and the only inference to be drawn is that if they had submitted themselves to cross-examination, their evidence would not have supported their case but would have strengthened that of the plaintiffs. We think therefore that upon the circumstances the lower Courts were justified in holding that this purchase made by the husband was made not for his wife but according to Indian custom for himself.

But it was urged in appeal that we are not justified in inferring from the absence of the husband and the wife from the witness-box anything against them, because in fact they desired to go into the witness-box but their request was refused. But that is not a fair statement of the case at all. The advocate for the appellant and her husband made a definite statement in Court that he did not propose to call his clients. The case was adjourned for argument from time to time, and it was only in the course of arguments that the appellants changed their advocate and an application was put in praying that the wife and husband who were in Court should be examined as witnesses. This application the Judge refused, as it was in his discretion to refuse it. We have not here a case where a defendant has been trying to procure the presence of his witnesses and had first failed but had at the last minute succeeded, but we have a case where the defendants should have been the first witnesses to go into the witness-box, but did not do so; and even when a commission was issued for the examination of the appellant at her request, it was never executed because no costs were paid. The circumstances in this case are quite different from the facts and circumstances of the case in 20 Cal 740,[5] and moreover, with the greatest respect to the Chief Justice who gave judgment in that case, we prefer the reasoning of Ghose J., who doubted the correctness of the order that the Court was about to make, being of the opinion that there was no irregularity in the procedure adopted by the Munsif. So in this case we hold that there was no irregularity in the procedure on the part of the Subordinate Judge. There was no such error in procedure as can be allowed to prevail in an appeal under Section 100, Civil P. C.

We see therefore no reasons whatever to interfere with the concurrent findings of the lower Courts on facts or with the legal inferences that have been drawn from those findings. The appeal is therefore dismissed with costs.

B.D./R.K. *Appeal dismissed.*

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[5] Moni Lal Bandopadhya v. Khiroda Dasi, (1893) 20 Cal 740.

## * A. I. R. 1938 Sind 209

DAVIS J. C. AND DADIBA C. MEHTA J.

*Lilaram Ladakmal and others* — Applicants.

v.

*Wadhumal Assudomal*—Opposite Party.

Criminal Revn. Appln. Nos. 31 to 43 of 1938, Decided on 5th May 1938, to quash the proceedings pending before the Bench Magistrates, Hyderabad.

**(a) Bombay Prevention of Adulteration Act (5 of 1925), S. 12 (1)—Complaint addressed to Bench of Honorary Magistrates as such—Mere fact that upon verification of complaint there is signature of one Magistrate only would not mean that they were not sitting as Bench.**

In Hyderabad the Magistrates who constitute the 'B' Bench, are Magistrates of the Second Class only when sitting together as a Bench, and when sitting singly they are Magistrates only of the Third Class. [P 211 C 1]

Where the complaint was addressed to a Bench of Honorary Magistrates as such, from the fact that upon the verification of the complaint itself there was only the signature of one Magistrate, it would not follow that two Magistrates were not present sitting as a Bench. [P 211 C 2]

**(b) Bombay Prevention of Adulteration Act (5 of 1925), S. 13 (1)—Summons not applied for within 30 days of grant of certificate—Defect is not mere irregularity but is fatal to prosecution case.**

Section 13 should be considered separately as regards its two sub-sections, because sub-s. (1) relates to a condition of time, and if it can be shown that a summons was not applied for within 30 days of the date of the grant of the certificate by the public analyst, that would be fatal to the prosecution case, for time once gone is gone beyond recall. This cannot be regarded as a mere irregularity which can be cured. [P 211 C 2]

**(c) Bombay Prevention of Adulteration Act (5 of 1925), S. 13 (2)—Mere fact that date is omitted from summons would not be fatal flaw in proceeding.**

Though it is very desirable indeed that the provisions of Sec. 13 (2) should be closely followed, that the name of the complainant should be given, the name and place fixed for hearing should be shown, it cannot be held that if for instance the date be omitted from the summons it would be a fatal flaw in the proceedings. All that can be said is that it is an irregularity which can be cured, if necessary, by an issue of amended summons and by the Magistrate allowing such adjournment as the omission of any particular from the summons may seem to require so as to give the accused the notice in the summons to which he is entitled. [P 212 C 1]

*** (d) Criminal P. C. (1898), S. 200—Mere fact that complaint mentions wrong Section or wrong Act does not prevent Court from taking cognizance of offence under right Section of right Act.**

It would not be right to say that merely because the complainant whether in ignorance or inadvertence, mentions the wrong Act or mentions the wrong Section, there is no complaint within the meaning of S. 200. It is true that if such errors occur in the complaint, care must be taken at the proper time to see that the accused is in no way prejudiced. But if the facts are such as to disclose an offence under a particular Section, under a particular Act then existing, then whatever errors there may be in the complaint as regards the number or name of the Act or Section, the Magistrate should take cognizance of the complaint for what in substance it is and even if the Magistrate has repeated in the summons the mistake that occurred in the complaint itself, that mistake is a mistake which can subsequently be rectified. [P 212 C 1, 2]

P. S. Shahni — *for Applicants 1 to 11 and 13.*

Kundanmal Dayaram — *for Applicant 12.*

Partabrai D. Punwani — *for the Crown.*

**Davis J. C.** — These revision applications are made to us so that we may quash proceedings purporting to be under S. 4, Bombay Prevention of Adulteration Act, 5 of 1925, now pending before the City Magistrate, Hyderabad, on the ground that the provisions required by that Act as a condition precedent to a proper institution of proceedings have not been complied with. This case in some ways is an interesting case as throwing light upon the proceedings of Honorary Magistrates in the mofussil. It appears that trouble in the first instance arose because the complaint was made under S. 176 of Act 18 of 1925, Bombay Municipalities Act, which at that time was not in force in Hyderabad Municipality, its place having been taken by the corresponding provisions of the Bombay Prevention of Adulteration Act 5 of 1925, for on 1st August 1936, by the application of Act 5 of 1925 to the Hyderabad Municipality, S. 176 of Act 18 of 1925 was no longer in operation or effective. Therefore when on 6th October 1936 a complaint was made by the Municipal Prosecuting Inspector of the Hyderabad Municipality of an offence under S. 176 of Act 18 of 1925, he was making a complaint under a Section of the Act which was no longer in operation. The appropriate Section at that time was Sec. 4, Bombay Prevention of Adulteration Act 5 of 1925, as subsequently amended by Act 23 of 1935. But it is perhaps only fair to say that the Municipality guarded themselves against any charge that they were not conversant with what was being done in the way of enacting new laws and repealing old ones, by a sentence in the complaint which asks the Court to proceed against the accused under the Section above named or any other Act or any other Section applicable.

The learned Bench Magistrates however who dealt with this complaint, were content to direct summons under S. 176 of Act 18 of 1925 to issue and to fix the hearing for 13th October 1936, and a summons, which did not appear to contain the details required by S. 13, Bombay Prevention of Adulteration Act, which was the appropriate Section then in operation, was received by the applicants on 10th October. Thereafter, when, on these proceedings, this and other similar cases came before the City Magistrate, Hyderabad, and this question of the repeal of S. 176 of Act 18 of 1925, so far as the Municipality of Hyderabad was concerned, was raised, the City Magistrate was of the opinion that, as a complaint had been filed under a wrong law and as the particulars required by Section 13, Bombay Prevention of Adulteration Act, had not been given, the complaint was bad; and he advised their withdrawal.

Apparently however, the District Magistrate was not content with this opinion of the City Magistrate, and possibly because the complaint had not been dismissed or the accused had not been discharged, no application was made by the District Magistrate to the Sessions Court in revision or to this Court in revision to set aside what he apparently considered a wrong decision of the City Magistrate. But the Public Prosecutor of Hyderabad was consulted, and he apparently was of the opinion that the fact that the complaint was put under a wrong Section or a wrong law did not bar the jurisdiction of the Court or prevent it taking cognizance of an offence under the right Section of the right law, and apparently in accordance, let us say, with the view of the Public Prosecutor, the then City Magistrate on 18th December 1936, ordered process to issue against the accused presumably under Section 13, Bombay Prevention of Adulteration Act, for an offence under that Act. Hence these applications in revision have been argued by Mr. Shahani before us with his customary enthusiasm and thoroughness.

Now the case, as he takes it, can be put simply in this fashion; that the Sections that really govern the proceedings of the nature contemplated by this complaint and of the offence charged are Ss. 12 and 13, Bombay Prevention of Adulteration Act, and Ss. 12 and 13 are as follows:

> 12. (1) No offence under this Act shall be triable by a Magistrate exercising powers less than those of a Magistrate of the Second Class.
>
> (2) The amount of fine recovered from persons accused of any offence under this Act shall be paid to the local authorities within whose local areas the offence is committed.
>
> 13. (1) No summons shall be issued for the attendance of a person accused of an offence under this Act unless the summons is applied for within 30 days of the date of the grant of the certificate by the public analyst of the result of his analysis.

(2) Every such summons shall specify the particulars of the offence charged, the name of the complainant and the date and place fixed for the hearing of the case. The case shall not be proceeded with until at least seven clear days have elapsed from the date of the service of the summons.

So far as S. 12 of the Act is concerned, he emphasizes the fact that these offences are offences triable only by Magistrates of the Second Class and that in Hyderabad the Magistrates who constitute the "B" Bench are Magistrates of the Second Class only when sitting together as a Bench and that when sitting singly they are Magistrates only of the Third Class, and he has referred us to the pages of the Sind Official Gazette which support his contentions. Therefore his first point is that the record shows that this complaint was made and cognizance in effect taken only by a Magistrate sitting singly, sitting as a Third Class Magistrate; therefore no proper complaint can be deemed to have been made to a Magistrate of the Second Class within the provisions of S. 12, Bombay Prevention of Adulteration Act. Moreover he argues it is important that a proper complaint should have been made within the provisions of S. 13 of the Act, because they provide that no summons shall be issued for the attendance of a person accused of an offence under this Act unless the summons is applied for within 30 days of the date of the grant of the certificate by the public analyst of the result of his analysis; it follows that a summons can only be granted when a complaint has been properly made and a summons properly applied for; if no complaint has been properly made, no summons can have been properly applied for or properly granted; therefore it is quite impossible in this case that the provisions of S. 13 of the Act can have been complied with and non-compliance must be fatal to these proceedings. But this argument depends, of course, upon our accepting as correct the very attractive picture the learned advocate has drawn to us of two Honorary Magistrates, constituting a Single Bench sitting, at different ends of that Bench, each one busily engaged upon a different case, so that in effect while nominally sitting as a Bench of Second Class Magistrates they are in fact sitting singly as Third Class Magistrates. But however exaggerated or however true this picture of Honorary Magistrates at work may be, it is not proved to be a fact on the evidence before us. We are dealing with applications in revision, and the applicants ask us at the outset to quash certain proceedings, and we think the burden must be upon them of showing that the facts which are necessary to the making of an order by us in their favour have been proved. There is no proof upon the record that when this complaint was made to the Bench of Magistrates, it was not received by them sitting as a Bench of two or more. The record shows it was addressed to a Bench of Magistrates as such. The only proof, if it could be so called, of their acting in the manner which the learned advocate has described, lies in the fact that upon the verification of the complaint itself, there is only the signature of one Magistrate. But it is very natural to suppose that if two Magistrates are sitting together in a case of this nature, one Magistrate only would sign below the verification of the complaint but it by no means follows two Magistrates were not present sitting as a Bench on this one case, and we think we are justified, and indeed under the circumstances we think it is only proper that we should infer under S. 114, Evidence Act, that these Magistrates to this extent properly discharged their judicial functions.

So that we cannot say that it is in any way proved that the application for a summons was not made to a Bench of Second Class Magistrates properly constituted, or that a summons was not granted by a proper Bench so as to make the objection brought in the matter of the time limit of 30 days effective. We would point out here that we consider that S. 13, Bombay Prevention of Adulteration Act, should be considered separately as regards its two sub-sections because sub-s. (1) relates to a condition of time, and we think that if it can be shown that a summons was not applied for within 30 days of the date of the grant of the certificate by the public analyst that would be fatal to the prosecution case, for time once gone is gone beyond recall. The law requires that proceedings shall be started within a certain time; if they are not started within that time then they cannot start at all. We cannot regard this as a mere irregularity which can be cured. We can regard it only as a fatal defect in the proceedings in limine, but in this case this fatal defect is not proved to exist.

But so far as the second part of S. 13, Bombay Prevention of Adulteration Act, is concerned, that is the part which relates to the specification of particulars of the offence charged in the summons, though it is very desirable indeed that the provisions of this Section should be closely followed, that the name of the complainant should be given, the name and place fixed for hearing should be shown, we should find it difficult to hold that if, for instance, the date be omitted from the summons, that could be said to be a fatal flaw in the proceedings. All that can be said is that it is an irregularity which can be cured, if necessary, by an issue of amended summons and by the Magistrate allowing such adjournment as the omission of any particular from the summons may seem to require so as to give the accused the notice in the summons to which he is entitled. It is also to be observed that under Sec. 13 (2) of the Act

> the case shall not be proceeded with until at least seven clear days have elapsed from the date of the service of the summons,

and when the summons is referred to in sub-s. (2) it means a summons with all necessary particulars. Mr. Shahani was at first inclined to emphasize the point that as the complaint was made on 6th October, while the offence complained of occurred on 14th August 1936, it is almost inevitable that more than 30 days elapsed before application was made for a summons, an application which we assume to have been made under S. 13, Bombay Prevention of Adulteration Act. But again, so far as that point is concerned, we can only say that there is no evidence to support this case that the application was made after 30 days. In the absence of any evidence, we cannot accept his objection on this point as proved.

But apart from these particular objections, the general objection was taken that nothing now could rectify these proceedings, that they were started under a wrong Act, and so far as the particular Section of the particular Act under which the complaint was made is concerned, it was on that day, 6th August 1936, repealed and ineffective, and this was the view which commended itself to the learned City Magistrate when in the first instance he suggested that this complaint and others like it, should be withdrawn. But we do not think that it would be right to say that merely because the complainant, whether in ignorance or inadvertence, mentions the wrong Act or mentions the wrong Section, that thereby it must be said that there is no complaint within the meaning of S. 200, Criminal P. C. It is true that if such errors occur in the complaint, care must be taken at the proper time to see that the accused is in no way prejudiced. But if the facts are such as to disclose an offence under a particular Section, under a particular Act, then existing, then we think whatever errors there may be in the complaint as regards the number or name of the Act or Section, the Magistrate should take cognizance of the complaint for what in substance it is, and although in this case the Bench Magistrates have repeated in the summons the mistake that occurred in the complaint itself, that mistake is, we think, a mistake which can hereafter be rectified in accordance with the order that we shall have made.

We think therefore that so far as the objections urged by Mr. Shahani are concerned, that is to say, that the Magistrates did not function as a Bench, that they are not competent to take cognizance of this complaint of an offence which is triable only by Magistrates of the Second Class, that the wrong Section of the wrong Act was mentioned in the complaint, and that the application for the summons was made too late after the grant of the certificate to found lawful proceedings, we must say that upon the record before us these objections have not been proved and cannot be allowed to prevail.

We must however see that the accused is not prejudiced by the irregularities which undoubtedly have occurred in these proceedings, and we think that the proper course to take is to make it clear that the offence alleged is an offence falling under S. 4 (1), Bombay Prevention of Adulteration Act, (the appropriate clause or clauses should be stated in the summons) and that the procedure laid down in sub-s. (2) of S. 13 of the Act must be strictly followed, and that a new summons specifying the particulars of the offence charged, the name of the complainant, the date and place fixed for hearing of the case as required by that sub-section shall issue and the case shall not be proceeded with until at least seven clear days have elapsed from the date of the service of the summons as the Section requires. That again will make clear the time within which the accused now being charged with an offence under the Bombay Prevention of Adulteration Act will have to take action if they wish to plead the defence of warranty. For instance, Cl. (4)

of sub-s. (3) of S. 4 of the Act lays down certain provisions as to the time within which the defence of warranty can be taken. It says:

> No evidence of a warranty under Proviso (a) to sub-s. (3) shall be admissible on behalf of the seller (a) unless the seller has within three days of the service of the summons under S. 13 sent to the complainant a copy of the warranty with a written notice stating that he intends to rely upon it and specifying the name and address of the person from whom he received it and has also sent a like notice of his intention to that person; and (b) . . . .

These are the conditions of the sub-section required of a seller if he is to take advantage of a warranty, and the period of three days which is fixed within Cl. (a) of sub-s. (4) of Sec. 4 of the Act must as strictly be complied with, as the period of 30 days fixed under sub-s. (1) of S. 13 of the Act. If this is done, we think these proceedings will be regularized and it will be possible for them now to proceed before the City Magistrate in a regular, lawful and seemly manner. Order accordingly. The order we have made above will also mutatis mutandis be the order passed in the connected applications, that is to say, in Criminal Revision Applications Nos. 32 to 43 of 1938, inclusive.

D.S./R.K. *Order accordingly.*

## * A. I. R. 1938 Sind 213

DAVIS J. C. AND DADIBA C. MEHTA J.

*Dharamdas Hiranand* — Appellant.

v.

*Emperor*.

Criminal Appeal No. 34 of 1938, Decided on 20th May 1938.

**(a) Criminal P. C. (1898), S. 195 — Old system of sanctions is now abolished.**

The old system of sanctions is now abolished. The Court or officer concerned does not sanction a prosecution. The Court or officer concerned makes the complaint direct. Where therefore complaint in a case is made by the Sub-Inspector concerned, with the necessary administrative sanction, no judicial sanction is necessary. [P 214 C 1]

*** (b) Penal Code (1860), S. 211—Giving of first information of cognizable offence to police is institution of criminal proceedings within the meaning of second part of S. 211.**

No distinction should be drawn between the first and second parts of S. 211, I. P. C., between proceedings before the police and proceedings before the Magistrate. The second part of Sec. 211 must be read with the first part of S. 211 and the second part of S. 211 refers to "such criminal proceedings"; obviously these criminal proceedings are the criminal proceedings referred to in the first part. Criminal proceedings are just as much instituted within the meaning of the Section when first information of a cognizable offence is given to the police under S. 154, Criminal P. C., as when a complaint is made direct to a Magistrate under S. 200: *A I R 1931 Nag 134 (F B), Dissent.; 17 Cal 574; 20 Mad 79 and A I R 1931 All 269, Rel. on.* [P 214 C 1, 2]

**(c) Penal Code (1860), S. 211 — Words "be instituted" in second part denote passive mood.**

The words "be instituted" in second part of S. 211 do not denote the past tense. The words denote the passive mood. [P 215 C 1]

**(d) Criminal P. C. (1898), S. 195 (1) (b) — Offence under S. 211, I. P. C., not committed in Court of Sub-divisional Magistrate—His giving of 'B' summary as administrative officer cannot be held to have been proceeding in his Court—His complaint is not necessary.**

Section 195 (1) (b) does not relate to offences under S. 211 generally. It relates to offences under S. 211, I. P. C., when such offence is alleged to have been committed in or in relation to any proceedings in any Court. [P 215 C 1]

Where offence under S. 211, I. P. C., is not committed in the Court of Sub-divisional Magistrate, his giving of the "B" summary as an administrative officer cannot be held to have been a proceedings in his Court. Hence his complaint is not necessary. [P 215 C 1]

H. T. Raymond — *for Appellant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.** — The accused in this case, one Dharamdas, has been convicted by the Sessions Judge of Larkana of an offence under S. 211 (2), Penal Code, and sentenced to two years' rigorous imprisonment and a fine of Rs. 300. The case for the prosecution is that on 15th January 1936 the accused made a complaint to the head constable in charge at Sewan Police Station against one Muradali Shah of Wahur and six others, alleging that Muradali Shah had shot at him with his gun, had incited his men to beat and rob him and they had robbed him of his coat and Rs. 20 and kicked and beaten him. He named one Raghumal, who was with him, as his witness. The head constable took a copy of his first report to the Sub-Inspector who was camped at Bubak, who, that same night, went to Wahur, the scene of the offence, and the next morning made enquiry. The accused, then the complainant, pointed out the wall behind which he had taken refuge from the shot and the Sub-Inspector could find no trace of shot; the accused refused to go to a doctor to be examined and said he had no injury; the house and otak of the zamindar were searched and a black coat claimed by the accused as his and alleged to have been taken when he was robbed, was attached. This coat the zamindar claimed as his own, and it was identified by the tailor and the washerman as the zamindar's coat, and the son of the accused, who was said to have bought it for his father, failed to identify it. The Sub-Inspector could not find the accused's witness Raghumal, and after having examined other witnesses and having come to the conclusion that the case was false, the Sub-Inspector reported the case to the Sub-divisional Magistrate for "B" summary, which was given, and on having received the administrative sanction of the Deputy Superintendent, the Sub-Inspector filed a complaint against the accused for the offence under S. 211, I. P. C., of which the accused has been convicted. (After discussing the evidence the conclusion was that the accused had knowingly made a false complaint against the zamindar Muradali Shah. The judgment then proceeded further.) It is argued however that the conviction must be set aside on the grounds of law. First, it was argued that the necessary sanction for filing the complaint was not obtained and that absence of such sanction is not cured under S. 537, Criminal P. C., because Cl. (b) relating to sanction has now been omitted from S. 537. Apparently the learned advocate was not aware that Cl. (b) of S. 537, Criminal P. C., relating to sanctions is now omitted from the Section because it is no longer necessary. The old system of santions is now abolished. The Court or officer concerned does not sanction a prosecution. The Court or officer concerned makes the complaint direct : *see* S. 195 (1) (a) and (b), Criminal P. C. The complaint in this case is made by the Sub-Inspector concerned, with the necessary administrative sanction. No judicial sanction is now necessary.

It was then urged that the offence could not fall under Sec. 211 (2), Penal Code, because the making of a false complaint to the police is not the institution of criminal proceedings within the meaning of that Section and reliance was placed upon a Full Bench ruling of the Nagpur High Court, A I R 1931 Nag 134.[1] With all due respect to the learned Judges who decided that case, we can see no such distinction as they have drawn between the first and second parts of S. 211, I. P. C., between proceedings before the police and proceedings before the Magistrate. The learned Judges have not referred to Cls. (l) and (m) of S. 4 (1), Criminal P. C. Under Cl. (l) the term "investigation" by a police officer includes all proceedings under the Code for the collection of evidence by a police officer or an authorized person other than a Magistrate, and is distinguished from a judicial proceeding which includes any proceedings in the course of which evidence may be legally taken on oath. If therefore the Legislature had wished to differentiate between proceedings by a police officer and proceedings by a Magistrate, as the learned Judges of the Nagpur High Court believed, then, with all respect, it appears to us the Legislature would have used the term "judicial proceedings" as contrasted with "criminal proceedings," the term used in S. 211, I. P. C.

Our opinion is that the second part of S. 211, I. P. C. differs from the first, so far as the institution of criminal proceedings is concerned inasmuch as it provides a more serious punishment for criminal proceedings on false charges when such proceedings relate to the more serious offences. It is true the first part of S. 211, I. P. C., refers both to criminal proceedings and false charges, while the second part of S. 211, I. P. C., does not seem so to differentiate, but appears to combine both in language so concise as to be defective. But it is clear that the second part of S. 211, I. P. C., must be read with the first part of S. 211, I. P. C. and the second part of S. 211, I. P. C., refers to "such criminal proceedings;" obviously these criminal proceedings are the criminal proceedings referred to in the first part. It may be that the second part of S. 211, I. P. C., will not apply in certain cases when the first part will apply, for the first part of S. 211, I. P. C., relates specifically to a "false charge" while in the second part of S. 211, I. P. C., the "false charge" appears involved in the criminal proceedings, but with that aspect of the case we are not now concerned. In our opinion, criminal proceedings are just as much instituted within the meaning of the Section when first information of a cognizable offence is given to the police under S. 154, Criminal P. C., as when a complaint is made direct to a Magistrate under S. 200. S. 190, Criminal P. C., applies equally to both cases. The view that the second part of S. 211, Penal Code, applies in appropriate cases to investigations by the police and are not limited to proceedings before a Magistrate is the view of the Calcutta and Madras High Courts : 17 Cal 574[2] and 20

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[1] **Sultan Ahmad v. Emperor, (1931) 18 A I R Nag 134=1931 Cr C 721=133 I C 398=32 Cr L J 1009=27 N L R 275 (F B).**

[2] **Karim v. Queen Empress, (1890) 17 Cal 574.**

Mad 79.[3] Reference may also be made to an interesting judgment of the Allahabad High Court reported in (1931) 29 A L J 177,[4] in which a previous ruling of that Court that Sec. 211, Penal Code, cannot apply to a police investigation is dissented from. We think that it is clear the first information given by the accused to the Sub-Inspector of the offences of attempted murder, dacoity, etc. committed by the zamindar and his raj men amounted to the institution of criminal proceedings within the meaning of the second part of S. 211, I. P. C. The words "be instituted" in that part of the Section do not appear to us to denote the past tense as is sometimes contended. The words denote the passive mood.

One last and further point is raised however in a very prolonged defence, and that is, that as no complaint was made by a Court, the complaint would not lie; but reference to S. 195 (1) (b) does not relate to offences under S. 211 generally. It relates to offences under S. 211, I. P. C., when such offence is alleged to have been committed in or in relation to any proceedings in any Court, and when the learned advocate was asked to identify the Court or the Court's proceedings in which this offence had been committed, he finally pointed to the Court of the Sub-divisional Magistrate who gave the "B" summary. But this "B" summary was given by a Sub-divisional Magistrate as an administrative officer and not as a Court at all. The giving of a "B" summary cannot be held to have been a proceeding in his Court. The offence under S. 211, I. P. C., was not committed in his Court. The accused never came before the Court. Nor was the offence committed in relation to the Court or in relation to any proceeding in his Court, wide as those words are. We think therefore there is no merit in this appeal either on law or on facts. We think this case was a false case deliberately persisted in till the end, and a deterrent punishment is called for. We see therefore no reason to interfere with the sentence of two years' rigorous imprisonment passed by the Sessions Court. The appeal is dismissed accordingly.

D.S./R.K. *Appeal dismissed.*

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[3] Queen-Empress v. Nunjunda Rau, (1897) 20 Mad 79=1 Weir 188=7 M L J 16.

[4] Emperor v. Johri, (1931) 18 A I R All 269=1931 Cr C 429=136 I C 277=33 Cr L J 256=(1931) 29 A L J 177.

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## A. I. R. 1938 Sind 215

DAVIS J. C. AND DADIBA C. MEHTA J.

*Parmanand Jhangaldas and others* — Appellants.

v.

*Jairamdas Sadhuram and others* — Respondents.

Second Appeal No. 14 of 1935, Decided on 24th May 1938, against Judgment of Asst. Judge, Sukkur, D/- 22nd December 1934.

**(a) Transfer of Property Act (1882), S. 53—Fraudulent preference — Mere preference to particular creditor is not transfer within S. 53—Difference between transfers in bankruptcy and under Section 53 explained.**

Mere preference of one creditor to another is not a transfer within the meaning of S. 53. There is a distinction between transfers in bankruptcy which are bad, because they do in fact prefer one creditor to another, and between transfers which fall under the provisions of S. 53, which are bad because they are sham transactions intended to benefit the debtor and defeat or delay the creditors generally. [P 216 C 1]

**(b) Second Appeal—Findings of fact cannot be disturbed—Yet inferences of law can be interfered in second appeal.**

While a Court in second appeal will not interfere with findings of fact of the lower Appellate Court, whether right legal inferences have been drawn from those facts, whether, for instance, the possession is adverse or not, whether a transfer is made with intent to defeat or delay within the meaning of S. 53, are questions of law, which can be dealt with in second appeal : *20 Cal 93 (P C); 19 Cal 255 (P C); A I R 1930 P C 91 and A I R 1937 Sind 51, Rel. on.* [P 216 C 1]

**(c) Transfer of Property Act (1882), S. 53—Para. 2 of sub-s. 1 does not come into operation until Para. 1 is fulfilled.**

Section 53 does not apply to cases simply where one creditor is preferred to another, and the provisions of Para. 2 of sub-s. (1) of S. 53 do not come into operation until the provisions of Para. 1 of that sub-section have been fulfilled : *A I R 1915 P C 115 and A I R 1929 P C 279, Rel. on.* [P 216 C 1, 2]

Sunderdas Jethanand — *for Appellants.*

Kimatrai Bhojraj — *for Respondents.*

**Davis J. C.** — This is an appeal from the judgment of the Assistant Judge at Sukkur reversing a judgment of the Joint Subordinate Judge at Shikarpur in which he held that a particular transaction was void under S. 53, T. P. Act, being a transfer of an immovable property with intent to defeat or delay creditors within the meaning of S. 53 (1), T. P. Act. The Appellate Court however took a different view. It held that the plaintiffs had failed to prove that the transfer was not a transfer for consideration, and that it was not even proved that the transferor was indebted to the plaintiffs. But we think, that this case can be quite briefly decided on the principle that mere preference of one creditor to another is not a transfer within the meaning of Section 53, T. P. Act, and that there is a distinction between transfers in bankruptcy which are bad, because they do in fact prefer one creditor to another, and between transfers which fall under the provisions of S. 53, T. P. Act, and which are bad because they are sham transactions intended to benefit the debtor and defeat or delay the creditors generally. The first point taken in appeal was that no second appeal would lie in a case of this nature because whether a transfer of an immovable property is made with a particular intent, with intent to defeat or delay creditors, is a question of fact, which has been found by the lower Appellate Court, and however erroneous that finding may be, it is not for us in second appeal to interfere. But while a Court in second appeal will not interfere with findings of fact of the lower Appellate Court, whether right legal inferences have been drawn from those facts, whether, for instance, the possession is adverse or not whether a transfer is made with intent to defeat or delay within the meaning of Sec. 53, T. P. Act, are questions of law, which can be dealt with in second appeal, and reference may be made to the case of the Privy Council in 19 I A 228[1] and the case in 19 I A 48[2] and a case of the Privy Council reported in 32 Bom L R 380[3] while one aspect of this matter has been considered and discussed at some length in a case of this Court in 30 S L R 371,[4] so that there is no doubt in our mind that the question as to whether this transfer is or is not a transfer falling within Para. 1 of sub-s. (1) of S. 53, T. P. Act, is a question we can consider in second appeal.

Now, it is, we think, settled law, whatever may have been the opinion in the past, that S. 53, T. P. Act, does not apply to cases simply where one creditor is preferred to another, and that the provisions of Para. 2 of sub-s. (1) of S. 53 of the Act do not come into operation until the provisions of Para. 1 of that sub-section have been fulfilled. In 43 Cal 521[5] at page 524, Lord Wrenbury said :

> As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles, C. B. in (1887) 21 Ir 27[6] where he says :
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> "The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with or without consideration or reserved or retained by the debtor to their prejudice. It follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property although the effect of it or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the statute, because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected.
>
> The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid : (1876) 2 Ch D 104[7] at p. 108. So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy".

And the exposition of the law as laid down by Lord Wrenbury was followed by the Privy Council in 7 Rang 624.[8] Now, the facts found by the lower Appellate Court in this case fit most aptly to the law as set out by Lord Wrenbury, for the lower Appellate Court has found that the transfer impeached was made for adequate consideration in satisfaction of genuine debts and without reservation of any benefit to the debtor. It cannot be said that there was not upon the record evidence which justified the lower Appellate Court in a finding of

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1. Ram Gopal v. Shamskhaton, (1893) 20 Cal 93 =19 I A 228 (P C).
2. Luchmeswar Singh Bahadoor v. Manowat Hoosein, (1892) 19 Cal 255=19 I A 48=6 Sar 133 (P C).
3. Wali Muhammad v. Muhammad Baksh, (1930) 17 A I R P C 91=122 I C 316=11 Lah 199=57 I A 86=32 Bom L R 380 (P C).
4. Gulabrai v. India Equitable Insurance Co. Ltd., (1937) 24 A I R Sind 51=167 I C 929= 30 S L R 371.
5. Musahar Sahu v. Hakim Lal, (1915) 2 A I R P C 115=32 I C 343=43 Cal 521=43 I A 104 (P C).
6. Re Moroney, (1887) 21 Ir 27.
7. Middleton v. Pollock, (1876) 2 Ch D 104=45 L J Ch 293.
8. Ma Pwa May v. Chettyar Firm, (1929) 16 A I R P C 279=120 I C 645=7 Rang 624=56 I A 379 (P C).

facts which so aptly attracts this application of the law.

It is true, as the learned advocate for the respondents says, that in this case defendant 1 mortgaged to his father-in-law the only immovable property he possessed as security for money advanced by him some years before, but the lower appellate Judge found that this was a perfectly genuine transaction. He found, and there is clearly evidence to support his finding, that there was a genuine debt due by defendant 1 to defendant 2, and defendant 2 had advanced to defendant 1, for the purpose of the partnership of which the plaintiffs were members, sums of money from time to time, and the fact that there was this relationship and this lapse of time does not appear to us in itself sufficient to attract the application of Para. 1 of sub-s. (1) of S. 53, T. P. Act, to this mortgage so as to make this transfer voidable. We think there is nothing more in this appeal than this, and that it should be dismissed with costs. Order accordingly.

B.D./R.K. *Appeal dismissed.*

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## A. I. R. 1938 Sind 217

DAVIS J. C. AND DADIBA C. MEHTA J.

*Takhtram Tulsidas Ambwani*—Appellant.

v.

*Emperor.*

Criminal Revn. Appln. No. 75 of 1938, Decided on 11th May 1938, from Judgment of Additional Sessions Judge of Nawabshah.

**(a) Penal Code (1860), S. 204—Mere refusal to produce document is not offence under Sec. 204—But refusal coupled with secret dealing with document or with dealing intended to be kept secret, amounts to offence under S. 204.**

Although a mere refusal to produce documents is not an offence under S. 204, a refusal to produce a document with the intention, otherwise proved of keeping the document secret may well be sufficient evidence to prove a secretion within the meaning of Sec. 204. An honest refusal to produce a document is not a "secretion" of a document within the meaning of S. 204. Where there is a refusal, coupled with a secret dealing with the document or with a dealing intended to be kept secret it amounts to an offence under S. 204. [P 218 C 1]

**(b) Bombay Court of Wards Act (1 of 1905), Ss. 44-A, 15, 16—Power to call for documents given by S. 44-A can be exercised by Court of Wards for purposes of the Act and not only for purposes of Ss. 15 and 16—Mere fact that Court of Wards is party to civil suit does not deprive it of that power.**

Section 44-A gives the Court of Wards power to call for production of documents for the purposes of the Act referred to in S. 4 and other Sections of the Act and not only for the purposes of Ss. 15 and 16; and an enquiry under Ss. 15 and 16 is not a condition precedent for the exercise of the power. So also the mere fact that a claimant to the estate has filed a civil suit against the Court of Wards would not deprive it of the power to call for documents under S. 44-A. [P 218 C 1, 2]

K. H. Nagrani — *for Appellant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.**—The accused in this case was a clerk in the Court of Wards. He also claimed to be the adopted son of one Tulsidas Vaparimal who died possessed of considerable property but without a son. His nearest heir was Kishinchand Changomal, a minor, and a son of his daughter. As the result of the attempt of the accused to have his name entered as the heir of Tulsidas in the Revenue records, the Court of Wards assumed superintendence of the minor's estate and thereupon issued notice upon the accused to produce all account books and documents relating to the property of the deceased. These notices were for some time ignored but at last the accused agreed to produce the account books and documents in accordance with the notice, but under legal advice he changed his mind and refused to do so. Thereafter it came to the knowledge of the Court of Wards that the accused was dealing with the property and had accepted, in satisfaction of debt, 9 acres and 24½ ghuntas of land from one Hassomal Atumal, and from the sale-deed it appeared that this Hassomal had executed a kabuliyat in favour of the deceased in his lifetime and thus the existence of this document which the accused had among others refused to produce became known. A complaint therefore of offences under Ss. 204, 403 and 404, I. P. C., was made, and ultimately the accused was convicted of offences under Ss. 204 and 403, I. P. C., and sentenced for each offence to a fine of Rs. 200. His appeal was dismissed by the Additional Sessions Judge of Nawabshah, and his revision application was admitted in this Court mainly on the argument that a mere refusal to produce a document was not a secretion of a document within the meaning of S. 203, I. P. C. It was also urged that as the accused had filed a civil suit against the Court of Wards involving this question in dispute between him and them, they could not lawfully call upon him to produce documents or account books in relation to the estate.

As this is an application in revision, we are not prepared to hear arguments upon the facts, to hear, for instance, arguments that the accused did not act dishonestly. This is a question of fact on which on evidence both Courts have come to a concurrent finding, but on the question of whether a mere refusal to produce documents is a secretion within the meaning of S. 204, I. P. C., we have heard arguments, and though it follows that a mere refusal to produce documents is not an offence under the Section, for the Section does not say "whoever refuses to produce or secrets or destroys any document," and indeed, Sec. 175, I. P. C., relates to the intentional omission to produce a document, a refusal to produce a document, with the intention, otherwise proved, of keeping the document secret may well be sufficient evidence to prove a secretion within the meaning of the Section.

Refusal to produce a document may well be evidence of the secretion of a document within the meaning of S. 204, I. P. C. An honest refusal to produce a document is obviously not a "secretion" of a document within the meaning of the Section, but where, as in this case, the accused out of set purpose kept the Court of Wards in ignorance of what documents were in his possession and in addition disposed of one of these documents without the knowledge of the Court of Wards, so that now the document is no longer in his possession, it appears to us that the Courts below were justified in finding that the accused secreted the document. It is clear the accused kept secret the existence of the document, and perhaps the words "keeps secret" more clearly express the idea of "secretion" involved in S. 204, I. P. C., than does the word "secrets," but where there is a refusal coupled with a secret dealing with the document or with a dealing intended to be kept secret, as is the case here, we cannot say that the offence is not committed.

But it was then argued that as the Court of Wards was a party to a civil suit, they were not entitled to order documents to be produced under S. 44-A of the Act, nor apart from this, were they entitled to call for documents when there was no enquiry within the meaning of S. 15 or S. 16 of the Act. But we cannot accept the argument that the Court of Wards is rendered powerless and unable to act in protection of the ward's estate because a claimant to that estate chooses to file a suit in a Civil Court, nor can we hold that the Court of Wards is empowered to call for documents only when an enquiry under S. 15 or S. 16 of the Act is pending. S. 44-A of the Act gives the Court of Wards power to call for the production of documents for the purposes of the Act, not only for the purposes of S. 15 or S. 16 of the Act. What the purposes of the Act are, are clearly to be ascertained from S. 4 and other Sections of the Act. We see therefore no reason to interfere with the conviction under Sec. 204, I. P. C. No point of law arises out of the conviction under S. 403, I. P. C. We therefore dismiss the revision application. Order accordingly.

R.M./R.K. *Application dismissed.*

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## A. I. R. 1938 Sind 218

DAVIS J. C. AND LOBO J.

*Gobindram Jamiatrai* — Applicant.

v.

*Karachi Municipal Corporation* — Opponent.

Criminal Revn. Appln. No. 47 of 1938, Decided on 7th April 1938, against conviction and sentence passed by Special First Class Magistrate, Karachi.

**(a) Bombay Prevention of Adulteration Act (5 of 1925), S. 4 (1) (a)—Proprietor although sleeping partner is liable.**

A proprietor of a shop is liable for the sale of adulterated stuff sold in his shop, although such proprietor is only a sleeping partner : *(1892) 66 L T 649 and (1898) 79 L T 381, Rel. on.*

[P 219 C 1]

**(b) Bombay Prevention of Adulteration Act (5 of 1925), S. 4 (1) (a)—Public officer as purchaser—Offence is committed.**

An offence under S. 4 (1) (a) is committed in respect of adulterated food even though it is purchased by a public officer as such public officer : *(1902) 2 K B 1, Expl. and Rel. on.*

[P 220 C 1, 2]

Hari Charan Jagumal — *for Applicant.*

Sunderdas Jethanand — *for Opponent.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.** — The applicant in this revision application has been convicted by the Special First Class Magistrate, Karachi, of an offence under S. 4 (1) (a), Bombay Prevention of Adulteration Act, and sentenced to a fine of Rs. 30. The Magistrate found that the Assistant Health Officer of Karachi took five samples of ghee from a shop of Gobindram Dhanomal, the applicant, and that of the five samples one was shown to contain 37 per cent. of foreign fat. It was not therefore genuine but adulterated ghee. Now we admitted this application on the argument that this applicant

Gobindram was a sleeping partner, and as such, was not responsible for the sale at his shop of adulterated ghee. But after having looked into the record, we are not satisfied in any way that the applicant proves that he was a sleeping partner. His shop is named after himself and his mere allegation that he is a sleeping partner is not sufficient, in our opinion, to establish that fact. But even if he were, we think, that following the decisions in the two English cases in (1892) 66 L T 649[1] and (1899) 79 L T 381,[2] it is clear that he would be liable, for it is not only the actual salesman who is responsible and who can be convicted under the Act for sale of adulterated food.

In (1892) 66 L T 649,[1] the master was convicted as a seller of adulterated milk under S. 6, Sale of Food and Drugs Act, 1875, though the servant had adulterated it with water. It was urged on behalf of the master in appeal against his conviction that he had not connived at the adulteration, nor had he actually sold the milk, and therefore he could not be rightly convicted. Hawkins J. said :

> Now I am of opinion, as I have already said, that the conviction ought to be affirmed. I think myself that the master for all purposes must be deemed to be the seller of the milk; that is to say, it is impossible to say that he is not a seller of the milk. It may be said that the person who actually deals with the milk, and sells it, and delivers it for the master, may also within the provisions of this Act of Parliament be the seller of the milk ; but at the same time, even if he is so, as I think he is, I think that the master himself is also the seller of the milk. There is no doubt that civilly he would be the person alone who would be to blame.

The learned Judge goes on to say :

> I think however that it is not necessary at all that the man who sells the milk, that is to say the principal or seller, is necessarily to be taken to be cognizant of the adulteration, the law making it, I think, an offence if adulterated milk is sold in point of fact, unless, indeed, the person who sells it is able to protect himself from liability to a penalty by reason of the provisions to be found in S. 25. . . . . .S. 6 does not say, 'No person shall knowingly sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality demanded'. The word 'knowingly' seems to have been carefully excluded by the Legislature from this S. 6, and I can very well understand good reasons for it. A master might in that case protect himself by saying. 'Although it is perfectly true my servant sold adulterated milk, and I received the proceeds of the milk which he so sold, yet I am not to be rendered responsible, because you failed to prove I had any cognizance, or that I was conniving at the wrongful act of my servant'. . . . . . . .No connivance being therefore necessary to establish the offence under this Section, is there any reason for saying that the man is not to be responsible for the act of a servant in the same way that the master is ordinarily responsible for the act of a servant ? The Magistrate does not put it that it is a criminal act on the part of the master, but the penalty is inflicted, it seems to me, for the purpose of making people exercise care in selling articles which they have no right to adulterate. If what was done was the act of the servant, no one could doubt that the master would be responsible for the act.

Then the learned Judge goes on to say :

> It does not seem to me that connivance would make the smallest difference. It would not have made the agent more or less the agent acting for the appellant, selling the milk taken from the appellant's premises. It strikes me if he had gone with the milk, his master knowing perfectly well he was going to adulterate it, and sell it as adulterated milk, no one would for a moment have contended with anything like a hope of success that the master was not responsible under such circumstances for the act of the person who was acting under his directions. Connivance is immaterial, and the mere actual sale of the milk is that which creates what it is difficult to call an offence, if it is done without anything like a guilty knowledge; but call it an offence for the purpose of defining and expressing what I mean, it is not the less an agency on the part of the man who sold the milk, because, cognizance being immaterial, it is not proved or shown that the master had any knowledge of the fact of the adulteration.

This case, (1892) 66 L T 649,[1] was followed in (1898) 79 L T 381.[2] In that case, the seller undertook to sell pure unskimmed new milk in specified quantities and prices to be sent by the Great Western Railway to its destination; but it was adulterated on the way and nevertheless the farmer who supplied the milk was held liable for its adulteration. Lord Russel C. J. said :

> The sole remaining question is this : Take it that the respondent was entirely innocent morally of the adulteration to which he was no party and could not protect himself, is he to be held answerable for it? I think he has brought himself within the Act, taking into consideration the object and scope of the Act of Parliament. An innocent vendor is liable for the unauthorized act of his servant beyond the scope of his employment, and even when the act is done in express disobedience to his orders. I think therefore looking to the object of the Act and the absence of any provision or any reference to *scienter* he has brought himself within it. If he were to be relieved of responsibility a wide door would be open to evade the beneficial provisions of the Legislature.

The learned Judge goes on to say :

> Assuming the Magistrate was right in holding that the respondent has acted innocently, it was obviously a case in which the fine ought to be a

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[1] Brown v. Foot, (1892) 66 L T 649 = 61 L J M C 110=17 Cox C C 509=56 J P 581.

[2] Parker v. Alder, (1899) 1 Q B 20=79 L T 381 =68 L J Q B 7=47 W R 142=15 T L R 3= 19 Cox C C 191=62 J P 772.

nominal one, but we cannot be deterred by the hardship of the case from giving full effect to the intention of the Legislature.

Now, in each of those cases the circumstances were far more strongly in favour of the appellant than the circumstances in this case. The words of S. 4, Bombay Prevention of Adulteration Act, are even wider than the words in the corresponding provision of the English Act. For while S. 6, Sale of Food and Drugs Act, 1875 says :

> No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser

the words of the Bombay Act are :

> Any person who (a) sells or causes to be sold or offers for sale to the prejudice of the purchaser . . ,

so that there is nothing in the provisions of the English Act which prevent the rulings under it operating with greater force in cases coming under the Bombay Act. The learned advocate who appeared for the applicant has raised another point urging that it cannot be said that a Municipal Officer who purchased food for the purpose of analysis can be prejudiced, should it subsequently appear that the food is adulterated, and he referred us to the case in (1902) 2 K B 1[3] at p. 10, relying upon the judgment of Darling J. But we do not think that the learned advocate has correctly appreciated the meaning of that judgment. In fact Darling J. seems to say that which is contrary to what the learned advocate thinks he says. Darling J. does not say, it is necessary to prove that the purchaser was in fact prejudiced, but he says :

> I think the words (of the Section) 'to the prejudice of the purchaser' are used in the sense that there is a sale to the prejudice of the purchaser if a purchaser in the abstract would be prejudiced, although the actual purchaser may for some reason peculiar to himself not be prejudiced. Goods might be sold under a false description and might not inflict any actual injury, because they were in fact of a better quality than the goods demanded; but it was never intended that in such a case there should be a prosecution; and I think that is the reason why the words 'to the prejudice of the purchaser' are inserted in the Section. Provision is made in S. 13 for the purchase by Inspectors of Nuisance, Officers of Health, and other similar persons, of samples of food or drugs for the purpose of analysis, and if it were necessary to prove that the sale was to the prejudice of the particular purchaser, it never could be proved in such a case as that, because the purchaser is probably provided with money out of the public funds to pay for the article and however bad it may be, he is none the worse off because the article is not intended to be used by him, but it is to be analysed. A person in that position cannot in the nature of things be prejudiced by the sale.

And, apparently, it is upon the last sentence here quoted that the learned advocate relies in proof of his argument that if the purchaser was a public officer, an offence cannot be committed in respect of adulterated food purchased by him as such public officer, but that is not the meaning of the words used by Darling J. at all, and the meaning of his words is precisely to the contrary effect. We think therefore that there is nothing in this revision application, and it must be dismissed.

B.D./R.K. *Application dismissed.*

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## * A. I. R. 1938 Sind 220

LOBO J.

*Ghulam Hussein Khatau* — Petitioning Creditor.

v.

*Shahban Mohib* — Debtor.

Case No. 10 of 1938, Decided on 11th July 1938.

*** Presidency Towns Insolvency Act (1909), S. 9 (e)—Attachment in execution of award is not attachment in execution of decree of Court for creating act of insolvency.**

Sec. 9 (e) must be strictly construed in favour of the debtor to whom the matter of adjudication as an insolvent under the Insolvency law is one of vital importance. Any inconvenience arising out of such a construction is for the Legislature to consider and remedy if they think proper by amendment ; it is not for the Court to enlarge the meaning of the words used by the Legislature. An attachment in execution of an award is not an attachment in execution of the decree of a Court within the meaning of S. 9 (e) for the purpose of creating an act of insolvency : *A I R 1928 Cal 840, Approved and Foll. ; 35 Bom 196, Rel. on.* [P 221 C 1; P 222 C 2]

Kimatrai Bhojraj and Hakumatrai M. Eidnani — *for Petitioning-creditor.*

Kundanmal Dayaram — *for Opponent.*

**Order.**—On 29th March 1938 the petitioning creditor Ghulam Hussein Khatau presented a petition for the adjudication of Shahban Mohib as an insolvent. The act of insolvency on which the petition is based is thus set out in the petition :

> That he failed to pay the amount of the decree though an attachment against his immovable properties, viz., plot Nos. 31 M. M. 3 and No. 7 M. M. 4 situate at Machi Miani Quarter, Karachi. has been made in Exn. No. 1351 of 1937 on 23rd December 1937 and 7th January 1938 which attachment has subsisted for more than 21 days.

Notice of the petition was issued to the debtor who filed objections. The debtor stated (1) that he disputed the petitioning creditor's debt ; (2) that he disputed the act of insolvency alleged against him ; and (3) that the properties alleged to be under attachment were not his properties but were wakf properties in which he had no interest. The second of these objections has been argued as a preliminary point. Now Sec. 9, Presidency Towns Insolvency Act, sets out the acts of insolvency which entitle a creditor to present a petition for adjudication. Cl. (e) of Sec. 9 reads :

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[3] Pearks, Gunston & Tee Ltd. v. Ward, (1902) 2 K B 1=71 L J K B 656=87 L T 51=66 J P 774=20 Cox C C 279=18 T L R 538.

> If any of his property has been sold or attached for a period of not less than 21 days in execution of the decree of any Court for the payment of money.

It is the debtor's contention that in this case there was no attachment of property in execution of the decree of any Court for the payment of money. The attachment relied upon by the petitioning creditor was an attachment in execution proceedings arising out of an award under the Arbitration Act. Under S. 15, Arbitration Act, an award on a submission on being filed in Court shall be enforceable as if it were a decree of the Court, and it is the contention accordingly of the petitioning creditor that the words in Cl. (e) of Sec. 9 "in execution of the decree of any Court for the payment of money," are wide enough to cover execution proceedings to enforce an award under the Arbitration Act. It is argued that there is no reason whatever why the Legislature should have placed an attachment in execution of the decree of a Court on a higher plane than an attachment in execution of an award when the Arbitration Act provides that an award when filed in Court is enforceable as if it were a decree of the Court. There is however direct authority in support of the contention raised by the debtor in this case. In A I R 1928 Cal 840[1] a Bench of the Calcutta High Court has held that an attachment in execution of an award is not an attachment in execution of the decree of a Court within the meaning of Sec. 9 (e) for the purpose of creating an act of insolvency. The judgment in this case is that of Rankin C. J. of the Calcutta High Court, and must undoubtedly be treated with the greatest respect. In the course of his judgment Rankin C. J. says :

> When we come to look at the words of Sec. 9, Presidency Town Insolvency Act, we find they are words which have to be given a strict construction. I do not mean a narrow construction, but they are not words which are to be amplified upon any notion of convenience.

Now, no doubt it would be a matter of great convenience that an attachment in execution of an award should be treated on the same basis for the purposes of S. 9 (e), Presidency Towns Insolvency Act, as an attachment in execution of the decree of a Court ; but the Chief Justice of the Calcuta High Court was clearly of the opinion that the argument of convenience did not justify an amplification of the clear words of Cl. (e) of Sec. 9. In another part of his judgment Rankin C. J. says :

> Could it be said in favour of such petitioning creditor that the words 'in execution of the decree of any Court for the payment of money' had been satisfied ? It seems to me quite impossible to say that. It is true enough that for the purpose of enforcing an award you may treat the award as though it were a judgment, and therefore you may apply to it all the provisions of O. 21 and various other provisions. It is another thing altogether to say that something which is not a decree must be taken to be a decree with the result that a man is to commit an act of insolvency so that he is to be adjudicated upon a petition presented, it may be, by some one who has no concern with the award at all. In my judgment the only way to deal with this matter is to deal with it in the same spirit as in the case to which we have been referred : (1907) 1 K B 478.[2] The words : "In execution of the decree of any Court for the payment of money" cannot be extended by analogy. They must be extended, if at all, by the Legislature and we cannot hold that there has been an act of insolvency when the definition given by the Legislature has not been complied with.

These are strong words and strong language, and as I have said above the judgment of Rankin C. J. must be treated with the greatest respect. The case of *Ramsahai* v. *Joylall*[1] is referred to by Sir D. Mulla in his Commentary on the Law of Insolvency at p. 94. In para. 123 Sir D. Mulla states :

> An award for the payment of money filed in Court under S. 11 of I. A. A. 1890, is not a 'decree' within the meaning of the present clause although it is enforceable under that Act as if it were a decree. No insolvency petition can therefore be founded on an attachment or sale in execution of an award.

In support of this proposition Sir D. Mulla cites the case of *Ramsahai* v. *Joylall.*[1] The commentator proceeds :

> It is therefore for consideration whether Cl. (e) should not be amended by adding the words 'or in execution of an award for the payment of money.'

Now, it cannot be disputed that Sir D. Mulla as a commentator on the Law of Insolvency is universally regarded as an authority, and in the course of his Commentary on the Law of Insolvency Sir D. Mulla has not hesitated in several places to record his respectful dissent when he has considered that the judgment of any High Court in India is doubtful or incorrect. It is significant that in referring to the case in A I R 1928 Cal 840[1] the learned commentator has not recorded any dissent, but on the contrary states that it is for consideration whether Cl. (e) should not be amended by adding the words 'or in execution of an award for the payment of money.' In this part of his commentary Sir D. Mulla has also referred to the case in 35 Bom 196,[3] where it was held by a Bench of the Bombay High Court that an award filed in Court under S. 11, Arbitration Act, was nothing more than an award although it was enforceable as if it were a decree. In that case an application had been made under O. 21, R. 29, for stay of execution of a decree. The application was dismissed on the following grounds set out in the judgment of Sir Basil Scott C. J. :

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[1] **Ramsahai Mull More v. Joylall, (1928) 15 A I R Cal 840=115 I C 584=32 C W N 608.**

[2] **In re Bankruptcy Notice (No. 1), (1907) 1 K B 478=76 L J K B 171=96 L T 131=14 Manson 1=23 T L R 214.**

> Now, such an order can only be made by the Court, if there is a suit pending on the part of a person against whom a decree has been passed, against the holder of a decree of the Court. It appears to me that the petitioner is not a holder of a decree of the Court . . . . . . for the award, to which the applicants seek to give the force of a decree, is nothing more than an award, although it is enforceable as if it were a decree.

In the course of his judgment in A I R 1928 Cal 840[1] Rankin C. J. has stated that in his opinion the matter before him was to be treated in the same spirit as in (1907) 1 K B 478.[2] That was a case under S. 4 (1)(g), Bankruptcy Act of 1883, in which the Court of Appeal upheld the order of the Registrar refusing the issue of a Bankruptcy Notice on the strength of a judgment obtained in pursuance of an order purporting to be made under the Arbitration Act of 1889 to enforce an award on a submission. Referring to the executing of an award under the English Arbitration Act, Fletcher Moulton, L. J. states :

> The powers of the Court as to giving effect to such an award in such an arbitration are defined by Sec. 12, Arbitration Act, 1889. That Section provides that 'an award on a submission may by leave of the Court or a Judge be enforced in the same manner as a judgment or order to the same effect.' But it gives no power to turn such an award into a judgment. It gives to the award the same status as a judgment for the purpose of enforcement, but it leaves it what it was before, viz. an award.

The learned advocate for the petitioning creditor has argued that the judgment of Rankin C. J. is wrong; that it places too narrow an interpretation on the wording of Cl. (e) of S. 9, Presidency Towns Insolvency Act, that the words "in execution of the decree of the Court for the payment of money" are wide enough to cover the execution of an award for the payment of money. He has drawn my attention to a series of reported cases in which various provisions of the Civil Procedure Code dealing specifically with decrees resulting from civil suits have been held applicable to proceedings connected with the enforcement of an award; and he has invited me on a consideration of these cases and on general principle to differ from Rankin C. J. and to hold that the words in Sec. 9 (e), Presidency Towns Insolvency Act, "in execution of the decree of any Court for the payment of money" are sufficiently wide to cover the "execution of an award for the payment of money." I must however decline the invitation not only because in my humble opinion the judgment of the Calcutta High Court is good law but because it appears to me that S. 9 (e), Presidency Towns Insolvency Act, must be strictly construed in favour of the debtor to whom the matter of adjudication as an insolvent under the Insolvency law is one of vital importance. It seems to me clear that any inconvenience arising out of such a construction is for the Legislature to consider and remedy if they think proper by amendment ; it is not for the Court to enlarge the meaning of the words used by the Legislature.

In this view of the matter, it would serve no purpose for me to refer to the cases reported in 43 All 394,[4] 27 C W N 666,[5] 75 I C 927[6] and 47 Cal 29[7] and other cases cited by the learned advocate for the petitioning creditor where it has been held that the provision of the Civil Procedure Code applying specifically to decrees in civil suits is applicable to execution proceedings on an award under the Arbitration Act. I may however remark that in each and every one of those cases the procedure held applicable was procedure necessary for the execution of an award. On these grounds and for these reasons I must decide this objection in favour of the debtor. It follows that no act of insolvency having been established by the petitioning creditor his application for adjudicating the debtor as an insolvent must be dismissed. I accordingly dismiss it with costs.

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[3] **Tribhuvandas v. Jivanchand Lallubhai & Co., (1911) 35 Bom 196=8 I C 179=12 Bom L R 860.**

[4] **Sital Prasad v. Clements Robson & Co., (1921) 8 A I R All 199=61 I C 401=43 All 394=19 A L J 187.**

[5] **Gladstone Wyllie & Co. v. Joosule Peer Mahomed & Co., (1924) 11 A I R Cal 117=76 I C 868=27 C W N 666.**

[6] **Pakhar Das v. Radha Kishen, (1924) 11 A I R Lah 544=75 I C 927.**

[7] **Louis Dreyfus & Co. v. Purusottum Das Narain Das, (1920) 7 A I R Cal 386=56 I C 325=47 Cal 29.**

D.S./R.K. *Application dismissed.*

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## ✲ A. I. R. 1938 Sind 223

DAVIS J. C. AND LOBO J.

*Gangabai w/o Pamanmal*

v.

*Pamanmal Lachman.*

Criminal Revn. Appln. No. 50 of 1938, Decided on 7th April 1938, from order of the Addl. City Magistrate, Karachi, D/- 24th January 1938.

**✲ Criminal P. C. (1898), S. 488 (8) — Residence—Maintenance — Residence need not be permanent — What amounts to sufficient residence—No hard and fast rule available—Rule should not be construed strictly so as to deprive woman of assistance from Court which is easily accessible — Each case however must be dealt on its own facts.**

Where there is something more than a flying visit, where a man leaves his house and resides for some time in the house of his parents-in-law with his wife, that is a sufficient residence within the meaning of sub-s. 8 of S. 488. Sub-s. 8 does not necessarily refer to permanent residence. It refers also to temporary residence. The word "residence" of course implies something more than a mere brief visit, a mere flying visit. It suggests a certain continuity, but if there be a continuity for such a period of time as to allow it fairly to be said that the husband did reside even for a matter of some weeks with his wife, it does not appear that the Section should be so strictly construed as to deprive the woman, who often in these cases is helpless, of assistance from the Court which is most easily accessible to her. It is not however possible in such cases to fix any arbitrary period of time to say, for instance, two months at Agra, six weeks at Bombay, one month at Karachi as a minimum to constitute residence for the purposes of S. 488. Each case will have to be dealt with on its merits. It could easily be said that a visit of a few days is not residence within the meaning of S. 488, but it could not easily be said that a visit of a few weeks was not residence within the meaning of S. 488. Each case however must be dealt with on its merits, the distinction between a mere visit and residence being borne in mind : *A I R 1930 Bom 348 and A I R 1927 All 291, Rel. on.* [P 223 C 2; P 224 C 1]

**Kishinchand J. — *for Applicant.***

**Partabrai D. Punwani, Advocate-General — *for the Crown.***

**Davis J. C.**—This is a revision application against an order of the Additional City Magistrate of Karachi dismissing the petition of the applicant for maintenance of herself and her children under S. 488, Criminal P. C. The learned Magistrate dismissed the petition of the applicant Gangabai not on its merits but because he was of the opinion that the husband against whom these proceedings were brought does not reside in Karachi, nor he is in Karachi within the meaning of Cl. 8 of S. 488, Criminal P. C., nor could it be said that he last resided with his wife in Karachi so as to give the Karachi Court jurisdiction.

The learned Magistrate however does not appear to have considered the evidence from the point of view of whether the visit of this Pamanmal to his parents-in-law's house after his wife had left him in Hyderabad was of sufficient duration to constitute a last residence within the meaning of sub-s. 8 so as to give the Karachi Magistrate jurisdiction, but there is authority to show that where there is some thing more than a flying visit, where a man leaves his house and resides for some time in the house of his parents-in-law with his wife, that is a sufficient residence within the meaning of sub-s. 8 of S. 488, Criminal P. C. Reference may be made to the case in 54 Bom 548[1] and to the case in 49 All 479.[2] Sub-s. 8 does not necessarily refer to permanent residence. It refers also to temporary residence. The word "residence" of course implies something more than a mere brief visit, a mere flying visit. It suggests a certain continuity, but if there be a continuity for such a period of time as to allow it fairly to be said that the husband did reside even for a matter of some weeks with his wife, it does not appear to us that the Section should be so strictly construed as to deprive the woman, who often in these cases is helpless, of assistance from the Court which is most easily accessible to her. In this case the evidence of the mother and father of Gangabai is to the effect that after she left Hyderabad, as she says, because of the ill-treatment of her by the opponent, she came and lived in her parents' house and that after some time the opponent

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[1] Sama Jetha v. Bai Wali, (1930), 27 A I R Bom 348=1930 Cr C 780=127 I C 179=31 Cr L J 1157=54 Bom 548=32 Bom L R 764.

[2] Sher Singh v. Amir Kunwar, (1927) 14 A I R All 291=101 I C 670=28 Cr L J 494=49 All 479=25 A L J 485.

Pamanmal her husband followed her and lived with her there. Their evidence is to the effect that the opponent lived with the petitioner as his wife in the house of her parents for more than a month. We do not think that this can be said to be merely a flying visit, a visit of so brief a nature as not to bring the petitioner within the provisions of sub-s. 8 of S. 488, Criminal P. C. It is not possible in such cases to fix any arbitrary period of time to say, for instance, two months at Agra, six weeks at Bombay, one month at Karachi as a minimum to constitute residence for the purposes of S. 488, Criminal P. C. Each case will have to be dealt with on its merits. It could easily be said that a visit of a few days is not residence within the meaning of S. 488, Criminal P. C., but it could not easily be said that a visit of a few weeks was not residence within the meaning of S. 488, Criminal P. C. Each case however must be dealt with on its merits, the distinction between a mere visit and residence being borne in mind. We think therefore the learned Magistrate was wrong on the question of jurisdiction and that the case should be sent back to him to dispose of it on its merits according to law. Order accordingly.

B.D./R.K. *Case sent back.*

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## A. I. R. 1938 Sind 224

DAVIS J. C. AND LOBO J.

*Emperor*

v.

*Kauro Mizari.*

Criminal Revn. Appln. No. 14 of 1938, Decided on 6th April 1938.

**Bombay Children Act (13 of 1924), Ss. 3 (a), (c), 22 — Accused, child within meaning of Cl. (a) of S. 3 and youthful offender within meaning of Cl. (c) of S. 3—Court cannot order his detention in prison without certificate under Section 22.**

Where the accused, convicted of the offence of murder, is a child within the meaning of Cl. (a) of S. (3), and is a youthful offender within the meaning of Cl. (c), the Court can lawfully commit him to prison only under the provisions of S. 22 after it certifies that the boy is so unruly or of so depraved a character that he is not a fit person to be sent to a certified school and that none of the methods by which a case may be legally dealt with is suitable. [P 224 C 2]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

**Davis J. C.** — In this case one Kauro, son of Mizari, caste Brohi, a boy of 14 years, has been found guilty on his own plea of killing his mother whom he said he found at night in illicit intercourse with her paramour Imamdin and the Sessions Judge of Sukkur sentenced him to five years' rigorous imprisonment. The attention of the learned Judge however was not drawn to the relevant provisions of the Bombay Children Act and we have been moved by the learned Advocate-General to modify the order of the Sessions Judge that the accused should be sentenced to five years' rigorous imprisonment and kept in the juvenile section of the prison and bring it in accordance with the provisions of the Children Act.

The accused in this case is a child within the provisions of Cl. (a) of S. 3 because he is under 16 years of age and he is a youthful offender within the meaning of Cl. (c) because he has been found to have committed an offence punishable with transportation or imprisonment, but the learned Judge could only have lawfully committed this boy of 14 years to prison under the provisions of S. 22 of the Act after he had certified that the boy is so unruly or of so depraved character that he is not a fit person to be sent to a certified school and that none of the other methods by which a case may be legally dealt with is suitable. But the learned Judge has not so certified, nor can we upon the material before us, give this certificate, without inquiry, as we cannot say merely on the material before us that the boy is so unruly or of so depraved character that he is not a fit person to be sent to a certified school. Moreover any order of ours to send the boy to a certified school under S. 23 would be of no avail because the learned Advocate-General informs us that as yet there is no certified school in this province. Therefore it appears to us that the proper course for us to take is to pass an order under S. 26 that this youthful offender shall be kept where he is at present, in the Hyderabad Jail, and report the case to the Governor-in-Council for orders under sub-s. (1) of that Section. Under sub-s. (2) the Governor-in-Council has ample powers to order this youthful offender to be detained in such place and on such conditions as he thinks fit. We therefore modify the order of the learned Sessions Judge accordingly.

R.M./R.K. *Order modified.*

## A. I. R. 1938 Sind 225

LOBO J.

*Special Land Acquisition Officer* — Applicant.

v.

*Assudomal Dharamdas, Claimant and others* — Opponents.

J. Misc. No. 14 of 1938, Decided on 17th May 1938.

**Land Acquisition Act (1894), S. 23—Methods of valuation classified — Claimant challenging valuation — Burden of proof is on him to show that it is unfair — Price paid in reasonable time in transactions relating to land is most cogent evidence of market value — Evidence of offers has little probative value— Evidence of experts is not reliable unless it is supported by other evidence.**

The methods of valuation of land, under the Land Acquisition Act, may be classified under three headings : (a) the opinion of valuators or experts, (b) prices paid within reasonable time in bona fide transactions of purchasers of land acquired or lands adjacent to the land acquired and possessing similar advantages, and (c) a number of years purchase of the actual or immediate prospective profit from the land acquired. To arrive at a fairly correct valuation, it is necessary to take two or all of these methods. An exact valuation is practically impossible. It is the approximate market value that at most can be sought to be determined. [P 225 C 2]

Where a claimant challenges the valuation made by the Special Land Acquisition Officer, the burden of proof is on him to prove that the valuation is insufficient and unfair. The price paid within a reasonable time in bona fide transactions relating to the land is the most cogent evidence of market value under the Land Acquisition Act. So also great weight should be attached in arriving at the market value, to admissions in solemn deeds executed by parties to a litigation. No doubt evidence of offers in respect of the land has to be considered by the Court but the probative value of such evidence is very low, for, offers alleged in Land Acquisition proceedings are scarcely ever bona fide. They can easily be arranged without any loss or inconvenience to either party; so also, although the opinion of experts is evidence in such cases, its value is not great and it would not be possible to place reliance on this kind of evidence unless it is supported by or coincided with other evidence; and where such evidence is not only not supported by or coincident with the best evidence in the case, but there is such divergence or disagreement on material points between the evidence of the so-called experts, no reliance can be placed over it. Moreover, even experienced architects and municipal land surveyors cannot be regarded as valuators or experts merely because in course of their business or duty they have had an occasion to value some property here and there : *11 C W N 875; A I R 1928 P C 305; 29 All 184 (P C); A I R 1928 Rang 65; 10 Bom L R 907 and A I R 1924 Lah 548, Rel. on.* [P 225 C 2; P 226 C 1; P 227 C 1, 2]

**Sunderdas Jethanand** — *for Applicant.*

**Khanchand Gopaldas** — *for Claimant.*

**Order.** — For the purpose of widening Napier Road in connexion with a general scheme for the development of the Serai Quarter, the Karachi Municipality have through the Special Land Acquisition Officer acquired 226 square yards of open land being part of Survey No. 3/2/2 survey sheet S. R. 5 Serai Quarter at the junction of Napier Road and Bellasis Street. The Special Land Acquisition Officer awarded compensation at the rate of Rs. 45 per square yard. Adding to this 15 per cent. for compulsory acquisition, the Special Land Acquisition Officer awarded a total amount of Rs. 11,696 to Assudomal Dharamdas, the claimant. Assudomal received the amount under protest and called for a reference under S. 18, Land Acquisition Act. It was his contention that compensation should have been allowed at the rate of Rs. 100 a square yard. It is this reference under S. 18, Land Acquisition Act, which is now before me for disposal.

Now, it is generally recognized that methods of valuation of land under the Land Acquisition Act may be classified under three heads : (a) the opinions of valuators or experts; (b) the prices paid within a reasonable time in bona fide transactions of purchase of the land acquired or of lands adjacent to the land acquired and possessing similar advantages, and (c) a number of years purchase of the actual or immediate prospective profit from the land acquired. It is also generally recognized that to arrive at a fairly correct valuation, it is necessary to take two or all of these methods. An exact valuation is practically impossible. It is the approximate market value that at most can be sought to be determined.

Now in the case before me the third of the methods referred to above cannot be employed for the strip of land acquired is open land only ten feet wide and at the time of acquisition the owner had already erected on the remaining part of his plot of land a complete and consolidated building. Nor is there in this case the evidence of valuators or experts in the true sense of the term. I am not prepared for a moment to regard experienced architects and municipal land surveyors as valuators or experts merely because in the course of their business or duty they have had occasion to value a property here or there in Karachi. There remains therefore only one method; recent transactions relating to the land acquired itself and to adjacent lands possessing similar advantages; and it is upon an appreciation of the evidence about these that it falls to me to decide whether the award of the Special Land Acquisition Officer should stand or needs to be revised. The burden of proof in these cases is on the claimant to prove that the valuation of the Special Land Acquisition Officer is insufficient and unfair. Reference may be made in this connexion to the case in 11 C W N 875.[1]

Plot No. 3/2 sheet S. R. 5 measuring 2807½ square yards was originally the property of one Ghulam Hussein Varu. By a deed of conveyance dated 28th November 1932 it was purchased by the claimant in this case and one Thadomal, his cousin, for a sum of Rs. 82,000. There were structures on the plot consisting of a two floored building including godowns with out-houses attached. On 25th May 1934 the claimant and Thadomal effected a partition of plot No. 3/2 by a deed of partition which is Ex. 15 in the case. A sub-division of this plot into Survey Nos. 3/2/1 and 3/2/2 containing respectively 1336½ square yards and 1407½ square yards had already been sanctioned by the Karachi Municipality: Exs. 16 and 17. By this deed of partition the claimant obtained plot No. 3/2/2, the western part, containing 1470½ square yards and abutting on Napier Road, while Thadomal got plot No. 3/2/1, the eastern part, measuring 1336½ square yards.

The notification under S. 4 in this case is dated 20th July 1936 and though the award was only made on 13th December 1937 it is clear that the acquisition proceedings before the Special Land Acquisition Officer had been started already in November 1936. In 31 Bom L R 241,[2] it has been held by their Lordships of the Privy Council that the price paid within a reasonable time in bona fide transactions relating to the land acquired is the most cogent evidence of market value under the Land Acquisition Act. Here we have two such transactions relating to the land in question. The entire plot was purchased by the claimant and Thadomal on 20th November 1932 only four years before the acquisition proceedings. The price at which it was purchased including the value of the buildings thereon works out at Rs. 29 per square yard and there is no reason to hold that that was not the real market price. Evidence has been given that there was a boom in land in Karachi which reached a peak in 1920-21, that thereafter there was a decline till 1930 or 1931 followed by a scarcely appreciable rise. On 25th May 1934 just about two years before the acquisition proceedings the co-owners in this plot of land effected a partition thereof between themselves. A reference to the deed of partition, Ex. 15, makes it perfectly clear that the co-owners were aware of the fact that the 226 square yards of land which have been acquired by the Karachi Municipality were at the time under alignment. This fact is referred to in the deed of partition; it is indicated in the sketch attached to the deed of partition. Further the partition deed recites:

> The west side plot bearing Survey No. 3/2/1A has been agreed to be taken by party 1, Seth Assudomal, for the price of Rs. 73,525 calculated at the rate of Rs. 50 per square yard being the present market value, and the other plot, viz. the east side plot bearing Survey No. 3/2/1 has been agreed to be taken by party 2, Seth Thadomal, for the price of Rs. 37,422 calculated at the rate of Rs. 28 per square yard.

The deed further recites that for the purpose of equalization, Seth Assudomal was to pay and had paid to Seth Thadomal a sum of Rupees 18,051-8-0. It has been argued, and there is no answer to the argument, that there could be no better evidence of the market value of the land acquired at the time of the acquisition than the evidence furnished by the purchase of November 1932 and the partition deed of May 1934. In fact it is upon the basis of the partition deed that the Special Land Acquisition Officer has made his award. In 34 I A 27[3] at p. 35, their Lordships of the Privy Council have laid it down that the greatest weight is to be attached to admissions in solemn deeds executed by the parties to a litigation. The deed of partition Ex. 15 sets out in specific terms that the market value of plot No. 3/2/2 is Rs. 50 per square yard. This document has been executed by the claimant Assudomal. Assudomal has been examined as a witness and has not attempted to explain away or qualify in any manner the recital referred to in the deed of partition and there is no reason whatever therefore why the Special Land Acquisition Officer should not have taken the admission of the parties in Ex. 15 as the basis of his award of compensation in this case. It is to be borne in mind that this was not a case where for instance for the purpose of avoiding payment of heavy stamp duty property is undervalued. This was a case of partition of property between two shrewd business men. The sub-divisions made were unequal in size, one exceeding the other by no less than 135 square yards; the sub-divisions were unequal in advantages, the western sub-division having a most important frontage on Napier Road. When in these circumstances two hard-headed business men have deliberately fixed the market price of the two sub-divisions at Rs. 50 and 28 per square yard there is no reason for doubting that this was the true market price fixed by willing parties to a transaction fully acquainted with all the surrounding circumstances. (The judgment then discussed the evidence and proceeded.) Neither Kundanmal Kishomal nor Wassandmal, Manager of Naraindas Tilokchand who made the alleged offers, has been called in evidence. Further it appears to me exceedingly unlikely that an offer of Rs. 70 per square yard should be made for 450 square yards of the plot in question when those 450 square yards included 226 square yards under alignment. I am not prepared to accept the evidence of offers. Such evidence is at all times of little value. As to such evidence the remarks of the Chief Justice of the Rangoon High Court in 5 Rang 799[4] are very pertinent. The learned Chief Justice said :

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[1] Harish Chunder Neogy v. Secretary of State, (1907) 11 C W N 875.

[2] Ghulam Hussein Ahmed Somaji v. Land Acquisition Officer, Bandra, (1928) 15 A I R P C 305=114 I C 9=31 Bom L R 241 (P C).

[3] Rani Chandra Kunwar v. Narpat Singh, (1907) 29 All 184=34 I A 27=4 A L J 102 (P C).

> No doubt, proof of bona fide offers have to be considered by a Court, but the probative value of offers has, for good reasons in this country, been held to be very low indeed, for, the offers alleged in Land Acquisition proceedings are scarcely ever bona fide. They can be easily arranged without any loss or inconvenience to either party, and individuals respectable in their various relations of life, have no compunction in lending themselves to a fictitious transaction which may assist a friend in extracting more than his due from Government or a public body at no cost to themselves.

To the same effect are the remarks of Broadway J. in 5 Lah 227.[5] The learned Judge says :

> Again it seems to me that if the evidence of offers be admissible, such evidence can rarely be of any real value . . . An offer however amounts merely to an expression of opinion on the part of the offerer and this can only be proved by the evidence of the offerer himself.

The learned Judge also referred to the following remarks to be found in 10 Bom L R 907[6] at page 919 :

> The evidence of offers made by irresponsible brokers on behalf of undisclosed principals, or perhaps for their own purposes without any principal behind them, is useless, even supposing it is relevant.

In the present case, as I have stated above, the supposed offerers have not been called in evidence. I have in a previous part of this judgment made some reference to the evidence of so-called experts. Mr. Hassasing (Ex. 7) was called as an expert witness by the claimant. Mr. Daruvala (Ex. 26) was an expert witness put forward on behalf of the Municipality. As to expert evidence, it was held in 11 C W N 875,[1] a case cited with approval in 5 Lah 227,[5] that although the opinion of experts was evidence its value was not great and that it would not be safe to place much reliance on this kind of evidence unless it was supported by or coincided with other evidence. In the present case not only is the evidence of the experts not supported by or coincident with the best evidence in the case but there is such divergence and disagreement on material points between the evidence of the so-called experts that it is difficult to avoid the conclusion that the view or opinion, of each of these experts is largely coloured by prejudice in favour of the party who has called him. (The judgment then dealt with the evidence and proceeded.) There remains then for consideration the question whether the Special Land Acquisition Officer while accepting Rs. 50 per square yard as the basis of compensation on the admission of the claimant contained in Ex. 15 was justified in deducting Rs. 5 per square yard from the figure as the value of the building standing upon the plot.

It would appear that there stood originally upon the plot purchased by the claimant and Thadomal a two storeyed building with godowns and out-houses attached. After the partition the claimant demolished the greater part of the building which stood on his divided portion and he deposes that the demolition cost him Rupees 500. He also states however that he used the stones of the demolished building which he values at Rs. 2000. There is no evidence on the record that the claimant and Thadomal after their purchase in 1929 earned any appreciable rent from the building on the plot they had purchased. There is some evidence on the other hand that the building was old and dilapidated and there are on the record notices from the Municipality issued in 1934 calling for demolition of the building. Again in Ex. 15

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[4] Reddiar v. Secy. of State, (1928) 15 A I R Rang 65=109 I C 11=5 Rang 799.

[5] Secretary of State v. Sarla Devi Chaudhrani, (1924) 11 AIR Lah 548=79 IC 74=5 Lah 227.

[6] Government of Bombay v. Merwanji Muncharji Cama, (1908) 10 Bom L R 907.

except in the preamble there is no reference to the building on the plot partitioned from which it would appear that the parties to the partition in arriving at the figures Rs. 50 and Rs. 28 per square yard as the market value at the time were not in any way influenced in arriving at these figures by reason of the building standing on the plot. There is, I think, every reason to infer that the plot was for purposes of valuation regarded as an open plot and the dilapidated building standing thereon was treated as negligible. When therefore Thadomal and the claimant, a pair of shrewd business men, fixed the market prices of the sub-divisions at Rs. 50 and Rs. 28 per square yard respectively, they, in my opinion, undoubtedly regarded these figures as the market value of open land in that locality. In these circumstances it appears to me that the Special Land Acquisition Officer, while accepting the admission of the claimant contained in Ex. 15 as the basis of his award of compensation, was not justified in deducting Rs. 5 per square yard as the value of the building standing on the plot. In my opinion Rs. 50 per square yard was the market value of the land and was what the claimant was entitled to without any deduction. As a result of this conclusion it follows that the figure of compensation awarded by the Special Land Acquisition Officer must in this case be enhanced by Rs. 5 per square yard and there must be a proportionate enhancement of the 15 per cent. allowed for compulsory acquisition. Except for these alterations, I uphold the award of the Special Land Acquisition Officer. Order accordingly.

There remains the question of costs. I think in this case the claimant must be saddled with the costs of this reference. He has come forward with a grossly exaggerated claim in spite of the fact that he himself in Ex. 15 was a party to fixing the market price of the land in question at Rs. 50 per square yard. It appears to me that if his demand had been confined to the elimination of the deduction of Rs. 5 per square yard made by the Special Land Acquisition Officer the Municipality might readily have acceded the claimant's contention and this reference would have been avoided.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Sind 228

DAVIS J. C. AND DADIBA C. MEHTA J.

*Emperor*

v.

*Ali Molo and others* — Accused.

Criminal Ref. No. 317 of 1937, Decided on 2nd May 1938, made by Lobo J., D/- 15th December 1937.

**(a) Bombay Prevention of Gambling Act (4 of 1887), Ss. 6 and 7 as amended by Bombay Act 1 of 1936—In gambling cases as well, corroboration of evidence of approver by other independent evidence is necessary—Amount of evidence required depends upon circumstances of each case.**

In a gambling case, as in any other case, the evidence of approvers or accomplices must be corroborated, in the usual manner, by evidence other than that provided by themselves, whereby the Court can be satisfied that they speak the truth not only when they speak to the factum of the crime but when they speak as to the identity of the accused. The purpose of requiring independent evidence corroborating the evidence of the approver is that the Court can be satisfied that he is speaking the truth. It has no other purpose. The amount of that evidence depends upon the circumstances of each particular case; the question as to whether it provides sufficient corroboration for the evidence of the approver to be relied on with confidence also depends on the circumstances of each case. [P 230 C 1; P 232 C 2; P 233 C 1]

**(b) Bombay Prevention of Gambling Act (4 of 1887), Ss. 6 and 7, as amended by Bombay Act 1 of 1936—Interpretation of.**

Sections 6 and 7 must be interpreted in a reasonably broad spirit having some fair relation to the realities of the kinds of people to which the Act was intended by the Legislature to apply. [P 230 C 2]

**(c) Bombay Prevention of Gambling Act (4 of 1887), Ss. 6 and 7, as amended by Bombay Act 1 of 1936—Sub-Inspector raiding house on information by police informer and finding number of persons of different communities sitting in room at midnight, having considerable sums of money on them, one of them having on him slips of papers with unintelligible writing on them—Sub-Inspector is justified in inferring that slips of papers are betting slips—Court is justified in raising presumption of gambling against accused which puts burden of proof under S. 7 on accused—Accused failing to account for their presence in the house—High Court will not interfere in revision.**

Sections 6 and 7, Bombay Prevention of Gambling Act must be read together. The words "which he has reason to suspect" in S. 6 must be read with the words "had reasonable ground for suspecting, which occur in S. 7; for, though it is true that under S. 7 it is the Court that has to be satisfied that where a thing seized is not obviously an instrument of gaming, but is to come, if at all, within the category of "any other thing" referred to in S. 7, that the police officer had reasonable grounds for suspecting the thing did so come, yet even the Court must look at it from the point of view of the officer's point of view, from the point of view of the information the police officer had before the seizure and not after. Indeed, the words in Ss. 6 and 7 must mean very much the same thing. [P 230 C 2; P 231 C 1]

Where, on the information of a police informant that gambling is going on in a particular house in American Futures, a Sub-Inspector finds a number of persons of different communities, who have no particular relationship or connexion among themselves, sitting at a table in a room in that particular house at midnight, who can give no satisfactory account of their presence and who, when searched, are found to have considerable sums of money upon them, while upon one of them are found slips of paper on which there is a writing not necessarily intelligible to the Sub-Inspector at the time, the Sub-Inspector has every reason to suspect that these slips of papers with the unintelligible writing, so taken from one of the persons, contain record of bets and the Court under the circumstances, is justified in raising the presumption against the accused which puts upon them the burden of proof under S. 7. Where in such a case the accused fail to give an account of their presence in the room on the particular night which the Court can accept, the High Court will not interfere in revision and acquit the accused : *A I R 1937 Bom 385 and A I R 1932 Bom 181, Disting.* [P 230 C 1, 2; P 231 C 2]

**(d) Bombay Prevention of Gambling Act (4 of 1887), Ss. 6 and 7, as amended by Bombay Act 1 of 1936—Reason for suspicion given in S. 6, Cl. (a) includes information given by police informant—In case of seizure of things suspected to have been used for gambling, police officer concerned must judge and be judged by all surrounding circumstances and information he then possesses.**

The reason for suspicion which is referred to in Cl. (a) of S. 6 includes the information given by a police informant, for, in many cases it is only upon such information that the police can act at all. So also, so far as the seizure of all things, reasonably suspected to have been used or intended for the purpose of gaming under Cl. (c) is concerned, it cannot be expected that the police officer must wait for a translation or interpretation of a writing, otherwise unintelligible to him, found upon slips of paper on the person of the suspected man. He must judge and be judged by all the surrounding circumstances and the information he then possesses. He may particularly, where his information is that the betting is betting in American Futures, have reason to suspect that when slips of paper with writing upon them are considered of sufficient importance by the suspected person to be kept upon his person, those slips of paper are betting slips used or intended to be used for the purpose of gaming, even though the writing is to him unintelligible at the time. [P 231 C 1, 2]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Kishinchand H. Nagrani — *for Accused.*

**Davis J. C.**—A learned Judge of this Court sitting in Sessions Court Jurisdiction has referred to us an appeal of three accused against their conviction under S. 5, Bombay Prevention of Gambling Act, by the Special First Class Magistrate, Karachi. The learned Judge could not himself deal with the appeals because they were time-barred. But he himself had acquitted in appeal six co-accused of the present three appellants, and he was of the opinion that the reasons he gave in his judgment for acquitting the six accused who had appealed in time applied with equal force to the case of these three accused whose appeals are time-barred and who should, in his opinion, be acquitted. The case itself is not a very complicated one. It relates to the conviction of certain accused for gambling in American Futures, and the case itself, it appears to us, falls to be decided upon the question whether the presumption under S. 7, Prevention of Gambling Act, is raised against the accused or not. For, if it is raised, they are presumed to have been gambling, and the learned advocate who appears for them admits that there is nothing on the record which will enable him to say that the accused had rebutted the presumption against them.

So far as the facts of this case are concerned, the Assistant Superintendent of Police on 17th December 1936 issued a warrant under S. 6 of the Act and entrusted it to the Inspector of Police, Karachi City Section, for execution. The warrant authorized the Inspector to enter and search the house of the appellant Allahno who was accused 4 in Criminal Appeal No. 90 of 1937 in the Sessions Court and was convicted by the learned Magistrate not only of an offence under S. 5, but of an offence under S. 4, Prevention of Gambling Act, as the house in which the gambling took place was his. On the strength of this warrant the Inspector with Sub-Inspector Mulchand and the informer Kamberali and two mashirs raided the house in question at midnight on the same day and found the three appellants, and Allahno and the co-accused in the house; some slips of paper containing writing were seized from the person of Allahno when he was searched, there were considerable sums of money found on the persons of some of the accused and two packs of playing cards were also found. The Magistrate was of the opinion that the accused who were of different communities could show no special connexion or relationship with each other except that of gambling in American Futures, and he could not accept their explanation that they were gathered together there in an innocent celebration of the Idd, and he convicted the accused accordingly under S. 5 of the Act and fined them each Rs. 50. But the learned Judge of this Court in appeal acquitted those accused who had appealed. The present three appellants did not appeal. The learned Judge was of the opinion that the facts of this case did not raise a presumption under S. 7 against the accused and more particularly he did not think that the Exs. 1-D/4, 1-D/5, and 1-D/8 which were held by the lower Court to be betting slips in American Futures were proved to be such. To him they appeared wholly unintelligible documents containing a jumble of figures and it was his opinion that it was utterly impossible to say from an examination of these and other papers found that either the police officer who seized them or the Court could be satisfied or could suspect that they were instruments of gaming. The learned Judge also pointed out quite rightly that the police informant and one of the accused Hussain who turned approver were infamous witnesses and that their evidence required corroboration.

It is quite clear, of course, that in a gambling case, as in any other case, the evidence of approvers or accomplices must be corroborated, in the usual manner, that is to say by evidence other than that provided by themselves whereby the Court can be satisfied that they speak the truth not only when they speak as to the factum of the crime but when they speak as to the identity of the accused. But, with all respect to the learned Judge, we think that he has fallen into error when he holds that the slips of papers 1.D/4, 1-D/5 and 1.D/6 were wholly unintelligible documents and contained a mere jumble of figures. For when we refer to the certified translation of these slips, and this translation must also have been before the learned Judge, we find that far from being a jumble of figures they contain an ordered series of figures which when interpreted with the assistance of the approver, are found quite clearly to be documents used for the purpose of gambling in American Futures and contain a record of figures which when related to published prices of cotton determine whether the bets are won or lost. And, speaking for myself, I think that whenever on the information of a police informant that gambling is going on in a particular house in American Futures—because in the imperfect world in which we live police informants are necessary though unworthy things—a Sub-Inspector finds a number of persons of different communities who have no particular relationship or connexion among themselves sitting at a table in a room in that particular house at midnight, who can give no satisfactory account of their presence, and, when searched, are found to have considerable sums of money upon them, while upon one of them are found slips of papers on which there is a writing not necessarily intelligible to the Sub-Inspector at the time, the Sub-Inspector has every reason to suspect that these slips of paper with unintelligible writing so taken from one of these persons contain record of bets. Quite naturally, the bets or figures relating to the bets are recorded in a manner not obviously intelligible to strangers, for when people are doing that which they know is an offence against the law, they are not likely to provide evidence against themselves. Indeed, it might with reason be said that in certain circumstances the very unintelligibility of the documents is itself good reason for the Sub-Inspector to suspect that they contain something which it is desired to conceal and which is not without offence.

It is not suggested in this case that the accused were doing cross-word puzzles or playing parlour games, nor were they learned counsel engaged in the study of their briefs writing references from Desai's Case Pointed Index upon slips of paper. It is true that in this case the writing was in Gujrati and the Sub-Inspector was not a Gujrati ; so, to him, the figures in a language which he did not understand may well have appeared unintelligible, but we find it difficult to believe that the question as to whether a Sub-Inspector or even the Court, is justified in finding that there was reason to suspect that certain slips of paper were betting slips depends upon the mother-tongue of the Sub-Inspector who makes the search or the number of languages with which he is acquainted or the language in which the betting slips are written. Quite clearly, Ss. 6 and 7, Prevention of Gambling Act, must be interpreted in a reasonably broad spirit having some fair relation to the realities of the lives of the kind of peoples to which the Act was intended by the Legislature to apply.

Now, turning to Ss. 6 and 7, Bombay Prevention of Gambling Act 4 of 1887, which has lately been amended by Bombay Act 1 of 1936, it appears that Ss. 6 and 7 must be read together. For S. 6 gives a police officer duly authorized power to enter, with the assistance of such persons as may be found necessary, by night or by day, and by force, if necessary, any house, room or place which he has reason to suspect is used as a common gaming house, and the words "which he has reason to suspect" must, we think, be read with the words "had reasonable grounds for suspecting" which occur in S. 7; for though it is true that under S. 7 it is the Court that has to be satisfied that where a thing seized is not obviously an instrument of gaming, but is to come if at all within the category of "any other thing" referred to in S. 7, that the police officer had reasonable grounds for suspecting the thing did so come, yet even the Court must look at it from the police officer's point of view, from the point of view of the information the police officer had before the seizure and not after. The words are not "where the Court is satisfied that the thing so seized was an instrument of gaming," but where "the Court is satisfied that the police officer had reasonable grounds for suspecting that the thing so seized was an instrument of gaming"—a very different thing. Indeed, the words in S. 6 and S. 7 must mean very much the same thing. For under S. 6, the police officer has power under Cl. (d) to seize all things which "are reasonably suspected to have been used or intended to be used for the purpose of gaming"; the lawfulness of the seizure depends upon the police officer having reasonable grounds to suspect, and if under S. 7 the Court holds that it is not satisfied that the police officer "had reasonable grounds for suspecting that the thing so seized was an instrument of gaming," the seizure itself under Cl. (d) of S. 6 would appear to be unlawful.

Clearly even a police officer cannot be expected always to be as wise before as after the event, and the reason for suspicion which is referred to in Cl. (a) of S. 6 must obviously include information given by a police informant, for, in many cases it is only upon such information that the police can act at all; and so far as the seizure of all things reasonably suspected to have been used or intended for the purpose of gaming under Cl. (c) is concerned, it cannot be expected that the police officer must wait for a translation or interpretation of a writing, otherwise unintelligible to him, found upon slips of paper on the person of the suspected man. He must judge and be judged by all the surrounding circumstances and the information he then possessed. He may, particularly where his information is that the betting is betting in American Futures, have reason to suspect that when slips of paper with writing upon them are considered of sufficient importance by the suspected person to be kept upon his person, those slips of paper are betting slips used or intended to be used for the purpose of gaming even though the writing is to him unintelligible at the time. And, indeed, in this case, the police officer's suspicions were justified by the event.

The slips of paper with the apparently unintelligible writing upon them were in fact betting slips upon which were written in Gujrati an orderly series of figures clearly to be related to betting in American Futures. Therefore with all respect to the learned Judge, we think that even when the action of the police officer was judged by the wisdom that follows the event, the Court should have found that the police officer who entered that house at midnight and who found all these people assembled together round a table in suspicious circumstances, with no reasonable explanation as to their presence, had reasonable grounds to suspect from the surrounding circumstances and from the information that he possessed that the slips of paper, Exs. 1-D/4, 1-D/5 and 1-D/8 which he found concealed upon the person of one of the company, were betting slips for the purpose of betting in American Futures, as, in fact, they have been proved to be. Therefore, we think, clearly the presumption against the accused which puts upon them the burden of proof under S. 7 should have been raised by the Court. The learned advocate for the appellants himself admits that if this is so, the appellants cannot answer the case against them.

It appears then to us that this is clearly not a case where we should interfere in revision and acquit the accused who cannot even give an account of their presence in that room that night, which the Court can accept. The true explanation of their presence is that they were there for the purpose of committing and did in fact commit the offence of which they have been convicted.

Our attention has been invited to the case in I L R (1937) Bom 670,[1] on which, it is said, the learned Judge very largely relied in acquitting the accused. In that case, certain slips were found in crevices in a wall when the room was searched and certain other loose papers were found in a box and the accused were convicted largely upon the evidence afforded by these slips of paper. The writing upon the slips of paper was itself unintelligible, and it was only on the interpretation given by the Sub-Inspector that they could be construed at all as betting slips. The accused were convicted under S. 5, Bombay Prevention of Gambling Act, and in dismissing the appeal, the learned Sessions Judge of Ahmedabad said :

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[1] Harilal Gordhan v. Emperor, (1937) 24 A I R Bom 385=171 I C 282=I L R (1937) Bom 670=38 Cr L J 1047=39 Bom L R 613.

> No doubt the slips read without the aid of special kind of interpretation would appear to be innocuous but the Police Sub-Inspector has deposed to the real interpretation of certain words in them, and if regard be had to that, it is clear that they are betting slips and are, according to the Act, instruments of gaming. If I am correct so far, it means that the presumption under S. 7 of the Act applied and it will be for the defence to displace it. I agree with the learned Magistrate that it cannot be regarded as displaced.

Now, so far as these slips of paper are concerned, the learned Chief Justice in revision said :

> The other evidence against the accused is the alleged finding on their premises of instruments of gaming, which consisted of certain slips. Those slips have now been translated, and they are by themselves quite unintelligible. They certainly do not purport to be records of gambling transactions. It appears however that the Police Sub-Inspector went into the witness-box and stated that in his view, based on experience in other cases, these slips were instruments of gaming. He suggested apparently that slip B should be construed in such a way that the first entry, which is Rs. 20 of Kaku, amounts to the record of a bet of Rs. 2 on mandi by a man named Kaku, though there is nothing whatever in the slip itself to suggest that that is its meaning. In point of fact, it is not the prosecution case that a man named Kaku made a bet of Rs. 2, and prima facie a mandi transaction is not a gambling transaction. So that the particular instance, which the Sub-Inspector gives as to how one slip should be construed, does not appear to support the prosecution. But the question arises how far a police officer is entitled to go into the box and speak as an expert as to the way in which apparently harmless documents should be interpreted. In my opinion, it is impossible to say that gambling is either an art or science within the meaning of S. 45, Evidence Act. I think that the only Section under which evidence of this nature might in a proper case be admitted is S. 49, which provides so far as material :
>
> 'When the Court has to form an opinion as to the meaning of words or terms used in particular districts or by particular classes of people, the opinions of persons having special means of knowledge thereon are relevant facts.'
>
> It may be that under that Section a police officer might give evidence that he had a long experience amongst people who indulged in satta gambling in a particular district, and from that experience, supported by instances which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion (which would be relevant under the Section) that the slips in question were prepared in accordance with that system or code and had a certain meaning. But the Sub-Inspector in this case does not appear to have done anything of this sort. He is not entitled merely to express the opinion that unintelligible documents found in the room of a man charged with gambling must be records of gambling transactions. It is for the Court to decide what the documents mean, and opinion on the matter can only be relevant if made so by the Legislature. In my opinion, the convictions were not justified on the evidence.

The learned Chief Justice also referred in his judgment to the unreliable nature of police agents who are generally paid by results. It was, he said, necessary that the evidence of police agents should be corroborated, and the fact that a police agent was provided with a companion who was called a panch did not improve the prosecution case. But in this case the slips 1-D/4, 1-D/5 and 1-D/6 found upon search upon the person of accused Allahno had been explained by the approver Hussain as being a record of the numbers from 1 to 10 in serial number which when related to the published prices of cotton in the newspapers the next day would decide whether the bets were won or lost, and though Hussain is an approver and his evidence must be corroborated before it can be relied on, it appears to us that the finding of these slips of paper upon the person of the accused Allahno not in the handwriting of Hussain and not being evidence provided by him, can fairly be said to be evidence which corroborates the evidence of Hussain, when he says that these men were there gathered to bet in American Futures. For these slips of paper containing these figures are quite clearly intelligible on the assumption that Hussain is speaking the truth and are not intelligible on any other assumption, and we see no reason why we should suppose that grown men like the accused would indulge like children in unintelligible scribblings upon slips of paper which they keep upon their persons when another far more reasonable and rational explanation of their conduct is forthcoming. After all, the purpose of requiring independent evidence corroborating the evidence of the approver is that that the Court can be satisfied that he is speaking the truth. It has no other purpose. The amount of that evidence depends upon the circumstances of each particular case ; the question as to whether it provides sufficient corroboration for the evidence of the approver to be relied on with confidence also depends on the circumstances of each case. In this case the evidence of the approver as to the factum of the offence, the betting in American Futures is sufficiently corroborated by the finding of this assembly of men at this time and place and in these circumstances, the finding of considerable sums of money upon them and the finding of these betting slips. The evidence of the approver as to the identity of the accused is sufficiently corroborated by their presence at the scene of the offence and their arrest.

We see therefore no reason to reject the evidence of the approver and come to the conclusion that the accused are not guilty when they appear from the evidence on record guilty.

The facts of the case before us are different from the facts in the Bombay case in I L R (1937) Bom 670,[1] referred to above. Our attention has also been drawn to another Bombay case, 34 Bom L R 267.[2] In that case certain slips of paper were found with names of race-horses and amounts of money in bets. The learned Judges came to the conclusion that the circumstances of the case were consistent with these papers being merely records of private bets and in no way supported the case for the prosecution that the doctor's premises were held as a bucket shop, a place where bets are unlawfully received, and that if any presumption was raised at all under S. 7, the presumption was so slight that it was very easily rebutted. But we are not dealing here with S. 7 of the old Act, but S. 7 in the new Act, and this Section is as follows:

> When any instrument of gaming has been seized in any house, room or place entered under S. 6 or about the person of any one found therein, and in the case of any other thing so seized if the Court is satisfied that the Police Officer who entered such house, room or place had reasonable grounds for suspecting that the thing so seized was an instrument of gaming, the seizure of such instrument or thing shall be evidence, until the contrary is proved, that such house, room or place is used as a common gaming house, and the persons found therein were then present for the purpose of gaming, although no gaming was actually seen by the Magistrate or the Police Officer or by any person acting under the authority of either of them.

We must therefore return the reference, and reject the appeal of the three accused. Order accordingly.

R.M./R.K. *Order accordingly.*

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## A. I. R. 1938 Sind 233

DAVIS J. C. AND WESTON J.

*Rukibai w/o Dr. Partabrai* — Appellant.

v.

*Dr. Partabrai Godhumal* — Respondent.

Second Appeal No. 39 of 1935, Decided on 22nd July 1938, against Judgment of Asst. Judge, Larkana, D/- 13th May 1935.

**(a) Hindu Law—Marriage — Restitution of conjugal rights—Suit for—Suit by Hindu wife —Claim is in nature of equitable right—Gross failure on part of wife to perform obligation imposed on her by sacrament of marriage, disentitles her to relief claimed.**

A claim for restitution of conjugal right is of the nature of an equitable right. Although, under Hindu law, the husband may be bound to maintain his wife, it does not follow that she is entitled, as a matter of course, for an order from the Court for the restitution of conjugal rights. That depends upon the facts of each case. Even something less than what might be called a matrimonial offence for the purpose of a divorce or judicial separation may be sufficient to prevent a plaintiff from obtaining an order for restitution of conjugal rights. Where a Hindu wife is the plaintiff in such a suit, gross failure on her part to perform the obligation of the sacrament of marriage imposed on her for the benefit of the husband might, if properly proved, afford good grounds for refusing to her the assistance of the Court.
[P 234 C 2 ; P 235 C 2 ; P 236 C 1, 2]

Where therefore, although the wife suing her husband for restitution of conjugal rights is guilty of no matrimonial offence, in the sense that she has not been guilty of any adultery, nevertheless if it is clear that she had deserted her husband's house, rejected all attempts at reconciliation and had insulted and outraged his family house and that she has been moved to seek an order for restitution of conjugal rights, not because in truth she wants to live with her husband, but merely to restrain a second marriage which the husband is contemplating, there being desertion on the part of the wife and a gross failure to perform the duties imposed upon her as a Hindu wife, the Court is justified in refusing to pass an order for restitution of conjugal rights in her favour. The mere fact that she has borne her husband a child is not, in itself, sufficient to outweigh her failure in other duties. The Court is even justified in refusing to pass an order in such a case on account of the unwifely conduct of the wife extending for a long period, even though the application may be made in good faith : *A I R 1927 Bom 264 and 11 M I A 551 (P C), Rel. on.*
[P 237 C 1, 2]

**(b) Marriage—Restitution of conjugal rights —Suit for—Powers of Court.**

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[2] Emperor v. Rustam Cursetji Lam, (1932) 19 A I R Bom 181=1932 Cr C 240=136 I C 868 =33 Cr L J 889=34 Bom L R 267.

No Court can compel a man or woman to live with one another against their will. [P 237 C 2]

Pahlajsing B. Advani — *for Appellant.*
Fatehchand Assudomal — *for Respondent.*

**Davis J. C.**—This is an appeal against the judgment of the Assistant Judge, Larkana, dismissing an appeal against the judgment of the Subordinate Judge, Larkana, who dismissed the plaintiff's suit for restitution of conjugal rights. The plaintiff in this case, who belongs to the Amil community of Larkana, is a woman, and was married to the defendant, and for some time lived with him as his wife and bore him a son, but thereafter trouble arose between them: the wife left the husband's house and did not return, and after vain efforts at reconciliation the husband married a second wife. To prevent this, the plaintiff brought the suit out of which this appeal arises asking not only for an order of restitution of conjugal rights but an injunction restraining the defendant from marrying a second wife in her lifetime. But her prayer for an injunction was made too late, for by the time notice could be served upon the defendant he had married a second wife. But the plaintiff continued with the suit, which she had begun, for restitution of conjugal rights, and she failed because both the Courts found that her suit was not brought in good faith at all, that its main purpose—she herself admitted this—was to prevent the defendant marrying again, and having been unable to succeed in this, the real purpose of her proceedings was frustrated, and the suit was pressed only for some ulterior purpose, the learned Subordinate Judge believing it to be at the instigation of her father.

Now, the first point taken in appeal, and undoubtedly it was the only point taken in the lower Appellate Court, was that the right of an order for restitution of conjugal rights was not an equitable right as the lower Courts had found, but a legal right, and the learned advocate for the appellant argued, as he had argued in his memorandum of appeal, that a Hindu wife has an absolute and unqualified right to return to her husband's house, and he has an absolute and unqualified duty to receive and maintain her, but that in any case he could not refuse to receive her unless it was shown that she had been guilty of a matrimonial offence such as adultery or desertion for two years and cruelty, which would justify her husband in obtaining a divorce or judicial separation; and in support of his argument the learned advocate referred us to certain cases which however were not recent cases, and none of which appeared to us to be so relevant to the present case as a Bombay case, 51 Bom 329.[1] In that case, as in this, the parties were Hindus, and dealing with this question of the nature of the right, Marten C. J. said:

> I think they have lost sight of the nature of the suit, which, after all, is one rather akin to an action in personam on the Original Side, or in the Equity Courts in England. I have already pointed out that in the arguments in 11 M I A 551,[2] it was described as akin to a specific performance action. In two other cases Lord Herschell has been disposed to apply to such a suit some of the principles with which we are all familiar sitting in a Court of Equity. I refer to the principle that he who seeks equity must do equity or must come into equity with clean hands. Accordingly in (1895) A C 384[3] Lord Herschell remarks (p. 390):
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> 'It is not a motion strange to our law that the Court should refuse its aid to one who does not come into it with clean hands, and when the question arises for decision, I think it may well be considered whether the Court would be bound to entertain an action, and grant relief at the suit of one whose misconduct, though falling short of a matrimonial offence, has been the primary cause of the difficulty, and has led to the refusal to adhere.'
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> And then in (1897) A C 395[4] Lord Herschell states (p. 456):
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> 'Indeed, if the broadest definition of cruelty which has been contended for in this case were accepted, it would still be to my mind unsatisfactory that a husband who, though stopping short of cruelty in that sense, had by insult and outrage driven his wife to leave him, should, without repentance for the past or any assurance of amendment for the future, be able to invoke the assistance of the Court and call for the strong arm of the law to force his wife under pain of imprisonment to resume cohabitation. One would think that the Court might well refuse to afford its assistance to one who acted thus.'

So it is clear that this right is of the nature of an equitable right; and the learned advocate for the appellant was at pains to show that it was not in the nature of an equitable right, because if equitable principles, such as have been referred to by the Chief Justice in the Bombay case, applied, then clearly the plaintiff fared badly, because if a suit for restitution of conjugal rights was not brought in good faith for

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1. Bai Jivi v. Narsingh Lalbhai, (1927) 14 A I R Bom 264=51 Bom 329=29 Bom L R 332.
2. Moonshee Buzloor Ruheem v. Shumsoonnissa Begum, (1867) 11 M I A 551=8 W R 3 (P C).
3. Mackenzie v. Mackenzie, (1895) A C 384.
4. Russell v. Russell, (1897) A C 395.

that purpose but for another, the learned Judges had ample discretion in the exercise of what might fairly be called an equitable jurisdiction to dismiss the plaintiff's suit on the ground that it was not brought in good faith. Moreover, the passage in this judgment, to which we have referred, is authority against the argument of the learned advocate for the appellant that an order for restitution of conjugal rights must be made unless it can be shown that the party asking for that order has been guilty of a matrimonial offence. Clearly, remedies that have their origin in the Ecclesiastical laws in England and have relation to a Christian society must be applied with caution to Hindus. It is obvious that rules which have their origin in and are adapted to society where divorce is recognized may be inapplicable with full force to a society such as that to which the plaintiff and defendant belong where divorce is not recognized, and where while the husband may marry more wives than one, the woman has no such corresponding privilege, and indeed, cannot obtain a divorce, for divorce in this community is not recognized. Madgavkar J. in 51 Bom 329[1] at p. 338, said :

> In view of the order we propose to pass, I do not desire to enter exhaustively into the present state of the law as regards the husband's rights and the wife's defences in a suit for restitution by the husband. I content myself with holding that, on the pleadings as at present framed, the lower Courts have, in my opinion, taken too broad a view of the rights of the husband. It is argued for the appellant wife that desertion in certain circumstances might suffice as a defence. The respondent contends that the Hindu Shastras are clear as to the right of the husband to recall a wife even after desertion and that the Courts are bound to give effect to these rights. As at present advised, I am of opinion that the Courts have declined to lend themselves to either extreme position.
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> One reason is that the Hindu law itself, even while it lays down the duty of the wife of implicit obedience and return to her husband, has laid down no such sanctions or procedure, as compulsion by the Courts to force her to return against her will. This remedy and this procedure, as has been pointed out by the learned Chief Justice, began in England from the Ecclesiastical Courts and have been modified by legislation. They have been adopted by the British Indian Courts by various analogies such as to consider them as species of suit for specific performance. However that may be, it is undoubted, since the case in 11 M I A 551,[2] that the Indian Courts have jurisdiction in such suits and under the Civil Procedure Code, O. 21, Rr. 32 and 33, that, until lately, the wife could even be imprisoned on her failure to obey the decree. Nevertheless, the difficulty pointed out at the outset has always been present to the minds of the Courts, viz. that such compulsion is repugnant to modern ideas, it is based on one-sided texts thousands of years old, hardly suited even in India to existing social conditions, and it has to be enforced by sanctions and procedure borrowed from the West and from somewhat archaic canons of Ecclesiastical law. Hence the provision in O. 21, R. 33, as it originally stood, that even while passing a decree for restitution of conjugal rights the Court could expressly direct that it should not be executable by imprisonment. Under the latest amendment the penalty is abolished.

Then the learned Judge in the course of his judgment refers to certain observations of Harington J. in 34 Cal 971[5] at p. 973, who observed :

> But while I recognize that the habits of Hindus and Europeans with regard to marriage state so differ that it would not be safe to say that whatever was a defence to an action of this nature in the case of a European would also be in every case a defence in the case of a Hindu, yet I am not prepared to assent to the proposition that this Court is bound to send a Brahmin lady to reside in a house in which her husband keeps a low caste prostitute.

In concluding the learned Judge said : (page 341) :

> The Courts therefore recognize the difficulty and on the one hand do not lay down that differences and a desertion which the party responsible might desire to retract should be held to be a sufficient ground so as to leave no locus pænitentiæ, but, on the other hand, they have not assented to the proposition that actual physical cruelty is necessary to enable the wife to resist such a suit. In the absence of legislation it appears therefore on the whole that the Courts desire to consider the entire conduct of the parties so as to be able to judge whether the plaintiff deserves at the hands of the Court the relief which he seeks, and whether such a relief is not unreasonable in the particular case against the defendant. Neither judgment below has any reference to these considerations.

The same principles, though not exactly the same considerations, will apply when the question is not of a husband's demanding his wife's return but of a wife asserting the duty of her husband to return to her, or to receive her in his house. Under Hindu law a husband may be bound to maintain his wife. It does not follow she is entitled to an order from the Court for the restitution of conjugal rights. That depends upon the facts of the case. And apart from the difficulty of determining from English precedents what acts in Hindu society constitute matrimonial offences, which offences, it is argued, are conditions precedent to the grant of a divorce or judicial separation under English law, it is now recognized, and the passages which we have quoted make it clear, that something less than what might be called a matrimonial offence for the purpose of a divorce or judicial separation may be sufficient to prevent a plaintiff obtaining an order for restitution of conjugal rights, and in 51 Bom 329,[1] Marten C. J., referring to the case in 11 M I A 551,[2] decided by their Lordships of the Privy Council said (p. 332):

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[5] **Dular Koer v. Dwarka Nath Misser, (1907) 34 Cal 971.**

> Their Lordships there set out at pp. 606 and 607 the arguments advanced at the Bar, one of which was that a suit of this nature was in the nature of a suit for specific performance. It was then pointed out that the very fact that the parties were not subject to the rather rigid principles of the ecclesiastical jurisdiction might really be to their benefit by allowing rather wider defences to be put forward. At p. 612 it is said:
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> 'If however it be granted that, according to Mahomedan law, the husband may sue to enforce his right to the custody of his wife's person; and that, if her defence be cruelty, she must prove cruelty of the kind just described, it by no means follows that she has not other defences to the suit which would not be admitted by our Ecclesiastical Courts in a suit for the restitution of conjugal rights. The marriage tie amongst Mahomedans is not indissoluble as it is among Christians. The Mahomedan wife, as has been shown above, has rights which the Christian or at least the English wife has not against her husband. As Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety, and her other legal rights; or it might, on a sufficient cause, exercise that jurisdiction which is attributed to the Kazee by the Futwa (if the law, indeed, warrants such a jurisdiction), of selecting a proper place of residence for the wife, other than her husband's house'.
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> Then at p. 614 after refusing to accept the wider propositions laid down in the lower Court, and pointing out that the general Mahomedan law had to be applied, the judgment proceeds at p. 615:
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> 'It seems to them clear, that if cruelty in a degree rendering it unsafe for the wife to return to husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered, and considered with some reference to Mahomedan law.
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> Before however any of these principles can be applied, the facts to which they are to be applied must be established by legal proof; and this, their Lordships are of opinion, has not been done in the present case. Besides the evidence on the futile and now abandoned issue about Freemasonry, there is little evidence in the cause'.

We emphasize the words:

> It may be too that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might if properly proved, afford good grounds for refusing to him the assistance of the Court.

For, substituting the wife for the husband where the wife, as in this case, is plaintiff, it appears to us that the learned trial Judge has in fact found gross failure on the part of a Hindu wife to perform the obligations by the marriage contract, or, more correctly, the sacrament of marriage, imposed upon her for the benefit of the husband, for it is clear that in this case the wife has not, as she should have, under Hindu law, on her marriage become one with the family of her husband. She has in her heart remained in the family of her father. She has sided with her father's house against her husband's house; she has refused all efforts at reconciliation and insulted and outraged his house by the charges of misconduct she has brought against him and his widowed sister-in-law.

It is said in appeal that the judgment of the lower Appellate Court is wrong because it has not discussed at length and found again upon questions of fact on which the decision in this case must turn. But it is clear from the judgment of the lower Appellate Judge that the facts as found by the trial Court were not challenged in appeal before him, and the only point taken in that appeal is the point that he has set out for his decision, whether the Subordinate Judge has rightly exercised his discretion in refusing relief to the plaintiff for restitution of conjugal rights, and although fault can be found with this issue on the ground that it is unduly comprehensive, nevertheless it is clear that it was precisely on this question of the exercise of this discretion that the learned advocate for the plaintiff wished in that Court and in this, to take his ground; and it is clear to us that the lower Appellate Court did not again discuss and find at length on questions of fact because the findings of the trial Court on questions of fact were accepted before it. On those findings of fact it is clear the wife left her husband's house without his permission; she did not, as the learned Judge observed, realize her position as a Hindu wife, and though it may well be that time and the spread of education have softened the harsh austerity of the simple rule that a Hindu wife must look on and revere her husband as a god, yet it is clearly her duty to honour and obey him, and it is clear that this is precisely what this petitioner did not do, not on one or two occasions, for occasional lapses might be forgiven, but over a long period of time. In December 1927 she left her husband's house without permission, but after a period of nine months on the intervention of good people, she returned. There was documentary evidence before the learned trial Judge that on the very night she left, the husband's brother wrote in courteous and fitting terms to her father to ask her to return, but it was of no avail, and even after her return the old quarrels and misunderstandings revived and continued. There were accusations and counter-accusations about a gold locket, which may seem a small thing in itself but led to serious quarrels. A committee of the panchayat was appointed to inquire into the charges in this connexion and they found against the father. In 1929 the father was excommunicated by the panchayat and the daughter sided with the father and again left her husband's house without permission in May 1931, and from that date to the date of suit she was living with her father when every attempt at reconciliation had been made by her husband and had failed.

In September 1932, there was further trouble arising from the serious illness of the husband's brother, and such was her conduct as a Hindu wife, in this matter, that her husband determined to take a second wife because all his efforts at reconciliation had failed. It was then primarily to restrain the second marriage that the suit was brought. Therefore though it may be said that the plaintiff has been guilty of no matrimonial offence in the sense that she has not been guilty of adultery, nevertheless it is clear that she has deserted her husband's house, rejected all attempts at reconciliation and has insulted and outraged his family house, and that she was moved to seek an order of restitution of conjugal rights not because in truth she wanted to live with her husband as one of two wives, for it is clear from her statement that she does not, but to punish him. The learned trial Judge says so far as she is concerned:

> **The wife herself has made it clear in her deposition that after her husband's second marriage everything is over and that she would require separate maintenance to finish up the rest of her life.**

**So far as maintenance is concerned, there is already an order of maintenance under S. 488, Criminal P. C., against her husband.** She could in fact get nothing further by these proceedings, for, under O. 21, R. 33, she would get a payment of money and nothing more. No Court can compel a man or woman to live with one another against their will. Not only then is this petition vitiated by the fact that it is not brought in good faith, but the facts as found by the Judge show a desertion by the wife of the husband and a gross failure to perform the duties imposed upon her as a Hindu wife. The fact that she has borne her husband a child is not in itself sufficient to outweigh her failure in other duties. We agree with the learned Judges in the Courts below that she has over a period of years been guilty of such unwifely conduct as would, in our opinion, justify the Court in refusing to give her an order even had she in good faith desired it. We would remark that our failure to give her the order she seeks would appear in no way to prevent her becoming reconciled with her husband, if good people should again intervene. We therefore dismiss this appeal. We make no orders as to costs as they will have to be paid out of the plaintiff's maintenance.

R.M./R.K. *Appeal dismissed.*

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## * A. I. R. 1938 Sind 237

DAVIS J. C. AND DADIBA C. MEHTA J.

*Premier Clothing Company*—Plaintiffs.

v.

*F. H. Frusher* — Defendant.

Reference No. 27 of 1936, Decided on 20th May 1938.

*** Civil P. C. (1908), S. 60 — Pay of soldier in regular forces governed by Army Act is not liable to attachment.**

The pay of a soldier of His Majesty's regular forces subject to the Army Act of 1881, is not liable to attachment under a decree of the Civil Court : *A I R 1933 All 597, Dissent.; A I R 1934 Bom 31 and A I R 1933 Bom 185, Rel. on; A I R 1918 Bom 32 and A I R 1919 Bom 133, Ref.*
[P 239 C 1]

Santdas Idanmal —
*for Original Plaintiff.*

**Davis J. C. — This is a reference to us by the Judge of the Karachi Small Cause Court under O. 46, R. 1, Civil P. C., stating a case with his opinion for our decision, and the point on which doubt is entertained is whether the pay of a soldier of the regular forces is attachable under S. 60, Civil P. C. Apparently the learned Judge who held office before the learned Judge who has made the reference was of the opinion that the pay of a soldier of the**

regular forces was attachable, because he must be deemed an officer within the meaning of S. 2, sub-s. (17), Civil P. C., but we think that the opinion of the learned Judge, now stating the case to us, that the pay of a soldier is not attachable under the Civil Procedure Code, because in this matter he is governed by the Army Act and not by the Civil Procedure Code, is correct. The learned advocate for the judgment-creditor has stressed the fact that the proviso to S. 60, Civil P. C., has now been repealed, and this proviso excluded the application of the Section to any person subject to the Army Act. Thus he argues that a commissioned officer and a soldier are left subject to the provisions of the Civil Procedure Code and whereas the commissioned officer is protected as to half his pay, the private soldier is not protected at all; and for this argument he relies upon the case in 55 All 648.[1] With all respect to the learned Judges who decided that case, we think that they have omitted to allow sufficient force to the fact that the Army Act is the Act which specially governs officers or soldiers in the military service of the Crown and only so far as it is otherwise specially enacted can it be said that they are not subject to or protected by its provisions.

There are certain Bombay cases subsequent to the amendment of 1914 by which the proviso, on which the learned advocate for the judgment-creditor so strongly relies, was repealed, which make it clear that the pay of a soldier is not liable to attachment under the Civil Procedure Code at all and indeed it would be strange, if when the Legislature made the pay of the commissioned officer subject to attachment to the extent of one-half, they had at the same time by implication made the pay of a soldier of the regular forces subject to attachment as to its whole. In 43 Bom 716[2] at page 725 Martin J. dealt at length with the question of this proviso, which is as follows :

> Nothing in this Section shall be deemed
>
> (a) * * * * * * *
>
> (b) to affect the provisions of the Army Act or of any similar law for the time being in force,

and he came to the conclusion that the proviso was repealed as it was unnecessary. The learned Judge also refers in his judgment to the case in 43 Bom 368[3] which is a case more in point, being a case relating, as this case relates, to a soldier but even in that case it was pointed out that a repeal of the proviso to S. 60, Civil P. C., is really of no significance. The Chief Justice in that case said :

> The sub-section may be taken to be dead law on the ground that it had "expired" by the re-enactment since 1908 of the Army Act, which thus became a later enactment superseding and rendering unnecessary the saving clause in the Civil Procedure Code.

Now, the case in 43 Bom 368[3] proceeded on the fact that the First Class Warrant Officer there concerned was a soldier within the definition of S. 190, Army Act, and on the question of deduction from his pay, the Court was clearly of opinion that he was controlled by the provisions of Sec. 145, Army Act, and that an order made under this Section as to the payment of maintenance for his wife and child was held to prevail over an order of a Civil Court. There are however two later cases of the Bombay High Court, one, the case in A I R 1934 Bom 31,[4] in which the Court referring to the previous case in 43 Bom 368[3] and the case in A I R 1933 Bom 185[5] at page 187 in quite brief judgments decided that the pay of a staff sergeant, a soldier for the purpose of the attachment of his pay, was not attachable under S. 60 (1) (i), Civil P. C. Therein the learned Judge pointed out that Ss. 136 and 144 read together prevailed over the provisions of S. 60, Civil P. C. In A I R 1933 Bom 185[5] Murphy J. dealt with this question at length and with the argument on which the learned advocate for the judgment creditor chiefly relies, in the following words :

> By S. 136, Army Act, 'the pay of an officer or soldier of His Majesty's regular forces shall be paid without any deduction other than the deductions authorized by this or any other Act or by any Royal Warrant for the time being, or by any law passed by the Governor-General of India in Council.' The Civil Procedure Code being a law passed by the Governor-General in Council, it is an authority by which deductions from the pay of an officer or soldier of His Majesty's regular forces may be made and therefore the order under O. 21, R. 48 is legal and effective. On the other hand, it has been contended that notwithstanding anything in S. 136, S. 144, Army Act, bars any deductions being made in the pay of a soldier by

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[1] Husain Baksh v. Briggen Shaw, (1933) 20 A I R All 597=148 I C 364=55 All 648=1933 A L J 1468.

[2] Kering Rupchand & Co. v. G. B. Murray, (1918) 5 A I R Bom 32=50 I C 683=43 Bom 716=21 Bom L R 143.

[3] M. G. Duckworth v. G. F. Duckworth, (1919) 6 A I R Bom 133=50 I C 427=43 Bom 368=21 Bom L R 137.

[4] W. J. Edwards v. Bhaga Devaji & Co., (1934) 21 AIR Bom 31=149 I C 26=35 BomLR 1112.

[5] Charles S. Brown v. A. D. Hanson, (1933) 20 AIR Bom 185=144 I C 897=35 Bom L R 360.

proviso (1) to that Section: 'Any person having cause of action or suit against a soldier of the regular forces may, notwithstanding anything in this Section, after due notice in writing given to the soldier, or left at his last quarters, proceed in such action or suit to judgment, and have execution other than against the person, pay, arms, ammunition, equipment, regimental necessaries, or clothing of such soldier'. This provision explicitly bars execution against a soldier. In the parallel case in 43 Bom 368,[3] a similar question arose in respect of an Assistant Surgeon, who was a First Class Warrant Officer, as in this case.

By "execution against a soldier" the learned Judge, we think, means 'execution against the person, pay, ammunition and such other regimental necessaries as are mentioned in the proviso', and in his opinion — and the ruling is clearly to the effect — the provisions of the Army Act prevail, so far as those subject to it are concerned, over the Civil Procedure Code, except so far as it is otherwise expressly enacted. They say, referring to the judgment in 43 Bom 368[3]:

> Their Lordships' reasons for holding that the Army Act prevailed over the Civil Procedure Code are given in the learned Chief Justice's judgment in that case. Briefly put, they were that, notwithstanding any specific provisions being repealed, the terms of S. 4 of the Code had the same effect, and that the special law applicable to the then defendant overrode the provisions of the general law under S. 60 (i) . . . . . . We can see no distinction between the bar contained in S. 145 (2), Army Act, and that contained in S. 144. . . . . . .

This being so, we think it is clear that the pay of a soldier of the regular forces cannot be attached and that the effect of the words "or by any law passed by the Governor-General for India in Council" by which S. 136 of the Army Act of 1881 was later amended does not have the effect, as the learned advocate for the judgment creditor argues, of making the Civil Procedure Code apply in full force to the pay of a soldier, depriving him even of that limited protection which by reason of S. 60 (i) read with S. 2 (17) (c) gives the commissioned officer protection for half his pay. In our opinion therefore, the answer to the case stated by the Judge of the Karachi Small Cause Court is that the pay of a soldier of His Majesty's regular forces and the judgment-debtor in this case is such a one subject to the Army Act of 1881, is not liable to attachment under a decree of the Civil Court. As the question is one of public interest and two Judges differed in their opinion, we think this is a case where we should make no order as to costs and we order accordingly.

D.S./R.K. *Answer in the negative.*

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## * A. I. R 1938 Sind 239

DAVIS J. C. and DADIBA C. MEHTA J.

*Mt. Aman Khatun, w/o Khair Muhammad, and others* — Appellants.

v.

*Abdul Rasool Abdullah and others* — Respondents.

Application in First Appeal No. 4 of 1937, Decided on 25th May 1938.

*** (a) Civil P. C. (1908), O. 22, R. 12 — Applicability.**

Rule 12 of O. 22, Civil P. C., is not intended to apply to appeals against orders passed in execution : *A I R 1929 Pat 565 (F B), Dissent.; A I R 1933 All 388; A I R 1928 Mad 772 and A I R 1934 Mad 664 (1), Rel. on.* [P 240 C 1]

**(b) Civil P. C. (1908), O. 22, R. 4 (3) — Suit for partition against brothers — Appeal against order passed in execution proceedings— During pendency of appeal one brother dying — His legal representative not brought on record within time—Appeal abates as a whole.**

A suit for partition and proceeding in execution of such a suit must proceed against all the co-sharers and they or their legal representatives must be on the record. [P 240 C 2]

Where in a suit for partition against brothers an appeal is brought against an order passed in execution and during the pendency of the appeal one of the respondent brothers dies, the appeal abates as a whole if his legal representative is not brought on the record within limitation : *A I R 1933 Sind 384 and A I R 1937 Sind 208, Disting.* [P 240 C 2]

The consequence following the abatement of an appeal cannot be avoided by the simple device of an affidavit in appeal that the party who has died gave up his interest in the property before the order in execution appealed against was passed. [P 240 C 2]

Dipchand Chandumal — *for Appellants.*
Srikishendas H. Lulla—*for Respondants.*

**Davis J. C.** — This is an application by respondent 1 in an appeal from an order passed by the First Class Subordinate Judge, Shikarpur, in execution proceedings. The applicants pray for an order that the appeal abates on the ground that one Din Muhammad, respondent 3, died in June 1937, and that after a lapse of more than three months his legal representatives are sought to be brought on the record. The execution proceedings were in a suit brought by the appellants against three brothers Nur Mohomed, Abdullah, and Din Mohomed, for partition of the joint property. Din Muhammad died during the pendency of the appeal. The parties are Mahomedans.

The first point taken by the learned advocate for the appellants against the case of the respondents that the appeal has abated as a whole, was that O. 22, R. 12, Civil P. C., applies to appeals against orders in execution as well as to orders in execution themselves. It was argued that once an execution proceeding, always an execution proceeding, whether in appeal or otherwise, and reliance was placed on a Full Bench judgment of the Patna High Court to this effect, 9 Pat 372,[1] in which two Judges (a third dissenting) held that an appeal against an order passed in execution proceedings was a mere continuation of the execution proceedings, and that in consequence Rule 12, O. 22, applied, and Rr. 3, 4 and 8 of O. 22, Civil P. C., did not apply to such appeals. But, with all respect to the learned Judges who decided that case, we prefer the view of the Allahabad High Court in 55 All 509,[2] that R. 12, O. 22, does not apply to appeals against orders in execution.

It was pointed out in that case that fresh applications for execution could in execution proceedings be made from time to time, so that there could be no abatement of the suit in execution proceedings, but that an appeal stands on a different footing. Successive appeals cannot be made, if one has already abated yet, if the principle applicable to proceedings in execution applied also to appeals against orders passed in execution proceedings, the appeals would never abate, whoever died. The Allahabad High Court followed the view of the Madras High Court in 51 Mad 858,[3] which is followed subsequently by that Court in A I R 1934 Mad 664.[4] In our opinion, R. 12 of O. 22, Civil P. C., was not intended to apply to appeals against orders passed in execution.

But it was then argued that appeal, if it abated, abated at all only against the one respondent the one brother, Din Muhammad, who died; for, at some time subsequent to the decree, the three brothers partitioned their property, and the property the subject matter of the execution application, fell to the share of the two other brothers, Abdullah and Nur Muhammad, so that Din Muhammad has now no interest in the property. If that is so, it is difficult to see why the appellants ask, as they have done, for the heirs or legal representatives of Din Muhammad to be brought on the record. But we do not think the consequence following the abatement of an appeal can be avoided by the simple device of an affidavit in appeal that the party who has died gave up his interest in the property before the order in execution appealed against was passed. The application in execution was itself made against all three brothers; no question of the transfer of property was then raised. There was not, and there is not now, an application under O. 22, Rule 10, Civil P. C., nor is there likely to be, and if the application to join the heirs or legal representatives of the deceased Din Muhammad had been made in time, it would not have been refused. This is not a case such as is referred to in A I R 1933 Sind 384,[5] and A I R 1937 Sind 208[6] where the plaintiffs, Mahomedans, asked for a partial partition of their property which was permissible under Mahomedan law, and where the plaintiffs chose to exclude certain property from the partition. In this case the proposal is not to exclude some of the property but to exclude one of the co-sharers: and this is not the same thing. A suit for partition and proceedings in execution of such a suit must proceed against all the co-sharers and they or their legal representatives must be on the record. We do not see how S. 47 (3), Civil P. C., helps the appellants. There is no doubt as to who are the legal representatives. We think, therefore, that Din Muhammad's legal representatives must be brought on the record or the suit must abate as a whole. But they cannot be brought on the record because the application to do so is long out of time. Din Muhammad died in June 1937. The application was made in March 1938, long after three months, the period of limitation, and no good reason has been shown for this delay. The principal reason shown is that no application was made because no application was necessary, as Din Muhammad was not a necessary party. We hold otherwise. We think, therefore, this appeal must abate as a whole, and the appellants must bear the costs of the appeal and of this application.

D.S./R.K. *Order accordingly.*

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[1] Muhammad Taki v. Rai Fateh Bahadur Singh, (1929) 16 A I R Pat 565=122 I C 148 = 9 Pat 372 = 10 P L T 763 (F B).

[2] Changa Mal v. Ram Dularey Lal, (1933) 20 A I R All 388 = 144 I C 391 = 55 All 509 = 1933 A L J 706.

[3] Sundayee Ammal v. Krishna Chetti, (1928) 15 A I R Mad 772 = 110 I C 662 = 51 Mad 858 = 55 M L J 497.

[4] Gangunaidu v. Muttenna, (1934) 21 A I R Mad 664 = 151 I C 777.

[5] Momanshah Budhal Shah v. Rajalmal, (1933) 20 A I R Sind 384 = 147 I C 311.

[6] Dassumal Ramrakhiomal v. Muhammad Baksh Amir Baksh, (1937) 24 A I R Sind 208 = 170 I C 609 = 30 S L R 428.

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